THE REVOLUTION IN THE CIVIL LAW

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This article analyses the causes of the change in attitude by the American courts towards civil disputes. Mr. Belli depicts this change by a variety of controversial illustrations and concludes that the essential ingredient in this development was the recognition of individual's rights.

We have come a long way from *MacPherson* v. *Buick Motor Company*. The great expansion of a manufacturer's liability for negligence since that case marks the transition from industrial revolution to a settled industrial society. The courts of the nineteenth century made allowance for the growing pains of industry by restricting its duty of care to the consumer. They restricted the duty so much that in 1842 a court could say about the injured plaintiff in *Winterbottom* v. *Wright* that 'it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced.' With a *tour de force* of supreme simplicity the court demonstrated that it was not under the influence. It ignored strict liability, made short shrift of the issue of the manufacturer's negligence, carried the injured plaintiff to the doorstep of privity of contract, and left him on the doorstep. However clearly the manufacturer could foresee injuries to others, the court confined his duty of reasonable care to those in privity, and confined privity to those with whom he dealt directly. It feared that otherwise there would be 'the most absurd and outrageous consequences.' In effect it feared a plaintiff-population explosion, and could not envisage how a manufacturer could be expected to exercise reasonable care toward just anybody he could foresee might suffer injury from his defective product.

If in time the accident problem is solved through some compensation scheme that covers the basic economic losses of accident victims, it will remain to be seen whether the law of negligence as we know it today in this area will atrophy or will survive in a diminished role to afford additional compensation to victims whose injuries are caused by actual fault on the part of others. Money damages, of course, can never really compensate for the non-economic losses resulting from personal injuries. Although it is therefore reasonable to exclude such losses from coverage in any purely compensatory system, inherent justice between the person injured and the person who caused the injury may demand compensation for such losses when the latter was actually at fault. Something of this sort has apparently taken place in England. The adoption of broad social insurance to cover accident and other losses has been followed by judicial limitation of strict liability in tort. Liability for negligence remains, however, and the problem of double recovery is resolved pragmatically by deducting one-half of the social insurance benefits that would be received for the first five years after the accident from the damages for lost earnings.

As we enter the computor age we are still far from solving the massive accident problems that began with the industrial revolution. The cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing. There is a wealth of analogy yet to be developed from the exploding bottles of yesteryear, from lathes on the loose, and capricious safety valves, and drugs with offside effects. There are meanings for tomorrow to be drawn from their exceptional behavior.[1]

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The Civil Law Revolution preceded the criminal. In many areas it was not as abrupt, or perhaps it just did not have the apparency of abruptness attendant upon the Criminal Revolt because it lacked the traumatic impact of United States Supreme Court decisions and the bitter criticism of them.

Laymen dramatically learned of the Criminal Revolt from the United States Supreme Court opinions because of editorial and commentators'

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1 Traynor, *The Ways and Meanings of Defective Products and Strict Liability* (1965) 3 Tenn. L. Rev. 363, 376.

and cartoonists' bitter complaints. District Attorneys and policemen throwing up their hands that law enforcement was no longer possible, that we were "coddling criminals" with the Supreme Court decisions and Edgar Hoover's clucklings, were a much more startling phenomenon than the more subtle civil law revolt.

The trend (abrupt in some states) to the more Adequate (and consonant) Award, to the now more business-like procedures in our civil courts was hardly noted in the press (although insurance companies were not tardy in propagandizing to such an extent that juries are no longer asked for by plaintiffs—defendant insurance companies demand them knowing the job they have done).

Moreover there was no Fourteenth Amendment (the efficacy of which remained in limbo because of a five to four decision, the *Slaughter-House Cases*,[2]) which badly needed an overhauling with respect to civil issues. Indeed there is still question whether some of the Constitutional guarantees now recognized with respect to the Criminal law apply over on the civil side.

The NACCA had a small part in the Civil Revolt. But principally this change was due to a contextual meshing of the gears of law with changing economic, social and political conditions. Inflation, and higher wages, and the recognition of individual man, his dignity, his right to live out his life in happiness and freedom from pain and with all of his members, were the real exploding and still explosive forces.

Much of the Law Revolt on the civil side is due to court decision ("judicial legislating"). Legislatures did have some hand in it but the spark was struck by the courts themselves overruling ancient doctrines incompatible with modern living conditions. The powerful union and labor lobbies, perhaps because they lacked direction, did not spearhead the Revolt at the legislative level. Certainly Bar Associations were in lethargy and embarrassingly so until outside criticism, the segregated Bar Associations, forced them to change.

Bar Associations, state and national, generally have been on the *status quo* and *stare decisis* side because they have been controlled and still are by the conservative forces of capital and money. Railroad, bank and insurance company lawyers have customarily berthed in the front offices, or at least in the "diamond horseshoe", of Bar Association organizations. These representatives of capital were not about to start or give impetus to a law revolt which ultimately would, in the final analysis, find disfavor with their corporate clients. And the plaintiffs' lawyers weren't organized, had no lobbies. Certainly, the individual plaintiff in the personal injury case had no voice at the legislatures compared with the railroad lobby or the insurance lobby or the public utility lobby or the bank lobby or the trust company lobby or the title insurance company lobby.

Is there a single essential ingredient that characterizes the Civil Law Revolt such as found in the Criminal Law Revolt? There is. It is again that same recognition of the individual's rights, his idiosyncrasies, his "home is his castle" philosophy (right to privacy). But, the em-

[2] (1873), 83 U.S. (16 Wallace) 36.

phasis, though not entirely, is on economic values. The end result in the civil case is the Adequate Award. Even though I have contended this is a consonant award, and not reward, nevertheless the Revolt in essence has been represented in a higher money judgment.

On the civil side, the great majority of cases tried are personal injury cases. And the judgment sought in these is not a civil right, a vindication, an injunction, "recognition", but money—as much money as the plaintiff can get. Contrarily, the insurance companies have attempted to brake the revolt by keeping money damages down. They too, do not talk ideology but rather money—less money.

After the economic revolt, expressed in the Industrial Revolution, the corporation was the vehicle that carried the new economic society to the then new frontier. Laws and judicial decisions favored the corporation over the individual, nurturing and protecting this then all-important institution. Limitation of payments of just compensation by means of corporate liability protected the nascent corporation. Railroads were given grants of land alongside their tracks as an award for pushing into unexplored territories. If man gained his political and criminal law freedom on the rack and the wheel and the torture machine, the Civil Law Revolt was bottomed on torn and mangled bodies in early industry. Legislatures did, at labor's instance, initiate the movements for better health and safety laws, workmen's compensation, pension and health legislation.

The Civil Revolt was held back in this country by the old common law English decisions, many of which had been overruled in England but retained in this country long after their initial necessity, usefulness and anachronistic vitality. Illustrative are the cases now being overruled, embodying the principles of charitable immunity, disavowal of causes of action for prenatal injuries, interspousal immunity, and denial of recovery for a tort where there is no impact. The Adequate Award, (larger money damages) in keeping with inflation and higher wages and the recognition of man's individual dignity, was court-born first in jury verdicts, but is now maintained by judge trials and sustained by appellate courts. Legislatures had no part in this. Indeed, legislatures kept, and still do in many instances, a ceiling upon death quantum.

There was a time when the $100,000 award was rarely if ever given. Indeed, there were many cases in which $1,100 was "adequate" for the loss of a leg in 1896, $5,500 for the loss of a male organ in 1882, $2,000 for permanent spinal injuries and paralysis in 1906. But in the early 1950's came the $100,000 award then the $200,000 award, and then the prophesied $1,000,000 personal injury award that is now judicial history. Awards of $500,000 up to $1,000,000 in the wrongful death case and the paralysis cases, while not common, now can at least be expected, not so much in the case of the wealthy plaintiff with his high position in society, but in the case of the healthy high wage earner permanently crippled.[3]

The civil trial has become a more business-like trial. It had to with population increase. There are more judges sitting in the trial courts,

[3] *See* Belli, *Ready for the Plaintiff* (1956), Belli, *Modern Trials* (1954), Belli, *Modern Damages* (1959); Belli, *Trial and Tort Trends.*

nisi prius, in Los Angeles alone than in all of England. They do a business-like and workman-like job. Pleadings have been simplified, judges keep regular office hours and work hard and do their homework. Pretrial looks forward to settlement rather than court performance, discovery prevents "ambush" and makes of the civil lawsuit less of a game than a more predictable means of obtaining certain justice (a functional new kind of *stare decisis?*).

The lawyer, both "trial" and "office", has become a specialist more than ever before, although I prefer to regard the trial-lawyer-general-practitioner, the typical English barrister, trying civil and criminal, domestic relations, all sorts of cases, as the essence of the true lawyer. Some lawyers now specialize even in the specialty of personal injury litigation. For example, there is the railroad lawyer, the maritime lawyer, the aviation lawyer, and the medical malpractice lawyer.

Dean Roscoe Pound wrote in his Introduction to *Modern Trials:*[4]

> The economic revolution which produced big business in the last decades of the 19th Century largely changed the center of gravity in the legal profession of America from the advocate to the advisor. In an era of increasing specialization, advocacy has become a specialized function, one of many others.
> The setting up of a multitude of administrative agencies in the development of the service state has made for specialization by individual practitioners as well as for departmentalized specialista associated in large firms. Extreme specialization has been coming to be inevitable for adequate service to big business and even little business. As Mr. Swain put it 'the law office with large corporate clients must have partners and associates expert in all branches of the law which have attained importance;' thus arises the further plaint that 'the big firms are as inclusive as department stores'.

Turning from lawyers to procedure we find the procedure of demonstrative evidence (black boards, skeletons, aerial photos, enlarged x-rays, models, experiments, blow-ups of transcript pages and records and reports, extended opening statements) constitutes a Revolution in the civil law. Most of this demonstrative evidence had been used in criminal law before it came over into the civil field. The end result of demonstrative evidence is the Adequate Award. But it is also a more factual, a more just, a less confused, a more analyzed, a more consonant trial. Electronic devices, moving pictures, tape recordings, the snooper's art, shadowing and eavesdropping . . . the availability of all of these procedures invited use in the civil trial. The civil trial lawyer accepted the invitation, and now demonstrative evidence has been used on appeal too.

There was a Revolt in warranty, probably because lawyers and judges didn't understand common law history code pleading in the forms of action. The Revolt abandoned privity, notice, contributory negligence, and extended itself in some states into the area prognosed by Justice Traynor in his concurring opinion in *Escola* v. *Coca Cola*[5] and the opinion of the late Mr. Justice Jackson, of the United States Supreme Court in *Dalehite* v. *U.S.*[6]

Then the concept of center of gravity and the exigencies of interstate travel and communication caused a revolt in the civil law from the old concepts of *Pennoyer* v. *Neff.*[7] State jurisdictional lines have

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4 *Ibid.*
5 (1944), 150 P. 2d 436.
6 (1953), 346 U.S. 15.
7 (1877), 95 U.S. 714.

not been completely obliterated. They are still maintained and so is the basic integrity of the Federal and state court jurisdiction systems. But "Uniform Codes" and "uniform laws" and "restatements" have in many instances homogenized the conglomerate and idiosyncratic (some modern, some ancient) rules and decisions between the several states.

The medical malpractice case, in many of its intendments, is still unrealistic. Judicial overrulings have caused a revolt in many states in this field. But in some states the medical malpractice case, not because of its lack of merit, but because of ancient persistent rules, is more heard about than heard of in court. Indeed, there are still low verdict centers and high verdict centers.[8]

Geographical qualification of experts in the medical malpractice case has been abandoned and so have charitable immunities and interfamilial immunities and the denial of the right of a prisoner, as being no longer a citizen, to sue.

The F.E.L.A. Act has become almost an absolute liability workmen's compensation type act with common law damages. So has the maritime Jones Act.

Aviation law has developed somewhat but the aviation case by many jurors is still regarded as an occasion of the passenger risking his life when taking to an unnatural element, air flying. The layman knows, or should know, of the safety of aviation and of its universal acceptance. But when he sits as a juror he sometimes votes his disregard of this now accepted fact of our daily life.

Workmen's compensation limits are still utterly inadequate and unrealistically so when based upon the argument of cost, for the workman is the most expensive unit in today's economy. If higher awards would raise the expense of doing business to inflationary levels, there would seem to be something wrong with the administration of these workmen's compensation acts since most of the other costs of doing business have increased disproportionately to the workmen's compensation awards.

Evidence, the technique by which trial lawyers live, still suffers from the basic weakness that it is a negative doctrine, i.e. the exceptions are more noted than the general rules.[9] But the expert is gaining ascendency in every civil law suit as more and more experts become knowledgeable in a particular specialized field. The trial lawyer has learned that he can at least inquire and look for an expert, without knowing of him as a specialized entity, in almost any kind of complex fact endeavor to be brought to the scrutiny of the trier of facts.

The defenses to the common law cause of action have been whittled away. This is obviously the trend towards the absolute liability, i.e., assumption of risk must be the assumption of a specific risk, unavoidable accident has been discarded, willfulness and wantonness avoid contributory negligence. But except in the F.E.L.A. and Jones Act cases contributory negligence has made few gains.

The law still remains the specialist's happy hunting ground and there seems to be a particular brand of morality in Americans that

[8] See the writer's illustration of which are the highest verdict centers, the lowest verdict centers, comparing one against the other in *Modern Damages supra*, n. 3.
[9] 1 Belli, *Modern Damages*, introduction (1959 abridged ed.)

justifies the searching out of the most technical loophole in a tax case as being still part of the game. The concept of "cheating the Government" does not deter the applause for the successful competitor.

Contracts have become more readable despite the cerebral abstruseness of some specialized lawyers in some of the specialized contract fields. The layman has demanded that he understand, from his doctor, the Latin writing on the prescription. Likewise he's demanded an intelligible written instrument perpetuating his meeting of the mind with his contractee. Indeed, today's layman is a more knowledgeable layman and he demands answers, understandable ones, from all of his professional servants.

"Trespass to Personality" may be a new tort which can encompass defamation, right of privacy, false imprisonment, alienation of affection, outrageous conduct, etc. With *New York Times Co.* v. *Sullivan*,[10] Justice Black finally achieved one of his goals by proving that freedom of speech meant just about that. The *Sullivan* Case has effectively wiped out a considerable area of tort law (defamation). This is one shot in the Civil Revolt which came from the Supreme Court. Generally, few revolt cases in tort law have come from this high court.

Civil rights cases, sit-downs, picketing, boycotting, injunctive relief, all in their field are moderated by the concept of individual protection and individual rights just as much as are the political cases involving reapportionment, jurors' oaths, right to refuse a blood transfusion.

The divorce case is still, and apparently becoming more so, an abrasive commercial endeavor out of touch with the reality of women's emancipation and modern social conditions. The law revolt has not taken advantage of the available tools of psychiatry counselling and third party advising available. Children still suffer the trauma of divorce. In probate, weaving spiders still spin. But though it is still possible, Dickens' *Jaryndice* v. *Jaryndice* would not be the usual case.

The IBM machine and its ancillary siblings have just begun their invasion of the law. They are used for example in some corporate and tax ventures to determine a most favorable state with the least amount of research. While "discovery" is a Revolt in the civil as well as the criminal law it has unexpectedly bogged down by insurance company devices used ostensibly to cut costs, i.e., the printed forms of interrogatories which have become so extensive, and in many instances just as unnecessary, that they have increased, not decreased, cost of litigation and clouded rather than clarified issues. The extended form interrogatories have also been used to harass plaintiffs as much, in some instances, as the technical forms of action in the old days. The jury still goes its ancient and useful way despite all attempts to analyze, categorize, spy upon and disrupt its unscientific procedure, which latter is its greatest good, that of determining community conscience.

The insurance company, the paying defendant in most personal injury and indeed most civil cases, has been forced to go modern with its new all-encompassing more protective policies. These are more frequently being sued upon and about, the insurance company and the

[10] (1964), 376 U.S. 254.

novel policy. The insurance company is loath to abandon the fault system in favor of a workmen's compensation-like absolute-liability-procedure and it has only half-heartedly substituted arbitration in some of its policies for the common law courtroom.

The American Bar Association, like the American Medical Association, neither of them heretofore ever in the forefront of modernizing their disciplines for the layman, (but seemingly more anxious to maintain and protect them for themselves) has at last made some advances toward modernity. The plaintiff and the plaintiff's lawyer have been recognized, if still only half-heartedly, as an institution necessary to litigation.

Some of the new American Bar Association seminars, as the American Medical Association seminars, offer the means to keep the modern practitioner knowledgeable in his art. But what is of more importance, they keep him proficient in manners best equipped to the layman. These educational devices have done more for the doctors, for example, than any public relations pictures of the old family doctor sitting beside the bedside of the sick child in all night vigil, the morning sun just peeking through the window of the homely hut.

Whether "God is dead" or not, the civil law by Supreme Court edict has given each individual human the right to make his own determination. And having made it, if he answers in a vigorous negative, he has the right to worship in whatever manner he believes essential to supplement his decision no matter how bizarre.

And man may have access, legally, to birth control pills. He may even take "peyote" if it is as essential to his religious observance as the chalice of wine is to the Episcopalian.

While man may not make his own implemented individual decision on whether to fight in Viet Nam (here the greater good, i.e., police power, the security of the state transcends that of the individual decision), modern man's philosophy of living, his trip to the new frontier in whichever vehicle he chooses, airplane or bicycle, is protected.

University students may write four letter words on the walls of their universities, and though they offend "good taste", the Supreme Court has given them a whole protocol of protection so that their inventiveness, and novelty of expression, and capacity for flights of thought fancy will not be trammeled. Miscegenated marriages may, the court indicates, be protected. Fornication, until recently as far as the law was concerned, an apparently lost art, under the decisions of some courts, has been recognized as both a conjugal and non-conjugal legitimate enterprise.

And at last, probably the finest example that there has been a Revolt on the civil side in the common law is the pronouncement from the conservative House of Lords that "stare decisis has been abandoned as an instrument of *ratio decidendi*".

Even the Supreme Court of Pennsylvania has recognized the Civil Law Revolt. The recently decided case of the Pennsylvania Supreme Court, *Auerbach* v. *Philadelphia Transportation Co.*,[11] in the select

11 (1966), 221 A. 2d 163.

language of Justice Musmanno, one of the discerning and forefront runners in the law revolt; $237,500 verdict case was affirmed for plaintiff, defendant's bus causing his leg amputation. Carefully dissecting defendant's many appellate complaints which, before the Revolt, would have resulted in reversal (particularly in Pennsylvania), Musmanno, J., concludes of and about defendant's complaints

> This, of course, is to ignore fact for fancy, positive evidence for guesswork, and demonstrated proof for dialectic legerdemain. The jury and the court below rejected this line of disputation and it finds no more concurring approval here.[12]

So, in the Civil Law Revolt that's also *where the action is now*—without ancient "dialectic legerdemain".

12 *Id.*, at 173.