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By ELLIS J. HORVITZ*

In recent years the California Supreme Court has pioneered in the adaptation of tort law to modern needs. As a frequent spokesman for the court, Justice Tobriner has been a leader in this development.

Tort law, more than most other fields of law, is a creation of the common law. It is primarily judge-made law rather than statutory law. In Justice Tobriner's view, the common law is an ongoing process that involves the modification of old rules and the creation of new ones to reflect changing community values as well as to protect traditional values in the face of changing social and economic conditions. He has observed, "The economic tensions of the society press upon the legal status quo. Inevitably the stress and strain works changes: the doctrinal innovations do not rise phoenix-like from the ashes of their predecessors, but rather stem from society's demands and changes."[1]

Justice Tobriner has articulated the societal needs and public policy goals he has sought to implement in tort law through his judicial opinions and other published writings. He has repeatedly formulated rules designed to protect the rights and well-being of individuals within society, a society that is "rapidly becoming more complex and col-

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1. Tobriner, *Retrospect: Ten Years on the California Supreme Court,* 20 U.C.L.A. L. REV. 5, 12 (1972). Professor Llewellyn has described the reverse side of the same coin: "I know of no phase of our law so misunderstood as our system of precedent. The basic false conception is that a precedent or the precedents will in fact . . . simply dictate the decision in the current case . . . .

Now the truth is this: only in times of stagnation or decay does an appellate system even faintly resemble such a picture of detailed dictation by the precedents, and even in times of stagnation . . . movement and change still creep up on the blind side of the stagnators." K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 62-63 (1960). Justice Holmes said it more succinctly: "To rest upon a formula is a slumber that, prolonged, means death." O. W. HOLMES, *Ideals and Doubts,* in COLLECTED LEGAL PAPERS 306 (1920).

lectivized"[2] and more "risk-infested."[3] Justice Tobriner observed that "[o]ur current crowded and computerized society compels the interdependence of its members,"[4] and forces individuals necessarily to rely upon public institutions both to perform their basic functions and to protect them from injury.[5] Individuals are, therefore, less able to control their immediate environments or to participate in the principal decisions affecting their lives.

Justice Tobriner's writings reflect the influence of earlier jurists, particularly Justice Brandeis. Justice Brandeis' central concern, articulated by Learned Hand a generation ago, contained the seeds of Justice Tobriner's legal philosophy today: "Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual."[6]

From this perspective, Justice Tobriner has over the past fifteen years been a principal architect in the formulation of significant new developments in the field of tort law. This Article will focus on Justice Tobriner's contributions to two of those developments. First, decisions by the California Supreme Court reflect reduced emphasis on the nature of the defendant's conduct and greater sensitivity to the character of the plaintiff's injury. Second, the court has given increased attention to the status of the parties and the relationship between them. No longer is the principal issue whether the defendant engaged in wrongful conduct but rather which party by reason of status and position is best able (a) to prevent the injury regardless of fault, (b) to absorb the loss, and (c) to carry the burden of explaining how the injury occurred.

In the course of this change the California Supreme Court and other courts have redefined and expanded the concept of duty, reflecting judicial sensitivity to the nature of the plaintiff's injury and the enhanced importance of the parties' status and position.

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2. Tobriner, *Lawyers, Judges and Watergate,* 49 CAL. ST. B.J. 111, 182 (1974). *See also* Tobriner, *Retrospect: Ten Years on the California Supreme Court,* 20 U.C.L.A. L. REV. 5 (1972).

3. Tobriner, *The Changing Concept of Duty in the Law of Torts,* 9 CAL. TRIAL LAW. J. 17 (1970); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976).

4. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976).

5. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 280, 419 P.2d 168, 179, 54 Cal. Rptr. 104, 115 (1966) (a contract case).

6. L. Hand, *Mr. Justice Brandeis,* in THE SPIRIT OF LIBERTY 159-60 (1952).

Dillon v. Legg: Recognition Of The Plaintiff's Injury

Dillon v. Legg[7] exemplifies the California Supreme Court's new emphasis on the character of the tort injury in each case. Mrs. Dillon suffered emotional shock and physical injury when she watched the defendant driver negligently strike and kill her infant child with his car. Because Mrs. Dillon was outside the zone of danger[8] when she witnessed the accident, the trial court entered judgment on the pleadings for the defendant based on the authority of *Amaya v. Home Ice, Fuel & Supply Co.*[9] The supreme court reversed.

If limited to its facts, *Dillon* is not a significant case. Justice Tobriner acknowledged that "here we deal with a comparatively isolated and unusual situation."[10] Nevertheless, *Dillon* is truly a landmark case. Five years before, the California Supreme Court had reached the opposite conclusion in *Amaya*. The majority in *Amaya* expressed overriding concern that a rule creating a cause of action in favor of a mother who was outside the zone of danger would have no logical stopping point and would if recognized have "thrown [us] back into the fantastic realm of infinite liability."[11]

In *Dillon*, the court reexamined the fears that the court in *Amaya* has expressed, reversed its prior holding, and gave redress to the mother's injury.[12] From the opening line of his opinion, Justice Tobriner stressed the nature of the plaintiff's injury:

> That the court should allow recovery to a mother who suffers emotional trauma and physical injury for witnessing the infliction of death or injury to her child for which the tortfeasor is liable in negligence would appear to be a compelling proposition. As Prosser points out, "All ordinary human feelings are in favor of her [the mother's] action against the negligent defendant . . . ."[13]

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7. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

8. Pretrial depositions indicated that the deceased infant's sister, also a plaintiff in this case, was possibly standing on the curb such that she may have been in the zone of danger. The trial court denied a motion for judgment on the pleadings with respect to her allegation that she sustained emotional disturbance, shock, and injury to her nervous system after seeing the defendant strike her sister. Justice Tobriner commented: "In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident." *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

9. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

10. 68 Cal. 2d at 743, 441 P.2d at 922, 69 Cal. Rptr. at 82.

11. *Id.* at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45.

12. 59 Cal. 2d at 295, 379 P.2d at 513, 29 Cal. Rptr. at 33.

13. 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.

He observed that none of the feared dangers expressed in *Amaya* and past American decisions[14] "excuses the frustration of the natural justice upon which the mother's claim rests."[15]

The remainder of the opinion painstakingly analyzes the history of the concept of duty in the common law. Feudal society imposed liability on an actor regardless of fault or duty since "the defendant [in feudal society] owed a duty to all the world to conduct himself without causing injury to his fellows."[16] In the nineteenth century, the concept of duty developed into a "legal device . . . designed to curtail the feared propensities of juries toward liberal awards."[17] The opinion explained that this development was a result of

> [t]he Industrial Revolution, which cracked the solidity of the feudal society and opened up wide and new areas of expansion . . . . In the place of strict liability it introduced the theory that an action for negligence would lie only if the defendant breached a duty which he owed to plaintiff.[18]

Following this historical review, Justice Tobriner said that the issue of liability

> should be solved by the application of the principles of tort, not by the creation of exceptions to them. Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion.[19]

Dillon v. Legg represents a turning point in two significant respects. It marks the ascendancy of the court's recognition of the rights of the injured plaintiff as a major element in determining the scope of the defendant's liability. The plaintiff's reasonable expectations and need for personal security prevailed over the limiting and immunizing concept of "duty," which found its justification in the needs of an earlier industrial era.

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14. "[T]hey state . . . the imposition of duty [upon the tortfeasor to the mother] would work disaster because it would invite fraudulent claims and it would invoke courts in the hopeless task of defining the extent of the tortfeasor's liability." 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.

15. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

16. 68 Cal. 2d at 734-35, 441 P.2d at 916-17, 69 Cal. Rptr. at 76-77.

17. *Id.* at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76 (citation omitted) (quoting W. PROSSER, LAW OF TORTS 332-33 (3d ed. 1964)). Justice Tobriner further quoted, " 'It must not be forgotten that "duty" got into our law for the very purpose of combatting what was then feared to be a dangerous delusion . . . that the law might countenance legal redress for all foreseeable harm.' " (quoting J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 47 (1967)).

18. *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.

19. *Id.* at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

The second and perhaps the most significant aspect of *Dillon* lies in the court's rejection of the fear of "the fantastic realm of infinite liability"[20] as an insurmountable obstacle to the law-making function of the judiciary. *Dillon* exemplifies judicial recognition that compensable loss must be redefined periodically by weighing considerations of justice and of social and economic policy appropriate to the time and place. Justice Tobriner noted that "[i]n future cases the courts will draw lines of demarcation upon facts more subtle than the compelling ones alleged in the complaint before us."[21] In this manner he has confirmed his confidence in the ongoing process of the common law.[22]

Tarasoff v. Regents and Barrera v. State Farm — Status: The Defendant's Ability to Prevent Injury

Justice Tobriner's opinion in *Tarasoff v. Regents of the University of California*[23] offers a dramatic illustration of the importance of the defendant's status, particularly his ability to prevent the injury, as a factor in determining tort liability. *Tarasoff* is not without precedent; it follows logically from earlier cases.

The facts are as follows. Prosenjit Poddar murdered Tatiana Tarasoff. Poddar previously had confided his intention to kill Tatiana to a psychotherapist treating him at Cowell Memorial Hospital at the University of California.

Tatiana's parents brought suit for wrongful death against the psychotherapists and their employer, the Regents of the University

20. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 315, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963).

21. 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

22. In the nine years since *Dillon* was decided the fears expressed by the majority in *Amaya* have not materialized. In Capelouto v. Kaiser Foundation Hospitals, 7 Cal. 3d 889, 892 n.1, 500 P.2d 880, 882, 103 Cal. Rptr. 846, 858 (1972), and in Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977), the court held that *Dillon* does not give a cause of action to a claimant who, upon witnessing a third party negligently injure a family member, suffers only emotional distress unaccompanied by physical injury. More recently, Justice Tobriner, writing for the majority, again limited the holding of *Dillon* in Borer v. American Airlines, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977), and in Baxter v. Superior Court, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 461 (1977). Basing his decision on considerations of social and economic policy rather than on the mechanical application of *Dillon*, Justice Tobriner for the court held in *Borer* that a child does not have a cause of action for loss of parental companionship and consortium when the parent is negligently injured. Similarly, in *Baxter*, the court through Justice Tobriner held that the parent is not entitled to such an action arising out of injury to the child.

23. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

of California. The trial court sustained demurrers. The California Supreme Court reversed.

The defendants asserted that they owed no duty of reasonable care to Tatiana or to her parents. In rejecting this contention, Justice Tobriner, relying on the court's earlier decision in *Rowland v. Christian*,[24] invoked the duty of every person to use ordinary care. He quoted the salient language of *Rowland*,[25] which was adopted from an early English case:

> [W]henever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."[26]

Justice Tobriner noted that the common law duty to use ordinary care did not normally include a duty to control the conduct of others nor to warn potential victims. Historically, common law judges were reluctant to impose liability based upon an affirmative duty to act. He explained, however, that there is an exception to this rule when "the defendant stands in some special relationship to either the person whose conduct needs to be controlled or . . . the foreseeable victim of that conduct."[27]

In analogous cases an affirmative duty to act has emerged from the physician-patient relationship. Courts have held physicians liable for negligent failure to protect third parties from patients' dangerous propensities, including failure to isolate a patient with a contagious disease or failure to warn a patient receiving medication not to drive a car.[28] By analogy he concluded that a psychotherapist in a special relationship with a foreseeably dangerous person has a duty to attempt to protect the potential victim.[29] Justice Tobriner quoted Fleming and Maximov: "[T]he ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional expertise."[30]

Balancing society's interest in the victim's personal safety against

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24. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

25. *Id.* at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100 (quoting 11 Q.B.D. 503, 509 (1883) (Brett, J.)).

26. 17 Cal. 3d at 434, 551 P.2d at 342, 131 Cal. Rptr. at 22.

27. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

28. 17 Cal. 3d at 436-37, 551 P.2d at 342-44, 131 Cal. Rptr. at 22-24.

29. *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.

30. Fleming and Maximov, *The Patient or His Victim: the Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1067 (1974).

the interest of fostering effective treatment through the confidential communication of therapist and patient, the court found the interest in personal safety paramount. It stated, "The protective privilege ends where the public peril begins."[31] Summarizing, Justice Tobriner emphasized:

> Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. . . . [W]e see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.[32]

Tarasoff finds its origins in earlier decisions in which the defendant's status, his relationship to the injured person, and his ability to avoid the injury were significant factors in determining the issue of liability.[33] One of these earlier cases is *Barrera v. State Farm Mutual Automobile Insurance Co.*[34] Barrera obtained judgment against State Farm's insured for injury from an automobile accident. State Farm attempted to avoid liability by rescinding its policy because of the insured's misrepresentations in his original application for insurance. Speaking for the court, Justice Tobriner rejected State Farm's defense holding that the defendant was under a duty to the insured as well as to the public "to conduct a reasonable investigation of insurability within a reasonable time after issuance of an automobile liability policy."[35] He noted that the "quasi-public nature of the insurance business and the "public policy that protects an innocent victim of the careless use of automobiles from an inability to sue a financially responsible defendant"[36] were the two major reasons the court imposed a duty to investigate. Such a duty is owed to members of the public who suffer injury at the hands of presumably insured motorists. An insurance company, which takes the risk that its insured will be involved in an accident causing injury, is in the best position to conduct an investigation of the representations of its insured. As in *Tarasoff*, the defendant's status as the one best able to either prevent

31. 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

32. *Id.*

33. *See id.* at 436 nn.7 & 9, 551 P.2d at 343-44, 131 Cal. Rptr. at 23-24.

34. 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969). Justice Tobriner dealt with the defendant's status and the relationship between the plaintiff and defendant in interpreting an insurance contract of adhesion in Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

35. 71 Cal. 2d at 668-69, 456 P.2d at 680-81, 79 Cal. Rptr. at 112-13.

36. *Id.* at 674-75, 456 P.2d at 685, 79 Cal. Rptr. at 117.

the wrong or ameliorate the injury was an important factor in determining whether tort liability should attach.

Another example of Justice Tobriner's concept of relationship-derived liability is *Johnson v. State*.[37] In that case the Youth Authority placed a teenager with homicidal tendencies in a foster home with the plaintiff without warning the plaintiff of the youth's dangerous propensities. The youth assaulted and injured the plaintiff. Justice Tobriner said "As the party placing the youth with . . . [the plaintiff], the state's relationship to the plaintiff was such that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character"[38] and summarily disposed of the contention that the state owed no duty to the plaintiff.[39]

Finally, the defendant's status, particularly his superior position to prevent injury or spread the risk, was a visible factor in imposing tort liability in *Vesely v. Sager*.[40] In the opinion by Chief Justice Wright in which Justice Tobriner concurred, the supreme court held that civil liability may be imposed upon a tavern keeper for providing alcoholic beverages to an already intoxicated customer who thereafter injures a third person. The court reevaluated and abandoned the old common law doctrine that furnishing alcoholic beverages is not the proximate cause of the third party's injuries and observed that the issue was not one of proximate cause but rather one of duty.[41] A tavern owner controls the liquor served on the premises and is, therefore, best able to judge whether to refuse to serve a customer because that customer may become dangerous to others.

Haft v. Lone Palm Hotel — Status: The Defendant's Superior Ability to Explain How Injury Occurred

Haft v. Lone Palm Hotel,[42] further illustrates the significance of the status and relationship of the parties, in this case to show who can best bear the burden of explaining how the injury occurred. The facts are brief and tragic. Mr. and Mrs. Haft and their five-year-old son

37. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

38. *Id.* at 758, 447 P.2d at 355, 73 Cal. Rptr. at 243.

39. The court has also applied relationship-derived liability to commercial injury. *See* Connor v. Great Western Savings & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). Liability based on status also has found expression in products liability cases. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

40. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

41. *Id.* at 163-64, 486 P.2d at 158-59, 95 Cal. Rptr. at 630-31. *See generally* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

42. 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

were vacationing at the defendants' hotel. While Mrs. Haft was away shopping, both her husband and child drowned in the swimming pool furnished by defendant for use by its guests. Defendants failed to provide any major safety measures required by law, including a lifeguard or substitute sign advising guests that no lifeguard was present. The court observed, "It would be difficult to find a pool that was more dangerous than the attractive facility which the Lone Palm offered its guests . . . ."[43]

Despite overwhelming evidence that the defendants had breached their duty, Mrs. Haft's wrongful death claim foundered on the doctrine of proximate cause. Accordingly, the lower court entered judgment for the defendants. Reversing and remanding, Justice Tobriner noted that there was a complete absence of evidence to explain exactly how the decedents drowned and that "the evidentiary void in the . . . action result[ed] primarily from the defendants' failure to provide a lifeguard to observe occurrences within the pool area."[44] He continued:

> The absence of such a lifeguard in the instant case thus not only stripped decedents of a significant degree of protection to which they were entitled, but also deprived the present plaintiffs of a means of definitively establishing the facts leading to the drownings.
>
> [P]laintiffs have gone as far as they possibly can under the circumstances in proving the requisite causal link between defendants' negligence and the accidents. To require plaintiffs to establish "proximate causation" to a greater certainty than they have in the instant case, would permit defendants to gain the advantage of the lack of proof inherent in the lifeguardless situation which they have created.[45]

Justice Tobriner for the court concluded that the burden shifted to the defendants to prove that their negligence was not the proximate cause of the drownings. The opinion reemphasized the defendants' statutory violation, their creation of a dangerous condition, and, most important, their control over and familiarity with the premises. This last factor was the basis upon which the court held that the status of the defendants gave them superior ability to explain how the injury occurred.

The rationale in *Haft v. Lone Palm* finds its origins in earlier cases, such as *Ybarra v. Spangard*,[46] a medical malpractice case in

43. *Id.* at 763, 478 P.2d at 468, 91 Cal. Rptr. at 748.
44. *Id.* at 771, 478 P.2d at 474, 91 Cal. Rptr. at 754.
45. *Id.* at 771-72, 478 P.2d at 474-75, 91 Cal. Rptr. at 754-55.
46. 25 Cal. 2d 486, 154 P.2d 687 (1944).

which the supreme court invoked the doctrine of res ipsa loquitur to shift the burden of explanation for the plaintiff's injury to the defendant doctors and hospital personnel. In *Ybarra* the supreme court observed that, without the benefit of the doctrine of res ipsa loquitur, the court would be forced to invoke the principle of absolute liability in order to avoid gross injustice.[47]

In the years since *Ybarra v. Spangard,* the doctrine of res ipsa loquitur has been used with regularity in medical malpractice cases, particularly in cases in which unexplained injury has occurred on the operating table. Recognizing the limitations of the doctrine of res ipsa loquitur, Justice Tobriner in *Clark v. Gibbons*[48] wrote a concurring opinion in which he suggested that, when an inexplicable accident occurs in the operating room as in *Ybarra,* the court should abandon the concept of negligence and "the largely fictitious and often futile search for fault which presently characterizes medical injury litigation" and substitute a doctrine of strict liability.[49] Recognizing the catastrophic effect which a malpractice judgment can have upon a doctor's career and possibly anticipating the present medical malpractice litigation crisis, he observed that a rule of strict liability (1) "can insure that the burdens of unexplained accidents will not fall primarily upon the helpless but will be borne instead by those best able to spread their cost among all who benefit from the surgical operations in which these misfortunes occur,"[50] (2) will permit "a far higher percentage of all medical controversies [to be] settled out of court, without the 'economic and emotional strain of protracted litigation requiring difficult or impossible proof,' "[51] and (3) will "not impose the stigma of negligence upon a doctor merely because an operation yields an uncommon and inexplicable result . . . [which] may well bear no relationship to negligence."[52] This concurring opinion further exemplifies Justice Tobriner's emphasis on the superior status of the defendants not only to prevent injury but to explain how it occurred.

By the same token, easing the burden of the plaintiff's proof was a motivating factor in the development of the law of products liabil-

47. *Id.* at 490-91, 154 P.2d at 689.

48. 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967).

49. *Id.* at 417, 426 P.2d at 538, 58 Cal. Rptr. at 138.

50. *Id.* at 419, 426 P.2d at 539, 58 Cal. Rptr. at 139 (footnote omitted).

51. *Id.* at 421, 426 P.2d at 540, 58 Cal. Rptr. at 140, (quoting Ehrenzweig, *Compulsory "Hospital-Accident" Insurance, A Needed First Step Toward the Displacement of Liability for "Medical Malpractice,"* 31 U. CHI. L. REV. 279, 288 (1964)).

52. *Id.* at 421, 426 P.2d at 540, 58 Cal. Rptr. at 140.

ity. In *Cronin v. J.B.E. Olson Corp.*,[53] the California Supreme Court eliminated the requirement that the plaintiff prove that the manufacturer's defect made the product unreasonably dangerous, explaining that this requirement "has burdened the injured plaintiff with proof of an element which rings of negligence."[54] Justice Sullivan, writing for the court, reaffirmed that the very purpose of instituting the doctrine of strict products liability "was to relieve the plaintiff from problems of proof . . ."[55] which he faced when trying to prove negligence or breach of warranty.

Conclusion

It is a commonplace observation that the increasing tempo with which change occurs is one of the principal characteristics of contemporary society. This change pervades virtually all aspects of our lives. The California Supreme Court, often with Justice Tobriner as its spokesman, has recognized and given expression to these changes in the field of tort law. This recognition is consistent with the evolutionary process of the common law. Justice Tobriner's opinions reflect this process at work in what Professor Llewellyn has described as the Grand Style of Reason.[56] His opinions disclose a deep respect for precedent and recognition of the need for continuity.[57] Nonetheless, he agrees with Justice Holmes that "the present has a right to govern itself so far as it can; . . . historic continuity with the past is not a duty, it is only a necessity."[58] He has therefore recognized the need for change and choice and has sought to frame new rules appropriate to our times and circumstances. He has observed, "The common law is no more than an ongoing manuscript of mankind's long, struggling march. The law's genius lies in its creative continuity."[59] As he has built upon earlier legal concepts and developed them into decisional law, so has he opened new areas of inquiry which, like fine wine, will require years to develop into mature doctrine. Above all, by his example he teaches that critical reevaluation is continually necessary to the health and growth of the law.

53. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
54. *Id.* at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
55. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
56. *Id.*
57. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, 402 n.1 (1960).
58. O. W. HOLMES, *Learning and Science,* in COLLECTED LEGAL PAPERS 139 (1920).
59. Tobriner, *The Changing Concept of Duty in the Law of Torts,* 9 CAL. TRIAL LAW. J. 17, 23 (1970).