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Respect for Law & Man: The Tort Law of Chief Justice Kenison

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TRIBUTE

RESPECT FOR LAW AND MAN: THE TORT LAW OF CHIEF JUSTICE FRANK ROWE KENISON

"The law,—it has honored us, may we honor it."
—Daniel Webster*

David G. Owen**

INTRODUCTION

The professional life of a state supreme court justice is generally a quiet one, distant from the rough and tumble political world of the executive and legislative branches of government. Most people take little interest in the day-to-day work of such judges, deciding on cold records whether trial or intermediate appellate judges properly applied the rules of law to resolve disputes, and only occasionally tinkering with the rules themselves. So it is that the role of many justices, even chief justices, is not long remembered once they leave judicial office. Yet, from time to time, a state will produce a supreme court justice whose service on the court has a significant impact on the development of the common law of the state and perhaps the nation. Chief Justices Oliver Wendell Holmes, Jr. of Massachusetts[1] and Charles Doe of New Hampshire[2] so influenced the law during the late nineteenth century, as did Chief Justices Benjamin Cardozo of New York[3] during the

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* Of the New Hampshire Bar, in a speech to the Charleston, South Carolina Bar, May 10, 1847. Daniel Webster was born, educated, practiced law and represented New Hampshire (and later represented Massachusetts) in the United States Congress.

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1. *See, e.g.*, Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964); Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975 (1977).

2. *See, e.g.*, Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59 (1963); Note, *Doe of New Hampshire: Reflections on a Nineteenth Century Judge*, 63 HARV. L. REV. 513 (1950).

3. *See, e.g.*, Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361 (1939); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20 (1939).

early part of this century and Roger Traynor of California[4] more recently. So too will Chief Justice Frank Rowe Kenison of New Hampshire be long remembered for his profound contribution to the common law.[5]

There are a multitude of different windows through which the significance of any judge's work may be assessed. Since tort law spans as broad a spectrum of human activity as any other area of the law, an analysis of a judge's torts opinions should shed much light upon his basic attitude toward the proper role of law.

Thus I studied Justice Kenison's decisions on tort law,[6] decided from 1946[7] through 1977[8]—a period of over thirty years. From this study emerges a portrait of an exemplary supreme court judge who served his people well. His method of analysis and writing style are forthright, honest, and clear.[9] His opinions are thoroughly researched from a variety of legal sources both from within the state to a large and eclectic range of sources from without—a

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4. *See, e.g.*, Malone, *Contrasting Images of Torts—The Judicial Personality of Justice Traynor*, 13 STAN. L. REV. 779 (1961); Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1961).

5. Frank Rowe Kenison (1907-1980) was appointed Associate Justice of the New Hampshire Supreme Court on February 22, 1946, and Chief Justice on April 22, 1952, and served in the latter until his retirement on November 1, 1977. Professor Robert A. Leflar, Director of the N.Y.U. Law School Appellate Judges Seminars from 1956-77, and a former Associate Justice of the Supreme Court of Arkansas, has referred to "a few of America's greatest common law judges, including Holmes of Massachusetts, Cardozo of New York, Traynor of California, Kenison of New Hampshire, and Schaefer of Illinois." Leflar, *Honest Judicial Opinions*, 74 NW. U.L. REV. 721 (1979). *See also* Leflar, *True "False Conflicts," Et Alia*, 48 B.U.L. REV. 164 (1968) ("one of the nation's outstanding judicial scholars"); J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES (2d ed. 1978), Teachers' Manual 7-12 ("one of the great state supreme court judges"); Letter from Chief Justice Warren E. Burger to Massachusetts Justice Paul C. Riordan, 1974 ("one of the foremost jurists in the country"). Chief Justice Burger and Kenison were co-faculty at the N.Y.U. Law School Appellate Judges Seminar.

Boston University Law Review dedicated an issue (no. 2) to him in 1968, in which four professors examined his contributions to various areas of the law. 48 B.U.L. REV. 159 (1968). The 1970/71 volume of *The Annual Survey of American Law* was dedicated to Chief Justice Kenison. He was Chairman of the Conference of the Chief Justices of the United States. For his own contributions to the law reviews, see Kenison, *Some Preliminary Observations on the State Appellate Judge Today*, 61 COLUM. L. REV. 792 (1961); Kenison, *By Way of Introduction*, 38 SO. CAL. L. REV. 377 (1965).

6. Chief Justice Kenison wrote approximately fifty opinions that dealt principally with the common-law tort principles.

7. His first tort law opinion, Copadis v. Haymond, 94 N.H. 103, 47 A.2d 120 (1946), was a negligence case involving an intersectional collision of two automobiles.

8. His last tort law opinion, Paquette v. Joyce, 117 N.H. 832, 379 A.2d 207 (1977), involved an automobile that left the road and collided with the defendant's tree stump.

9. *See generally* Leflar, *Honest Judicial Opinions*, 74 NW. U.L. REV. 721, 727-29 (1979).

characteristic that enriches the wisdom and authoritative quality of his decisions. His opinions consistently appear to reach a just and logical result, well explained, efficiently administered, and based on traditional New England common sense. Yet there is another aspect of Justice Kenison's decisions, a constant theme woven silently throughout his opinions for more than thirty years, that is perhaps their dominant characteristic: a respect for the sources, purposes and limits of the law.

I. Respecting the Sources of the Law

Judge Kenison respected the sources of the law. His tort opinions reflect a deep commitment to the right and duty of a democratic people to rule themselves, whether by constitution, legislation, common law, or tradition outside the law.

A respect for constitutional principle is evident in Judge Kenison's decisions. In *Belkner v. Preston*,[10] for example, the plaintiff's decedent filed a tort action against the defendant in Hillsborough County and then died. The plaintiff, the decedent's mother and administratrix, moved to be substituted as the plaintiff eleven months later, but confronted a statute giving the administrator in such a case a maximum of two terms of court within which to seek substitution.[11] Litigants in counties with 2 terms of court per year thus had up to 12 months within which to seek substitution, whereas litigants in 3-term counties (such as Hillsborough) had at most 8 months.[12] Judge Kenison saw this form of discrimination against litigants in 3-term counties as having "no rational relationship to the statutory purpose of providing for the survival of pending tort actions,"[13] and therefore violative of the plaintiff's right to equal protection of the laws under the fourteenth amendment to the United States Constitution. The plaintiff was accordingly allowed a full twelve months to file her motion for substitution.

When Judge Kenison more typically upheld statutes against constitutional attack, rather than showing disrespect for constitutional authority, he demonstrated a respect for the legislature's broad responsibility under the constitution to enact statutes for

10. 115 N.H. 15, 332 A.2d 168 (1975).
11. *Id.* at 16, 332 A.2d at 170.
12. *Id.* at 17, 332 A.2d at 170.
13. *Id.* at 19, 332 A.2d at 172.

the public welfare. Thus, in two cases against constitutional challenge, he upheld statutes imposing strict liability on defendants for certain risks—fires from railroads[14] and realty damage from wild boars.[15] In the latter case, the Chief Justice remarked: "The police power of the state to control matters which are or may be considered nuisances is extremely broad."[16] Although the court had long disfavored strict liability in tort, as discussed below,[17] he reasoned in the boar case that "we cannot say that the state is powerless to adopt the view of absolute liability for damage by wild boar as a legislative policy. The statute . . . is constitutional."[18] Judge Kenison thus respected the broad and fundamental power of the elected assembly to enact legislation binding on the courts unless offensive to constitutional principle.

In addition to a respect for constitutional and statutory law, Judge Kenison's opinions show an abiding respect for New Hampshire common law—for the rule of precedent—even when he personally had some doubt as to the wisdom of the earlier doctrine. In one of his early tort decisions, *Owen v. Dubois*,[19] Associate Justice Kenison demonstrated simultaneous respect for the common law of the New Hampshire Supreme Court, the statutory law of the New Hampshire legislature, and consequently for the separation of powers principle of the New Hampshire Constitution. The defendant's truck struck Mr. Owen when he drove his vehicle from a private driveway onto a highway. In Mr. Owen's negligence suit against the truck driver, the defendant asserted that he should have had the right of way, urging the court to extend the right-of-way statute—which by its terms applied only to public ways—to cover the case.[20] Judge Kenison thought this was a "strong argument" based on common understanding:

> It may well be doubtful if the average motorist realizes that the automobile emerging from a private driveway has as great a right as the one proceeding along a public highway. Both speed and traffic on a public highway will be greater than that on a private driveway and there is less opportunity for motorists on a public highway to view those coming from ob-

14. State v. Boston & M.R.R., 99 N.H. 66, 105 A.2d 751 (1954).
15. King v. Blue Mountain Forest Ass'n, 100 N.H. 212, 123 A.2d 151 (1956).
16. *Id.* at 218, 123 A.2d at 156.
17. *See infra* text accompanying notes 23-27.
18. 100 N.H. at 218, 123 A.2d at 156.
19. 95 N.H. 444, 66 A.2d 80 (1949).
20. *Id.* at 445, 66 A.2d at 81.

> structed driveways. For these reasons, among others, it has been considered sound and sensible in several states to place a greater burden on the latter class of motorists.[21]

Yet the court was not writing on a clean slate, and it owed respect to the legislative provision as interpreted by earlier courts:

> In such situations in this jurisdiction, however, the rule has been consistently followed that neither party has a statutory right of way and that 'each owed to the other the reciprocal duty to act reasonably.' [citing two earlier New Hampshire decisions] The Trial Court followed the statute as written and never changed by the Legislature and as consistently construed in this state since the advent of the modern motor vehicle. If a different rule should apply, it is in the province of the Legislature to so provide by a statute of general application.[22]

The judge's respect for precedent and the early common law of New Hampshire is perhaps even more starkly demonstrated by the wild boar case mentioned above, *King v. Blue Mountain Forest Association.*[23] Although the New Hampshire Supreme Court had for many decades rejected efforts to inject strict liability principles into the common law of torts,[24] it had adopted a strict liability rule in an early line of cases for damage caused by trespassing livestock.[25] The plaintiffs in *King* urged that this strict liability rule be extended from livestock to cover wild boars, and Judge Kenison felt constrained on the authority of the trespassing livestock cases to broaden the coverage of strict liability in this context.

> If a farmer who owns or possesses contented cows is held to strict liability for trespass to real estate it would be a strange doctrine that would not impose at least the same liability upon the owner of battering boar[s] which were im-

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21. *Id.*

22. *Id.* at 445-56, 66 A.2d at 81.

23. 100 N.H. 212, 123 A.2d 151 (1956).

24. Beginning most notably with Chief Justice Doe's famous opinion rejecting the strict liability doctrine of *Rylands v. Fletcher*, in Brown v. Collins, 53 N.H. 442 (1873). *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 548 (5th ed. 1984); MacLeod, *Chief Justice Kenison and the Law of Torts: A Comment on Process*, 48 B.U.L. REV. 175, 185-87 (1968); Note, *Doe of New Hampshire: Reflections on a Nineteenth Century Judge*, 63 HARV. L. REV. 513 (1950).

25. *See* Noyes v. Colby, 30 N.H. 143 (1855); Kennett v. Durgin, 59 N.H. 560 (1880); Blaisdell v. Stone, 60 N.H. 507 (1881).

> ported into the state for the purposes of exclusive and private hunting.[26]

So, from respect for a long-established policy of former courts, and in an effort to treat alike litigants of the same general type, Judge Kenison extended an early common law strict liability rule that cut sharply across the grain of the court's long-standing aversion to this form of liability.[27]

Justice Kenison also respected the legal authority of trial judges, judicial referees and masters. He forbade reference to the trial courts as "lower" courts in internal memoranda,[28] this reflected his view of their vital role as the principal judicial law-givers to the general citizenry—the connecting institution between the law and the governed. His tort opinions bear witness to this respect for the courts of first impression, particularly in the strong presumption of correctness he accorded to findings and rulings of such courts.[29]

While the jury may be located at the bottom of the judicial organization chart, its key role as a source of law was firmly imbedded in Judge Kenison's judicial philosophy. Especially in the tort law context, where many of the central issues are defined in terms of "reasonableness"—of the defendant's conduct, in negligence;[30] of his land use, in nuisance[31]—the law resides enormous discretion in the jury to decide the liability and even damages issues almost as it sees fit, often effectively beyond judicial review. Judge Kenison respected this powerful role of the jury, acting in Jacksonian tradition for the wider community, in applying law to resolve interpersonal disputes.[32]

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26. 100 N.H. at 215, 123 A.2d at 154.

27. Within months of his retirement, Judge Kenison remained faithful to the state's traditional opposition to strict liability, refusing to extend the doctrine to a ski area tramway operator. Bolduc v. Herbert Schneider Corp., 117 N.H. 566, 570, 374 A.2d 1187, 1190 (1977): "We have not been prone to extend strict liability in this jurisdiction."

28. Discussion between Justice Kenison and author (August or September 1972). For an example of his own use of the "trial court" denomination, *see supra* text accompanying note 22.

29. *See generally* Lynch v. Bissell, 99 N.H. 473, 116 A.2d 121 (1955); Richards v. Crocker, 108 N.H. 377, 236 A.2d 692 (1967); Lemery v. O'Shea Dennis, Inc., 112 N.H. 199, 291 A.2d 616 (1972).

30. *E.g.*, Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

31. *See generally* Micucci v. White Mountain Trust Co., 114 N.H. 436, 321 A.2d 573 (1974); Robie v. Lillis, 112 N.H. 492, 299 A.2d 155 (1972) (non-jury hearing).

32. *See* Richards v. Crocker, 108 N.H. 377, 236 A.2d 692 (1967) (upholding compromise verdict of jury).

Two octogenarian-fall-down cases, *Brosor v. Sullivan*[33] and *Bernard v. Russell*,[34] demonstrated Judge Kenison's deference to jury decision-making. In *Brosor*, the 83-year-old decedent slipped on a scatter rug on a highly polished and waxed hardwood floor in the defendant's residence,[35] and in *Bernard*, the 82-year-old plaintiff was struck by the defendant's car while crossing the street.[36] In *Brosor*, Judge Kenison refused to follow certain other states which hold as a matter of law that scatter rugs on polished floors are a common risk that involves no negligence. Instead, he upheld a jury verdict in favor of the plaintiff, ruling that the question of the homeowner's negligence was properly a jury question.[37] In *Bernard*, the plaintiff appealed an adverse verdict, citing a number of cases in which the plaintiff had prevailed on similar facts. Judge Kenison observed as follows:

> We recognize that plaintiffs have recovered verdicts in cases like the present. . . . However, uniformity in verdicts is not a jewel in the crown of the jury system and the only thing that the appellate court can do is to review the evidence to see if the verdict is one that the jury is entitled to reach.[38]

The Chief Justice let the verdict stand.

In addition to the common law of New Hampshire, Judge Kenison looked abroad for guidance in the formulation and application of law. First, he looked to the law of other states. Not only did Judge Kenison respect the applicability of other state law to certain cases brought in New Hampshire courts under traditional conflict of law principles,[39] but his conflicts opinions were in the national vanguard in adopting principles realistically identifying the sovereign most legitimately concerned with the particular dispute.[40] Moreover, he turne frequently to the common law of other states for guidance where the New Hampshire court had not considered an issue, or for corroboration or dialectical inquiry where it

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33. 99 N.H. 305, 109 A.2d 862 (1954).

34. 103 N.H. 76, 164 A.2d 577 (1960).

35. 99 N.H. at 306, 109 A.2d at 863.

36. 103 N.H. at 76, 164 A.2d at 578. (N.H. Rep. states age is 82, A.2d states age is 79).

37. 99 N.H. at 306, 309, 109 A.2d at 863, 865.

38. 103 N.H. at 78, 164 A.2d at 579 (citations omitted).

39. Levlock v. Spanos, 101 N.H. 22, 131 A.2d 319 (1957) (law of Vermont, place of automobile accident, governed question of whether wife's estate could sue husband's estate).

40. *See, e.g.*, Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966), discussed *infra* in text accompanying notes 151-58.

had. In Associate Justice Kenison's first important torts opinion,[41] in 1946, he relied on cases from New York and Massachusetts. Nor did he grow parochial over the years. In his last torts opinion,[42] in 1977, the Chief Justice relied in part on cases from Kansas, Illinois, Arkansas, Pennsylvania and the United States Court of Appeals for the Fifth Circuit. Yet Judge Kenison well understood that the Polar Star of any judge must be the welfare and law of the people who vest him with his judicial powers. It thus was fitting that the last case Judge Kenison cited in his last torts opinion was from New Hampshire.[43] For one always must go home.

When the common law of New Hampshire and other states was incomplete, fragmented, in disagreement, or just seemed wrong, Judge Kenison often turned to "secondary" sources of the law—legal commentary such as the various Restatements of the law, the treatises (especially Prosser[44] and Harper & James), and the law journals. His opinions are rich in citations, quotations, and ideas from the judges, lawyers, and academics from around the country who had studied similar problems and offered perspectives that helped illuminate the way toward a just result. One senses that he reaches out in this respect not only in a search for good solutions to new problems, but also with an appreciation of New Hampshire's symbiotic membership in a community of legal jurisdictions connected by many common threads of value and experience. Again, his first important torts opinion relied upon two treatises on automobile law, and upon the Restatement of Torts;[45] his last concluded with a quotation from Prosser on Torts and with a reference to the Restatement (Second) of Torts.[46]

The legal commentators reciprocated. His opinions are frequently cited in the law journals[47] and treatises[48] as being leading

41. Clough v. Schwartz, 94 N.H. 138, 48 A.2d 921 (1946).

42. Paquette v. Joyce, 117 N.H. 832, 379 A.2d 207 (1977).

43. *Id.* at 837, 379 A.2d at 210.

44. *See, e.g.*, Cook v. 177 Granite St., Inc., 95 N.H. 397, 399, 64 A.2d 327, 329 (1949) (1st ed.); Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 173, 121 A.2d 781, 782 (1956) (2d ed.); Hamberger v. Eastman, 106 N.H. 107, 109, 206 A.2d 239, 241 (1964) (3d ed.); Robie v. Lillis, 112 N.H. 492, 495, 299 A.2d 155, 158 (1972) (4th ed.).

45. Clough v. Schwartz, 94 N.H. at 140, 48 A.2d at 922 (1946).

46. Paquette v. Joyce, 117 N.H. at 837, 379 A.2d at 210 (1977).

47. Among the many Kenison opinions noted in the law journals is Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973). The decision in this case formed the thesis for a major article by Professor Jean Love and was noted in many law reviews. *See* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WISC. L. REV. 19; *Notes*, 59 CORNELL L. REV. 1161 (1974); 1974 DUKE L.J. 175; 23 EMORY L.J. 1051 (1974); 2

cases in various areas of tort law, and law students across the nation daily learn the law of torts by reading his opinions in the casebooks.[49] Chief Justice Frank Rowe Kenison has become a significant part of this nation's common law.

II. Respecting the Purposes of the Law

A judge shows the greatest respect for the sources of the law, for the law-givers, by discerning and promoting the *purposes* behind the law. It is therefore only through "functional" analysis in many cases that law can be applied intelligently and according to the mandate of its sources. Although the search for policy objectives behind the rules is often fraught with difficulty, Judge Kenison had a sharp insight into the social values and principles of purpose that gave foundational support to the system of tort law doctrine.

A threshold purpose of the law must be to afford persons holding grievances against one another reasonable access to the courts. This principle is evident in Judge Kenison's opinions interpreting statutory time limitations for tort claims,[50] particularly those con-

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Ford Urb. L.J. 647 (1974); 35 Ohio St. L.J. 212 (1974); 8 Suff. U.L. Rev. 1305 (1974); 5 Tex. Tech. L. Rev. 887 (1974); 43 U. Cin. L. Rev. 218 (1974); 1974 Wash. U.L.Q. 510; 9 Urb. L. Ann. 259 (1975); Annot., 64 A.L.R. 3d 329 (1975). *See also* Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 Mich. L. Rev. 99, 133 (1982) (referring to *Sargent v. Ross* as "[t]he leading case").

48. By way of example, *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528, is discussed in Prosser and Keeton on Torts, § 63, at 446, and in 5 F. Harper, F. James & O. Gray, The Law of Torts § 27.16, 294, 295 (2d ed. 1986) ("it would appear that the forces of logic and of history favor this reform and that it can be expected to spread").

49. *See, e.g.*, W. Prosser, J. Wade & V. Schwartz, Cases and Materials on Torts 174, 524 (6th ed. 1976) (Dorais v. Paquin, 113 N.H. 187, 304 A.2d 369 (1972); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973)); W. Keeton, D. Owen & J. Montgomery, Products Liability and Safety—Cases and Materials 862, 864 (1980) (Willett v. General Electric Co., 113 N.H. 358, 306 A.2d 789 (1973); Workman v. Public Service Co., 113 N.H. 422, 308 A.2d 540 (1973)); H. Shulman, F. James & O. Gray, Cases and Materials on the Law of Torts 953 (3d ed. 1976) (Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1965)); L. Green, W. Pedrick, J. Rahl, E. Thode, C. Hawkins, A. Smith & J. Treece, Cases on the Law of Torts 539 (2d ed. 1977) (*Sargent*, 113 N.H. 388, 308 A.2d 528); G. Christie, Cases and Materials on the Law of Torts 532 (1983) (*Sargent*, 113 N.H. 388, 308 A.2d 528); M. Franklin & R. Rabin, Cases and Materials on Tort Law and Alternatives 181 (3d ed. 1983) (*Sargent*, 113 N.H. 388, 308 A.2d 528); D. Noel & J. Phillips, Cases and Materials on Torts and Related Law 541, 641 (1980) (*Sargent*, 113 N.H. 388, 308 A.2d 528); *Hamberger*, 106 N.H. 107, 206 A.2d 239); R. Epstein, C. Gregory & H. Kalven, Cases and Materials on Torts 551 (4th ed. 1984) (*Sargent*, 113 N.H. 388, 308 A.2d 528).

50. *See* Ford v. Black Mountain Tramways, 110 N.H. 20, 259 A.2d 129 (1969) (60-day notice of claim requirement in certain actions against ski areas); *cf.* Roy v. Roy, 101 N.H. 88, 133 A.2d 492 (1957) (action brought 15 years after accident; substitution of parties

cerning the discovery rule. In *Raymond v. Eli Lilly & Co.*,[51] the plaintiff had suffered injury to her eyes in 1968 from taking the defendant's oral contraceptive. She discovered her possible claim against the defendant manufacturer in 1970 or 1971 and filed suit in 1975.[52] The question was whether the 6-year statute of limitations began running from the date of her injury, and hence barred the action, or whether the discovery rule (adopted earlier in the medical malpractice context)[53] tolled the running of the statute until the plaintiff reasonably should have discovered her claim.[54] Extending the discovery rule to the products liability context, Judge Kenison addressed the considerations behind the limitations rule. For one thing, drug companies:

> know or at least should expect that some time may pass before the harmful effects of their products manifest themselves in drug users and that there may be another lapse of time before the injured person is able to discover causal connection between his injury and the drug he consumed.[55]

In addition, "unlike the situation in most cases, the passage of time in a drug case is likely to increase both the amount and the accuracy of the evidence . . . ."[56] And finally, the imposition of the discovery rule should encourage manufacturers to marshal their resources to discover and remedy dangerous side-effects of their drugs.[57] The discovery rule thus was not unfair to defendants, and was consistent with the underlying objectives of the statute, including the goal of discouraging victims from sleeping on their rights:

> [A] person cannot be said to have been 'sleeping on his rights' when he does not know and reasonably could not have known that he had such rights. By employing the discovery rule, we avoid the harsh and illogical consequences of interpreting the statute in a manner that outlaws the plaintiff's claim before he was or should have been aware of its existence.[58]

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permissible).

51. 117 N.H. 164, 371 A.2d 170 (1977).

52. *Id.* at 166, 371 A.2d at 172.

53. Shillady v. Elliot Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974).

54. 117 N.H. at 167, 371 A.2d at 172.

55. *Id.* at 174, 371 A.2d at 176.

56. *Id.*

57. *Id.* at 174, 371 A.2d at 176-77.

58. *Id.* at 170, 371 A.2d at 174 (citations omitted).

Seven months later, in *Brown v. Mary Hitchcock Memorial Hospital*,[59] Judge Kenison reaffirmed the importance of the objectives underlying the discovery rule. In that case, he reformulated its definition, in conformance with its purposes, in terms of the "discovery or a reasonable opportunity to discover the wrongful nature of the defendants' conduct . . . ."[60] The rationale of *Raymond* was that one should not lose a legal right for failure to assert it before he discovers he has suffered an injury; the rationale of *Brown* was that one should not lose such a right before he discovers that he has a right to redress that injury in the courts.[61]

Once persons have entered the legal system, the rules applied to resolve their disputes should be applied fairly and logically according to explicitly articulated values and policies of the jurisdiction. In his application of substantive tort law doctrine, Judge Kenison employed just this type of functional approach, defining the principles of tort law in terms of the purposes of a just society that lay behind the law. If a dominant general principle is discoverable from his torts opinions, it may be that each person must, in the pursuit of his own interests, show reasonable respect for the interests of others. To Judge Kenison this meant, among other things, that one must respect the basic dignity of other persons, including the interest in privacy surrounding intimate aspects of their lives. In *Hamberger v. Eastman*,[62] the defendant landlord hid a listening and recording device beside the married plaintiffs' bed that transmitted voices and other sounds to the landlord's house next door. The tenants sued the landlord for invasion of privacy, for intruding upon their physical and mental solitude and seclusion, a nascent tort in certain other states that had not before been recognized in New Hampshire.[63] Judge Kenison observed in part as follows:

> We have not searched for cases where the bedroom of husband and wife has been 'bugged' but it should not be necessary—by way of understatement—to observe that this is

59. 117 N.H. 739, 378 A.2d 1138 (1977).

60. *Id.* at 743, 378 A.2d at 1140.

61. "A cause of action will not accrue until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendants' *wrongful* conduct." *Id.* (emphasis in original).

62. 106 N.H. 107, 206 A.2d 239 (1964).

63. *Id.* at 109, 206 A.2d 239.

> the type of intrusion that would be offensive to any person of ordinary sensibilities. What married 'people do in the privacy of their bedrooms is their own business as long as they are not hurting anyone else.'
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> . . . .
>
> If the peeping Tom, the big ear and the electronic eavesdropper (whether ingenious or ingenuous) have a place in the hierarchy of social values, it ought not to be at the expense of a married couple minding their own business in the seclusion of their bedroom who have never asked for or by their conduct deserved a potential projection of their private conversations and actions to their landlord or to others.
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> . . . [T]he invasion of the plaintiffs' solitude or seclusion, as alleged in the pleadings, was a violation of their right to privacy and constituted a tort for which the plaintiffs may recover damages, to the extent that they can prove them. 'Certainly, no right deserves greater protection . . . .'[64]

Certainly there was no clearer judicial herald for providing tort law protection against interpersonal invasions of privacy then Chief Justice Kenison.

In addition to protecting the dignity and hence individuality of persons, the law of torts protects the physical security of persons against unreasonable invasions by others. For more than thirty years, in a large number of different contexts, Judge Kenison defined and applied the negligence law duty of reasonable care owed to others in the community and, through contributory negligence doctrine, to oneself. His opinions reveal a balanced philosophy of tort responsibility, requiring potential injurers to accord substantial respect to the safety of others, and requiring potential injury victims to act responsibly for their own protection. The standard of proper conduct Judge Kenison adopted was of course the ubiquitous "reasonable man of ordinary prudence,"[65] which he further defined in traditional reasonableness, calculus of risk terms:

> General principles of tort law ordinarily impose liability upon persons for injuries caused by their failure to exercise

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64. *Id.* at 111-12, 206 A.2d at 241-42 (citations omitted).

65. *E.g.*, Bernard v. Russell, 103 N.H. 76, 164 A.2d 577 (1960) (pedestrian struck by automobile).

> reasonable care under all the circumstances. A person is generally negligent for exposing another to an unreasonable risk of harm which foreseeably results in an injury.[66]
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> . . . .
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> . . . [A person] must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.[67]

Judge Kenison held these general principles applicable to most types of persons in most types of contexts. So, his decisions establish that due care must be exercised by motorists to enter the highway cautiously,[68] to keep their eyes on the road,[69] and to clear the windshield of ice and drive at prudent speeds on unfamiliar roads;[70] by contractors to avoid creating unreasonable risks for workers[71] and adjoining landowners;[72] by doctors treating patients;[73] by vendors of alcohol to intoxicated patrons;[74] and by premises owners to provide lighting[75] or warning[76] of darkened stairways, to safely construct and maintain stairways,[77] to secure scatter rugs to slippery floors,[78] and to fence their high retaining walls.[79]

Judge Kenison's opinions also affirm the existence of a correlative obligation on the individual to act prudently to protect himself. Thus, a person must act with reasonable caution to avoid fall-

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66. Sargent v. Ross, 113 N.H. 388, 391, 308 A.2d 528, 530 (1973) (citations omitted).

67. *Id.* at 397, 308 A.2d at 534.

68. Owen v. DuBois, 95 N.H. 444, 66 A.2d 80 (1949); Naramore v. Putnam, 99 N.H. 175, 106 A.2d 568 (1954).

69. Roy v. Roy, 101 N.H. 88, 133 A.2d 492 (1957) (automobile guest statute: driver turning to look at and talk to passenger in back seat as gross negligence).

70. McAllister v. Maltais, 102 N.H. 245, 154 A.2d 456 (1959) (auto guest statute: gross negligence).

71. Butler v. King, 99 N.H. 150, 106 A.2d 385 (1954).

72. Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956).

73. *See generally* Brown v. Mary Hitchcock Memorial Hosp., 117 N.H. 739, 378 A.2d 1138 (1977).

74. *See* Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965) (violation of criminal statute as evidence of negligence).

75. Holmes v. Clear Weave Hosiery Stores, Inc., 95 N.H. 478, 66 A.2d 702 (1949).

76. Richards v. Crocker, 108 N.H. 377, 236 A.2d 692 (1967).

77. Filip v. Gagne, 104 N.H. 14, 177 A.2d 509 (1962); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

78. Brosor v. Sullivan, 99 N.H. 305, 109 A.2d 862 (1954).

79. Wheeler v. Monadnock Community Hosp., 103 N.H. 306, 171 A.2d 23 (1961).

ing down stairways,[80] slipping on ice,[81] crossing streets in front of traffic,[82] sledding into traffic on a snow-covered street,[83] injuring himself while intoxicated,[84] walking on the wrong side of a snow-covered highway in dark clothing at night,[85] and driving off the road into a tree stump.[86] In most of these opinions, Judge Kenison based his decision—sometimes explicitly, other times implicitly—on the fundamental social values and objectives that lay behind the rules of tort law. He was thus concerned with protecting the parties' reasonable expectations of how other people will act, and their expectations concerning other aspects of the apparent safety or danger in a particular situation;[87] with using the law instrumentally to encourage safe behavior;[88] with helping to assure that all persons, including those with special limitations, are treated and treat one another with respect;[89] and with assuring compensation to persons injured by the heedless conduct of

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80. *See* Rau v. First Nat. Stores, 97 N.H. 490, 92 A.2d 921 (1952).

81. *See* Cook v. 177 Granite St., Inc., 95 N.H. 397, 64 A.2d 327 (1949) (no duty: icy condition obvious).

82. Bernard v. Russell, 103 N.H. 76, 164 A.2d 577 (1960).

83. Codding v. Makris, 104 N.H. 381, 187 A.2d 804 (1963).

84. Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965) (glass imbedded in wrist while pounding fist on table).

85. Dorais v. Paquin, 113 N.H. 187, 304 A.2d 369 (1973).

86. Paquette v. Joyce, 117 N.H. 832, 379 A.2d 207 (1977).

87. *See, e.g.*, Holmes v. Clear Weave Hosiery Stores, Inc., 95 N.H. 478, 66 A.2d 702 (1949) (customer, invited by clerk to dimly lit back room, fell down open stairway when clerk told her to step back) (plaintiff "was directed by the defendant's agent to a place that she had a right to expect to be safe"), *id.* at 480, 66 A.2d at 704. *See also* Butler v. King, 99 N.H. 150, 106 A.2d 385 (1954) (plaintiff leaned on porch railing which collapsed because defendant contractor had removed supports) ("railing was level and stood upright and in the same position [as] if it had been effectively secured at both ends . . . . [and] looked like a normal railing [that] fit in tightly"), *id.* at 152, 106 A.2d at 387; Wheeler v. Monadnock Community Hosp., 103 N.H. 306, 171 A.2d 23 (1961) (child fell over unfenced retaining wall to lower level) ("There was no warning to this injured child and the retaining wall from the side from which she approached it had the appearance of a low curb."), *id.* at 308, 171 A.2d at 24.

88. *See* Sargent v. Ross, 113 N.H. 388, 399 A.2d 528 (1973) (tenant's child fell from poorly constructed steps: liability rule "should help insure that a landlord will take whatever precautions are reasonably necessary under the circumstances to reduce the likelihood of injuries from defects in his property"), *id.* at 399, 308 A.2d at 535; Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977) (burdens on defendant of discovery rule are "justified if they cause the defendant to conform to a higher standard of care"), *id.* at 175, 371 A.2d at 177.

89. *See generally* Brosor v. Sullivan, 99 N.H. 305, 109 A.2d 862 (1954) (landlord should have secured or removed scatter rug on polished hardwood floor in front of only door to elderly tenant's bedroom, especially since he had slipped before); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964) (landlord "bugged" tenants' bedroom).

others.[90]

Although Judge Kenison's decisions hold the ordinary person to a reasonably high standard of behavior, his opinions do not generally demand more of people than they can give. The tort law goals of deterrence and punishment are generally out of place where a defendant has acted as carefully as he is able, and society usually loses more than it gains in terms of both freedom and efficiency when it forces individuals to shoulder the costs of accidents they could not realistically prevent. Thus, he tempered the application of the stringent "prudent man" standard to conform to some of the frailties of human life.

While this tempering of the normally high standard of prudence was most evident in cases involving young children injuring themselves at play,[91] he also saw a proper allowance in the normal standard for weaknesses in adults. This was certainly true for adults with physical disabilities, including those resulting from old age:

> The whole theory of negligence presupposes some uniform standard of behavior. . . . However, the standard has been flexible enough in the case of aged and physically disabled persons to bend with the practical experiences of everyday life. The law does not demand that the blind shall see, or the deaf shall hear, or that the aged shall maintain the traffic agility of the young.[92]

He even acknowledged the possibility that an allowance should be made for drunks: "We recognize that a drunken person is as much entitled to protection as a sober one and much more in need of it."[93]

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90. *See generally* Owen v. DuBois, 95 N.H. 444, 66 A.2d 80 (1949) (truck driver, who may have been speeding and may have seen plaintiff long before collision smashed into plaintiff's car); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966) (New Hampshire's ordinary rules of negligence preferable to automobile guest statute of another state; such statutes were enacted before advent of widespread liability insurance).

91. *See* Wheeler v. Monadnock Community Hosp., 103 N.H. 306, 171 A.2d 23 (1961); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

92. Bernard v. Russell, 103 N.H. 76, 77, 164 A.2d 577, 578 (1960) (82-year-old plaintiff pedestrian with cataract in one eye struck by defendant driver; jury properly considered plaintiff's age and physical condition on contributory negligence). *See also* Brosor v. Sullivan, 99 N.H. 305, 109 A.2d 862 (1954).

93. Ramsey v. Anctil, 106 N.H. 375, 377, 211 A.2d 900, 901 (1965) (dictum) (citing Robinson v. Pioche, Bayerque & Co., 5 Cal. 460, 461 (1855)).

The Chief Justice also made more subtle allowances for lapses in judgment by normal men and women in everyday life. In *Holmes v. Clear Weave Hosiery Stores*,[94] a shopper fell down a stairway in a dark room at the back of the store while chattering with the clerk over the color of a coat. Rendering judgement on the verdict for the plaintiff, Judge Kenison remarked as follows on the contributory negligence issue:

> Plaintiff's conduct is to be considered in the light of the attendant circumstances and not in the abstract. She was unfamiliar with the layout of the back room and the position of the stairs. Both she and the defendant's clerk were mutually and respectively engrossed in the making of a sale and purchase of a coat during a dispute as to the shade. When two women are so engaged, it cannot be said as a matter of law that the purchaser is negligent in failing to observe all the details of the surroundings in a room into which she had been invited.[95]

A similarly keen and compassionate recognition of practicable limitations on personal responsibility is evident in *McAllister v. Maltais*.[96] The defendant driver in that case was driving through a sleet storm at 50-55 miles per hour without stopping to scrape the windshield which had become glazed over with ice except for a small and blurry "peephole" at the bottom. While negotiating a curve, he ran the car off the road and into twin oak trees, injuring his adult daughter, Cora.[97] In the daughter's action against her father, the jury returned a verdict for the daughter, and Judge Kenison reviewed the issue of whether she had been contributorily negligent or assumed the risk in failing to protect herself from harm:

> At the time the danger arose, the plaintiff Cora was faced not with legal theories, but facts. . . . First, she could not have attempted to have used force on her father. We shall not labor the point that all reasonable persons need not agree that she should have done so. Again it is obviously not a compelled conclusion that she should have attempted to get out of the moving car. There remains to consider whether all rea-

94. 95 N.H. 478, 66 A.2d 702 (1949).

95. *Id.* at 479-80, 66 A.2d at 703-04. *See also* Richards v. Crocker, 108 N.H. 377, 326 A.2d 692 (1967).

96. 102 N.H. 245, 154 A.2d 456 (1959).

97. *Id.* at 247, 154 A.2d at 458.

> sonable persons must agree that she should have made a more violent protest to her father to stop and clear the windshielf or let her take over the driving . . . .
>
> The determination of these question requires a statement of certain findable salient facts. It appears that Cora was a woman who, although forty-five years old and married, had spent much if not most of her life with her father and was at that time living under the same roof with him. She respected both his authority and his judgment. He, on the other hand, was a strong-minded individual who, whether he should or should not have done so, considered his daughter still 'a little girl,' who was not to order him about, but who was to accept his decisions. While this did not, of course, relieve her from her duty to exercise ordinary care, it is a fact to be considered in judging the reasonableness of her conduct toward her father on this occasion. He did not like back-seat or front-seat driving and when, at other times, she had spoken to him about his driving, 'He got mad.' Even on that day, although he had to a degree heeded her first protest to slow down, he had refused her request that he stop and clear the windshield and replied that he would do so when he reached a filling station or a garage. To her further plea that she had a scraper in the car, he responded by silence and continued on his way. It appeared to her that storm signals were out and she testified repeatedly that she believed it would have done no good to argue or plead further, because 'He would still do what he wanted to.' In effect, she made it clear that while she was disturbed and upset about his conduct, she did not know what to do about it and said no more 'because I did not want to make it any worse.'[98]

Judge Kenison sustained the verdict in Cora's favor, ruling that the jury was entitled to conclude that her conduct should not bar her from recovery.[99]

In addition to the substantive objectives of tort law, based on principles of safety and responsibility, Chief Justice Kenison's opinions reveal a somewhat different form of legal ethic—that the law should show no favorites, but should instead treat all parties with equal respect, and that it should demand equal obedience to its rules from all. One looks in vain in his opinions for bias toward injurers or injureds, governmental units, corporations, rich or poor.

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98. *Id.* at 250-51, 154 A.2d at 460-61.
99. *Id.* at 252, 154 A.2d at 461.

Such preferences, both positive and negative, lie deep within the hearts of many persons, but of course should not control decisions of an impartial judge.

Judge Kenison's tort opinions are illuminated by his even-handed treatment of all parties that stood before the court. Landowners sometimes were held liable for an injury,[100] sometimes they were not.[101] Sometimes the Boston and Maine railroad had to pay in tort,[102] other times it did not.[103] Little children[104] and old men[105] sometimes recovered for their injuries, at other times both young[106] and old[107] took nothing on their claims. That the law held little room for favorites in Judge Kenison's jurisprudence was evident in his low regard for the traditional tort immunities from suit.[108]

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100. *See, e.g.*, Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973) (young child fell from dangerous stairway).

101. *See, e.g.*, Paquette v. Joyce, 117 N.H. 832, 379 A.2d 207 (1977) (automobile drove off road and into defendant's tree stump).

102. State v. Boston & Me. R.R., 99 N.H. 66, 105 A.2d 751 (1954) (fire started by defendant's locomotive; statute).

103. Beaudet v. Boston & Me. R.R., 101 N.H. 4, 131 A.2d 65 (1957) (passenger missed a step and fell while descending from train).

104. *See* Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973) (young child fell from dangerous stairway); Wheeler v. Monadnock Community Hosp., 103 N.H. 306, 171 A.2d 23 (1961) (young child fell to lower level from unfenced retaining wall).

105. *See* Brosor v. Sullivan, 99 N.H. 305, 109 A.2d 862 (1954) (landlord failed to secure scatter rug on slippery floor).

106. Codding v. Makris, 104 N.H. 381, 187 A.2d 804 (1963) (child sledding on streets hit by car; statute).

107. *See* Rau v. First Nat. Stores, 97 N.H. 490, 92 A.2d 921 (1952) (elderly man fell down stairway in nonpublic area at rear of store); Bernard v. Russell, 103 N.H. 76, 164 A.2d 577 (1960) (elderly man crossing street struck by car).

108. At issue was usually some limited form of immunity from the ordinary responsibility to act with due care. "In recent years, immunities from tort liability affording 'special protection in some types of relationships have been steadily giving way' in this and other jurisdictions." Sargent v. Ross, 113 N.H. 388, 396, 308 A.2d 528, 533 (1973) (abolishing limited immunity of landlords). *See also* Hurley v. Town of Hudson, 112 N.H. 365, 296 A.2d 905 (1972) (criticizing "archaic and often inequitable doctrine of municipal tort immunity"), *id.* at 367, 296 A.2d at 906; Ford v. Black Mountain Tramways, Inc., 110 N.H. 20, 259 A.2d 129 (1969) (60-day notice of claim statute construed to be inapplicable to claim); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966) (gross negligence standard of automobile guest statute inferior to ordinary negligence standard); Filip v. Gagne, 104 N.H. 14, 177 A.2d 509 ("There appears to be no reason or policy which would justify immunity of conservators from liability for their own negligence in maintaining the estate of their wards."), *id.* at 16, 177 A.2d at 511; Wheeler v. Monadnock Community Hosp., 103 N.H. 306, 171 A.2d 23 (1961) (charitable immunity doctrine inapplicable in New Hampshire); Leary v. McSwiney, 103 N.H. 85, 166 A.2d 118 (1960) (state claims statute construed to permit claim by nonresident landowner whose property was damaged in crash of National Guard jet); Cnaeps v. Brown, 101 N.H. 116, 135 A.2d 721 (1957) (statute requiring court approval of settlements on behalf of minors did not shield infant from claims of persons injured by minor's negligence; purpose of statute was to protect his interests, "not to grant immunity from his own

"Equality before the law" was the watchword of the judge.

The tort opinions of Chief Justice Kenison show a deep regard for the purposes behind the law, and his application of specific doctrine to resolve disputes was richly informed by an appreciation of the social values from whence the doctrine sprang. And by this type of enlightened functional analysis of the rules of law, he assured that the law would remain the servant of the citizens of New Hampshire, rather than the other way around.

III. Respecting the Limits of the Law

A mature understanding of and respect for law includes an appreciation of its limitations. Law would be reduced to tyranny, and its purposes deprived of a vital dimension, if it were viewed one dimensionally as a good. It is only the most insightful judge who truly understands that law, like most everything known to man, is an evil in excess. Although law must by nature move into the human comedy from time to time to referee disputes between the players, it should cut narrowly and precisely while inside and should move out swiftly when the job is done. Since the job to be accomplished can properly be defined only in terms of the purposes behind the law, a mature respect for the purposes of the law includes a keen respect for its proper limits.

Deciding when to declare that a generally good rule of law should go no further is often exceedingly difficult. There is much less prescribed wisdom to guide the courts on why, when and how to stop the law than on why, when and how to use it. There is perhaps nothing that the judiciary can do to demonstrate more emphatically its respect for the governed citizenry, who by constitution reserved to themselves their essential freedoms,[109] than to draw a bright line around the law containing it to its proper and limited functions. Judge Kenison appreciated the limits of the law.

The problem of defining the limits of the law is ever present in the law of torts, which seeks to resolve the inevitable clash of com-

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liabilities"), *id.* at 118, 135 A.2d at 723; Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956) (majority rule terminating contractor's liability after completion and acceptance of work by owner rejected: "We adopt the view outlined by Prosser that independent building and construction contractors should be held to a general standard of reasonable care [toward endangered persons] even after acceptance of the work."), *id.* at 173, 121 A.2d at 782.

109. *See* N.H. Const. part I, art. 1 & 2; U.S. Const. amend. IX & X.

peting interests of man as a social animal, since one man's freedom is often another man's risk of harm. The law seeks, on the one hand, to protect each person's freedom of action to advance his own interests, as he defines them, until they interfere unreasonably with the rights of others. From the opposing side, the law seeks to protect each person's freedom of security in person, personality and property from undue invasion by others.[110] The Chief Justice accommodated these ever-clashing interests with fairness and basic logic tempered by a skeptical attitude toward the propriety of legal intervention in the affairs of men.

The limits of the law began for Judge Kenison at the courthouse doors. As much a friend as he was to parties seeking access to the courts for resolution of disputes, he imposed some limits on the access rules. In *Simoneau v. Town of Enfield*,[111] for example, the plaintiff who was injured on a town bridge failed to file his claim with the town within the 10-day limitation period required by the notice of claim statute. The superior court granted him a 60 day extension for filing the claim, but he still neglected to file until 5 days after the extension period had ended.[112] The superior court dismissed his claim, and the supreme court affirmed.[113] Judge Kenison noted that the law was properly tolerant of failures to meet the exceedingly short, initial 10-day time limitation on such claims. There could be no excuse, however, for failing to file during the grace period which offered a second opportunity to pursue his claim.[114] Neither fairness nor logic supported providing such a claimant with a "third bite at the litigation apple."[115]

Once claimants were within the common-law tort system, the extent of their rights was to be determined according to the functions served by the tort law rules. An excellent example of this perspective is Judge Kenison's astute opinion in *Dorais v. Paquin*,[116] an action by a 17-year-old pedestrian struck by a car. The plaintiff was walking to work along the right-hand side of the highway, in the roadway because snowbanks covered both sides of the

110. "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others . . . ." N.H. CONST. part I, art. 3.

111. 112 N.H. 242, 293 A.2d 317 (1972).

112. *Id.*

113. *Id.*

114. *Id.* at 243, 293 A.2d at 318.

115. *Id.*

116. 113 N.H. 187, 304 A.2d 369 (1973).

road.[117] The defendant driver dimmed her headlights upon the approach of another car and first saw the plaintiff when she turned her high beams back on just before hitting the plaintiff. The trial judge submitted both the negligence and contributory negligence issues to the jury which returned a verdict for the driver.[118] On appeal, the pedestrian claimed that the trial judge had erred in failing to instruct the jury that she was only to be held to a standard of care of a child of like age, experience and knowledge.[119] The question before the court therefore was whether a 17-year-old teenager was entitled to be judged according to the traditional standard of care for children.[120] The Chief Justice went straight to the rationale for the special rule for children:

> The fundamental reason for measuring a child's conduct by a varying child standard instead of the reasonable prudent man standard derives from the basic unfairness of predicating legal fault upon a standard which most children are simply incapable of meeting. Children generally do not have the same capacity to perceive, appreciate and avoid dangerous situations which is possessed by the ordinary, prudent adult.[121]

So it is a child's immaturity of judgement and physical skills, not his status as a minor, that entitles him to a lowered standard of prudent behavior. Yet, the 17-year-old plaintiff failed to introduce evidence at trial "showing that she was any less able than an adult to appreciate the risk of walking along the wrong side of the road clad in dark clothing without a light under dark and icy conditions."[122] Rejecting the plaintiff's argument equating "children" with "minors,"[123] Judge Kenison adopted a flexible standard functionally defining the limits to the special child rule:

> There is no fixed age in this State when 'infants' are touched with the legal wand and suddenly bound to exercise the same degree of care as adults.
>
> Once a youth's intelligence, experience and judgment ma-

117. *Id.* at 188, 304 A.2d at 370.
118. *Id.*
119. *Id.*
120. *Id.* at 189, 304 A.2d at 371.
121. *Id.* at 188, 304 A.2d at 371.
122. *Id.* at 189, 304 A.2d at 371.
123. *Id.*

> ture to the point where his capacity to perceive, appreciate and avoid situations involving an unreasonable risk of harm to himself or others approximates the capacity of an adult, the youth will be held to the adult standard of care.
>
> The closer a child comes to majority, and the more common and obvious the risk, the more likely it is that the youth will be held to the adult standard of care. See Laws 1973, Ch. 72 lowering the age of majority to eighteen. It will be infrequent that a 17-year-old will not be held to an adult standard of care. . . . [T]he plaintiff in this case had substantially an adult capacity to appreciate the obvious risk of walking on the wrong side of the road under dark and icy conditions in dark clothing and without a light.[124]

Whatever may have been his attitude toward the all-or-nothing rule of contributory negligence, later abandoned by the New Hampshire legislature,[125] Judge Kenison masterfully defined the scope of the special child standard of care in terms of its objectives.

The Chief Justice employed the same functional analytical technique in *Paquette v. Joyce*.[126] The passenger in a car was injured when a driver failed to negotiate a turn, drove up onto the defendant's property and crashed into a 3 foot high tree stump that the defendants had converted into a decorative planter after they had cut down the tree.[127] Landowners were liable under New Hampshire law for creating or maintaining artificial—but not natural—conditions that involved foreseeable and unreasonable risks to travellers who deviated foreseeably from the highway.[128] The plaintiff therefore argued that the defendants had converted a "natural" condition into an "artificial" one when they cut down the tree and left the stump.[129] In an opinion affirming the defendant's motion to dismiss the claim, Judge Kenison rejected the plaintiff's attempt to extend the artificial condition rule of liability to include tree stamps.[130] "The tree stump had no greater propensity to cause harm to users of the highway in the ordinary course of

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124. *Id.* at 190-91, 304 A.2d at 372 (citations omitted).
125. *See* N.H. REV. STAT. ANN. § 507:7-a (1970).
126. 117 N.H. 832, 379 A.2d 207 (1977).
127. *Id.* at 834, 379 A.2d at 208.
128. *Id.* at 835, 379 A.2d at 209.
129. *Id.*
130. *Id.*

travel than did the tree."[131] Nor would an argument be tenable that the defendants had reduced the visibility of the hazard by cutting down the tree:

> But even assuming that the object now became less visible, this would not contribute to its propensity to cause harm. The stump was not hazardous because it presented a hidden trap to those who stray from the highways. It was dangerous only to travellers six feet off the highway encountering it at sufficient speed to be injured by the impact, to whom the diminished visibility of the object would in most cases be irrelevant. We are not prepared to say that the defendants' conduct introduced a risk that was appreciable enough to be foreseen and that would give rise to a duty to avoid.[132]

When claimants could not prove negligence, they sometimes sought recovery on strict liability. Yet the judicial tradition in New Hampshire against extending the limited pockets of this form of liability is deeply rooted in the past. Chief Justice Kenison, concerned that the law not demand more of people than their capabilities, so as to enable them to conform their conduct to the law, continued throughout his career to maintain the state's skeptical judicial attitude toward strict tort liability. In the case involving property damage from wild boars,[133] the court was asked to adopt the Restatement's strict liability rule of damage caused by wild animals. Judge Kenison reasoned as follows:

> An examination of the cases in this state definitely indicate a clear tendency to limit strict liability to those cases where the Legislature has provided for it or to those situations where the common law of the state has imposed such liability and the Legislature has not seen fit to change it. In the leading case of Brown v. Collins, 53 N.H. 442, the doctrine of *Rylands v. Fletcher* was entirely repudiated . . . and there has been no indication that, apart from statute, strict liability would be imposed in cases involving blasting or in cases involving dangerous domestic animals. . . . In view of the consistent policy evidenced by an unbroken line of decisions in this state which, with the exception of cases of cattle trespass to real estate, impose liability at common law for

131. *Id.*

132. *Id.* at 836, 379 A.2d at 209 (citations omitted).

133. King v. Blue Mountain Forest Ass'n, 100 N.H. 212, 123 A.2d 151 (1956); *see supra* text accompanying notes 16-19.

> negligence only, we do not now adopt a rule of absolute liability for injuries to persons and property caused by wild animals, as a generous principle of law.[134]

In this third torts opinion,[135] within months of going on the court in 1946, Judge Kenison refused to apply the doctrine of imputed contributory negligence that would have held a fireman riding on a fire truck strictly responsible for the negligence of the driver. In his third to last torts opinion,[136] within months of leaving the court in 1977, he refused to impose strict tort liability on a ski area operator for the death of a boy who fell from a tramway: "We have not been prone to extend strict liability in this jurisdiction."[137] In between these two decisions, he refused to replace negligence law with strict liability in cases involving claims of imputed negligence from a bailee to a bailor,[138] damages caused by wild animals,[139] and injuries to a passenger departing from a common carrier.[140]

One of Judge Kenison's most elegant tort opinions is *Robie v. Lillis*,[141] a nuisance action. This case demonstrates more than most the Chief Justice's sensitivity to the inherent trade-offs in a dynamic society where productive activity involves inevitable harm to others. He appreciated the importance of carefully drawing the line between allowable freedom of action, on the one hand, and security from harm, on the other, so as to prevent the law from intruding too deeply into social intercourse. The defendant in *Robie* built an aluminum boat storage shed on its 4-acre tract of land in an unzoned, rural area near Lake Winnipesaukee.[142] Plaintiffs sought to have it removed, claiming that "the existence and operation of the boathouse constitute a nuisance because the shed is the first and only commercial structure in what is otherwise a quiet, rural and residential area and that it is a blight upon the otherwise unscarred landscape" that would depreciate the value of their properties.[143]

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134. *Id.* at 216-17, 123 A.2d at 155 (citations omitted).
135. Clough v. Schwartz, 94 N.H. 138, 48 A.2d 921 (1946).
136. Bolduc v. Herbert Schneider Corp., 117 N.H. 566, 374 A.2d 1187 (1977).
137. *Id.* at 569, 374 A.2d at 1187.
138. Lynch v. Bissell, 99 N.H. 473, 116 A.2d 121 (1955).
139. King v. Blue Mountain Forest Ass'n, 100 N.H. 212, 123 A.2d 151 (1956).
140. Beaudet v. Boston & Me. R.R., 101 N.H. 4, 131 A.2d 65 (1957).
141. 112 N.H. 492, 299 A.2d 155 (1972).
142. *Id.* at 493, 299 A.2d at 157.
143. *Id.* at 493-94, 299 A.2d at 157.

New Hampshire law defined a private nuisance as an activity that results in a substantial and unreasonable interference with the use and enjoyment of another's property.[144] Judge Kenison quoted approvingly from the comments to the Second Restatement of Torts:

> 'Life in organized society . . . involves an unavoidable clash of individual interests. Practically all human activities . . . interfere to some extent with others or involve some risk of interference. . . . [E]ach individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. . . . The law of torts does not attempt to impose liability . . . in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances. . . . [T]he law . . . requires that an intentional invasion be unreasonable before one is liable for causing it.'[145]

Ruling that the shed was not sufficiently unsightly to require its destruction, and noting that the courts cannot generally protect landowners from changes in the market values of their properties, Judge Kenison indicated that the risk of commercial construction in sparsely populated, unzoned areas is a normal risk of ownership of such land.[146] He concluded his analysis as follows:

> Plaintiffs urge that in this day of increased ecological concern we should broaden the existing boundaries of the law of nuisance to fill in the gap where environmental and zoning legislation leaves off. We are of the opinion, however, that the traditional nuisance analysis performs just that function admirably well and would be exceptionally difficult to improve upon. . . . [T]he present rules which resolve conflicting land uses upon an analysis of the unreasonableness and substantiality of a person's interference with another's rights are flexible, equitable and well adapted to the problem. When plaintiffs fail to obtain relief as in the instant case, it is because the interference complained of has not been shown to be substantial or unreasonable under all of the circumstances. It

144. *Id.* at 495, 299 A.2d at 158.

145. *Id.* at 496, 299 A.2d at 159 (quoting Restatement (Second) of Torts § 822 comment g (Tent. Draft No. 17, 1971)).

146. *Id.* at 498, 299 A.2d at 160.

> does not appear unreasonable to us to locate a boat storage shed on a four-acre tract of land in a rural albeit 'residential' locality which depends in part for its economic livelihood on boating and other recreational activities.[147]

Yet Judge Kenison's keen appreciation for the importance of defining proper limits of the law did not mean that he viewed the law as static. To the contrary, when legal doctrine grew weary and wooden for modern life, he saw the necessity of expanding the boundaries to keep the doctrine current with changing social conditions. Two of his most famous tort decisions, *Clark v. Clark*[148] and *Sargent v. Ross*,[149] made significant alterations in existing doctrine to conform it to modern society and scholarly thought. Both cases have been the subject of substantial commentary in treatises, casebooks and law journals[150] across the nation and so will not be examined closely here. Yet no discussion of Chief Justice Kenison's contributions to tort law would be complete without some mention of both cases, and so they will be considered briefly as demonstrative of his willingness when necessary to expand the boundaries of the law of torts.

The problem in *Clark* was a procedural one of determining whether to apply the tort law of Vermont or of New Hampshire to an automobile accident involving New Hampshire residents driving in Vermont.[151] The driver husband was sued by his passenger wife in New Hampshire for negligence in operating the car. Vermont, but not New Hampshire, had an automobile guest statute requiring that the guest prove "gross and willful negligence" by the host

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147. *Id.* at 499, 299 A.2d at 161.

148. 107 N.H. 351, 222 A.2d 205 (1966).

149. 113 N.H. 388, 308 A.2d 528 (1973).

150. The attention given to Clark v. Clark—generally viewed as a conflicts rather than a torts case—by a leading conflicts scholar, Professor Leflar, *see supra* note 5, is typical of the substantial scholarly praise that the decision continues to receive. *See, e.g.*, R. LEFLAR, L. MCDOUGAL & R. FELIX, AMERICAN CONFLICTS LAW ___ (4th ed. 1987) (forthcoming); R. LEFLAR, L. MCDOUGAL & R. FELIX, CASES AND MATERIALS ON AMERICAN CONFLICTS LAW 16 (1982); Leflar, *Honest Judicial Opinions*, 74 NW. U.L. REV. 721, 728 (1979); Leflar, *True "False Conflicts," Et Alia*, 48 B.U.L. REV. 164 (1968): "Among Conflict of Laws students Chief Justice Frank R. Kenison has come to be known as one of the nation's outstanding judicial scholars, largely by reason of . . . *Clark v. Clark*. *Clark* . . . became almost at once a leading case, widely noted in the law reviews, much cited and relied upon in subsequent judicial opinions in other states, and likely to be reprinted in any Conflicts casebook that may be published soon." (citations omitted) *Id.* at 164. For scholarship on *Sargent v. Ross*, *see supra* notes 47-49.

151. 107 N.H. at 352, 222 A.2d at 207.

driver in order to recover.[152] The traditional choice of law rule in cases of this type was to apply the law of the place where the injury occurred. Judge Kenison noted the unanimity of scholarly opposition to the place of injury rule, and observed that its single virtue—that it was easy to apply—existed only because it was a mechanical rule. "It bore no relationship to any relevant consideration for choosing one law as against another in a torts-conflicts case."[153] He rejected the alternative analytical technique of "recharacterizing" the problem from tort to family law, procedural law or some other legal category. "This court prefers not to rely on such a technique because it overlooks policy considerations that should underlie choice of law adjudication."[154] He therefore replaced the place-of-the-wrong-rule with a dynamic analytical approach that examined "the relevant choice of law considerations," including the predictability of results, maintenance of good interstate relations, simplification of the judicial task, pursuit of the forum state's governmental interests, and favoring the better rule of law.[155] As for the latter, Judge Kenison remarked:

> We prefer to apply the better rule of law in conflicts cases, . . . when the choice is open to us. If the law of some other state is outmoded, an unrepealed remnant of a bygone age, 'a drag on the coattails of civilization,' we will try to see our way clear to apply our own law instead. If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law.[156]

Judge Kenison reasoned that the relationship between the spouses, and the risk that they might collude to obtain insurance from the husband's liability carrier, were both of legitimate concern only to New Hampshire courts.[157] Since the ordinary negligence doctrine of New Hampshire, moreover, was a better rule than Vermont's standard of gross negligence, he concluded that the relevant choice-influencing considerations compelled the application of New Hampshire law to the tort action between the spouses.[158]

Chief Justice Kenison was also willing to expand the existing

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152. *Id.* at 351, 271 A.2d at 207.
153. 107 N.H. at 352, 222 A.2d at 207.
154. *Id.* at 353, 222 A.2d at 208.
155. *Id.* at 354, 222 A.2d at 208.
156. *Id.* at 355, 222 A.2d at 209 (citations omitted).
157. *Id.* at 356, 222 A.2d at 209.
158. *Id.* at 357, 222 A.2d at 210.

limits of legal doctrine in the substantive law of torts. *Sargent v. Ross*[159] was undoubtedly his most significant doctrinal contribution to tort law. This was an action against the landlord of a residential building with an outdoor stairway from which the plaintiff's 4-year-old daughter fell to her death. The upstairs tenant, whose apartment was serviced by the stairway, was babysitting the child at the time of the fall.[160] There was no apparent cause of the accident except that the stairs were dangerously steep and that the railing was insufficient to prevent a child from falling over the side.[161] In the mother's suit against the babysitter for negligent supervision and against the landlord for negligent construction and maintenance of the stairway, the jury returned verdicts for the babysitter and for the plaintiff on her claim against the landlord. The landlord appealed, relying upon "the general rule which has long obtained in this and most other jurisdiction that a landlord is not liable, except in certain limited situations, for injuries caused by defective or dangerous conditions in the leased premises."[162] Rather than confront head-on the entrenched general rule of nonliability, the plaintiff contended that the case fell within one or more exceptions to the no-duty rule: specifically, that the landlord had retained control over the stairway, that the addition of the stairway to the building several years before had been a negligent repair of the premises, or that the dangerous condition of the stairway was a concealed defect in the premises.[163]

Noting that the landlord's tort immunity was a form of " 'quasi-sovereignty' " that found "its source in an agrarian England of the dark ages," Judge Kenison found the "untoward favoritism of the law for landlords" repugnant to modern notions of justice.[164] The court was thus compelled to re-evaluate the landlord tort immunity rule in its entirety "where we are asked either to apply the rule, and hold the landlord harmless for a foreseeable death resulting from an act of negligence, or to broaden one of the existing exceptions and hence perpetuate an artificial and illogical rule."[165] Judge Kenison summarized the problem as follows:

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159. 113 N.H. 388, 308 A.2d 528 (1973).
160. *Id.* at 390, 308 A.2d at 530.
161. *Id.*
162. *Id.*
163. *Id.* at 390-91, 308 A.2d at 530.
164. *Id.* at 391, 308 A.2d at 530.
165. *Id.* at 392, 308 A.2d at 531.

> The anomaly of the general rule of landlord tort immunity and the inflexibility of the standard exceptions, such as the control exception, is pointedly demonstrated by this case. A child is killed by a dangerous condition of the premises. Both husband and wife tenants testify that they could no nothing to remedy the defect because they did not own the house nor have authority to alter the defect. But the landlord claims that she should not be liable because the stairs were not under her control. Both of these contentions are premised on the theory that the other party should be responsible. So the orthodox analysis would leave us with neither landlord nor tenant responsible for dangerous conditions on the premises. This would be both illogical and intolerable, particularly since neither party then would have any legal reason to remedy or take precautionary measures with respect to dangerous conditions.[166]

The control test was insufficient because "it substitute[d] a facile and conclusive test for a reasoned consideration of whether due care was exercised under all the circumstances."[167] The concealed defect and negligent repair exceptions could both be stretched to cover the facts, but Judge Kenison thought that a more forthright solution was in order: "We think that now is the time for the landlord's limited tort immunity to be relegated to the history books where it more properly belongs."[168] Turning the ancient no-duty rule on its head, Chief Justice Kenison remarked:

> [W]e today discard the rule of 'caveat lessee' and the doctrine of landlord nonliability in tort to which it gave birth. . . . Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. . . . The questions of control, hidden defects and common or public use, which formerly had to be established as a prerequisite to even considering the negligence of a landlord, will now be relevant only inasmuch as they bear on the basic tort issues such as the foreseeability and unreasonableness of the particular risk of harm.
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> . . . .
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> Our decisions will shift the primary focus of inquiry for judge and jury from the traditional question of 'Who had con-

166. *Id.* at 393-94, 308 A.2d at 532.
167. *Id.* at 393, 308 A.2d at 531.
168. *Id.* at 396, 308 A.2d at 533.

> trol?' to a determination of whether the landlord and the injured party exercised due care under all the circumstances. Perhaps even more significantly, the ordinary negligence standard should help insure that a landlord will take whatever precautions are reasonably necessary under the circumstances to reduce the likelihood of injuries from defects in his property.[169]

Although the decision had radically altered the principles of landlord tort law that had been developed and applied in New Hampshire back into the mists of time, Judge Kenison was confident that the time for change had arrived. "The abiding respect of this court for precedent and stability in the law is balanced by an appreciation of the need for responsible growth and change in rules that have failed to keep pace with modern developments in social and juridical thought."[170] The rule of *Sargent v. Ross* has been praised by the scholars[171] as it has spread across the land.[172] Chief Justice Kenison's general philosophy of restraint toward the reach of law thus allowed for the expansion of its limits when required by the public good.

Conclusion

The study of Chief Justice Kenison's tort law opinions provides several gems of insight into his judicial legacy. For over thirty years, he touched the law confidently but gently, with a fitting respect for the proudly independent people of New Hampshire. During four decades he used the law of torts, derived from many sources but rooted ultimately in the citizens of the state, to help the people rule themselves. He was scrupulous in his efforts to assure that the tort law rules were fair and reasonable both in their conception and their application. Each time he applied tort doctrine to a new dispute, he nurtured and enriched the law, snipping and pruning when necessary for its health and then only with studied care.

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169. *Id.* at 397-99, 308 A.2d at 534-35 (citations omitted).

170. *Id.* at 398, 308 A.2d at 534.

171. *See supra* note 47 and *infra* note 172.

172. Wisconsin followed *Sargent v. Ross* in 1979, Massachusetts in 1980, Florida in 1981, Idaho in 1984, Nevada in 1985. *See* 5 F. Harper, F. James & O. Gray, The Law of Torts § 27.16 at 294-95 (2d ed. 1986); Annot., 64 A.L.R.3d 339 § 4 (1975). California followed *Sargent v. Ross* in Brennan v. Cockrell Investments, Inc., 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973) but refused to admit it. *See also*, Hall v. Warren, 632 P.2d 848 (Utah 1981). M.F. McNamara, 2,000 Famous Legal Quotations 327 (1967).

For over thirty years, Judge Kenison's service on his state's high court reflected a deep and abiding respect for the sources, for the purposes, and for the limits of the law. In the process, he honored the people of New Hampshire whose protection and enhancement is the driving purpose behind the law, and for whose benefit the law is contained within proper limits.

Another lawyer in New Hampshire's proud legal history, Daniel Webster, observed as follows, at the funeral of Mr. Justice Story, nearly a century and a half ago:

> Justice Sir, is the greatest interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society.[173]

Chief Justice Frank Rowe Kenison of New Hampshire, for over thirty years, so labored on the law with great distinction. His legacy will endure for so long as the law still stands protecting the citizens of New Hampshire and the nation.

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173. The oration was delivered on September 12, 1845. Daniel Webster died seven years later, one hundred years before Frank Kenison was appointed Chief Justice of New Hampshire in 1952. The Boy Scouts of America, in 1975, conferred upon Chief Justice Kenison the Daniel Webster Distinguished Citizen Award.