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A Proposed Code Provision on Tort Liability

James Barclay Smith

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It is accepted history that in ancient, primitive times the government and its administration were so simple that, in addition to his other duties, the King exercised the judicial power out of hand. Eventually, this function of government was delegated to courts where private parties were permitted to seek redress for their injuries. From whatever reasons, the function bloomed into the Anglo-American system—flowered by the rules of common law pleading. Great was the good; and the glory thereof is said to be the purpose simply to seek the truth. The litigant sought the truth—the duty of government was to provide the machinery to disclose it. Rules developed rules, and rules developed interpretations until their art was the master of its creators. Bentham and Maitland, Edward Livingston and David Dudley Field landmarked efforts to control litigation to the end that rights could be fairly, simply, and finally declared without needless delay. However, the progression to complexity seems to be congenital in every system. By the same token, government has the continuing obligation to reinventory the whole to assure adherence to the stated principle. It is elementary in human experience that the rank and file are impressed by the first index of government, the manner in which its mandates, methods and officers touch them. Realism in contact colors theory of perspective.

The phenomenon of complexity of government confounds everyone. The eternal question arises: Is it necessary? In the overall, as the business of government increases, the answer must be in the affirmative as to the trend. But in the particular, as we learn more of method and have confidence in our institutions, the answer can and must be in the negative.

Our purpose here is to establish simple standards to achieve just results in measuring the consequences of negligent injury to others. Many years of study to this end have led to the con-

* Professor of Law, University of Kansas.

clusions expressed in the appendix hereto. They are presented for legislative enactment.

Fair-minded decent men, considerate of their fellows, probably would come to a just reparation agreement among themselves. With them, the injuries are truly accidental. But those whose conduct is negligent, either habitually or occasionally, those who disregard the rights of others, are not such men. They embrace the toils of the law to exploit as they destroyed. And their less numerous brothers are caught by the necessity of survival and self defense in an adversary proceeding from which they cannot escape. Every relationship requires the protecting hand of the impartial moderator, the *representative* government of all, expressing itself through the courts in just and simple rules of substantive and procedural law. From one end of the bookshelf of the centuries to the other, in every mature system of jurisprudence, there is only one rule of substantive law in torts—he who injures another must make the injured party whole. It must follow that the standard, demanded by experience, of rules of procedure is a rule which permits the statement of the evidence of negligence and of the consequences of negligence to be stated to those (the jury and the judge) who must equate the equities of the parties.

Complexity is an inescapable evolution of practice under rules of procedure. It is true that the courts are an armor of protection both defensively and offensively. But it is also true that the public policy is against litigation. It was articulated by proscribing champerty and maintenance. They have analogy in the rule against multifariousness.

Once the litigants are in court, public policy constantly has been seeking rules to dilute and lessen the distortion of justice-defeating technicalities of pleading and proof. Here come trooping the rules of set-off, of counterclaim, and of joinder. Rallied with them are interpleader, intervention, and the bringing in of third parties and alternative pleading. Great advances were recorded in the Livingston code and in that of Field, which gradually spread across the states. The federal conformity rule was supposed to make local process single. More recent are the new civil practice act in New York and the New Jersey modernization. Great advance was made in the new federal rules of civil procedure, even if conformity was lost.

After this recital, a little glossing must convince any intelligent layman that he may just tell the story of the negligent

injury to an intelligent officer and have an end to it. But here he really meets the "law." He did not plead, or he did not cross-plead, or he did not say he was not negligent, or he did not say the other fellow was negligent, or that such negligence contributed to the result. All the time he only asks the judge—"Don't you understand me?"; and he gets the answer, "Yes, I understand you, but you did not use the magic form and sequence of tag and touch. The rules! The rules! You have not played the game according to the rules." To all this the good man answers simply, "I am playing no *game*. I want only peace." But that would bring him out in accord with the fundamental public policy. And all of these niceties of sequence and recital have their concomitant, burden of proof.[1]

Smug in the equipment of his art, the lawyer held to his technical rules. Aside from the disrepute or contempt which attached to the courts and to the lawyer in the popular mind, relief had to be had. The business man turned to arbitration. For a long time he was stymied by the courts' saying he was ousting them of their jurisdiction. Finally, the popular demand and usage seem to have given virtue to the practice. But the legislatures, confronted by a shaking and complex economy, found that results had to be reached in time to be useful, and the courts' "rules" just would not permit this. It was not an incapacity within the judicial power that caused the business of the courts to go to the administrative tribunal;[2] but there it is, and what indignation it causes at the bar![3]

The maximum achievement in procedure seems reflected in the theory of the equity accounting. The proposed rules of delictual liability expressed in the appendix are designed to make each party account for his negligence and let the trier of fact equate them upon all of the relevant evidence of fault, free of tricks of pleading and proof. There is no need to project a new cycle of interpretations and of rules resulting from legislation denominated Comparative Negligence, as has happened in some of our states and in the provinces of Canada. No matter how many rules of pleading and proof are carried in an instruction, the average juror, seeking a just result, will ask himself how much the favored pleader hurt the other party, before he affixes damages. When the balance of the account is struck, the uni-

1. Moreau v. Pennsylvania R.R., 166 F. (2d) 543 (C.C.A. 3rd, 1948).
2. Smith, Jurisprudence and Constitutional Canon (1941) 28 Va. L. Rev. 129, at n. 122.
3. See remarks of Reed (1937) 62 A.B.A. Rep. 89.

versal rule of tort responsibility will have been served. Injury will have been made whole through damages. The proposed rule of pleading and procedure will make admissible all relevant evidance of related, negligent injury. An accounting is not barred because a party other than the defendant has committed a breach of duty. Adjustment to a balance is the purpose of the proceeding. When, as is so commonly true, one of the litigants in tort actions is wholly without fault, it seems nonsense to abort a prayer for relief because a plaintiff may have contributed a little to the cause of injury. Livingston's test of a code, namely, that ordinary men may understand it readily and be convinced of the justness of its purpose, still seems the sense of a code of justice.

APPENDIX

Delictual Liability

(Consequences of Negligence)

Measure of Fault. When the negligence of both the plaintiff and the defendant are concurring proximate causes of injury, the damage shall be apportioned as the equities of the case require. If the negligence of only one of the parties is the sole proximate cause of the injury, that party shall bear the whole burden of reparation as the equities of the case may appear. If, notwithstanding the negligence of one, the other party by the exercise of ordinary care and caution could have avoided the effects of that negligence, the negligence of the latter in failing to do so is the sole proximate cause. An allegation of negligence by any party will permit evidence of negligence of all and make operative the rules of this section.

Measure of Damages. Compensation will be calculated with recognition of the duty of the injured party to minimize damages; and, if property be damaged, he is entitled only to an amount of money necessary to spend in repair of the property so as not to leave it essentially depreciated in present market value or inferior in practical use, not to an amount necessary to restore it to the identical condition it was in before the injury.

The foregoing appendix is submitted for discussion and integration into legislation. The need for legislation seems clear. I believe the form suggested is a proper one.