1981

"You Can Call It Thucydides or You Can Call It Mustard Plaster, But It's All Proximate Cause Just the Same!"

Guido Calabresi

Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation

Calabresi, Guido, "You Can Call It Thucydides or You Can Call It Mustard Plaster, But It's All Proximate Cause Just the Same!" (1981). Faculty Scholarship Series. 1992.
https://digitalcommons.law.yale.edu/fss_papers/1992

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
"You Can Call It Thucydides or You Can Call It Mustard Plaster, But It’s All Proximate Cause Just The Same!"

Guido Calabresi†

Yes, Jimmy was a legal realist who had no patience with word games, new or old. He treated ancient formalisms and neologisms alike, with the same cheerful, slightly bemused scorn. If the emperor had no clothes, it didn’t matter whether the royal tailor had long served the court or had just been hired. Jimmy would describe what he saw, and always in a tone that suggested that he couldn’t quite believe that others had not seen or had been unwilling to affirm what, to him, seemed obvious. And obvious it frequently was, but only after he had described it.

Yet Jimmy was unusual among the legal realists for he knew how to build as well as how to tear down. Much of tort law as he found it, as it had traditionally been described, made no sense because it ignored the existence of insurance. It was ripe for debunking. But Jimmy was not satisfied with pointing out the sham that many of the traditional formulations were and how courts and juries got around them. He had to develop new rules that would make sense, given insurance, for now. (Not forever. Like his great squash opponent, Grant Gilmore, he knew better than to fall into that trap.) And he had to do it with unfailing objectivity.

It is this last quality that made his work especially useful to those of us who followed him. He was more than skeptical of the significance traditionally accorded deterrence in torts law. Given insurance, individual deterrence simply made no sense to him, and so he focused on compensation. But he was too self-critical and objective to be satisfied with torts law as a compensation device. If that is all there is to it, then torts is only a halfway house toward social insurance paid out of general taxes. He was far

† Sterling Professor of Law, Yale Law School.
from against such social insurance, but again he was too objective to con-
clude simply that we would end up there. There were too many contra-
indications that, unlike many of his contemporaries, he could not ignore.
And this inevitably meant that he would ask, in his teaching and in his
writing, questions he was not prepared to answer. Were there other,
structural, forms of deterrence that would justify a torts, rather than a
social insurance, system of compensation, even in the presence of insur-
ance? Did these serve to explain those areas of strict liability that survived
the high days of fault in the nineteenth century? He could not say; he did
not know; yet the questions were consistently and courageously asked.

His great case book, written with Harry Shulman, remains today the
most modern of torts case books for precisely this reason. The questions
are all there—magnificently demonstrated in brilliantly chosen and
counter-pointed cases—those still to be faced, no less than those to which
his followers have given possible answers. I wrote my first article in his
torts class while struggling with those questions; I use his casebook still
because it continues to urge me to “carry the quest further” (his own
words, with which he inscribed the copy of Harper and James that Fowl-
er Harper left me) and to show me how much remains obscure. Just as he
remade torts law, he showed us all how much remains, always, to be
remade.

Of his work in procedure I cannot speak firsthand. In our time he was
the theorist in contrast to J.W. Moore, the down-to-earth lawyer. But
what a practical theorist! As in his polemic with his friend Charles Greg-
ory on the difference between contribution among joint tortfeasors and
comparative negligence, his theories were always based on the world as it
was, as it really worked. This, together with his utter lack of cant and
pomp, sometimes misled those who did not know his writings. I remember
a great, but overly sober, European proceduralist, coming out of a first
meeting with Jimmy and exclaiming to me that no one that bouncy, that
childishly questioning, that pragmatic could be a scholar. I told him to
read Jimmy, and soon after the European theorist became Jimmy’s fol-
lower and lifelong admirer.

I could go on about Jimmy as a scholar, but to do so would be to slight
what he was as a teacher and colleague. And in the classroom (which he
loved) as well as in the faculty meeting (which he hated)—showing in-
stinctive taste as to each—he was superb. He fooled those students who
wanted “practical law” into thinking they were, or soon would be, getting
some, while making them discover for themselves the joys of thinking
about legal theory. He was gentle with the weak—in those harsh times
when many teachers could be extraordinarily cruel—and fierce with those
who thought they knew it all. “Let him speak for himself,” he would
bellow when a self-declared "class leader" would try to make elegant the halting attempts of the class dodo. And sure enough, often as not, the dodo would (with Jimmy’s help) come out with wisdom the “class leader” would never have dreamt of. He had the disconcerting habit of asking a question and, after half an hour of fruitless attempted answers each of which he would patiently demolish, of leaving the class utterly frustrated with a shrug that more than implied that he didn’t know the answer either. Only later were we to realize, that in teaching no less than in scholarship, questions as yet without answers are as fundamental to learning as are brilliant new solutions. His verve, his “brio” in the classroom, cannot be adequately described—but whether he was telling a hilarious anecdote (always with a point worth remembering), insisting that his students use English correctly (an alternative is the choice between only two possibilities), or parsing the facts of an immensely complicated case, one was alive and jumping with him. “Gee,” he would say, and too soon, always too soon, the hour would be over.

When I came on the faculty he was already a senior colleague, a keeper of the wisdom and traditions that this anarchical place wisely does not entrust to minutes or to acta. Though he hated meetings—whether of faculty or committees—for the time they took from important things like teaching and writing—he always was willing to serve. He could end a long and tedious wrangle over grading systems (in which many who should have known better had raised issues of trivia into issues of principle) with a straightfaced—ironical—account of all the useless past wrangles and equally useless changes that had occurred in grading in the history of the school. Yet he cared passionately about the place, and did so with his usual fierce objectivity.

He could oppose the appointment of a Dean for reasons lost to the memory of almost all, and yet be among the very first and fiercest in proclaiming him, correctly, a great Dean and in following his lead. Whether Jimmy ever became personally close to the man, I do not know. It did not matter. What mattered was that the Dean was doing his job and Jimmy knew it right away. He could dislike a junior member of the faculty and express the strongest doubt that the person could possibly be promoted, and then on reading what the person had written become in committee and in faculty a most powerful advocate for tenure. Again, personalities, styles and approaches did not matter. Was the person someone who dared to be original and who had the capacity to carry it off? If so, Jimmy could be counted on.

He was keenly aware of how hard it can be to begin to teach and write at a place like the Yale Law School. But, unlike many, he knew what to do about it. I had only been back a few weeks, a year or so after graduat-
ing, when Jimmy appeared at my door with a draft of an article he was writing. "Can you help me with the second part," he said, "since you know more about that than I do." In retrospect that statement was ridiculous; of course, he did not need my comments. At the time, however, it seemed plausible, and I was fooled, though only into realizing the truth—that we were now colleagues, that I could ask him to help me, to read my drafts without fear of being judged, that age and tenure existed but that the only thing that mattered was carrying the quest further.

There surely was a Jimmy before Ruth, but I did not know him. For me his dapper elegance and unfailing courtesy were always associated with her. So also was their eighteenth-century farm house, so welcoming and so comfortable that it too had to provide a model for how a scholar could live. I as often visualize them, together in winter, before the huge fireplace, as I do him, behind, to the side, around, and in front of the desk . . . teaching.

Next week classes begin; my torts class will, because his did, spend an excessive amount of time on *Ives v. South Buffalo Ry.* And I will invariably think of Jimmy as I always do—as, in fact, do so many of his former students—with that very special affection and gratitude one has for that person who first taught one to carry the quest further.

September 1, 1981

Works of Fleming James, Jr.

Books

*FOUNDATION GUIDEBOOK TO ACCOMPANY CASES AND MATERIALS ON THE LAW OF TORTS* (with H. Shulman 1947).
*CASES AND MATERIALS ON TRIALS, JUDGMENTS AND APPEALS* (with T. Arnold 1936).

Pamphlet

A Proposal for Limiting Calendar Delay in Jury Cases (with A. Stockman for the New York Law Society 1936)

Articles

*An Arbitration Laboratory in Law School,* 2 THE ARBITRATION JOURNAL 79 (1947).
Fleming James


Compensation for Auto Accident Victims: A Story of Too Little and Too Late, 26 CONN. B. J. 70 (with S. Law 1952).


Damages in Accident Cases, 41 CORNELL L. Q. (1956).

Remedies for Excessiveness or Inadequacy of Verdicts: New Trials on Some or All of the Issues, Remitter and Additur, 1 DUSQUESNE U. L. REV. 143 (1965).


Harvard and Yale Visited, 10 HARV. L. SCHOOL BULL. (with B. Kaplan October 1958).


Accident Proneness and Accident Law, 63 HARV. L. REV. 769 (with J. Dickenson 1950).


Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 HARV. L. REV. 1156 (1941).


Indispensability of Government or of Superior Officers in Actions to Review Administrative Determinations, 10 HOW. L.J. 22 (1964).


Case Presentation, 1 J. LEGAL ED. 129 (with A. Mueller 1948).


Statutory Standards and Negligence in Accident Cases, 11 LA. L. REV. 95 (1950).


Pre-trial Procedure, Dispositions, and Discovery, 101 N.Y.L.J. 1168 (1939).


American Developments in Automobile Compensation, NORDISK FORSAKINGS TIDSKRIFT.


An Historical Analysis of the Judiciary Article of the New York State Constitution, in PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION, 9 REPORTS OF THE N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE 21 (with L. Frechtel, M. Rochlin & A. Stockman 1938).


To Leon Green, 56 TEX. L. REV. 535 (1978).


Comparative Negligence: an address, 26 UTAH B. BULL. 109 (1956).

Contribution Among Tortfeasors in the Field of Accident Litigation (Address) 9 UTAH B. BULL. (B. A. No. 208-13, December 1939).

Nature of Negligence, 3 UTAH L. REV. 275 (1953).


Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees, 63 YALE L.J. 605 (1954).

Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 YALE L.J. 144 (1953).

Contributory Negligence, 62 YALE L.J. 691 (1953).


Legal Cause, 60 YALE L.J. 761 (with R. F. Perry, 1951).

Functions of Judge and Jury in Negligence Cases, 58 YALE L.J. 667 (1949).


Discovery, 38 YALE L.J. 746 (1929).


Book Reviews


Fleming James


50 YALE L.J. 955 (1941), reviewing J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940).


46 YALE L.J. 1273, reviewing H. MCCLINTOCK, CASES ON EQUITY (1936).