The Burdens of All

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A Social History of American Tort Law

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To Joe Kearney, Adrian Schoone, and Marquette Law School's faculty, staff, and students, past, present, and future

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Introduction

Why should not the sacrifices of all be taken at once as the burdens of all; not scattering by the way human wrecks to float as derelicts for a time, increasing the first cost till the accumulation disappears from view in the world of consumable things?… Only the lawmaking power can answer.

—Justice Roujet Marshall (Wisconsin) 1911[1]

Tort law, the law of how the costs of accidents and other harms should be allocated, is part of a larger American story. Individualism and self-reliance have always been core American values, but in the late nineteenth century a competing ethic emerged: that in an industrializing society increasingly dominated by large institutions and mass action, socialization of risk and accident costs was morally and practically imperative. The battle between these values has shaped American society from that time to the present. Tort law has been a faithful mirror of that battle.

American tort law was improvised from bits of the common law at the beginning of the industrial age. Since then, many of its parts have been regularly readjusted and lubricated, others have been redesigned, and new parts have been added to ease social friction in the joints and improve performance. As a result, the machine has been perennially complex and often confusing. The intricacies of tort law are difficult for laypersons to understand, and it has been a fertile field for academic and judicial disputation. Many scholars have described the intellectual and doctrinal history of tort law, but no one has attempted a comprehensive social history, an aspect at least as essential to an understanding of tort law's nature, its current controversies and its importance for Americans. This book tries to fill that gap.

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1. *Houg v. Girard Lumber Co.*, 129 N.W. 633, 639 (Wis. 1911).

Tort law history can be loosely divided into five eras. The first began in the late eighteenth century, as the first signs of the industrial revolution appeared in the United States, and ended about 1870. During the pre-industrial era, the common law created injury liability rules primarily for traditional master-servant and kinship relationships. The industrial revolution brought people into regular contact with strangers, such as factory owners and railroads, for the first time and forced lawmakers to create new rules for injuries arising out of such contacts. Relying on free-labor ideals of individual responsibility and on an instrumentalist belief that the law should encourage business enterprise, early-nineteenth-century lawmakers created a contributory-negligence system that denied recovery to accident victims who were at fault in any way, no matter how minor. In the 1850s, several Midwestern and Southern states tried to soften the system's harsh effects by experimenting with comparative negligence, which allowed accident victims partly at fault to recover an amount reduced in proportion to their negligence; by repudiating the fellow-servant rule which exempted employers from liability when an employee was injured by another worker; and by expanding the scope of acts that were considered proximate causes for which the actor could be held liable.

The second era (1870–1900) reflected the maturation of the American industrial revolution. Railroad accidents dominated state court tort dockets at first, but by 1890 industrial accidents predominated. Americans increasingly realized that railroad and workplace injuries were a social problem, an inevitable byproduct of industrialization that could not be satisfactorily resolved by application of traditional fault principles. During the Granger revolt that swept the Midwest in the 1860s and 1870s, a handful of states eliminated the fellow-servant rule for railroads and their employees. In 1880, Great Britain enacted an employer liability statute eliminating the fellow-servant rule and several other employer defenses; several American states soon copied the statute. Industrial safety laws began to appear after 1880, but they were piecemeal reforms. Lawmakers hesitated to enact comprehensive safety codes, and state courts divided as to whether employers who violated safety laws were liable to injured workers. American reformers gradually began to look at socialization of workplace injury costs but opposition from employers and jurists who favored incremental reform, such as Thomas Cooley and Thomas Shearman, slowed progress.

Next, the book examines the Progressive Era's influence on tort law. Progressives played an important role in three major reforms: workers compensation, the rise of comparative negligence and expansion of manufacturers' liability for defective products. Beginning in the late 1880s, reformers made a close study of workplace injuries and gradually became convinced that such injuries were inevitable, not merely a product of individual fault, and should be handled through some form of social insurance. During the first decade of the twentieth century, they settled on a solution: workers compensation, which would impose absolute liability on employers but would cabin the benefits paid to workers and would virtually eliminate the risk and expense of workplace-accident litigation. They waged a masterly campaign to wean lawmakers,

business leaders and the public from traditional concepts of fault. Male reformers such as Carroll Wright and John Commons made a rational, statistics-based case for reform, but Crystal Eastman's stories of the human cost of accidents to workers' families, set forth in her book *Work Accidents and the Law* (1910), the movement's most important publication, resonated with the public in a way that statistical studies could not. Workers compensation laws raised difficult constitutional issues and they appeared in an era when judges regularly struck down other Progressive laws. Reformers received a scare when New York's highest court struck down its state's workers compensation law in 1911, but courts in other states soon rejected the New York court's criticisms and upheld their states' laws, and in 1917 the U.S. Supreme Court gave its approval.

Progressives also struck new blows at contributory negligence. Between 1905 and 1908, Congress and several states enacted laws allowing negligent railroad workers a reduced recovery from their employers when their negligence was slight and the employers' negligence was gross. Several of the laws were soon modified to allow railroad workers to recover in all cases with only a proportional reduction of damages for their own fault, and by 1920 many other states had followed suit. In 1910 Mississippi enacted the first modern comparative negligence law applicable to all tort claims.

Socialization of the cost of product-related injuries also advanced during the Progressive era. The common-law privity doctrine, an instrumentalist doctrine developed by courts at the beginning of the industrial revolution, held that consumers could sue manufacturers of defective products that injured them only if they had purchased the product directly from the manufacturer. The doctrine worked well for a pre-industrial economy in which most products were locally made and sold, but not for the nationalized economy that arose after the Civil War. State courts made limited exceptions to privity as early as the 1850s for products deemed inherently dangerous, and beginning in the 1890s, an increasing number of courts cut through the framework of exceptions and gave all injured consumers the right to sue manufacturers directly.

The mid-twentieth century marked the peak of collectivist sensibilities in the United States. The rise of the automobile, the Great Depression and World War II imbued Americans with a sense of common experience and purpose that made them more receptive than ever before to socializing many of the costs of life, and those sentiments made themselves felt in tort law. Many states replaced piecemeal workplace safety statutes with omnibus statutes imposing a general duty on all businesses to make their premises reasonably safe, and in the process eliminated traditional employer defenses. Not all socialization efforts were successful: as the number of autos skyrocketed, reformers hoped that a no-fault system equivalent to workers compensation could be developed for auto accidents, but a plan developed by Columbia University researchers in the early 1930s failed to gain traction. Instead, auto accident costs were socialized to a limited extent through the spread of auto insurance and judicial expansion of auto owners' liability for negligence of other family drivers. During this golden age of accident cost socialization, American courts also chipped away at immunities created by nineteenth-century judges to insulate from liability relationships and

institutions deemed socially essential, including spousal and parental relationships, charities and local governments, from liability for accidents.

Comparative negligence also spread, albeit slowly. In 1931, Wisconsin enacted a diluted comparative negligence system that allowed proportional recovery only to victims who were less than fifty percent at fault. Debate shifted away from the comparative merits of contributory and comparative negligence to the comparative merits of Wisconsin's diluted system and Mississippi's pure system, which allowed victims a proportional recovery regardless of their degree of fault. University of California law professor William Prosser emerged as a giant in the field of tort reform during the 1940s and 1950s; after he endorsed comparative negligence in 1953, the pace of adoption accelerated, and by 1970 all but a handful of states had abandoned contributory negligence. That was not all: between 1940 and 1970, Prosser executed one of the great tours de force of American legal history, using his writing skills and his influence within the American Law Institute to persuade nearly all states to move away from privity and impose "strict" (near-absolute) liability on manufacturers of defective products. But during the 1960s, several states warned that they were not altogether comfortable with elimination of fault concepts in such cases, signaling that the golden age of socialization might be coming to an end.

The 1960s, a time of great social unrest, ushered in the modern age of American culture and of tort law. The modern age has been dominated by a debate between those who support the right to express one's individuality no matter how unconventional it is, a belief referred to in this book as "expressive individualism," and those who believe that allegiance to traditional social mores and an emphasis on self-reliance and individual responsibility are paramount. That debate has also dominated modern tort law, most prominently in the "tort reform" movement, a collective label for a variety of traditionalist efforts to roll back accident-cost socialization. The movement has focused the general public's attention on tort law to an extent seldom matched in tort-law history. Just as labor unions and philanthropic organizations drew public attention to employers liability laws and workers compensation between 1880 and 1910 and consumer advocates drew attention to the flaws of privity during the early twentieth century, traditionalist groups including the Federalist Society, the U.S. Chamber of Commerce, the American Tort Reform Association and the American Legislative Exchange Council have waged a sophisticated campaign in support of tort reform since the 1970s.

The tort reform movement has had many facets. In the 1970s and again in the 1990s and 2000s, complaints about insurance crises supposedly caused by excessive tort damage awards were followed by demands for caps on awards, particularly in medical malpractice cases. Jurists and lawmakers sharply disagreed whether crises existed and if they did, whether they were caused by excessive awards or by economic cycles in the insurance business. States' responses varied widely: some states enacted liability-limiting laws, some did not. The laws have elicited many constitutional challenges, and American courts' responses have been mixed. Traditionalists have also had some success in limit-

ing the reach of contributory negligence: they have persuaded some states to narrow the traditional doctrine of joint and several liability (holding that in cases involving multiple defendants, each defendant may be held liable for all defendants' collective portion of fault) and to choose diluted instead of pure comparative-negligence systems.

Traditionalists have also had success in other areas. They have persuaded many courts and lawmakers that consumer negligence should be preserved as a defense to product liability and that liability should be based on cost-effectiveness analysis rather than consumers' safety expectations. Traditionalists have also waged effective public campaigns painting product-liability plaintiffs as flouters of personal responsibility and painting their lawyers as predators. Many states have adopted an "economic loss doctrine" holding that plaintiffs who purchase products for commercial use must rely on contract rules, not more liberal strict-liability rules. Hopes for an equivalent to workers compensation in the auto-accident field briefly revived in the early 1970s but, as in the 1930s, eventually guttered out. The struggle between expressive individualism and traditionalist views has also surfaced in the field of legal immunities. Many courts and legislatures have revived municipal immunity, and a new generation of immunity statutes has arisen since 1970 to protect a new set of institutions deemed socially essential, ranging from participants in youth sports programs to churches accused of enabling sexually abusive practices by their clergy.

Tort law has evolved not only through the pronouncements of legislators and jurists but through its day-to-day use in the courtroom. The book examines tort law in the courtroom from two perspectives. First, it presents the results of a statistical survey of supreme court tort decisions of five sample states, New York, North Carolina, Wisconsin, Texas and California, at ten-year intervals from 1810 through 2010. This Five-State Survey is admittedly limited—analysis of all of the hundreds of thousands of tort cases that have made their way through American courts since independence would be a herculean task well beyond the book's scope—but the Survey is suggestive of how American accidents have changed in nature over time and how those changes have reflected larger social trends. In particular, it suggests that the movement in tort law away from nineteenth-century idealization of self-reliance to twentieth-century receptivity to socialization was accompanied by a judicial shift away from a mild tilt in favor of defendants to a mild tilt in favor of accident victims.

The book also examines the debate over the proper balance of power between judges and juries in the courtroom, a debate that has continued throughout American history and has had a deep influence on tort law. English common law gave judges the authority to determine what legal rules apply in a particular case but gave juries the authority to determine the facts (that is, what really happened) in cases where there was conflicting evidence. During the American colonial era, juries gained the right to determine the law in seditious libel cases. Nineteenth-century reformers tried to expand juries' law-finding powers, but they were blocked by Massachusetts chief justice Lemuel Shaw and other judicialists, who believed that judges should take a dominant role in deciding cases. American judges stoutly defended judges' power to

take tort cases away from juries when they thought there could be only one proper legal outcome.

The struggle between judicialists and advocates of greater deference to juries intensified during the Progressive era. Many Progressives, most notably Theodore Roosevelt, were incensed by court decisions striking down Progressive reform laws as unconstitutional and they, along with prominent judges including North Carolina's Walter Clark and Arkansas' Henry Caldwell, urged limitation of judicial powers. Judicialists pushed back and even argued that juries should gradually be eliminated, as was happening in Great Britain. Judges gradually become more deferential to reform laws, but they have continued to defend their power to take cases away from juries and since the mid-twentieth century they have been aided by a powerful new tool: summary judgment.

Tort law's history demonstrates the resilience of American ideals of individual freedom and responsibility, ideals that survived the maturation of the industrial revolution, the Progressive era and the mid-twentieth-century heyday of collective sensibilities and that have revived and strengthened since 1970. But many of the socializing reforms of earlier eras have also survived notwithstanding the erosive effects of tort law's modern era: for example, contributory negligence, the demise of privity and the partial demise of fault in product liability cases have become thoroughly entrenched in the American legal landscape. Tort law is a product of constant improvisation, a machine that has proved sensitive, if not always immediately responsive, to social and economic trends. Those traits will continue to shape it and ensure its continuing importance in American life during the decades to come. It is hoped that the historical insights this book offers will enable readers to better understand both the course of tort law as it unfolds before them in the coming years and the social and economic forces that will shape that unfolding.