A Revisionist History of Tort Law

A Revisionist History of Tort Law

From Holmesian Realism to Neoclassical Rationalism

Alan Calnan

Carolina Academic Press
Durham, North Carolina

Library of Congress Cataloging-in-Publication Data

Calnan, Alan, 1959-
A revisionist history of tort law / by Alan Calnan.
p. cm.
Includes bibliographical references.
ISBN 0-89089-473-6
1. Torts--United States--History. I. Title.

KF1251.C35 2003
346.7303'09--dc22

2003062560

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Printed in the United States of America.

In Memory of,
Carol Ann Calnan, who passed too soon.

In Dedication to,
Marcy Calnan, who could not have arrived soon enough.

CONTENTS

Part IV: Tracing Tort Law's Moral Development

PREFACE

As a historian, I have always been impressed with John Godfrey Saxe's poetic fable, *The Blind Men and the Elephant*.[1] In this fable, six learned blind men examine an elephant to determine its essence. The first man touches the elephant on its "broad and sturdy side." He concludes that the elephant is much like a wall. The second man strokes the elephant's tusk. He thinks the elephant is like a spear. The third man feels the elephant's trunk. He compares the elephant to a snake. The fourth man embraces the elephant's knee. He sees the elephant as a tree. The fifth man caresses the elephant's ear. He analogizes the elephant to a fan. Finally, the sixth man grabs the elephant's tail. He relates the elephant to a rope. After all of the men have examined the elephant, they gather to compare opinions. Each man vigorously defends his own opinion and attacks the opinions of the others. None can see that each man is partly right, but all are essentially wrong.

The fable teaches several valuable lessons of historiography. First, like the blind men, the historian usually cannot see the thing or things he seeks to describe. Thus, he must be especially conscientious in his investigation of the facts. Second, the historian, like the blind men, cannot fully understand his subject by studying only a few of its isolated parts. Rather, he must take in the whole subject, examining its substance and structure and observing its surrounding environment. Finally, like the blind men, the historian cannot accurately perceive his subject by relying exclusively on his own perspectives and experiences. Instead, he must gather different sources of information, eliminate his preconceptions and activate his imagination.

As a torts scholar, I have long been perplexed by the law's many anomalies. Some torts—like negligence and intentional torts—are based on fault. However, other torts—like strict liability—require no fault at all. Within the fault-based torts, some doctrines—like *res ipsa loquitur* and negligence *per se*—require virtually no proof of fault. Conversely, within the realm of strict liability, some actions—like those sounding in products liability—require extensive proof of fault-based concepts like defectiveness and foreseeability. Most disturbingly, some torts—especially intentional torts—are grounded in morality. Yet other torts—particularly strict liability theories—are justified on public policy grounds alone.

1. John Godfrey Saxe, *The Blind Men and the Elephant*, http://www.wordfocus.com/word-act-blindmen.html (last visited on November 8, 2003).

A few years ago, I decided to explore these anomalies further. Instinctively, I turned to history for guidance. I thought that, if I can locate the sources of these anomalies, I can better understand, explain, critique or defend them. Unfortunately, the more history I read, the more confused things became. I soon realized that the historiography of tort law was itself both confused and confusing. Indeed, it reminded me of Saxe's fable. Scores of historians had set out to examine the same subject—tort law. However, each historian focused solely on some minute part of this vast field. A few looked at early Anglo-Saxon law. Others looked at the medieval actions of trespass or trespass on the case. Still others looked at the nineteenth-century theory of negligence. Within this diverse group, most historians looked only at the law's facade—analyzing old cases, codes and statutes—and neglected its underlying values and intellectual traditions. No matter which approach they took, all of these historians were swayed by their own preconceptions. Because their perspectives were so different, they could not reach consistent conclusions. Because their biases were so entrenched, they could not see the real truth: they all were partially correct, yet they all were essentially wrong.

Intrigued by these findings, I continued to press forward. What I discovered was even more remarkable. Despite their disagreements, almost all tort historians shared a common point of inspiration. All seemed to rely—in whole or in part, deliberately or not—on the historiography of Oliver Wendell Holmes, Jr. In the late nineteenth century, Holmes developed his own brand of antihistorical historicism. He viewed history not as a source of knowledge or culture, but as a tool to promote his jurisprudential ideology. Because his jurisprudence changed over time, Holmes' historical conclusions wavered as well. Indeed, by the time he joined the United States Supreme Court, Holmes had presented so many inconsistent and contradictory historical opinions that he could be cited in support of just about any theory of tort law's development.

What I wanted, actually needed, to know was, how different would tort law's history look if we could free ourselves from Holmes' influence? Indeed, what would happen if we heeded rather than ignored the lessons of Saxe's fable? Would a reimagined history reaffirm the theories and doctrines of modern tort law, or would it raise doubts about their desirability and legitimacy? This book was written in the hope of answering at least some of these questions.

Of course, neither my answers, nor my passion for pursuing them, was self-induced. I had a lot of help in both areas. Both my interest and my insights were triggered by past historians. Indeed, I owe a great debt to many of the historians whose work I critique in this book. Without the provocation of their ideas, I never would have taken up this extraordinary challenge. I also am in-

debted to some of my earlier mentors— particularly Dr. Gerard Innocenti and Dr. David Valuska. Their curiosity about, and zeal for investigating history continues to stoke my own fire for historical analysis.

I received a lot of motivation and support on the home front as well. My parents, U.S. Navy Captain Thomas J. Calnan Jr. and the late Ann Calnan, both encouraged and stimulated my interest in law and history, and gently but wisely guided me down these paths. They also taught me first-hand about strict law and equity, topics which consume a good portion of this book. My wife, and my muse, Marcy Calnan, helped me get all this down on paper. Besides conducting research, answering questions and reading drafts, she tolerated my attention lapses and offered me the freedom to pursue my dreams. Without her love, patience and understanding, this book truly would not have been possible.

Many folks within my law school community also were generous with their time and effort. Brian Bloom, Greg Givens, David Moncure and Eric Puritsky provided incredible research assistance, pouring through volumes of old case reports and traveling all over to track down obscure sources. Cathy Carpenter read and offered insightful comments on a related, earlier article— comments that helped convince me to turn that piece into this book. And David McFadden, the Senior Reference Librarian at Southwestern University School of Law, contributed his expertise—not to mention many of his books—so that I might more swiftly and capably complete this project.

Finally, I would like to acknowledge the people at Carolina Academic Press, especially Bob Conrow, Erin Ehman and Alexis Speros. Their commitment to (if not necessarily their endorsement of) my ideas, and their dedication to putting these ideas in print, makes me proud to be one of their authors.