THE ACTIVITY-RISK THEORY OF TORT: RISK, INSURANCE AND INSOLVENCY

O. E. LANG*
Saskatoon

The law has struggled for centuries with the problem of compensating victims injured by the activity of others. We have reached a stage where the cost of administering the solution arrived at in our tort law forces us to re-examine it. The purpose of this article is to examine the problem and to test a theory for its solution. The theory is in no way new; indeed much comfort will be taken from old decisions in our courts. But when theory and cases conflict, the cases will be held at fault.

The basic proposition and starting point is that activity should bear the risks of harm which it produces. Unless the act is sufficiently worthwhile to pay for the increase in risks which accompany it, the act should not be done at all. In the words of Bramwell J.: "If the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person."[1] In simple cases, this means that if the actor who receives (or controls) all the benefits[2] from an act also has to pay for harm resulting from the increase in risk, then the proper decision about whether to do the act is more likely to be made. This is the defence for the old law's theory of strict liability in trespass. Putting a person or thing in motion obviously increases the risk of harm to others. This risk includes some harm which is likely, some which is only possible and some which is quite unlikely. The mover ought to pay even for the unlikely if it occurs. The risk of it happening was apparent and if modern terminology is to be used, the mover could be said to be at fault for having acted, knowing this sort of harm could result,

*O. E. Lang, of the College of Law, University of Saskatchewan, Saskatoon.

[1] *Powell* v. *Fall* (1880), 5 Q.B.D. 597, at p. 601.

[2] It is recognized that in some cases part of the benefit is out of the individual's control and hence some of the burden of insuring the risk should be on society generally.

and indeed, would result sooner or later if the activity was repeated. In this sense, he could be accused of intending the harm (or risk) while regretting it (or hoping the worst would not materialize).

This liability should remain on the actor even if his decision to act is perfectly reasonable. This only means that the benefits —which generally accrue to him—outweigh the risks of harm. Out of the benefits, he should pay for that harm, especially since this removes the difficult determination of what is exactly reasonable in all the circumstances. Thus, if a rancher introduces cattle into a grain growing district, this activity increases some risks to the crops. A reasonable fence ought to be erected by the rancher[3] who will receive the benefits from the cattle. A fence is reasonable when the marginal cost of strengthening it is equal to the change of risk[4] to the crops from that additional strength. Beyond that point, the rancher should prefer to pay for lost crops rather than to strengthen the fence. The precise conclusion is that he should pay for such lost crops even though his fence is reasonable. This retains the sanction against unreasonable conduct, since the rancher's own risk is unduly increased if he fails to fence reasonably. But the difficult negligence question is avoided and the cost of fencing and risk of not fencing is upon the persons likely to be in control of the fence. The risk properly falls upon ranchers in any case if we have decided that property rights include the use of the property without interference from another who accordingly must *sic utere suo ut alienum non laedas.*

In discussing the basis for liability, an essential distinction must be drawn between pure tort situations and assumpsit or contract situations. In the former, the victim is given no choice in regard to the risk before it has materialized in harm to himself. In the assumpsit situation, he has a choice. He introduces himself into the area of the risk. In the former cases, the risk should be fully upon the actor. In the latter, however, the victim introduces himself into the risk area because he is seeking benefits for himself.[5] He

[3] Some later discussion may suggest that a farmer introducing grain into cattle country ought to fence, but this is not correct if our social policy places the rights to the use and enjoyment of property in a secure position. If the cattlemen do not wish to fence they must pay damages or buy the farmer's land. In some places, a duty to fence protectively has been imposed however. See Wigmore, Responsibility for Tortious Acts: Its History (1894), 7 Harv. L. Rev. 315, 383, 441, at pp. 451, footnote 6, and 452, footnote 6. But this is equivalent to granting the rancher a limited easement over neighboring land.

[4] This risk is the chance of harm multiplied by the likely amount of harm.

[5] One could distinguish further between partial and complete assumpsit. The latter is described here: it is benefit from the actor's activity which

ought to do so only if the benefits outweigh the risk. To put the risk upon the actor in such circumstances can only be justified if he has control of the benefit through the price which he can charge the potential victim. In that case, we merely force the actor to insure his victims against loss and in return allow him to add the cost of that insuring to the price of his activity. This takes away from the victim the choice of not insuring, but can be justified if insurance itself is quite desirable and if, as is frequently the case, the cost of insuring is lessened when the actor effects it.

Historically, trespass in pure tort situations produced liability for acting without regard to the reasonableness of the conduct.[6] In trespass, because the harm was a direct result of the activity, there was no risk-causation problem. Thus, if D throws a log which strikes P, the log throwing is the *causa causans* of the injury. The injury would not have happened without the throwing, and hitting something is a real risk of throwing any object. Where the harm is indirect, as where D throws a log down in a place other than the one it formerly occupied and a horse stumbles over it throwing its rider, it is not accurate to say that the harm was caused by D moving the log. Without reflection, one might regard this moving as a *sine qua non* to the injury, but in fact if there is nothing to distinguish the kind of place where D left the log from the kind of place in which he found it, he has in no way increased the risk to riders. This rider was as likely to have been saved as hurt by the new position of the log which was merely part of the world against which he rode. If, however, the log was moved from pasture to roadway, an increase in risk did occur and should have been borne by D. This is the proper result whether D knew or did not know about the roadway: all men must know that acting may change situations and increase risks; this risk should be charged to their acting.

The mistaken switch to the terminology of negligence is explicable. Most injury cases will involve intention to injure or unreasonable disregard for the possible victim. In these cases, talking

the potential victim seeks, and that benefit is in the actor's control. In partial assumpsit, *infra*, the victim introduces himself into the area of risk erected by the other's activity for purposes of activity of his own. In this case basic activities and property rights ought to be protected; ordinary activities are to be protected against extraordinary; earlier against later; or in other cases liability should be divided evenly. Automobiles and trains meet in this category.

[6] "Wer unwillig getan muss willig zahlen", Pollock and Maitland, The History of English Law (2d. ed., 1923), Vol. 1, p. 54. For controversy about "absolute" liability, see Winfield, The Myth of Absolute Liability (1926), 42 L.Q. Rev. 37, and Wigmore, *op. cit.*, *supra*, footnote 3, at p. 315 *et seq.*

about intention instead of increase of risk is inappropriate but will not produce a wrong result. In the rarer cases, where the actor increases the risk while acting reasonably, the discussion about intention is continued but produces the wrong result. This mistake is easier because in these rarer cases the question whether risk was increased can be difficult. One has to distinguish increase of risk from the apparent *sine qua non* of the moved log discussed above. Likelihood of harm is one approach. Foreseeability expresses this approach so long as it remains an objective test; but it is a word which draws attention to the mind of the actor and thus bolsters misguided concern about his intentions. The proper test, increase of risk,[7] was thus replaced, especially in trespass upon the case, with the test of reasonable conduct.

In trespass of the pure assumpsit type, because he voluntarily introduced himself into the area of risk, in the early law, the victim bore that risk. It was open to the parties to agree otherwise, however, and sometimes the actor would "insure" his victim by an assumpsit or assumption of liability. He would do this, of course, because it was made worth his while. The courts soon raised a *prima facie* presumption of an assumpsit whenever the potential victim paid for the particular "professional" work to be done.[8] This presumption produced a form of insurance and put the duty to insure on the person able to carry the insurance most cheaply. At the same time, this helped the profession as a whole by building public confidence in it. It is impossible to justify such a presumption, however, where no value is given to the actor. This, in effect, requires him to make a gift of the benefit of insurance in addition to the gift of the benefit of his work. This is the position in regard to the modern doctor who chooses to be a good Samaritan. This mistaken result was probably due not only to the practice of raising the presumption when the actor was paid, but also because liability was imposed upon the actor when his express assumpsit was given for only very vague consideration. Thus, in *Coggs* v. *Bernard*,[9] the voluntary carrier was liable having undertaken to carry goods safely because "he had the goods committed to his custody upon those terms". The evidence that there was benefit to the defendant

[7] It is the increase in risk test, not ownership notions, which best explains the lack of liability for a fox which has escaped and "resumed his wild nature". At this point, the risk is back to normal: only while the fox is kept is the risk increased through additional possible contacts. Twisden J., in *Mitchil* v. *Alestree* (1676), 1 Vent. 295. See O.W. Holmes, The Common Law (1881), p. 22.

[8] The "professions" referred to include the doctor, the smithy, the innkeeper and the common carrier.

[9] (1704), 2 Ld. Raymond 909.

is found as a logical conclusion from his willingness to promise safe carriage as well as to carry. The modern mind familiar with advertising and good will can understand how the carrier might feel himself benefitted by this "free" carriage; our predecessors failed to notice the presence of both consideration and assumpsit precedent to liability and imposed it in the absence of both. An express assumpsit can be taken to prove the existence of consideration; and when there is consideration, it is logically possible and convenient to presume an assumpsit, but this particular chicken-and-egg should not come into existence simultaneously.

When presuming an assumpsit, it was possible to select the most convenient type of promise, but it was natural to take as a model a commonly used form of express assumpsit. The smithy promised to shoe well, the veterinarian promised to use best techniques in curing the horse, and the carrier promised to set down safely. These promises clearly are not absolute insurance against all harm. The risk of harm from other causes rests with the owner who submits his goods to the actor; but harm caused not by the shoeing, curing or carrying, but by the failure to do so properly is put upon the actor. Without a deviation from perfect acting, harm which may occur is merely incidental to the shoeing. But less than perfect acting renders the actor liable for harm caused by his failure. The myth of the reasonable man need not have been erected here. It was not ordinary reasonable human conduct which the actor was promising: it was perfection, with himself bearing the risks of human error. Later, it will be argued that the convenience of having the actor insure has led to his taking on more and more of absolute liability in regard to harm from all causes through the ready application of *res ipsa loquitur*.

Highway cases involving two similar users are in the partial assumpsit rather than the pure tort category. On the one hand, the actor should be liable for damage he causes; on the other hand, the victim comes knowingly into the area of the risk. So Baron Martin in *Rylands* v. *Fletcher*[10] says, "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger." He goes on to say that recovery is not available without proof of want of care or skill. As in all assumpsit cases, this is a possible

[10] (1865), L.R. 1 Ex. 265, at p. 286.

but not necessary conclusion. The available alternatives always include leaving it to agreement by the parties, or, in the absence of such agreement, or in any case, putting the whole burden on one, or the other, or on the victim unless the actor was negligent. Many factors may influence the choice. For instance: (1) If the vehicle owners pay for the highway, the pedestrian is there on sufferance and should bear the whole risk including the risk of negligence; otherwise, he should be charged a fee for entering; (2) If the pedestrian long frequented the pathway, then the vehicles introduce the risk and should pay for all of it; (3) If insurance is generally desirable and can be obtained more cheaply in one way than in another, that may be allowed to determine the question; (4) Putting some burden on the drivers may render them more careful (reasonable) in their driving. The choice between these alternatives depends on all of the circumstances and therefore may change with time and place.

Here, and earlier, there has been a muted suggestion that some significance is to be attached to the order in time in which activities are begun. A new activity finds a particular state of things in existence and should only be begun if it can pay for harm to that existing situation. A *bonus pater familias* would not begin a new venture which could not compensate his other ventures or pay for their discontinuance. This same principle should be applied to society as a whole. This is the true explanation for liability to "natural user" in *Rylands* v. *Fletcher*. Natural user means ordinary or pre-existing activities. In actual cases, the pre-existence of a type of activity is logically more important than the timing between a specific plaintiff and his neighbor. Ordinary activities are protected much as passive use is protected as a part of ordinary property interest. To protect more is to limit the value of one man's property by allowing interferences from the activity of his neighbor. The neighbor is thus able to obtain the economic advantages of activity without paying all of the costs. The active neighbor should either buy up the neighbouring land or pay for any damage done to it, thus holding its value at ordinary market levels. The earlier ordinary activities are the background against which later ones move. This principle is not always open to easy application but should be borne in mind for cases where it can be applied. The precise way this principle and the choice between alternatives in presumptive assumpsit should be applied in highway cases in today's circumstances will be more fully discussed later.

Introducing negligence and the test of the reasonable man was

at least a possible solution in assumpsit cases. It was perhaps inevitable that the moralistic mania furthered by Austin should propel it into general use.[11] It is plausible, at first glance, that the wrongdoer should be punished and that the negligent man is a wrongdoer. It is true, however, that he is punished as surely for improperly increasing the risk if the whole risk of his activity is upon him. Damage for which he must pay will occur more frequently if he acts unreasonably. Therefore, to achieve the deterrent effect, the difficult questions of fact about the existence of negligence need not be raised. On the other hand, early departures from the moralistic test occurred in the application of objective rather than subjective tests. Then too, while in the beginning, only very unreasonable conduct was called negligence, soon the slightest departure from perfection raised liability. The man on the Clapham Omnibus is a perfect creature who never deviates in the slightest respect from desired conduct. He is never forgetful, never preoccupied, never lighthearted, in short, not human.[12] Yet the slightest human failing may render one liable for huge damages. This forces our courts and lawyers into much expensive litigation to establish all the shadings of the facts. The system is crude also in allowing the like conduct of another man to go unpunished if he is lucky enough not to have it result in actual damage. With the growing use of insurance, the deterrent value of liability has largely disappeared. There is some real point to deterrents but they should be in the nature of premium assessments for increasing the risk. They should be collected like fines, but with a civil burden of proof, since the failure to collect from him who increases the risk puts the burden upon others. They should be collectable from everyone whose act increases risks significantly, regardless of whether harm results from that particular act. We can stop playing national roulette with negligence and liability actions.

In many areas, our law has resisted the full introduction of negligence as a test for liability and has preferred the simple doctrine that activity should bear its costs. Partly, this results from the old precedents. Thus, cattle trespass retains its old (and proper) basis of liability. Some exceptions exist because the benefit is not always within the control of the actor or owner.[13] The risks from

[11] Lectures on Jurisprudence (1911), Vol. 1, p. 459.

[12] Note the safe *obiter dictum* of Devlin J., in *Lewis* v. *Carmarthenshire County Council*, [1953] 1 All E.R. 1025, at p. 1028: "Few users of the road have never fallen short of the standard of care which the law demands." Some might have said none.

[13] This explains the non-liability for trespass of dogs. Society generally receives their companionship free and therefore bears some of its cost.

dangerous things are sufficiently obvious to force judges to conclude that the person who chooses to keep them should bear the risks. Yet this is merely a forceful example of a general principle. The doctrine of *Rylands* v. *Fletcher* was a noble attempt to reintroduce the proper basis for liability, but less noble judges have allowed it to be eaten away. The doctrine of *res ipsa loquitur* is another technique through which strict liability may be approached. Strangely enough, it has had its greatest use in assumpsit situations, such as hospital care and air travel. In these areas, the rational support for strict liability rests on the desirability of potential victims being insured and the economic advantage to be gained if the institution or organization does the insuring.[14] This is not a case where the institution ought to bear the cost of its activity, since the activity is done for the benefit of the victim himself. But, if the cost of possible damage is put on the institution, it can and will recover this cost from its potential victims. It should be noticed that if convenience in insuring dictates this result, it may be most convenient to carefully limit the amount of the damages recoverable in order to obtain cheaper insurance through avoiding the difficult assessment of actual personal loss. Anyone not satisfied with such limited insurance can obtain additional insurance himself.

Vicarious liability represents a partial introduction of the theory that activity should bear its costs. To the extent that negligence is applied in judging the liability of the servant, the liability of the activity is similarly limited. This is more obviously unreasonable if the activity-risk principle is at the root of vicarious liability and is broad enough to support strict liability. The predictable "negligence" or human frailties in carrying out work should be paid for out of the resulting product but so should the predictable harm resulting despite reasonable or perfect conduct. But the interesting thing here is that any test applied to render the servant liable would be adequate to render the activity liable to the same extent without any doctrine of vicarious liability, were it not for the possibility of insolvency. Were the servant alone liable, he would demand a higher return for his services sufficient not only

[14] This is the strongest reason for such a decision as *Donoghue* v. *Stevenson*, [1932] A.C. 562, where high sounding talk about neighbors was allowed to obscure the simple question whether the price of ginger beer ought to be forced up to include some risks to its drinkers or whether manufacturers should be free to sell at a lower price, with risk on the drinker. Consider, however, the effect on sales of any particular brand if the consumers came to know that the manufacturer was refusing responsibility for the purity of the drink.

to cover his time and effort but also to pay for the risk of harm to others (as well as to himself). The activity and end product would thus bear the cost. With insolvency as a possibility, and especially with painless bankruptcy procedures available, this is not always true. The insolvent-ready-for-bankruptcy servant can undersell his services by not charging for the large risks from which bankruptcy will save him. The activity and its product could thus escape part of its costs, unless alternative liability were pinned upon it. Vicarious liability is therefore a technique for implementing the activity-risk theory more fully by overcoming the dangers of insolvency. It is but a partial solution and is surely as applicable to independent contractors doing work as to servants.[15] The objective is desirable and any scheme of liability must bear it in mind. It is not as important to guarantee against insolvency in assumpsit situations, since the potential victim may well be seen to take the risk of the actor's insolvency. However, the desirability of insuring or spreading such risks and the economic advantage of one large insurance policy may commend the placing of this burden on the activity which is able to include the premium in its costs and pass it on in higher prices.

Owner liability for harm done by automobiles[16] is another form of insolvency guarantee designed to assure that automobile ownership will carry all of its costs. As in the case of the slave or child in Roman law, or the "bane" in Anglo-Saxon law, this insolvency guarantee is logical because the owner benefits from owning the person or thing; but it is really only defensible up to the value of that ownership. Noxal surrender is a proper limitation on an insolvency guarantee based on ownership.[17] It is open to grave abuse, however, if the bane has been used in the master's activity and the master seeks to limit his liability to the bane. It is the activity and not the ownership of the bane which should bear the loss.

One further proposition bearing on the placing of tort liability must be examined. Activity, it has been argued, ought to bear its costs. However, there is some saving in almost any system if losses are allowed to lie where they fall. Hence, if a particular

[15] Of course, in olden days a "servant" was more likely to be insolvent than was a "contractor"; but if insolvency guarantee is the real rationale for vicarious liability, then a master should be liable when anyone does work for him and becomes insolvent. Defining "servant" in any other way is pure legalism, mechanical jurisprudence.

[16] *E.g.*, The Vehicles Act, S.S., 1957, c. 93, s. 157. It adopts the limitation of liability to negligence however.

[17] This theory throws a rather different light upon the analysis by Holmes of noxal surrender: *op. cit., supra,* footnote 7, p. 8 *et. seq.*

activity is basic or nearly universal, there is no prospective difference in the risks whether it is left upon each person as a potential victim or as a potential causer of the harm; and this is true whether the harm results from accident or from what our law calls negligence. It may be desirable to assess premiums against those who substantially increase the risk, but the guiding principle for placing liability will be the desirability and cheapness of insuring. This principle may lead to the conclusion that insurance ought to cover specific scheduled damages rather than particular losses determined at great expense.

This schedule of damages, fixed payments according to the specified harm, can be appropriate not only where the activity is basic or general but also wherever an assumpsit situation is involved, wherever convenience of insuring is the guide, and wherever insolvency guarantee is the reason for liability. Its use should drastically reduce the cost of administering the scheme of tort or insurance. It would pay decent minimums for damage done and would impose upon those having something valuable to protect the responsibility of protecting it by themselves or with insurance paid for out of the income or value of the thing protected.

The guiding principles for handling tort liability should accordingly be these:

(1) Activity should bear the costs of the increase in risks which accompany it to the extent at least that the benefit from the activity is within the control of the actor. All previous or normal or natural users or activities are taken as fixed in determining the increase in risk from a new activity. The actor would normally be wise to insure and spread his risk, but insolvency aside, this could be left to his option.

(2) Insolvency interferes with the proper paying for risks and must be guarded against. Vicarious liability and owner liability are random remedies. A form of compulsory insurance would be more complete and equitable.

(3) Insurance, voluntary or compulsory, interferes with the encouragement through liability of reasonable risk conduct. It should accordingly be accompanied by premium assessments for risk-increasing conduct. These premiums should be available for the (part) payment of harm from such risks.

(4) Wherever the activity is very general or where the potential victims voluntarily and unnecessarily enter the area of the risk, it is logical to leave the loss where it falls, and this is an inexpensive solution. However, spreading the loss through insurance avoids

the great pain of large losses and is desirable. Convenience should dictate who is to insure. But the expense of determining the exact loss of the victim should be avoided by giving him an impersonal amount determined according to a fixed schedule of minimum needs.

The application of these principles to automobile travel would be a suitable starting point in practical application and may serve as a useful illustration.

All harm caused by automobiles should be paid for by compulsory insurance without question of intention or negligence. The insurance would be financed through vehicle charges and usage charges based on gasoline consumption.[18] Risk-increasing activity or conduct should call forth premium assessments with court enforcement requiring proof on balance of probabilities only. These premium assessments could replace highway traffic offences without interfering with the Criminal Code. The assessments could go up and down according to a statistical analysis of the extent to which the particular conduct increases losses; and whether to penalize any particular risk-increasing conduct would depend on a balancing of the size of the increase against the cost of enforcement. The amount collected would go into the insurance fund or funds.

The damages payable should not cover any exceptional feature of the defendant or his property. As far as possible, they would be ascertainable by reference to a schedule which would include complicated medical detail.[19] The figures would be decent minimums. Thus, the death of a father of a family would bring compensation to his family according to its size to keep it in frugal comfort. A pianist's hands would gain no consideration above ordinary hands. This egalitarian approach is logically similar to the earlier discussed one of ordinary user and ordinary value of property. It has the decided advantage of much lowering the cost of administering the insurance scheme. Those who want special value insurance can arrange for it themselves and pay for the premiums

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[18] These might be taxes but this is not meant to completely preclude non-governmental insurance. Someone may be able to devise a scheme to retain free enterprise or non-monopoly by prorating the gasoline tax, and the premium assessments, among the group of insurers and by using involvement of the vehicle as the single and equal ground for liability.

[19] For a very limited example, see Saskatchewan Automobile Accident Insurance Act, S.S., 1960, c. 15, s. 20 or for a more complete but uncomplicated one, The Laws of Ethelbert of Kent (516-560) in F. L. Attenbourough, The Laws of the Earliest English Kings (1926), pp. 7-15. The Saskatchewan scheme allows claims beyond the schedule whereas in Ethelbert's and the proposed scheme, the schedule is exclusive.

out of the income earned by the valuable interest they wish to protect. This specific arrangement insurance is much cheaper to administer than a tort system assessing damages after the fact. In any case, the pianist and others with special interests to protect need protection from a vast variety of natural and human sources of danger, and self insuring is therefore necessary.

In similar fashion, the reasonable solution to spreading the risk of harm from air travel is to place absolute liability upon the airline, with the airline passing the price of this risk on to its users. The sole justification is the obtaining of insurance the cheapest way possible and accordingly, a schedule of minimum liability should be applied as far as the tort law is concerned. The airlines could be permitted to give more than the minimum insurance, or to make additional self insurance readily available to their customers, or to do both.

The general objective is to have activity more completely bear its risks. Strict liability is helpful to this end and also removes the expense of determining negligence. A schedule of damages would save further expense. Premium assessments could provide the necessary deterrent more equitably than the present system. In assumpsit and joint-activity situations, the activity-risk theory is not applicable but the desirability of insurance, the need to guard against insolvency, and economic advantages through inexpensive insurance all argue for the schedule of damages, strict or even absolute liability, and compulsory insurance. The end result may be general society insurance with activity and special assessment premiums, some contribution from taxation, and compensation without regard to cause but according to a modest, rigid schedule.