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The Thrust of Tort Law
Part II
Judicial Law Making*

LEON GREEN**

By the time legislation in the tort area came to the fore, the functions of the courts in tort law development were well established. Even later in some jurisdictions where legislatures undertook to codify the law they did little more than write into statute the product of the courts, leaving to them its further development. Also when legislatures have undertaken new areas of tort law they have done little more than designate the directions, leaving to the courts the expansion and limitation of the remedies made available. More often than not legislative action in the tort field has been the result of default by the courts in meeting some pressing problem of wide implications, as for example, the recognition of an action for death,¹ the survival of the personal injury action,² the refusal or inability to simplify the action by an employee for personal injury against his corporate employer,³ and the excessive use of injunctions against labor unions.⁴

COURTS V. LEGISLATURES

In recent years the power of the courts to make, unmake and remake tort law without legislative sanction has come in question.

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² Ibid.

³ Id., at 373, 382, 386.

This is due in part to the decisions removing restrictions and limitations placed by the courts on themselves during the 1800’s when all tort liability was reduced to a minimum. Their difficulties have been magnified by the doctrine of stare decisis so frequently urged as a block to the solutions of the numerous new problems which continue to arise. The power of the courts to free themselves from their past decisions and to fashion law for today and tomorrow is further complicated by the fact that redesigning the law has become such a stupendous undertaking with so many unanticipated consequences that many judges hesitate to enter upon the case-by-case labor when it is so easy to call upon legislatures to lay out the way for the courts. This attitude finds great support among lawyers and the populace generally, partly because of the interests of clients who are fully satisfied to leave things as they are, and partly because of the philosophy that it is the courts’ function to declare and administer the law as it is found, but is no part of their functions to make new law—a philosophy developed by the courts themselves as a protection against political attack. Thus it is that we hear much about “judicial legislation,” sometimes from judges themselves, and witness much flaying of the courts by the profession for their departures from what is asserted to be the well-established law of the land. The courts will be pressed more and more to exercise their power to extend and modify their doctrinal controls as a


6 The literature on the subject is abundant and it overwhelmingly points in one direction. Each writer, however, adds something distinctive. WIGMORE, PROBLEMS IN LAW ch. 2 (1920); ALLEN, LAW IN THE MAKING, 126 et seq. (1926); ALLEN, CASE LAW: AN UNWARRENTABLE INTERVENTION, 51 L.Q. REV. 333 (1935); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 131 et seq. (1921); CARDOZO, THE GROWTH OF THE LAW, ch. 1 (1924); Douglas, Stare Decisis, 49 COLUM. L. REV. 735 (1949); HOLMES, THE COMMON LAW, 36 (1881); HOLMES, THE PATH OF THE LAW (1897); HOLMES, COLLECTED LEGAL PAPERS 181 (1920); JACKSON, DECISIONAL LAW AND STARE DECISIS, 30 A.B.A.J. 334 (1944); POUND, THE SPIRIT OF THE COMMON LAW (1921); POUND, THE THEORY OF JUDICIAL DECISION, 36 HARV. L. REV. 302 (1923); POUND, THE FORMATIVE ERA OF AMERICAN LAW chs. 1, 3 (1938); Salmond, The Theory of Judicial Precedents, 16 L.Q. REV. 376 (1900); Schaefer, Precedent and Policy (Ernst Freund Lecture, University of Chicago Law School 1955); Green, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 40 ILL. L. REV. 303 (1946); HARDMAN, STARE DECISIS AND THE MODERN TREND, 75 W. VA. L. Q. 163 (1926); DAVIS, The Doctrine of Precedent as Applied to Administrative Decisions, 59 W. VA. L. REV. 111 (1957); LLEWELLYN, THE COMMON LAW TRADITION (1961); LEVY, REALIST JURISPRUDENCE AND PROSPECTIVE OVERRULING, 109 U. PA. L. REV. 1 (1960).
multitude of new problems arise from the revolutionary environment now in the making. And if they respond, the clamor of usurpation of legislative power and for legislative restraints on the courts will increase. It would thus seem timely to give thought to the respective functions of courts and legislatures to refashion and modify tort law.

To speak of "judicial legislation" is either a mere figure of speech, or more likely, a slur on the court itself or its decision. A court cannot legislate in deciding a case any more than a legislature can render a judicial decision in enacting a statute. This does not mean that courts do not make law, for they have made the great bulk of tort law and legislatures have made comparatively very little. The two law-making processes have little in common. The judicial process is day-to-day, a case here and a case there, with a minimum of hurry and a maximum of deliberateness, under the control of sober-minded and highly trained men of experience in the law, with a specific controversy before them, brought under the glare of the wisdom of the past and the headlights of the future, and seeking a reasonable adjustment between the litigants consistent with the interests of the rest of us.

The legislative process is so unlike this that it is difficult to discover similarities. Both deal with problems but the problems have different dimensions—one highly particularized, the other highly generalized. Legislators may be dedicated, scholarly, unhurried men, but such men are not found in large numbers in any legislative body. More frequently they are politically-minded men harried by political considerations. Partisanship and the interests of a particular constituency are large factors in any important matter. Taxes, budgets, appropriations, schools, elections, highways, natural resources, eleemosynary institutions, criminal law, departmental investigations, resisting the demands of strong interests and their lobbyists, and scores of other pressures leave legislators no time and no disposition to consider the problems of tort law unless a bill is brought ready-made and sponsored by a group or groups with great political power. And even then, if strong opposition appears, the bill is lost in some

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one or more of the many deviations that beset legislative procedures. The legislative way is not designed and has little competence to deal with tort problems unless the relief sought is merely to open a new field for the courts, and/or is tied to some more important matter as was true of the Federal Tort Claims Act which had bounced around in congressional committee hearings for many sessions until a friendly Attorney General made it a part of a Reorganization Act of 1946,9 destined to become law in absence of congressional veto within a limited period. We cannot dismiss the attacks upon the power of courts to fashion law as something unimportant. The problem is an old one and will persist. Let us turn to a more careful examination of the courts' competence for the making of tort law, and by doing so indicate more specifically the inadequacy of the legislative process to perform this function.

The policies of the tort law of the last century were staked out, its doctrines formulated and its remedial limits set during the struggle for economic stability of a new country. Little grumbling was heard concerning the power the courts were exercising in the development of substantive law but there was wide dissatisfaction with the restrictions imposed by common law and equity procedures. The forms of action and common law pleading were superseded by code pleading and great changes made in court organization and trial procedures. While the procedures were largely the work of the legislatures, the courts supplied the substantive core of tort law through actions of trespass, negligence, nuisance, deceit, libel, conversion, a group of actions for the protection of the family and a wholly new group of actions for the protection of trade through legal and equitable remedies. Some of these actions were nothing more than the offspring of the actions of trespass and case but the abolition of the forms of pleading gave them freedom for new growth more responsive to the problems and needs of the times. During most of this period the growth and expansion of defenses to liability were luxuriant. Many immunities were grafted on tort law. It became difficult to conduct a case to judgment without error. The dockets of the appellate courts became crowded with cases from the trial courts and doctrinal snares and tangles required much writing and clarification.

When in the late 1800's the courts began to be called upon to reconsider the restrictions, limitations, and immunities imposed in earlier cases, and to extend the reach of tort law to the numerous hurts resulting from the mechanized activities of an exceedingly industrious people, great professional murmuring began to rise. Courts relaxed their restrictive doctrines slowly and the tempo of relaxation has not yet reached its climax. When the courts refused to take further steps, as for example, in not removing their restrictions placed on death and survival statutes, the legislatures sometimes stepped in and amended the statutes. Statutes were enacted for the protection of the interests of married women. Dram shop acts were passed for the protection of the family and for the merchants who supplied the family with clothing and groceries. Fence and other specific laws were enacted for the protection of landowners. Statutes regulating the operations of railroads were enacted for the protection of highway travelers. For most part these and other legislative acts were sketchy and fragmentary but they served to open the doors of the courthouse and swell the rising tide of litigation. Still, most courts applied the same restrictive doctrines to legislation that they did to their own court-made law.

The most radical legislative interposition in tort law on the American scene came early in this century to clear away the restrictive doctrines developed by the courts in the industrial employer-employee cases and to replace them with workmen's compensation and employers' liability acts. Many judges and many practitioners were greatly peeved by this loss and impairment of court jurisdiction, as they were later when so many important problems were brought under the New Deal administrative agencies. Generally it can be said that the courts were slow to remove the fetters they had fastened on themselves and on the tort law of the 1800's so that it could be an effective instrument in meeting the problems of the current period, and in retrospect, they seem to have resented the little assistance the legislatures gave them in liberalising tort doctrine. In fact, it required an extended period of legal education and the passing of several generations of professional and judicial personnel to reach the present level of tort law.

10 Prosser, op. cit. supra note 1 at 672.
12 Prosser, op. cit. supra note 1 at 382.
It can now be said with some assurance that our courts are in a position to exercise their function of keeping tort law more nearly responsive to the social and economic environments as they are ushered in by the life about us. Their apparatus is extensive, their personnel is trained by schooling and experience, and they are served by a profession of able advocates. Their organization is becoming more and more integrated into systems superintended by the administration of judges expert in getting the work load of the courts done more promptly. The development of procedures for preparation of cases for trial, the trial itself and review by appellate courts have been handed back by the legislatures to the courts themselves under their rule-making power, and the courts in turn have enlisted and received the assistance of practitioners and committees of the associations of the bar in developing procedures suited to the effective administration of the courts’ business.

The trial of a case continues to be the hub of the judicial process in tort cases; the development of the facts of the transaction in litigation the most treacherous phase of trial; the instructions to the jury the most fertile source of formal errors. The pitfalls of fact determination so vividly described by the late Judge Jerome Frank in his little volume *Courts on Trial* are constantly being reduced in number and in their capacity to render a trial a fiasco. This is due to many factors, the most important perhaps are the control the judge may exercise through pre-trial proceedings, the great facilities the lawyers have for producing evidence by thorough investigation, by expert witnesses and by scientific methods. It is enough to say that aside from many of the tragic highway and skyway collisions which defy unravelling by expert or layman, the facts of most of the tort cases brought to trial can be determined with considerable accuracy. The hazard of swearing matches between partisan, excited, and sometimes untruthful, witnesses, however, can never be entirely removed.

Assuming that the facts of a tort case can be ascertained with approximate certainty, the controlling law will usually yield to careful research. Any different interpretation of the facts will, of course, call for different alignment of law, and if several interpretations may be made, the choice of law is always influenced by the result the interpreter is convinced should be reached. Tort cases frequently give rise to important questions of policy though the policy is infrequently made explicit. It is the decision of these cases
which challenge the law-making power of courts. Judge Cardozo could find such a challenge in what seemed to be very simple cases.\textsuperscript{13} Other judges may have a case involving challenge to the highest intellectual and creative talent and treat it with yawning routine. This leads me to say, as with all artists, more depends upon what the judge brings to his work than upon the material he works with. It is in the treatment of cases involving questions of policy that courts have achieved their greatest successes and have suffered their greatest failures. It is also here that the clamor is raised for legislative supremacy and abdication by the courts of their creative power.

We inquire which process, judicial or legislative, offers more of justness and fairness for the litigant, more capable administration for a more stable society. It is frequently said—often by the courts themselves—that some problem—usually one on which they have defaulted—is for the legislature; that the court is in no position to make the investigations necessary for an informed judgment, and that the legislature can shape the law more nicely to meet the problem. Courts may say this even in cases in which they have rendered some legislative act abortive and all they need do is to remove their restrictive interpretation,\textsuperscript{14} or in other cases in which no legislative act is involved but only the court's own obsolete rule or doctrine.\textsuperscript{15} I doubt seriously that these excuses can be sustained. It is my conviction that there is no more reliable source of tort law than the court which is faced with the problem. The courts know more of the history of the law and what is involved in any departure from established rule than legislatures know or can find out. They have more time and are better equipped for a problem's study. They have adversary counsel upon whom they may rely to explore the facts and the law and the difficulties to be encountered in the future. Where counsel fall short the judges may call upon their


\textsuperscript{14} This was true with respect to death and survival acts, notes 1 and 2, \textit{supra}.

clerks. The manner in which the problem or some similar problem has been met by other courts is on record and is more likely to be given thorough study by a court. Factual studies of the social and economic implications are usually available. Judges are less partisan and less influenced by purely political considerations. They are freer from pressures of parties, groups, and friends, and their decisions are seldom laden with political consequences as are the acts of legislatures. They have the power and facilities of exposition at their command, under caution imposed by threatened or actual dissent by those from their own ranks. They decide a single case and in subsequent cases they have the power to modify their course or to reverse it altogether if convinced their course is erroneous or ill-advised. Their judgment may be as restricted as they desire.

On the other hand, a statute is a formal declaration that must be given meaning and usually must be lived with a long time before its scope is fully defined, and before it can be modified. If accepted literally its coverage is usually either too broad or too narrow. Usually a statute is ambiguous and must be given meaning from case to case much in the same manner that a court gives meaning to its own rule or doctrine. If this is the process the court does everything except take the political responsibility for a statutory departure. As a matter of fact, legislatures seldom step in either to modify or extend tort law even when a court refuses to reject some antiquated doctrine, but leave the courts to their own resources. On the other hand, the courts may and do make great use of criminal statutes and police regulations either directly or by way of analogy as a base for civil liability.16 Some years ago the New York legislature was prevailed upon to set up a commission to study decisional law for situations which required legislative correction. The commission has made numerous studies and proposals but few have been acted on. Indeed, the courts seem to have been more influenced to action by the exposure of their errors and shortcomings than have the legislature. Legislatures realize, as do most lawyers, that except for radical changes in far-reaching policy, the best tort law is judge-made law and judges should not be encouraged to shirk their responsibility to keep tort law in tune with

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16 Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201 (1959); Davis, West Virginia Negligence Cases and the Legislative Standards of Conduct, 61 W. Va. L. Rev. (1938); Morris, The Role of Criminal Statutes in Negligence Actions, 49 Colum. L. Rev. 21 (1948).
the times, and especially should not be encouraged to rely on the legislature to do their house-cleaning.\textsuperscript{17}

**Controls**

Let us assume that tort law has been and still is primarily the product of the judicial process; that it has followed the environmental changes of the past with considerable fidelity; that at no time is it static but is constantly being pushed forward or backward by the crush of events; and that it always presents a jagged front of movement if not of progress. Let us further assume that laymen in some degree sense the fact that courts somehow make law; that the profession fully recognizes the fact and that judges with varying degrees of enthusiasm accept law-making and remaking as one of their important functions. On the basis of these assumptions what controls the exercise of this function by the courts? What determines the limits of the courts' power, since they themselves must sit in final judgment on what they do? These questions have concerned the students of the common law and of its judges for a long time.

**Creativeness and Stare Decisis**

As already has been stated, judges frequently deny that courts have the power to make law, and have asserted that the courts' function is to decide a case and declare the law that controls the decision; that judges may find the law but they do not make law. How much of this attitude reflects defensive coloration, how much is semantics, and how much honest belief cannot be known. Sometimes we think we detect the tongue in the cheek; sometimes the protests are so violent that we are reminded of Shakespeare's lady. But giving the judges credit for a deep sense of innocence we suggest that no case can be decided without making law. The making of a decision of necessity means the making of law whether it is the result of statutory construction or the product of reasoning from precedent or principle. If the case involves some new problem its decision settles the dispute and at the same time creates a precedent

\textsuperscript{17} See, Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960); Pedrick, op. cit. supra note 7. Professor Clarence Morris, "If and when justice requires a change in the law that a court can make without violating the traditions of judicial law making, the power and ability of the legislature to make the same change are irrelevant—because the court cannot know whether or when the legislature will act, and because the court's change is unlikely to embarrass legislative action if and when the legislature decides to take action." (unpublished memorandum)
which will influence decisions in other cases, and these in turn will become precedents themselves which will influence the decisions of still other cases to follow. The ultimate reproductive capacity of judicial decision may be as far-reaching and as explosive as the seeds of plant and animal life, but no two specimens will be identical. There are always similarities and also differences in any two decisions dealing with the same or similar problems. Whether a particular decision is utilized to support or not support a subsequent decision will depend upon the emphasis given the similarities or differences by the court deciding the subsequent case. This permits judge and advocate to "roll their own" precedents as was once the practice with cigarettes, or they may allow some expert to roll them as is the practice now. But whether they roll their own or choose an expert's brand the precedent will serve the end desired. The creativeness of the judicial process is inevitable and unavoidable even though a court may explicitly limit a decision to the peculiar facts of the case before it as is sometimes done. A court may deliberately regiment a vast array of former decisions of marginal, if any, bearing at all, to support and justify a decision believed to mark a new course.\(^1^6\) In fact, in nearly all cases in which a court undertakes to mark a departure and lay out a new course it will find support in former cases, sometimes as precedents but more frequently as recognizing the principle on which the departure is based. By the same process a court may wholly reject or overrule its former decisions which obstruct the new path the court would mark.\(^1^9\) The techniques of the courts for reaching the ends of law in the particular case are so numerous that they cannot be successfully enumerated —so numerous and sometimes so subtle that no court can be fenced in if it is master of the common law tradition.\(^2^0\)

\(^1^6\) A good example of the practice is found in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).


\(^2^0\) How flexible and how comprehensive the common law tradition is has been meticulously explored and recorded by Professor Karl Llewellyn in his recent book: The Common Law Tradition (Deciding Appeals) (1960). The book came to me after this series of discussions had been given form. I added the last sentence in the text above in order to drop this footnote. Had the book been published earlier I should have noted it many times, with excerpts. It gives more support to many of my statements than I have found elsewhere, and goes leagues beyond. The supporting data given by the author have great breadth and depth, and sometimes it seems would well support some other or even an opposite conclusion than that reached by him. This only indicates that he wrestled with tough angels.

The book has many themes and sub-themes and could not be summar-
The doctrine of stare decisis is sometimes thought to be the opposite pole to creativeness. Stare decisis is essentially an administrative policy argument, namely, that a court should not depart from its former decisions because they give stability, predictability and justness of decision, and are of great importance as a means of control by the supreme court of the courts below. It is an argument of great weight but it in nowise impairs the courts' creative function. At most it simply influences a court to adhere to the same pattern it has already created. Even for this desirable purpose it is illusory. Life cannot be made to stand still; it will break out of any rule that can be formulated. Stare decisis is inevitably undermined by its own force. Assume that what is thought to be the holding or the principle of a case is followed in several subsequent cases; each case will differ, if only slightly from the case that is followed. As restatements of a rule or doctrine are accommodated to new facts the original rule will be swallowed up in interpretations and refinements and may lose its integrity. Its offspring will become precedents in their own right but for different holdings and they in turn will suffer the same fate. It is most remarkable how older precedents fade out and new generations of precedents take their place until advocates and judges may find in the libraries support for any position that justice, as they conceive, commands them to take. Stability and justice are viewed differently from different sides of the counsel table, and from the bench above as well. They do and must rest on much firmer foundations than past decisions or any principle that may be deduced from them. They need not interfere with the growth of law or with the courts' law-making function. Instead, they are the reinforcing factors of both. The surest means of rendering law unstable and unjust is the adherence to precedents which have died on the vine and it is as much the function of courts to remove them from the law as it is to make new precedents.

The conclusion that interests me at this juncture I doubt the author would accept, namely, that the courts have at their command numerous techniques which may be legitimately used to reach what they deem to be the just and practical solution of any problem submitted to them through the litigation process and the most compulsive influence in reaching decision is that of the environment in which they work. I doubt that any advocate or judge could find so many values in any other book available. In addition to the masterful probing of the author, the reader will be forced to do some hard thinking for himself, and therein lie additional values without limit. At times he may feel that the author in seeking the judges' lair has lost himself in the jungle, but if he sticks with him he'll bag big game.
While stare decisis should not, and seldom does play any great part in the decision of a case against what a court considers a just result, it does serve a great function in stabilizing the litigation process and in guarding it against *ad hoc* improvising. It is also an excellent terminal argument. Advocates sensing an adverse decision find it hard to let go. The simple announcement by a judge: "Counsel, I sympathize with your point of view. If I were free your argument would be very persuasive, but fortunately or unfortunately, as I see the law, it is settled against your client." What else is there to say? Thus it is that stare decisis is a time-saving device and gives finality without offense. Likewise, it is an escape of the harried trial judge from examining too extensively questions which he thinks the appellate courts should consider. Also, it may postpone the evil day when an appellate court must face up to the re-examination of some obsolescent rule. Even so, I doubt that it often controls decision if the court is convinced that justice is opposed to precedent, and if the advocate opens some way to by-pass it. Even in cases where the holdings of former cases may be doubtful a court may well hesitate to make a departure that is equally doubtful. It would seem in the overwhelming number of cases in which stare decisis has been stressed by a court that it is employed as an argument to support the correctness of the decision made by the court rather than to compel a decision the court would not otherwise have reached. However often the courts may indicate their unwillingness to make a departure because forbidden by stare decisis their motivations usually lie elsewhere. As an escape from all manner of embarrassments neither the courts nor the practitioner could afford to renounce the doctrine. It is the backbone of the adversary process and when faced with threat of utter rout is available for either attack or retreat.

The supports of stability and justice and also the controls of the judicial development of tort law are to be found in more dependable factors than the doctrine of stare decisis. They are to be found: (1) in the structure and personnel of the court system; (2) in the language of the law; and (3) in the environmental factors that influence judgment.

**Structure and Personnel of a Court System**

The structure of the court systems of nearly all jurisdictions is now compact and integrated. Trial courts and intermediate appellate courts are under considerable supervision by the highest ap-
pellate courts. The procedural rule-making power does much to make this supervision effective. In jurisdictions which have administrative personnel charged with keeping track of the work of all the courts and their operations the supervisory function of the highest court is made more effective. Judicial councils and conferences of judges afford forums for the discussion of procedural problems and to some degree troublesome problems of substantive law. Bar association sections in some jurisdictions devote their studies to the operations of the courts. The results are that both courts and practitioners are sensitive to any tensions or failures to function at any point in the court structure, and they receive the attention of those who have the responsibility of dealing with them. As a well-articulated court structure facilitates the decisional supervision of the highest court, this in turn enables and encourages advocates to raise and have considered problems of substantive law which they would otherwise hesitate to raise. The stability and the growth of law are served.

The personnel of the courts is a great factor both in the stability and in the development of law. Many lawyers who reach the bench have already passed the growth meridian. Their attitudes and ideas have jelled and they are happy to live within their limitations which fortunately will accommodate most of the problems which come before them in the course of their brief tenures. Others enter upon their judgeships with hopes of leaving the law enriched through their efforts. The resistance of fellow judges and the drags of obsolescence and heavy dockets wear most of them down rather quickly and their urge for the improvement of decisional law is greatly reduced or lost altogether. The few judges who never lose their edge may at times upset their brethren and the profession but it is they who eventually are honored as the great judges of their day.

This much also must be said. Judges, however great their power, are not always free to decide a case justly or even as they think justly. They are held under restraints by the attitudes of their fellow judges, the legal profession, and their lay constituents. They are under strong compulsions to satisfy both doctrinal restraints and the notions of justice held by those they serve. They are under the pressures of their environment as are we all and only by great efforts and great courage can they modify or surmount their environment or even respond to the environmental changes about them. Assume that a judge comes to his office with a minimum of intellectual
shackles, he must make commitments in the decision of every case in which he participates and in every opinion he writes. In a relatively short time he has encased himself in a prison of ideas and tenets from which escape is difficult. He may recognize that consistency is the hobgoblin of little minds but he also recognizes that inconsistency in a judge quickly undermines his stature with fellow judges and the profession. I know of no better example of some of these observations than Mr. Justice Holmes whom we regard as about as free a judge intellectually as ever sat on a court. His ideas of tort law were formed early in his life by his great scholarship and writing of the classic, The Common Law. This was at a time when a new environment was moving in to challenge the validity of the common law he wrote. He could never escape his early commitments and some of his decisions in tort cases were museum pieces by the time they were written. His freedom was limited to new areas which developed later in his life.

All in all the greatest insurance that tort law will accommodate itself to the environment is the constant turnover and replacement in personnel of the courts and of the profession—new judges and new advocates fresh from the maelstrom of daily affairs, and charged with the same impulses that give the environment its motion. Fortunately, there are no breaks in this chain of replacements. It keeps moving endlessly from year to year bringing recruits to reinforce and shortly take over the processes of litigation through which tort law is refashioned. It is this renewal of personnel that provides stability and dependability of law by giving to it the rhythm of the environment it serves and of which it is a part.

It is here that law schools have become so important in shaping the law of the future. I do not think anyone can exaggerate the influence the law schools have had on the great development of tort law in this century. They too are a part of the environment and daily sit in judgment on the courts. However much the judges may discount the criticisms of professors and students, they prefer to have their approval. But the reactions of the judges to the law school are not nearly so important to the progress of the law as is the fact

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that very quickly they will be supplanted by the law students of
today, and the more rapidly this takes place the more quickly will
tort and other law respond to the environmental needs. Thus the
great necessity that law teachers never allow themselves to grow
stale or obsolescent and that law students never close their hearts
and minds against the creative processes of the law. The saddest
teaching experience I have is to realize that some young fellow
leaves my class still dead in the head. My hope is that some other
teacher may succeed where I failed, for it is the highest tragedy
for a young lawyer to begin his professional life already intellectually
petrified, and a public calamity for him later to be elevated to the
bench.

THE LAW’S LANGUAGE

Another source of great stability and growth of tort law is
found in its language—the medium of communication which has
been developed for dealing with its problems. Inasmuch as tort law
is largely litigation law, its vocabulary and grammar are designed
for adversary purposes. Its concepts are numerous and its theories,
doctrines, principles, rules, and formulas are broad in scope and
extended in reach. I could not present a comprehensive and ade-
quate picture of the language of tort law and the functions it serves
even if I had the time, but I desire to make some observations
which will indicate its stabilizing value.

Any important term of tort law such as assault, trespass, false
imprisonment, negligence, nuisance, deceit, intent, unlawful, accident,
duty, causation, foreseeability, reasonableness, proximate, probable,
remote, and scores of other terms is a complex concept. These
concepts have grown more complex in meaning and usage with the
years as new problems requiring their use have arisen. Each term
is exceedingly flexible, capable of accommodating many shades of
meaning. Moreover, each term has associated with it modifying
refinements which may limit or expand its coverage and usage.
It is not a language of precision but rather one of ambiguity—
strikingly like the language of diplomacy—always requiring the judg-
ment of some one to make it explicit. Thus it is a language for
adversaries—language that gives the judge a wide latitude for judg-
ment. It forecloses nothing until it is employed by the judge to
indicate his decision. It can thus accommodate an infinite number
of cases and at the same time permits advocate, judge, and jury to
look through its transparent texture and view the factual data be-
neath with a minimum of obstruction. This transparency of language
permits the consideration of each case on its factual merits if the language is used intelligently. At the same time, it is automatically geared to the environment through those who argue and who give judgment. The language of tort law, as is the case with other language, may and does suffer from misuse and may also be employed abortively. More frequently than not the battles over principles and precedents are nothing more than disagreements over the use of language. For as often as we tell ourselves that the facts of a case should dominate decision, language pushes itself to the forefront and, if it has become crystallized in the minds of advocate or judge, blurs the image of the facts. The efforts to freeze the language of tort law into definite molds impairs its usefulness though it will not remain frozen. Its flexibility, though impaired for the moment, is indestructible however much it may be abused in the particular case. Even the least sensitive judge who may insist that language compels decision senses that it is the problem raised by the facts before him on which he must pass judgment. Thus it is that stability of law and justice are served by language that permits and requires judgment on the merits of a case as disclosed by the particular facts.

So far I have been speaking of the internal composition of the judicial process and its built-in restraints on judicial law-making. Let us now consider the influences from without that control law-making by the courts. These influences may be identified as (1) the moral climate, (2) the economic climate, and (3) balancing danger and liability.

(1) The Moral Climate

The moral climate of the environment is vastly more comprehensive than the coverage of tort law.\(^2\)\(^2\) Tort law is identified with morality only in so far as tort law is operative. If a person by his conduct has created some risk or has assumed some relation to some other person, then tort law comes into play, but not until then.\(^2\)\(^3\) As we have stated earlier, tort law is based fundamentally

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22 See Probert, Speaking of Torts, 49 Ky. L.J. 114 (1960) for excellent discussion of language usage. The problem of language has interested me for many years, see Green, Judge and Jury 43 et. seq. (1930); The Study and Teaching of Tort Law, 34 Texas L. Rev. 1 (1957).

on the moral concept of recompense or reparation for harm done whether inflicted unlawfully, intentionally, negligently, accidentally, or innocently. Its very language is a moral absorbent. The terms tort, injury, wrong, unlawfulness, trespass, intent, care, fault, duty, blame, violation of duty, deceit, fraud, slander, negligence, damage, and many other of its terms were taken out of the moral vocabulary and made to do service for tort law. Wherever a court has insisted upon a distinction of tort and morality, it has always been a compromise of morality with some competitive concept. It must be remembered, of course, that morality also takes its color from the environment as does tort law, that each is in constant process of reflecting environment undergoing ceaseless change, and further, that neither can be imprisoned by formula or definition except in the most flexible terms. One is found in the daily lives of men and the other in the administration of law by men. Discover one and the chances are the other is nearby. Each must have environmental support and where support is weak, both tort law and morality are weak. The most we can say is that tort law strives to be moral and in absence of serious administrative and economic considerations usually is moral. Thus we accept morality as a factor that greatly influences all tort law and as one of the most reliable controls of court-made law—a control from within and from without that pervades all other controls but which can seldom be identified separately from them.

(2) The Economic Climate

The last observation is confirmed in the assessment of the influence of the economic climate on tort law. The economic climate was the predominant influence in the development of tort law throughout the 1800’s. Its influence reduced liability under tort law from the high moral plane that required one who hurt another to compensate him for his injury, to the level that one who hurts another unintentionally was not liable to him at all except in the most restricted sense. And even if the hurt were intended, many escapes from liability were made available. What is good economically for the individual is usually justified by him as morally sound. Likewise, what is considered good economically for the group usually determines the moral climate of the environment. When the good of the individual conflicts with the good of the group, the group prevails. During the 1800’s, when both individuals and the group were wholeheartedly in pursuit of this world’s goods, morals and even religion
frequently accommodated themselves with the utmost fidelity to the sacrifice of industrial employees for profit, to the acquisition of wealth by fraudulent means and the exploitation of human beings, especially children and recent immigrants, through slave wages and even slavery itself. The tort doctrines of negligence and deceit were weighted heavily against the victims through defensive doctrines and immunities based on the economic good of the group disguised by a thin veneer of moral terminology. On the other hand, when wealth and the economic security of many individuals and of the group generally had been achieved, the same doctrinal immunities began to be rejected and the rules of negligence and deceit law have been re-weighted and given a fresh moral coating and the victims of tortious conduct are receiving much greater consideration. Morality is servile under economic stress and so is tort law. In turn, a secure economic order may be served by a resurgent morality, and when that is true, tort law is likewise resurgent. This has been true in the environmental period of the last decade or so. When it became clear that enterprise could fend against liability for the tortious conduct of its agents and employees through various means of distributing its losses, morality gave its support and tort law extended its protection accordingly. In fact, it has come to be realized that the ability to distribute the losses of enterprise through prices and/or insurance may well add greatly to the economic good of the group as well as to the good of the victims of enterprise. People generally, as well as judges and juries, develop a keen sensitivity for the unfortunate victims of the dangers of a mechanized industrial and social order and provision for their care against physical hurts becomes only a phase of the general desire to make provision for the hazards of unemployment, old age, disease, and poverty. It can always be said that a society's economy holds a heavy hand over tort law.

(3) Balancing Danger and Liability

The protective or preventive power of courts through tort law has grown to be very great. Whether the court finds its power and the impulse to use it in the economic good, in morality, or whether its power and impulse are but a composite of all the influences of the environment subsumed under the concept of justice, is not too

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24 How the concepts of justice, morals and law fade into or rather absorb each other is deftly and delightfully considered by Professor Edmond Cahn in his two small volumes, The Moral Decision (1955) and The Sense of Injustice (1949).
important. Courts do exercise their protective power in tort law through both legal and equitable remedies to balance liability against danger. Late in the 1800's the court exercised this power by way of damages imposed in behalf of a mine owner whose mine was destroyed by the escape of water collected on the surface by a mill owner. Against this danger the mine owner could provide no possible protection for his mine. From this reversion to medieval law the courts of many jurisdictions have come to impose liability for injury inflicted by any hazardous undertaking on neighboring premises. The doctrine is characterized as strict liability, and its rationalization is that anyone who engages in an enterprise against whose dangers he affords no protection, and against which the victim can provide no protection, is liable for the injuries done the victim. The doctrine has many limitations but is now accepted in many types of cases. More frequently, perhaps, the doctrine invoked is nuisance and the courts have exercised their equitable jurisdiction in either preventing altogether or greatly minimizing the risks and possible injury. Injunction, partial restraint, damages, or any combination of remedies may be utilized and time may be given to permit the parties to work out some solution which will allow the operation of an enterprise without too serious injury to it or its victims. Also, very recently what was considered the closed concept of trespass has been expanded to include the use of modern forms of destructive force which would not have fallen within the orthodox concept. If the courts can give trespass new dimensions it is not difficult to believe that they can expand the less refractory doctrines of tort law. And we do not have to make any wide search for instances in which they have done this very thing, as I have previously indicated by their extension of the doctrines of negligence, deceit and warranty, and by removing the restrictions and limitations earlier imposed on those doctrines.

25 Fletcher v. Rylands, L. R. Q. Exch. 265 (1866), Rylands v. Fletcher, L. R. 3 H. L. 830 (1868).
28 Martin v. Reynolds Metal Co., 221 Ore. 86, 342 P.2d 790 (1959); cf., Reynolds v. Yturibide, 258 F.2d (9th Cir. 1958).
TWO EXAMPLES

Your studies will confirm some of the statements I have made, others you may accept on faith, but there are some about which you may have great doubts. It would have been much more enlightening to you and satisfying to me to have supported each statement with a vivid example. To have done so would have required almost complete coverage of a course in torts. But I do not want to leave you without support for some of the more basic assertions I have ventured. For this purpose I choose two examples—widely different, but important.

(1) Court Control of Jury Trial

One of the neatest and least noted areas of making law by the American courts is found in the substantive devices by which they have come to control jury trial, especially in negligence cases, though not restricted to them. In most jurisdictions the common law power to comment on the weight of the evidence has been forbidden the trial judge by statute. The orthodox common-law method for submitting the negligence issue to a jury is by the use of the foreseeability formula; namely, whether as a result of his conduct the defendant should, under all the circumstances, have reasonably foreseen some harm to the plaintiff or someone so situated, and whether he exercised the care of an ordinarily prudent person to avoid hurting the plaintiff. This is an exceedingly comprehensive formula and once submitted leaves most of the power of judgment in a negligence case to a jury. By orthodox common law the judge could take up every phase of this formula, state the evidence as it bore on the particular facet of the formula, and advise the jury of the court's opinion as to the weight to be given the evidence, so long as the jury was left free to find the ultimate issue. The American judges in most states have been denied this power. But the courts found a way to avoid this limitation on their power.

The first step was the full exercise of their power to say there was no evidence raising the issue, or that it was so flimsy as to be insufficient to support a verdict, or so weighty as to require a directed verdict. This exercise of power was not unorthodox, for courts have exercised it time out of mind. But the American courts exploited this power to weigh the facts by the use of inferences, presumptions, prima facie case, negligence per se, res ipsa loquitur, burden of proceeding, and burden of proof. Each of these terms
raises a question of law and therefore is subject to the court's instructions.

Moreover, the courts came to look further into the "circumstances" surrounding the defendant's conduct and discovered what are called independent intervening, or independent supervening, or dependent intervening, or dependent supervening causes and to instruct on them wherever found. Likewise, they may discover circumstances that suggest unavoidable accident, sudden emergency, or sole proximate cause and instruct on them. In other words, by this method the courts may convert particular fact circumstances into questions of law on which they instruct and thereby exert control over the jury's verdict. Suffice it to say that the exploitation of this power through instructions on facts converted into points of law serves all the purposes indirectly that the power to comment on the evidence can serve directly. The only difference is the pompousness of the instructions, the fractionalizing of the ultimate issue, and the confusion produced by so many and such metaphysical doctrinal refinements. 29

These maneuvers were not the inventions of the trial courts but primarily the inventions of advocates which were approved by the appellate courts who found in them the power to control both trial judge and jury, for these instructions open for review the whole trial process by virtue of the exceptions taken to the giving, or the refusal to give, instructions on the evidentiary circumstances raised to the level of points of law. How completely the appellate courts have brought jury trial under their control by this type of strategy can only be determined by the close study of a particular jurisdiction, for there are numerous variations in the tactics employed from jurisdiction to jurisdiction in the submission of negligence and other issues.

(2) Railway v. Stout

For a second example I choose what on its face is one of the simplest cases in all tort law 30—a case that a person who had

29 See Werkman v. Howard Zinc Corp., 97 Cal. App. 2d 43, 218 P.2d 43 (1958), one of numerous cases indicating how the courts have come to load the submission process with purely fact considerations which they have converted into questions of law. Notice how the Torts Restatement supports this method of jury trial control by the courts. Better methods of control can be found than this cluttering of instructions, opinions, and law books with false issues and highly confusing statements.

never heard the word "tort" could decide without hesitation—and yet which proved to be the most explosive decision of the nineteenth century, challenged and fought over in every court of the country for a period of seventy-five years and now, while generally accepted, is still being limited or expanded in numerous cases by many courts.

A six-year old boy named Stout, who lived in a small frontier Nebraska hamlet, went with some other boys a little older to ride on the turntable of defendant railroad which had only recently extended to that point. The turntable lock was out of order and some of the boys could turn it while the others rode. Employees of the railroad had seen boys playing on the turntable previously. On this occasion, young Stout's foot was caught and crushed while he was attempting to mount the turntable. He sued the railroad for damages on account of its negligence in leaving such a dangerous machine open to children, and recovered judgment. The main defense was that the railroad was not negligent and that Stout's injury was an accident. The jury found otherwise. It was agreed that Stout was too young to be contributorily negligent. That Stout was a trespasser on the railroad's premises was brushed aside by the court on the basis of several earlier decisions which bore slight analogy to Stout's case.

The profession tagged the decision as the "turntable" doctrine and rejected it as a repudiation of the doctrine that a landowner owes a trespasser no duty except not intentionally to hurt him; a doctrine that the courts had created and on which they had relied time out of mind. Only a few courts accepted the decision on the basis of simple negligence employed by the Supreme Court of the United States, but many courts reached the same conclusion on one or another of six or seven other doctrines created on the spot to support the decision, all of which involved fictions varying from a trap at one extreme, to that of an invited guest at the other extreme.31 Courts deeply schooled in the common law, such as those of Massachusetts, New York, and Pennsylvania, treated the decision with contempt, and such scholarly judges and professors as Jeremiah Smith and Oliver Wendell Holmes rejected the doctrine in the strongest terms.32

Let us consider briefly what was involved. On the one side was the deeply revered rule of the common law that had for centuries protected English landed estates, earlier from enemies and latterly from poachers. The rule was suited to the English environment. On the other side was a small frontier community where land boundaries were unknown except to a surveyor. Any person could travel or hunt anywhere in the wide open spaces without anyone’s permission. Except for a few widely separated farms, there were no fences, no keep-out signs, nothing but prairies where cattlemen, their cattle and the Indians still roamed. The boys were few in number and had no playgrounds, no little red wagons, no bicycles, no baseball, no football, no movies, no hills for slides, no sapling to bend over and ride, no swimming holes away from a treacherous river. What could they do to have fun? They could play leap frog, stink base if they could find an old sock to unravel for a yarn ball; they could wrestle, jump, play hide and seek, and roam. Walking the rails and counting the ties of the new railroad gave their play a new dimension, and when they took possession of the turntable it was doubtless the most joyful discovery of their lives.

The estate involved was lately public domain, now donated to a railroad company, but still unfenced. What harm could these boys do to the rails and the turntable? The railroad had no interest in keeping anyone off its premises. In wet weather the track was the smoothest and driest way in the community and everybody made use of it.

Can you imagine two environments further removed—the landed English estate guarded against poachers and this hamlet community so recently a terminus of a continental railway on its way to the Pacific? What kinship did this landowner have with land kept for rabbit warrens and the refuge of wild game for the sport of the nobleman and his guests? Here was land devoted to and activated by the most dangerous machinery of the times, left open to anyone who might come upon it—the certain rendezvous of small boys seeking adventure.

Here then was the setting for the declaration of a new principle as valid in its day as the trespasser rule was for the English estate. But it required more than half a century for the doctrine to be acceptably formulated by a group of law professors under cover of the Restatement, and then another quarter of a century to find ac-
ceptance by the courts and the profession.\textsuperscript{33} This is the story in slender outline. If it could be followed through from case to case with all the scholarly fulminations, table-pounding, crafty arguments, solemn pronouncements, and melodramatic by-play, no one would be left in doubt that courts fabricate law in all the patterns in which words can be arranged to accommodate the ends that courts deem just; that stare decisis is an argument, not a commandment; that its chief value lies in its creativeness in support of the stability of the social order; that most tort problems involve details in profusion and variety beyond the reach of the blunt provisions of general rules or statutes; that law cannot advance beyond the understanding and courage of advocates and judges and their capacity to recharge its language with new thought and meaning; and that the making, unmaking, modification and shaping of law to the case in hand is serious business largely controlled by the moral and economic climates and the dangers of the environment as they are brought to bear on the litigation process by the march of time.

**SUMMATION**

By way of summation of this discussion permit me to restate the basic considerations that underlie the making of law by courts. As a separate and equal department of government the courts are established to hear and determine the claims or controversies brought to them through the litigation process within the limits of their jurisdictional powers. If the case is governed by constitutional or statutory provision it is the function of the court to construe and give meaning to the provision in adjudicating the claim. It is rare indeed that a provision of constitution or statute is so explicit that it does not require construction or interpretation.\textsuperscript{34} The very necessity of interpretation gives the courts power to determine its ap-


\textsuperscript{34} See the excellent discussion of my colleague, Professor Joseph P. Witherspoon, *Administrative Discretion to Determine Statutory Meaning: The High Road*, 35 Texas L. Rev. 62 (1956); *The Low Road* (pts. 1-2), 38 Texas L. Rev. 392, 572 (1960).
plication to the particular case, and as other claims require adjudication it is inevitable that construction be broadened or modified to meet the peculiar facts of the case. Thus, in time, any important provision of constitution or statute is so greatly glossed by construction or interpretation that it becomes a product of court-made law and its form and content either lose much of their original vitality or else are so transformed by the courts' creativeness as to fall within the domain of decisional or judge-made law.

This process of law making is different from what is known as common law only in the fact that the common law is usually developed from the adjudication of a case without aid of constitution or statute. The courts, through the assistance of advocates, find in the great fund of wisdom common to all mankind, as constantly replenished by the experience and decisions of the courts themselves, some policy, principle, theory, doctrine, rule, or formula that is thought to control the determination of the case. In making this determination, the policy, principle, theory, doctrine, rule, or formula is stated as the basis of decision. This formulation is available for future cases in the same way as a decision based on constitutional or statutory provision. And with the coming of new cases it will be glossed, extended, or modified so as to accommodate the particular case. Over the years, with hundreds of courts making decisions made available by published reports, the mass of decisional law with its restatements, commentaries, texts, encyclopedias and search books becomes so massive as to require great expansion of professional services and expenditures.

As the courts face thousands of new cases every year, the labor involved in focusing on any particular case the teachings of relevant decisions and the wisdom reflected by critics and commentators becomes more and more a hopeless undertaking however industrious the advocates, the judges, and their research assistants may be. How do we meet such a situation? It is my thesis that we meet it in the only practical way. We focus on the particular case in its particular setting. The function of the court with its adversary process of litigation is to settle the case justly between the parties with due consideration of the interests and affairs of the rest of us who may be affected by the decision, and also with due consideration of the burdens and problems it may create for the courts themselves in subsequent litigation. Advocates support their respective claims
with such facts as they can produce by way of proof and by such arguments as they can draw from former decisions and any other source of wisdom they find available. The judges are trained and experienced in the processes of litigation. They draw on all they know and all that may be presented to them. They usually have a wide choice of principles, theories, doctrines, and rules to guide and influence them, and under the controls which their environment has on their thought and action they make their decision. Having made decision, no court is so lacking in ability that it cannot rationalize what it has done in terms of law and justice, at least to its own satisfaction.

There is nothing mysterious about this process. It only becomes mysterious when we attempt to reduce it to mechanical or metaphysical analysis or logic such as discovering the ratio decidendi, or when we as commentators or critics re-try the case on the basis of our own judgment of the facts and choice of law to reach the ends we would serve. We measure the court's product by the imagined product we should have preferred and may immediately raise a clamor that the court is in error or has departed from the sacred doctrine of stare decisis.

The responsibility of fashioning law for adjusting the claims which arise out of the myriad activities of the everyday life of a people was given to the courts by our forebears some centuries ago and on the basis of a long history we have no regrets. Their power was not expended by their first nor their last decision. If a court is convinced that justice calls for a pattern of decision different from some decision made by it or some other court under somewhat similar facts at a different period of time, it has the responsibility to do justice in the case before it, and if need be, rectify its formulation of law. No society could long endure under law that could not be made to respond to the needs of its members. A court's limitations are largely those that it imposes on itself. And, if any American court should seek to bind itself by a rule that would prevent the correction of its errors or the advance of the cause of justice beyond its former decisions, it would be held in contempt by every other court and every informed citizen in the country. Not since Littleton has any responsible law-giver seriously insisted that "what never was, never never should be," and the doctrine of stare decisis bears no such implication. With constant change in physical and social environments, and replacements in the personnel of lawyers, judges,
and jurors—an endless procession—the development of tort law is assured. The lawyer who does not learn to accommodate his stride to the law’s movement will live a frustrated and an unhappy life.

(Part III of this article will appear in the April issue.)