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THE ABOLITION OF TORT LIABILITY FOR NEGLIGENCE FOR ACTS NOT ENTERED INTO FOR PROFIT

JAMES T. BRENNAN*

The law suit has as its primary purpose the collection of money damages from the defendant. In the final analysis damages are what the law is all about. Logically, the question of liability takes precedence over damages. Most legal scholars and judges concern themselves with liability. However, the determination of no liability is merely the determination that the court will not order the defendant to pay damages to the plaintiff. Practicing attorneys and the public are little interested in the symmetry of legal logic, but they are interested in the amount of damages which are awarded by the courts.

Though it is not always true,[1] when a law suit is brought demanding damages, a net loss to society generally has occurred; and the court is being asked to shift the burden of this loss from one party to another rather than being asked merely to equalize accounts.

Compartmentalized legal theory is as much with us today as in the days of the writs. Suits for damages may conveniently be divided into suits based upon contract and tort. The same set of facts giving rise to the law suit may abstractly create a cause of action in contract and a cause of action in tort.[2] Yet different legal rules with different legal and practical consequences follow from whether the action is characterized to be one in tort or in contract.[3] This might be called sheer nonsense, except that whether one party recovers at all from another, and how much he may recover is determined by the characterization the court places on the occurrence giving rise to the law suit.[4]

If the action is deemed to be in contract, the questions affecting liability are whether a contract was formed and whether the defendant performed. There are no defenses except prior breach by

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1. For instance, recovery in quasi-contract for unjust enrichment.
2. Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929); Inglis v. American Motors Corp., 2 Ohio 2d 132, 209 N.E.2d 583 (1965).
3. Hawkins v. McGee, *supra* note 2.
4. *Ibid.*

the plaintiff available to the defendant.[5] The statute of limitations is generally considerably longer on contract actions than on tort actions.[6] If the action is deemed to be in tort, it may either be a deliberate or a negligent tort. Even as to deliberate torts, such as battery, there may be explanatory defenses available to the defendant such as consent,[7] or self-defense.[8] In negligent torts, the defendant has the defenses of assumption of the risk,[9] and contributory negligence,[10] as well as the general defense that his conduct was not the proximate cause of the injury.[11]

There is a fundamental difference between actions based on a contract and those based on tortious conduct. Before the contract was entered into, the defendant had no duty to perform his promise to the plaintiff. He agreed to legally bind himself to perform his promise to the plaintiff, but he did not agree to undertake any further duties toward the plaintiff than those he promised.[12] In actions based on tort, the law itself has imposed upon the defendant a duty toward the plaintiff. It is the law, not the defendant, which created the duty, and therefore it is the law, not the defendant's conduct, which determines the scope of the defendant's duty toward the plaintiff. The difference is that in the action based upon the contract, the defendant voluntarily assumed certain duties toward the plaintiff and by the assumption of only certain duties, refused to accept further duties;[13] whereas in the action based upon tort the defendant never voluntarily assumed any duties, so there cannot be any inference from his conduct that he refused to assume further duties.

The fundamental difference in the origin of the duty of the defendant toward the plaintiff has given rise to separate rules of damages for actions founded in contract and those founded in tort.

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5. Assuming both parties were legally capable of contracting, there are no equitable defenses, such as fraud, misrepresentation or undue influence which would make the contract voidable, and the promised act was not and has not become illegal.

6. The North Dakota statute of limitations for simple contracts is six years. N. D. CENT. CODE § 28-01-16 (1960). The six year period also applies to most torts, although the period is two years for specified torts. N. D. CENT. CODE § 28-01-18 (1960). This is unusual. More typical are the six year Ohio statute of limitation for actions based on a contract in writing OHIO REV. CODE § 2305.07 (Baldwin 1964) and the two year limitation on actions based upon injury to persons or property. OHIO REV. CODE § 2305.10 (Baldwin 1964).

7. McAdams v. Windham, 208 Ala. 492, 94 So. 742 (1922); Nichols v. Colwell, 113 Ill. App. 219 (1903); Gibeline v. Smith, 106 Mo. App. 545, 80 S.W. 961 (1904); Vendrell v. School Dist. No. 26C, 233 Or. 1, 376 P.2d 406 (1962); Ogden v. Rabinowitz, 86 R.I. 294, 113 A.2d 416 (1957).

8. Cain v. Skillin, 219 Ala. 228, 121 So. 521 (1929); Higgins v. Minaghan, 78 Wis. 602, 47 N.W. 941 (1891).

9. Chesapeake & O. Ry. Co. v. Nixon, 271 U. S. 218 (1926); Morton v. California Sports Car Club, 163 Cal.App.2d 685, 329 P.2d 967 (1958); Crone v. Jordan Marsh Co., 269 Mass. 289, 169 N.E. 136 (1929); Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942); Clise v. Prunty, 108 W.Va. 635, 152 S.E. 201 (1930).

10. Wolfe v. Green Mears Constr. Co., 134 Cal.App.2d 654, 286 P.2d 433 (1955); Reep v. Greyhound Corp., 171 Ohio St. 199, 168 N.E.2d 494 (1960); Hutchinson v. Mitchell, 143 W.Va. 280, 101 S.E.2d 73 (1957).

11. Ford v. Trident Fisheries Co., 232 Mass. 400, 122 N.E. 399 (1919); North v. Johnson, 58 Minn. 242, 59 N.W. 1091 (1893); Weeks v. McNulty, 101 Tenn. 495, 48 S.W. 809 (1898).

12. This, however, does not require that the law should not hold him responsible for the entire loss to the plaintiff which was proximately caused by his failure to perform his promise as agreed.

13. See footnote 12, *supra*.

The great fundamental difference between contract and tort damages is the scope of liability of the defendant for the consequences of his conduct. The landmark contract case of *Hadley v. Baxendale*[14] stands for the proposition that only those damages which were within the contemplation of the parties when they exchanged their promises may be collected upon a breach of contract.[15] This principle arose in a case where the defendant was negligent in performing his promise. The doctrine has been upheld in a long line of cases.[16] The doctrine has been applied by analogy to all contract situations. It has had perhaps its greatest difficulty in the long line of telegraph cases in which the telegraph companies attempted to limit their liability to the higher price of the telegram or special higher limits available to the sender for an added charge.[17]

The limitation of contract damages to those within the contemplation of the parties at the time they entered into the contract is hard to justify if the defendant deliberately or negligently failed to perform his promise and caused greater loss to the plaintiff than that amount. Practically however, this solution appears in accord with justice, since the price of defendant's promise to perform is likely to have been based on his cost of performance plus a reasonable profit.[18] If the defendant had been notified of the likelihood that he would be held responsible for greater damages, he would have added a further charge for insurance. This is commonly done in baggage bailments. On the other hand, any person of reasonable intelligence can foresee that the other party may fail to perform his promise within the agreed time, or even at all. It is a question of who should bear the burden of this foreseeable risk of loss which either party, if he desired, might insure against.

When we turn our attention to torts, we are faced with several different classifications which deserve individual treatment. There are the absolute torts, such as trespass, which are a historical appendix in our law and should undoubtedly be abolished.[19] There are also the modern absolute liability torts for ultrahazardous activities based upon the sound social policy that those who engage for profit in businesses which are hazardous to their fellow human beings should be required to pay in full for any losses they cause by their activities.[20] Insurance is a legitimate cost of the deliberate operation of such businesses.

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14. 9 Exch. 341 (1854).
15. See RESTATEMENT OF CONTRACTS § 330 (1932).
16. Elzy v. Adams Exp. Co., 141 Iowa 407, 119 N.W. 705 (1909); Bates Mach. Co. v. Norton Iron Works, 113 Ky. 372, 68 S.W. 423 (1902); Hammer v. Schoenfelder, 47 Wis. 455, 2 N.W. 1129 (1879).
17. Kerr S.S. Co. v. Radio Corp., 245 N.Y. 284, 157 N.E. 140 (1926); Stone & Co. v. Postal Tel. Co., 35 R.I. 498, 87 A&I 319 (1913). See also Germain Fruit Co. v. Western Union Tel. Co., 137 Cal. 598, 70 Pac. 658 (1902); Cultra v. Western Union Tel. Co., 61 I.C.C. 541 (1921).
18. See Cultra v. Western Union Tel. Co., *supra* note 17.
19. Only nominal damages will be recoverable for a technical trespass. Henry v. Williams, 132 S.W.2d 633 (Tex. 1939).
20. Britton v. Harrison Const. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Luthringer v.

Then we come to the deliberate or wilful torts. Battery is an excellent example. At first blush, it appears desirable to hold the defendant responsible not only for the readily anticipatable injuries, but also those which, while intellectually foreseeable, were not likely results but nonetheless did occur in the particular case.[21] The difficulty is that a simple right uppercut might make an individual liable not for a few broken teeth but for supporting an invalid and a large family for life. Not only harm to the plaintiff, but the seriousness of the defendant's conduct ought to be considered if justice is to be done to the defendant as well as to the plaintiff. After all, the defendant may be appropriately, in fact most appropriately, punished for his unlawful conduct by the criminal law. Since his discharge in bankruptcy would be impossible,[22] an unlucky defendant could have all of his property taken away from him and his wages garnisheed for the rest of his life. The effect on the defendant would be out of all proportion to the gravity of his conduct in a fleeting instant. On the other hand, there might be no doubt that he caused the plaintiff and society a $500,000 loss. Yet such losses are foreseeable and can be insured against. While it should be against public policy to allow potential defendants in actions based on deliberate torts to obtain insurance against liability for their conduct, certainly individual insurance plans or state insurance could protect each individual in society against losses he might sustain by such conduct of others.

The problem of what should be the extent of liability of a defendant for negligent conduct is much the same as that of what should be the extent of liability of a defendant for deliberate tortious conduct, with the equitable exception that in the case of negligence much less reason exists to punish the defendant. Justice to the defendant cries that he not be held liable for damages he might not reasonably have foreseen.[23] This, however, is not a very helpful standard to the defendant because in many cases where he may have been negligent, he could reasonably have foreseen great harm to innocent persons. Anyone driving an automobile can reasonably foresee damages of several hundred thousand dollars resulting from

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Moore, 31 Cal.2d 489, 190 P.2d 1 (1948); Caporale v. C.W. Blakeslee & Sons, Inc., 149 Conn. 79, 175 A.2d 561 (1961); Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N.E. 528 (1899); Rylands v. Fletcher, 3 H. & C. 774 (1865), *reversed* L. R. 1 Ex. 265 (1866), *affirmed* L. R. 3 H.L. 330 (1868).

21. The general rule is that liability for battery extends to the consequences which the defendant did not intend and could not have reasonably foreseen. Ware v. Garney, 139 F. Supp. 71 (D. Mass. 1956); Watson v. Rinderknecht, 82 Minn. 235, 84 N.W. 798 (1901); Transil v. Bayer, 85 Neb. 431, 123 N.W. 445 (1909); Harris v. Hindman, 130 Or. 15, 278 Pac. 954 (1929); Vosberg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891).

22. 11 U.S.C. 35 (a) (2).

23. Some recognition of this problem does exist: "While the fundamental rule of law is to award compensation, yet rules for ascertaining the amount of compensation to be awarded are formed with reference to the just rights of both parties, and the standard fixed for estimating damages ought to be determined not only by what might be right for the plaintiff to receive in order to afford just compensation, but also by what is just to compel defendant to pay." C. J. S. *Damages* § 71 (1966). See also Van Gorden v. United States, 91 F. Supp. 834 (W.D. Mo. 1950); Fornwalt v. Reading Co., 79 F. Supp. 921 (E. D. Pa. 1948); Hansen v. Oregon-Wash. R. & Nav. Co., 97 Or. 190, 188 Pac. 963 (1920); Grissom v. Heard, 47 So.2d 108 (La App. 1950).

momentary negligence.[24] However, were we to limit the negligent defendant's liability to the damages he might reasonably have foreseen would result from his negligence, would it be fair as between an innocent party harmed by the defendant's negligence and the defendant that the innocent injured party rather than the negligent defendant should absorb the loss to the extent which the actual loss exceeded what the defendant might have reasonably foreseen? The courts have universally answered "No".[25] Tort law is the only area of the law which has a no-limit basis. In the criminal law we are dealing with morally more reprehensible conduct than is normally the case in tort law, yet the criminal law provides a maximum penalty for the violation of any particular statute.[26] The reason for our no-limit tort law may be that we persist in matching the moral culpability of the plaintiff and the defendant. And the idea that all losses caused by negligence should be fully recoverable is a strong one in our society. Another possible reason is that we have failed to conceive of any reasonable limitation on recovery which would be just to plaintiffs and defendants alike. Foreseeability is hardly a practical standard at all. The natural and proximate consequences are at least practically ascertainable in most cases.[27]

All losses are not recoverable in our society. On his own property a person may be injured accidentally or through his own negligence and not be able to recover from anyone. On the property of others or the state, he may be injured and have no legal right to recover from anyone. Until recently, government and charitable immunity barred recovery in a large number of cases. The severest injuries may be suffered in military service. Compensation for them depends upon government largess to its veterans.[28] Many persons are injured in participating sports and are unable to receive compensation for their injuries. Compensation for injuries cannot be considered so universal as to be above reconsideration.

In order to understand the difference between the damages

24. Foreseeability is semantic crystal ball gazing. God can foresee everything. Man's experience, intelligence, concentration, and knowledge of facts influence what he foresees at any given instant. Hindsight is never foreseeability.

25. 25 C.J.S. *Damages* § 25(b) (1966) states, "In the case of torts not amounting to willful or wanton wrongs, the general rule is that the wrongdoer is liable only for such consequence as were or should have been contemplated or might, in the light of attending circumstances, have been foreseen, or such as according to common experience and the usual course of events might reasonably have been anticipated. In cases of tort, the wrongdoer is liable for the natural and probable consequences of his act or omission, although their particular form or character was not foreseen or anticipated, and it is not necessary that the particular consequences shall have been within the contemplation of the wrongdoer." See also Sult v. Scandrett, 119 Mont. 570, 178 P.2d 405 (1947).

26. This is true despite the fact that unforeseen consequences may transform a criminal act into a more serious crime.

27. This lack of practical alternative standard reinforces our moral and historical predilection to awarding consequential damages without limit in tort actions. The prevalence of liability insurance also helps perpetuate this measure of damages against the insured and uninsured alike.

28. The leading surviving Japanese fighter ace of World War II, who was blinded in one eye and severly wounded over Guadalcanal states, "With the surrender, I was thrown out of the Navy. Despite my wounds and my long service, there was no possibility of a pension. We were the losers, and pensions or disability payments are received only by the veterans of a victor nation." SAKAI, SAMURAI at 11 1948).

available in tort actions and those available in contract actions, it is necessary to examine various classifications of damages. For practical purposes, both nominal and punitive damages will be ignored as irrelevant and immaterial to a re-examination of the extent of liability for damages caused by tortious conduct. Two distinct classifications of damages should be helpful: (1) damage to property as opposed to injury to human beings, and (2) past losses as opposed to future losses. Certain torts require the further distinction between damages to material property as opposed to damages to intangible property.

It is relatively easy to approximate the value of a loss when the loss is to property. All property is bought and sold and repaired on the open market. Even for those types of property in which there is little or no active trading, experts can be found who can give an approximate valuation. Physical injury to the body, however, presents more difficult problems in valuation. We can actually determine the cost of repairs to the human body. The cost of physician's services, hospital care, drugs, therapy, etc., are readily and accurately ascertainable. The law has taken the position that there should be compensation for pain and suffering.[29] Beyond the fact that we know it exists, the intensity and duration of pain and suffering in any particular case are at present unmeasurable. It is obvious that any monetary amount awarded for pain and suffering must be totally speculation.[30] For the moment ignoring the distinction between permanent and temporary incapacitation, physical injuries may be divided into 3 categories: (1) Those injuries which in some way diminish the individual's earning capacity, (2) those which cause the individual inconvenience and/or pain, and (3) those which affect the social life of the individual. It is clear that the only category of physical injury which can even be approximated in monetary terms with reasonable certainty is injuries which diminish the individual's earning capacity. The reason is obvious; earning capacity is normally measured in monetary terms. There is a market place for it.[31] Any attempt to put a monetary valuation on inconvenience, pain, or social problems[32] must be highly speculative.[33]

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29. Hickenbottom v. Delaware, L. & W. R., 122 N.Y. 91, 25 N.E. 279 (1890); Hunt v. Boston Terminal Co., 212 Mass. 99, 98 N.E. 786 (1912); Middleboro Coca-Cola Bottling Works v. Ball, 262 Ky. 101, 89 S.W.2d 875 (1936); Illinois Cent. R. v. Frick, 256 Ky. 317, 76 S.W.2d 13 (1934); Lane v. Southern R., 192 N.C. 287, 134 S.E. 855 (1926).

30. Thus it is said that the amount to be awarded rests within the discretion of the jury. Daniels v. Payne, 49 N.D. 370, 191 N.W. 776 (1922).

31. Reynolds v. Clark, 28 Del. 250, 92 Atl. 873 (1914); Laird v. Chicago R.I. & P. Rv., 100 Iowa 336, 69 N.W. 414 (1896); Gregory v. Slaughter, 124 Ky. 345, 99 S.W. 247 (1907); McKenna v. Citizens Natural Gas Co., 201 Pa. 146, 50 Atl. 922 (1902).

32. Scott v. Cowan, 114 Kan. 32, 217 Pac. 698 (1923); Main v. Grand Rapids G.H. & M. Ry., 207 Mich. 473, 174 N.W. 157 (1919); Vascoe v. Ford, 212 Miss. 370, 54 So.2d 541 (1951); Kierkowski v. Connell, 253 Pa. 566, 98 Atl. 766 (1916).

33. Bucker v. Krause, 200 F.2d 576 (7th Cir. 1953); Kurta v. Probelske, 324 Mich. 179, 36 N.W.2d 889 (1949); Kulengowski v. Withington, 222 S.W.2d 579 (Mo. App. 1949).

We have seen that only the cost of medical treatment[34] and lost income resulting from an injury[35] may be estimated with any reasonable degree of certainty. Estimating or ascertaining damages with reasonable certainty presupposes that the loss has already occurred and become fixed. Future medical expenses[36] and loss of future earnings[37] are speculative because these losses have not as yet been incurred.[38] They become increasingly more speculative for each month and year they are removed from the date of the award. Loss of earnings and medical expenses for the first few months after an award may be subject to reasonably accurate estimation. What losses will be incurred by the injured person 20 years hence because of his injury can only be ascertained by looking into a magic crystal ball. Of the two, future medical expenses are much more capable of estimation. The cost of any operations and other services, which it can presently be stated will be required in the future, may be fairly accurately estimated. Loss of future earnings is highly speculative. The reason is that two simultaneous equations with two unknowns are involved. We do not know what the person's future earnings or future way of life would have been had the injury not occured. We don't know what he will do in the future now that the injury has occured. We can only foresee that in most cases the permanently injured individual will adapt his future life to his injury. This may or may not cost him an economic loss in the future.[39]

There are several additional factors which should be considered in conjunction with monetary awards for future medical expenses, pain and suffering and loss of income. First there is inflation.[40] Inflation has been the general historical rule since ancient times. It may not occur in the short run, but over a lifetime inflation is bound to decrease the purchasing power of a dollar awarded year before. Since part of principal as well as income from the principal would theoretically be consumed by the injured party each

34. Tomey v. Dyson, 76 Cal.App.2d 212, 172 P.2d 739 (1946); Sezzin v. Stark, 187 Md. 241, 49 Atl. 742 (1946); Jyachosky v. Wensil, 240 N.C. 217, 81 S.E.2d 644 (1954).

35. Osterode v. Almquist, 89 Cal.App.2d 15, 200 P.2d 169 (1948); Winter v. Pennsylvania R., 45 Del. 108, 68 A.2d 513 (1949); Tozer v. Kerr, 342 Mich. 136, 69 N.W.2d 171 (1955); Blackton v. McCarthy, 231 Minn. 303, 42 N.W.2d 818 (1950).

36. Birmingham Elec. Co. v. Farmer, 251 Ala. 148, 36 So.2d 343 (1948); Buswell v. City & County of San Francisco, 89 Cal.App.2d 123, 200 P.2d 115; Walton v. Grant, 302 Ky. 194, 194 S.W.2d 366 (1946); Kowarakis v. Hawver, 208 Miss. 697, 45 So.2d 278 (1950); Petty v. Kansas City Pub. Serv. Co., 355 Mo. 824, 198 S.W.2d 684 (1947).

37. Florida Greyhound Lines v. Jones, 60 So.2d 396 (Fla. 1952); Western & Atlantic R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949); Atlantic Coast Line R. v. Ouzts, 82 Ga. App. 36, 60 S.E.2d 770 (1950); Beam v. Baltimore & O. Ry., 770 Ohio App. 419, 68 N.E.2d 159 (1945).

38. Of course the courts don't describe them as speculative because they are recoverable. If the courts admitted the highly speculative nature of such losses, it is doubtful if they would be recoverable.

39. The chances are almost as great that he will make more money in the future in the occupation he adopts because of his injury than he would have made in the occupation he would have had but for the injury.

40. Southern Pacific Co. v. Zehnle, 163 F.2d 453 (9th Cir. 1947); Hord v. National Homeopathic Hosp., 102 F. Supp. 792 (D.D.C. 1952), *affirmed* 204 F.2d 397 (D.C. Cir. 1953); Boboricken v. United States, 76 F. Supp. 70 (W.D.Wash. 1947); Aasen v. Aasen, 328 Minn. 1, 36 N.W.2d 27 (1949); Nobbe v. Hardy Continental Hotel Sys. of Minn., 225 Minn. 496, 31 N.W.2d 332 (1948); Koenigs v. Thome, 226 Minn. 14, 31 N.W.2d 534 (1948).

year, theoretically, inflation should cut down the living standard the award was designed to guarantee the injured party. A second factor is the human propensity to spend. A carefully measured out monetary award, if adequate, should provide the capital[41] necessary to maintain the injured individual in the future in the standard of living to which he was accustomed before the injury. Once in a great while, awards for future loss of income and medical expenses may be conserved to do just this. However, in the great majority of cases, the recipient of the award manages to spend the entire award within two or three years so that in fact he received one bonus fling for his injury, and thereafter must make his way in the world with his injury just as though he had never received any award for future medical expenses, pain and suffering, and loss of earnings.[42] Then there is the high cost of collecting the award. The contingent attorney's fee takes from 25 to 50 percent of the award, and there may be other sizeable costs of collection, such as expert witness fees, in addition.

Contract damages are awarded for measurable past losses of profit,[43] except in rare cases where a basically tort action is prosecuted under a warranty theory.[44] Thus contract cases present few of the problems of measurement of damages which are present in tort actions. Loss of past profits is usually readily ascertainable and loss of future profits are usually held to be too speculative[45] to be recoverable in contract cases.[46] Yet future loss of earnings to the individual is exactly analagous to loss of future profits to a business.

Losses due to negligence in our society will continue to occur. There is need for thoughtful reconsideration of the most socially desirable means of compensating injuries caused by negligence and the injuries which follow in its wake. We are talking about two things—compensation and deterrent. Damages are presently used in tort actions in both capacities. Possible tort liability is at present hardly a deterrent to the adequately insured motorist. The real deterrent to the insured motorist is the possibility that if he is negligent, he himself will be injured or killed . Perhaps we should

41. Hallada v. Great Northern Ry., 244 Minn. 81, 69 N.W.2d 673 (1955); Borcherding v. Eklund, 156 Neb. 196, 55 N.W.2d 643 (1952); Wentz v. T. E. Connolly, Inc., 273 P.2d 485 (Wash. 1954).

42. On one trip to Europe two of the three other occupants of the author's cabin were traveling to Europe on insurance money collected from automobile accidents.

43. Sward v. Nash, 230 Minn. 100, 40 N.W.2d 828 (1950); Norwood v. Carter, 242 N.C. 152, 87 S.E.2d 2 (1955); Consumer's Co-op Ass'n. v. Sherman, 147 Neb. 901, 25 N.W. 2d 548 (1947); Burt v. Lake Region Flying Serv., 78 N.D. 928, 54 N.W.2d 339 (1952); Bale v. Brudevig, 77 N.D. 494, 43 N.W.2d 753 (1950).

44. See note 2, *supra.*

45. Tovell v. Legum, 207 Ga. 193, 60 S.E.2d 339 (1950); Keener Oil & Gas Co. v. Stewart, 172 Okla. 143, 45 P.2d 121 (1935); Jurec v. Raznik, 104 Mont. 45, 64 P.2d 1076 (1937); M. Schulz Co. v. Gether, 183 Wis. 491, 198 N.W. 433 (1924); Marcante v. Hein, 51 Wyo. 389, 67 P.2d 196 (1937).

46. Of course anticipatory breach may give rise to the problem of ascertaining what a future situation would have been. See Kay Petroleum Co. v. Piergrossi, 137 Conn. 620, 79 A.2d 829 (1951).

divorce deterrence from compensation in our thinking about negligent acts not entered into for profit.

It might be desirable to divide all torts into those which occur in connection with the operation of an enterprise entered into for profit and those acts which are not connected in any way with profit making. Activities engaged in for profit should, as far as practical, pay their entire social cost. They may easily pass on to the ultimate consumer the true cost of the enterprise by any price increase necessitated by adequate insurance coverage.

Activities which are not entered into for the purpose of profit present a more difficult problem. The loss occurs regardless of whether there is legal liability or not. Liability is in fact irrelevant to compensation. Insurance, government or private, is the obvious solution. The question is who should be the insured; and if insurance coverage is inadequate, who should bear the loss. Historically, the burden has been placed on the tortfeasor for moral reasons. Since insurance is the answer, the question who is most likely to obtain adequate insurance becomes relevant. But the answer to this question is determined by the historical development of tort liability. Today the home owner and automobile driver are more likely than the pedestrian to have adequate insurance against the medical expenses and future loss of earnings which may foreseeably be caused by the pedestrian falling on a defective sidewalk or being struck by a speeding car. However, this is not ordained in the stars. The extent of Blue Cross and major medical insurance in the total population today is high. Loss of income insurance coverage is growing. If our tort liability law for negligence had not developed along its present lines, it is likely that all the employed population would, through one source or another, have insurance coverage against medical expenses and future loss of earnings because of accidents both negligent and non-negligent.

The advantages of such insurance coverage against losses due to torts over our present system are twofold. First, all of the expenses and uncertainty incident to the question of determining liability would be saved. The only question would be the amount of compensation which should be recovered. Secondly, each individual would determine for himself the amount of protection which he wished to have, both for medical expenses and for loss of income. He would not be dependent upon the chance financial responsibility of the tortfeasor.

The abolition of tort liability for negligence in activities not entered into for profit would make it impossible for a person to have his lifetime savings wiped out by momentary negligence because of inadequate insurance coverage of the resultant loss to the insured person. And if a person were injured by the negligence of another as is foreseeable, he would be able to collect his damages

up to the amount of the protection he had purchased for himself.[47] The incidence of negligence would then have to be combatted by the criminal law.

The extent of future losses must always be speculative. The only really just solution is their abolition. This could, as a practical matter, only be accomplished through the medium of government, rather than private, insurance as a prerequisite for the abolition of awards for losses which may occur in the future because of an occurence in the past is the establishment of a permanent institution to which the injured may periodically apply in the future for compensation payments for losses which they can demonstrate they suffered in any given period because of the past occurence.

47. This of course would depend upon the good faith of the insurer. At present one cannot rely too heavily on the good faith of insurance companies. Whether the insurance companies or unscrupulous plaintiffs and attorneys were the original cause of the situation is debatable and really irrelevant to a proper social solution to the problem of just and adequate compensation for losses due to negligence. If the insured were seeking to recover from his insurer, it is predictable that competition among insurers would place them under considerable pressure to honor all just and reasonable claims.