

OLD PHRASES AND NEW FACTS

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In the last few years, Law Reviews have been filled with articles which purport to deal with law realistically or functionally and which attack what, to paraphrase Jerome Frank, may be called "Bealistic" conceptualism. Many of these articles have gone to what appears to the writer to be extravagant extremes. Nonetheless, they all show a healthy tendency to urge judges, lawyers and law teachers to look rather to what the law does than to what the courts say. After all, it is a comparatively easy matter to construct a beautifully consistent and symmetrical system of supposed law if it is phrased in terms so vague as, without more, to be inapplicable to the facts of any situation which has not, in the past, constantly come before the courts in the course of litigation. The present article is intended to deal with only a few particulars in which an intensive investigation may be valuable not only in shedding light upon the nature of the judicial process but also in aiding courts themselves to realize the precise nature and effect of the function which they exercise.

The first of these is the exact function exercised by courts and juries in those fields of law in which the principles and rules are couched in terms which require human judgment for their definition before they can be applied to the facts of any particular case. Many years ago, Professor James Bradley Thayer demonstrated to the satisfaction of the entire profession the fact that judges are often not only permitted but required to decide pure and simple questions of fact in passing upon the admissibility of testimony. This shattered the old idea that anything which courts decided was, therefore, matter of law. Unfortunately, Professor Thayer was almost exclusively preoccupied with the admission of evidence. He, accordingly, paid scant, if any, attention to the function of court and jury in dealing with evidence once it was admitted. No one of equal authority has attempted to demonstrate the corollary of his proposition—namely, that juries do, under the guise of passing on matters of fact, often lay down the law as it is applicable to the actual facts of the case before them. This is most obvious in negligence cases and in dealing with a somewhat similar situation, namely, whether there is a privilege which justifies intentional aggression. In both of these situations, not only the general principles but also the rules applicable to the particular types of situation are so phrased that someone must deter-

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mine whether the plaintiff or defendant acted reasonably in view of the circumstances which existed at the time of his action.

Whatever else it is, this question is not one of fact in any true sense of that word.¹ It might be so if the standard of so-called "reasonable" conduct was what the average man did. It might be so if it meant what the particular jury men customarily did; but both of these tests have been rejected. To describe negligence as the failure to use that care which a reasonable man would use under the circumstances is merely a convenient way of leaving it to the judgment of someone, either court or jury, to say whether the defendant (or the plaintiff in a case of contributory negligence) acted as the court or jury think he ought to have acted. To speak of this as what a reasonable man should do, has certain advantages. The very fact that the social judgment of court or jury is personified in a reasonable *man* emphasizes the fact that account must be taken of the fact that the defendant or plaintiff is a man with certain unescapable human frailties. But, after all, this technique is nothing more nor less than a convenient method of leaving it to someone to pass an *ex post facto* judgment upon the conduct of the particular party litigant.

If this is kept constantly in mind, the task of ascertaining the proper function of court and jury in forming such judgments is greatly simplified. It may be possible to segregate those matters upon which a court has, or under our concept of justice is assumed to have, a peculiar competence to pass a proper judgment from those upon which the judgment of the ordinary man "in the street" is likely to be satisfactory. It is possible to recognize certain conflicts between the popular and the legal concept of what is just. There is an immense field in which intelligent investigation might show extremely interesting and probably exceedingly valuable results.

The control which courts exercise over juries, under the guise of their power to rule that the evidence is not sufficient to justify reasonable men in finding that the defendant's conduct was negligent, varies enormously in different jurisdictions. Indeed, there are many state constitutions the words of which, at least, prohibit the court from exercising anything approaching a true control over the jury. What are the causes of these variations? It is more than possible that they may be due to very deep-rooted differences in social values. It is entirely natural that courts in highly industrialized states, in which the whole tone of public opinion is favorable to the removal of every bar to effective production, should tend to regard it as unreasonable to demand of industry any precautions which might check intensive production by making it unprofitable. On the other hand, in agricultural states it is quite natural that no such regard should be paid to the supposedly harm-

1. See Bohlen, *Mixed Questions of Law and Fact* (1924) 72 U. OF PA. L. REV. 111, reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) 601.

ful economic effect of requiring decent consideration for the interest of the individual's life, limb and property. The statutes in the various states show a similar difference in attitude on the part of the legislatures. It would be extraordinary if the attitude of the judiciary were not similarly influenced.

Another matter may safely be said to have led courts that have been given or have assumed a fairly effective power of control over the juries, to exercise their power in a manner which to the ordinary man may appear to infringe unduly upon the proper functions of the jury. For good or evil, judges feel that the "mine run" of juries entertain a prejudice in favor of the injured man which, if the decision is left to them, will lead them to find in his favor, irrespective of whether they believe that either he or the defendant has acted properly or improperly. After all, the concept that tort liability is based on fault is legal rather than popular. The supposedly archaic idea that "he who breaks must pay" still has a very large following in the class from which jury men are drawn.

Furthermore, courts feel an intense and probably well warranted distrust of partisan expert testimony. They are naturally reluctant to permit actions to be brought in which recovery depends upon the jury's estimate of the truthfulness and reliability of the testimony of the plaintiff and the conflicting testimony of partisan medical witnesses. If there be any justification for the attitude of the great majority of the industrial states of this country in refusing to allow recovery for illness or miscarriage caused by conduct of the defendant negligent because it was likely to cause more direct physical harm, it lies in this distrust by the courts of the jury's competence to handle such testimony intelligently and fairly.

In addition, it is a regrettable fact that, taken by and large, though with many honorable exceptions, of course, courts do not implicitly, to say the least, trust the accident bar. The scent of perjury and fabrication clings to cases in which it would be puerile for any court to expect the jury to detect it. In their effort to prevent disreputable practitioners from winning verdicts by improper practices, courts have been forced to decisions which have subsequently, in more meritorious cases, been effectively cited as precedents.

The field of investigation in these domains is immense. If honestly cultivated by investigators who have no theory to sustain, no thesis to demonstrate, but the single desire to establish the truth, the effort of cultivating it will, I feel sure, bear a harvest which will amply repay the labor which must be expended.

Too little attention has been paid to the fact that a very large part of our law consists of rules for the creation of machinery and instrumentalities to accomplish certain purposes of those who use them. There may be many cases in which there are two separate and distinct questions: First, the propriety of the purpose for which the legal instrumentality is to be used; sec-

ond, and equally important, the effectiveness of the steps taken to create an instrument which will accomplish that purpose. The first involves what may not properly be called social judgment; the second involves merely a knowledge of the technique of creating a tool capable of doing the job desired.

It is in the latter field that the so-called functional approach may be most valuably employed. There is no doubt that much of the legal machinery by which the business of life is accomplished is archaic in the sense that it was designed to meet social needs far more simple and, in the main, quite different from those of the present day. The old machinery has been patched from time to time. It has been in part rebuilt, but too often by legislatures and courts which have been more concerned with preserving the integrity of the original design than in adapting the machinery to its new uses. After all, what is a contract but a device by which the future can be made measurably secure? What is a corporation but a "method" by which business may be done collectively without individual responsibility? From time to time these pieces of legal machinery should be re-examined, not to see whether they conform to their original design but to see whether under modern conditions they are effective to accomplish the ends which they were designed to serve.

But the inquiry must not stop at this point, and here the so-called functional approach is exceedingly valuable, if not essential. If it be recognized that the corporate structure is merely a method, a device, a piece of machinery, to accomplish socially desirable ends, we have the basis for ascertaining intelligently whether it is being properly used or improperly abused. Mere efficiency is not enough. The value of a machine is gauged not by the quantity but by the quality of its product. The ingenuity of our profession has led to the use of the corporate device for ends which are quite outside those for which it was originally designed. If these ends are socially desirable, the adaptation of the old machine to accomplish them is itself desirable and all that remains is to make the machinery ideally effective for that purpose. If the ends be undesirable, it is well to recognize the point at which courts have been led to permit the abuse of the corporate mechanism. It is the task of statesmanship, using that word in its broadest sense, to determine what is socially desirable. This task the inertia of our legislatures often forces the judiciary to perform. Perhaps they are best fitted to perform it. Cases involving corporation law come before them daily. They have material for understanding the manner in which the corporate structure is used and abused. Investigations of corporate finance, such as those made by Professor Berle and others, are immensely helpful. If our courts can be made to rid themselves of the idea that a corporation is a legal thing or concept in itself, and recognize that it is merely a method or means to an end, it is safe to predict that those investigations will produce a rich harvest.

Luckily, in the forty years which have passed since the writer came to the Bar, the attitude of law teachers, law students and even of judges toward the law has fundamentally changed. In 1892 it would have been considered well-nigh impious to look beyond the words used by judges and to try to find out what they were doing by the use of their words and why they wished to do it. The teaching of law was an exegesis on sacred texts culled from judicial opinions. Many of us may go too far in our efforts to psycho-analyze, as it were, the judiciary, who not only do not desire such treatment but, indeed do not realize that they need it. Nonetheless, the change in approach seems to the writer altogether healthful.

The law student today recognizes that many of the most beautifully intricate and subtle of legal theories are merely a particular form of legal fiction designed to make the circle of the assumption of an immutable body of law square with the necessity of making the administration of law accomplish what are recognized as desirable social ends. Theories are now recognized as often a means of justifying decisions rather than as reasons for making them. Many situations can be pointed out where substantially identical results have been reached upon entirely different theories. The introduction of the automobile, with the realization of the danger which is inseparable from its use, has led to a wide extension of the ambit of vicarious responsibility of those who permit others to drive their cars. There is perceptible a very definite feeling that the automobile is so dangerous a means of locomotion that the owner of it should answer not only for the manner in which he drives it, or in which it is driven by those who, as his servants, are engaged in forwarding his business or affairs, but also by anyone whom he permits to drive. In some jurisdictions, statutes provide specifically that the registered owner of the car shall be liable for the negligence of anyone whom he permits to drive it for any purpose. In others, insurance is required which, by the terms of the statute or in practice, covers a similar liability. In others, the family-purpose doctrine extends the owner's liability beyond that which the law of agency would impose. In others, the owner is required to control his licensee's driving when he has the opportunity to do so. In an English case the licensee was called the agent of the owner, although the owner was not present and, therefore, had no opportunity to exercise the power of control which his ownership was held to give him. In some jurisdictions, the liability is frankly put on the ground that the automobile is a dangerous instrument. Thus the same result is in whole or in part reached by quite different routes.

So, too, the very prevalent feeling that one who has negligently put himself in peril should not thereby be barred from recovery against a defendant who, with knowledge of the plaintiff's dangerous position, fails thereafter to exercise carefully his then existing ability to avert the accident,

is given expression in various jurisdictions in various ways. In many, it is expressed by holding that the defendant had the last clear chance of averting the accident and that, therefore, the contributory negligence of the plaintiff does not bar him from recovery; in others, by treating the defendant's failure to take reasonable care after knowledge of the plaintiff's peril as wanton, wilful or reckless misconduct. The same result has been reached in a few jurisdictions by the application of the so-called comparative negligence doctrine. Here again, the theories differ but the result is the same. Obviously, the theories do not require the result but are merely justifications of it. These are only two of a large number of examples which every judge, lawyer, and law teacher, conversant not only with the law of his own jurisdiction but with that of others as well, will immediately recognize as of like kind.

If, however, we are to look at the law realistically, if we accept Justice Holmes' view that the law consists of a prophecy as to how the majority of seven or nine men will decide in a given case, we must not overemphasize the importance of decisions rendered under similar states of fact. What the practitioner called upon to advise his client must consider is, as Justice Holmes has indicated, how a particular court will react to the facts which he believes his client's testimony is sufficient to establish. It is the effect of those facts upon court and jury which is all important. Whether courts should attach as much importance as they do to the language, particularly if it be striking, or of some highly respected brother or previous member of the Bench, may be doubtful; that they are apt to do so is clear. The desire for symmetry, for consistency, whether adult or infant as one disagrees or agrees with Jerome Frank, is likely to be decisive except where the application of a previously announced principle shocks the judge or court. There is wide room in the very broad formulæ in which much of our law is couched for the exercise of judicial judgment or, to use a less formal word, "hunch"; but it is the reverse of "realism" to exaggerate the field in which this judgment or "hunch" operates.

Modern students, who will be the *corps d'élite* of the practicing Bar of the near future and from whom it is to be hoped and perhaps expected that ultimately the Bench will be recruited, are beginning to recognize what may be termed the "invocatory" word. By this is meant a word which has customarily been used to describe a situation that has habitually been recognized as requiring a particular legal result. Students are being taught to realize that, where this result is desired, courts often justify it by using such a word to describe a situation to which the word is entirely inappropriate if it be taken in its traditional sense and not so extended as to be valueless as a word of definition or even of description.

It is interesting to find this survival of the primitive instinct of word magic. There is an obvious similarity between the action of a court which, for one reason or another wishing to hold one man responsible for the action of another, calls the one the agent of the other, although many of the most essential requirements for agency are absent, and the keeping secret the name of the tribal god so that its enemies may not invoke him to destroy the tribe of which he is the deity. Little harm is done by this if exactly what the court is doing and why the word is being used is recognized. Unfortunately, this is not always the case. Cases in which, for a reason quite different from that professed, a customary term is used in an entirely new sense, are too often used by analogy to extend unduly the meaning of the original term in fields in which it is appropriate. A more serious instance of archaic recrudescence, in the writer's opinion, is the doctrine, to which the authority of a very great name has given immense vogue, that the court's construction of the words of a contract determines its scope and effect, even though neither of the parties so understood them. This is interesting to music lovers in that it calls to mind the runes on Wotan's spear; but it is unfortunate that in dealing with a legal tool so important as a contract such currency should have been given to a concept which is not only archaic but also differs radically from the understanding of substantially everyone who uses it. This is particularly true since every end which this technique serves could have been reached by other methods more in conformity with modern legal thought.

The failure to recognize that many of our legal principles and rules deal with the creation of instrumentalities or tools to accomplish a desired result, has had what appears to the writer to be a highly undesirable consequence. A tool has no value as a thing in itself; it is a means to accomplish an end. In order to attain its proper efficiency a tool must be designed for the particular purpose for which it is to be used. The mere fact that a certain type of tool is called by a common name does not, in ordinary life, imply that each tool shall be in every particular the same. There are many forms of spanners, the diameter of which depends on that of the nut which is to be tightened or loosened. Thus, while certain characteristics are common to all spanners, certain other characteristics vary with the use to which they are to be put. Is not this equally true of such devices as "contracts" or "corporations"? Should it not be recognized that, while there are certain characteristics common to all contracts, the contract for insurance or the contract for the issuing of share certificates may have other characteristics peculiar to the subject-matter with which it deals, that may differ very radically from the characteristics of the ordinary mercantile or commercial contract?

The idea that a single word carried with it always a unitary connotation has made immense trouble in other fields. Throughout the law, the problem of causation continually arises. When the writer came to the Bar it was accepted that there was such a thing as legal "causation", a body of rules and principles by which the causation requisite to responsibility in every field could be ascertained. Today there is a growing recognition that this is not so. To condense what Lord Haldane said in *Upton v. Great Central Ry.*,² it is now recognized that causation is relative to the problem under discussion. After all, the rules of causation are rules which limit responsibility at some point short of answering for all the events of which the actor's conduct is a necessary antecedent. The problem is one of determining the ambit of responsibility. There is no reason why the same rules should apply in criminal prosecutions, in which the purpose is largely punitive, and in tort actions, in which the purpose is in the main compensatory. There is even less reason why the same rules should apply where the responsibility is based, in theory at least, and still too largely also in fact, on the wrongdoing of the defendant and where, as in workmen's compensation cases and insurance cases, culpability, real or legalistically assumed, has no part in determining the existence or extent of responsibility.

It is perhaps too much to ask that courts should abandon the use of words and phrases which in fact are valueless as affording a yardstick by which to measure the legal effects of a situation or even as giving to a jury any aid in determining the matter in controversy. To regard such vague, unmeaning phrases as expressing the law is extremely convenient. It enables courts to leave at large to the jury the determination of many matters which are essential to the decision of the case in hand while at the same time not appearing to abrogate any of their own functions. "Power of control" is the traditional test of agency. Yet, without the ability to exercise it, "power of control" is merely a metaphysical abstraction. It exists when the circumstances are such as to make it just to hold the alleged principal vicariously responsible for the acts of the alleged agent. Indeed, the arrangement between the two may be such that an attempt to exercise the power would be a breach of the contract between them. Nonetheless, it is convenient and may be valuable to leave the whole question of vicarious responsibility under novel circumstances to a jury. The circumstances of the cases presented for adjudication are infinitely various. If courts were themselves to decide whether agency exists under a particular state of facts, their rulings would arise to trouble them in the future when a case before them was similar but not identical. This is so because, unfortunately, any ruling of a court, being an application of a legal principle, is assumed to partake of the immutability which it flatters the legal profession to ascribe to the common

2. [1924] A. C. 302, 307.

law. The decision of the jury, on the contrary, is merely ephemeral, "good for the day and trip only." Their decision in no way binds the future. It does not preclude a contrary finding in a case in which the circumstances may be only slightly different. It may, therefore, be well that courts should leave the matter to the control of the jury. If so, the phrase "power of control" is as convenient a device as can be imagined.

It is futile to believe that anything any one man could write, certainly anything which the present writer can say, can change court practices so traditional and in many respects so convenient. However, and here, unlike a sermon, the text is at the end, there is great gain in the fact that in many of our principal law schools the reality of what the courts are doing is being brought to the attention of students. It is possible that, if students are taught to see that many of the methods adopted by courts are mere devices, they will, if and when they come to the Bench, remember some little of their teaching. Perhaps, indeed, like a growing number of eminent and conspicuous judges, they will, when the need arises, tell the real reasons for their decisions and not conceal them beneath legalistic and often meaningless phrases.