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NORTHERN ILLINOIS UNIVERSITY

50 Years of Negligence:
The Development of Tort Law as Viewed Through Illinois, 1850-1900

A Thesis Submitted to the

University Honors Program

In Partial Fulfillment of the

Requirements of the Baccalaureate Degree

With University Honors

Department of

History

By

Ivan O. Taylor Jr.

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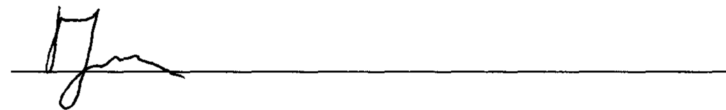
Faculty Approval Signature: 

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The late nineteenth century (1850-1900) was a time of great change in American society. Fed by the expansion of the Industrial Revolution, the growth in legal doctrine matched the mechanized innovation. Tort Law, law that governs non-criminal wrongs, experienced the most change and growth. It was in this particular aspect of the law that a peculiar paradigm emerged. Judges and juries seemed to have clashed when applying this fairly new piece of law. Juries, as a reflection of the society, attempted to decide trials to match what they wanted. However, they were thwarted by judges invoking their own vision of how tort law was to be implemented. In this thesis, I will explore the various clashes that occurred in multiple cases and how these clashes helped evolve tort .Using Illinois as a representative of the whole country at that time, I intend to show how these clashes forced changes in the application of tort law that better emulated the ideals of the society.

Whenever the idea of a personal injury lawsuit arises in the minds of present day Americans, it generally brings with it thoughts of annoyance, disgust and contempt. There exists in the modern era the prevailing notion that suing another for damages is a post modern construct often fed by the most greedy and inept of the society. What would surprise many is how similar the current cases parallel those from the nineteenth century in there prevalence. Further surprising, present day persons would also think it peculiar how the society then had thought of those cases as a beneficial check against non-criminal harm. During the fifty year span of the latter half of the nineteenth century, personal injury lawsuits were subject to the various interpretations of legal doctrines and to the changes in the doctrines themselves; in contrast to the static system that currently exists. This legal doctrine upheaval in the late nineteenth century was due mostly to the newly developed Tort Law attempting to properly define itself. Torts are civil wrongs; wrongs that cause some form of harm but have no criminal sanctions for them. It was not until 1850 that the first treatise dedicated to torts was published to guide judges in their decision with these civil cases.[1] The whirlwind of changes that lead to the creation and development of the tort law was due to the interactions of the expanding economy and industrial market throughout the country. In Illinois particularly, the use of Chicago as a central hub by rail companies allowed for its use to properly exemplify these changes and how they affected the people of the state. The effects of tort law during trials in Illinois show how the confusion over the purpose of the law was skewed in its application. With the basic

[1] Friedman, Lawrence. *A History of American Law, Third Edition*. Pg.350.

function of law being a method to support the public good, the clashing between judges and juries over judgments made clear that these two groups upheld conflicting views over the proper application of this doctrine. Due to the continuous pressure by jurors, a forced reexamination of the doctrines under tort law allowed for their alteration to better reflect the society that they resided in.

The earliest essence of tort law resided in the domain of contract law. Law of contract derived itself from the basic duty to uphold promises in the exchange of goods or services. This duty grew to be incorporated into the English common law, which colonists brought with them to the New World. If issues arose between individuals, Courts of Equity would settle disputes in the best interest of the public, maintaining a balance. Legal knowledge in the early years of a fledgling United States is most attributed to the *Commentaries of English Common Law* by Sir William Blackstone.[2] Blackstone's *Commentaries Book II* had the initial use of the word contract. First, it occurred as merely another method in which a title could be transferred between persons. Its second and more important usage occurred in the chapter, "Of Injuries to Personal Property". Within this chapter, Blackstone proclaimed the rights of individuals to have dominion over their own land and therefore be able to bar neighbors' actions from infringing upon that right.[3] From his initial work, contract law evolved to be dominated by the idea of the title theory of exchange and damages. In the event that a seller failed to provide the goods to a buyer, the buyer then had the right to acquire their promised goods or bring some sanction down on

[2] Hall, Kermit. *The Magic Mirror.* Pg 45.
[3] Blackstone, William. *Commentaries of English Common Law: Book II.* Pgs 440-70.

the seller. This system thrived in the eighteenth century with its minimal, limited market. Damages were thought of as the current loss and not the future expectation of monetary gain. As the nineteenth century begun, contract law had cemented itself as a force for individual choices.[4] What was wanted by the parties involved in a dispute was upheld by courts. When tort law began developing from contract law, it unfortunately lost this aspect from its parent doctrine.

In the early years of the nineteenth century, tort law was slowly being created from basic elements of common law, especially that of contract. The first significant treatment tort received in growth was from Francis Hilliard's book *The Law of Torts, Or Private Wrongs.* By bringing a more scientific approach to legal writings, Hilliard used his treatise to present a systematic classification to this law.[5] Hilliard formalized the ways in which redress could be had when harm occurred between persons.[6] His work detailed how torts were to be approached legally. Chapter 3, entitled "General Nature and Elements of a Tort", Hilliard explains torts, outside their connection to a contract or crime, had been explained as either based upon lacking a precedent or are an infinitely possible action. While the presence of both ideas made the notion of torts quite unclear, the point Hilliard was trying to make was that one became liable for a tort when they violated their original moral duty to not injure another when exercising one's own rights.[7] The notion of a moral duty relates to how the common law developed out of customs. If an injury is shown, then the

[4] Horwitz, Morton. *The Transformation of American Law 1780-1860*. Pgs 161-3.
[5] Horwitz, Morton J. *The Transformation of American Law: 1870-1960*, pg 12.
[6] Friedman. *A History of American Law*, pg 350.
[7] Hilliard, Francis. *The Law of Torts, Or Private Wrongs*, pgs 81-82.

defendant must prove that it was somehow justified. Hilliard continues by explicitly stating the necessity of an injury and loss, one always existing with the other, in order to maintain a tort. Furthermore, there had to exist a tangible relation between the action and the injury as well as the malicious intent of the one committing the act.[8] What is commonly known about tort law and is what is sought after in court proceedings is its use of negligence in deciding fault. Negligence is either to not do an action that a reasonable person would do or doing an action that a reasonable person would not do. A third possibility was causing unintentional mischief to a third party. One who has tried to take reasonable care but is a part of an accident due to extraordinary causes is not liable for negligence. The burden of proving the negligence of the defendant was rested solely with the plaintiff.[9] Within this small, basic scope of tort law, Hilliard provided a fairly simple process for others to follow. Forgetting one's moral duties by allowing one's rights to injure another creates a tort. Then negligence is proven by not acting reasonably or hurting a third party. The issue is that this simple concept was twisted. There was not a problem with claiming a tort and bringing a civil case to trial, but with negligence. More accurately, with the additions that were added to negligence to subvert its very existence. Hilliard had written that in order to bring forward a tort one must be absent from any negligent fault. If the plaintiff had been negligent and contributed to their own harm, they cannot recover against the defendant if

[8] *Ibid.* pgs 82, 90-91, 98.
[9] *Ibid*, pgs 124-130.

they can prove the plaintiff was negligent in their actions.[10] It is more than reasonable to not allow those who contributed to their own harm to receive compensation from whoever might also be at fault. However, how this aspect was applied was contorted as the late nineteenth century moved forward.

Early private injury cases did well to follow the scheme utilized by Hilliard and showed some of the overzealousness of jurors in deciding cases. One such case from this time was that of *Galena and Chicago RR Company v. Albert R. Fay.* Fay and two companions boarded the plaintiff's train at Elgin and were scheduled to ride for three miles to depart at Clinton. The order of cars was: locomotive and tender, baggage car, second class, and then first class. The passenger car being full, the conductor told the three to ride in the baggage car. Halfway through the trip, when the train reached the flat or strap rail the hind bucks of the second class car and the front bucks of the first class car jumped the tracks.[11] When this occurred, Fay jumped from the second class car causing his injuries. The initial trial revealed that Fay had been roughhousing with one of his companions in the second class car when the accident occurred. Witness testimony further showed that other passengers in the first and second class car were physically fine, though emotionally shaken, from the slight derailment.[12] The jury found in favor of Fay, awarding him $2500. On appeal, the opinion by Judge Scates stated that the trial court was in error when giving instructions to the jury; reversing the previous decision and remanding the case for a new trial. Several

[10] *Ibid*, pgs 132-135
[11] 16 Ill. 558; 1855 Ill. LEXIS 161, pgs 1-2.
[12] *Ibid*, pgs3-4.

instructions proposed by the defendant company were rejected despite them showing Fay's culpability.[13] Though this case was overturned by the improper actions of the trial judge in his instructions, an underlying notion is the juries' willingness to side with the plaintiff against the railroad company despite evidence showing joined or plaintiff only culpability. The same problem in this case with jury instructions also appeared in *Galena & Chicago Union Railroad Company v. Lewis H. Yarwood*. Yarwood was a companion of Fay on the train, who also jumped off when the wheels derailed. Judge Scates also gave this line of reasoning to declare a new trial.[14] In this case, it can be observed that despite the jurors misguided and biased attempts, the law produced the correct outcome while staying in line with how the doctrine dictated. Trial testimony showed that Fay was negligible in his actions when the accident occurred, resulting in his injures; disqualifying him from being able to receive damages. A correlation that is simple to understand.

In *The Peoria Bridge Association v. Lyman J. Loomis*, the initial trial court found the bridge association at fault for Loomis' accident. Loomis argued that the Association negligently failed to provide for a peaceful crossing by permitting railways to build upon adjacent land to the bridge. The train bridge was permitted due to an amendment to an initial 1847 Act authorizing the construction of a bridge across the Illinois River. While Loomis was crossing the bridge in his wagon, a passing train had spooked his horses; causing them to back up, knocking off the guardrail and eventually falling off the side.[15]

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[13] *Ibid*, pgs 5, 23-4, 28.
[14] 15 Ill. 468; 1854 Ill. LEXIS 45, pgs 1, 4-6.
[15] 20 Ill. 235; 1858 Ill. LEXIS 98, pgs 1-3,

Witness testimony for Loomis claimed that the guardrails were neither sturdy enough nor sufficient resulting in his fall and injury. Defense testimony focused on the ample time Loomis had to cross the bridge and the delay between his horses becoming frightened before backing over the side of the bridge.[16] During appeal, Judge Breese points out the lack of evidence presented by Loomis to prove willful negligence on the part of the Bridge Association. Part of the proof of negligence for the plaintiff was if they were not completely free of fault is to be only minimally culpable. Breese pointed out the testimony that stated Loomis had had ample time to either have walked his horses across or gotten off the wagon before it fell over the side. Judge Breese ends his opinion by stating that the jury's decision in damages given to Loomis had to have been based on a prejudice.[17] This case might seem to have emphasized the blatant disregard some juries had for the law when presented with the opportunity to make a corporation suffer blame for an injury. Even the appellate judge likened this jury's decision as being based upon prejudice. But on closer examination, the subtext makes it seem as if the jury's mere existence fostered resentment from the appellate judge. Besides unabashedly calling the trial jury prejudice and implying their idiocy, Judge Breese quickly dismisses Loomis' claim of The Association's negligence without a second thought.[18] Thinking methodically, with a majority of personal land transportation at the time powered by horses, a fairly easily spooked animal, one would think putting a noisy thoroughfare for trains near them would be outside reasonable

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[16] *Ibid*, pgs 12-15, 23-4.
[17] *Ibid*, pgs 35-7.
[18] *Ibid.*

thought. While still likely Loomis had contributed to his own injury, to just dismiss the possibility of The Peoria Bridge Association being at fault *prima fascia*[19] borders on the ridiculous.

A similar issue with the judge's interpretation of a case can be found in *The Chicago and Rock Island Railroad Company v. James Still.* On April 28, 1856, Still lost his two horses and wagon when he was struck by a train where it crossed the public highway due to, by his claim, the carelessness of the train operators.[20] The witnesses Still brought with him all make the same claim: they did not hear the whistle be blown or bell rung as it approached the crossing nor did they see the head light lantern lit on the front of the train. The Railroad Company had witnesses who refuted the claims made by the plaintiff's witnesses: the head light was burning brightly and the both the whistle and bell were used appropriately.[21] In the first trial, the jury could not come to a decision based upon the evidence given by the witness testimony. A second trial was held; using the same evidence, this second jury did find in favor of the plaintiff and awarded Still for the damages he received.[22] With the Railroad Company's appeal, the presiding judge, Walker, based his ruling opinion on something that might have once resembled the doctrine on tort law. Judge Walker gives a brief description over what occurred and emphasized the need for utmost care to try to avoid such a collision. When he compares the opposing witnesses' testimonies, he gives more credence to those from the Railroad Company because they were positively testifying,

[19] *Prima Fascia* – at first glance
[20] 19 Ill. 499; 1858 Ill. LEXIS 15, pg 1.
[21] *Ibid.* pgs 2-15.
[22] *Ibid*, pgs 1, 19.

while Still's witnesses were only negatively testifying.[23] Because the Company's witnesses happened to be stating affirmatives, that automatically gave what they said more weight than the opposing witnesses who were stating negatives. Besides for this "reason", Walker stated that there was clear, undisputed evidence that Still was inadequately positioned in his wagon by having his back to where the train cars were coming from. A better sitting position and a quick glance would have saved Still the injuries he suffered.[24] This damning evidence was spoken of only one person and was not a witness for the Railroad Company. William Miller, the first witness to testify on behalf of Still had mentioned that Still was sitting in the bottom of the wagon.[25] He, Miller, is one of the same persons that Judge Walker had previously dismissed the testimony of because it was negative in its claim. Walker reversed the decision of the lower court because Still's witnesses' testimony was out weighted except for the one part that showed Still not taking the utmost care in his wagon. As with the prior case of *The Peoria Bridge Association*, it was more than likely Still should have seen the train approaching. However, the explanation used by Judge Walker to create negligence in Still's inaction appeared convoluted and forced.

Now it might seem as if the harsh scrutiny of the appellate judges' decisions were unfairly portrayed, but so was the treatment given to jurors at the time. The notion of contributory negligence, that the plaintiff also being at fault for their injury, was not just a method to prevent abuses of tort law by individuals. From how it was used, its function

[23] *Ibid,* pgs 21-22.
[24] *Ibid*, pgs 22-23.
[25] *Ibid*, pgs 2-3.

would suggest that it was meant to keep the ideologies of the jury and by extension, society, in check.[26] With the use of contributory negligence, judges had their way to achieve the verdicts that they believed would be the best outcome in the eventual appeals. Unsurprisingly, it generally appeared to be for the benefit of corporations. It was not however just for the desire of keeping a revenue generator in state. There was real concern on behalf of some judges as to how much should a company pay for its damages and to how many, even minimally affected.[27] In *The Chicago and Rock Island Railroad Company v. James McKean*, it followed an eerily similar pattern to the *Still Case* in how the accident occurred and the trial witnesses for both sides. Farmer McKean was hit by the train while crossing the tracks with his two-horse drawn wagon. The appeal of the case had Judge Breese reverse the decision of the lower court that was in favor of McKean. Breese based his ruling on the fact that McKean had suffered relatively minor personal damage with only a displacement of an ankle bone and that the jury's decision was likely due to prejudice against the railroad company.[28] What was interesting was the concurring opinion by Judges Walker and Lawrence. They felt that the judgment should have been reversed due to the excessiveness of the money rewarded. Their opinion even explicitly states that if the awarded compensation ($5875) was less, the case would not have been picked for

[26] Malone, Wex S. "The Formative Era of Contributory Negligence" in *Essays in Nineteenth-Century American Legal History* edited by Wythe Holt, pg 282.
[27] Friedman, pgs 351-352.
[28] 40 Ill. 218; 1866 Ill. LEXIS 178, 37-38.

review.[29] The striking positions of the judges in this case showed the flaw in having conflicting ideas justify the same ends.

Contributory negligence was not the only way in which judges kept tort claims out of the hands of juries; another doctrine used was that of the fellow servant rule. This dictated that an employee could not sue their employer for damages caused to them by another employee. Only if the employer was proven personally negligent, could the employee then sue.[30] This rule is best exemplified by the case *Francis Honner v. The Illinois Central Railroad Company*. Honner, an employee of the company, attempted to sue for damages when he became injured when another employee improperly used the turntable causing the attached iron bar to be broken off and flung at Honner.[31] The trial court ended with a judgment of a demurrer, a decision that accepts the facts but denies the sufficiency of them to support the allegation. Judge Caton in the appeal stated that the demurrer was correctly used. At no point had Honner provided evidence that it was his employers that were neglectful in their duties. Caton even alluded to the dangers that inherently existed with his job.[32] This relates to yet a third doctrine used to subvert the use of negligence. Assumption of risk meant that if an employee works at a position in which their lives are generally threatened, they cannot sue for damages if an injury occurred as they took it

[29] *Ibid*, 46.
[30] Friedman, pg 354.
[31] 15 Ill. 550; 1854 Ill. LEXIS 60, pgs 1-2.
[32] *Ibid*, pg 5.

upon themselves to work at the dangerous position.[33] The sinister use of this doctrine often neglected the reality that employer and employee were not on equal footing when deciding what work should be completed. It was ill-advised to believe that an employee would willingly put themselves in extraordinarily dangerous position.[34]

Within this entire seemingly downward spiral of tort law having minimal impact benefiting persons, there are several cases in which the stricter doctrines of negligence were seemingly set aside. In *Owen Tuller et al. v. Rosannah Talbot,* Talbot was a passenger in Tuller's stage coach that over turned due to negligence of the driver, causing her injuries. The accident occurred when Ward, another passenger, was asked to drive when the original driver became ill. It was Ward's lack of knowledge for the road that resulted in the stage coach overturning in a ditch. The initial case had the jury ruling in favor of Talbot and awarding her $1050.[35] Justice Walker in his opinion on the appeal stated that neither the court nor jury erred in their processes. Even though Ward was initially a passenger, when he took up the position as the driver of the stage coach, his actions as such became the responsibility of Tuller. Furthermore, the trial court's instruction on the duty of common carriers of people was properly given as it only informed of the responsibility.[36] This occasional leniency on individuals is most noticeable in lawsuits against cities. In the case of *The City of Joliet v. Amelia H. Verley,* Joliet had built a small set of stairs to connect a city's

[33] Gold, David M. *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism*, pg 88.
[34] *Ibid*, pg 89.
[35] 23 Ill. 298; 1860 Ill. LEXIS 213, pgs 1-2, 7.
[36] *Ibid*, pgs 7-11.

sidewalk to a canal bridge that had been constructed by an outside company. Verley was injured when her dress became snagged on a loose nail on the walkway. During her attempt to turn around to unsnag her dress, she toppled over some loose, warped planks on the stairs. The jury had ruled in favor of Verley, awarding her $1500.[37] The ensuing appeal towards the ruling brought by Joliet, lead to Judge Beckwith's opinion that resulted in jury's decision being proven correct. Beckwith first stated that Joliet had had no obligation to connect its city sidewalk to the bridge walkway as it was built by another company outside its control. However, by building a connection, the city had then become obligated to maintain that connecting path. Even though the catalyst for the injury was a protruding nail on the bridges pathway, the loose boards and lack of handrails on the connecting path caused Verley to fall and injure herself. Had the boards been in proper shape, she could have easily loosened her dress from the nail without incident. There being no fault as to how the case was submitted to the jury, Beckwith affirmed its decision.[38] Both of these cases displayed judgments based on the merits of the evidence along with following the basic ideals of tort law. The decision in the *Talbot Case* could have easily been reversed by Judge Walker if he had focused on the fact that Ward was still not an employee of Tuller despite taking up the driver's mantle.

Barbara Stumps v. Susanna Kelley shows another example of the weight of the evidence dictating the outcome. Kelley, on behalf of a minor that was injured, sued Stumps

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[37] 35 Ill. 58; 1864 Ill. LEXIS 170, pgs 1-2, 5.
[38] *Ibid*, pgs 6-12.

when her cow hooked the minor. The jury found for Kelley in the initial case and granted a judgment of $500.[39] In the appeal, Stumps argued that the jury erred in its decision due to its contradicting evidence presented at trial. Judge Walker in his opinion did say there was some leeway as to which way the evidence weighed more heavily, but the ruling reached was consistent with the evidence that had been brought forth.[40] One could think that the injury of a child had brought out the more lenient ruling from the judge, but that notion is easily disproven by the case *The Galena and Chicago Union Railroad Company v. Frederick Jacobs*. A four and a half year old minor was struck by a train on the Railroad Company's property; the result of the original trial was a verdict in favor of Jacobs and receiving $2000 out of the sought after $15,000.[41] In the appeal, Judge Breese reversed the decision of the lower court for several reasons. First, Jacobs had failed to provide any evidence to suggest that the Railroad Company knew that a minor was on their property or had the consent to be there.[42] Secondly, the evidence Jacobs had provided asserting the consent of workers' families to be on the Railroad property was ill conceived as the minor is not related to any workers.[43] As for negligence, Breese stated that the levels that accrued in both parties should be compared in order to come to the correct decision.[44] Though Breese took a soft approach in denying the collection of damages for the minor, an act not normally seen, it was still denied all the same. There was a fairly simple pattern that seemed to have

[39] 22 Ill. 140; 1859 Ill. LEXIS 34, pgs 1.
[40] *Ibid*, pgs 4-5.
[41] 20Ill. 478; 1858 Ill. LEXIS 159, pg 1.
[42] *Ibid*, pgs 16-18.
[43] *Ibid*, pgs 20-22.
[44] *Ibid*, pgs 42-43.

emerged in these early tort law cases; whenever it was an individual v. a large corporation, the individual losing their case appeared as a foregone conclusion. Cases involving small companies, cities or were between persons appeared to use a less strict version of tort law; one that was more in tuned with how the juries perceived it should work. Being beyond approach was essentially the only method to win against a large corporation as how the use of tort law stood in the early decades of its use.

The status quo of the application of tort law by the courts continued well into the 1870's. In *The City of Peru v. Laura A. French*, Peru attempted to appeal the trial court's decision awarding damages to the plaintiff. French was crossing Bluff Street where it intersected with Rock Street when she had stepped into a hole, breaking her leg and permanently crippling herself.[45] The jury trial had decided that the city was negligent in their duties to maintain the wooden plank crossing and that French was completely without fault, awarding her $2000. Peru vehemently decried the decision and based their appeal on an invalid verdict contrary to the evidence, an excessive monetary award and the lower court refusing to allow evidence beneficial to the city.[46] Judge Scott delivered his decision of the appeal by affirming the actions of the lower court. Scott first discounted the evidence Peru had wanted but was excluded. Peru had produced a paper that claimed French had withdrawn her offer to accept a $100 settlement from Peru. However this evidence lacked the subsequent proof that this letter had been written by French or her

[45] 55 Ill. 317; 1870 Ill. LEXIS 360, pgs 1-2.
[46] *Ibid*, pg 2.

attorney and was a mere proposition, not an agreement French had to uphold.[47] Judge Scott continued his opinion by discounting the city's opinion that the jury lacked the evidence to side for French. There was more than enough evidence citing the disrepair of the sidewalk, its woeful condition and that the city knew of the problems the sidewalk had.[48] Scott completes his opinion by stating that the amount of damages awarded to French was not excessive, as at the time of the incident, she had been abandoned by her former husband and was supporting herself, which she could not due to her injuries.[49] This case's similarities to *Joliet v. Verley* show how little has changed in the portrayals of particular groups in these cases. *The Chicago, Burlington and Quincy RR Co v. Albert Griffin* is another example of the stagnant use of tort law. With the appeal also decided by Judge Scott, he reversed the trial decision that had awarded Griffin $1500 in damages.[50] Griffin had intended to ride the train from Mendota to Earl, however a mistake had occurred and he was given a ticket to Meriden, a midway destination, instead. When the conductor wanted Griffin to pay the twenty cents for the ride from Meriden to Earl, he initially refused and was out off the train. Griffin quickly changed his mind and went to the conductor to pay the fare but became irate and used inappropriate language in the presence of other passengers. The conductor having the authority to enforce decorum on the train had Griffin kicked off the train.[51] Scott stated that the jury was misinformed before deliberating. Griffin's use of

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[47] *Ibid*, pgs 4-5.
[48] *Ibid*, pg 6.
[49] *Ibid*, pgs 7-9.
[50] 68 Ill. 499; 1873 Ill. LEXIS 272, pg 1.
[51] *Ibid*, pgs 2-3.

obscene language allowed the conductor the right and duty to remove him from the train; as he was no longer a passenger the first time he was put off the train, there was no broken arrangement between him and the train company.[52]

Some changes did start to occur in the mid 1870's that showed very small but noticeable shift in the way appellate judges viewed tort law and its application in the lower courts. In *The Illinois Central Railroad Company v. Joseph Hammer*, Judge Walker not surprisingly reversed the decision of the lower court that had decided in favor of Hammer.[53] Where the accident occurred in Champaign was known as the depot grounds, an area considered quasi public as the rail company shares the rights to the land with the public. Due to this joined land, Hammer could not be considered trespassing when the accident occurred.[54] Judge Walker stated that both sides were negligent: Hammer for not taking better care when crossing the depot and the company for not having a greater duty for safety. The lower court instruction to the jury said that they could vote in favor of Hammer if they thought his negligence was slight in comparison to the railroad company's negligence.[55] Judge Walker gives the correct interpretation of the law as the plaintiff having slight negligence and the defendant having gross negligence. With the instructions that were originally given, Walker believed that would allow plaintiffs who were guilty of gross negligence receive damages because the defendant was even more so negligent.[56] While what occurred in this case does not seem like it had any major importance, a second look

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[52] *Ibid*, pgs 5-8.
[53] 72 Ill. 347; 1874 Ill. LEXIS 180, pg 1.
[54] *Ibid*, pgs 1-3.
[55] *Ibid*, pgs 5, 8.
[56] *Ibid*, pgs 8-10.

allowed one to see what the deciding judge had explicitly stated. That it was possible for a plaintiff in their personal injury lawsuit to have had some negligence in their own harm, but could still receive compensation for their damages if the defendant was grossly negligent. This was a momentous step forward in the application of tort law; when one no longer had to be a pristine immaculate of any negligent actions to be allowed some compensation. In *The Chicago and Northwestern Railway Co v. William Coss*, this new rule of plaintiff slight negligence/defendant gross negligence also arises. Also decided by Judge Walker on appeal, he did reverse this decision in favor of the appealing railroad company. Coss was injured while attempting to cross freight trains in order to reach the soon to depart passenger train.[57] Walker's opinion stated that while the railroad was negligent in not providing safe and adequate passage for its passengers to reach the train, Coss put his life in too great a hazard to warrant any compensation for the damages he received.[58] These two cases displayed a great change undertaking the courts as tort law was concerned. For there to have been a concession from upper courts to allow the possibility of some plaintiff negligence to not instantly disqualify them from receiving money for their injuries, shows the effect the juries were having on the thoughts of appellate judges.

Even with this slight shift, juries still occasionally displayed an unnecessary zeal to benefit those who were hurt in connection to a corporation. *The City of Monmouth v. Julia Sullivan* had a jury that believed the duties of a city to care for its sidewalks extended farther than it actually did. Temporarily leaving a church festival at 2:00am "to attend the

[57] 73 Ill. 394; 1874 Ill. LEXIS 363, pgs 1-2.
[58] *Ibid*, pgs 3-4.

call of nature", Sullivan walked fifty feet away, stepped off the side of the sidewalk to use the vacant lot and fell six feet down.[59] Judge Pillsbury, in favor of Monmouth, reversed the lower court's decision. He cited that Monmouth had kept the thirteen foot wide sidewalk in good repair and the area Sullivan had stepped down to reach had never been connected to the sidewalk. Sullivan as a visiting person for the festival, failed to ask the companion she was going to attend nature with for the nearest outhouse or if she were stepping down in a safe place.[60] It would be impractical for Monmouth to provide unnecessary railings on such a wide path when it is clear that there was a drop. Furthermore, Sullivan had of her own volition walked off the sidewalk.[61] The overzealous approach of the jury had to be checked by the appellate judge in this case, but this did not negate the continued importance in affecting tort law.

More changes occurred during the early 1880's that furthered signified the shifting tort law. In *The Chicago City Railway Company v. Benjamin Mumford*, the trial court judge issued a remittitur[62] only awarding Mumford $5000 of $8000 for his injuries and overruling a new trial.[63] Mumford, while attempting to exit a street car in Chicago near Palmer House, was flung to the ground when the street car jerked forward suddenly. Witnesses on the street car gave consistent testimony of what happened to Mumford. The driver of the car notified the stop, when the car slowed, Mumford tried to exit, but was

[59] 8 Ill. App. 50; 1880 Ill. App. LEXIS 295, pgs 2-3.
[60] *Ibid*, pgs 3, 5.
[61] *Ibid*, pgs 8-10
[62] The reduction of an excessive monetary verdict.
[63] 97 Ill. 560; 1881 Ill. LEXIS 36, pg 1.

thrown to the ground due to a sudden jerk by the car.[64] Judge Craig upheld the lower court's decision, citing the evidence showing that the driver had initiated the stop but failed to properly complete said stop. Craig also stated that the lower court judge use of a remittitur negated the appealing railways claim that the damages were too excessive.[65] A similar action of reducing the awarded money occurred in *The Union Rolling Mill Company v. Thomas Gillen*. The Union Rolling Mill Company manufactured iron and steel in Chicago. They possessed their own train engines to make deliveries throughout the city by use of the Chicago/Alton rail tracks.[66] After a delivery, the Mill Company cars backed into the wagon of Gillen, destroying the wagon and causing him severe injury. In the appellate decision, Judge Sheldon had affirmed the decision of the lower court. What the Mill Company was arguing the most during its appeal was the use of a remittitur after the original judgment had an excessive amount of $5000. Sheldon was clear that, the use of remittitur was well established and without evidence to prove their other arguments that Gillen had displayed negligence in his own actions or was already inflicted with lameness, the Mill Company lost their appeal.[67] By adding the capability to lower awarded compensation from an excessive level allowed for individuals who were deserving of receiving damages from having to forfeit them due to a jury trying to award them too much.

The concept of individuals having "nobody to blame", a joke at the expense of contributory negligence, in personal injury lawsuits began to wane as the century was

[64] *Ibid*, pgs 2-6.
[65] *Ibid*, pgs 10-12.
[66] 100 Ill. 52; 1881 Ill. LEXIS 68, pg 1.
[67] *Ibid*, pgs 5-8.

drawing to an end.[68] An increase in the number of cases reflected the greater ease in which one could bring a case to trial. Furthermore, those that were brought forward had less to worry about overly expanded details falsely dictating decisions. In *North Chicago St. R. Co. v. Margaret Fitzgibbons*, Judge Sears upheld the lower court's judgment in favor of Fitzgibbons who was injured when attempting to exit a train when it started moving again. He dismissed the first claims of the rail company regarding the juries choosing which witnesses to believe. Sears stated that despite Fitzgibbons only having four witnesses to her opponents nine, the actual testimony of the witnesses leading to differently weighed evidence did not automatically disqualify the jury's decision.[69] This idea is in contrast to the completely opposite belief of Judge Walker in the *Still Case*.[70] The damages being asked for, $10,000, were not excessive due to the extensive nature of Fitzgibbons injuries.[71] Although not mentioned, the facts of this case veered closely to a late nineteenth century doctrines' development in tort law designed to ease the burden of proving negligence. The doctrine of last clear chance generally shifted fault on to the defendant if there was ample opportunity for them to still avoid causing harm.[72] As it was the train in this case that caused the injuries to Fitzgibbons by not waiting fully for her, as a passenger, to depart. The other new doctrine that emerged was *res ipsa loquitor*, the thing speaks for itself. In *The Town of Grafton v. Elizabeth Mooney*, the town's negligence in the injuries of Mooney

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[68] Friedman, pgs 357.
[69] 79 Ill. App. 632; 1898 Ill .App. 342, pgs 3-4.
[70] 19 Ill. 499; 1858 Ill. LEXIS 15, pgs 21-22.
[71] 79 Ill. App. 632; 1898 Ill .App. 342, pgs 4-5.
[72] Friedman, pgs. 359.

was upheld by the appellate judge. Mooney had been injured when another pedestrian stepped on a loose plank, causing the end to come up and hit her ankle.[73] Grafton tried to push blame onto Mooney for not watching out for the obviously loose planks, but Judge Thompson dismissed their claim. Since it was clear that the sidewalk had been in disrepair for some time, Grafton had failed to exercise reasonable diligence in the upkeep of its sidewalk being negligible for the harm it caused.[74] Although the changes in tort law were not the spark of a huge alteration, the lessening usage of contributory negligence to deny tort claims slowly increased in consistency. In *Mabel Cook v. A.S. Piper & Co.*, Cook was injured when a cake of ice fell off of a wagon after she cut across the street to get to the ice wagon. It was the appeal that reversed the ruling and declared Cook in favor to receive compensation. Judge Horton chided the actions of the trial judge for removing the jury's ability to decide on the negligence culpability of the wagon owner.[75]

The seemingly simple premise of tort law was anything but from its inception through the beginnings of the twentieth century. Illinois showed some prime examples of how jury decisions and judge decisions clashed throughout the country as both groups attempted to perform their task for bettering the society as a whole. Tort law started as vague notions embedded within common and contract law. After Blackstone touched upon the subject, Hilliard was able to scientifically structure tort law into a set of systematic rules. Unfortunately, they were viewed as guidelines; open to the interpretation of many,

[73] 89 Ill. App. 622; 1899 Ill. App. LEXIS 695 pgs 1-3.
[74] *Ibid*, pgs 4-6.
[75] 79 Ill. App. 291; 1898 Ill. App. LEXIS 270, pgs 2, 4.

causing a perverse application and perception from both judges and jurors. As the years progressed, the marked contrast between the dichotomic groups shrank more and more as juries began having a small, but steady impact on the ideals of appellate judges. Those minute gains allowed for judges to enforce the law that more accurately reflected what society wanted. For the last decade of the nineteenth century, contributory negligence was no longer being forced into all aspects of tort law. One aspect that the legal scholar Ira Moore wrote about in his treatise of the Illinois civil law was of the changes that occurred to tort law during the latter half of the nineteenth century.[76] Cases in the early twentieth century were being decided on an expanded mode of Hilliard's basic principles while still reflecting the fifty years of development that they experienced. Despite the seemingly long span of time, the change in tort law illustrated the importance of the impact society has on its laws.

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[76] Moore, Ira M. *A treatise on... torts... in the state of Illinois.* pgs 263-6.

Secondary Sources:

Blackstone, William. *Commentaries of English Common Law: Book II.* 1769.

Friedman, Lawrence M. *A History of American Law: Third Edition.* New York: Simon & Schuster, Inc., 2005.

Gold, David M. *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism.* New York: Greenwood Press, 1990.

Grossberg, Michael and Christopher Tomlins, Editors. *The Cambridge History of Law in America: Volume II The Long Nineteenth Century (1789-1920).* Cambridge: University Press, 2008.

Hall, Kermit L. *The Magic Mirror: Law in American History.* New York: Oxford University Press, 1989.

Hilliard, Francis. *The Law of Torts, Or Private Wrongs.* 1859.

Horwitz, Morton J. *The Transformation of American Law: 1780-1860.* Cambridge: Harvard University Press, 1977.

Horwitz, Morton J. *The Transformation of American Law: 1870-1960.* New York: Oxford University Press, 1992.

Ladinsky, Jack and Lawrence M. Friedman. "Social Change and the Law of Industrial Accidents" in *Essays in Nineteenth-Century American Legal History* edited by Wythe Holt, 301-334. Westport, CT: Greenwood Press, 1976.

Malone, Wex S. "The Formative Era of Contributory Negligence" in *Essays in Nineteenth-Century American Legal History* edited by Wythe Holt, 267-300. Westport, CT: Greenwood Press, 1976.

Moore, Ira M. *A treatise on contracts, torts, damages, evidence, and practice and procedure in civil cases in justice and other courts, and on the powers and duties of justices of the peace and constables, in the state of Illinois.* Chicago: Callaghan, 1900.

Primary Sources:

Honner v. Illinois Central Railroad Comp. 15 Ill. 550; 1854 Ill. Lexis 60

Galena & Chicago Union RR Company v Yarwood. 15 Ill. 468; 1854 Ill. Lexis 45

Galena & Chicago Union RR Company v Fay. 16 Ill. 558; 1855 Ill. Lexis 161

Peoria Bridge Association v Loomis. 20 Ill. 235; 1858 Ill. Lexis 98

Galena & Chicago Union RR Company v Jacobs. 20 Ill. 478; 1858 Ill. Lexis 159

Chicago and Rock Island Railroad Company v Still. 19 Ill. 499; 1858 Ill. Lexis 15

Stumps v Kelley. 22 Ill. 140; 1859 Ill. Lexis 34

Tuller et al v Talbot. 23 Ill. 298; 1860 Ill. Lexis 213

The City of Joliet v Verley. 35 Ill. 58; 1864 Ill. Lexis 170

Chicago and Rock Island Railroad Company v McKean. 40 Ill. 218; 1866 Ill. Lexis 178

The City of Peru v. Laura A. French. 55 Ill. 317; 1870 Ill. LEXIS 360

The Chicago, Burlington and Quincy RR Co v. Albert Griffin. 68 Ill. 499; 1873 Ill. LEXIS 272

The Illinois Central Railroad Company v. Joseph Hammer. 72 Ill. 347; 1874 Ill. LEXIS 180

The Chicago and Northwestern Railway Co v. William Coss. 73 Ill. 394; 1874 Ill. LEXIS 363

The City of Monmouth v. Julia Sullivan. 8 Ill. App. 50; 1880 Ill. App. LEXIS 295

The Chicago City Railway Company v. Benjamin Mumford. 97 Ill. 560; 1881 Ill. LEXIS 36

The Union Rolling Mill Company v. Thomas Gillen. 100 Ill. 52; 1881 Ill. LEXIS 68

Looney v The City of Joliet. 49 Ill. App. 621; 1893Ill. App. Lexis 110

Cook v A S Piper & Co. 79 Ill. App. 291; 1898 Ill. App. Lexis 270

North Chicago Street R Co v Fitzgibbons. 79 Ill. App. 632; 1898 Ill. App. Lexis 342

The Town of Grafton v Mooney. 89 Ill. App. 622; 1899 ill. App. 695