



Per portion (30g):

Sugar 5g	Fat 3g	Saturates 0.2g	Salt 0.01g
3%	2%	4%	<1%

The People of the United States

Tranquility, provide for the common defence, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do hereby constitute and establish this Constitution for the United States of America.



TORT

EXPLORING THE FAULT LINES

New book by Marquette Law School's Schoone Fellow delves deep into the history of tort law in the United States

By Joseph A. Ranney

1. The Five Eras of American Tort Law

My very first law school class was Torts, and I remember the oddness of being dropped into a strange new world of words and rules. How could the seemingly straightforward task of allocating responsibility for accidents be so complex?

As a law student and a litigator, I put that question aside and devoted my energies to mastering and using tort law. But the question kept nagging me, and when Marquette University Law School's Adrian P. Schoone Fellowship generously gave me time and resources to study the history of American tort law, I found that history to provide many insights and answers. I've written about my findings in *The Burdens of All: A Social History of American Tort Law* (Carolina Academic Press 2021).

The Burdens of All focuses on the social and economic forces that shaped tort law.

Venturing broad conclusions about law and dividing law into eras is always a risky business. Nevertheless, I'm convinced that there's a central thread running through tort law history: namely, the debate whether accidents should be treated as a matter of individual fault and responsibility or, rather, as the inevitable product of industrialization and modernization, whose costs should be socialized. I'm also persuaded that American tort law's history can best be understood by dividing it into five approximate eras with some overlap.

■ Origins of modern tort law (1800–1870).

Early tort law evolved from common-law property rules and free-labor values, both of which emphasized individual rights and responsibilities. Its core, first fully articulated in an 1839 New York case, was contributory negligence: the rule that an accident victim who is at fault in any way

Joseph A. Ranney is a longtime adjunct professor at Marquette Law School and the school's Adrian P. Schoone Fellow in Legal History. This article is based on his newest book, *The Burdens of All: A Social History of American Tort Law* (Carolina Academic Press 2021). It includes two posts by Ranney from the Marquette Law School Faculty Blog about themes in the book and, with the publisher's permission, two lightly edited book excerpts touching upon issues that affect people's lives daily: auto insurance and product liability. The entries here conclude with a reaction by Professor Alexander B. Lemann of Marquette Law School.



Illustrations by Stephanie Dalton Cowan

During this period (1920–1970), tort law moved toward socialization through state-by-state abandonment of contributory negligence in favor of comparative negligence; adoption of strict products liability; abolition of familial, charitable, and governmental tort immunities; and judicial recognition that setting the parameters of accident causation was as much a matter of social policy as legal theory.

may not recover. But beginning in the 1850s, a few courts tried to soften the harsh effects of contributory negligence through liberalized concepts of causation, rejection of the fellow-servant rule, and other devices.

■ **The softening of fault-based law (1870–1910).** Workplace and railroad accidents proliferated in an increasingly urban, industrial America, and they gradually sensitized lawmakers to the idea that accidents were an inevitable byproduct of modernization—socially manageable risks rather than matters of individual fault. State legislatures continued the work of softening contributory negligence by abolishing the fellow-servant doctrine for railroad workers and imposing safety duties on employers. Courts enforced the new laws strictly and created rejoinders to contributory negligence such as the distraction and emergency doctrines.

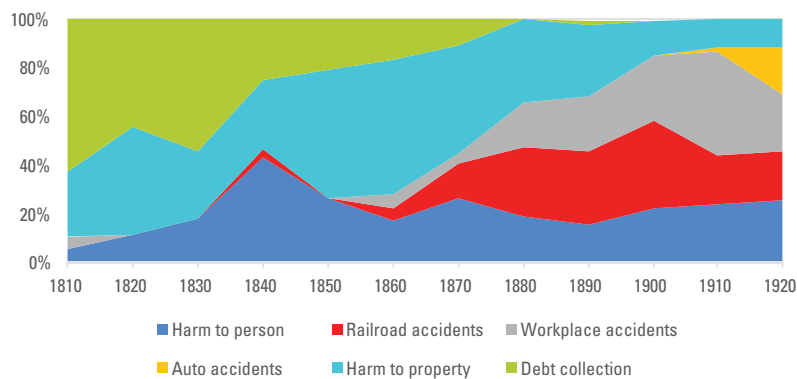
■ **Progressivism and tort law (1900–1920).** Tort law plays an understudied but important role in the history of the Progressive Era. Progressives were primarily responsible for two fundamental changes in tort law: adoption of no-fault workers' compensation systems, which took workplace accidents out of tort law, and adoption of the first modern comparative negligence laws by Wisconsin (1907), the U.S. Congress (1908), and Mississippi (1910). Progressives also played an important role in expanding manufacturers' liability to consumers for defective products, thus further socializing the costs of accidents.

■ **The golden age of socialization (1920–1970).**

The Great Depression, World War II, and the rise of national highway, radio, and television networks made Americans more receptive to collective action and socialization of risk than ever before. During this period, tort law moved toward socialization through state-by-state abandonment of contributory negligence in favor of comparative negligence; adoption of strict products liability; abolition of familial, charitable, and governmental tort immunities; and judicial recognition that setting the parameters of accident causation was as much a matter of social policy as legal theory.

■ **The struggle continues (1970–present).** By 1970, many jurists believed that complete socialization of accident costs was near, but that has not come to pass. During the past half-century, the United States has become embroiled in a struggle between socializers and traditionalists, the latter wishing to preserve the primacy of fault and individual responsibility in tort law as well as other areas of American life. The modern-era struggle over tort law has played out in many forums, including debates over medical malpractice liability, efforts to cabin strict products liability, and the revival of tort immunities. The struggle shows no sign of abating today.

Figure 1 – Five-State Survey: Tort Case Mix, 1810–1920



2. Changing Times Bring Changing Legal Realities

The Burdens of All looks not only at substantive law but at tort law in the courtroom. It includes a survey of supreme court decisions in five states—New York, North Carolina, Wisconsin, Texas, and California—at ten-year intervals from 1800 to the present. Its purpose is to determine what kinds of tort cases came before the courts and how judges handled them. Did the nature of tort cases change as society changed? Did judges tilt in favor of tort plaintiffs, defendants, or neither? The five-state survey is by no means definitive, but it provides some intriguing clues.

Tort dockets have consistently reflected social change

During the early 19th century, debt-related cases (most commonly suits against sheriffs and other officials for allegedly going overboard in their collection efforts) and land disputes dominated tort dockets. Application of tort law to personal-injury cases was still in its infancy. (See Figure 1.)

As the Industrial Revolution took hold, the old case mix disappeared. Railroad and workplace accident cases began to appear at midcentury and soon dominated tort dockets. Railroad cases' share of those dockets stabilized about 1880, but the share of the dockets involving workplace-injury cases continued to grow and outstripped railroad cases by 1900. Land disputes, business disputes, and other cases involving harm to property interests continued to appear, but they played less of a role in tort law than formerly, perhaps because they were increasingly resolved under contract principles.

The age of the automobile also became the age of auto accident cases. Auto cases first appeared on court dockets shortly after 1900; by 1960 they accounted for more than half of all tort cases in the five-state survey. Workplace accident cases declined after 1910 due to the advent of workers' compensation, but that decline was matched by an increase in suits for injuries incurred at stores, construction sites, and other public premises. (See Figure 2.)

Another new pattern emerged after 1970. Auto accident cases declined dramatically, partly because of an auto-safety campaign that climaxed with the passage of federal seatbelt and other auto-safety legislation in the mid-1960s. But the primary instrument of change was the rise of intermediate appellate courts and state supreme

courts' increasing freedom to select the cases they wished to hear. Two of the survey states created intermediate appellate courts in the 1960s and 1970s, and supreme courts in all five states drastically reduced their caseloads after 1970. Since that time, those courts have selected tort cases for review based primarily on the cases' intellectual interest and value for law development and reform. For example, the prominence of professional malpractice cases in the modern tort mix reflects state legislatures' efforts to address medical malpractice insurance "crises" by cabining physicians' liability, together with state courts' desire to address constitutional challenges to those efforts.

Judges have consistently made use of their power to overturn tort verdicts

Tort law's history is intertwined with a longstanding debate over the proper balance of power between judges and juries. For more than 200 years, American judges have used procedural devices—including nonsuits, directed verdicts, orders for new trials, and, more recently, summary judgment—to dispose of cases without trial where they believe the result is clear, or to correct what they perceive to be jury error.

Occasionally these practices have triggered protest movements. During the early 19th century, several states enacted laws giving juries broad powers to determine issues of law as well as of fact, but courts struck down the laws as an infringement of judges' fundamental duty to declare and apply the law and correct jury errors. In 1902, at the height of the American Industrial Revolution, future North Dakota Justice Andrew Bruce observed that

Figure 2 – Five-State Survey: Tort Case Mix, 1920–2010

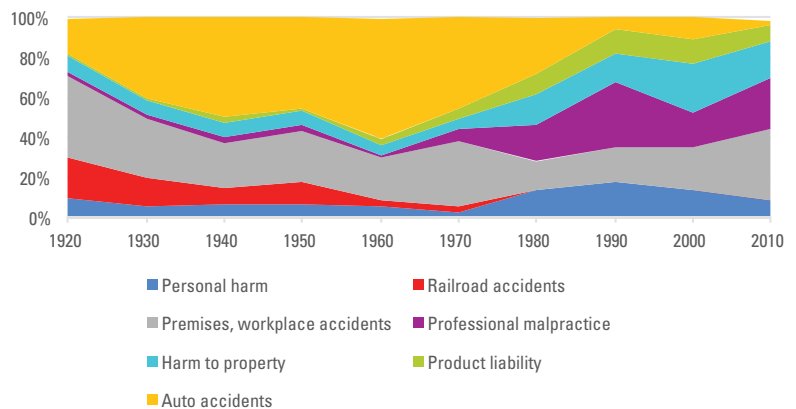
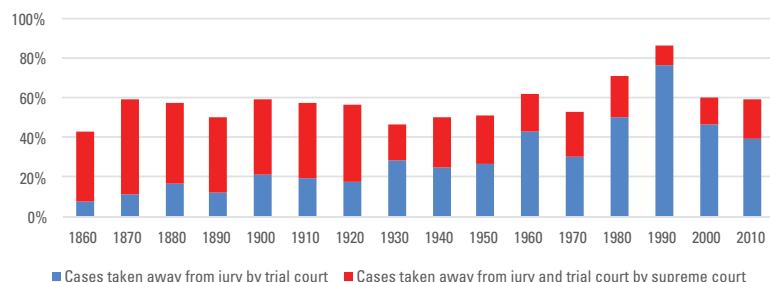


Figure 3 – Judicial Takeaway Rates, 1860–2010

judges “have come to believe that there is abroad a conspiracy against capital and employers.” Judges regularly overturned jury verdicts in favor of injured workers and railroad accident victims. Public resentment of that trend led Bruce to conclude: “As things now are . . . every personal injury case is a factor in the increase of social discontent.”

Public resentment of the judiciary contributed to the Progressives’ campaign for popular recall of judicial decisions. That campaign failed, but jury defenders won a few victories during the Progressive Era. Judges were no longer allowed to opine to the jury on the credibility of evidence and the proper outcome of cases, and some jurisdictions revived an old rule that judges must let juries decide a plaintiff’s claim if there was even a “scintilla” of evidence to support it. But judges across the nation firmly and successfully resisted other efforts to limit their power to take cases away from juries, and in recent decades they have continued to do so.

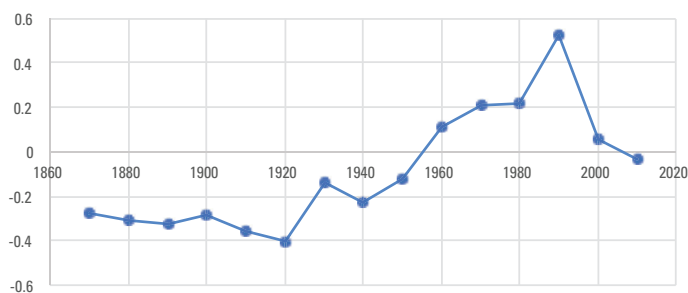
Figure 3, which is based on cases in the five states that were surveyed (again, involving only state supreme court decisions), is suggestive, if not authoritative, as to the rates at which trial judges and supreme courts have taken cases away from juries over time. Throughout America’s history, judges have consistently taken away more than half of all tort cases from juries, either by deciding them before verdict or by overturning jury decisions. The takeaway rate decreased modestly during the golden age of tort socialization, perhaps as a belated response to Progressive criticisms of judicial overreach or because an age of increased trust in collective popular action produced a greater measure of judicial deference to juries. But since 1970, takeaway rates have returned to pre-golden-age levels. This may be a partial confirmation that the golden age

has ended; or this may be due to supreme courts’ increased case selectivity, which puts before them cases involving complex issues that often are not conducive to jury deference.

The shift index: Have judges used their powers to favor accident victims or defendants?

So which side, if either, have judges favored? In order to answer this question, I developed a judicial “shift index.” In simple terms, the shift scale runs from +2 (cases in which a supreme court reverses a trial-court judgment for the defendant on the merits and orders judgment for the plaintiff) to -2 (supreme court reverses a trial-court judgment for the plaintiff and orders judgment for the defendant). Cases where plaintiff (+1) or defendant (-1) wins a partial victory on appeal—for example, a reversal of a trial-court dismissal and remand for a new trial—receive an intermediate score, and cases where neither side gains a net advantage on appeal (such as affirmance of the trial-court result) are scored as zero. The shift index provides a crude but useful way to examine whether state supreme courts tend to favor accident victims or defendants.

Figure 4 confirms Andrew Bruce’s perception that late-19th-century judges were protective of tort defendants. The shift index’s steady upward trend during the golden age of socialization is striking: it strongly suggests that the rise in American collectivist sentiment led judges to take a less suspicious, more sympathetic view of plaintiffs’ claims to redress for injury during that era. The post-1970 shift figures should be viewed more cautiously than pre-1970 figures because they reflect a smaller and more selective body of cases, but they do raise the question whether judicial protectiveness toward defendants, many of which are corporations and institutions, is once again on the rise.

Figure 4 – Judicial Shifts, 1860–2010

3. Driving Tort Law to New Places

This is an excerpt from chapter 4 in The Burdens of All: A Social History of American Tort Law (Carolina Academic Press 2021).

The automobile's rise as a presence in tort law corresponded with its rise as a presence in 20th-century American life. Experimental motor vehicles first appeared in Europe and the United States in the 1890s. Their potential superiority to horses for purposes of farm-to-market, city, and interurban travel quickly became apparent, but producing affordable, reasonably reliable autos proved difficult at first. Prior to 1910, autos were generally regarded as a luxury suitable only for wealthy Americans; subsequent improvements such as Charles Kettering's invention of the self-starter to replace hand cranks and, most important, Henry Ford's adoption of assembly-line techniques for mass auto manufacturing eventually brought autos within the economic reach of middle-class Americans. The rise of the auto is best summarized by historian James Flink's conclusion that "most Americans first read about the car by 1900, first saw one in action by 1910, first rode in one by 1920, and first owned a car by 1930." Autos gripped the American imagination: they embodied speed, physical power, and the freedom to go where one wanted. They enabled city dwellers to commute to work and contributed to the rapid suburban growth that marked the 1910s and 1920s. Farmers and other rural Americans also came to rely on autos and trucks as an economic and social lifeline to the rest of the world.

Lawmakers quickly recognized the need to accommodate this flood of new machines and the accidents that followed in its wake. They had little difficulty fitting automobile law into the traditional framework of tort rules governing highway accidents. Thomas Cooley and other 19th-century jurists who had shaped tort law as it pertained to roads had recognized that roads would be used in ever-changing ways. Nineteenth-century laws requiring railroads to observe speed limits and use whistles, bells, and other devices to alert others to their presence provided guidance for auto laws. In 1901, Connecticut became the first state to enact speed limits for autos, and during the next 15 years nearly all states enacted rudimentary "rules of the road." Early laws focused on speed limits and basic safety equipment such as headlights, brakes, and horns and other warning devices. Many states also codified the common-law principle that all highway

Figure 5 – Autos and Auto Accidents, 1920–1970

Year	United States		Wisconsin	
	(all figures in 1,000's)			
	Registered Automobiles	Auto Accidents (Fatalities)	Registered Automobiles	Auto Accidents (Fatalities)
1920	8,131	N/A (12.5)	277	N/A
1930	23,034	N/A (32.9)	677	N/A
1940	27,466	6,100 (34.5)	751	17 (0.8)
1950	40,339	8,300 (34.7)	961	74 (0.8)
1960	61,671	10,400 (38.1)	1,328	115 (0.8)
1970	89,244	16,000 (54.6)	1,854	107 (1.1)

users would have "equal rights," and required motorists to register their vehicles. Between 1910 and 1925, Congress and the states appropriated millions of dollars to construct new roads and upgrade existing highways. This good-roads movement responded to existing demand but also fueled additional demand for autos and auto travel.

The proliferation of autos and highways produced collisions, injuries, and deaths in startling numbers. Injury and death rates were particularly high during the first years of the auto age, due partly to the fact that early autos posed extensive safety risks: closed-cab autos did not become common until the late 1920s, and early tires were flimsy and prone to frequent blow-outs. Auto design improvements reduced death rates in proportion to the number of autos and miles driven, but the total number of deaths increased as auto use grew. How could the toll be reduced? Americans were not sure. At first, free-labor views of individual responsibility prevailed: careless drivers were seen both as the source of the problem and as holding its solution. Auto experts and the press denounced drivers who caused accidents as "motorized morons" and "road hogs"; and state legislatures prohibited driving under the influence of alcohol and enacted ever more-elaborate rules of the road.

But auto accidents proved to be a surprisingly intractable problem, one that public shaming and increased driver regulation failed to solve. The public rejected efforts to portray careless drivers as outlaws: in its view, most accidents involved ordinary citizens and resulted from bad judgment or bad luck, not outrageous behavior. Furthermore, many Americans instinctively viewed traffic police as an affront to the values of freedom and independence that autos represented, and they viewed traffic courts, sometimes with justification, as nests of corruption, incompetence, and class bias.

By the early 1930s, reformers realized that their efforts to reduce accidents by shaming had

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failed, and they redirected their energies to what became known as “the three E’s”: engineering, education, and improved traffic-code enforcement. Transportation planners tried to minimize opportunities for collision by constructing one-way streets and divided highways. They also made extensive use of sidewalks and pedestrian crossings, because collisions between autos and pedestrians were a large part of the accident problem. Pedestrians took the legal doctrine of equal road-use rights seriously, but many motorists felt at some level that pedestrians should yield to their greater power and their desire for speedy, uninterrupted travel. Reformers also promoted formal driver education and laws that made such education a requirement for driver licensing; uniform national traffic rules, a movement that gained little success before the 1960s; and more-user-friendly traffic courts.

Socialization of auto accident costs: the Columbia Plan

For tort law’s purposes, the most important aspect of “the three E’s” movement was that it reflected a shift from a free-labor-oriented view to a more socialized view of auto accidents. During the 1920s and early 1930s, reformers gradually accepted the fact that accidents were an inherent risk of auto use and, thus, could be viewed as a price that must be paid for the benefits of the automobile age. From this, reformers drew parallels between auto and industrial accidents and considered whether an equivalent of workers’ compensation could be devised for automobiles.

Calls for a no-fault system for auto accidents arose as early as 1916, and in 1932 Columbia University’s Council for Research in the Social Sciences studied the issue closely and formulated a model no-fault plan. The Columbia Plan would impose absolute liability for accidents on auto owners regardless of the extent of their involvement, but, like workers’ compensation, it would also insulate them from tort litigation and would limit victims’ compensation. Victims could recover their medical expenses, lost income, and other economic losses, but would be allowed no compensation for their pain and suffering, an item that the council believed was too difficult to measure and control.

The Columbia Plan had little success. A bill embodying most of its features was introduced in New York’s legislature in 1938 but failed, and the plan was not introduced in any other state

legislature. The primary obstacle to a no-fault auto accident system was that auto owners, unlike employers, had no customers to whom they could pass on their costs. State-sponsored compensation funds and compulsory auto insurance were suggested as funding mechanisms, but the former seemed to many lawmakers to be too close to overt socialism. Laws requiring drivers to purchase auto insurance at prescribed minimum levels of coverage or to verify that they were able to pay accident costs out of their own resources as a condition of licensure appeared in many states during subsequent decades, but legislators could not bring themselves to require substantial levels of coverage or to couple such requirements with a no-fault system. Socialization of accident costs through insurance would remain largely a matter of individual choice.

The family-purpose doctrine

The ultimate lesson of the Columbia Plan was that any socializing of auto accident costs would have to be done incrementally and indirectly. In addition to enacting insurance laws, some states partially socialized accident costs within families by requiring parents to sponsor their children's driver's license applications and making them vicariously liable for any damage the young drivers caused.

But the "family-purpose" doctrine was the most important of the incremental socializing measures. Beginning about 1912, some courts expanded auto owners' liability by creating a legal presumption that autos were intended to be used by the entire family. They reasoned that the pleasure and convenience family members gained from auto use was also the owner's "affair and business." Accordingly, when family members used the auto with the owner's explicit or tacit permission, they became his agents, and he would be legally liable for any injuries they caused.

The new doctrine represented a major expansion of agency law, and it was controversial. Courts that adopted the doctrine generally refrained from characterizing it as a policy response to the automobile age, but they had difficulty reconciling it with traditional rules of agency, and they were criticized by many traditionalist judges. Even though "every good father makes it his 'business,' . . . to furnish so far as he can, for use by the members of his family, all those things that will contribute to their convenience and pleasure," said California Supreme Court Chief Justice Frank Angelotti, still,

that did not mean that a family member who used the car "exclusively on a mission of his own," such as a personal errand or a date, was acting as the father's agent; and based on that logic, nearly half the states rejected the family-purpose doctrine. Courts that adopted the family-purpose doctrine often justified their decisions by stating, erroneously, that they were simply following the majority rule; this prompted commentator Norman Lattin to gibe that the doctrine was created "[b]y a wave of the wand, and by means of a fictional shellac for permanence." Some adopting courts relied on state statutes imposing vicarious liability on owners who loaned their autos to others, and a few frankly admitted that they were motivated by practical considerations. As early as 1918, Tennessee justice D. L. Lansden argued that:

[T]he practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to person and property occasioned by their negligent operation by infants or others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities.

Even traditionalist courts allowed a degree of flexibility: in close cases, they often deferred to jury determinations that a particular use of the family car benefited the owner as well as the driver, thus allowing accident victims to recover from solvent owners under traditional agency rules. As family auto insurance became more widely available, the debate over the family-purpose doctrine gradually became moot.

Liability to auto passengers

Another important battle over socialization involved drivers' liability to their passengers. Passengers entered autos as guests, and, under the common law, hosts were liable to invited guests if they caused an accident through lack of "ordinary care." During the early years of the automobile era, many courts applied the ordinary-care rule in auto cases, but a feeling grew among jurists and lawmakers alike that, if applied literally, the rule could lead to unfairness. Drivers performed a gratuitous service for passengers, and surely they

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Tennessee justice
D. L. Lansden in 1918

Privity rules worked satisfactorily during America's pre-industrial and early industrial eras, when most Americans made their own tools, clothing, furniture, food, and other essential products or bought them directly from local artisans, but the rapid pace of industrialization after the Civil War brought the privity rule into question.

should receive some recompense in the form of reduced exposure to liability.

Accordingly, some courts held that ordinary care was limited to "active negligence"—that is, driver conduct that created dangers over and above the usual risks that motorists faced on public streets and highways. Other courts were uncomfortable with any reference to an ordinary-care standard, and held that drivers would be liable only for intentionally or recklessly putting passengers at risk. Passengers would be deemed to assume the risk of ordinary carelessness on a driver's part, such as failure to maintain an auto in good condition or a tendency to drive fast.

During the 1910s and 1920s, many legislatures enacted statutes immunizing drivers from liability to passengers, with limited exceptions for drunk driving and intentional harm. Oregon went the furthest, creating immunity without exceptions, but it returned to the immunity mainstream after its supreme court struck down the law as violative of a clause in the state constitution creating the right to a remedy for harms.

But advocates of a true ordinary-care rule, one more friendly to passengers and more likely to socialize the cost of accidents, persisted. C. P. Berry, the author of a leading early automobile-law treatise, argued in 1924 that "[i]t is a matter of every day occurrence in every part of the country for persons of ordinary prudence to rely greatly upon the person in control of the vehicle" and that "[i]t would be strange, indeed, to require every person in a vehicle to keep the same lookout that the driver naturally keeps."

Some courts explicitly or tacitly agreed, holding that almost any driver deviation from strict compliance with rules of the road would violate the ordinary-care standard and affirming jury verdicts that reflected that view. The spread of comparative negligence laws during the mid-20th century allowed a finer calibration of fault than did contributory negligence and reduced the need to protect drivers with high walls of immunity. Beginning in the late 1950s, many courts returned to a true ordinary-care standard for drivers.

Traditional negligence principles and reluctance to fully socialize auto accident costs proved surprisingly durable as the automobile age progressed. Nearly all states flatly rejected the idea of characterizing autos as dangerous instrumentalities, a tack that would have fit comfortably into existing tort law and would have

allowed imposition of near-absolute liability on drivers. Some courts incrementally socialized auto accident costs by holding that violation of vehicle safety statutes automatically constituted negligence, thus easing accident victims' burden of proof; but other states held that such violations were nothing more than evidence of negligence which a jury could consider, and every state allowed drivers to invoke contributory or comparative negligence as a defense.

Between 1920 and 1970, many state supreme courts struggled with heavy workloads, but renewed calls for a no-fault system that would have eliminated auto cases from those workloads were met with a curious judicial silence. It is unclear whether that silence reflected a belief that auto accidents, unlike workplace injuries, did not lend themselves to socialization and extrajudicial resolution, or a belief that free-labor notions of individual responsibility must be preserved and that socialization of auto accident costs should be accomplished through insurance and other private means rather than legal change.

4. Product Liability Law: The Vertical Integration of Fault

This is an excerpt from chapters 3 and 4 in The Burdens of All: A Social History of American Tort Law (Carolina Academic Press 2021).

Product liability law was transformed during the Second Industrial Revolution (1870–1920) and the Progressive Era. The common-law rule of privity held that consumers harmed by an unsafe or defective product could seek compensation from those who were "in privity" with them—that is, had sold the product to them directly—but not from a manufacturer who had sold the product to an intermediate merchant. Consumers were also expected to examine goods before buying them and to assume nearly all risk of injury after the goods passed out of the seller's hands, although there were exceptions for some foods and drugs. Sellers and buyers could negotiate for contractual warranties of quality and fitness for a particular use.

Privity rules worked satisfactorily during America's pre-industrial and early industrial eras, when most Americans made their own tools, clothing, furniture, food, and other essential products or bought them directly from local artisans, but the rapid pace of industrialization after the Civil War brought the privity rule into question. Mass manufacture of goods for regional, national, and



international markets was a central feature, indeed a central purpose, of the Industrial Revolution. During the late 19th century, manufacturers enlisted an army of intermediate sellers as mass markets became the norm, and a rising consumer culture required manufacturers to appeal directly to customers through product branding and advertising in order to succeed.

Beginning in the 1850s, products of regional and national manufacturers, labeled as such, occupied an ever-increasing amount of shelf space in the department stores that were becoming common in large cities and in country and village general stores throughout the United States. Advertising agencies dedicated to regional and national product promotion soon began to appear, as did mail-order giants such as Montgomery Ward & Co. and Sears, Roebuck & Co., which created the first truly national product distribution systems.

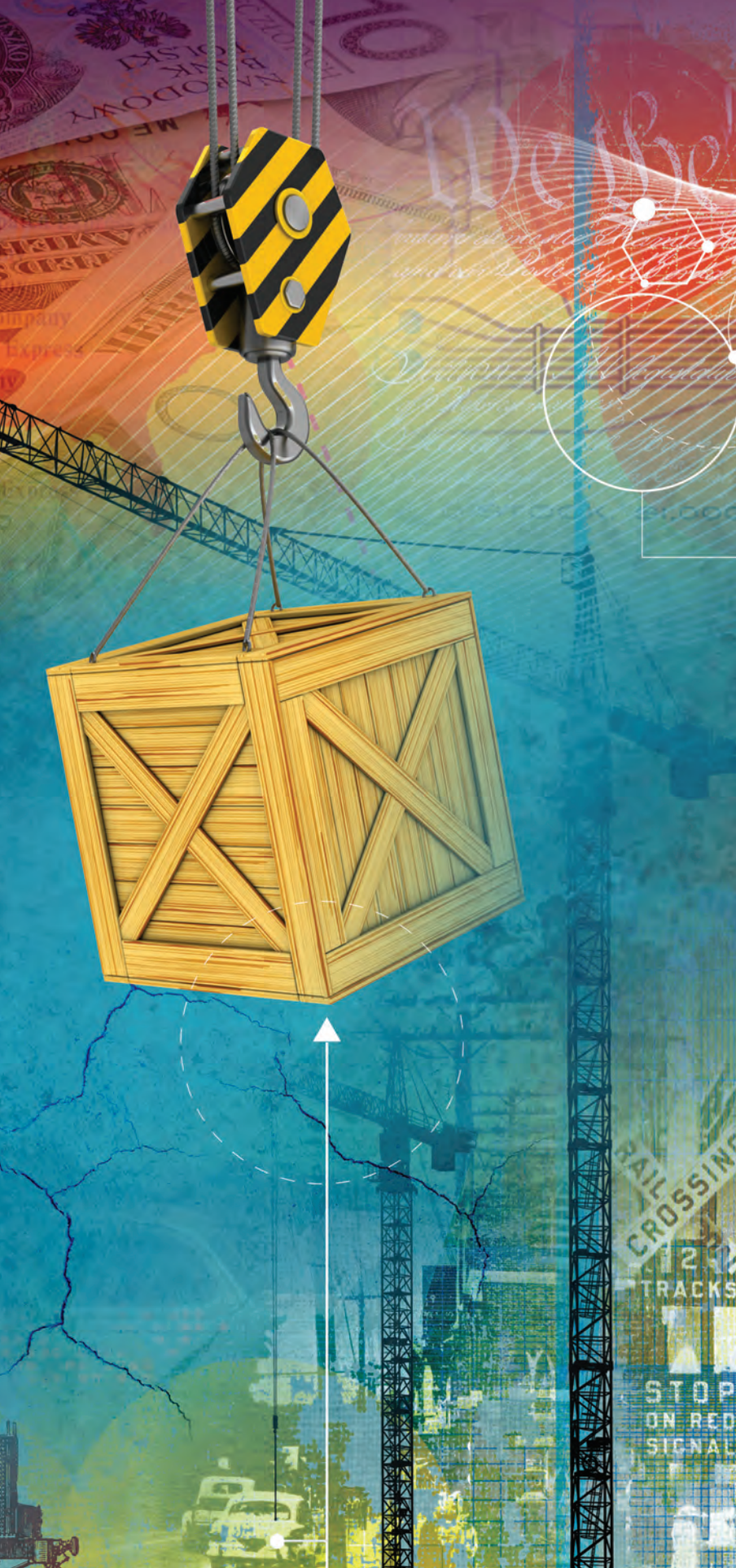
The increasingly direct nature of communication between manufacturers and consumers, and increasing popular recognition that intermediary sellers were no more than a link between them, raised two important questions: first, should product liability be governed by contract rather than tort law, and second, should the law eliminate privity rules and make manufacturers directly liable to consumers for defective products?

Because pre-industrial England and America had never viewed product quality as exclusively a matter

of contract, early-industrial-era British and American courts did not fence off product liability from tort law. But they saw no reason to modify privity either. In *Winterbottom v. Wright* (1842), the first important case to address the issue, Lord Abinger defended privity in instrumentalist terms. Without privity, he said, “the most absurd and outrageous consequences, to which I can see no limit, would ensue.”

After *Winterbottom*, the steady shift to mass production, to regional and national product distribution, and to a consumer-oriented economy created subtle but powerful currents against privity, and it soon began to erode, albeit slowly. In *Thomas v. Winchester* (1852), New York’s highest court, relying heavily on pre-industrial food-and-drug statutes and court decisions that had imposed heavy responsibilities on drug manufacturers, held that a manufacturer who had mistakenly filled a bottle labeled as dandelion extract with belladonna was directly liable to a consumer poisoned by the drug, even though the consumer had purchased the bottle from a pharmacist.

American courts interpreted *Winchester* not as challenging the concept of privity, but as creating an exception for products deemed inherently dangerous. Between 1860 and 1900, the courts carved out additional exceptions for other poisonous drugs, for food, and for fuel and illuminating oils such as kerosene and naphtha,



which could explode when mixed improperly or stored at high temperatures. Many of the products so classified were not, strictly speaking, inherently dangerous but became so only if stored or used improperly. This was a tacit expansion of the scope of liability envisioned by *Winchester*, and courts that participated in the expansion sometimes obscured the expansion by referring interchangeably to “inherently” and “imminently” dangerous products.

Accidents involving construction equipment became increasingly frequent as the industrial age advanced. Beginning in 1882 with the New York case of *Devlin v. Smith*, courts created another privity exception for construction-equipment defects, based on the premise that manufacturers knew exactly how their equipment would ultimately be used. Some early cases also suggested it would be appropriate to make manufacturers directly liable to consumers where they actually knew of the product defect or overlooked a visible defect.

But the emerging consumer economy raised a broader question: should courts also eliminate privity where the manufacturer didn’t actually know of the defect but could have discovered it through ordinary care—in other words, where the manufacturer was negligent? Judges in some early construction-equipment cases arguably did so, but they shied away from saying as much: instead, they chose to slot their cases into the imminent-danger category.

The frontal assault on privity begins

The first direct attack on privity occurred in *Heaven v. Pender*, an English construction-equipment case decided the year after *Devlin*. Master of the Rolls William Brett, relying on the industrial-era concept that duties of care were not confined to pre-industrial, status-based relationships but potentially extended to everyone directly harmed by a wrongdoer’s conduct, suggested that where “everyone of ordinary sense would . . . recognize at once” that, absent use of “ordinary care and skill with regard to the condition of the thing supplied . . . there will be danger of injury to the person . . . for whose use the thing is supplied,” then failure to use ordinary care would render the supplier liable to anyone injured by the product.

Brett’s colleagues declined to adopt his suggestion as law, but other courts took notice, and in *Schubert v. J. R. Clark Co.* (1892), another construction-equipment case, Minnesota’s supreme court became the first American court to squarely

eliminate privity for manufacturer negligence. The *Schubert* court declined to rely on the imminent-danger doctrine and adopted Brett's rule: companies that offered a defective product, said Justice Daniel Dickinson, would be "deemed to have anticipated that . . . it would come to the hands of a purchaser, either directly from the defendant [manufacturer] or from some intermediate dealer, for actual use, and with the consequences which actually were suffered." Standing alone, that statement might have fit within the imminent-danger or actual-knowledge exceptions, but Dickinson put the court's intent to forge new ground beyond doubt:

[I]t would be difficult to distinguish such a case [where the manufacturer did not sell directly to the consumer] in principle from one where the transaction is directly between the wrongdoer, then knowing the danger, and the party who is injured. If any distinction is to be made it must rest upon grounds of expediency, the arbitrary fixing of a limit to the liability of the wrongdoer, but we consider that in principle the defendant should be held to responsibility for an injury resulting proximately . . . from its confessedly negligent act, which was such as to expose another to great bodily harm.

The steady advance of the consumer economy and Progressives' focus on food and drug safety played important roles in privity's continuing erosion after *Schubert*. Beginning in the 1880s, product-safety statutes appeared with increasing frequency, and between 1900 and 1915, most states enacted laws regulating the manufacture and sale of oleomargarine, narcotics, commercial feeds, and fungicides. Support for a federal food-and-drug act (FDA) grew rapidly after 1900: popular magazines such as *Ladies Home Journal* and *Collier's Weekly* devoted extensive space to the topic, and Upton Sinclair's book *The Jungle* (1906), describing horrific dangers and health hazards in the meat-packing industry, became a best seller. A series of experiments conducted under U.S. Department of Agriculture chief chemist Harvey Wiley starting in 1902, known as the "poison squad" tests, also dramatized the hazards of mislabeled and adulterated drugs and attracted national attention. In Washington, President Theodore Roosevelt and North Dakota Senator Porter McCumber pressed for congressional enactment of an FDA applying to nearly all food- and drug-related products in interstate commerce, and in 1906, Congress

complied. Between 1906 and 1911, no fewer than 40 states enacted "little FDA" laws for intrastate commerce that borrowed heavily from the federal model. Food and drug laws were one of the few categories of reform laws that escaped judicial criticism during the era: judges of all political faiths agreed that such regulation fell squarely within the states' police power over public health.

The pure-food-and-drug movement's advance during the Progressive Era did not immediately convince American judges to abandon privity in product liability cases, but it made them more open to doing so, and after 1900, jurists and a few courts began to edge toward *Schubert*. In 1906, an unsigned article in the *Harvard Law Review*, relying in part on *Schubert*, called openly for abolition of privity in cases involving manufacturer negligence as well as those involving defects known to the manufacturer, and, in 1913, Thomas Shearman and Amasa Redfield suggested in their influential tort law treatise that privity should be eliminated in all cases where "it is contemplated that the thing shall be resold." In *Watson v. Augusta Brewing Co.* (1905), Georgia's supreme court held a soda bottler directly liable to a consumer who swallowed broken glass inside the bottle, stating that privity "does not matter" because the public, for whom the product was intended, had "the right to rest secure in the assumption that [it] will not be fed on broken glass." New York's highest court, where the erosion of privity had begun more than 50 years earlier, inched toward abolition in *Torgesen v. Schultz* (1908) and *Statler v. George A. Ray Manufacturing Co.* (1909), cases which involved, respectively, an exploding seltzer siphon and an exploding coffee urn. In *Torgesen*, the court spoke favorably of Brett's opinion in *Pender* and stated broadly that manufacturers must "take reasonable care to prevent the article sold from proving dangerous when subjected only to customary usage." In *Statler*, it went a step further: manufacturers of products "liable to become a source of great danger to many people if not carefully and properly constructed," said Justice Charles Hiscock, were "chargeable with knowledge of defective and unsafe construction" whether or not they had actual knowledge.

In 1916, the New York court made another important contribution to the erosion process in *MacPherson v. Buick Motor Co.*, holding Buick directly liable to a driver who was injured when one of his auto's wooden-spoked wheels broke. Justice Benjamin Cardozo, who would finish his career by

But the emerging consumer economy raised a broader question: should courts also eliminate privity where the manufacturer didn't actually know of the defect but could have discovered it through ordinary care—in other words, where the manufacturer was negligent?

joining the U.S. Supreme Court and would become one of the most celebrated American jurists of the 20th century, reviewed his court's previous decisions and held in forceful, direct prose that their logic compelled complete abolition of privity in all cases of manufacturer negligence. Cardozo explained that:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

This was too much for Chief Justice Willard Bartlett, who had authored the *Torgesen* decision. He noted that a Buick vendor, not Buick, had made the defective wheel, and he argued that seltzer siphons and coffee urns were inherently dangerous (being intended for use under pressure) in a way that autos were not. But those of Bartlett's colleagues who had joined in the *Torgesen* and

Staller decisions did not see it that way, and they agreed with Cardozo.

Most modern scholars regard *MacPherson* as a watershed case, the case that definitively pulled down the barrier between manufacturers and consumers in personal injury cases, but the *Schubert* and *Watson* cases put that in question; and, consistent with the gradual nature of privity's erosion, *MacPherson's* rise to fame was slow. *MacPherson* received immediate attention from writers in Harvard's and Yale's law journals: one writer viewed it as a potentially transformative case, but others viewed it as merely creating a new category of imminently dangerous products. No other state supreme court would abolish privity in reliance on *MacPherson* until 1927, and the first law review article anointing it a watershed case did not appear until 1929. Privity eroded substantially during the Progressive Era due to Progressives' receptivity to socialization of accident costs and industrialization's role in breaking down economic walls between manufacturers and consumers, but at the end of the era it was still alive, if enfeebled, in most states. Privity's death would be a major focus of attention in the American legal community during the decades to come. ■



TORT LAW'S PAST—AND FUTURE

Some observations on Joseph Ranney's *The Burdens of All*

By Alexander B. Lemann

One of the great merits of Joseph Ranney's *The Burdens of All* is its breadth. The book pulls back from the doctrinal squabbles that fill the pages of most torts casebooks and presents a broader history of the law of torts in its social context. In doing so, Ranney offers a history that illuminates forgotten corners of tort law while also reminding us of its inseparability from the generation-defining preoccupations of law—and indeed of American life—more broadly.

One theme that comes across strongly, thanks to Ranney's creative and exhaustive use of data, is a sense of the almost tidal ebb and flow of ideas that have shaped the law of torts. This is a story that historians of tort law have long told, and it gets new support and clarity in Ranney's data. Seemingly disparate doctrines such as the privity rule and contributory negligence began to fall during the Progressive Era, a trend that continued as the legal realist movement and an embrace of technocratic governmental approaches to solving societal problems reached its apex in the postwar period. Many scholars during this time both predicted and advocated for the advent of strict liability, seeing it as the logical next step in tort law's project of socializing risk. But to the surprise of many, this trend petered out, and starting in the 1980s the pendulum began swinging back in favor of fault-based principles and thus largely in favor of defendants. All these fluctuations can be traced in Ranney's ingenious "shift index."

Another theme of Ranney's work is the importance of technology in influencing developments in tort law. The history of the automobile provides an illuminating example. In Ranney's telling, the physical dangers associated with cars led first to a moralistic vilification of reckless drivers. This gave way, in keeping with the broader trends outlined above, to a more dispassionate, scientific view of the problem, one focused less on individual bad actors and more on the role of controllable variables like roadway and vehicle design.

This approach has worked tremendously well. Americans drive far more miles per year than they did in the middle of the 20th century, and yet the number of highway fatalities has remained flat, meaning that driving is now dramatically safer than ever before, on a per-vehicle-mile-traveled basis. Indeed, the National

Highway Traffic Safety Administration recently published a report showing that its own regulatory interventions in vehicle and roadway design have saved lives on a scale comparable to advances in treating and preventing heart disease and significantly exceeding advances in fighting cancer.

In another sense, though, this scientific approach to risk has never made its way into the heart of tort law, as Ranney documents. Efforts to push tort law away from the fault principle and toward socialization of risk have, in the automobile context at least, always failed. To the familiar example of no-fault insurance schemes, Ranney adds now largely forgotten ideas such as the family-purpose doctrine and passenger liability. The broader principle shows up in other areas of tort law as well: efforts to instantiate a set of rules-based optimal incentives have always failed, and the concept of fault remains stubbornly enmeshed in the law of torts.

One of the pleasures of delving into the past in a work like Ranney's is the nuance that it brings to any thinking about the future. The next great leap forward in automobile technology is today gradually making an appearance on American roads. Autonomous vehicles are widely expected to usher in a new era in safety, since the vast majority of car accidents are caused by human error. But while perfectly adept, highly autonomous vehicles exist mostly in theory, "semiautonomous" vehicles with more limited capabilities have already begun carrying passengers—and causing fatalities.

Unsurprisingly, in light of Ranney's work, experts have already begun arguing that traditional tort doctrines such as negligence are not suited to the autonomous vehicles of tomorrow. Instead, they propose the legislative creation of liability schemes akin to workers' compensation or no-fault insurance for autonomous vehicles. The social history of tort law as Ranney tells it counsels, in my view, a more cautious approach. Negligence—the fault principle—has had remarkable staying power, arguably because it aligns with basic, commonly held instincts about right and wrong, and the need to hold wrongdoers to account. History gives us little reason to think this idea will lose its appeal every time a new technology comes along. ■



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