

1959

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Recommended Citation

DeParcq, William H., "In Defense of the Fault Principle" (1959). *Minnesota Law Review*. 2549.
<https://scholarship.law.umn.edu/mlr/2549>

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Comment:

In Defense

of the Fault Principle[†]

Several writers have recently advocated abandoning the "fault" principle of liability in negligence actions; they propose to substitute for the principle a strict method of compensation based on the fact of injury alone. Mr. DeParcq takes issue with this proposed revision of the concept of liability in negligence actions, and concludes that society cannot yet afford such a system of compensation.

William H. DeParcq*

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

Sioux City & Pac. Ry. v. Stout, 17 Wall. (84 U.S.) 657, 664 (1874).

IN recent years there has been a strong movement spurred by some judges and law professors to abandon the traditional requirement that recovery for personal injuries or death is limited to cases where defendant was at "fault" and thus was "negligent,"

† This comment is the substance of an address made before the Michigan State Bar Association, in Detroit, Michigan, May 2, 1958. It followed the principal address delivered by Professor Fleming James, Jr., Harvard Law School, entitled "Practical Changes in the Field of Negligence." The remarks here expressed are intended to reflect the plaintiff's position on the abandonment of the "fault" principle.

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and to substitute instead a system of strict liability by which every injured person, or beneficiaries of those deceased, would recover regardless of fault.

These proposals, which made their first appearance innocuously enough in the law reviews, but which have since spilled over to such popular journals as *Colliers* and the *Saturday Evening Post*, would mean a revolutionary change in personal injury litigation as we know it. For that reason they deserve the most careful scrutiny by the profession.

The would-be reformers would not agree that they are proposing a drastic change when they urge abandonment of the fault principle. They believe that the fault principle has long since become meaningless, and claim that they are merely recognizing what is already an accomplished fact. "Negligence in Name Only" is the title of one of their articles,¹ Professor Ehrenzweig's highly-controversial little book has the paradoxical title, *Negligence Without Fault*,² and two other authors entitle their work, "Is the Law of Negligence Obsolete?"³ After reading the title to that article it came as no surprise to find the authors concluding twenty-one pages later, "The law of negligence as it exists today is obsolete."⁴

This claim, that under present law jury verdicts for plaintiffs are being allowed to stand even though defendant was not at fault, is made generally by these writers with regard to automobile cases and other run-of-the-mill negligence cases. It is urged with particular vehemence with regard to Federal Employers' Liability Act cases. Mr. Justice Jackson protested nine years ago that the fault principle "is without much practical meaning" in view of Supreme Court decisions in FELA cases.⁵ Not only the railroad lawyers but also the law review writers were quick to take up the cry. Last winter I wrote an article in the *Texas Law Review* reviewing the eleven Supreme Court decisions last term involving FELA.⁶ An able Texas lawyer, writing a reply to my article, called my discussion "a gleeful dance on the grave of the negligence concept. . . ."⁷

Far from doing a gleeful dance on the *grave* of the negligence concept, I think that the negligence concept is still very much alive. In ordinary personal injury litigation various sets of statistics show

1. Leflar, *Negligence in Name Only*, 27 N.Y.U.L. Rev. 564 (1952).

2. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951).

3. McNiece & Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255 (1952).

4. *Id.* at 276.

5. *Wilkerson v. McCarthy*, 336 U.S. 53, 76 (1949) (dissenting opinion).

6. DeParcq, *The Supreme Court and the Federal Employers' Liability Act, 1956-57 Term*, 36 TEXAS L. REV. 145 (1957).

7. Gee, *A Dissenting Postscript or, Notes From Underground*, 36 TEXAS L. REV. 157 (1957).

that plaintiffs have received verdicts in anywhere from seventy to eighty-five per cent of all cases. Certainly this means that in from fifteen to thirty per cent of those cases, the jury has found for the *defendant*. The injured persons denied recovery in those cases would hardly agree that the negligence concept is dead. In FELA cases, a member of the United States Supreme Court has said that the basis of liability "is and remains negligence."⁸ That this is not mere idle talk is shown by the fact that only last term the Court unanimously affirmed a directed verdict for the railroad in an FELA case.⁹ Though the figures are admittedly old, a study by the Railroad Retirement Board of 641 fatal injuries to railroad workers in the years 1938-1940 showed that only 497 of these resulted in any cash settlement.¹⁰ In other words in almost one case out of four, the railroad—presumably because it was not at fault—paid nothing for the death of its employee.

It seems to me that these figures conclusively refute the claim that the fault principle is dead. So long as a substantial proportion of defendants are escaping liability for injuries to their employees because it is determined that they were not at fault, negligence remains very much the basis for recovery.

This seems to me so clear that I feel even the reformers must recognize it. My guess is, therefore, that when they say the fault principle is dead, they do not mean that at all, but are merely overstating their view that the requirement of fault has not barred recovery in some cases where they think recovery should not have been allowed. They point, for example, to the case of *Ferguson v. Moore-McCormack Lines*,¹¹ in which ice cream in a freezer was so hard that a ship's waiter could not get it out with the scoop, and lost two fingers when he took a nearby butcher knife to loosen the ice cream; or to *Ringhiser v. Chesapeake & O. R.R.*,¹² where routine switching of a gondola car caused serious injury to an engineer who had jumped into the car to satisfy an urgent call of nature. How, they ask, can you say that the employer was at fault in those cases? The answer, of course, is that it is not for me to say how the employer was at fault. Nor is this the job of railroad lawyers or professors, or even appellate judges. Under our system, this is for the jury. If the jury, properly instructed, determines that the defendant is at fault, as it must and does when it returns a verdict against him, it is as silly and as futile to say that the fault principle

8. Douglas, J., concurring in *Wilkerson v. McCarthy*, 336 U.S. 53, 69 (1949).

9. *Herdman v. Pennsylvania R.R.*, 352 U.S. 518 (1957).

10. U.S. RAILROAD RETIREMENT BOARD, *WORK INJURIES IN THE RAILROAD INDUSTRY* 98 (1947).

11. 352 U.S. 521 (1957).

12. 354 U.S. 901 (1957).

is being abandoned as it would be to say that the presumption of innocence is dead because in some cases juries have convicted criminal defendants whom other persons may think not guilty of the crimes of which they are charged.

All the tumult and the shouting about the fault principle being dead boils down, then, only to this: *Some* writers believe that there are *some* cases in which juries have found for plaintiffs under circumstances which the writers regard as not involving fault. Undoubtedly this is true. Indeed, it is probably true that there have been cases in which juries have found for the plaintiff though everyone would agree that defendant was not at fault. The jury is a human institution, and it would be foolish to expect perfection from it. But these critics of the jury have yet to produce any evidence that the occasional errors of a jury are all in favor of the plaintiff, or that they are the result of deliberate disregard of the fault principle, or that any other system can be devised which would not err even more frequently. Indeed, such scanty evidence as we have points in the other direction.

Richard Hartshorne, distinguished federal district judge, and former Chairman of the Section on Judicial Administration of the American Bar Association, before his appointment to the federal bench, was for twelve years a trial judge in Essex County, New Jersey. During that period, in every case which he tried he wrote down privately, while the jury was out, his own opinion as to what the verdict ought to be. After the jury returned he compared its verdict with his own, and kept statistics as to how they matched. He regarded the jury's verdict as "wrong," not only if it was against the party for whom the judge would have decided, but also if the amount of damages was substantially different from what the judge would have awarded. The result over the twelve year period was that "out of the 253 verdicts received, the court had serious question with but thirty-eight, in seventeen of which it was felt that the verdict for the defendant should probably have been for the plaintiff, whereas in twenty-one others the verdict for plaintiff should probably have been otherwise."¹³ In terms of percentages, in eighty-five per cent of the cases the jury reached the same result as this able judge, in seven per cent of the cases the jury found for the defendant though the judge would have found for plaintiff, and in only eight per cent of all cases was the jury's verdict more favorable to the plaintiff than the judge would have given.

Of course these figures are not conclusive. It will be interesting to see the results of the intensive study which the University of

13. Hartshorne, *Jury Verdicts: A Study of Their Characteristics and Trends*, 35 A.B.A.J. 113-14 (1949).

Chicago Law School has been making of juries. But I think we can fairly say that there is no evidence to date that juries do not make a conscientious and usually successful attempt to apply the fault principle discerningly. And it is beyond cavil that the requirement of fault does continue to bar recovery in a substantial number of cases. Adoption of a system of liability without fault would then be, as I asserted at the outset, a revolutionary change in our legal system.

The mere fact that this proposal represents a change does not, of course, make it bad. There is much that is attractive in the idea of providing compensation for all injured persons, rather than confining it to those seventy to eighty-five per cent who are injured through the fault of another. Liability without fault has very respectable historical roots in the early common-law cases which allowed recovery in the action of trespass without any showing of negligence. And I fully believe that the present standard of liability based on fault has very little effect as a deterrent of carelessness, and thus that there is no reason to believe we would have more accidents if the fault principle were abandoned. But before we agree that this attractive proposal should be adopted, it is necessary to take a very close look at the consequences it would have for those persons who have been injured. I propose that we consider first that substantial group of persons who are harmed by the fault of another, and who therefore are entitled to recovery at the present time.

Adoption of a system of absolute liability would undoubtedly mean that those persons would receive a much smaller amount than they receive at the present time. Many of our present rules of damages make sense only in terms of the fault principle. Take, for example, recovery for future pain and suffering by a person who has been injured. Already this item of damages has been severely attacked by Professor Jaffe of the Harvard Law School.¹⁴ And in a recent issue of the *Ohio State Law Journal* Professor Plant, of the University of Michigan Law School, has proposed that in all cases payment for pain and suffering be limited to fifty per cent of the actual medical expenses incurred by plaintiff.¹⁵ Think what this would mean to the person, for instance, who has lost an arm and who suffers from a "phantom limb." The marvels of modern medicine are such that an amputated arm is quickly and efficiently dealt with. A week or two in the hospital, medical expenses of perhaps \$200, and the injured person is sent home. Under Professor Plant's scheme, the injured person would be awarded only \$100 for pain

14. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *LAW & CONTEMP. PROB.* 219, 223-25 (1953).

15. Plant, *Damages for Pain and Suffering*, 19 *OHIO ST. L.J.* 200, 210-11 (1958).

and suffering, even though for fifty years he must endure the burning sensation and pain which such an injury causes, as well as the embarrassment and humiliation which the lost arm will cause.

Professor Plant's proposal strikes me as completely unsound, but it would be even worse to deny all recovery for this pain and suffering. Yet that is exactly what will happen if liability without fault becomes the rule. Professor James states it candidly in a recent article: "Allowance for intangible items like pain and suffering (natural enough where compensation is made by a wrongdoer) may well be out of place where the bill is being footed by innocent persons."¹⁶ The only satisfactory justification for pain and suffering awards is that pain and suffering does represent a loss to the injured person, even though a noneconomic loss, and that "as between an innocent plaintiff and a negligent defendant, it is not difficult to decide who should bear this loss."¹⁷ Abandon the fault principle and you will be taking away from injured persons the damages to which they are now entitled for pain and suffering. By the same token, damages for "intangible" losses in death cases would presumably no longer be allowed. At the present time, in FELA cases at least, the verdict in a death case may include an award for the value of the care and guidance which deceased provided his children, and for the services which he performed about the home.¹⁸ This item of damages will hardly survive abandonment of the fault principle. Nor is this all. Already there are articles suggesting that there should be no recovery for loss of consortium in the absence of fault.¹⁹ And the present rule that an injured person can recover for lost earnings, though his employer has continued to pay him while he was recovering, and that he can recover for medical expenses though some third party provided them without charge, will certainly be abandoned if the fault principle is abandoned.²⁰

I think it will be agreed that the person who is injured through the fault of another will receive a smaller award if liability without fault should become the rule because of the effect such a change would have on those rules of damages which are justifiable only in terms of defendant's fault. But what about his recovery for his actual out-of-pocket losses, the expenses of his medical care, his lost earnings and the like?

16. James, *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293, 297 (1958).

17. DeParcq & Wright, *Damages Under the Federal Employers' Liability Act*, 17 OHIO ST. L.J. 430, 438-40 (1956).

18. *Norfolk & W. Ry. v. Holbrook*, 235 U.S. 625 (1915); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913); DeParcq & Wright, *supra* note 17, at 450-51.

19. *E.g.*, Jaffe, *supra* note 14, at 228-31.

20. James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537 (1952).

We can start, I think, from the premise that if liability is to be imposed without fault, we will no longer use juries to determine the damages. As one author says: "If the proposed injured workers' law is to operate regardless of negligence, it is not likely that its administration will be left to the already overburdened courts, federal or state."²¹ How then will such cases be handled? Justice Hofstadter, of the New York Supreme Court, gives the obvious answer. Such cases, he says, should be disposed of "in a sound and up-to-date manner patterned after the universally accepted system of workmen's compensation . . . on the basis of established payment schedules administered by a state board. . . ."²²

As you realize, adoption of the "universally accepted system of workmen's compensation" for all accident cases will mean a complete loss of the flexibility which the jury system provides. Damages will be computed from a statutory schedule, rather than apportioned to the loss suffered by a particular plaintiff. In an unusually fine article which appeared this winter in the *American Bar Association Journal*, an able Chicago defense lawyer, John C. McKenzie, gave an example of the operation of his state's Workmen's Compensation Act. "By its provisions," he said, "an Illinois lawyer who lost his index finger while working would receive \$1,480. Contrast that case with that of a watchmaker, who depends wholly upon the skill of his hands for his livelihood. He too, for the loss of an index finger, would receive \$1,480. Whatever this is, it is not justice."²³

Not only would awards under an administrative system patterned after workmen's compensation be inflexible, but they also would be much smaller than verdicts under the usual rules of damages. I am not going to make the usual shocking comparisons between amounts which have been recovered in tort cases and the recovery which would have been had for the same injury under the workmen's compensation law of one state or another. All know what they would show. Indeed those who want to abandon the fault principle are generally agreed that the state workmen's compensation acts are much too stingy, and they would propose more generous recovery if all accidents were to be brought under a similar scheme. But recovery can be more generous than under the present statutes and yet still be far less than full compensation for the harms suffered. Indeed the reformers admit frankly that they would not attempt to provide full compensation for the injured person. Professor Jaffe

21. Parker, *FELA or Uniform Compensation for All Workers*, 18 *LAW & CONTEMP. PROB.* 208, 211 (1953).

22. Hofstadter, *Let's Put Sense in the Accident Laws*, *Saturday Evening Post*, Oct. 22, 1955, p. 17.

23. McKenzie, *What is Truth? A Defense of the Jury System*, 44 *A.B.A.J.* 51, 54 (1958).

says that "as the goal becomes universal coverage of injury and disease, protection must tend to shrink toward the minimum level of economic loss."²⁴ And Professor James has said: "I regard the making of some substantial compensation in all accident cases as far more important than an assurance of the full outer reaches of compensation."²⁵ In fact when Professor James got around to discussing this question in the brilliant treatise which he and Professor Harper recently published on tort law,²⁶ they make it sound as if the injured person ought to be ashamed of himself for being so greedy as to ask for full compensation: "Even when we consider the victim's pecuniary loss," they say, "we must remember that accidents bring a net pecuniary loss to society as a whole—the social wealth and income is thereby diminished—so that if the victim is made entirely whole he will fare better than society and will not himself share the economic burden he is asking society to distribute."²⁷

On the whole, we can safely conclude that the person who is a victim of another's fault will receive, if the fault principle be abandoned, a minimum recovery which will be but a small portion of the damage he has suffered and to which he is entitled under our present system. Let us look at some of the other consequences of this change. It is suggested, from time to time, that court proceedings are an expensive way to award compensation to an injured person, and that this expense will be reduced by a plan similar to workmen's compensation. Such evidence as is available does not support this claim. Professor Conard, now of the Michigan Law School, made a study a few years ago of comparative expense under FELA and the Illinois Workmen's Compensation Act.²⁸ He found that for each dollar the injured person received, the employer and his victim each pay about twice as much in costs in workmen's compensation proceedings as they do in FELA matters, and that the cost to the taxpayer is four and one-quarter cents for each dollar received by the victim under workmen's compensation, while it is only one-half cent for each dollar paid out under FELA.²⁹

Nor do I think that it can be persuasively argued that imposition of liability without fault will lead to a better distribution of loss throughout society. For practical purposes today, important personal

24. Jaffe, *supra* note 14, at 235.

25. James, *supra* note 20, at 549 n.42.

26. HARPER & JAMES, *THE LAW OF TORTS* (3 vols.) (1956).

27. 2 HARPER & JAMES, *op. cit. supra* note 26, § 25.1, at 1302. *But see* Cooper-
rider, *Comment on The Law of Torts*, 56 MICH. L. REV. 1291 (1958).

28. Conard, *Workmen's Compensation: Is It More Efficient Than Employer's Liability?*, 38 A.B.A.J. 1011 (1952). See also, Richter & Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L.Q. 203 (1951).

29. Conard, *supra* note 28.

injury suits are always against defendants who are in a position to shift and distribute the loss. Either the defendant is insured, and the loss is ultimately borne by the policyholders of the insurance company, or it is a business enterprise which is able to pass on the loss to its customers by increasing the price of its product. The case in which a verdict is actually paid by an uninsured defendant is now so rare as to be insignificant. Perhaps an administrative scheme for awarding compensation, accompanied as it would be by compulsory insurance or self-insurance, would mean a somewhat more thorough loss distribution than we now have. But the difference would be at most a rather small difference in degree, rather than a difference in kind.

Finally, it is said that abandonment of the fault principle will relieve congestion in the courts. Former Judge David Peck, in New York, has been the most vocal exponent of the view that trial by jury in accident cases is a luxury we can no longer afford. Undoubtedly, congestion in the courts would be relieved by taking *all* personal injury cases away from the courts and putting them in the hands of an administrative agency. Indeed the problem of congestion would be completely solved by prohibiting *all* lawsuits, and inventing administrative boards to handle all disputes. Strangely, Judge Peck and his sympathizers never propose this. They are willing to hear the year-long antitrust suits, the contract disputes between industrial giants, and other cases of that kind. I would think that so long as our courts exist, there is no more important work they can do than hear the claims of the widowed and the maimed.

I do not wish to minimize the problem of court congestion. Of course it is shameful that litigants should have to wait four years to bring their cases to trial in New York City. This is an especially serious problem since the American Bar Association, ignoring the views of state courts which have passed on the question, has held that it is unethical for a lawyer to advance money to a client pending trial, even though the only alternatives are for the disabled client either to accept whatever inadequate settlement the defendant may offer, or to starve. But there are remedies for court congestion which will solve the problem in the few metropolitan centers where it is a problem without remitting all injured persons to the tender mercies of an administrative agency. We can readily provide more courts and more judges. Modern procedural methods will do a great deal, as has been dramatically shown by the improvement in the calendar situation in federal courts in New York City since those courts started using modern procedural techniques. New York has, in its state courts, as antiquated a code of procedure as does any important state in this country, and it has shown no real interest in adopt-

ing modern rules. Until it does, I can not be impressed by the screams of New York judges for the abolition of jury trial.

I will not pause to mention the ruinous effect on lawyers which adoption of liability without fault, administered by a state agency, would have. You can be sure that lawyers' fees would be restricted in proceedings before such an agency, and that the income of the profession would be drastically reduced. But we should not continue to have lawsuits merely to make lawyers rich, any more than we should abolish lawsuits in this area merely to make less work for the judges. Instead the decisive consideration must be, what system will be best for the person who is injured. We have seen, I think, that for the seventy to eighty-five per cent of injured persons whose injuries result from the fault of a financially responsible defendant, the present system is far superior to that which is now being urged. Under the present system injured persons receive full compensation for their losses; under the proposed new system they would be compensated only for a small proportion of their loss.

I have not overlooked the effect which the new system would have on those who are injured by their own carelessness, or as a result of an unavoidable accident, or by a defendant who is not financially responsible. They receive nothing now. If liability without fault should be adopted, they would receive the bare subsistence payments which would accompany that scheme. For them it undoubtedly would be a change for the better. I am fully sympathetic to the problem of the uncompensated victim, but I do not think abolition of the fault principle offers a useful answer to that problem. I do not think we should rob Peter, who was injured through the carelessness of some other person, of a portion of the full compensation he has coming in order that we may have a little bit to pay Paul, whose injuries were not the result of fault. Yet this is exactly what these proposals for liability without fault amount to. They would give the Peters, who make up seventy to eighty-five per cent of all injured persons, much less than full compensation, so that they might give the same bare subsistence sum to the fifteen to thirty per cent of the injured people who are Pauls.

Perhaps there is something to be said for a universal compensation system which would make prompt payment of minimal amounts to all injured persons, while at the same time permitting those whose injuries are the result of fault to sue for full damages, just as they now do. This would protect Paul from starvation without impoverishing Peter.³⁰ This is the system in England, and in most foreign countries. It is the system in Saskatchewan for dealing with automo-

30. Parker, *supra* note 21, at 217; Richter & Forer, *supra* note 27, at 234-35. See generally James, *supra* note 20.

bile accident victims. Indeed I have always thought unanswerable the argument of Mr. Justice Brandeis in *New York Cent. R.R. v. Winfield*,³¹ that this is permitted by FELA, and that an injured railroad worker should be allowed to collect workmen's compensation from his state, regardless of fault, and also sue his employer under the act, if the employer's fault caused his injury.

I do not expect, however, to see such a plan, providing both for minimal payments without fault and for substantial damages where fault exists, adopted in the foreseeable future. Until then I think it is better to adhere to the fault principle and to leave fact questions to juries than to adopt any of the proposed plans of liability without fault. In my judgment a rule which over the years has provided full and fair compensation for the great bulk of injured persons is better than one which would mean inadequate awards for all.

31. 244 U.S. 147, 154 (1917) (dissenting opinion).

