

Placek v Sterling Heights

Civil Wrongs and the Rights Revolution

405 Mich 638 (1979)

The Michigan Supreme Court led the state into a nationwide movement to liberalize tort law. In the twentieth century, and particularly after World War II, states and the federal government altered the common law to make it easier for plaintiffs to bring and win injury suits against manufacturers, physicians, insurance companies, and public utilities. Though these changes in private law were incremental and less visible than changes in constitutional or criminal law, they had enormous public consequences. Michigan took a major step down this road in 1979 when it adopted a more plaintiff-friendly standard of “comparative negligence” in place of the older “contributory negligence” standard. By the end of the century, many argued that the system had become abused, and tort reform became a significant political and legal issue.

The law of torts developed alongside the law of contracts in the nineteenth-century civil law. The word “tort” simply means “wrong”—but a wrong remedied by an individual lawsuit rather than a criminal prosecution. Many torts—intentional ones like assault and battery—doubled as crimes, and there never was a perfect distinction between them. Judges and legal scholars also tried to distinguish between tort and contracts. Michigan Supreme Court Justice Thomas McIntyre Cooley indicated this in the subtitle to his 1878 treatise on the law of torts, “the wrongs which arise independent of contract.”¹ The general trend of the nineteenth century was to maximize contract and minimize tort; the principal feature of the twentieth century was the growth of tort and the decline of contract.²

Within the realm of torts, judges developed the central principle of “negligence.” For a tort suit to succeed, the plaintiff had to show that he was injured by another person, either intentionally or through the carelessness of the defendant. Activities that were inherently dangerous bound actors to a standard of “strict liability”; they had to pay damages even if not negligent. But the vast majority of tort suits alleged negligence. Some negligent parties were exempted from liability—such as charitable and governmental institutions and members of the victim’s family. Defendants possessed several defenses in negligence suits—what plaintiffs’ lawyers referred to as the “unholy trinity” of contributory negligence, assumption of risk, and the fellow-servant rule. These defenses grew out of contract law and showed that fault, while the central principle in tort law was not the only one.³ Illustrative of these rules was *Smith v Smith*, in which the Supreme Judicial Court of Massachusetts said:

It would seem, at first, that he who does an unlawful act, such as encumbering the highway, would be answerable for any direct damages which happen to anyone who is thereby injured, whether the party suffering was careful or not in his manner of driving or in guiding his vehicle, for it could not be rendered certain whether, if the road were left free and unencumbered, even a careless traveler or team driver would meet with any injury. But on deliberation we have come to the conclusion that this action cannot be maintained, unless the plaintiff can show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury. The party who obstructs a highway is amenable to the public in indictment, whether any person be injured or not, but not to an individual, unless it be shown that he suffered in his person or property by means of obstruction; and where he has been careless it cannot be known whether the injury is wholly imputable to the obstruction, or to the negligence of the party complaining.⁴

Contributory negligence meant that the plaintiff could not recover damages if the defendant showed that the plaintiff’s own negligence contributed to the injury. As Cooley put it, “When it appears that but for his own fault the injury would not have occurred, it also appears that the duty to protect him did not rest upon others; for no one is under an obligation to protect another

Accident liability broader

By PAT SHELLNBARGER
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LANSING — If you are injured in an accident — even though you are partly to blame — you may collect damages from another person, the Michigan Supreme Court has ruled.

Insurance industry officials said it is too early to tell whether the decision will cause premium rates to go up because of increased claims. But, the ruling is expected to affect the outcome of thousands of damage suits filed every year in Michigan courts.

In all similar cases, juries must be instructed to decide whether the injured person was at fault and, if so, how much his own negligence contributed to the accident, the court ruled. This departs from long-standing policy that excluded anyone who contributed to his own injuries from receiving any damage award through the courts.

THE CASE leading to the ruling involved a 29-year-old Sterling Heights woman injured in a two-car collision in 1970. She later was charged with killing her two children in what psychiatrists said was the result of psychological trauma caused by the accident.

Under the Supreme Court decision, a person found to be 51 percent at

Headline from the February 9, 1979, issue of the *Detroit News*. Reprinted with permission.

against the consequences of his own misconduct or neglect.” He continued, “No man shall base a right of recovery upon his own fault. Between two wrong-doers, the law will leave the consequences where they have chanced to fall.”⁵ This principle illustrated the dual nature of tort law. It tried to compensate injured victims—to restore them to their condition before the injury. But it also sought to deter bad and irresponsible behavior, and thus those who were themselves negligent ought not be rewarded. Very much like the simultaneously developing law of contract, tort law tried to recognize the independence and self-responsibility of the individual. Oliver Wendell Holmes, Jr. reiterated this principle in his 1881 classic, *The Common Law*. “The general principle of our law is that loss from accident must lie where it falls.”⁶

Critics denounced the contributory principle as inhumane and unfair to injured plaintiffs. “The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free,” wrote William Prosser, the twentieth-century dean of modern tort law. “No one ever has succeeded in justifying that as a policy, and no one ever will.”⁷ It seemed to be especially unjust to employees who were injured on the job. Injured workmen faced the hurdles of “assumption of risk”—the idea that the worker understands the ordinary hazards of a job and calculates the dangers into the employment contract (higher wages for more dangerous jobs).⁸ They also could not recover for injuries that were due to the negligence of their “fellow servants.” A railroad, for example, paid for the injuries to passengers that resulted from the negligence of railroad employees, but they were not responsible for injuries that employees inflicted upon one another. Such a principle “strikes the twentieth-century observer as the archetypical doctrine of an age entranced with the idea that each man was equally capable of protecting himself against injury,” one historian observes. “In its most extreme applications the doctrine seems almost a parody of itself.”⁹ As a result, judges did not apply the principle in a doctrinaire way, but fashioned numerous exceptions to mitigate it.¹⁰

Many historians concluded that the whole nineteenth-century common-law legal system worked to shift the burden of industrialization from entrepreneurs and capitalists onto workers, farmers, and consumers. The law of torts and contracts permitted the sharp and the shrewd, the wealthy and the powerful, to profit without worrying about the injuries that their railroads and mills caused to the public. It allowed businesses to “externalize” the costs of accident and injury onto society through a legal system that permitted “civil wrongs.” In effect, the law provided a “subsidy” for industrial developers. Virginia law professor Charles O. Gregory inferred that Chief Justice Lemuel Shaw adopted the assumption-of-risk principle in 1850 out of “a desire to make risk-creating enterprise less hazardous to investors and entrepreneurs than it had been previously at common law.... Judicial subsidies of this sort to youthful enterprise removed pressure from the pocket-books of investors and gave incipient industry a chance to experiment on low-cost

operations without the risk of losing its reserve in actions by injured employees. Such a policy no doubt seems ruthless; but in a small way it probably helped to establish industry, which in turn was essential to the good society as Shaw envisaged it.”¹¹ Gregory noted that this explanation was “pure speculation”; later historians developed the “subsidy” thesis in more detail, arguing that courts—and federal courts especially—were biased in favor of big business interests and against the people.¹² But other scholars have concluded that “the nineteenth century negligence system was applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare.”¹³ Another concludes that, however rigorous and harsh the rationalistic legal rules might have been, individual judges tempered them with a “jurisprudence of the heart” in particular cases.¹⁴ Scholars in the “law-and-economics movement” have defended the negligence-based tort system as both just and efficient.¹⁵

It is clear that judges fashioned exceptions to the contributory negligence doctrine all along. Juries often decided not just facts, but whether the facts showed negligence, and they tended to favor injured plaintiffs over corporate defendants. Contributory negligence did not prevent recovery in cases of intentional torts in which defendants were willful, wanton, or reckless or violated a statute. Judges also devised the “last clear chance” doctrine: if the plaintiff could show that the defendant had a clear opportunity to escape the consequences of the plaintiff’s negligence and did not take it, the defendant would be liable. This qualification to contributory negligence arose in an English case in which plaintiff Davies left his ass fettered in the highway and the defendant drove into it.¹⁶ Americans rapidly embraced the “jackass doctrine.” As one commentator noted, “The groans, ineffably and mournfully sad, of Davies’ dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal... has appealed to and touched the hearts of men. There has girdled the globe a band of sympathy for Davies’ immortal critter.”¹⁷ Commentators disparately described last clear chance as “an arbitrary modification of a harsh rule” or “an exception based on sound policy and judgment.”¹⁸

However harsh and biased nineteenth-century tort law may have been, it was turned in a pro-plaintiff direction in the twentieth century. The federal government led the way, in regulating the interstate railroad system. It imposed safety standards on the railroads, and made the railroads liable for the injury or death of employees, abrogating the contributory-negligence and fellow-servant doctrines, in the federal Employers Liability Act of 1906. The law established what was known as “comparative negligence,” in which the court calculated how much of the plaintiff’s injuries were due to his own negligence, and deducted that from the amount of the award. Many states enacted workmen’s compensation acts, and work-related injuries were gradually eased out of the tort system.¹⁹ States then applied comparative negligence to other suits; Mississippi in 1910 was the first to do so.²⁰

At the same time, plaintiff attorneys began to employ new, more aggressive tactics in personal-injury cases. Traditionally, the American legal profession discouraged litigation. Attorney self-restraint was a matter of professional ethics, and often limited by

law. Lawyers were not allowed to advertise, for example, and could be disbarred or prosecuted for practices like “champerty” and “bar-ratry,” or the stirring up of disputes and litigation. By the turn of the century, a new breed of lawyers began to challenge these standards. They were often immigrants in the new industrial cities, educated in night law schools. They worked on contingency fees, taking a percentage of a successful plaintiff’s award, and getting nothing if the suit failed. The older legal establishment derided them as “ambulance-chasers” and a threat to professional standards. The elite bar also vented its prejudice against the social and ethnic (often Jewish) origins of the new plaintiff bar.²¹ For their part, the plaintiff attorneys were not just making a living for themselves, but providing legal services to a clearly underserved community.

A reorientation among legal academics also helped to shift the nature of tort law. Nineteenth-century civil law strove to keep liability connected to negligence or fault, and to minimize litigation. As one critic put it, “ideally, nobody should be liable to anyone for anything.”²² Law professors increasingly looked upon the litigation system as a source of redistributing risk and resources to redress the socioeconomic inequality that the industrial revolution had produced. “Quickly after the turn of the century the idea grew that industrial injuries should be considered an unavoidable part of the productive process and that compensation should be awarded automatically as a normal cost of doing business,” one historian notes.²³ Manufacturers and employers were wealthy enough to absorb the costs, through liability insurance, safety measures, or by charging higher prices for their products. If contract could be absorbed into tort law, and the role of fault or negligence could be reduced or eliminated, then litigation could act as a kind of social insurance system.

A group of reform-minded scholars, often among the group loosely referred to as “legal realists,” undertook this transformation, constructing what has been called the theory of “enterprise liability.” The two most important theorists were Fleming James and Friedrich Kessler. James’ scholarship focused on the goal of legal reform to make it easier for plaintiffs to win their suits. He argued, for example, that the injured are inherently at risk for accidents, and not responsible for their injuries. Thus tort law could not effectively fulfill its function of deterring irresponsible behavior. Without any role for fostering personal responsibility, tort law could concentrate on its compensatory function. Kessler was more radical, arguing that the burdens of litigation should be shifted from individual plaintiff to corporate defendant because corporations had monopoly power. Not only did nineteenth-century tort law oppress injured individuals, it threatened to bring fascism to America, as it had in his native Germany. Nineteenth-century principles of liberty of contract and individual fault had been instruments of liberation in their day, but now they served to maintain giant concentrations of capital. For these theorists, as nineteenth-century negligence doctrine “externalized,” imposing the social costs of industrialization on the individual, so twentieth-century law should “internalize,” and impose the cost of the harm done by individuals on society at large. William Prosser enlisted the ideas of James and Kessler in his campaign to reform tort law.²⁴

A more general and important point that the realists made was that the law was an instrument of social policy, and that judges did not merely “discover” principles of law, or interpret statutes or the constitution in a neutral way, but, at least to some degree, made it. Law and judging were inescapably political; lawyers and judges should embrace their role as policymakers and “social engineers.” Many judges began to move in the direction of expressly taking consideration of public policy into account, and gradually altered the principles of old contract and tort law. One limitation on product-liability litigation, for example, was the principle of “privity of contract.” Manufacturers were only liable for product defects to those with whom they had a contractual relation. In 1916, New York Court of Appeals Justice Benjamin Cardozo, among the most prominent of the realist judges, allowed a suit by an automobile driver against the Buick Motor Company, rather than against the dealer who sold the car.²⁵ Justice Roger Traynor of the California Supreme Court took a similar approach, using the arguments of the realist academics to extend the principle of strict liability in tort suits.²⁶ Holding that manufacturers were liable not just to their contractual partners, but to the public generally, was typical of the decline of contract and the rise of tort, as American social thought moved from nineteenth-century individualism to twentieth-century collectivism.²⁷

The Michigan Supreme Court was not as active as these courts, but did curtail the doctrines of negligence and privity in the 1940s–1950s.²⁸ Indeed, after the New Deal and Democratic Party ascendancy had placed many liberal reformers on the federal and state courts, many observers claimed that the courts were biased in favor of plaintiffs and against business.²⁹ Political scientists wrote that Democratic members of the Michigan Supreme Court were statistically biased toward plaintiffs in workmen’s compensation cases, for example.³⁰ Michigan abandoned the privity requirement after many other states, in 1958, when a Democratic majority sat on the Court.³¹ After that, the Michigan Supreme Court eagerly adopted liberal liability standards. The Democratic majority on the Court showed a “penchant...for ‘rough justice’ over ‘ancient rules,’” a scholar noted.³² Liberal activism fed upon the frisson of liberal reform in the 1960s–1970s, especially the consumer and environmental movements marked by Ralph Nader’s 1965 book, *Unsafe at Any Speed*, which exposed the hazards produced by the auto industry.³³

Plaintiffs frequently asked Michigan courts to abandon the contributory negligence standard and adopt comparative negligence. Thirteen states did so by statute between 1971 and 1973. In some of these states, the comparative standard was a compromise, which staved off calls for a complete no-fault system like that in automobile accidents. The Florida and California supreme courts ended contributory negligence in the next two years.³⁴

In 1970, Patricia and Joseph Placek were driving through an intersection in Sterling Heights, to the left of a car making a right turn in front of them. Police officer Richard Ernst was driving through the intersection, on an emergency run, with siren and lights on. The Placeks said that they did not hear or see the police car before it collided into them; the police admitted that only cars directly in

front of them would have. Patricia Placek became wracked by pain that required heavy medication, and her condition introduced great strain in her marriage. When Joseph Placek threatened to divorce her and take custody of their children, Patricia shot them. She was charged with murder but found not guilty by reason of insanity.³⁵ The Placeks then sued the City of Sterling Heights. A first trial in 1972 found for the City, but the Placeks appealed to the Court of Appeals, which overturned the decision and ordered a new trial, because the trial judge had allowed the jury to consider that the Placeks had not been wearing seat belts.³⁶ A new trial also denied recovery to the Placeks on contributory negligence grounds; the Court of Appeals sustained this judgment without opinion. The Placeks appealed to the Michigan Supreme Court, which heard the case in 1978, over eight years after the accident.

The Supreme Court of the late 1970s was recovering from some internal agony. Dissatisfaction with Thomas “the Mighty” Kavanagh’s leadership led the associate justices to oust him and install Thomas “the Good” Kavanagh as chief justice in 1974. Thomas the Mighty then died suddenly of cancer. Shortly after that, Justice John B. Swainson was indicted in federal court on bribery charges related to an effort to overturn the conviction of John J. Whalen, an organized crime figure. Swainson was a rising star in Michigan politics, a popular former governor and World War II veteran who had lost both legs below the knees in France. Three Supreme Court justices testified that Swainson had not tried to influence their decisions in the Whalen case. Swainson was acquitted of the more serious charges, but convicted of perjury, and resigned from the Court in 1975; he served 60 days in a halfway house in Detroit.³⁷

But the Court began a period of recovery and stability in 1977. The members of the Court remained the same for six years—after the 1946–1952 period, a twentieth-century record for continuity. In partisan terms, the Court was evenly divided. Democrats T. G. Kavanagh and “Soapy” Williams had been joined by Blair Moody, Jr., in 1977. The senior Republican and chief justice was Mary S. Coleman, the first woman to serve on the Michigan Supreme Court, beginning service in 1973. John W. Fitzgerald and James L. Ryan joined the Court in the next two years. The swing vote was held by Justice Charles Levin. Scion of a family of prominent Michigan Democratic politicians, Levin ran as an Independent. He formed his own political party in 1972, nominated himself for an open seat on the Supreme Court, and was elected.³⁸ Justices Williams, Kavanagh, and Levin had already voted to replace contributory negligence and adopt comparative negligence in a 1977 case, but the three Republicans opposed them and left the Court tied.³⁹

Justice Williams wrote the opinion that granted the Placeks a third trial based on the comparative negligence standard. “There is little dispute among legal commentators that the doctrine of contributory negligence has caused substantial injustice,” he wrote. He noted that most other state courts and legislatures had done away with it, so that “the question before remaining courts and legislatures is not whether but when, how and in what form to follow this lead.”⁴⁰ Quoting a leading negligence reformer, Williams noted that “pure” comparative negligence did not allow a

plaintiff to benefit from his own fault, since the damages awarded were reduced in proportion to his share of responsibility for the injury. “That is justice,” he noted.⁴¹

But even if comparative negligence was a superior principle, was it appropriate for the Court, rather than the legislature, to adopt it? Former Governor Williams addressed this question of judicial lawmaking forthrightly. “There is no question that both this Court and the legislature have the constitutional power to change the common law.” He noted that, “although the courts have not been the primary agencies for adoption of comparative negligence, they are certainly in as good, if not better, a position to evaluate the need for change, and to fashion that change.” Such a policy “is consistent with this Court’s responsibility to the jurisprudence of this state.”⁴² Chief Justice Coleman’s concurring opinion was even more explicit in its expression of legal realism. She recognized that the Court’s decision “may be seen by some as usurping the legislative prerogative.” “Historically, traditional notions of the role of appellate courts were that they merely discover and then declare the meaning of the common law. The reality that this body of law, as opposed to statutory law, was judge-made was ignored,” she noted. “Modern jurisprudence has abandoned this ostrich-like approach, recognized the obvious and acknowledged that whenever a court overrules prior precedent it is functioning in a lawmaking capacity.”⁴³

While the Court unanimously adopted the comparative negligence standard, it split on the problem of the limits and application of judicial lawmaking. The majority held that the new standard would be applied not just to future cases, but retroactively to some cases, including pending retrials and appeals. The Republican justices did not want the new standard to be applied retroactively, but only prospectively. In the traditional distinction between legislating and judging, legislation applied only to future cases (thus the Constitution prohibits “ex post facto laws”), while Court decisions applied only to past cases. But decisions that work a clear and abrupt change in seemingly settled law raise profound problems if applied retroactively. When the United States Supreme Court imposed the “exclusionary rule” on the states, overturning criminal convictions based on illegally seized evidence, it did not require that all prisoners convicted on such evidence be released and retried, due to the obvious chaos that such an order would cause.⁴⁴ Chief Justice Coleman, pointing out that “it is difficult to imagine a more legislative-like decision” than this, urged the Court to apply it only prospectively for similar reasons of equity and policy.⁴⁵

Though the *Placek* decision raised many detailed and technical questions of application, it provoked no immediate legislative reaction.⁴⁶ The Placeks themselves settled out of court with the City of Sterling Heights.⁴⁷ The decision reinforced the movement of change in the law, sometimes described (often pejoratively) as “liberal judicial activism,” that marked the 1960s–1970s in Michigan and the nation. It confirmed the legal realists’ aspiration that, since judges were necessarily policymakers, they ought to use that power to foster progressive social policy. Since the New Deal, state legislatures and especially Congress had extended commercial regulation, and transferred supervision of the economy from judges to

administrators; labor, for example, had been largely removed from the realm of the common law and taken over by the National Labor Relations Board, workmen's compensation commissions, and anti-discrimination agencies. Decisions like *Placek* augmented judicial power. As one scholar observes, the new tort theories "appointed the judge as an agent of the modern state." They "charged the judge to internalize costs and distribute risks. Enterprise liability theory also allowed judges to join the effort to aid the poor. Indeed, the theory conceived of courts as possessing unique powers to achieve these ends in comparison to alternative branches of government."⁴⁸ As in the apportionment and desegregation cases, the majority of the judiciary prided itself on having done the right thing when the political branches would not.

To some degree, the legal realists' hope that tort law would become part of a social engineering project had been realized. Plaintiff lawyers depicted themselves as crusaders for social justice, using the lawsuit to vindicate the rights of the poor, women, minorities, and consumers against irresponsible corporations. Indeed, tort plaintiffs acted as "private attorneys general," achieving public good in their private suits. "Private tort litigants serve the public interest by uncovering dangerous products and practices," two legal scholars recently claimed.⁴⁹ The legal and ethical limitations on plaintiff attorney activity were relaxed in these decades as well. "In 1975 one of the most widely quoted of the new legal ethicists [Monroe Freedman] could write of a 'professional responsibility to chase ambulances,'" one critic of the new mood observes. The United States Supreme Court permitted lawyers to advertise two years later.⁵⁰ Even more significant were the "mass tort" class-action suits, against manufacturers of asbestos and silicon breast implants, and ultimately the tobacco industry. Critics decried the "litigation explosion" in America, and a movement for tort law reform got underway in the 1980s. If the nineteenth-century ideal had been that "nobody should be liable to anyone for anything," the new principle was that "everybody was liable to everyone for everything." In this view, the legal system reinforced a social and cultural movement that devalued individual responsibility, blamed "society" for all problems, and focused on victimhood.⁵¹

In 1986, the American Tort Reform Association was established. It fed the widespread public sense that the litigation system had gotten out of control, influenced by many stories of outrageous lawsuits. The most famous (the "tort-reform poster-child") was the woman who sued McDonald's when she spilled scalding coffee on herself.⁵² Others included a woman who won a \$1.6 million judgment against a phonebook company that had led her to a physician who botched her liposuction surgery, a student who sued his school for stress caused by summer homework, and a city employee who backed his dump truck into his own car and sued the city.⁵³ Such suits provided material for innumerable lawyer jokes among late-night TV comics and talk-radio hosts. They also spawned many "urban legends," such as the pregnant woman who sued the manufacturer for the failure of its contraceptive jelly, which she ate (on toast). Warning labels showed the extent of product-liability awards, such as the brass fishing lure with a three-pronged hook that cautioned "harmful if swallowed," and

the cocktail napkin-map from a Hilton Head restaurant that warned, "not to be used for navigation."⁵⁴

The advent of the "litigious society" fit the dour national mood of the 1970s. In the aftermath of the Vietnam War, the Watergate scandal, and the general social upheaval of the cultural revolution, American society appeared to be coming apart. The sense that the government and legal system were causes rather than solutions to the problems fueled a conservative political reaction, which, by 1980 ended the decades-long dominance of New Deal Democratic liberalism. The economic effects of the litigation system were significant. Litigation costs had grown at four times the rate of the economy since 1930, amounting to 2 percent of the national income. Average tort awards in Cook County (Chicago) rose in inflation-adjusted terms from \$52,000 to \$1.2 million between 1960 and 1984. By 1990, it was estimated that the tort-law system cost the country \$300 billion a year. The plaintiff bar took in \$40 billion in 2002; plaintiffs themselves netted only about half of the amount of judgments, after paying lawyers' fees and other costs. The indirect costs of increased liability were said to raise prices for everyone, and inhibit innovation. One West Virginia Supreme Court justice opined, "Much of my time is devoted to ways to make business pay for everyone else's bad luck."⁵⁵ Michigan and other states of the industrial midwestern "Rustbelt" were especially hard-hit by the economic downturn of the 1970s, part of which, the conservative critics contended, resulted from government policies that grew out of the liberal rights revolution—union privileges and labor costs, environmental requirements, affirmative action, and the new tort regime. Detroit, a city of nearly two million in the 1950s, lost half its population by the end of the century.

Inevitably, it is difficult to balance the rights of criminal defendants and society's need for safety and order; so it is inevitably difficult to balance the conflicting rights and interests of plaintiffs and defendants in tort law. While it may be arguable that the abuses of the late twentieth century tort regime, however exaggerated by conservatives, exceeded those of a century earlier, similarly exaggerated by progressives, they seem to have provoked a greater political reaction.⁵⁶ Almost every state adopted some kind of tort reform in the 1980s–1990s, capping punitive damage awards, restricting comparative negligence, and doing away with doctrines like "joint and several liability," in which a plaintiff could recover the full amount of damages from any one of multiple defendants, regardless of the relative contribution of that defendant to the total injury. The Michigan legislature was especially active in tort reform. It punished frivolous lawsuits, limited joint and several liability, and headed off the possibility of mass-tort lawsuits to make the food industry liable for obesity. Since tort law remained a state issue, it became a factor in judicial appointments and elections. This was especially the case in 2000, when three Republicans who had established the first Republican majority on the Court in decades were up for re-election, and the Michigan Trial Lawyers Association raised hundreds of thousands of dollars to defeat them.⁵⁷ If nothing else, the tort revolution made state Supreme Court elections around the country increasingly bitter, partisan, and expensive.

FOOTNOTES

1. Cooley, *A Treatise on the Law of Torts, or the Wrongs Which Arise Independent of Contract*, 2d ed (Chicago: Callaghan, 1888).
2. *Id.* at 95–97; Gilmore, *The Death of Contract* (Columbus: Ohio State Univ Press, 1974).
3. Rabin, *Some reflections on the process of tort reform*, 25 San Diego L R 24 (1988); Rabin, *The historical development of the fault principle: A reinterpretation*, 15 Georgia L R 925 (1981).
4. *Smith v Smith*, 19 Mass 621, 664 (1824).
5. Cooley, *Treatise on the Law of Torts*, *supra* at 793, 807.
6. Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), pp 94–95.
7. Prosser, *Comparative negligence*, 51 Mich L R 469 (1953).
8. See, e.g., *Michigan Cent R Co v Smithson*, 45 Mich 212; 7 NW 791 (1881).
9. White, *Tort law in America: An Intellectual History* (New York: Oxford Univ Press, 1980), p 41.
10. Rabin, *Historical Development of the Fault Principle*, *supra* at 942; Karsten, *Heart versus Head: Judge-Made Law in Nineteenth Century America* (Chapel Hill: Univ of NC Press, 1997), pp 113–128.
11. Gregory, *Trespass to negligence to absolute liability*, 37 Virginia L R 368 (1951); Prosser, *Comparative negligence*, *supra* at 469.
12. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard Univ Press, 1977) was the pathbreaking work. Friedman, *Civil Wrongs: Personal Injury Law in the Late Nineteenth Century*, 12 Am B Found Res J 351 (1987) and *More civil wrongs: Personal injury litigation, 1901–10*, 34 Am J Legal Hist 295 (1990). For other references, see Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (New York: Oxford Univ Press, 1992), pp 401–402.
13. Schwartz, *Tort law and the economy in nineteenth-century America: A reinterpretation*, 90 Yale L J 1720 (1981).
14. Karsten, *Heart versus Head*, *supra*. See also Friedman's critique in *Losing one's head: Judges and the law in nineteenth-century American legal history*, 24 Law & Soc Inquiry 253 (1999), and Karsten's defense, *Using one's head: Were jurists "unconscious" socio-economic ciphers or conscious agents? A response to Friedman*, 24 Law & Soc Inquiry 281 (1999).
15. Posner, *A theory of negligence*, 1 J Legal Stud 29 (1972). For a critique, see Purcell, *Litigation and Inequality* (Oxford Univ Press, 1992), pp 257–262.
16. *Davies v Mann*, 152 Eng Rep 588 (1842).
17. Cooley, *Treatise on the Law of Torts*, *supra* at 801, 811; Prosser, *Comparative negligence*, *supra* at 469–472.
18. White, *Tort law in America*, *supra* at 49.
19. Kelly, Harbison, & Belz, *The American Constitution: Its Origins and Development*, 7th ed (New York: Norton, 1991), pp 418–419; Schwartz, *Tort Law and the Economy, 1770–1771*.
20. Prosser, *Comparative negligence*, *supra* at 482.
21. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (New York: St. Martin's, 2003), pp 6–7; Purcell, *Litigation and Inequality*, *supra* at 35, 150, 187. Plaintiff advocates pointed out that the original "ambulance chasers" were corporate defense attorneys who conspired with physicians and cojoked injured and incoherent plaintiffs to sign inadequate settlement agreements in their hospital beds.
22. Gilmore, *Death of Contract*, *supra* at 14.
23. Purcell, *Litigation and Inequality*, *supra* at 162.
24. Priest, *The invention of enterprise liability: A critical history of the intellectual foundations of modern tort law*, 14 J Legal Stud 461 (1985).
25. *MacPherson v Buick Motor Co*, 111 NE 1050 (NY, 1916).
26. *Escola v Coca-Cola Bottling Co of Fresno*, 150 P2d 436 (Cal, 1944).
27. Gilmore, *Death of Contract*, *supra* at 95.
28. *Bricker v Green*, 313 Mich 218; 21 NW2d 105 (1946); *Spence v Three Rivers Building & Masonry Supply, Inc*, 353 Mich 120; 90 NW2d 873 (1958); Porter & Tarr, eds, *State Supreme Courts: Policymakers in the Federal System* (Westport: Greenwood, 1982), p 87.
29. Purcell, *Litigation and Inequality*, *supra* at 230.
30. Ulmer, *The political party variable in the Michigan Supreme Court*, 11 J Pub L 352 (1962); Smith & Stolberg, *Looking Beyond Race: The Life of Otis Milton Smith* (Detroit: Wayne State Univ Press, 2000), p 150, 161.
31. *Spence v Three Rivers Builders & Masonry Supply, Inc*, *supra*.
32. *State Supreme Courts*, *supra* at 98–99; Ulmer, *Politics and procedure in the Michigan Supreme Court*, 46 SW Soc Sci Q 382 (1966). See also Baum, *State Supreme Courts: Activism and Accountability*, in *The State of the States*, Van Horn, ed (Washington, DC: Congressional Quarterly Press, 1989).
33. Rabin, *Some Reflections*, *supra* at 21.
34. White, *Tort Law in America*, *supra* at 165.
35. Interview with Sheldon Miller, attorney for the Placeks. The Placeks' attorneys decided not to bring up the stress-induced killings at trial, uncertain as to whether it would make a jury more or less sympathetic to their client.
36. *Placek v Sterling Heights*, 52 Mich App 619; 217 NW2d 900 (1974).
37. Pace, *John Swainson, 68, Michigan Governor and Perjured Judge*, New York Times, May 16, 1994, p B8; Roger F. Lane interview with John W. Fitzgerald, October 8, 1990. Justice Thomas G. Kavanagh was convinced that the national Republican party had framed Swainson to eliminate an attractive Democratic candidate—Roger F. Lane interview, November 19–20, 1990. See Pizzigati, *The Perverted Grand Juries*, Nation, June 19, 1976, p 743, claiming that the federal grand jury is "a little-understood institution which the Nixon administration distorted to be a legal loophole in the Bill of Rights."
38. *Michigan Supreme Court Historical Society Reference Guide* (Lansing: Michigan Supreme Court Historical Society, 1998); Fink, *Michigan lawyers in history—Justice Charles Levin: A scholarly independent*, 83 Mich B J 50 (2004).
39. *Kirby v Larson*, 400 Mich 585; 256 NW2d 400 (1977).
40. *Placek v Sterling Heights*, 405 Mich 638, 652–653; 275 NW2d 511 (1979).
41. *Id.* at 661. "Pure" comparative negligence allowed a plaintiff to recover regardless of the proportion of his own negligence. Thus, even if he was 99 percent at fault, he could recover 1 percent from the defendant. "Modified" comparative negligence places some limit, usually 50 percent, beyond which the plaintiff cannot recover at all. In "pure" contributory negligence, a plaintiff could recover nothing, even if he was only 1 percent at fault.
42. *Id.* at 656, 659–660.
43. *Id.* at 686.
44. Kelly, Harbison, & Belz, *The American Constitution*, *supra* at 634.
45. *Placek v Sterling Heights*, *supra* at 693. Coleman also believed that the trial court had properly instructed the jury on the standard of negligence to consider.
46. Silver & Toth, *Torts*, 26 Wayne L R 833 (1980); Platzer, *Michigan adopts comparative negligence: Will comparative contribution follow?* 4 Det C L R 1157 (1980).
47. Interview with Sheldon Miller, *supra*.
48. Priest, *The Invention of Enterprise Liability*, *supra* at 519.
49. Koenig & Rustad, *In Defense of Tort Law* (New York: New York Univ Press, 2001), p 2.
50. Olson, *The Litigation Explosion: What Happened when America Unleashed the Lawsuit* (New York: Dutton, 1991), p 8.
51. *Id.*; Sykes, *A Nation of Victims: The Decay of the American Character* (New York: St. Martin's, 1992).
52. Koenig & Rustad, *In Defense of Tort Law*, *supra* at 6.
53. Sickinger, *Directory Liable for Ad Fraud*, The Oregonian, February 25, 2005, p C1; Abdul-Alim, *Homework During Summer Vacation Prompts Lawsuit*, Milwaukee Journal-Sentinel, January 20, 2005, p 1 (the student dropped the suit); *Man Hits His Own Car then Sues Himself*, Associated Press, March 16, 2006. The American Tort Reform Association maintains a file on such "looney lawsuits."
54. Compiled by the Michigan Lawsuit Abuse Watch.
55. Levy, *Shakedown: How Corporations, Government, and Trial Lawyers Abuse the Judicial Process* (Washington: CATO, 2004), p 119; Dunning, et al., *Pernicious Ideas and Costly Consequences: The Intellectual Roots of the Tort Crisis* (Washington: National Legal Center for the Public Interest, 1990), p 83, 119–120.
56. Cf. Rabin, *Some Reflections*, *supra* at 13.
57. Thernstrom, *Trial Lawyers Target Three Michigan Judges Up for Election*, Wall Street Journal, May 8, 2000; Young, *Reflections of a Survivor of State Judicial Election Warfare* (Manhattan Institute for Policy Research, 2001).