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## ANALYSIS OF TORT CASES<sup>1</sup>

LEON GREEN\*

The discussion of any problem of law must begin with the assumption that it can be adequately handled by some accepted legal theory, or that it can be made to submit to some such theory yet to be designed. An adequate working hypothesis is as necessary to a legal science as to any other science. Needless to say there has been no comprehensive system of legal theory designed to take care of all the problems which arise under government. Any system which there may be is made up of numerous fragmentary parts, each fashioned to handle a particular group of problems, and even these larger parts are made up of still smaller fragments. For instance, there are groups of contract problems, agency problems, corporation problems, tort problems, but each one of these groups is controlled by a conglomerate of theories rather than by a single theory. Difficulties and misunderstandings arise largely out of the clashings and contradictions of a multitude of helter-skelter theories improvised for the day and perpetuated to plague legal science indefinitely.

The value of legal theory is found primarily in three requisites. (1) There can be no such thing as acceptable lump-sum judgments on complex transactions. Complicated data can only be handled reliably by breaking them into parts and examining them bit by bit. An analytical device is the first demand made on legal theory. (2) The process of government for passing judgment on the problems involved in most situations is complex. The judicial process may consist of trial judge, jury, and appellate court, to say nothing of preliminary steps taken by attorneys, commissioners, and other agencies. In order to make possible a division of labor there must be adequate machinery for al-

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<sup>1</sup> This brief discussion of legal theory in tort cases introduced a series of lectures dealing with tort problems given by the writer at the College of Law of West Virginia University on Feb. 25-26.

locating the functions and distributing the burdens of the process. This is the second demand on legal theory. (3) In order that the persons who are concerned in the processes of government may articulate what they are doing so that they may make themselves understood and understand others likewise engaged, and that there may be a synthesizing of the entire results of these processes, the most flexible, adaptable and comprehensive facilities for communication should be available. This is the third demand on legal theory. All these requisites are so inter-dependent that they require highly co-ordinated intellectual machinery.

In the field of torts are found a series of problems thrown together under such catch-phrases as trespass, deceit, defamation, malicious prosecution, negligence and others. Each of these series of problems has its own set-up of legal theory. A transaction or case generally awaits a classification into one of these series before it is subjected to analysis and solution. Attempts are made to keep these classifications sharply defined and set off one from the other. But about the first observation made by any one who has attempted to teach the subject of torts is that these groups cannot be kept separate. They tend to run all over the field. Judges in their opinions intermingle the terms appropriate to the various theories in most disconcerting fashions and long before students give over the study of the first group they are talking in the terms of subsequent groups. What law teacher has not heard about negligence and equity and malice from a first year law student before the end of the first week? The instructor finds that the whole orderliness of his course is destroyed before he gets well started. These classifications are by no means exclusive. Nor can it be expected that they should be kept distinct when it is remembered how piece-meal they grew up and have been developed.

But an observation not so readily made, is that each of these larger classifications is itself made up of many smaller fragments of theories. I think it possible to state in multiple form the simplest cases which arise under any of the classifications.

Take this simple case:

P becomes enraged at some purely conventional remark of D, and answers him sharply. D rejoins with a still sharper reply. P resorts to epithets of an abusive nature. D smacks P's face. P strikes back. D knocks P down and severely hurts him. P sues D.

Without departing from the most orthodox terminology the problem can be stated in several forms.

- (1) Is D guilty of an assault and battery?
- (2) Was P guilty of an assault upon D?
- (3) Was D acting in self defense?
- (4) Did P by provoking the combat thereby consent to it?
- (5) Did D in the exercise of his privilege of self-defense use excessive force?
- (6) Did P provoke the combat so that the damages are to be mitigated? Which inquiry is most pertinent?

The number of doctrinal terms is not without significance: Assault, battery, self-defense, privilege, excessive force, mutual altercation, consent, provocation, mitigation. The number of rules involved is also interesting:

- (1) One who intentionally puts another in apprehension of immediate harmful or offensive touching is guilty of an assault.
- (2) One who intentionally inflicts violence upon another, or touches him offensively, is guilty of a battery.
- (3) Mere words do not constitute an assault.
- (4) One whose interest of personality is threatened by the application of immediate violence is privileged to defend himself.
- (5) One who defends himself against unlawful violence must not use excessive force.
- (6) One who engages in a mutual altercation thereby consents to the violence inflicted upon himself.
- (7) Consent is not a defense to an unlawful act of violence.
- (8) Consent is a defense to an unlawful act of violence.
- (9) One who under adequate provocation makes an assault upon another is not excused but such provocation may be considered in mitigation of the damages.

These forms of statement, doctrinal terms, and rules by no means exhaust the possibilities as the concluding analysis will indicate.

If this simple case is to be submitted to a jury for determination, which of these rules and what forms of statement shall the problem take? In other more complicated cases in trespass, in deceit, in defamation, in negligence, the network of theory increases in complexity with the multiplicity of data.

What does this mean? The implications are numerous. Let these suffice for the time: (1) Practitioners, as well as judges, in dealing with a case will resolve it into the sort of question or theory that best adapts itself to the conclusions each may desire to reach. There are always two lawyers, at least one trial judge, and may be a large number of appellate judges. It is not at all unusual for the same case to be presented in multiple theories. (2) A multitude of arguments and disagreements may arise in dealing with a case when it is not a matter of right and wrong, but purely a matter of taste and judgment as to the form of statement.

The waste of energy in attempting to harmonize holdings of different courts when the trouble may lie in the selection of an acceptable legal theory is very large. I do not believe that it is generally appreciated what a large part this multiple choice of theories plays in our courthouse government. It must be remembered that the cases as reported by the appellate courts are refined products. They are the results of a long process. They by no means indicate how the cases looked to the lawyers and judges who tried them. Sometimes a lawyer scarcely recognizes his case after it has gone through the court of last resort. An opinion may, and frequently does, merely represent an elaboration of the theory which caught the fancy of the judge or court writing the opinion. This fact makes it difficult to look through the well developed essay of the judge and catch even a glimpse of all the competitive and conflicting theories and data from which the choice of the appellate court was made. Another judge or court might with equal assurance have reached an entirely different conclusion and thus have written a very different opinion. This is nothing more than one of the risks incident

to the judicial process. But it is highly important that it be recognized that there is such a risk.

Probably the most extravagant net-work of theories employed in tort cases is found in the negligence group. The most important of these cluster about the following: (1) legal right, (2) legal duty, (3) negligence, (4) assumed risk, (5) contributory negligence, (6) last clear chance, (7) proximate cause, (8) wilful and gross negligence, (9) imputed negligence, (10) comparative negligence, (11) mitigation of damages, (12) aggravation of damages. Each of these has subdivisions.

There are very few negligence cases, if any, which cannot be stated in at least several of these theories. One lawyer or one judge will insist that a problem to be decided is a question of legal duty, another a question of assumed risk, still another a question of contributory negligence, while the appellate court may say it is one of proximate cause. Nor is there the slightest reason to say one or the other is correct except as it may fit into the basic assumption which a person may give his inquiry, or as it may lend itself to the judgment which the particular person desires. The possibilities for this sort of thing can scarcely be exhausted.<sup>1a</sup> Consider the possibilities for disagreement in the single theory of "proximate cause"; legal cause and cause in fact; natural cause and probable cause; intervening cause and concurrent cause; ultimate cause and intermediate cause; direct cause and remote cause; dominant cause and sole cause; and at least that many more such phrases.

In all this riot of theory and terminology is it any wonder that the courts are glutted with negligence cases? Is it remarkable that the reports are filed with dissertations which are most bewildering in their doctrinal teachings? Is it a cause for wonder that defendant's lawyers should insist

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<sup>1a</sup> Compare two recent statements:

"The broad general principles of the law have a significant habit of traveling in pairs of opposites \* \* \*." John Dickinson, *The Law Behind Law* II, 25 Col. L. Rev. 285, 298 (1929).

"Legal principles—and rules as well—are in the habit of hunting in pairs \* \* \*." W. W. Cook, 38 Yale L. J. 405, 406 (1920).

My only comment is that these principles and rules hunt in "packs" instead of "pairs" and that it is seldom that there are as few as a "pair" in a "pack".

upon jury trial in order to get the benefit of the errors and disagreements which fall out in such complexities?

A survey of this wilderness of methodology convinces me that there is no possibility of finding a way through it all unless certain basic assumptions are made. One of these assumptions is the necessity for an adequate and understandable theory of analysis, which takes into account the whole<sup>2</sup> judicial process as it operates in tort cases. This requires nothing short of an appreciation of the part played in these cases by that "despised" subject which is called procedure. Law schools and law teachers have for a long time been attempting to divorce procedure and so-called substantive law. They have thought of law as the formal rules employed by judges rather than the whole process involving the agencies which use such rules, and the uses they make of them, as well as the net result translated in terms of dollar and cent damages. They have ignored the administration of the power we call law for the least significant part of such administration. Any suggestion for dealing with negligence and other tort cases should comprehend not only the rules of law but the administration of those rules.

The suggestion which I make involves the use of an analytical formula. I choose this because it very largely avoids reliance upon definitions and rules—those hopeless attempts to freeze into a word, or multiple words, a meaning for all times and places. Also, I choose a formula method because it merely propounds but does not pretend to answer. It permits the division of labor between judge and jury and leaves the judgment of each as free as possible. It simplifies the statement of the questions on which judgment is to be passed and leaves the person who is expected to pass it as free to survey all the factors which should influence his judgment. This formula is not a departure, for it finds support in countless decisions. It resolves a case into these problems:

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<sup>2</sup> This does not mean that the judicial process as a whole must be dealt with by any analysis which may be formulated for use in tort cases. Pleading and Evidence are parts of the process, but they need not be dealt with; they can be isolated and yet accounted for. But it is remarkable how greatly the formula later set forth simplifies the pleading issue and thereby gives direction to the evidence pertinent thereto.

1. The right-duty problem.
2. The violation of duty problem.
3. The causal relation problem.
4. The damage problem.

Let it again be emphasized that the value of such a formula is found chiefly in the flexibility it gives in allocating the various phases of a case to judge and jury as is required under our theory of government. In many cases the judge's judgment alone is required; in others a concurrence of the judgment of judge and jury is required on a *single* problem; in still others, their concurrence is required on *multiple* problems. These ideas are represented roughly by the terms questions of law, questions of fact, and mixed questions of law and fact. Each of these, however, begs the question to be determined, and it is difficult to find different terminology that does not do the same thing. Sometimes the judge's functions are spoken of as matters of policy and those of the jury as fact finding. Even these are not sufficiently descriptive. Policy is but a quick summing-up word. Questions of fact are as narrow or as broad as it is desired to make them. I should say the judge's primary or most important functions are to pass upon the larger questions which go to limit responsibility generally, and not merely in the particular case, such as the administrative difficulties involved in such cases, the economic and moral exactions of the time and place, and the development of rules which are designed to prevent the recurrence of such hurts generally, as well as to apportion the losses in the particular and similar cases. These are the factors which are pertinent to the determination of "rights" and "duties." The latter are terms we use to symbolize the conclusions of the *judge* in imposing or denying responsibility after a summing up of all pertinent factors. So the first problem suggested by the formula falls to the judge and depends upon his judgment. It is subject to further analysis as will appear later.

On the other hand, whether in the particular case the defendant *violated his duty*, I would pass to the jury by some formula which would indicate as unrestrictively as possible upon what phase of the case the judgment of the jury should be desired. In negligence cases for instance, the "foresee-

ability of harm" formula is well designed for this purpose. Although the formula is framed on the so-called negligence issue, nothing less than the jury's judgment on the whole case should be desired or expected. As a matter of fact legal theory makes no pretense to determine the factors which should control the judgment of the jury beyond the delivery of a ritualistic formula, plus in some states such advisory cautions as the judge may think desirable to give. But the fact of significance as to this problem is that the jury's judgment is restricted to the *single* case, and it has no validity beyond this.

These two problems go to the heart of a case. Here is decided responsibility or no responsibility. The duty, and violation of duty, problems require a concurrence of judgment by judge and jury; the former from the standpoint of legal science at large, the latter from the standpoint of the details of the particular case. Incidentally, in all problems which go to the jury, the judge must say if the proof makes an issue to be submitted, and if so, he must translate that problem to the jury, through an appropriate formula.

Of the two remaining problems, that of damages is of great importance, while causal relation is of minor significance. Both are easily isolated. The damage problem requires the judge to determine the sufficiency of the evidence to warrant a finding and what measurements shall be used, but once the question is submitted it is for the jury to do the measuring. Causal relation between defendant's conduct and the hurt suffered is usually so clear as not to raise an issue, but nevertheless it is habitually submitted. This incurable habit on the part of courts is not merely a futile thing; it causes great difficulties. But when a question of causal relation is properly in the case, it is for the judge to determine whether the evidence makes an issue, and to submit the issue through some appropriate formula to the jury. It is for the jury to make the finding. The courts frequently submit what appears to be this problem under a so-called "proximate cause" formula. A great deal of confusion is developed by the latter practice. Under the analysis here suggested there would be no place for it.

Through the formula as a whole I should hope to keep the

functions of judge and jury separated as clearly as possible and likewise indicate the scope their respective judgments should take through the simple subordinate formulas employed for each problem. This is the process which as a matter of fact has been developed by the courts but which has been so frequently misunderstood or disregarded. Until the scope of such process is understood, and something of its practical workability is appreciated, the intricate problems which are hidden under the terminology of "proximate cause" and other such catchwords of the judges will not yield to analysis. My suggestion therefore is that tort cases can only be understood through the procedural process to which they should be subjected by a court.

For the purposes of clarity I analyze the formula at length:

1. *The Right-Duty Problem.*

- a. Has plaintiff a right? Does government extend protection to plaintiff's interest? Is there any rule of law designed to protect plaintiff's interest? Should plaintiff's interest be protected by law?
- b. Did defendant owe plaintiff a duty with respect to the interest which has been injured? Does, or should government protect plaintiff's interest against defendant's conduct? What rule of law protects the plaintiff's interest? Is plaintiff's interest protected against the hazard which it has encountered? Is plaintiff's interest protected by the rule of law he invokes against the risk encountered? Who shall, or should, bear the risk of plaintiff's hurt, plaintiff himself, or defendant?
- b<sup>1</sup>. It should be noted further that the inquiry is subject to great extension and variation, if the so-called defenses are developed in the several types of cases: Shall plaintiff's own fault (consent, equal guilt, assumed risk, contributory negligence) defeat his recovery? Or is defendant deprived of such defense by his own excessive conduct (undue advantage, last clear chance, discovered peril, gross or wilful negligence?) Is defendant protected by a privilege? (These are numerous; self de-

fense, defense of another, or of property, puffing, competition, rival claimant, probable cause, certain confidential relations, official position, truth, fair comment, etc.) Or is defendant denied such privilege by reason of excessive use? (excessive violence by way of defense, malice, vicious motive, etc.)<sup>3</sup>

- c. How does a judge know the answer to such a question, however it may be stated?<sup>4</sup>

## 2. *The Violation of Duty Problem.*

- a. Does the evidence make an issue that defendant has violated his duty to the plaintiff?<sup>5</sup>
- b. The translation by the judge to the jury of the issue, if made by the evidence.<sup>6</sup>
- c. The jury determines the issue whether defendant has violated his duty.<sup>7</sup>
- d. This entire process,<sup>8</sup> may be apposite to any defense noted above.<sup>9</sup> In other words, a jury's judgment may

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<sup>3</sup> These—a, b and b<sup>1</sup>—are all different ways of stating the same problem. There are others. Sometimes it presents a question more vividly to state it one way, sometimes another. One person may prefer one way, while another may prefer a different one. One type of case may require one form of statement, while another case requires a different form. The problem can frequently be reduced to a narrower form than here indicated. In my book, *Rationale of Proximate Cause*, in which numerous examples of this problem are given, I doubtless employ one or two forms of statement excessively but I found uniformity of expression of great value in developing the subject with the utmost brevity.

<sup>4</sup> I have discussed but not answered this inquiry in my articles: "The Duty Problem in Negligence Cases," 28 *Col. L. Rev.* 1014 (1928); 29 *Col. L. Rev.* 255 (1920). See *Sheldon v. The Wichita R. R. & L. Co.*, 125 *Kans.* 476, 264 *Pac.* 732 (1928). See CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928).

<sup>5</sup> How does the judge know when an issue is made? How does the employment of the "reasonable inference" formula help? See discussion in *Pleasant v. Fant*, 22 *Wall.* 116, 22 *L. ed.* 780 (1874); *Randall v. B. & O. R. R. Co.*, 109 *U. S.* 478, 482, 27 *L. ed.* 1003 (1883); WIGMORE ON EVIDENCE (2nd ed.) §2494.

<sup>6</sup> In negligence cases this is done through the "probability or foreseeability of harm" formula in some one of its many variations. I discuss this in my article, "The Negligence Issue," 37 *YALE L. J.* 1029 (1928). How is the issue submitted in other types of cases? The formula will be found to differ from type to type. There are numerous formulas available for this function.

<sup>7</sup> How does the jury find the answer? See discussion, 37 *YALE L. J.* 1029.

<sup>8</sup> 2. a, b, c.

<sup>9</sup> 1. b<sup>1</sup>.

be desirable on a defensive issue as well as an affirmative one. As an illustration: If the judge decides that contributory negligence should be let in as a defense, then under orthodox practice if (a) there is evidence to raise the issue, (b) it must be translated to the jury, (c) for their finding.

### 3. *The Causal Relation Problem.*

- a. Does the evidence make an issue that defendant's conduct caused plaintiff's hurt?<sup>10</sup>
- b. The translation of the issue by the judge to the jury?<sup>11</sup>
- c. The jury determines the issue, whether defendant's conduct was a "substantial" cause factor.<sup>12</sup>

### 4. *The Damage Problem.*<sup>13</sup>

- a. Does the evidence make an issue as to the extent and value of the hurt plaintiff has received to an interest as to which he may recover?<sup>14</sup>

<sup>10</sup> This problem seldom arises as the evidence is usually clear one way or the other. But how is the judge to know when an issue is made? The same "reasonable inference" formula should be used here as in the negligence issue. See *supra*, n. 5.

<sup>11</sup> This issue should be submitted by some variation of the "substantial factor" formula. See my article, "Are There Dependable Rules of Causation," 77 PENN. L. REV. 601 (1929); my book *RATIONALE OF PROXIMATE CAUSE* (1929) pp. 132-141.

<sup>12</sup> How does the jury find the answer to this question? See discussion, PENN. L. REV., *supra*, n. 11.

<sup>13</sup> Neither casebook nor text has apparently been able to distinguish the damage problem from the other problems of responsibility. They give practically all their attention to the three problems of *fixing* responsibility (problems 1, 2 and 3) as opposed to the measuring of responsibility in terms of money (problem 4). No attempt will be made to deal with the problem here. I set it aside with the suggestion that the discussion of *direct, consequential* and *remote* damages have nothing whatsoever to do with the problem. Such discussions are attempts to deal with the right-duty problem in language ill adapted to such a use. A good example of this use of such terms is found in *Farley v. Crystal Coal Co.*, 85 W. Va. 595, 9 A. L. R. 933 (1920). It is clear that there were more important factors directing the judgment of the court in that case than the abstruse distinction between direct and consequential.

<sup>14</sup> How does the judge determine this? See *supra*, n. 5.

- b. The translation by the judge to the jury of the issue, with appropriate instructions as to the standards and measurements to be used.<sup>15</sup>
- c. The jury determines the extent of hurt or loss and evaluates it in terms of dollars and cents?<sup>16</sup>

This analysis should not be misunderstood. It has no power of its own. It is merely a device for bringing to the surface the significant problems of a case so that judgment can be the better passed upon them. It permits the difficulties to be located and isolated rather neatly. But it does not control judgment. It also permits the functions of those who have a part in passing judgment to be easily allocated to them and kept as distinct as possible. In doing these things it necessarily must afford the means for articulating the process as well as its result. But it is not the only way to handle tort cases—if it is merely a good way, that is enough. Doubtless something much better will be developed.

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<sup>15</sup> The standards and measurements which may be employed in a particular case may be numerous. The one or more which a court will use depends upon the ones made available by the pleadings and evidence in the case. Ordinarily the court will direct the jury to employ the one which seems most appropriate to the particular issue. Sometimes the one employed is not as good as one which might have been used had it been made available by the pleadings and proof. The most significant thing which can be said here is that there is no *one* measure which *must* always be used in cases which seem to be of the same type. Courts are not so lacking in resourcefulness as that, though there are many discussions in opinions and in texts which would indicate that there are standardized measures of damages for each situation, and that there is some way to find out the one which must be used. Such statements are misleading.

<sup>16</sup> How does the jury arrive at the amount? They employ their judgment on this problem as they do on all other problems submitted to them. Their judgment is final so long as they act within the boundaries provided for their conduct, and so long as the court thinks the result not so unreasonable as to require modification or setting aside.