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Speaking of Torts

By WALTER PROBERT*

There is a battle for power going on. This is one battle among many to be heard in the land. Nor does it seem like a battle, more like a debate over Truth. At stake is the way men will speak—most particularly how men of the law will speak about a part of the law, that part called “Torts,” so called in the law schools, at least. This is but a comment upon the war of the writers of Torts.

The assumption of the writers of recent years, apparently, was that generally speaking liability in tort turned upon fault. Even according to this view, there were situations where liability occurred even though a defendant was not at fault, but this was the exception, not the general rule. The fault doctrine may no longer be so glibly stated. True, there are still those, perhaps a majority, who look upon fault, or something very like fault, as the basic principle of tort law. But there are at least two other views: one, that fault doctrine as a basic principle has been swallowed up by the numerous exceptions; the other, that fault never has been the basis of liability and certainly is not now the basis of liability.¹

While most of those who write about torts are law school teachers, this is much more than a mere academic debate. The outcome of this battle for power in the manipulation of tort principles will hit deeply into all corners of the legal arena. On the surface, the debate may seem to some a bit of a game of words. Actually, at stake are considerably divergent attitudes and value systems. It follows that the most “practical” of practitioners should at least look in, so to speak, mainly because the verbal patterns for the legal profession seem, to a very great extent, to

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¹ Sufficient citation to history as well as to variations in the current formulations will be found in the following two articles, hereafter discussed in more detail: James, “Tort Law in Midstream: Its Challenge to the Judicial Process,” 8 *Buf. L. Rev.* 315 (1959); R. Keeton, “Conditional Fault in the Law of Torts,” 72 *Harv. L. Rev.* 401 (1959).

be stabilized in the law schools. Remember, today it is in the law school that the indoctrination comes, leaving permanent verbal patterns deeply imprinted upon most of those who "make it."

Unfortunately, much of this debate goes on without conscious consideration of current theories of language behavior. Studies of the language of torts, as opposed to the study of torts, are practically nil.² This debate or any other cannot today be properly considered without at least some analysis of the language behavior involved.

Something of the History

What you believe about the happenings of days gone by depends largely upon what you read, and so it will be with the history of torts. On the matter of discovering the underlying principles of the law of torts, it really does little good to read at all, at least about the early English history, for there are widely diverging reports. Take your choice: liability was strict. Liability was not strict. However all seem to agree that the mere causing of damage set up a sort of presumption of liability. But "cause" itself turns out to be an evaluative word, not too different from "fault", leaving the history pursuit somewhat unsatisfying for most of those who pursue it.³

Yet there should be no surprise over the disagreement. There is more of history in our bones and nervous systems, osmotically transmitted in a time-binding tradition, than there is in the books we can read. All we can report of history, particularly of the law of torts history, is what we can read. All we can read are case reports and scant texts. Imagine for a moment judging today's societies by their case reports and hornbooks. Furthermore, we must read through eyes cast in a current mold. No, we will learn little from that pursuit, at least in this instance.

We *can* learn from history, at least more recent history, that there is present a desire and perhaps a need to find an overriding principle of the law of torts, something to explain, in an abbreviated way, what has been happening in this area. "Science" is supposed to involve a similar urge. Its principle of parsimony

² Some attention has been given to the language of torts by such people as F. Cohen, "Field Theory and Judicial Logic," 59 Yale L.J. 238, 251 (1950); Green, "The Study and Teaching of Tort Law," 34 Texas L. Rev. 1 (1957), *inter alia*; Malone, "Ruminations on Cause-in Fact," 9 Stan. L. Rev. 60 (1956).

³ See note 1, *supra*.

calls for as few principles as possible to explain the workings of Nature. Many tort scholars seem to be working under that principle. Perhaps the principle of parsimony is not unique to science. It seems to be a pedagogical device also. The scholar-teachers of tort law, for instance, look for something to explain the cases. Many somehow or other find, through this pursuit, a certain small number of principles.

The famous Wigmore once suggested that if there were unifying principles it was not to be found in the name "Torts." He was all for complete abolition of that label.⁴ But that name is at least one common element to all those situations called tort, by definition. There were and are other similarities in tort situations. There are procedural similarities, serving to distinguish tort litigation from criminal but not contract. Certainly there can be found underlying principles for each of the nominate torts. Thus, battery involves some kind of bodily touching and so on. And some believe there are even fewer principles tying all the nominate torts together, for instance, the famous triad of intentional wrongdoing, negligence and strict liability. These principles prove more a matter of hindsight description than devices of prediction or explanation. Wigmore suggested that *the* guideposts were to be found under the headings of "damage," "responsibility," and "justification."⁵

Most of the writers do agree that the significant growth of negligence doctrines was in the early 1800's, against the backdrop of what came to be called the Industrial Revolution, and fault became the predominant theme of tort liability.⁶ Certainly the literature is full of this kind of talk, reference to laissez-faire economic theories, leave-business-alone government, self-reliance and responsibility, individualism and so on and on. Certainly there is evident a tendency in the scholarly literature as well as in judicial reports to bring to bear this kind of language to explain tort liability of all kinds.

But "most" is not "all." Roscoe Pound, some time ago, while giving a sort of lip service to the fault notion, subtly suggested

⁴ Wigmore, *Selected Cases on the Law of Torts* vii (1911).

⁵ Wigmore, "The Tripartite Division of Torts," 8 *Harv. L. Rev.* 200 (1894).

⁶ For some comments on the fault basis of tort law, see Holmes, *The Common Law* 144-163 (1881); Radin, "A Speculative Inquiry into the Nature of Torts," 21 *Tex. L. Rev.* 697 (1943); Seavey, *Cogitations on Torts* (1954).

that that way of talking was all right for its time. He added that all this was really based on an underlying philosophy focussed upon free will. There were better ways of putting it. (He too was involved in looking for the fewest possible explanatory principles.) He suggested that a better framework would come from talking about the expectations of individuals about themselves and their societies.⁷ Out of this came his famed theory of interests which according to at least one author has heavily impregnated today's doctrine of negligence.⁸ As noteworthy as his move away from fault notions, probably more noteworthy, was his radical reorganization of not just tort theories, but all law theories. Under a theory of interests, one does not look for common principles of torts, rather he looks for common principles for all of law, so that torts and contracts lose their identity as such.⁹ This way of talking has not captured the legal profession. Yet there are even more all-embracing ways of talking which have been proposed.¹⁰

This sort of talk could be expected from Pound, for he is a jurispudent, not a tort specialist. Yet Leon Green seems to have had similar thoughts, about thirty years ago. He proved to be another prophet, for that era, for his way of talking and organizing, just in the area of torts, has not yet captured the tongues of the legal profession either. To oversimplify, his approach has been to look at at tort situations for their common grounds of "facts" and later procedural happenings, such as judge and jury relationships. Yet, the influence of his way of talking will probably prove considerable.¹¹

Whatever tort law has been, the taught law of torts has been predominantly focussed around notions of fault, as witness the

⁷ Pound, *An Introduction to the Philosophy of Law* 145-190 (1922).

⁸ Seavey, *Cogitations on Torts* 27 (1954); Frosser, *Law of Torts* 12 (2d ed. 1955).

⁹ A prospective litigant's interests may be frustrated in various ways by persons promoting their own interests. The interests may be catalogued, as Pound has in many places indicated, and considered straight on without the camouflage of contract or tort or other legal doctrine.

¹⁰ The scholars responsible for the more all-embracing system are Harold Lasswell and Myres McDougal of Yale Law School. Representative of their insights and methodology are: Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *Yale L.J.* 203 (1943); McDougal, "Law as a Process of Decision: A Policy-Oriented Approach to Legal Study," 1 *Nat. L. Forum* 53 (1956).

¹¹ Green, Malone, Pedrick, Rahl, *Cases on Torts* (1957); Green, "The Study and Teaching of Tort Law," 34 *Tex. L. Rev.* 1 (1957).

casebooks which have been in use and as witness the hornbooks in use in law schools around the country. There are signs, however, of a change in this way of talking. The principal factor, or disrupting influence if you wish, has been the increasing use, in court and mostly out, of liability insurance. Those who would talk in terms of "fault" or in synonymous terms, find insurance hardly relevant. To those who are not enchanted with such doctrines, little else seems relevant.

The War Games

One of the early crusaders for tort-insurance statements rather than tort-fault statements has been Fleming James.¹² He does say that fault-talking has been predominant in tort statements, but still not universal. Furthermore, he well indicates that "fault" has been used in several senses, referring alternately to laissez faire notions, to the reasonable man standard, and to a legal standard. Of course, as James and others have recognized, the latter reference of "fault" can be found any time a person is held liable for causing damage, that is, such a person is at fault because he is liable. In such a manner the term loses all significance for analytical purposes.

More important, in James' recent statements he argues that there are no overriding principles which will unite and integrate all lower order tort doctrines.¹³ For example, any effort to reduce the analysis of *all* tort principles to the familiar formula: duty, breach of duty, proximate cause, and damage, is not helpful according to James, for the presence or lack of duty to act in a certain way to avoid damage is only one way of stating the problem the court faces in a tort case. Such terminology does not solve the court's (or the attorney's) problem.

More fruitful than a search for summarizing principles, according to James, would be fact studies. Since litigation is an attempt to resolve conflicts arising out of behavior in society, that behavior should be studied. Legal solutions should be reached by analysis of extensive field studies, and decision makers should

¹² James, "Tort Law in Midstream: Its Challenge to the Judicial Process," 8 *Buf. L. Rev.* 315 (1959); see also Harper and James, *The Law of Torts* (3 vol. 1956) in which is incorporated much of James' earlier writings.

¹³ All subsequent comments about James concern chiefly his article cited in note 12.

consider the impact of their decisions upon the parties and society generally. Others have talked this way about law generally and in a more scientifically oriented way, but it is a way of talking which could bring significant changes in the behavioral responses of teachers, lawyers, and judges. This is a way of talking which has not yet made significant gains in the legal world.

While James renounces the possibility of finding overriding tort principles he does in effect pronounce an overriding method of approaching the problems of torts. This viewpoint seems chronologically to have come out of a belief that much of the law of torts can currently be explained as a response to the increasing importance of liability insurance as a vehicle for distributing the loss arising out of a damage situation over large groups of people rather than inflicting it upon a particular plaintiff or defendant. These conclusions stem in part from fact studies which have already been made in the automobile accident area. James has been crusading so that this tort-insurance idea might be applied to much of the tort area. So a particular defendant would be found liable perhaps because he has insurance or as some would have it, because he belongs to a class of persons who should bear the particular risk involved and can best do so by carrying insurance.¹⁴ Since the insurance company, ultimately the persons insured by that company, actually pays, it does not make sense to talk about fault for clearly the company is not at fault. Courts do not presently talk about insurance, but both courts and juries respond to the fact of its existence. Ultimately under the James, the Green,¹⁵ and other theories, insurance will be consciously considered and new schemes of handling the automobile problem will probably arise.

Naturally, there are going to be people who disagree with such a way of talking and behaving. A fairly recent disagreement comes from Robert Keeton.¹⁶ He declares that fault is still a predominant basis for liability, or if not that, "conditional fault." He suggests that despite contrary views fault has been the basis of liability for many centuries in the English-speaking countries.

¹⁴ The outstanding example has been the use of explosives in blasting. James and others would apply this principle to automobile "accidents."

¹⁵ Green, *Traffic Victims* (1958).

¹⁶ Subsequent reference to Keeton concerns his statements in "Conditional Fault in the Law of Torts," 72 *Harv. L. Rev.* 401 (1959).

While defendants were assessed for causing damages without reference to what we now call the reasonableness of their conduct, that was the approach because it was probably considered blame-worthy to cause damage.

Keeton attempts to demonstrate that in those situations where courts impose liability under the headings of strict liability rather than those of negligence or intent, in the blasting cases, for instance, the man in the street would want to impose liability because there is either fault or conditional fault. Keeton means by "conditional fault" that a person or legal entity is at fault if he engages in permissible conduct, say blasting, involving unavoidable risks, if he does not arrange to pay for the loss he causes. Liability does not come simply because there is insurance, but because the man ought to arrange somehow to pay for the damage he causes in such circumstances. Fault can be removed by taking out insurance.

Keeton admits of a few exceptions, but finds tort law breaking down into three categories, acceptable conduct where there is no liability for causing damage, unacceptable or faulty conduct where there will be liability for causing damage, and conditionally acceptable conduct, as described above.¹⁷ For Keeton, then, fault (as qualified) is still a predominant factor in the law of torts. Insurance is also a factor but not a predominant one, else why have not courts talked about insurance more often? Besides, if insurance is the solution to the various problems of tort law, or even many of them, the obvious move would be for everyone to take out insurance to cover himself. Yet, reasons Keeton, such an approach will never be taken because of the harm it would bring: irresponsible conduct, unjust results, and so on. He concludes that it is not sensible to speak of insurance-loss-distribution as replacing fault in the law of torts.

Critique

It would be easy to say about either the James or the Keeton approach that it is wrong. Beware, however, of falling into a linguistic trap. Even law people have great difficulty in seeing the considerable flexibility there is in language usage and the

¹⁷ This summary of Keeton's categories is paraphrased from a paraphrase found in Gregory and Kalven, *Cases and Materials on Torts* 542 (1959).

powerful tools that words become in the manipulation of the unwary.

Take Keeton's conditional fault notion. So similar are these words to "fault" in appearance and grammatical function that many of his readers are likely not to recognize the few distinctions he does draw between the expressions. Further, both of these expressions, as he admits and then seems to forget, are oversimplifications. Consider the vast complex of events that leads up to a single piece of litigation: the persons, the activities, the discussions, the planning and studying, the individual backgrounds, the psychologies, the confusions, the words, the feelings, and so on. These are distilled into a trial report, further distilled into appellate opinion, further distilled by the commentator on judicial opinions—each commentator distilling according to his own equipment, his own perspective. Then it is further distilled into a word or two.¹⁸ From an operational, functional, pragmatic, semantic, experiential, or however you wish to describe it, point of view, such an expression is practically "meaningless."

However, and note this well, this is not to say that a person may not talk that way. The plain fact is that people do talk that way. Nor is it to say that they may not properly talk that way, for it definitely is a way of talking, and so far as I know there is no law, God's or otherwise, which prohibits that way of talking.

What of James? Despite the doctrinal skill which he has displayed in his writings, he is not altogether doctrinaire in approach. Indeed he seems something like a theologian friend of mine who gives his congregation only so much of his *avant garde* Christian talk as they can stand. James, glory be, gives signs of being heretical in his law approach.

But his is not necessarily the final answer, nor the only way of talking about torts. His approach can be labelled as sociological, or empirical, or pragmatic, or even scientific. Yet he too is oversimplifying the situation—as do we all when we apply our own unique personalities to what small portion of the world's total happenings we can absorb.

He suggests that there is a strong urge toward strict liability

¹⁸ Somewhat in point is the plight of the law student who condensed his class notes into successively smaller outlines. Finally one key word sufficed to remind him of an entire course. Then on the fateful examination morning—he forgot the word.

where there is insurance. Yet what have been his criteria of proof of that statement.¹⁹ This seems no less glib an assumption than Keeton's statement about how the man in the street will react to certain paper situations which Keeton has created. There is no indication that either of them has taken a Gallup-type poll.

Again, James protests that our present system of handling automobile litigation is a "miserable failure." By what criteria? His own reactions, of course. But we may not agree. Seldom does the critic draw out all his reasons. Indeed, he cannot do so. To some extent he must end up giving us what are his mere reactions, but often they are given as if there were some greater truth to them.

Back to Keeton. From another point of view his word choices are meaningful, most functional, even if lacking in as complete communication as possible. His article turns out to be a large scale attempt at persuasive definition.²⁰ "Fault," and so conditional fault, is a word which has seemingly won by tradition a considerable following in law persons. As such, it can be counted on to bring conditioned responses in a large body of law persons who are not fully aware of the techniques of verbal hypnotism. There is advantage in keeping such old friends on hand. Mr. Keeton's use of "fault" and "conditional fault" amounts to something on this order: "I (Keeton) do not like what I see. There are those who would apportion liabilities and losses among people according to current insurance distribution patterns. For reasons best known to me, if anybody, I do not care for that result." In the sense that a word or phrase is redefined every time it is used, fault is redefined by Keeton to include almost all of the judicial history of torts to date.

James uses the same technique to bring disfavor to the word "fault" and certain other tort words which have gained acceptance via habit. His objective is in part to renounce such words, bring a negative reaction to them among law-word users. In this case, the technique is every bit as proper as Keeton's. James also

¹⁹ Furthermore, what are the factors which distinguish "strict liability" from liability based upon "fault?" About all I can do on some occasions to accent the distinction which is supposed to exist is pound my fist on the desk—and repeat the appropriate words of art.

²⁰ For elaboration of the technique of persuasive definition, see Probert, "Law and Persuasion: The Language Behavior of Lawyers," 108 Univ. of Penn. L. Rev. 35 (1959).

wishes, I would think, to bring his economic and metaphysical views to the forefront in the law of torts. He too is engaging in the battle for leadership in this area.

Now if all this sounds rather nasty and undignified, please bear along. My effort is not to insult nor pick, but to suggest how ways of using language and reacting to language may tend to obscure the individuals doing the wording—as well as their goals.

To go on with it. James' suggestion of a "more fruitful" approach begs for a following, so to speak. If we do follow, we will do so only because of faith in a particular person or some point of view which we share, or some mistaken notion that James has given us some portion of the latest "truths."

James would probably claim no such ultimacy for his views (I am not so sure of Keeton). Yet his words do not readily reveal the qualification which theories of language behavior would impose.²¹ Yet, he too is free to talk the way he does. Disagreement with his choice of law words or the words he would have as law words will probably be disagreement with his objectives as best we can know them. At the moment I see no way acceptable to me of proving or disproving either his or Keeton's contentions.

Likewise there are other ways of talking. Some have already been suggested. Even different ways can and probably will be developed. Messrs. Lasswell and McDougal would talk in an even wider sweep than James.²² They would share his belief in the "necessity" of going outside of the opinions and the law courts to discover the various factors which one may consider in deciding a case or planning a system of compensation for hurts, or deciding how to talk about the cases or the system. Their language would be in terms of what they call "values," a way of talking which includes within its scope ultimately all things and events and interrelationships. Most people will not presently accept this way of talking because of its strangeness to them. There is a strength of verbal habit here which forces us to look

²¹ As yet, the best organized treatment of the interrelation of language and other behavior is to be found in Korzybski, *Science and Sanity* (4th ed. 1958), the theory of general semantics. For an application of this theory to legal language, see "The Language of Law, A Symposium," 9 *West. Res. L. Rev.* 115 (1958).

²² See note 10, *supra*.

at events through one set of classifications. One of the widest spread inhibitions is that of inflexibility in verbal manipulation of world events. Lasswell and McDougal share with Charles Morris²³ of "semantics" fame a desire to cross-fertilize the ways of talking that now exist in the various human endeavors, on the philosophical assumption that all endeavor is or may be treated as interrelated. One may look at things that way. Whether they will gather a following depends upon whether the verbal habits can be changed.

Of lesser scope but perfectly legitimate would be a way of talking about torts which would find its emphasis around the damages which juries and judges have actually assessed. This element has been much neglected in the total picture. Then too, those who spend their time investigating the facts behind individual cases, the private investigators, would, given the needed intellectual equipment, develop another way of talking. The way of talking turns out to be a function of purpose. Those who have a definite purpose tend to fight for their way of putting it. The pawns are those who care little what way the game goes. Yet they have their influence in that game as do the mass of uninformed voters upon the outcome of an election.

What Difference Does It Make

Since words do seem to affect persons via some minute change in the nervous system at the least, bringing life or death behavior at the most, I would guess that the reader will agree that the way one chooses to talk about tort-situations has some significance. One may respond to words as if they were things, but as the words vary, so will his response. Again, one may respond the way that current theories of language behavior suggest, as if words were largely symbols, representatives of things. To the degree that the symbols used in tort law point to larger and larger combinations of things and events, to that degree the variables which affect the decision-maker, the analyst, and the predictor, are increased. Again, we cannot be sure, but it may make a difference, and probably will. James' scheme would throw the burden of automobile accidents on an insurance system rather than individual tortfeasors, for instance.

²³ Morris, Signs, Language and Behavior (1946).

The way one talks about any problem-situation helps to decide his response to the problem. By way of simple example, consider the person who plans what he has already decided is a necessary trip to a somewhat distant city in the United States. He may literally ask himself which means of transportation he should use. He may be able to say that he can save some money if he finds enough people to share a ride by automobile. (Although others might argue that he is not actually saving money, what he says rules the day until he can be convinced to speak differently to himself.) He may say that the airplane is faster, but more expensive. Perhaps he will think in words of an anxiety producing nature when he thinks of airplanes. Our traveler can make his decision at this point on the basis of his limited information words—or he can gather more information and make further evaluations. He can inquire which mode is more comfortable, which more interesting, and so on. He can inquire into bus or train travel. The more the variables, the more likely the decision maker will make a decision varying in significant ways from his relatively uninformed decision. And so it is, I would think, with decision makers who consider the problems of torts.²⁴ But the thing some critics forget is that decisions can be often made on the basis of little or no information at all, that is, little or no new information relevant to a particular problem-situation.

What way of talking about torts is the best? The answer to such a question of course depends upon the "ethical" language one uses and so the variables he considers. Incidentally, it is difficult to get the language of ethics into court, so that whatever variables that language carries with it may often be ignored. However, legal scholars have been trying other ways to smuggle the information in. Thus, James' approach proves a significant way to do just that job, and whether you call his kind of language the language of ethics or of sociology or of law does not from this point of view make too much difference. At any rate there are many today who will refuse to answer a "what is best" question, on the grounds that bestness is a matter of personal preference. Still and again, many is not all or most. If a person will respond

²⁴ See the excellent discussion of the ways the rules of evidence help keep "relevant" information from the jury in Loevinger, "Facts, Evidence and Legal Proof," 9 West. Res. L. Rev. 154 (1953). The text discussion can be said to involve the problem of blocking and unblocking the channels of communication.

one way to language he somehow regards as best, yet another way to the other forms, then it makes a difference how this question is answered if it is answered at all.

It is the lawyer's business, of course, to know the preferences of the people he wishes to influence. Theories of language behavior tend to reveal these preferences. The very language used in most areas of discourse, including the language of this article more often than I wish, give impressions of bestness or worseness about things and events which are described. Mr. James and Mr. Keeton and anyone who has written about torts do give the impression that what they say is presently the best way of saying it. As often as not the criteria for judgment are ignored and the writer, consciously or unconsciously, relies upon the technique of persuasive definition to block off full communication and gain agreement.

Who Will Win

Styles change. Look at the Arts. Many of us accept with gratitude the varying ways of the novelists, the poets, and the playwrights (although many complain of the changes as not being "Art.") Some speak of the obsolete forms as cliché-ridden, trite. And we are all affected by these changing forms. The aesthetic and intellectual "senses" can be tickled and pleased by the changes in the art of painting. We may call these changes progress or evolution—or regression—but change it is. Such changes in expression and in gross behavior take place in a vastly complex way.

Legal language may be looked at as an art form, a medium of expression, a manifestation of the culture-complex. (I did not say that legal language is art). Changes take place here too. Dramatic in the abstract, for instance, have been the changes from forms of action thinking to cause of action thinking to today's emphasis on the talk-it-out discovery procedures. True, there is more involved than language, but then in the end we are concerned here with language behavior as it is interrelated with other behavior. The change in language gives clues as to potential changes in other behavior.

As the arts have their would-be-leaders, their battlers for prestige, influence, and appreciation, as well as improvement, so we of the law have our leaders and would-be-leaders, Messrs.

James and Keeton, for instance. Viewed in this light, rather than the light of justice and truth, such expressions take on a different glow.

There are signs in the land of the direction of motion of legal expressionism in the area of torts. Change is certain here, not just created change, but change in an evolutionary sense. Perhaps we grow tired of the old cliches, perhaps we desire a different form of expression, a new way of looking at tort-things, but the change is occurring.

When I took torts in law school (about twelve years ago) I heard nothing that I recall, of the impact of liability insurance upon tort theories; and as a matter of trial tactics, insurance talking was taboo. No criticism intended; I doubt that many others talked about liability insurance as changing the tort doctrines either. Oh, the prophets had been abroad for some time, but so it is with this kind of change. Actually there were other unsuccessful prophets whose predictions went unreceived, but we remember only the successful ones. We are being led now into a different way of talking and so a different way of behavior. Some move is inevitable; that we move, or have already moved, in this direction is perhaps "chance" in the large scale of things.

Note that even Keeton, with his "conservative" language (in the most literal sense of that word, retaining the old forms) signals the change. He dared not say that "fault" was the key expression. It is now "conditional fault." This sort of face-saving device has been used for centuries in the common law process. Perhaps some such catalytic agent as conditional fault will serve as much as the bold talk of James to work the change that James desires.

But there are other signs and other leaders. Consider the casebooks of the law schools. Surely what is being taught signals the changes in the total process of tort talk. One of these casebooks which has received modern endorsement was fathered by Leon Green as much as three decades ago.²⁵ He then primed the charge for the explosion now taking place. His then daring and even now intellectually progressive linguistic approach to torts should be examined by every law person who would understand

²⁵ Green, Malone, Pedrick, Rahl, *Cases on Torts* (1957); see a review of this book at 52 N. W. Univ. L. Rev. 295 (1957).

the process of the change. Suffice it here to say by way of oversimplification that he showed the way to a different organization of tort cases and thus heralded the possibility of a number of different ways of organizing those cases and so talking about them.

Another casebook takes what a short time ago would have been daring liberties with the taboos of the courtroom.²⁶ That insurance is an integral part of the considerations regarding tort liability becomes here an accepted fact, going even beyond Mr. James and his colleague, Mr. Harper, in their significant signs of the time treatise.²⁷

Not to be forgotten here is Mr. Belli, King of Torts, as he has been called. In the law-persons' class struggle for leadership he is disdained by the "scholars." By most any definition he is no scholar, but an advocate for the plaintiff approach who uses some of the scholarly forms for influence. This makes him no worse than the scholars, this makes him no less a leader or potential leader (and he clearly desires that position) one whom scholars will eventually have to watch despite themselves. Of course his main concern is not with all of torts as that is taught in the classroom, but only the so-called personal injury aspects.

The way these and others talk will be repeated eventually by more and more of those who stop, look, and listen. I predict that more and more lawyers and judges will listen and talk this way also, or in turn lose their own power positions, for other ways of handling tort problems are being suggested. The change will surely come, unless, of course, other leaders I do not now see move us in another direction.

My Preference

I suppose I have telegraphed this conclusion and necessarily detracted from the strength of my recommendations. If so, I have succeeded somewhat in my purpose of suggesting how writing styles *usually* mask the personality and preferences of the writer. I must confess, for whatever good it might do, a sympathy with the forces of Leon Green, Fleming James, and Company. I believe that the changes of the future will come from the sort of study that Mr. James has suggested, the signs

²⁶ Gregory and Kalven, *Cases and Materials on Torts* (1959).

²⁷ Harper and James, *The Law of Torts* (3 vol. 1956).

of the broader behavioral processes point unwaveringly in that direction. The experiments could go pretty much as he suggests. These will be pilot studies, but ultimately they will not be enough. There are others who want to see the scientific method at least tried out here, and that method calls for more precision than Mr. James has yet suggested. Indeed, it calls for a much more thorough-going, systematic, linguistically and psychologically clarified inquiry than he suggests.

One may dream faster than the events may move. Still, dreams have a way of turning up in real life. Yesterday's dreams, some of them, are today's signs of things soon to come, in torts as it is with all we do.

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