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**The John G. Fleming Lecture:
A Brief History of Accident Law –
Tort and the Administrative State**

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The John G Fleming Lecture: A brief history of accident law – tort and the administrative state

Robert L Rabin*

This article is a slightly revised version of the inaugural John G Fleming Lecture, presented at the University of California Berkeley School of Law on 24 October 2011. The article offers a brief thematic development of the history of accident law in the United States, focusing on the evolution of both tort and the administrative state, as well as the interplay between these two systems of protection against the risks and consequences of physical harm. In particular, it addresses developments over the course of four distinct periods: the early industrial era to the close of the 19th century; the 20th century to the mid-1960s; the mid-1960s to 1980; and the late 20th century to the present day.

AN INTRODUCTORY NOTE

I begin by offering a few words of introductory explanation for entitling this presentation “A brief history” not of *tort law*, but of *accident law*. There is a sub-text here that remains critical to the way in which torts is offered as a staple first-year course in American law schools. The more traditionally designed courses continue to begin the study of torts with detailed coverage of the variety of *intentional* harms: assault and battery, false imprisonment, intentional infliction of emotional distress and the like, along with the principal defences.¹ In my view, this is unfortunate, because I regard the overarching question of how our society is to deal with the all-pervasive problem of *accidental harm* – whether it be from motor vehicle injuries, toxic exposures, product defects, or professional malpractice – as far overshadowing intentional injuries in costs and consequences to society. So in my view, the most pressing question that torts has to address – in law school as in the outside world – is whether, from the multiple perspectives of fairness, compensation and deterrence, society is best served by a system of negligence law, or strict liability, or legislative no-fault compensation (or some mix of the three), against the backdrop of administrative regulation of health and safety concerns (that is, the administrative state).² These latter administrative – or regulatory – concerns are captured in this presentation by my focusing on the historical evolution of accident law not just in tort, but also as a key component of the administrative state.

My brief history, then, places accident law front and centre. I set the stage, however, with just a few words about the pre-industrial era, when liability for accidental harm was in fact a matter of virtually no consequence. Then, I take up, in turn, the evolution of tort and the administrative state in four distinct periods:

- the 19th century (the early industrial era in the United States);

* A Calder Mackay Professor of Law, Stanford Law School. This article is based on the inaugural John G Fleming Lecture, delivered at the University of California, Berkeley School of Law, on 24 October 2011. The Lecture was given in conjunction with the receipt of the 2011 Fleming Prize, and I am deeply gratified to have been selected for these joint honours. I would like to express my great appreciation to the School of Law, and in particular to Professor Stephen Sugarman, program organiser, long-time colleague, and close friend.

John Fleming was one of the most highly regarded torts scholars of his generation. His writings on comparative tort law and the subtleties of the United States tort system, beginning in the mid-1950s and extending over four decades, have had a lasting influence on scholarly thought about the aims and aspirations of the tort system. One need only look at the landmark Fleming JG, *Law of Torts* (9th ed, LBC Information Services, Sydney, 1997) and law review articles such as Fleming JG, “Is There a Future for Tort?” (1984) 44 La L Rev 1193; (1984) 58 ALJ 131, and Fleming JG, “Loss Allocation in Tort Law” (1966) 54 Cal L Rev 1478 to get a sense of the breadth and subtlety of his mind.

¹ Two widely used casebooks are illustrative: Schwartz V, Kelly K and Partlett D, *Prosser, Wade and Schwartz’s Torts* (12th ed, Foundation Press, New York, 2010); Epstein R, *Cases and Materials on Torts* (9th ed, Aspen Publishers, New York, 2008).

² The Torts casebook I co-edit, Franklin M, Rabin R and Green M, *Tort Law and Alternatives: Cases and Materials* (9th ed, Foundation Press, New York, 2011), reflects this approach to the basic course.

- the 20th century up to the mid-1960s (with particular emphasis on the progressive era early in the 20th century);
- the mid-1960s to 1980 (which I have referred to in earlier work as the public interest era); and finally,
- the late 20th century to the present day.

In keeping with the Lecture presentation, I emphasise dominant themes, rather than offering a detailed accounting of developments in each era.³

As I have just suggested, in the era preceding the Industrial Revolution, there was no identifiable area of accident law. Indeed, there was no coherent field of tort law more generally.⁴ In the English Yearbooks, one can identify a handful of classic cases that have come down to us sketching out the contours of the intentional torts.⁵ And one can similarly find instances of trespass on land that appear to assign liability without reference to fault of any kind.⁶ But these cases, decided under the ancient English writ system, where the question was often whether the claim was properly framed as trespass or trespass on the case (a direct or indirect harm), were far-removed from the law of accidents in our modern sense.⁷

THE INDUSTRIAL REVOLUTION AND THE EMERGENCE OF TORT: NINETEENTH CENTURY

The particular relevance of these observations about pre-industrial era case law is that, contrary to my view, the traditional account in American historical scholarship of how negligence (or fault liability) evolved in the early industrial era is to regard it as a retreat from *strict liability* to shield industry in its formative era from too-onerous responsibility for the newly emerging flood of accidental injuries.⁸ Both manufacturing enterprises and transportation by railroad generated hazards to human safety from unintended harm unbeknown in earlier times. Accidental injuries became widespread, and claims for redress were a natural consequence.

My account of the evolution of liability law in that critical era differs sharply from the traditional view.⁹ In my view, the arc is from *no liability* to negligence rather than from *strict liability* to negligence – and indeed, of even greater importance, liability for negligent conduct as an overarching principle emerged only gradually as the industrial era moved forward into the 20th century, rather than becoming a dominant principle in 19th century accident law.

Consider, in this regard, workplace injuries (including railroad workers' claims). In theory, these were tort claims; but in reality these cases fell largely under the sway of the contract paradigm, and not tort, through the pervasive defence of assumed risk against worker claims. In short, the contract paradigm, and an illusory freedom of choice, dominated tort.

Consider next, product injuries; that is, personal injury claims against manufacturers of allegedly defective products. Once again, contract thinking dominated tort: lack of privity of contract barred these suits unless the injured consumer had dealt directly with the manufacturer; here too, contract thinking was dominant.

³ I offer a more general account of the evolution of the administrative state over the course of a century, beginning in 1887 with the enactment of the *Interstate Commerce Act*, in Rabin R, "Federal Regulation in Historical Perspective" (1986) 38 Stan L Rev 1189.

⁴ See Friedman L, *A History of American Law* (3rd ed, Simon & Schuster, New York, 2005); Grey T, "Accidental Torts" (2001) 54 Vand L Rev 1225.

⁵ See eg *I de S and Wife v W de S*, YB Lib Ass folio 99, pl 60 (1348).

⁶ See eg *Thorns Case* YB Mich 6 Ed, 4 f 7, pl 18 (1466). There is considerable ambiguity on this point. See Schwartz G, "Tort Law and the Economy in Nineteenth Century America: A Reinterpretation" (1981) 90 Yale LJ 1717 at 1722-1727.

⁷ See eg *Scott v Shepherd* (1773) 96 ER 525.

⁸ See Horwitz M, *The Transformation of American Law, 1780-1860* (Harvard University Press, Cambridge, 1977); Gregory C, "Trespass to Negligence to Absolute Liability" (1951) 37 Va L Rev 359.

⁹ See Rabin R, "The Historical Development of the Fault Principle: A Reinterpretation" (1981) 15 Ga L Rev 925. The following paragraphs in the text summarise my thesis.

Consider, as well, landowner liability to injured entrants on land. In this category of cases, liability was largely limited to wilful misconduct; there was, in fact, no recovery for negligence except in the limited cases of claims by business invitees. Mirroring the contract-tort intersection just discussed, here property-protective rules dominated tort claims.

More generally, there were a host of categorical no-duty rules applicable to negligent conduct – such as, no recovery for emotional distress and no recovery for stand-alone economic loss – that stood as a barrier to recovery for the consequences of fault-based accidental harm. Correspondingly, there were areas of absolute immunity: sovereign, municipal and intra-family tort immunity, all of which created further gaps in the domain of liability for negligence.

These categorical areas of no-duty and restricted duty are simply ignored in the classical accounts of the expansive reach of the fault principle. Negligence is asserted to be dominant by identifying only the types of victim harm where it is recognised, and the larger universe of unrecognised harms is simply ignored.

A necessary caveat must be entered at this point to avoid overstating my thesis. Of course, liability for negligent acts does emerge in the early industrial era. But critically, it is mainly in cases involving “strangers” (eg horse-and-buggy road accidents), where no status relationship between the parties impeded its application.

THE INDUSTRIAL REVOLUTION: NINETEENTH CENTURY REGULATORY PERSPECTIVE

From our present-day vantage point, we view the administrative state – the public regulatory system – as a natural counterpart of tort: the Food and Drug Administration, a federal regulatory agency, regulates new drugs and medical devices; State tort law provides a complementary forum when things go wrong (that is, harm occurs) despite the regulatory oversight. But what about in that earlier time, at the dawn of the industrial era: to what extent did the administrative state fill the large gaps left by tort in the domain of protecting health and safety?

Throughout the 19th century, one finds only modest attentiveness to health and safety concerns. At the national level, administrative regulation lagged behind even the nascent development of a State-level common law of tort. An interesting, often-overlooked illustration makes the case. In the wake of a persistent number of steamboat boiler explosions that caused an alarming number of fatalities, Congress, in 1838 and then again in substantially greater detail in 1852, passed legislation establishing maximum pressure standards and providing for licensing, testing and inspection of steamboat boilers.¹⁰ This regulatory scheme stands as the initial and only federal effort in the area of regulating health and safety protection until early in the 20th century, in the progressive era.

At the State and local level, however, public health regulations (eg sanitation standards) and public safety provisions (eg modest railroad safety requirements) were quite common by the latter half of the 19th century.¹¹ Importantly, however, these regulatory schemes, while attentive to public health and safety, provided no compensation to individual victims in cases of personal harm; only tort would have offered a damages remedy to victims of harm that occurred despite regulatory sanctions.

At the outset of the 20th century, then, caveat emptor swept beyond commercial dealings to the marketplace of personal injury as well: let the victim, as well as the buyer, beware. The pathway to recovery for harm suffered by an accident victim, let alone the presence of anticipatory regulatory measures that would prevent the harm from occurring, offered only limited personal protection and compensation.

TWENTIETH CENTURY TORT/COMPENSATION SCHEMES: TO THE MID-1960S

The hallmark of early 20th century American tort law is generally regarded as *MacPherson v Buick Motor Co* 217 NY 382 (1916), and properly so. In *MacPherson*, a driver of his motor vehicle successfully sued not the retailer from whom he bought the car but the manufacturer, with whom he

¹⁰ See Burke J, “Bursting Boilers and the Federal Power” (1966) 7 Tech & Culture 1.

¹¹ See Friedman, n 4, pp 342-345 for a more detailed account.

had no personal dealings, when the collapse of a wheel on his car led to serious personal injury. In fact, product liability claims was not a major area of tort activity at the time. By far, the overwhelming majority of motor vehicle cases were suits by injury victims against negligent drivers, not against product manufacturers for defects, as in *MacPherson*. Nonetheless, the fall of the privity of contract barrier (that is, the bar to suing a once-removed product manufacturer) was a watershed event in the uneasy relationship between tort and contract. Cardozo J, in his typically opaque fashion, put it this way in *MacPherson* (at 390):

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

Interestingly, the full implications of *MacPherson* were not really realised for the next half-century. Tort remained essentially static in terms of *doctrinal* expansion after *MacPherson* until the mid-1960s. The main source of personal injury claims during this period remained motor vehicle accidents, with premises liability probably a distant second. These were categories of cases that only raised narrow litigation issues of whether the parties had exercised due care under the circumstances, without reference to sweeping new duty obligations or complex questions of causation. Those would come later.

The second landmark of accident law in this early 20th century period – nearly concurrent with *MacPherson* – was the rise of workers’ compensation, which spelled the demise of tort in industrial injury cases.¹² Workers’ compensation, and the consequent abandonment of tort in workplace accident cases, is generally regarded by scholars as a reaction against the contract-based constraints that had shackled tort as a remedy for injured workers.¹³ The entire tort/contract edifice came down: State legislative compensation schemes (workers’ compensation) replaced tort.

While this is accurate as far as it goes, it does not explain *why* workers’ compensation swept the country, State-by-State, at this point in time. After all, the assumed risk and fellow servant defences that stood as a bar to tort claims had, in fact, been even more stringently applied by common law courts in the earlier decades of the 19th century.¹⁴

In my view, the coming of workers’ compensation can only be fully understood in context. Workers’ compensation gestated in the heyday of early 20th century progressive era legislative reforms – and was part and parcel of a much more sweeping set of labour law reforms: maximum hour provisions, health and safety standards, all directed at aspects of a sweatshop work environment.¹⁵ It was predominantly this more broad-based labour reform agenda of the progressives, enacted against the backdrop of widespread workplace unrest, that animated the workers’ compensation movement, rather than simply a circumscribed reaction against harsh tort defences.

Indeed, as I will suggest, in my view the other broad-based legislative accident compensation movement – motor vehicle no-fault in the mid-1960s – is similarly best understood in larger political terms.¹⁶ The legislation was passed at the height of the consumer-environmental political reform era of the time, which featured car safety as a major cornerstone, generated in substantial part by nationwide

¹² I discuss these two landmarks of 20th century American tort law in greater detail, along with three other major events that I identify – Traynor J’s concurring opinion in *Escola v Coca Cola Bottling Co of Fresno* 24 Cal 2d 453; 150 P 2d 436 (1944), the movement from contributory to comparative fault, and Judge Learned Hand’s opinion in *United States v Carroll Towing Co Ltd* 159 F 2d 169 (1947) – in Rabin R, “Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts” in Madden MS (ed), *Exploring Tort Law* (Cambridge University Press, New York, 2005) pp 52-77.

¹³ See Friedman L and Ladinsky J, “Social Change and the Law of Industrial Accidents” (1967) 67 Colum L Rev 50.

¹⁴ Friedman and Ladinsky, n 13 at 55-62.

¹⁵ See Rabin R, “Some Reflections on the Process of Tort Reform” (1988) 25 San Diego L Rev 13.

¹⁶ Rabin, n 15 at 19-23.

attention to Ralph Nader's *Unsafe at Any Speed* (and General Motors' heavy-handed effort to discredit him), and the enactment of federal motor car safety legislation, as well as the rise of motor vehicle no-fault.¹⁷

My broader thesis is that major inroads into tort along the lines of legislative no-fault schemes are vitally dependent on a politically proactive atmosphere that embraces compensation schemes as part of a broader reform agenda. As a consequence, administrative compensation schemes have not thrived in American political culture. When they have been enacted – apart from workers' compensation and, to a lesser extent, motor vehicle no-fault – as in the coverage of childhood vaccine and black lung coal-mining victims, they are narrow in scope and political responses to industry influence.¹⁸

The no-fault phenomenon stands at the crossroads of tort and the administrative state. Like tort, it aspires to do double-duty: providing compensation and also creating incentives to safety. But unlike tort, no-fault is characterised at its core by a social welfare perspective. Reflecting the aspirations of the administrative state, it rejects fault as an eligibility threshold and at the same time rejects the notion of compensating for harm on an individualistic, make-whole basis; instead, placing ceilings on wage-loss recovery and eliminating (or sharply limiting) pain and suffering recovery.¹⁹

No-fault schemes, then, offer a natural segue, between tort and the more conventional form of administrative regulatory activity that was barely apparent in the preceding era, at the tail end of the 19th century.

THE FEDERAL REGULATORY PERSPECTIVE: FROM 1900 TO THE MID-1960S

Just as the progressive era political culture created a fertile field for workers' compensation, it also paved the way for national health and safety regulatory legislation broader in scope than bursting steamboat boilers. In particular, one finds the antecedents to modern food safety and pharmaceutical legislation in the meat inspection and pure food and drug mislabelling legislation of 1906.²⁰ While these were modest efforts – essentially, extensions of the common law prohibition against fraudulent conduct – the establishment of a federal regulatory presence in areas as vital to human health and safety as the food and drug supply constituted a landmark event in the development of accident law in the administrative state.²¹

What is equally notable, however, from a historical perspective, is the parallel to *MacPherson* in the realm of tort. Just as in tort, after the stirring of concern and laying of a regulatory foundation for health and safety in the early 20th century progressive era, there followed over a half century in which any heightened national concern for accidental injury victims was largely ignored, including most strikingly, the New Deal, which was dominated by Franklin Delano Roosevelt's program of economic security measures. Thus, in the area of personal health and safety concerns, the administrative state, in tandem with tort, largely laid fallow from the progressive era until the mid-1960s.

A PUBLIC LAW VISION OF TORT CRYSTALLISES: MID-1960S TO 1980

In the mid-1960s, a new era begins in which tort becomes a full participant in the perspective associated with the administrative state. Let me pick up on the dawning of this new era by returning for a moment to the social welfare theme that I identified with the coming of workers' compensation. This theme – in particular, the workers' compensation ideology of an enterprise bearing the injury costs associated with its economically productive activity – offered the first glimmering of a truly public law vision of accident law grounded in a concept of enterprise liability. Back in the progressive

¹⁷ Nader's book was published in 1965; the *Auto Safety Act* was enacted in 1966.

¹⁸ I discuss the principal no-fault enactments since 1970 in Rabin R, "The Renaissance of Accident Law Plans Revisited" (2005) 64 Md L Rev 699.

¹⁹ It follows that creating incentives to greater safety is a secondary goal of no-fault schemes.

²⁰ Act of 30 June 1906, ch 3913, 34 Stat 669 (*Meat Inspection Act*); *Pure Food and Drug Act*, ch 3915, 34 Stat 768 (1906).

²¹ I address the broader sweep of legislation defining the administrative state beginning with the formation of the Interstate Commerce Commission in 1887 and throughout the succeeding century in Rabin R, "Federal Regulation in Historical Perspective" (1986) 38 Stan L Rev 1189.

era, however, there was a sharp contrast between the ideology of workers' compensation and the contemporaneous landmark move in *MacPherson* to eradicate the privity limitation in tort on product defect suits. *MacPherson* relocated products liability within the emerging mainstream of tort: that is, *fault-based interpersonal liability*. In this important sense, *MacPherson* remained grounded in a conception of tort as essentially a private law regime. By contrast, workers' compensation *eradicated* the fault requirement, rejecting interpersonal responsibility as a focal point of compensating accidental harm.

When the clock is moved forward then, the hallmark of *tort* beginning in the mid-1960s period was the judicial effort to assimilate the enterprise liability ideology of workers' compensation to tort through emphasis on (i) creating optimal market-based incentives to safety; and (ii) at the same time, spreading accident costs broadly through the pricing mechanism, rather than having them fall on individual accident victims. Upon this foundation rose a public law vision of tort.²²

It is essential to note, however, that if enterprise liability in tort was strongly influenced by the social welfare perspective of workers' compensation, it also reflected the striking growth in private liability insurance in the period leading up to the mid-1960s, which provided strong support for the enterprise liability ideology.²³ In the end, enterprise liability theory in tort aspired to efficient and broad risk distribution of the costs of accidents as a norm, challenging the traditional tort focus on interpersonal responsibility.²⁴

In the case of products liability, this effort meant treating *MacPherson* as only a first step towards subsequent adoption of *strict liability* for defective products (which ultimately only succeeded in part). In other areas of tort law – land occupiers' liability, intrafamily tort liability, liability for encouraging heightened third-party risks to accident victims, affirmative obligations to protect against harm – the influence of enterprise liability thinking was somewhat more indirect, but still pervasive. It meant breaking down barriers of no-duty (and limited-duty) of due care so that fault-based liability, animated by insurance and compensation perspectives, extended to new categories of tort plaintiffs.²⁵

But *why* was this phenomenon, the romance of tort with enterprise liability, so late in coming? After all, workers' compensation had spelled out the underlying conception a half-century earlier.²⁶ Here, once again, the interplay between tort and the administrative state becomes critical to understanding the pro-active influences that were at work on the common law side. In my view, just as the rough correspondence in time of *MacPherson* and the progressive era health and safety legislation was no mere coincidence, so too, the heightened judicial sensitivity to enterprise liability ideology that characterised late 1960s to 1980 tort law is best understood as a convergence with the consumer/environmental legislative reforms of that period. Reform efforts in both tort and the administrative state were motivated by a newly-emergent demand for greater corporate responsibility and a shift in academic focus to economic concerns about internalisation of health and safety costs.²⁷

²² The foundation for this new emphasis in common law thinking is generally (and correctly) attributed to Traynor J's landmark concurring opinion in *Escola v Coca Cola Bottling Co of Fresno* 24 Cal 2d 453; 150 P 2d 436 (1944). But Traynor J, at that point, was unable to muster support for his expansive vision; the majority opinion in *Escola* proceeds on a conventional *res ipsa loquitur* theory of negligence.

²³ See Abraham K, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Harvard University Press, Cambridge, 2008) pp 171-197.

²⁴ These two functional goals – optimal incentives to safety and wide distribution of risk – are not necessarily consistent; particularly, in cases where the victim of injury is *ex ante* the cheaper cost avoider. The foundational discussion of these issues is Calabresi G, *The Costs of Accidents* (Yale University Press, New Haven, 1970). Note also that to the extent enterprise liability in tort emphasised *optimal* incentives to safety, it pushed beyond the workers' compensation conception of enterprise liability, which gave higher priority to broad-based compensation than to full compensation (and deterrence) of accidents.

²⁵ See generally, Sugarman S, "A Century of Change in Personal Injury Law" (2000) 88 Cal L Rev 2403.

²⁶ And indeed, vicarious liability for the negligent acts of employees was of even earlier vintage, although it was initially rooted in a more formalistic conception of responsibility. The classic treatment of the subject is Baty T, *Vicarious Liability* (Clarendon Press, Oxford, 1916).

²⁷ For discussion of the influential factors on the tort side, with a somewhat different emphasis from mine, see Schwartz G, "The Beginning and the Possible End of the Rise of Modern American Tort Law" (1992) 26 Ga L Rev 601 at 610-620.

THE FEDERAL REGULATORY PERSPECTIVE: MID-1960S TO 1980

Now, I will turn more directly to the same period, the mid-1960s to 1980, from a federal regulatory perspective. At this point, health and safety concerns finally become a dominant feature of the national administrative state agenda.

Until the mid-1960s, it remained the case that in virtually every principal area of health and safety concern, there was a vacuum of federal regulatory oversight.²⁸ Did this state of affairs, immediately preceding the dawn of what I have referred to as the public interest era,²⁹ reflect a high degree of political confidence that the tort system was achieving a socially desirable level of incentives to safe practices? Clearly not; in the mid-1960s the tort system, as I have indicated, was correspondingly just entering a new phase of proactive concern for health and safety. Moreover, in many critical areas, tort played a limited complementary role at most. Consider once again in this regard, the sphere of industrial injuries, where tort had been replaced by workers' compensation, which by design – through limits on wage replacement and no recovery for pain and suffering – was not meant to provide full deterrence of risky conduct. Consider as well, the air and water pollution areas, where only the ancient and limited law of nuisance occupied an inconspicuous corner of the field.

Tort aside, then, Congress moved to fill these federal legislative gaps during the public interest era animated by a spirit of activism carrying over from the Civil Rights and anti-Viet Nam War movements, and grounded in an emergent concern about heightened corporate and governmental responsibility.³⁰

Among many other newly-minted regulatory schemes, Congress enacted in succession: the *Auto Safety Act 1966*, addressing motor vehicle safety design features; the *Clean Air Act 1970*, addressing air pollution controls; the *Occupational Safety and Health Act 1970*, addressing workplace injuries; the *Federal Water Pollution Control Act 1972*, addressing water pollution and drinking water safety issues; and the *Consumer Protection Safety Act 1972*, creating federal authority to regulate risks in consumer products generally.³¹

Interestingly, the dramatic upswing in public health and safety legislation during this period was not really an attack on the fundamentals of a market-based economy; rather, like tort as a regulatory mechanism, it was an extension of the *policing model* of regulation: a multi-pronged effort to internalise accident costs to the source.

To sum up, beginning in the mid-1960s, tort and the administrative state assumed centre stage for the first time in exercising broad-based authority in the fields of health and safety, influenced by a strong undercurrent of reform sentiment aimed at enhancing corporate and governmental responsibility.

A POSTSCRIPT ON THE LATE TWENTIETH CENTURY AND BEYOND: EQUILIBRIUM AND RETRENCHMENT

One hallmark of the post-public interest era, dominant since the last two decades of the 20th century, has been a new and heightened attentiveness to the *intersection* of tort and the administrative state – and correspondingly, notable efforts at retrenchment targeting the tort system. This phenomenon has been prominently displayed in the *State* legislative tort reform movement, which picked up steam in

²⁸ I say “virtually” because there was a notable exception a few years earlier: the *Food Drug & Cosmetics Act 1962* established heightened requirements of safety and efficacy for new prescription drugs, in large part as a reaction to the near-miss in the United States of the European birth defect catastrophe in prescribing use of thalidomide during pregnancy. Otherwise, there was a legislative vacuum.

²⁹ See Rabin, n 21 at 1278-1315.

³⁰ Whether this spate of federal health and safety legislation filled the gaps *effectively* is, of course, another question, but beyond this historical overview.

³¹ These legislative efforts are discussed in greater detail in Rabin, n 21 at 1278-1295.

the mid-1980s and succeeding decades when ceilings and related limitations on non-pecuniary damage awards, punitive damages, joint-and-several liability, and the collateral source rule were widely enacted.³²

The spirit of retrenchment is similarly apparent in a dramatically increased attentiveness to legislative and regulatory preemption of common law tort claims through a series of United States Supreme Court decisions, in which the key question has been whether federal regulatory schemes, in order to be efficacious, require the displacement of State tort law.³³ At the same time, federal legislative initiatives *protective* of health and safety have failed to move beyond the bold enactments of four decades ago.³⁴

Below the radar screen of legislative initiatives aimed at reining in the common law, the tort system itself offers evidence of a retreat from the proactive 1970s to a diminished enthusiasm for further expanding the domain of accident law. For example, in the products liability area, the enthusiasm for enterprise liability has given way to an understanding that the concept of “product defect” is not self-defining – and, in fact, the judicial efforts to give it content in design and warning defect litigation have largely yielded doctrinal approaches that seem largely indistinguishable from fault-based liability.³⁵ Similarly, efforts to expand “enabling” responsibility to servers of intoxicated drivers who injure others, manufacturers of handguns, owners of premises where intruders prey on innocent victims, and the like, have met with limited doctrinal success.³⁶ So, too, in the realm of mass torts, efforts to aggregate classes of victims in product and toxic exposure cases have failed to build on early indications of judicial boldness, leading to informal mass settlement strategies.³⁷

Prevailing conservative tendencies notwithstanding, many of these areas – ranging from pre-emption to enabling responsibility – presently remain in flux, balanced uneasily between sensitivity to protection of victims of accidental harm, on the one hand, and concerns for unduly burdening economic growth and individual liberty, on the other. And that is precisely why accident law remains such a dynamic and intellectually interesting area, where past historical patterns are hazardous as predicates for predicting the future of tort and the administrative state.

³² See Sanders J and Joyce C, “Off to the Races: The 1980s Tort Crisis and the Law Reform Process” (1980) 27 Hous L Rev 207.

³³ See Rabin R, “Territorial Claims in the Domain of Accidental Harm: Conflicting Conceptions of Tort Preemption” (2009) 74 Brookl L Rev 987. It should be noted that the Supreme Court has frequently rejected preemption in this series of cases. The executive branch has played a role here as well, particularly during the Bush Administration when there was a concerted pro-preemption initiative. See generally Sharkey C, “Preemption by Preamble: Federal Agencies and the Federalization of Tort Law” (2007) 56 De Paul L Rev 227.

³⁴ Congressional no-fault efforts to expand the compensation side of the administrative state, with the sui generis exception of 9/11 victim compensation, have similarly stalled; most notably, the fruitless effort to enact an asbestos victims compensation scheme.

³⁵ See Schwartz, n 27 at 623-634.

³⁶ For discussion of the concept of enabling responsibility, see Rabin R, “Enabling Torts” (1999) 49 De Paul L Rev 435.

³⁷ See Rabin R, “Harms from Exposure to Toxic Substances: The Limits of Liability Law” (2011) 38 Pepperdine L Rev 419 at 427-429.