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In Tribute to Roger Traynor

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In this issue we honor a great judge, scholar, and person.

The product of Roger Traynor's judicial pen is the most tangible and available evidence of his outstanding professional contributions as judge and scholar. But before turning to that source for illustrations of the exceptional qualities of his work, I pay tribute to Roger Traynor as a remarkable and warm human being.

Roger Traynor was among the Advisers to the Reporter (Dean Prosser) for the American Law Institute's *Restatement (Second) of Torts*. For about a decade, from the mid-fifties to the mid-sixties, twice a year this group of judges, lawyers, and torts professors gathered for lively three-day sessions of intensive and uninhibited discussion that ranged in time over every major issue of torts. Roger Traynor's judicious temperament, gracious manner, and personal humility led him to speak less than his proportionate share of the time, and less assertively than was our wont, but with singularly telling effect. His quiet manner, his sensitivity to the varied social and individual interests claiming our attention as we debated the merits of opposing bodies of precedent, and his concern for clarity and accuracy in the expression of our recommendations were constant reminders to us all of the force of reason and the impact of probing thought, however quietly expressed.

Roger Traynor's judicial opinions disclose a style that is elegant in the finest sense of that term — precise, neat, straightforward, and lucid. Among other consequences is the fact that when he became a judge he did not cease to be a teacher. In his judicial opinions he has illumined both the processes of adjudication and the issues before his court.

The examples to which I naturally turn to document this appraisal of Roger Traynor's outstanding contributions are most familiar to those who have followed his opinions in tort cases. But the characteristics of his performance that these instances illustrate extend to the whole scope of his judicial performance and, for other observers, may be illustrated as well in his opinions bearing on other areas of the law.

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In the case of *State Rubbish Collectors Association v. Siliznoff,*[1] the association brought suit upon promissory notes by which Siliznoff undertook to pay $1,850 for the account of a member whose business Siliznoff's competitive activities had adversely affected. Siliznoff countered with claims for cancellation of the notes and for damages for assault. The Supreme Court of California sustained a verdict and judgment for Siliznoff on all these claims, even though assuming that the threats made against Siliznoff related to future rather than immediate physical harm and therefore did not meet the requirement of immediacy applying by precedent to a claim of assault.[2] The opinion of the court, delivered by Traynor, after setting the stage with a review of the proceedings and contentions, opens the statement and explanation of the court's decision with the following declaration:[3]

> We have concluded, however, that a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.

Here is a straightforward, lucid statement, easily read as a summary of the requisites of a cause of action: a claimant establishes a right to a judgment for damages against another [1] absent privilege, [2] by proving that the other intentionally subjected the claimant [3] to mental suffering [4] incident to serious threats [5] of either immediate or future harm [6] to physical well-being.

Consider also the summary statements appearing in two other Traynor opinions. The first was in *Escola v. Coca Cola Bottling Company of Fresno.*[4] Chief Justice Gibson, writing for the court and affirming a judgment for the plaintiff, held that in spite of evidence by the defendant that appropriate methods of inspection were used, the rule of *res ipsa loquitur* enabled the jury to find for the plaintiff. Traynor's concurring opinion opens with

1. 38 CAL. 2D 330, 240 P. 2D 282 (1952).

2. Siliznoff testified that on one occasion the only reason members of the association let him go that night was that he promised to come back the next day and sign. *Id.* at 335, 240 P. 2d at 284. This testimony surely would have supported the factual inferences necessary for both assault and false imprisonment. But the association contended that the threats related only to future action, and the court treated the case on this assumption.

3. *Id.* at 336, 240 P. 2d at 284-285.

4. 24 Cal. 2d 453, 150 P.2d 436 (1944).

two sentences, the second of which again can be read as his proposal for a summary of the requisites of a cause of action:[5]

> I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.

At the end of the opinion, he adds what might be regarded as an explication of the phrase "proves to have a defect that causes injury to human beings":[6]

> The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.

In *Greenman v. Yuba Power Products, Inc.*,[7] a summary of the requisites of the cause of action appears near the conclusion of the opinion:[8]

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shop-smith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

This summary has gained renewed prominence with the decision of the California Supreme Court in 1972[9] to adhere to it rather than add a further requisite that the defect make the product unreasonably dangerous — as the American Law Institute had proposed.[10]

In each of the Traynor opinions cited here, the statement of the elements of factual proof that brought the instant case within the principle of decision was a break from precedent. In *Escola,* Traynor stood alone, and the precedent remained in force, though perhaps less sturdy than it had seemed before. In the other two

5. *Id.* at 461, 150 P. 2d at 440.
6. *Id.* at 468, 150 P. 2d at 444.
7. 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963).
8. *Id.* at 64, 377 P. 2d at 901, 27 Cal. Rptr. at 701.
9. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P. 2d 1153, 104 Cal. Rptr. 443 (1972).
10. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

instances other members of the court joined Traynor and thus effected an immediate change, deciding the case at hand contrary to the way precedent directed.

Whenever a break from precedent occurs, questions about the scope and nature of the change are inevitably present. In addition to stating clearly the elements of factual proof that are the basis for the decision of the particular case, Traynor's opinions characteristically address the scope and nature of the change in a distinctively useful way. His opinion in *Greenman* made a major contribution toward clarifying the policy justifications for strict products liability and their independence from the bargaining relationships of sales transactions. His opinion in *Siliznoff*, rather than taking the path of a limited redefinition of assault to include apprehension of future as well as immediate impact, placed the newly recognized cause of action in the more instructive context of historical expansion of legal protection against intentionally inflicted emotional harm.

Traynor's opinions are a delight to students, and to those pedagogues who prefer clarity to confusion in the judicial opinions they place before their students. In explaining his position, Traynor often says more about how he got there than suits the taste of those who urge that judges say only what is needed to dispose of the case at hand. But he is nevertheless sensitive to the need for restraint against judicial pronouncements on issues that have not been submitted to adversarial scrutiny. When his opinions speak beyond the issues that must be decided, tightly-framed, typically they do so on long-debated issues and for the purpose of exposing the reasons that have in fact impelled the court to the result reached. An opinion that proceeds in this way more faithfully and accurately expresses the actuating principle of decision than does an opinion reasoned on narrower grounds barely sufficient to sustain the disposition. It is thus more candid and more instructive to the Bench and Bar, and it is a better guide to prediction for the future. It reflects a sensitivity to issues of judicial process as well as the merits of the case at hand. It is judicious in the finest sense.

We honor a judge whose personal qualities and professional performance have enriched all who have come to know them.