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THE FUTURE OF NEGLIGENCE IN ACCIDENT LAW

Fleming James, Jr.*

OUTSIDE the field of work injuries, negligence is certainly the
dominant concept in accident law today, but the future of its
dominance is by no means as clear as it must have seemed at the turn
of the century.¹ The sources of doubt are several. For one thing, social
insurance legislation may engulf the whole, or a large part, of the field
of accidental bodily injury law. If it does, the legislation might take
the form of comprehensive social insurance for disability from any
source, as part of the attack on the general problem of poverty.² Or, it
might take some form of enterprise liability, as workmen’s compensa-
tion did, such as that proposed for motor vehicle accidents by Keeton
and O’Connell.³ There is also the possibility that strict liability may
further supplant liability based on fault through the common-law proc-
ess by judicial decision, as it has already done to some extent in the
fields of extrahazardous activities and products liability.* The first ques-
tion I shall explore is the effect each of these possible developments
would be likely to have on the concept of negligence. Then I shall
try to assess briefly the likelihood that such a development will take
place.

Before we examine what each of these developments might do to
negligence, it would be just as well to take a look at what negligence
is. For present purposes it has two aspects: (1) it is one kind of legal
or moral fault which suffices as a basis for tort liability under a system
which by and large insists that liability be based on fault; (2) negli-

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¹ See, e.g., Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911); Ames, Law
and Morals, 22 Harv. L. Rev. 97 (1908); Isaacs, Fault and Liability, 31 Harv. L. Rev.
954 (1918). One of the clearest and best accounts of the change of attitude is to be
found in Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359
(1951).

² Compare Blum & Kalven, Public Law Perspectives on a Private Law Problem—

³ Keeton & O’Connell, Basic Protection for the Traffic Victim 273-483 (1965)
[hereinafter cited as Keeton & O’Connell].

⁴ See, e.g., Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Green-
man v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963);
Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Prosser, The
Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966).
gence is also a rather elaborate set of concepts such as reasonableness of
the risk and its foreseeability, the reasonably prudent man and his at-
ttributes and characteristics, proximate cause, and so on.

We shall be primarily concerned with the probable vitality of neg-
ligence as part of a scheme of liability grounded on fault. But the
possibility will be noted that even if fault is displaced in some fields, the concepts which have grown up in negligence—or some of them—may
endure as a means of solving some of the problems under the new dis-
pensation, so that negligence may enjoy a kind of vicarious immortality
so to speak, though limited in scope.

The first question then is the extent to which fault is likely to remain
the basis of compensation for accidental bodily injury if any of the
developments described above should take place.

Comprehensive Social Insurance

To the extent that compensation should be provided by social insur-
ance both the matter of fault and the concepts associated with negli-
gence would be irrelevant. Of course the existence in fact and the
duration of injury or disease and consequent disability would be rele-
vant questions, just as they are under present tort law and under work-
men's compensation, and these issues might include questions of the
causal connection between the injury or disease and the disability. But
if disability itself is the test of compensation, then no other concept
associated with the law of negligence would play any part since no
question about the source of the injury or disease would be open.

It is by no means clear, however, that tort liability would be com-
pletely supplanted by social insurance. The common-law remedy might
well be left as an additional or supplemental remedy, to inure to the
benefit of the injured person or the state—or in part to each. Thus if
insurance benefits should be less than potential tort recoveries, the claim-
ant might be permitted to pursue his common-law remedy for the bal-
ance, and the state might (or might not) be allowed to recover the
amount of insurance it had paid.6

If a broad social insurance scheme kept a place for tort liability, then

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6 This assumes that compensation would not be given for inability to work which resulted from the pendency of compensation proceedings rather than the original disease or injury. See Sanchez v. Industrial Comm'n, 96 Ariz. 19, 391 P.2d 579 (1964); Kowalski v. New York, N.H. & H.R.R., 116 Conn. 229, 164 Atl. 653 (1933).

that liability would probably remain grounded on fault, including negligence. Indeed, in that event, the pressure for abolishing or diluting the requirement of fault would probably diminish, and fault itself might be revitalized as a requirement for tort liability,\(^7\) though it would operate in a narrower sphere.

**Enterprise Liability**

Under a scheme of enterprise liability, tort law would also be likely to play a continuing role. In the first place, the statutory remedy need not be exclusive. The Province of Saskatchewan, for instance, has enacted a scheme of strict liability for motor vehicle accidents, which provides compensation only for limited amounts.\(^8\) The Saskatchewan statute also allows a victim to get further damages by pursuing his common-law tort remedy against anyone whose fault contributed to the injury.\(^9\) And the plan recently proposed by Keeton and O'Connell would make similar provision.\(^10\) As under broader social insurance, the residual tort liability would be likely to remain grounded on fault, as it is in Saskatchewan.

Even if the newer strict liability should be made an exclusive remedy against some classes of defendants, the chances are that tort remedies against other classes would be left intact. This has been the case with workmen's compensation, which generally excludes other remedies against the employer but allows them against third parties.\(^11\) And it would probably be the case under an automobile compensation plan which would in all likelihood impose strict liability on ownership or operation of a motor vehicle\(^12\) and leave unimpaired a victim's common-law remedies against parties whose fault contributed to a motor accident in another way, such as by negligent operation of a railroad or improper

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\(^7\) See Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 Harv. L. Rev. 241 (1949), suggesting that something of this sort happened in England in the train of wide provision for social insurance.


\(^9\) See authorities cited note 8 supra.

\(^10\) Keeton & O'Connell 7, 323-26, 441-65.


\(^12\) See Keeton & O'Connell 370-74.
maintenance of highways or nearby conditions which jeopardize high-
way travel.

Beyond this, enterprise liability is not likely to be adopted by legis-
latures for the whole field of accidental injuries. It presently covers
work injuries, and there are some proposals and some pressure for
adopting it for motor accidents. Whether legislative schemes of strict
enterprise liability will ever reach beyond that is problematical, and if
they do, the extension will be piecemeal. In any event, large areas of
traditional tort liability will no doubt remain, for at least a long time to
come.

Judicial Extensions of Strict Liability

Under judicial extensions of strict liability the law of negligence is
likely to retain a place, though a smaller one than it has now. In the
first place, such extensions (like those made by statute) are unlikely to
cover all fields of accidental injury. It is highly improbable, for ex-
ample, that a rule of strict liability will ever govern the field of medical
malpractice. Moreover, even when strict liability enters a field, it fre-
quently fails to occupy it completely. In either event, whatever is not
taken over by strict liability is left for negligence. Thus some jurisdic-
tions impose strict liability on blasting operations only where they cause
injury by casting debris.18 Where that is the rule, injuries caused by
percussion or concussion from blasting will be redressed only if negli-
gence is shown.14 And some courts which have imposed strict liability
on the maker of a defective product in favor of an ultimate consumer
are not willing to extend the protection of this rule to a bystander hurt
by the defect, no matter how foreseeable his injury.15 But these courts

18 See, e.g., Coley v. Cohen, 289 N.Y. 365, 45 N.E.2d 913 (1942); Booth v. Rome,
W. & O.T.R.R., 140 N.Y. 267, 35 N.E. 592 (1893); Smith, Liability for Substantial
Physical Damage to Land by Blasting—The Rule of the Future (pts. 1-2), 33 Harv. L.
Rev. 542, 667 (1920).
Some of the blasting cases are admirably treated in Gregory, supra note 1, at 388-95.
See also Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 570, 79
A.2d 591, 595 (1951) (citing Gregory's article in discussing and criticizing the New
York distinction).
14 See authorities cited note 13 supra.
15 See, e.g., Hahn v. Ford Motor Co., 256 Iowa 27, 126 N.W.2d 350 (1964); Berzon
v. Don Allen Motors, Inc., 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (4th Dep't 1965);
RESTATEMENT (SECOND), TORTS § 402A, comment o (1965). But see Piercefield v.
Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Mitchell v. Miller, 26
Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965); Comment, Strict Products Liability
and the Bystander, 64 Colum. L. Rev. 916 (1964).
—or many of them—will let the bystander recover if he can show the
maker’s negligence.\textsuperscript{16}

Judicial extensions of strict liability usually leave negligence available
as an alternative basis of recovery, and where they do, it is frequently
the practice for plaintiffs to rely on both theories. They often do this
in products liability cases today.\textsuperscript{17} This practice may be adopted by
plaintiffs to guard against possible limitations upon a new theory whose
boundaries are not fully developed. Or it may be used for collateral
tactical reasons. As long as the practice persists—for whatever reason
—it will keep alive a place for the law of negligence.

Beyond all this, a good many of the concepts which have grown up
in negligence law are likely to remain as useful tools for solving some
of the problems of strict liability, because they are familiar and also
reasonably well adapted to serving ends other than fault which would
have relevance under the new dispensation.

This is happening, for instance, in the development towards strict
liability in products liability cases. In the ordinary products liability
case the negligence issue involves two questions: (1) whether the prod-
cut is unreasonably dangerous for foreseeable uses and, if it is, (2)
whether the maker could have prevented the unreasonable danger by
exercising reasonable care.\textsuperscript{18} Now strict liability theories may make the
second inquiry irrelevant, but not the first. No one is held to warrant
that his product will cause no injury or even that it is free from danger.
What good is a knife that will not cut? Yet if it will, it is just as capable
of cutting a finger as a carrot or a stick of wood. Under a warranty
theory, or any other strict liability theory whose adoption is likely,
the plaintiff will still have to show that he was injured by some unrea-
sonably dangerous condition or quality of the product.\textsuperscript{19} And in de-


\textsuperscript{17} In all three of the leading cases, see note 4 \textit{supra}, plaintiffs proceeded on both a negligence
and a strict liability theory. The practice apparently persists. See Borowicz
v. Chicago Mastic Co., 367 F.2d 751 (7th Cir. 1966); Barnett v. Bailey’s Beautician Supply
1966); Shamrock Fuel & Oil Sales Co. v. Tunks, 406 S.W.2d 483 (Tex. Civ. App. 1966); Schwartz v. Macrose Lumber & Trim Co., 50
Misc. 2d 1055, 272 N.Y.S.2d 227 (Sup. Ct. 1966). The advice of a leading textbook
on the subject is that under modern liberal rules of pleading and practice “the plaintiff
may and should join all of his potential grounds for recovery in a single action, against
all persons potentially liable.” 3 FURMER & FRIEDMAN, \textit{Products Liability} § 46.01, at
810 (1966).

\textsuperscript{18} 2 HARP\textsc{er} & JAMES, \textit{Torts} §§ 28.13–14 (1956).

\textsuperscript{19} See \textit{Restatement (Second), Torts} § 402A (1965) (strict liability without privity
termining the question of reasonableness, a standard of care and the qualities of the reasonable man must be invoked. A condition is not unreasonably dangerous unless the reasonable man in the maker's shoes, knowing of the condition and the circumstances likely to attend the product's use, would take some precaution to protect consumers and others from the danger. This calls upon the jury to make one of the same judgments under a rule of strict liability that it must make under a rule of negligence. It must assess and weigh the likelihood of harm from the condition, taken with the probable seriousness of the harm if it happens, against the cost of taking a precaution which will be likely to avoid the harm.

The Likelihood of These Developments

The likelihood that comprehensive legislative developments of the kind described above will occur is highly speculative. Beginning with the New Deal there has, of course, been substantial expansion of Social Security and of private insurance schemes and fringe benefits under collective bargaining agreements. All of these innovations have ameliorated somewhat the plight of victims of accidental injury (along with that of victims of many other kinds of misfortune). But so far they pose no serious threat to our present structure of tort liability, although they do pose increasingly serious and vexing problems of cumulative remedies.

As for new statutory systems of enterprise liability, proposals for some kind of automobile accident compensation hold the center of the stage today, with little or no immediate pressure for anything beyond that. Whether auto compensation will be enacted seems to be a question on which one guess is as good as another. The proposals for it made earlier in the century came to little and lay dormant for a long time;


20 See authorities cited note 19 supra.

but the idea has recently come to have a new lease on life. More people are taking a new look at the shortcomings of the present system. The principal beneficiaries of that system are becoming increasingly militant in criticizing the proposals. These things may be signs of a time of change.

Resistance to change, on the other hand, continues strong and powerful, and it may be successful—at least in our time. If that happens, the concept of negligence will continue—at least in name—to dominate accident law. In that event, it is at least a good guess that inroads by judges and juries upon the requirement of fault will continue along pretty much the same lines as those they have taken in the recent past—limited and sporadic adoption of out-and-out strict liability in new areas, and a dilution of the substantive and procedural requirements for showing negligence.

The upshot of all this is that negligence is far from dead or even moribund as a factor in accident law. But its status is likely to undergo some further change. It would probably find a place even under legislative schemes for social insurance, and while its role would be narrower, there might well be a renascence of negligence within it, so that negligence might once again come to have real meaning in terms of fault. If, on the other hand, it should retain its present extensive role in accident law, it is likely to be further diluted until it becomes “negligence in name only,” or “negligence without fault.” As Professor Gregory has said, after summarizing the arguments advanced for enterprise liability:

With this kind of thinking in the air, together with the observable


growth of liability insurance as an institutional means of risk-bearing and loss shifting, many of our courts, in my opinion, have tended to relax the standards governing negligence and due care in a good deal of what passes for ordinary negligence litigation.\textsuperscript{26}

\textsuperscript{26} Gregory, \textit{supra} note 1, at 384.