

# ASSURANCE OBLIGE—A COMPARATIVE STUDY\*

ALBERT A. EHRENZWEIG†

When the master of *The Reynolds*, in an attempt to save the vessel, deliberately damaged Vincent's dock by keeping the ship moored to it during a raging storm, he knew that the law protected him against any interference. But he may not have foreseen that the Minnesota court would hold the shipowner responsible in damages for "having thus preserved the ship at the expense of the dock."<sup>1</sup> We would perhaps be reluctant to apply the same rule against a drowning beggar who saved his life by using and damaging a rich man's yacht. Should we argue, then, with the dissenting judge in the *Vincent* case that such emergencies, constituting inevitable accidents, exclude all liability for fault? The laws of most civil law countries have preferred this solution.<sup>2</sup> But, again, we would probably be reluctant to apply this rule in favor of a drowning millionaire who saves his life by using and damaging the boat of a poor fisherman.

To avoid the choice between general liability and general immunity of tortfeasors acting in necessity, the laws of many countries will, in such cases, take into account the parties' comparative insulation against loss and, partially at least, base liability on their respective wealths. While this answer is repulsive to Anglo-American tradition, its rationale could perhaps be adopted in a different manner. Since the spread of liability insurance, wealth has no longer been the only, or even the most effective, insulation against loss. Could we not make *The Reynolds'* liability contingent on her owner's protection by liability insurance? At first glance we are inclined to say that insurance can only protect against liability, but not create it. To show that a new rule to the contrary may be in the making, to trace this development and to analyze its broader significance, is the purpose of this paper. This discussion should be preceded by a brief presentation of the economic background of our problem.

In the absence of facts supporting liability either under the general fault dogma or a specific rule, the doctrine of *laissez faire* is satisfied with letting "the loss rest where it falls." In such cases, it is claimed, any interference by the law would merely effect an unjustifiable shift of loss between innocent parties.

\* This is a paper to be delivered at the International Congress of Comparative Law, London, in August, 1950. This will, it is hoped, explain the somewhat unorthodox presentation and documentation of what is still a rather speculative thesis.

† Dr. Jur. 1928, Vienna, Austria; J.D. 1941, University of Chicago; LL.M. 1942, Columbia University. Formerly judge and Privatdozent of Civil Law in Vienna. Member of the New York bar. Professor of Law, University of California, since 1948. Author, *INCOME TAX TREATIES* (Commerce Clearing House, 1950); (in German) *MISTAKE AND UNLAWFULNESS* (1931); *TORT LIABILITY* (1936); *A NEW LAW OF TORTS* (1937). Contributor to American and Continental legal periodicals.

<sup>1</sup> *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N. W. 221 (1910). See also *RESTATEMENT, TORTS* §263 (1934).

<sup>2</sup> See, e.g., §1306a of the Austrian Civil Code. Cf. the writer's *IRRTUM UND RECHTSWIDRIGKEIT* (Vienna, 1931) and *SCHULDHAFTUNG IM SCHADENERSATZRECHT* 198 *et seq.* (1936).

This reasoning is correct from the standpoint of the national economy, within which any physical loss results in a reduction of existing values. Within individual economies, however, interference by the law can do a great deal more. If individual loss is measured by the quantity and quality of the satisfaction impaired or by the "marginal utility" of the assets affected, the law can magnify or minimize the total of individual losses by allocating them to persons more or less readily capable of bearing them.

### *Richesse Oblige*

Almost a half century ago, Josef Unger, following this thought, urged that liability without fault should take into account the relative financial capacities of the parties.<sup>3</sup> "Richesse Oblige," he felt, should become a basic principle of the law of torts. While the economic justification of this postulate seems clear, its legal application requires decisive modification.

Neither Josef Unger nor anybody after him has ever suggested that the wealthy should bear all accidental losses of the poor. What has been called the "principle of the smallest harm"<sup>4</sup> has never been carried that far. Nor do we, in the absence of "fault," wish to make a rich man, merely because of his wealth, pay for a poor man's loss even if he has caused that loss. Any such liability for mere causation could, within our present system of tort liability, be based only on the paradoxical assumption that a person innocently causing injury is "less innocent" than the injured.<sup>5</sup>

There is one kind of causation without fault, however, to which the principle of the smallest harm is applied to an ever increasing extent. Beyond rudimentary strict liabilities of incompetent persons and for misdeeds of animals and other dangerous things, the "negligence" liabilities of both civil law and common law countries have come to aim primarily at an equitable distribution of risk rather than at censuring a wrongdoer or deterring the public. The French *théorie de risque* is perhaps the most significant expression of this shift of emphasis.<sup>6</sup> In other countries, too, presumptions or evidentiary rules, such as those in some places supporting the employer's liability for his employees,<sup>7</sup> have enabled judges and juries to apply rules of fault liability to the unavoidable causation of harm by hazardous enterprise. Further developing this thought, the American Law Institute would impose liability for the inevitable miscarriage of lawful ultra-hazardous activities.<sup>8</sup> An even more

<sup>3</sup> JOSEF UNGER, *HANDELN AUF EIGENE GEFAHR* (Acting at One's Peril) 140 (Jena, 1904).

<sup>4</sup> HANS SPERL, *UEBER DAS SCHADENERSATZRECHT NACH DEM BBO 14* (1902). See also VICTOR MATAJA, *DAS RECHT DES SCHADENERSATZES VOM STANDPUNKTE DER NATIONALÖKONOMIE* 28, n. 1 (Leipzig, 1888); BIENENFELD, *DIE HAFTUNGEN OHNE VERSCHULDEN* 55 (Berlin, 1933); ALBERT A. EHRENZWEIG, *SCHULDHAFTUNG IM SCHADENERSATZRECHT* 169, 185, 234 (Vienna, 1936).

<sup>5</sup> See UNGER, *op. cit. supra* note 3, at 5.

<sup>6</sup> See, e.g., 2 MAZEAUD, *LA RESPONSABILITÉ CIVILE* §§1152 *et seq.* (4th ed. 1949). See also Note, 63 HARV. L. REV. 671 (1950).

<sup>7</sup> See, e.g., Neuner, *Respondeat Superior in the Light of Comparative Law*, 4 LA. L. REV. 1 (1941). That civil law countries may yet come to avail themselves of this doctrine as a vehicle for new strict liabilities is strikingly demonstrated in a decision of the Austrian Supreme Court of Sept. 10, 1947 (I Ob. 500/47). See Fenzl, *Erfolgshaftung der "Gefährlichen Betriebe"*, 3 OESTERR. JUR. Z. 362 (1948).

<sup>8</sup> RESTATEMENT, TORTS §519 (1938).

general liability for "instruments and substances dangerous per se" has been the law of Mexico since 1932.<sup>9</sup> I have elsewhere attempted to segregate and analyze those and similar liabilities as based on what can perhaps be called "negligence without fault."<sup>10</sup>

If we assume in all these cases that the actor has engaged in a dangerous activity for the sake of material or ideal profit, we may conclude that within the actor's economy any loss resulting from his liability is reduced by that profit, and is smaller, to that extent at least, than the loss his victim would have to bear if the loss were left to rest where it fell. Any liability imposed on the actor can thus be rationalized under the principle of the smallest harm.

Only in a few instances have legal rules ever openly stated this rationale. It is at this point that the history of the civil law can perhaps show the way to conscious progress. More than 150 years ago, the Prussian Code, presumably following natural law doctrine,<sup>11</sup> adopted a rule which has gained or should gain a theoretical significance by far exceeding its practical importance. An incompetent person or an infant, though generally permitted to carry on his hazardous activities at public expense, may be held liable for harm caused by him under the principle of the smallest harm according to the respective wealth of the parties. The Austrian Code of 1813 added a similar rule regarding persons inflicting injury in emergency.<sup>12</sup>

In conformity with suggestions made by Otto Gierke,<sup>13</sup> Section 752(1) of the Second Draft for a German Civil Code contained a rule generalizing these provisions to include other cases of causation without fault. The reasons for the rejection of this far-reaching proposal are well known. The "Romanistic" influence prevailed,<sup>14</sup> and all that was saved was Section 829 of the Code which in substance repeats the Austrian provision. Similar rules have been enacted in Belgium, China, Denmark, Greece, Montenegro, the Netherlands, Peru, Poland, Portugal, Switzerland, and Turkey.<sup>15</sup> By an ironic turn of legal history it was the Soviet Code which, in con-

<sup>9</sup> Federal Civil Code of Mexico, Sec. 1913.

<sup>10</sup> An extensive study under this heading will be published shortly. This theory was developed in the writer's Note, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case*, 8 U. OF CHI. L. REV. 729 (1941), and in the writer's study prepared for the Law Revision Commission for the State of New York on *Products Liability for Breach of Warranty and Negligence*, LEG. DOC. NO. 65 (J) (1943). Stone, *Touchstones of Tort Liability*, 2 STAN. L. REV. 259, 277 (1950), speaks of "legal fault" in a similar sense.

<sup>11</sup> See ZEILLER, DAS NATUERLICHE PRIVATRECHT §179 (1802); ZEILLER, KOMMENTAR 3, 730.

<sup>12</sup> See ALLGEMEINES BUERGERLICHES GESETZBUCH §§1306a, 1310; PREUSSISCHES ALLGEMEINES LANDRECHT §§ 41 *et seq.*

<sup>13</sup> OTTO GIERKE, DER ENTWURF EINES BUERGERLICHEN GESETZBUCHES UND DAS DEUTSCHE RECHT 260 (Leipzig 1889).

<sup>14</sup> Cf. 2 MOTIVE ZU DEM ENTWURFE EINES BUERGERLICHEN GESETZBUCHES FUER DAS DEUTSCHE REICH 734 (1888).

<sup>15</sup> See Article 1368 *bis* of the Belgian Code Civil (added by the Law of April 16, 1935 sur la réparation de dommages causés par les déments et les anormaux); Sections 187 and 218 of the Chinese Civil Code [*cf.* RIASANOVSKY CHINESE CIVIL LAW 141 (Tientsin, 1938)]; Section 64 of the Danish Law of 1922 [*cf.* HANS MUNCH-PETERSEN, DEN BORGERLIGE RET §45 (11th ed. 1937)]; the Greek Civil Code of 1946 [*cf.* Valticos, *Le Nouveau Code Civil Héliénique*, 70 BULL. TRIM. DE LA SOC. DE LA LEG. COMP. 50, 56, 68 (1948); Zepos, *The New Greek Civil Code of 1946*, 28 J. COMP. LEG. AND INT'L L.

scious reliance on its model, adopted the principle originally proposed for the German law.<sup>16</sup> This background of the Soviet provision should make us remember that a tort liability partially determined by wealth would not be a revolutionary product of a communist economy but a consistent extension of a thought rooted in the natural law of the eighteenth century, recognized in "capitalistic" laws for 200 years, and persistently advocated by Continental writers.<sup>17</sup>

One may concede that the pioneer tradition of our Western world would resist a general liability of this type as hampering private initiative, though a similar resistance has been easily overcome in the law and practice of progressive taxation. Somehow it seems less objectionable to have the community of wealth pay for social services than to have a wealthy individual pay for loss innocently caused by him to a less pecunious compatriot. Arguments of this kind have failed, however, to prevent legislatures, juries, and judges anywhere from favoring tort claims against those innocent tortfeasors who, as entrepreneurs, are able to shift their losses to the public by increasing the price for their services or merchandise. True, this tendency must meet resistance as long as actual loss distribution may be precluded by competitive conditions or otherwise. But this resistance, it may be claimed, has lost much of its

56, 68 (3d Ser. 1946)]; Sections 575 and 579 of the Civil Code of *Montenegro* [French transl. Dareste and Rivière, Paris 1892]; Section 1406 of the Civil Code of the *Netherlands* (wrongful death) [cf. VAN DIEVOET, *LE DROIT CIVIL EN BELGIQUE ET EN HOLLANDE DE 1800 À 1940* 498 (Brussels, 1948); Meijers, *La Réforme du Code Civil Néerlandais*, 71 BULL. TRIM. DE LA SOC. DE LEG. COMP. 199, 202 (1948)]; Section 1140 of the Civil Code of *Peru*; the Civil Code of *Poland* [De Berier, *Le Nouveau Code Polonais des Obligations*, 64 BULL. TRIM. DE LA SOC. LEG. COMP. 329, 337 (1935)]; Articles 2378, 2385 and 2387 of the Civil Code of *Portugal*; Articles 52 and 54 of the Code of Obligations of *Switzerland*, which was almost verbally adopted in *Turkey* [WETTSTEIN, *THE SWISS FEDERAL CODE OF OBLIGATIONS WITH THE TURKISH ALTERATIONS* (Zurich, 1928)]; and in general 6 SCHLEGELBERGER, *RECHTSVERGLEICHENDES HANDWOERTERBUCH* 681 (Berlin, 1938); SWOBODA, *DIE ALLGEMEINEN GRUNDSATZUEBER DIE DELIKTISCHE HAFTUNG IN DEN VERSCHIEDENEN RECHTSSYSTEMEN*, *Report to the International Congress for Comparative Law*, The Hague, August 3, 1932, 50 Z. Bl. JUR. PR. 899 (1932).

<sup>16</sup> See Section 411 of the *Soviet Civil Code* providing that "in determining the amount of compensation to be awarded for an injury, the court in all instances must take into consideration the property status of the party injured and that of the party causing the injury." [Transl. 1 VLADIMIR GSOVSKI, *SOVIET CIVIL LAW* 525 (1948).] See also *Soviet Civil Code*, Sec. 406, and in general GSOVSKI, *supra* at 526. Similar proposals were included in the *Hungarian Draft* of 1928, Sec. 1736 [Cf. Szladits, *Les Tendances Modernes du Droit des Obligations*, 66 BULL. TRIM. DE LA SOC. DE LEG. COMP. 119, 129 (1937)]; in the *Franco-Italian Draft* of 1927; and in Section 1129 of the *Czechoslovakian Draft* of 1937. As to the latter see ALBERT A. EHRENZWEIG, *ZUR ERNEUERUNG DES SCHADENERSATZRECHTES* 36, 39, 41 (Vienna, 1937).

<sup>17</sup> Cf. PFAFF, *ZUR LEHRE VON SCHADENERSATZ UND GENUGTUUNG* 58 (Vienna, 1880); HEDEMANN, *DIE FORTSCHRITTE DES ZIVILRECHTS* pt. I, 112, 115 (Berlin, 1930); BAUR, *ENTWICKLUNG UND REFORM DES SCHADENERSATZRECHTES* 51 (1935); JOSEF MAUCZKA, *DER RECHTSGRUND DES SCHADENERSATZES AUSSERHALB BESTEHENDER SCHULDVERHALTNISSE* 224 (Leipzig, 1904); RANDA, *DIE SCHADENERSATZPFLICHT* 68 (2d ed. Vienna, 1908); BIENENFELD, *op. cit. supra* note 4, at 111; WILBURG, *DIE LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG* 20 (Graz, 1934); MANDL, *ZIVILISTISCHER AUFBAU DES SCHADENERSATZRECHTES* 132 (Breslau, 1932); STEINBACH, *DIE GRUNDSATZE DES HEUTIGEN RECHTS UEBER DEN ERSATZ VON VERMOEGENSSCHAEDEN* 32 (Vienna, 1888); HOHENLOHE, *GRUENDE DER SCHADENERSATZPFLICHT* 90 (Regensburg, 1914); MOELLER, *SUMMEN-UND EINZELSCHADEN* 137 (Hamburg, 1937).

In this country consideration of the respective financial conditions of the parties has always played an important part in the assessment of damages by juries. Occasionally, courts have expressly approved this practice. See *Daly v. Kiel*, 106 La. 170, 30 So. 254 (1901) (plaintiff's financial situation); *Jackson v. Briede*, 156 La. 573, 100 So. 722, 726 (1924) (defendant's financial situation); CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 298, n. 6 (1935) (exemplary damages).

justification since the spread of liability insurance which enables the entrepreneur tortfeasor to distribute his loss, beyond his own economic sphere, within a larger community of risk. Does then the principle of the smallest harm, while not supporting a liability measured by wealth, require us to impose a liability based on insurance? Is it true then that not only "richesse oblige," as Unger has said, but that insurance obligates as well?

### *Assurance Oblige*

At first glance, this suggestion seems paradoxical. Liability insurance, it will be said, is insurance against liability, and where there is no liability there can be no insurance against it. Obvious as it seems, this argument does not defeat the idea but merely invites further refinement—once it is recognized that liability insurance has long transcended its original meaning and mission.

The fundamental problem of the nature of liability insurance arose first when this insurance was permitted to protect a guilty injurer against the very liability purportedly designed to deter him and others from similar "wrongdoings." Timid attempts at prohibiting this liability insurance on that ground as illegal failed at their inception.<sup>18</sup> And rightly so, for the liability insured against was in most cases a fault liability only in name, and the defendant's protection by liability insurance did in no way impair its primary rationale, namely, the equitable distribution of losses. On the contrary, that rationale was more effectively secured by that insurance which, consequently, has not only everywhere been recognized as lawful but has even been made compulsory in many countries.<sup>19</sup> But the resulting inconsistency between the two functions of liability insurance as a protection against existing liabilities and as a device for shifting enterprise risks has appeared in many ways. The most significant product of this inconsistency is perhaps the rule, now widely adopted, that the injured himself may claim indemnification from the insurer, sometimes in disregard of the fact that the insured has forfeited his protection.<sup>20</sup>

That the significance of liability insurance now reaches far beyond the parties to the contract appears similarly in the converse situation in which the injured is fully or partially indemnified under either a private insurance contract, or a scheme of

<sup>18</sup> See McNeely, *Illegality as a Factor in Liability Insurance*, 41 COL. L. REV. 26, 33 (1941).

<sup>19</sup> See, e.g., EDISON BOWERS, SELECTED ARTICLES ON COMPULSORY AUTOMOBILE INSURANCE (1929); Lenhoff, *Insurance Features of Workmen's Compensation Laws*, 29 CORN. L. Q. 176, 353 (1943, 1944); Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705 (1916); SOCIÉTÉ DES NATIONS, INSTITUT INTERNATIONAL DE ROME POUR L'UNIFICATION DU DROIT PRIVÉ, RESPONSABILITÉ CIVILE DES AUTOMOBILISTES, ÉTUDE PRELIMINAIRE (1935), UNIFICATION INTERNATIONALE EN MATIÈRE DE RESPONSABILITÉ CIVILE ET D'ASSURANCE OBLIGATOIRE DES AUTOMOBILISTES (1940); JANNOT, KRAFTFAHRZEUGHAFTPFLICHT-RECHT UND VERSICHERUNG IM IN-UND AUSLAND (1937). Ultimately this development will probably require the wholesale abolition of the fault rule. Cf. the Automobile Accident Insurance Act, 1946, of Saskatchewan, 31 J. COMP. LEG. & INT'L L. 39 (3d Ser. 1949). But cf. Esmein, *La Faute et sa Place dans la Responsabilité Civile*, 48 REV. TRIM. DE DROIT CIVIL 481, 490 (1949).

<sup>20</sup> Legislation in several states has supported this trend. See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549, 564 (1948); Leigh, *Direct Actions Against Liability Insurers* [1949] INS. L. J. 633. For a typical Continental statute, see Article 49 of the Swiss MFG.

social insurance such as workmen's compensation, or a general health insurance of the kind now in force in Great Britain. Can such a person recover twice even if his injury was caused by an accident of a type inevitable in the operation of modern mechanical enterprises? Here, too, the rationale of both enterprise liability and enterprise liability insurance is in issue. True, where tort liability is essentially liability for a "wrong," denial of double recovery would result in an unjustifiable windfall to the injurer. But where, as in cases of an entrepreneur's liability for "negligence without fault,"<sup>21</sup> risk distribution is the primary rationale, the answer is less obvious.<sup>22</sup> Once a loss is distributed through "first party" (life, health, or accident) insurance among persons sharing similar risks of injury, much could be said against shifting the loss, either by a second recovery of the insured or by subrogation of the insurer, to other persons sharing similar risks of liability. It may have been for that reason that the Supreme Court of the United States has denied the Government recovery from an entrepreneur "wrongdoer" for compensation paid to an injured soldier.<sup>23</sup> The same reason, it may be assumed, underlies recent British legislation under which in any action for a personal injury there must be taken into account one half of the social insurance benefits accrued or likely to accrue from such injury.<sup>24</sup> In this country, too, judges and juries even without legislative interference will probably be less likely to favor the plaintiff, if and where his protection by private or social insurance will have become a matter of course. Contrary to the principles underlying most American compensation statutes, this "mitigating effect on damages"<sup>25</sup> should ultimately prevail where the plaintiff relies on a tort liability primarily based on risk distribution rather than fault.

The impact on the law of torts of both "first party" and liability insurance should make us more inclined to let insurance, like wealth, affect liability under the principle of the smallest harm. Yet we will hardly be inclined to predicate liability on the sole fact that an insurer has agreed to assume it. Not because such a rule would be "illogical" but because it would be undesirable as discriminating between plaintiffs injured by insured persons and others. We feel that he who injures the plaintiff innocently, *e.g.*, in self-defense, should not be held liable merely because he carries insurance against all liabilities. Recovery in such a case would constitute an unjustifiable windfall for the plaintiff who could not reasonably expect the existence of such insurance. On the other hand, there should be liability for a hazardous activity against liability from which the actor could be expected to insure himself, whether or not he actually carried such insurance. Thus, not the actual existence of liability

<sup>21</sup> See note 10 *supra*.

<sup>22</sup> See Justice Traynor's dissent in *Anheuser-Busch v. Starley*, 28 Cal. 2d 347, 352, 170 P. 2d 448, 451 (1946).

<sup>23</sup> *United States v. Standard Oil Co. of California*, 332 U. S. 301 (1947). See also Rand, J., in *King v. Canadian Pacific R. R.* [1947] S. C. R. 185, discussed by James, *supra* note 20, at 557.

<sup>24</sup> See Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241, 255 (1949).

<sup>25</sup> See, in general, as to the mitigating effect on damages of social welfare programs, Note, 63 HARV. L. REV. 330 (1949).

insurance should be the test for applying the principle of the smallest harm, but the fact that the defendant could reasonably be expected to carry such insurance. Not insurance itself obligates, but "Assurabilité Oblige."

*Assurabilité Oblige*

This last formulation invites another possible objection to the theory here proposed. Why should the airplane passenger be able to recover from the operator of his plane because the latter should have taken out (liability) insurance, although the plaintiff himself, before boarding the plane, could very well have been expected to protect himself by (life and accident) insurance? Indeed, a future system of liability for modern enterprise will have to decide on the preferability of either "first party" (life, accident, fire) or "third party" (liability) insurance for each of the more important typical hazards. Whether the passenger or the operator of the airplane should "bear the loss," *i.e.*, whether or not the latter should be held liable in tort, will in this sense depend on whether there should be a community of risk between all passengers or all operators, or, in other words, who should in fairness pay the premium.<sup>26</sup> Ultimately, failure to insure in such cases may become the basis of a new type of liability for fault.

The present need for such an analysis appears in those isolated but significant cases in which the availability of first party insurance has affected the law of tort liability. Thus, in the largely metropolitan jurisdiction of New York the availability to house owners of fire insurance was given as a reason for the limitation of the liability for negligent fires.<sup>27</sup> Similar thoughts have found expression in international law which, being free of hampering traditions, frequently anticipates desirable national developments. A British Royal Commission on Compensation for Suffering and Damage by Enemy Action, stated the general principle "that in the case of persons whose position justified the expectation that, in the ordinary course of things, they would appreciate and resort to insurance, it would be inequitable to allow them to rank, when insurance was available for their protection against the losses actually incurred."<sup>28</sup>

Only this approach, which would consciously choose the most desirable medium for the distribution of risks, will ultimately solve the present wasteful practice of mutual recoveries between insurance companies and other distributors of risks. The Supreme Court of the United States recently permitted accident insurers to recover as subrogees from the Federal Government under a federal statute which in terms protects only the injured himself.<sup>29</sup> It is regrettable that the Court in so holding

<sup>26</sup> See HARRY SHULMAN AND FLEMING JAMES, *CASES AND MATERIALS ON TORTS* 125 (1942), discussing *Regan v. New York & New England R. R.*, 60 Conn. 124, 22 Atl. 503 (1891).

<sup>27</sup> *Ryan v. New York Central R.R.*, 35 N. Y. 210, 91 Am. Dec. 49 (1866) (liability for damage to adjoining house but not to second or more remote house).

<sup>28</sup> 2 MARJORIE M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1315 (1937), with additional references.

<sup>29</sup> *United States v. Aetna Casualty & Surety Co.*, 338 U. S. 366 (1949). Cf. Note, 58 YALE L. J. 1395 (1949); James, *Contribution Among Joint Tort-Fessors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

failed to consider the underlying economic issue whether risk distribution through taxation, necessitated by admitting subrogation, is preferable to risk distribution through the increase of first party insurance premiums caused by the denial of subrogation.

It is true that a liability test based on the availability of liability insurance would, for some time to come, frequently imply injustice with regard to those particular defendants or activities which, reasonably or arbitrarily, would be rejected by insurers. But a beginning must be made to replace our obsolete pseudo-fault formulas of civil liability by new tests taking account of modern developments. Once this beginning has been made in the law, business will follow suit. And business will do more. It will continue to blast new ways even where the law stays behind, as it has done in the so-called "medical first payment revolution" which has secured to bystanders of automobile accidents the benefit of "liability insurance" without regard to liability.<sup>30</sup>

While a consistent formulation of new principles will have to await the development of consistent standards of insurability, it should be of interest that several imaginative American courts have courageously anticipated that development in a few typical situations.

Under the age-old principle, "The King can do no wrong," governmental agencies in the United States cannot be held for torts committed by their officials. The fact, however, that such agencies have to an increasing extent engaged in private enterprise has, in many cases, conferred on them a competitive advantage and exposed the public to unjustifiable risks and losses. Several American courts have therefore abandoned this anachronism and held municipalities and other governmental agencies liable where, in view of the existence of liability insurance, they can do so without burdening the taxpayer.<sup>31</sup> Similar holdings have established the liability of charitable institutions and trust estates,<sup>32</sup> which otherwise are held immune to safeguard their funds for the purposes of their creation. And finally, lawsuits between spouses and other members of one family, otherwise prohibited to preserve domestic peace, have occasionally been permitted where it is the liability insurer who ultimately bears the loss.<sup>33</sup>

That these decisions may foreshadow even more significant developments is

<sup>30</sup> See Yore, *Automobile Medical Payments Coverage Points a New Way*, *The Spectator* (Property edition), Feb. 22, 1940. This type of insurance seems to be spreading both to new types of insurance and new groups of persons. See James, *supra* note 20, at 565; and in general 8 APPLEMAN, *INSURANCE LAW AND PRACTICE* §§4895, 4896 (1942, Supp. 1949).

<sup>31</sup> *Rogers v. Butler*, 170 Tenn. 125, 92 S. W. 2d 414 (1936) (based on the assumption of a "waiver of immunity"). *Contra, e.g.*, *Pohland v. City of Sheboygan*, 251 Wis. 20, 27 N. W. 2d 736 (1947).

<sup>32</sup> See, *e.g.*, *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N. E. 2d 342 (1947); *O'Connor v. Boulder, Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P. 2d 835 (1939); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938); *Foster v. Roman Catholic Diocese of Vermont*, 76 A. 2d 230 (1950). See also Justice Rutledge's searching opinion in *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810, 823, 824 (D. C. Cir. 1942).

<sup>33</sup> See, *e.g.*, *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930); *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932); *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549, 565 (1948).

indicated by such statements as that of an eminent American judge who based a manufacturer's liability *inter alia* on the consideration that "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."<sup>34</sup> A spreading understanding of this truth will inevitably lead to the ultimate abolition of that often criticized game of "hide and seek" which now prohibits American plaintiffs from alleging and proving the existence of the defendant's liability insurance.<sup>35</sup>

I have not been able to find traces of this approach in Continental decisions or writings. But Continental legislators and scholars, who have openly introduced the principle of the smallest harm, should now be ready to consider the question whether insurance or insurability as bases of liability are not equivalent or even superior to comparative wealth. An indigent incompetent person has a thoughtful guardian who, anxious to protect both his ward and the public, has insured his ward against whatever liability he may incur because of his illness. Section 1310 of the Austrian Code, Section 829 of the German Code, or Article 58 of the Swiss Code could well be applied if the insured injures another impecunious person. The poor fisherman of our example could be similarly protected by the sportsman's insurer. Modifications or interpretations of existing statutes to this effect, insignificant as they may seem, would prepare the ground for the important developments foreshadowed in the American decisions just discussed.

The suggested *extension* of liability will perhaps be more easily acceptable once legislators, courts, and scholars will have recognized the need for a corresponding *limitation* of tort liability in view of the progress of social insurance. The employee, the pedestrian, or the consumer who was injured by an accident inevitable in modern mass enterprise and indemnified for his loss under some scheme of social compensation created for his protection against these very accidents, should not be permitted to avail himself against the entrepreneur of the ancient rule of liability for negligence which, though directed against a wrongdoer, was put at his disposal as a liability for "negligence without fault" at a time when, and it is believed only as long as, no other remedy was available.

As I have said before, I am fully aware of the strangeness of my proposition to the ears of both civil law and common law lawyers. How could it be that tort liability should be contingent on the very insurance designed to protect against such liability? I have tried to show not only that this proposition can be justified on economic grounds, but that it loses some of its strangeness and reveals more of its rationale if modified so as to relate to the reasonable expectability and availability of liability insurance. In that sense, what first appears as an extreme and somewhat absurd prin-

<sup>34</sup> Justice Traynor in *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P. 2d 436, 441 (1944).

<sup>35</sup> A number of courts here, too, have decided to put reality above obsolete concepts. See, e.g., *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190 (1926). This trend is approved in 2 JOHN H. WIGMORE, EVIDENCE 146 (3d ed. 1940).

ciple of strict liability may become more readily acceptable as a new type of liability for fault.

The law will grow. True, to write a law defining the scope of the new liability will not be easy with a business practice unsettled and not yet conscious of its mission. But the Great Codes of the civil law have shown the way, and where legislation must lag behind, we should look to the common law, that marvel of unending growth which, slow, groping, and often disturbing in its apparent lack of logic, is so miraculously self-confident and wise.