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F. H. Lawson

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LIMITED LIABILITY*

F. H. LAWSON**

One of the main objects of legal education is to train lawyers to think on preconceived, established lines, so that they may argue among themselves intelligibly and without wasting time and energy on fundamentals; another, contradictory aim is to accustom an élite to look at law critically and if necessary to question traditional views on rational grounds. One useful teaching method is to shake the student out of his accustomed ways and to force him to reconsider the categories of thought characteristic of his own legal system by reference to those of other systems. That sort of teaching is especially a function of comparative lawyers. I propose, therefore, as a comparative lawyer, to draw for the benefit of an élite of lawyers and laymen a cross-section through legal systems that has not, to my knowledge, been drawn before. You will find the topic of limited liability discussed sporadically in widely different context, but not, I believe, made the subject of a generalization based on historical and comparative study. I propose to trace some of its ramifications, in the hope of detecting in them a coherent pattern.

I make no apology for starting with Roman law. Most of the essential problems and the means of dealing with them are already there. The products of Roman analysis could, if properly and imaginatively used, be made to solve our modern problems also.

Early Roman law was very hard on debtors. Once certain procedural safeguards had been satisfied, the debtor was subjected to the physical control of his creditor, who could confine him in his private prison, but was probably forced to allow him to work off his debt. Even after the roughness of the procedure was alleviated, the power of the creditor remained intact.

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**Professor Emeritus of Comparative Law, Oxford University; Secretary-General of the International Association of Legal Science; Fellow of the British Academy; Lecturer in Law at the Universities of Lancaster and Manchester; Barrister at Law of Gray's Inn, M.A., D.C.L., Oxford; Hon. LL.D., Glasgow; Dr. Jur., Frankfurt; *Docteur en Droit*, Paris and Louvain and Ghent. Formerly Visiting Professor of Law at the Universities of California (Berkeley), Houston, Michigan, Pennsylvania, and at New York University.

But it would seem that this method of enforcement was of little use against insolvent debtors; it was a way of putting pressure on the solvent.¹ If it was necessary to proceed against a debtor's property, one would have expected to find some procedure analogous to a sheriff's sale, a public officer being authorized to enter upon the property and seize enough to cover the debt. Republican Rome, however, had no such officer—it left its citizens to enforce their rights themselves—and, moreover, the debtor was probably assumed to be insolvent. In that case it would be unfair to apply the principle of "First come, first served"; and so the debtor's property was sold *en masse* to the creditor who promised the other creditors the highest dividend.²

It is important to note that the debtor was not thereby discharged from liability to pay the residue of his debts. I need not pursue the matter further, including some rather obscure relaxations of the hardships to which he was still subject, and which correspond roughly to the modern exemptions from full execution, such as bedding, tools of trade—there was nothing so generous as the homestead exemption.³ Although in the end the debtor might not pay the whole of his debts, it was these obstacles that prevented the creditors from effecting a complete execution. The judgment that each had obtained was for the whole debt. Since it was the execution, not the liability, that was limited, they are not strictly germane to my subject. Nevertheless, true instances of limited liability do occur in Roman law. Some of the most interesting are concerned with succession on death.

There was no personal representative in Roman law.⁴ The successor, whether by will or on an intestacy, was always an heir, and stepped into the shoes of the deceased for all purposes, apart from the liabilities which died with the deceased. Hence he sued in his own right to recover debts due to the deceased and was fully liable for the debts owed by him. Some heirs could indeed always refuse to enter and so did not succeed. Others gradually acquired the right to abstain. The only heir who could not refuse was a slave of the testator, who was at the same time given his freedom. He automatically became heir and assumed the liabilities of the testator. He thereby incurred the disgrace of insolvency which would otherwise have fallen on his master. It was indeed the practice to substitute a slave as heir in case an inheritance turned out to be insolvent and for that reason the

1. W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 643 (2d ed. 1932).

2. *Ibid.*

3. *Id.* at 645.

4. B. NICHOLAS, INTRODUCTION TO ROMAN LAW 234-243 (1962).

instituted heirs abstained. No doubt as a reward for his services as liquidator of the inheritance, he was allowed, in contrast to other bankrupts, to retain any property he acquired subsequently. In other words, his liability was limited to the value of the inheritance he had acquired.

You may ask why any fuss should be made of this arrangement; was the deceased not really paying his own debts through the agency of his former slave? That would be to misunderstand completely the Roman point of view. The whole point was that the ex-slave became owner of the inheritance and succeeded to all the claims and liabilities included in it. It was a genuine case of a person's liability being limited to a separate estate or fund or account—call it what you will.

At a much later date Justinian introduced another technique which resembles the Common Law method of administering a decedent estate through a personal representative. An heir might enter on an inheritance and, within a short period, make an inventory of the inheritance. Thereupon, although he would recover in his own right all debts due to the deceased, he became liable to pay the debts of the deceased only to the extent of the inheritance. The so-called *benefit of inventory* has survived into the modern Civil law. A Civil lawyer considers an heir who takes advantage of it to enjoy a limitation of his liability; whereas a Common lawyer regards the personal representative as an agent to carry out the actual or presumed wishes of the deceased, including the administration of his estate.⁵

The separation of estates enjoyed by the slave freed and instituted in a will had, at a much earlier date, been applied to the converse case where an insolvent person became heir to a solvent estate and the creditors of the estate were afraid that it would become insolvent in the hands of the heir. They could apply to have the merger prevented. Here, it seems to me, we have a distinct advance; it is not a case of protecting the heir against the deceased's creditors, but of protecting one set of creditors against another set of creditors.

It may be urged that in all these cases the separation of one estate from another was of very short duration and was intended only to prevent a merger of two estates each of which constituted the entire property of a person. There was therefore no question of credit being given to anything less than the entire estate of a debtor. One cannot speak of credit being given to a separate account.

And yet the notion of a separate fund or account which bears only its

5. *Id.* at 241.

own debts goes back to ancient times. The *peculium* that a master gave to his slave or a father to his son was essentially an account, which alone could be touched to pay debts incurred by the slave or son in connection with it. A few words about the origin of what would at first sight appear to be a strange institution will not be out of place.

A Roman of full age all of whose male ancestors were dead might well have subject to his absolute power many descendants belonging to many generations, for a Roman did not escape from ancestral control at majority. Moreover, he might own slaves, some of whom might be Greeks or Levantines experienced in business who had passed through the slave markets after capture by pirates. Now if he was a person of some wealth he might not wish to manage all his affairs himself; and, in any case, if he was a senator, he could not engage in trade. Hence it was very natural for him to split up his property into several parts, each of which he would entrust to the management of one of his free descendants or slaves, drawing perhaps a portion of the profits from each undertaking.

So long as his descendants or slaves remained in his power, they could own nothing, and all they acquired became his property.⁶ In strict law they could bind other parties to him but could not bind him to other parties, on the principle that they could make his position better but not worse. Obviously at that rate no one would do business with them on credit, and so special actions could be brought against him in which the judgment was limited to the contents at the time of judgment of the fund entrusted to the particular person who had entered into the transaction. The fund was known as a *peculium*.

If one pauses for a moment to ask why the liability was so limited, one will see that it could only be on the footing that the plaintiff had given credit not to the defendant personally but to the particular account constituted by the *peculium*. Moreover, several accounts of the same person would be separately operated at the same time, in respect of each of which he could incur liabilities limited to the balance of the account at the time of judgment. What is the *peculium* but a prototype of the modern business corporation? In a business sense that is true, but there is a very important legal difference in that the corporation is a separate artificial person interposed for convenience between the stockholder and

6. *Id.* at 70, 202. I have inserted a hypothetical case arising out of business transactions by slaves in A ROMAN LAW READER, to be published shortly by Oceana Publications, Inc.

his customer; and hence each fund represented at Roman law by a *peculium* would be the capital of a distinct person.

Artificial or corporate personality was indeed known to the Romans, who have been credited with its invention. Most corporations were public or semi-public in character; there was however one type of corporation that engaged in business, the joint-stock partnership of publicans, or tax-farmers, who used it in order to operate with limited liability.⁷

To sum up, Roman law had already developed relaxations of liability to pay a judgment debt, separations of estates to avoid merger and in order to limit a person's liability to debts he had incurred personally, the recognition that a person might constitute separate funds, each of which would be saddled only with its own liabilities, and, finally, the joint-stock partnership operating with limited liability. Any further progress that has been made has been in the direction of detailed elaboration and the application of those techniques to new situations.

I should add that the Romans had developed highly sophisticated means of security, analogous to mortgage, pledge and guarantee, which afforded them better ways of collecting debts, and acted in direct opposition to limited liability.

For the time being some of the methods of limiting liability disappeared with the end of the ancient world and the lapse of Western Europe into a barbarism incapable of using refined legal methods. The separation of the freedman's after-acquired property from the inheritance disappeared of course with slavery, which also excluded the slave's *peculium*. The *peculium* of a free descendant subject to power disappeared when, in contrast to Roman practice, his ancestor lost his power over him on his attaining majority. Thereafter he did business as a principal. Thus the *peculium* no longer had any function to perform. Of course it remained in the Roman texts for anyone to see; it is very prominent in Justinian's *Institutes*, which every student had to learn. But quite obviously professors of the Civil law would not devote much attention to such an obsolete institution, nor would their students be prepared to listen to them if they did. There is very little about it in the great nineteenth century German treatises, which expounded Roman law as applied in large parts of Germany.⁸

7. P. DUFF, *PERSONALITY IN ROMAN PRIVATE LAW* 159-61 (1938).

8. II WINDSCHEID, *LEHRBUCH DES PANDEKTENRECHTS* §§ 289, 484 (8th ed. 1906). The editor notes that the so called *actiones adiectitiae qualitatis*, of which the *actio de peculio* was one, are not to be found in the German Civil Code, which came into force in 1900.

There were, however, some very interesting developments in the Middle Ages, mainly in connection with married women's property and commercial law.

What are called by Civil lawyers matrimonial régimes are of almost inconceivable complexity and variety,⁹ but one very important class has many features in common, the most interesting of which for our purpose is the reservation of separate property to each spouse combined with a pooling of the rest in a so-called 'community,' the administration of which is entrusted to the husband.

It has always been difficult to characterize the community according to the categories of the Civil law. A Common lawyer would regard it as a fund, in the sense that it preserves its identity although some or all of its component elements have changed; it is not expected, or even intended, that they should remain unchanged. It would probably be vested in a trustee for purposes of management. That is impossible in the Civil law. It is in fact uncertain whether the community property is owned by the husband, subject to a duty to share it with his wife at the termination of the marriage, or by the spouses jointly. If the latter is the correct view, then the husband can burden his wife's share with liabilities, as he can his own. But he cannot subject his wife's separate property to liability. Accordingly, whatever the correct construction, if we look at the matter from the wife's point of view, any liability he subjects her to is limited to her share of the community.

It has been just as difficult to keep commercial law within the categories established for Civil law; but it has not been so necessary as where matrimonial régimes are concerned, for commercial law has usually been administered by merchants in their own courts, as was once the case in England also. Throughout the Middle Ages and what we are learning to call the Early Modern Period, many of the transactions of merchants were governed by the Law Merchant, which was developed by the practice of merchants throughout the western world. Although it varied from place to place, it was for the most part international. Some of the most important development took place in Italy, where the refinements of commercial intercourse appeared at an early stage in such city republics as Venice and

9. M. WOLFF, *PRIVATE INTERNATIONAL LAW* 355-358 (2d ed. 1955). *MATRIMONIAL PROPERTY LAW* 3-235 (W. Friedmann ed. 1955). There have since been many changes; for France see AMOS AND WALTON'S *INTRODUCTION TO FRENCH LAW* 379-392 (F. Lawson, A. Anton, L. Neville Brown ed. 1967); for Germany see I. E. COHN, *MANUAL OF GERMAN LAW* 236-241 (1968).

Genoa. One of the new institutions which came from them was the *Commenda*.¹⁰

The *Commenda* was a form of limited partnership, in which one or more of the partners, the active partners, managed the business, and one or more partners were sleeping partners who merely supplied funds and shared in the profits and in the losses so far as their contribution extended. If they meddled with the management, they became fully and personally liable, like the active partners. That was of course a perfect example of limited liability. The sleeping partners could be sued as partners, but could be made liable only to the extent of their investment. Limited partnership on the lines of the *Commenda* has flourished in the Civil law countries. In the Common law countries it was introduced late, and, except in some places for special purposes, has not really taken root. We have used either the trust or the corporation.

We must therefore devote some consideration to the trust.¹¹ The first trusts were arrangements by which a trustee was given land to hold for the benefit of another person, the beneficiary. They were what we call fixed trusts, that is to say, the trustee had no power to alienate that particular piece of land. Trusts of movable property were of later origin, and became important only with the development of securities such as stocks and shares. Trustees then came to be burdened with ever increasing active duties, among which was that of varying the investments subject to the trust. When that became common, it gradually became clear that the beneficiary had interests, not in specific things, but in an abstract fund. He was entitled to an income from capital managed by others. That is probably now the normal case, though the beneficiary may be allowed the possession of physical objects, such as land, comprised in the fund and to manage them himself so as to produce an income from them.

Whenever a trustee is invested with powers of management, there are at least two accounts, the trustee's personal account and the trust account. If the trustee contracts as trustee, to the knowledge of the other party, he binds the trust account but not himself; if, on the other hand, he contracts personally, he does not bind the trust account. There is of course a danger that he may mix the two accounts. Solutions have then been adopted that favour the beneficiary against the creditor of an insolvent trustee, and which, as the great legal historian Maitland, who

10. I W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 195-197 (1922-1938).

11. See generally A. SCOTT, THE LAW OF TRUSTS (2d ed. 1956).

was also an experienced equity lawyer, long ago recognized, raise certain moral difficulties.¹² I shall say no more of them, for they have become less important recently. The single private trustee is rare. Normally he has associated with him a lawyer or a bank affiliate. The latter is very unlikely to become insolvent, and in any case the accounts held by it must be insured; in some jurisdictions at least, there is a guarantee fund to cover the former's defalcations.¹³

Since the title to the contents of both the trustee's personal account and of the trust account is in the trustee, actions may be brought against him personally and as trustee. In either case his liability is limited, for the creditor cannot touch the trust fund in the one case or make the trustee personally liable in the other.

Once the trust was fully developed, a means existed of giving a married woman property which she could manage and enjoy independently of her husband, and incur debts in connection with it.¹⁴ The property was vested in trustees for her separate use. But she could not bind herself personally. She could only bind her separate property, or, to put it another way, she could be made liable only to the extent of her separate property. It was a genuine case of limited liability. In more recent times, married women have been enabled by statute to acquire and hold separate property without the intervention of a trust, but with a contractual capacity limited to their separate property. They can however render themselves personally liable, and even be made bankrupt, if they engage in trade on their own account.

Limited liability came at first into business by a different road.¹⁵ Large scale operations, especially in distant foreign trade, required the combination of large numbers of persons, not all of whom could take part in management, and, after experiments had been made of different kinds, the normal device came to be that of the joint stock company, in which the several members invested and took stock in a separate corporate person which conducted business through its agents. Where that tech-

12. F. MAITLAND, *EQUITY* 175 (1936).

13. 3 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 247 (21st ed. 1950). Solicitors Act of 1941, 4 & 5 Geo. 6, c. 46, s. 2.

14. For a classical account see A. DICEY, *LAW AND OPINION IN ENGLAND* 371-395 (2d ed. 1920); for later developments see P. BROMLEY, *FAMILY LAW* 271-274 (3d ed. 1966).

15. 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 319-321 (1922-1938). 8 W. HOLDSWORTH, *Id.* at 192-222; C. COOKE, *CORPORATION, TRUST, AND COMPANY* (1951); R. STEVENS, *HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS* 1-10 (2d ed. 1949).

nique was adopted, the corporation itself contracted debts, and not the stockholders, each of whom stood to lose his investment and nothing more.

For a long time such a corporation could be created only by charter from the Crown or by Act of Parliament. If a number of persons pooled their investments and purported to trade as an unincorporated company, they could only be partners, and made themselves personally subject to unlimited liability for the debts of the company. On the whole it was not difficult to induce the Crown or Parliament to incorporate companies until the South Sea Bubble made necessary a general consideration of financial methods. Then such serious obstacles were placed in the way of incorporation that careful financiers began to look to the trust as a possible remedy. It was found that, if proper precautions were taken, the promoters could contract on behalf of the company without making themselves liable beyond the amount they held as trustees for themselves and the other investors. Occasionally that device has survived in order to evade special restrictions. I understand, for instance, that it is still impossible for a corporation to deal commercially with land in Massachusetts, and use has had to be made of the Massachusetts trust. I well remember my surprise at seeing the signature of a trustee at the foot of a document granting me a tenancy of an apartment in Lexington Hall, Cambridge. I expected him to be designated as director or manager.

The rest of that story is reasonably well known. Starting with a Connecticut statute of 1846, legislation in many countries has made it possible for promoters to incorporate companies without specific authorization from either executive or legislature, but with limited liability of their members. That legislation has been the main basis of our immense law of business corporations, about which, as a non-expert, I propose to say no more.

A pedantic lawyer might complain that I am speaking inaccurately when I say that the liability of a stockholder in a corporation is limited, at any rate once he has paid up the full value of his stock. It is the corporation that contracts the debts incurred in the conduct of the business, and the liability of the corporation is not limited in the strict sense of the term, since all its assets can be attached to satisfy its creditors. The same objection could be made to the popular term current in England, 'limited liability company,' or 'limited company.' In fact, unless the word 'limited' occurs in the correspondence with persons doing business with the company, the stockholders are personally liable on any debts incurred by the

company. Hence the legislator regards the limitation as a limitation on the liability of the stockholders. Surely that is the truth: the interposition of an abstract entity, the corporation, between the stockholders and their customers is a mere convenience adopted to facilitate their dealings with them. In fact, though not in law, the corporation is their agent.

How can these various forms of limited liability be justified? Would it not be fairer and more in accord with business morality that the law should invariably apply the French principle that the whole of a person's property is charged with the debts incurred by him or on his behalf? The most obvious answer is that if a person gives credit to another person knowing that that person's liability is subject to a limitation, he is assuming the risk of that limitation.

We may go further and say, first, that if he is not willing to take that risk but still wants to do business with the other person, he can try to obtain security; and there is a whole battery of security devices which enable a person to isolate one transaction from all others and make certain that he will not be saddled with a bad debt, whatever may happen to other creditors. This is regular in banking practice. If a person does business in corporate form and asks for a loan to be made to the corporation, a banker will usually ask for his personal guarantee and possibly for that of other persons.

Second, all round security might well cause an arrest in the flow of business; wise speculation is a necessary part of capitalism. If a stockholder risks the investment he makes by subscribing for his stock, why should not the creditor risk the investment he makes in his contract with the debtor?

Third, it is fair to say that business men, either in general or in a particular line of business, are all members of a single community engaged in pushing the economy forward. They are, in a sense, whether creditors or debtors, all partners in common enterprises. That is as true of capitalist economies as of socialist economies, though the fact may not be very apparent. It is not advisable to encourage a person to cut himself off from the rest. There should be a reasonable apportionment of risks, and one form of it is limited liability.

These considerations obviously apply to contract, where liability results from the giving of credit. Are they appropriate to tort? One's initial judgment would be that in tort, limited liability not only cannot be justified but does not exist.

And yet limited liability has long existed in maritime law.¹⁶ In some countries a shipowner is allowed to abandon a ship that has caused a collision, a custom that has been traced, somewhat spuriously, to a rule of Roman law that allowed a master to escape liability for his slave's wrongful act by surrendering him to the victim. Another custom, now, with varying modifications, in more frequent use, limited the liability to a conventional sum amounting to so much per ton of the ship's weight. Analogous limitations exist under the Warsaw Convention for aircraft.

How are we to justify such rules? They are usually thought to be means of encouraging maritime enterprise, by reducing the risks attendant on it. Perhaps a more convincing explanation is to be found in the notion of community, already mentioned in connection with contract. All persons engaged in navigation and maritime trade can be treated as forming a well-defined community, which they have voluntarily entered in awareness of the risks involved, and which they may from time to time cause or suffer damage. Moreover, the rules come from a time when, although insurance of the ship was of long standing, insurance against liability did not yet exist.

On the whole, the Common law systems have been hypocritically slow to admit the connection between liability insurance and tort. Some of the Civil law systems have been more candid, as I hope to show from a draft code which displays some of the most advanced thought on the subject.

The Dutch have been at work since the end of the War on a new Civil Code. The Sixth Book of their new Code deals with the Law of Contract, Tort and Enrichment; it is still only in draft, of which fortunately there is a provisional English translation. The draftsmen have made use of all the experience that was accessible to them, including, perhaps surprisingly, that of the Common law countries. They have tried to follow the dictates of common sense and have not been over-respectful to tradition.

The draftsmen have adopted the modern notion, first found in the Swiss Revised Code of Obligations, which empowers a judge in certain circumstances to reduce the damages awarded against a defendant if a full award would reduce him to extremities. However, the draftsmen add the proviso that that is not to be done if the defendant has "not covered

16. G. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* 875-950 (1939).

his liability with insurance although he was bound to do so.¹⁷ Then, after prescribing strict liability, that is, irrespective of fault, for certain accidents, the draft continues:

If a person is liable under the foregoing articles without a tort being attributable to him, then the court may mitigate the compensation according to the circumstances in so far as the liability was not covered by insurance and the debtor was not bound to take out such cover.¹⁸

So far, so good; but what if the possible damage is so enormous that it cannot be fully covered? The draft continues:

Amounts may be fixed by legislative decree which the liability referred to in the foregoing paragraph is not to exceed, if without such limitation it could not reasonably be covered by insurance.¹⁹

Accordingly, what appears at first sight to be only an indulgence to the defendant turns out to be mainly a means of forcing, and at the same time enabling, operators of certain kinds to take out liability insurance. But we have still to decide in what circumstances a person ought to take out liability insurance. There must, I think, be some limits, and I suggest that the open-ended provision of the draft would have to be applied to persons likely to find themselves involved in typical accidents, and who might therefore be regarded as belonging to a fairly well-defined community. In other cases, there is a discretionary limitation of liability.

Limitation may be attained by other means which, though not avowedly limitations on liability, give very much the same results. One of the most difficult branches of the law of torts regulates what we have come to call the measure of damages. Granted that the defendant has, by his negligent act or omission, caused to the plaintiff damage A, which he ought to have foreseen, and which led successively to damage B, C, D and so on, how far should the liability extend? Do we stop where foreseeability ends, or do we apply some other criterion, such as directness, which may let in damage B or some more remote damage? The latest English authority²⁰ has swung in favor of the foreseeability test, though difficulties still remain. The truth is that any solution is bound to cause hardship to either the plaintiff or the defendant, or their insurers.

17. Draft Civil Code, 6.1.9.7.

18. *Id.*, 6.3.17.1.

19. *Id.*, 6.3.17.2.

20. *Overseas Tankship (U.K.), Ltd. v. Morts Dock and Eng'ng. Co. Ltd. (The Wagon Mound)*, [1961] A.C. 388.

The odd thing is that almost immediately afterwards the traditional doctrine—that the defendant must take the plaintiff as he finds him, with all the plaintiff's predispositions to further unforeseeable damage—was upheld.²¹ This seems open to little objection if the predisposition, such as an allergy, is unknown to the plaintiff also. But there are others that are known to him, such as the additional loss likely to be caused to a pianist if his fingers are seriously injured, or the exceptional loss of earning power likely to be caused by a prolonged recovery to a person whose time is of exceptional value. Ought the defendant to be saddled with an exceptional award of damages? Should not the plaintiff in such cases himself cover the exceptional risk by insurance? It is believed that persons with peculiar qualifications like the pianist do take out such cover. I understand that Norwegian law is tending towards holding that damages should always be assessed on the footing that the plaintiff's earning capacity is that of an average person.²²

The use of limited liability in order to apportion risks may perhaps be detected in the Dutch draftsmen's treatment of the varying standards of liability towards persons in different relations towards the possessors of motor vehicles.²³ It is enough for our purpose to say that it is strictest towards those who are not engaged in the motor traffic, *e.g.*, pedestrians and occupiers of property adjoining the highway, less strict towards persons engaged in the traffic, but outside the possessor's vehicle, and least strict towards passengers in his vehicle. Towards the first class he will be liable irrespective of fault, towards the third only if he or his servant is at fault, towards the intermediate class if in addition the accident has been caused by a defect in the vehicle. If we think of the proper liability to the general public as being strict, then the limitations of liability found in the other cases can surely be said to result from the voluntary entry of the victims into more limited communities to which the possessor of the vehicle also belongs.

Whether these distinctions are soundly drawn I am by no means certain; I give them by way of illustration. The nearer all adult members of the public come to being motorists, the less reason there may be for treating motorists as a separate category of victims. Moreover, the more the use of motor vehicles becomes compulsory if one is to get about at all,

21. *Smith v. Leech Brain & Co. Ltd.*, [1962] 2 Q.B. 409.

22. K. Selmer, *Limitation of Damages According To the Circumstances of the "Average Citizen."* 5 SCANDINAVIAN STUDIES IN LAW 131-53 (1961).

23. Draft Civil Code 6.3.13-15.

the less voluntary is the entry of a person into the community of motorists. The analogy with ship owners becomes remote, and with contracting parties even more remote.

We have been dealing here with the liability of users of dangerous things or of those who engage in ultra-hazardous activities. The normal basis of liability for accidents is negligence, which implies a limitation of liability. That again may be regarded as consequent on a recognition that both plaintiff and defendant are members of a community, all of whom stand to gain from the operation in question if carefully performed. It is well known that the full development of liability for negligent damage had to wait until the use of fast means of transportation and dangerous mechanical means of production became not only innocent but essential to an advanced industrial economy. If the general public stood to gain from such dangerous activities, it seemed fair that its members should assume the reasonable risks involved in them. Later on, new forms of insurance were invented to soften the blow; but where accidents cannot easily be classified, so that their incidence cannot be statistically determined, or where the cost of insurance cannot be fairly spread among the members of an ascertainable community, liability insurance is difficult to arrange. That is where accident insurance must take up the slack; and, oddly enough, there seems to be no great difficulty in arranging cover, for a proper premium, up to defined amounts, whatever the cause of the damage.

Clearly, we have now moved a long way from our starting point. From immunities enjoyed by judgment debtors, such as the homestead privilege, we progressed to limitations on the amount that a debtor can be adjudged to pay of a debt that he has incurred. We have seen that such limitations are common in contract, and are usually to be explained by saying that the creditor gave credit either to an account rather than to the debtor personally, or to an artificial person such as a corporation interposed between the creditor and the natural persons in whose interest the debt was incurred. We have also seen that limitations can be deprived of their effect by the creditor's insisting on security, one form of which may be the unlimited personal liability of the debtor.

When we came to tort, we left a field in which risks can be apportioned by the parties and entered one in which they must be apportioned by the law. We found that where a person's liability was mitigated, the limitation of liability was effected by various means, not always ostensibly directed to that end. Occasionally it is left, or it is suggested that it be

left, to the discretion of the judge. Everywhere, I believe, limitation flows from common membership of plaintiff and defendant in a community. The general insistence in ordinary cases, on negligence as a basis of liability results from their common membership in the general public, which has a deep interest in the use of dangerous things and dangerous methods. Other limitations result from voluntary entry into a more restricted community with known specialized risks, which can be covered by insurance. Whether the appropriate form of insurance is liability or accident insurance is determined in some cases tentatively and even roughly, in others with considerable refinements. It is becoming the main object of the law of torts.