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RUMINATIONS ON THE ROLE OF FAULT IN THE HISTORY OF THE COMMON LAW OF TORTS*

Wex S. Malone**

Any attempt to assign negligence its proper role in the history of tort law must be deferred until a determination of the role that fault in *any* of its varieties played in early law. Even this deferment does not lead us back far enough, for we must also ask whether we can isolate a distinct role for tort law itself in the dawn of the history of the common law. The answer here must be clearly, No, if by "torts" we mean some sort of organized scheme for determining when and under what conditions the monetary costs of a harm suffered by one person should be shifted to the shoulders of another by means of some authoritative order. The very prospect of a civil suit for damages presupposes a sophistication that simply did not exist in the earliest half-organized legal societies.

ANGLO-SAXON PROCEEDING FOR BOT AND WITE

The primordial seed from which both crime and tort were to germinate was the blood feud that was characteristic of any barbaric society organized along the lines of blood kinship. The defense of the honor of the clan by resort to warfare against the harm-inflicting outsider and his entire kin was a traditional practice with roots deep in the need for survival of the family unit. The outrage that cried for revenge lay not so much in the desire to enforce atonement for the bodily harm inflicted upon the wounded family member as in the humiliation that was suffered by his entire kin group. The primary object of law was to provide a substitute for the feud; and, as would be expected, the remedy that eventually emerged was of a character calculated to offer balm where the hurt was deepest—in the clan's profound sense of indignity.¹

By the time Anglo-Saxon history had reached the period for which we have dependable records a definite ranking of persons in terms of their political or group standing had become

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1. Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 198 (1914).

recognized. Accordingly, when retribution in terms of money was offered as a substitute for clan vengeance, there emerged a definite schedule or tariff establishing the *wer*, the official money worth of all persons, and this *wer* depended principally upon rank. Furthermore, once the money award was made, the accepted apportionment of the *wer* among the injured person's relatives was in prescribed allowances to his paternal and maternal kin, since clan involvement was the most important consideration. Thus both the amount of the *wer* itself and the system of its distribution were faithful reflections of an affront to clan dignity—a matter wholly foreign to any sense of a need for reparation as envisioned in modern law.

This same demand for appeasement of the sense of honor was manifested in non-fatal injuries. Here the amount of the tariff to be paid was determined to a large extent by the public shame that attended the wound. According to the laws of Ethelbert: "If the bruise be black in a part not covered by the clothes, let bot be made with thirty scaetts. If it be covered by the clothes, let bot be made for each with twenty scaetts." Pound refers to a provision of Howell the Good, King of the Welsh, to the effect that a scar on the face is worth six score pence, whereas the permanent loss of both joints of the thumb (an injury that would virtually disable the hand) brought only seventy-six pence and a half-penny.²

The early history of the attempted suppression of the feud by government and the emergence of a system of composition under royal order is shrouded in uncertainty. We may safely assume that any distinction between crime and tort was unknown.³ The earliest exactions of payment were made in a single proceeding which served the dual purpose both of buying off the vengeful anger of the clan and of placating the king or lord for the disturbance of his peace or *mund*. The person successfully charged with an offense settled with the injured victim or his clan by a payment of *bot* and through the same proceeding he appeased the king by a payment of *wite*. The *bot* for homicide was the equivalent of the *wer* of the person slain.⁴

Although the *bot* and *wer* have long disappeared, they have impressed their characteristics, not only on the criminal law,

2. *Id.* at 202.

3. J. LAUGHLIN, *THE ANGLO-SAXON PROCEDURE, ESSAYS IN ANGLO-SAXON LAW* 183, 265 (1876).

4. *Id.* at 278.

but also upon conceptions of causation and fault in civic actions which were to emerge much later. Hence these primitive notions deserve our attention.

Considering that the primary purpose for the exaction of *bot* was appeasement of the clan urge for revenge, one might expect that the demand for *bot* would be limited to those dramatic situations where the offender had inflicted a direct injury or death through glaring theatric violence. However, as Pollock and Maitland observe,⁵ all the evidence points the other way. In situations where modern law would tend to ignore the defendant's participation because of its remote relationship to the wounding or death, the ancient tribunal apparently did not hesitate nevertheless to rule in favor of the victim and his family. Certainly this was true in the case of homicide, where the accused was expected to swear that he had done nothing whereby the dead man was "further from life and nearer to death."

"At your request I accompany you when you are about your own affairs; my enemies fall upon and kill me, you must pay for my death. You take me to see a wild beast show or that interesting spectacle, a mad man; beast or mad man kills me; you must pay. You hang up your sword; someone else knocks it down so that it cuts me; you must pay. In none of these cases can you honestly swear that you did nothing that helped to bring about death or wound."⁶

The fact that primordial law was thus apparently content to recognize even the most remote causal connection as being sufficient to justify the imposition of penalty suggests strongly an equal indifference toward matters of fault or blameworthiness on the part of the person against whom the proceedings were instituted. This view of the wholly amoral character of early law is supported by most writers,⁷ but not unqualifiedly by all.⁸

5. 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 468 (1895).

6. Leg. Hen. 88, § 9. See also 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 468 (1895).

7. See the list of authorities cited by W. PROSSER, *THE LAW OF TORTS* 17, n.616 (3d ed. 1964).

8. Oliver Wendell Holmes, Jr., observed in *THE COMMON LAW* (Howe ed. 1963, Lect. I) that appeals for personal violence appeared even in early history to have been confined to intentional wrongs. A modified view of this thesis will be found in T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 463 (5th ed. 1956); Isaacs, *Fault v. Liability*, 31 HARV. L. REV. 954 (1918).

THE DEODAND

Further evidence of the willingness of early law to exact its penalty without regard to moral guilt or innocence is afforded by the familiar institution of the *deodand*. Side by side with its willingness to condemn persons to the payment of *wer* for deaths traceable only remotely to their conduct was the demand of archaic law that its vengeance also be visited upon the immediate visible cause of death even though this agency were only a slave, an animal, or even an inanimate object. The "bane" (slayer) may be an ox, a sword, or perhaps a cart, a boat, or a millwheel.⁹ Apparently it was not even clearly required that the offending object be in motion, although Bracton would distinguish between the tree that falls and the tree against which a man is thrown.¹⁰ The disposition to be made of the offending beast or object appears to vary with the period, the community, and even with the nature of the thing itself. It is probable that in the earliest times the offending *bane* was handed over to the victim or his family for destruction or to be used as it saw fit.¹¹ The idea of attain was deep in barbaric consciousness. The owner was under an obligation immediately to put the condemned sword, mill stone, or plow share aside abandoned and unused under penalty of harboring the killer. Later the notion of *deodand* involved the surrender of the offending object to the king to be devoted to pious uses for the appeasing of God's wrath.¹²

In appraising the role or absence of any role of blameworthiness in early law the legal predicament of one who happened to be the owner of an offending animal or object is of particular

9. O. HOLMES, *THE COMMON LAW* 10 (1963); 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 471 (1895).

10. 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 472, n.6 (1895).

11. *See, e.g.*, EXODUS, ch. 12, verse 28. *See generally* O. HOLMES, *THE COMMON LAW* 10 (1963).

12. 2 POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 471 (1895). The notion of noxal surrender has persisted in law with amazing stubbornness. The *deodand* was not abolished in England until 1846 (9 & 10 Vict. c. 62). Four years earlier, and at a time when the taking of human life was still not recognized as an actionable tort, a *deodand* was imposed against a locomotive whose operation had resulted in the loss of four lives. The redemption value of the locomotive assessed against its corporate owner was fixed at 125 pounds. *Regina v. Eastern Counties Ry.*, 10 M. & W. 56, 152 Eng. Rep. 380 (1842). Even today the Louisiana Civil Code contains a relic of the *deodand* in a provision that the owner of a trespassing animal may fully discharge himself from liability by abandoning the offending creature to the person who has sustained injury. Thus, in that state any person may find himself the inadvertent owner of a wandering cow through noxal surrender. LA. CIV. CODE art. 2321.

interest. It is agreed on all sides that the owner was compelled to hand over the offender. Pollock and Maitland regard the acquittal of the owner of any further responsibility upon his surrender of the object as a mitigation of even older law which would have subjected him to penalty on the basis of his mere ownership or harboring of the *bane*¹³ (killer). On the other hand, Holmes insists that the primary desire of the community was to obtain surrender of the offending object or animal, and the law's only concern with the owner was to secure possession of the object from him. Hence his obligation to pay was only a means of forcing him to deliver.¹⁴ However this may be, the fact remained that early law was entirely willing to attribute responsibility to senseless objects and to vent its outrage upon them, thus betraying clearly that within the barbaric consciousness there was little concern with refined notions of a liability dependent upon wrongdoing.

TRIAL AS RITUAL

Along with this early tendency toward superstitious attribution of responsibility goes the ancient practice of recourse to ritual as the accepted mode of trial. The oath and the ordeal far antedate any serious attempt to fix facts through the production of testimony. Even before the time of the Appeal of Felony with its formalistic offer of trial by battle (to be discussed later) guilt was affixed or erased through resort to the solemn rite of *compurgation*. This was a formal procedure wherein oath helpers (to the apostolic number of twelve), who were known as *consacromentales*, swore merely to the purity of the oath of not guilty which had been previously given by the accused.¹⁵ Apparently it was assumed that a man who could procure this many good neighbors must be in good repute. If the person charged could not manage to secure *compurgation*, the last resort for determining responsibility lay in the judgment of God, or the ordeal. The function of the ordeal was that of an oracle through which divine truth was revealed. The familiar ordeals of fire, of water, and of morsel have been described

13. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 470 (1895).

14. O. HOLMES, THE COMMON LAW 12 (Howe ed. 1963); *see also* G. WILLIAMS, LIABILITY FOR ANIMALS 186 (1939).

15. J. LAUGHLIN, THE ANGLO-SAXON PROCEDURE, ESSAYS IN ANGLO-SAXON LAW 297 (1876).

many times¹⁶ and need not be elaborated here. It is sufficient to observe that the ritualistic character of the early trial should be accepted as further evidence that the object of primordial law was to appeal to the dramatic sense of the community and keep the peace by publicly appeasing the dignity of the offended family. At this time it was still far too early to think of trial as a serious effort to ascertain the precise facts so that blameworthiness could be established, even if the determination of fault had been a recognized end of law.

SEPARATION OF PRIVATE AND PUBLIC WRONG—
A NEW ROLE FOR FAULT IN CRIMINAL PROCEEDINGS

Eventually the functions of appeasement of the family through an assessment of bot and of atonement for the breach of the King's peace through the condemnation to pay *wite* begin to draw apart, and each of the two reparations begins to acquire its own peculiar characteristics. It is with reference to these newly emerging distinctions that we find the first clear suggestion that fault, or absence of fault, may have a role to play. As matters developed, the full *wer* must still be paid to the outraged family irrespective of whether the homicide was intended or unintended—whether it was innocent or blameworthy. However, if the person who anticipated a homicide charge did not wait for an accusation but proclaimed what he had done and succeeded in establishing that there was *misadventure*, he may escape the payment of *wite*. Here, then, is the first suggestion of what will develop later as a separate system of criminal law which punishes the guilty but which gradually comes to exonerate the slayer who can offer an acceptable moral justification. In contrast, it should be emphasized that there is no tendency whatsoever to relax the traditional requirement that the *wer* (civil reparation) must be paid irrespective of moral innocence on the part of the accused.

THE DISAPPEARANCE OF SCHEDULED TARIFFS
AND THE EMERGENCE OF THE APPEAL OF FELONY

For present purposes there is no need to explore the reasons that account for the rather sudden disappearance of the old

16. The ordeals are described in detail in *id.* at 301. They were abolished in 1215 by the Lateran Council which refused to accord religious sanction to the ordeal. See generally 2 F. POLLOCK & F. MATTLAND, HISTORY OF ENGLISH LAW 596 (1895).

system of the preappointed *bot* and *wite*. Pollock and Maitland suggest that the complete lack of flexibility in the old scheme and the onerousness of the tariffs, which left out of account the offender's ability to pay, were among the reasons.¹⁷ Somewhat in substitution for the ancient *wite* there has emerged the Appeal of Felony in the Twelfth Century, but payment of the *wer* of the victim has come to an end. Certain offenses gradually came to be regarded as *unemendable*. Homicide, for example, could no longer be forgiven by procuring the satisfaction of the clan through the payment of *wer*.¹⁸ In contrast, the conception of the restoration of the King's peace, which had been procured in the old proceeding by the payment of *wite*, became greatly expanded in scope. It was necessary to set apart for separate and more severe treatment those disorders which demanded the most serious attention of the King's justices. Thus there developed the first of what may be regarded roughly as a true criminal proceeding, the Appeal of Felony, in which the life or limb of the wrongdoer was at stake. It is interesting to note that the Appeal was initiated by a charge and challenge to battle prosecuted by the offended person or his family.¹⁹ Yet, although the processes of law were set in motion by him or them through the Appeal, there is no evidence that any monetary award to the victims was ever recognized.²⁰ No claim for compensation was to come into existence until the eventual emergence of the modern suit for damages through the action of trespass.

MISADVENTURE AS BASIS FOR PARDON IN APPEAL OF FELONY

It is in the criminal Appeal of Felony that we find the first indication that some regard for the moral aspect of the prosecution might be manifested by the courts. The process, however, was slow. The two major pretensions of innocence—self-defense and misadventure—were not at first available as pleas which, once established, could serve to forestall a conviction. At as late a time as the reign of Henry III the established fact that the accused killed through pure unavoidable accident (mis-

17. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 460 (1895).

18. See the account in *id.*

19. *Id.* at 461.

20. "The reading of several thousand 12th and 13th century cases from 1199 up till the time that the action of trespass became established has failed to reveal a single instance of damages recovered in an appeal." Woodbine, *The Origins of the Action of Trespass*, 33 YALE L.J. 799, 801 (1934).

adventure) or in defense of his own life served merely to justify a recommendation to the king's mercy for a pardon.²¹

For present purposes misadventure (*infortunium*) holds a special interest for us. One might suspect at first glance that this term suggests the presence of reasonable behavior on the part of the person charged with crime and, as such, it may have served as a forerunner of the notion of negligence, which developed later. However, *misadventure* was a term used merely to ground a recommendation for the exercise of royal discretion.²² Consequently it was little more than a convenient label to be affixed whenever a pardon had been decided upon. The same term was also used to indicate those appeals that failed because the death could not in any way be attributed to the agency of the defendant, and where, for that reason, the only available remedy was to exact a *deodand*.

Although no monetary award was available to the victim or his family under an Appeal, Woodbine points out that the power of the family to initiate an Appeal carried with it an accompanying competence to compromise. It is probable that as time went on the hope of pecuniary profit to be gained by bartering away the prosecution of an Appeal offered a sharper incentive for the initiation of the Appeal of Felony than did any naked desire for vengeance.²³ It is interesting to note that several recorded instances of royal pardon granted in an Appeal of Felony on the ground of self-defense or misadventure clearly indicate that the Crown was well aware of the function of the Appeal as an instrument for compromise. The pardon was conditioned upon the making of peace with the friends and kinfolk of the victim.²⁴ Woodbine suggests that the tardy appearance in history of the now familiar claim for damages might be explained by the fact that monetary satisfaction was frequently secured through resort to a threat of prosecuting an Appeal.

21. 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 476-83 (1895).

22. As late as 1401, Thirning, C.J., observed, "If a man kills or slays a man by misfortune, he shall forfeit his goods, and he must obtain his charter of pardon as an act of grace." *Beaulieu v. Finglam*, Y.B., 2 Hen. 4, f. 13, pl. 6; C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 166 (1949). Cf. Opinion of Ride, C.J., in the Tithe case (1506), Y.B. Trin., 21 Hen. 7, f. 27, pl. 5; C. Fifoot, *op. cit. supra*, at 197; Ames, *Law and Morals*, 22 HARV. L. REV. 97, 98 (1909).

23. Woodbine, *The Origins of the Action of Trespass*, 33 YALE L.J. 799, 803 (1924).

24. *Id.* at 804.

SUMMARY OF LIMITED ROLE OF FAULT UP TO THE
EMERGENCE OF TRESPASS

One value which hopefully we can gain from the foregoing outline of the course of trial is an appreciation that crime and tort had not yet fully separated by mid-thirteenth century and that the notion of damages, in the sense of reparation, had not fully emerged. Such limited significance as claims of misadventure and even self-defense had acquired at this time was solely within the newly developing area of criminal punishment by way of an Appeal of Felony; and even here they have barely achieved the dignity of defenses as of right. Such, then, is the stage that is set for the appearance of the action of Trepass.

THE ACTION OF TRESPASS

The precise source from which the action of Trespess derived will perhaps never be settled beyond dispute. Pollock and Maitland regard Trespess as an outgrowth of the Appeal of Felony,²⁵ and a similar attribution appears in Holmes' *The Common Law*.²⁶ This explanation, however, fails to account for what is definitely the most distinctive characteristic of Trespess—the award of damages to the injured plaintiff.²⁷ Furthermore, although it is true that Trespess can be described as a semi-criminal proceeding, yet the imposition of a fine or penalty was not infrequent in other medieval civil actions as well.²⁸

There is only a slightly better basis for the assertion, sometimes made, that Trespess had previously been recognized in the local manorial courts and that it was imported thence into the King's Court.²⁹ The most plausible explanation, advanced by Woodbine,³⁰ is that Trespess emerged as a derivative of the actions of novel Disseisin and possibly Replevin. This theory offers an acceptable account of the award of monetary damages.

25. 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 525 (1895).

26. O. HOLMES, *THE COMMON LAW* 3, 4 (1963).

27. See note 20 *supra*.

28. C. FITZGERALD, *HISTORY AND SOURCES OF THE COMMON LAW* 45, 46 (1949); Woodbine, *The Origins of the Action of Trespess*, 34 *YALE L.J.* 343, 361 (1925).

29. This explanation was advanced by Bohlen, *The Torts of Infants and Insane Persons*, 23 *MICH. L. REV.* 9, 13 (1924), and F. BOHLEN, *STUDIES IN TORTS* 543, 548 (1926). Woodbine points out that there was no record of the manorial courts until the second half of the thirteenth century, at which time Trespess was in frequent usage in the King's Courts. Woodbine, *The Origins of the Action of Trespess*, 33 *YALE L.J.* 799, 800 (1924).

30. Woodbine, *The Origins of the Action of Trespess*, 33 *YALE L.J.* 806 (1924).

As a link between the actions the same writer points out the *violence* characteristic of Trespass was fairly typical at the time in ejections from land as well as in cases of dispossession of chattels.

Although Trespass did not emerge as a popular form of action until the period 1250-1272,³¹ a few actions of Trespass can be found in the rolls of the King's Bench for the reign of John. When convicted of the trespass the defendant was fined and subjected to imprisonment if the fine were not paid.³²

The action of Trespass with its characteristic requirement of force and arms (*vi et armis*) is of particular importance in any effort to explore the role of fault in tort actions. The emergence in Trespass of an intransigent requirement that there must be an affirmative showing of a direct or immediate application of force by defendant tended to eclipse completely all other possible elements which otherwise might have influenced trespass liability. Attention, focused upon the operative mechanics that brought about the harm, was correspondingly distracted from any indicia of blameworthiness or the absence thereof.

The phrase *vi et armis* appeared in every Trespass writ as of course from the very beginning down to the abolition of the forms of action in the nineteenth century. Strangely, the precise origin of the term has never been made clear. Certainly the source of *vi et armis* is not in the Anglo-Saxon proceedings for *bot* and *wite*, for we have already seen that archaic responsibility could attach even where the causal connection between the defendant's alleged participation and the injury or death was of the most highly attenuated character imaginable.³³ Similarly, liability for mere failure to surrender as a *deodand* some offensive or harm-inflicting object of which defendant happened to be the unhappy possessor was something wholly different from the required showing in Trespass that the defendant made a physical demonstration of some kind.³⁴ Nor does the appearance of *vi et armis* in the Trespass action suggest any possible parenthood in the Appeal of Felony. The term *cum vi sua*, which appears with

31. 2 F. POLLOCK & F. MATTLAND, HISTORY OF ENGLISH LAW 525 (1895).

32. This was also true in the assize of Novel Disseisin. The criminal sanction was no more than an amercement, which was not uncommon in other civil actions. Woodbine, *The Origins of the Action of Trespass*, 34 YALE L.J. 359 (1925).

33. See p. 3 *supra*.

34. *Id.*

great frequency in Appeals, has an entirely different meaning. It indicates "with his force (of helpers),"³⁵ thus suggesting attack by a collective group, rather than by some single individual.

Woodbine (whom this writer has come to regard as the most persuasive authority on the early history of Trespass) points out that several decades before the emergence of Trespass proper there had appeared a number of variations of the more venerable assize of Novel Disseisin. Notable among these were the writs of *quare vi et armis* and *quare intrusit*, both of which regularly stressed the force and arms that later characterized the writ of Trespass.³⁶ Both these earlier actions dealt with intrusions upon land, which almost invariably imported a use of force. Like Trespass, the *quare* actions permitted a recovery of damages whenever a restoration of possession could not fully indemnify the complainant. The evidence is fairly persuasive, therefore, that these were the true immediate forerunners of Trespass, and that it is from them that the descriptive terms of *vi et armis*, as well as *contra pacem domini regis*, were derived.

It is the general stereotyped writ of Trespass *as of course* with which we are presently concerned, with its invariable requirement of a showing of force or violence applied by the defendant directly upon the person or the property of the complainant. Facts that could fit within this pattern imported of necessity a breach of the King's peace and thus supplied automatically the element of public transgression or wrong. It is not surprising, therefore, that no further showing of blame-worthiness or fault on the part of the defendant was necessary in order to warrant a recovery in Trespass.

Professor Street has observed that in the early litigated cases the element of force was dramatic and conspicuous and usually there was discoverable conduct partaking of a demonstrably "violent" character as that term is popularly understood today.³⁷ At the beginning, therefore, there was probably little occasion for the judges to concern themselves with any refinement of the fault element in Trespass. Wrongdoing was only

35. Woodbine, *The Origins of the Action of Trespass*, 34 YALE L.J. 360 (1925).

36. *Id.* at 362-67.

37. 3 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 233 (1906).

too obvious when the victim or his wife was beaten or his chattels carried away or his land depastured.

However, as time went on the form of the Trespass writ became crystallized, the element *vi et armis* changed in character. Force and arms was discoverable by the courts even though the conduct charged against the defendant amounted to little more than some mild innocuous physical motion toward the person of the victim³⁸ or even a quiet passage across the line that marked the boundary of his land.³⁹ No longer need there be a breaking of the fence or any theatric display of violence against the person. *Vi et armis* had assumed the artificiality of a mere technical device in pleading.

Along with "force and arms," the term, "breach of the King's peace" (*contra pacem*) subsided into little more than formalism.⁴⁰ It no longer indicated true wrongdoing on the part of the defendant that would merit his punishment. Nevertheless, the bare technical breach of peace itself continued to supply the element of criminality and thus obviated any need for proof of actual damages. Hence it could be said that every Trespass imports a damage.⁴¹

We may be tempted to anticipate that at this stage judges would feel an urge to initiate a search for personal misbehavior of some kind to supply the missing element of wrongdoing that was formerly implicit in "violence" and "breach of peace." But such was not to be the case. Whenever the plaintiff could demonstrate that in some way he was directly harmed by the defendant's affirmative conduct he would have established his prima facie right to recover in Trespass without more ado. The observation on the inconsequence of fault in Trespass is supported by a substantial amount of dicta in the early decisions. Writers have frequently pointed to statements such as the following comment by Rede, J. in the *Tithe* case (1506):

"Although the defendant's intent here was good, yet the

38. "Every trespass is in law done with force and arms." 2 C. ST. GERMAN, DOCTOR AND STUDENT 54. "If a log were put down in the most quiet way and upon a man's foot, the action would be trespass." 1 J. CHITTY, PLEADING 124 (1809).

39. *I.e.*, cutting a portion of a common vine on a wall without touching the surface. *Pickering v. Rudd*, 1 Starkie 56 (1815).

40. The conclusion that the Trespass was "against the peace of our lord the King" was not traversable. B. SHIPMAN, COMMON LAW PLEADING § 88 (3d ed. 1923).

41. W. PROSSER, THE LAW OF TORTS 29 (3d ed. 1964).

intent is not to be construed, though in felony it shall be; as where one shoots at the butts and kills a man, this is not a felony, since he had no intent to kill him; and so of a tiler on a house where against his knowledge a stone kills a man, it is not felony. But where one shoots at the butts and wounds a man, although it be against his will, yet he shall be called a trespasser against his will."⁴²

Even earlier, in the *Thorns* case of 1466, Brian had observed, "when any man does an act he is bound to do it in such a manner that by his act no prejudice or damage is done to others."⁴³ The court apparently agreed.

It is appropriate at this point to note that these early cases with their dicta on fault were usually decisions concerned exclusively with the scope and extent of some privilege which the defendant had asserted. The *Thorns* case, for example, was posited on the rather narrow question as to whether the defendant was privileged to enter deliberately upon the plaintiff's land in order to repossess himself of certain thorns that fell onto the land while they were being severed by the defendant. Similarly, the *Tithe* case, from which we have quoted, raised only the issue as to whether the defendant could transport and store grain of another person for the purpose of protecting it as a tithe. The lengthy discussion, above, by Rede of the effect to be given an absence of intent in a Trespass suit bore only tangentially on the issue, for the defendant's conduct with reference to the grain was clearly intentional.

This suggests the observation that a claimed absence of fault or blameworthy conduct by a defendant can be brought into focus within either of two entirely different contexts. In the situations where a privilege is asserted, such as the *Thorns* case or the *Tithe* case, the defendant seeks to persuade the court that his conduct should be condoned, rather than blamed, because it was dedicated to some purpose that society would approve. Absence of fault here is synonymous with presence of an acceptable justification. Hence, a conflict of values is boldly presented for resolution in these controversies.

42. Y.B. 21 Hen. 7, f. 27, pl. 5, reprinted in full in C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 197 (1949).

43. Y.B. 6 Ed. 4, f. 7, pl. 18, reprinted in C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 195 (1949).

On the other hand, such discussions of fault as that by Rede in the *Tithe* case, above, were directed toward a quite different aspect of fault or blameworthiness, namely, the notion of unintended or inadvertent harm. Here the defendant's claim for escaping responsibility rests only upon his assertion that he "didn't mean to do it," or he "couldn't help it." In this setting there is no clear opposition of one value to another, as in the privilege cases, and the person whose conduct was concededly the source of the harm suffered by the victim may find that his argument of innocence faces a cool reception in the courts.

INADVERTENT HARM—THE ESCAPE OF CATTLE AND FIRE

It is noteworthy that the first cases in which the court's attention was focused upon harm inflicted through inadvertence arose in connection with the escape of some dangerous agency which the defendant had failed to control. Particularly significant here were the two most obvious perils with which the early community was faced—damage by fire and by domestic animals at large.

The earliest case dealing with liability for the escape of fire, *Beaulieu v. Finglam* (1401),⁴⁴ appeared to be concerned primarily with the liability of a householder for fire damage to his neighbor occasioned by the overturn of a candle through the neglect of the defendant's servant or guest.⁴⁵ The court observed that the householder was responsible although the harm was occasioned by another person who was in occupancy with defendant's permission. Although the court admitted that the defendant might escape liability if a third person outside the house had started the fire "against the will of the defendant," nevertheless he remained responsible without reference to fault where the harm was traceable to his own conduct or the neglect of those whom he harbored within his dwelling. Nearly three hundred years later (1697) an opinion hinted that liability for escaping fire might be avoided by showing that the

44. Y.B. Hen. 4, f. 18, pl. 6, reprinted in C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 166 (1949).

45. The word, neglect, which appears in several decisions of this period, does not imply negligence in the sense of a want of reasonable care. This is made clear in another fire decision several centuries later. "Every man must so use his own as not to injure another. . . . He must *at his peril* take care that it does not through his neglect injure his neighbor." (Emphasis added.) *Turberville v. Stamp*, KB [1667], 12 Mod. 152, 88 Eng. Rep. 1228.

damage was occasioned by the intervention of a "violent" wind;⁴⁶ but, absent some such outside intervention, unqualified liability for the escape of fire persisted in England until the law was modified by statute in 1770.⁴⁷

Strict liability for damage to crops occasioned by the trespass of domestic animals has been imposed since earliest times and can fairly be regarded as a remnant of the notion of *deodand* discussed earlier.⁴⁸ The fact that the cattle escaped despite all precautionary measures taken by the owner did not relieve the latter of his responsibility.⁴⁹

The earliest claims in which recovery was sought for the damage done through the vicious character of dogs, bulls, and other domestic animals were instituted by writs that alleged that the defendant retained possession of the animal with knowledge of its vicious character, indicating that such animals were not kept at the peril of the owner until he had at least become aware of their dangerous propensities.⁵⁰ Knowledge of viciousness, however, was all that was required. Thereafter it was immaterial that the keeper did not intend that the animal should annoy his neighbor, or even that he used every reasonable precaution to restrain the creature.⁵¹

Apart from the situations involving the escape of fire and animals, mentioned above, the problem of inadvertent injury did not attract serious judicial attention until the seventeenth century. The reason for this delayed appearance is fairly obvious. Until the advent of industrial machinery, dangerous substances, and congested traffic, there were comparatively few ways in which one person could suffer an injury because of the mere neglect or inadvertence of another. Land, whose cultivation and development was the principal source of wealth-producing activity in the middle ages, was itself frequently the victim of depredation (as by fire or cattle); but the tillage of the soil and the production of goods by handcraft seldom posed any serious threat that required affirmative vigilance by one person for the safety of another.

46. *Turberville v. Stamp*, 1 Ld. Raym. 264, 88 Eng. Rep. 1228 (1697).

47. 6 Anne c. 31, § 6.

48. See p. 4 *supra*.

49. G. WILLIAMS, *LIABILITY FOR ANIMALS*, 185 (1939).

50. "*Quare quendam canem ad mordendas oves consuetum apud o. scienter retinuit.*" See discussion in G. WILLIAMS, *LIABILITY FOR ANIMALS* 278 (1939).

51. *Id.* at 327.

INADVERTENT INJURY THROUGH USE OF FIREARMS

With these thoughts in mind it is not surprising that the first dramatic claims for bodily injury resulting from sheer inadvertence arose out of the handling (or mishandling) of firearms. Although rudimentary small arms such as the matchlock and wheellock were known in the fifteenth century, small arms did not come into frequent use until a hundred years later. The problem of accidental shooting was launched in the much discussed seventeenth century decision, *Weaver v. Ward*.⁵² Weaver's suit was framed strictly in Trespass, with the customary allegation of *vi et armis*, direct injury, and without mention, presumably, of any wrongful intention or negligence by defendant. The latter did not deny the Trespass allegations, but set up instead a plea by way of confession and avoidance in which he relied upon the fact that while he and the plaintiff were skirmishing with muskets in a military exercise the defendant "casualiter et per infortunium et contra voluntatem suam" in discharging his piece wounded the plaintiff. The latter demurred to this plea and thus raised the question as to whether any evidence admissible under an allegation such as the above, conceding the Trespass, but denying all fault, could afford a legal justification. The court, as might be expected, sustained the demurrer. The opinion observed:

" . . . if men tilt or turney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like, because felony must be done animo felonico: yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass. . . ."

There is a striking similarity here to the previously quoted statements by Rede in the *Tithe* case more than a hundred years earlier.⁵³

The portion of the opinion, however, that has excited the interest of legal historians is the concluding sentence of the paragraph above:

52. K.B. Div. [1617] Hob. 134, 80 Eng. Rep. 284.

53. See p. 12 *supra*.

"therefore no man shall be excused of a trespass . . . except it may be judged utterly without his fault. . . ."

Here, it seems, is found the first suggestion that a defendant charged with Trespass may have a chance of being exonerated if he can show affirmatively that he was blameless. This dictum has been credited as the germ source of the notion which eventually emerged fullblown two centuries later that the establishment of fault is an essential prerequisite to liability in tort.⁵⁴ It, therefore, deserves careful examination.

First, in the light of such an observation we are somewhat at a loss to understand why the defendant Ward's plea was summarily dismissed on demurrer and why he was not permitted to present evidence in support of his claim that he was "utterly without fault." What should he have added in order to bring his case within the exception suggested by the dictum? We are afforded some assistance in our effort to make a critical appraisal of the dictum by the court's own commentary upon the expression "utterly without fault." The same sentence in the opinion continues by way of illustration as follows:

" . . . as if a man by force take my hand and strike you or here the defendant had said that the plaintiff had run across his piece when it was discharging, or had set forth the case so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

The two specific instances suggested by the court above can only be regarded fairly as illustrations of an absence of any *force* employed by the defendant—as where his hand was the mere passive instrument of harm, or where, as in the second instance, it is doubtful that the force of the projectile should be regarded as the immediate or direct cause of the wounding, it being suggested that the victim himself ran into the path of the bullet. These are both instances where arguably no Trespass has been committed. Such matters would not expectably be raised by way of justification or excuse, but rather by way of a plea of "not guilty."⁵⁵ Certainly if the term, "utterly with-

54. See, e.g., Bohlen, *The Torts of Infants and Insane Persons*, 23 MICH. L. REV. 9, 13 (1924) and F. BOHLEN, *STUDIES IN TORTS* 549 (1926).

55. A demurrer to a plea of justification was sustained for this precise reason in *Gibbons v. Pepper*, K.B. 1695, 1 Ld. Raym. 38.

out fault," was intended to suggest only that in the absence of a direct use of force the defendant is not properly chargeable with Trespass, it adds nothing novel to the law as it had previously existed.

The quotation above, however, continues by indicating that the defendant could exonerate himself from liability in Trespass if he "had set forth the case so as it had appeared that . . . the defendant had committed no *negligence* to give occasion to the hurt." (Emphasis added.) We may be tempted to indulge in the surmise that the court here is stating that proof of the use of reasonable care by the defendant will be sufficient reason to show that he was "utterly without fault" and to thus relieve him of responsibility. This, however, is too easy a conclusion. The word, negligence (or neglect), had been used previously to indicate a failure to act as distinguished from affirmative misconduct. It was a familiar term in the fire cases and had been used to indicate that liability for fire was absolute, (i.e., "he must *at his peril* (italics supplied) take care that it does not, through his neglect, injure his neighbor."⁵⁶ It is conceded everywhere that negligence, meaning a failure to use the care of a reasonable prudent man, is a much later development. This mythical creature did not make its appearance in English tort law until the nineteenth century was well under way.⁵⁷

Despite these words of caution regarding the famous dictum in *Weaver v. Ward*, the language still leaves us with an impression that under some imaginable circumstance a showing of complete blamelessness might serve to exonerate the hapless gunhandler who inadvertently injured another. Certainly this interpretation has been advanced by many writers,⁵⁸ and it was finally adopted by the Queen's Bench in a decision in 1890.⁵⁹ But in significant contrast is the derogatory fact that for nearly three hundred years after the case was decided we do

56. *Turberville v. Stamp*, 3 Ld. Raym. 264, 88 Eng. Rep. 1228 (1697). See interesting commentary in T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 469 (5th ed. 1956); see also J. CHARLESWORTH, *LIABILITY FOR DANGEROUS THINGS* ch. IV (1922).

57. The first effort to establish a standard of care in terms of the "reasonable man" was in *Vaughan v. Menlove*, 3 Bing. N.C. 467, 132 Eng. Rep. 490 (1837). The term was borrowed from the earlier bailment case, *Coggs v. Bernard*, 2 Ld. Raym. 909 (1703), where an obligation to use reasonable care was regarded as an implied term in a contract of bailment.

58. Bohlen, *The Torts of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); O. HOLMES, *THE COMMON LAW* 83 (1963).

59. *Stanley v. Powell*, 1 Q.B. 86 (1891).

not find a single English decision in which a defendant charged with accidental shooting managed to escape liability through the loophole of *Weaver v. Ward*—"utterly without his fault," although there are several instances of record where the attempt was made unsuccessfully.⁶⁰ Even after mid-nineteenth century, by which time proof of defendant's negligence or intention was coming to be generally recognized as an essential requirement for a recovery, there remained a strong tendency in the accidental shooting cases to refuse to impose upon the plaintiff the necessity of establishing fault and instead to saddle the defendant with the burden of exonerating himself by showing "that the discharge was entirely without his fault and that it had happened by accident unavoidable by him."⁶¹ This anomalous treatment of the accidental shooting situations was recognized by the Queen's Bench in England as late as 1890 in *Stanley v. Powell*.⁶²

EMERGENCE OF THE ACTION OF TRESPASS ON THE CASE

Returning to the earlier discussion of Trespass it will be recalled that the fundamental element of that action consists of an application of force by the defendant directly to the person or the possession of the plaintiff. Proof of force and directness justified recovery in trespass without any further showing—such as of fault or blameworthiness. But equally important is the converse of this proposition. If there was no demonstrable use of force by the defendant, or if such force as was used operated only indirectly to produce harm, the suit in Trespass was certain to fail. It is possible that for a short early period during the development of tort law the unfortunate suitor who could not fit his complaint within the confines of the Trespass writ found himself without recourse available in the King's Court. But such denials could not have persisted very long. It will be recalled that there is no record of Trespass

60. *Dickenson v. Watson*, 34 Car. 2, 84 Eng. Rep. 1218 (1682); *Underwood v. Hewson*, 1 Strange 596, 93 Eng. Rep. 722 (1724); *Dixon v. Bell*, 5 Mau. & Sel. 198, 105 Eng. Rep. 1023 (1816) (gun was discharged even though defendant had removed the priming; liability imposed). Cf. *Anonymous*, Cro. Eliz. 10, A.D. 1582 (householder shot at a fowl from the door of his house and set the house afire).

Numerous American decisions of the nineteenth century are to the same effect as above. They are listed, with an interesting discussion, in Inbau, *Firearms and Legal Doctrine*, 7 TUL. L. REV. 528, 548 (1923).

61. The language here is taken from *Hawksley v. Peace*, 38 R.I. 544, 96 A. 856 (1916).

62. 1 Q.B. 86 (1891).

prior to the middle of the thirteenth century. By about the same time, in 1285, there was adopted by the King's Council the Statute of Westminster II⁶³ providing in substance that whenever in one case a writ was found and in like cases falling under like law no such writ was discoverable, Chancery was authorized, subject to certain precautions, to issue a new writ appropriate to the particular needs of the case before the court. Hence there came into being a companion form of action known as the action of Trespass on the Case. This form was available whenever the complaint showed a complete absence of force or an injury that was only indirectly inflicted. The new action had become familiar by the first half of the fourteenth century.⁶⁴

Much historical scholarship has been devoted to the origin and development of the new action, and the wavering line that separates the action of Trespass from the action on the Case has been a frequent source of confusion for judges and writers.⁶⁵ Fortunately for our present purpose we need take special note of only two characteristics of the action on the Case that distinguish it from Trespass. First, it has been said that in an action on the Case the complainant must show injury and damage,⁶⁶ whereas we have observed that in Trespass, damage is implied from the trespassory invasion itself.⁶⁷ This difference is to be expected, since the defendant in Trespass on the Case was most frequently charged only with an omission to act (non-feasance). It follows that the plaintiff's suit would have little purpose unless he could in some way demonstrate a tie-in between some harm suffered by him and the omission charged against the defendant. Thus the establishment of a "resulting damage" as a requirement was to be expected.

Second, we are particularly interested in the observation frequently made that proof of wrongdoing or fault has been an essential prerequisite to recovery in Trespass on the Case from the very beginning of that action. It is submitted that this observation proves entirely too much. It is certainly true that some act or omission amounting to what we would now term

63. C. 24.

64. See the Table of Dates of the earliest writs in A. KIRALFY, *THE ACTION ON THE CASE* 17 (1951).

65. Although the textual treatments of the distinction are numerous, the reader is referred particularly to 3 T. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 252-87 (1906).

66. A. KIRALFY, *THE ACTION ON THE CASE* 12 (1951).

67. See p. 11 *supra*.

a *breach of duty* by the defendant must be shown. This is consistent with the requirement that there be proof of damage as mentioned above. Where, as in claims asserted in actions on the Case, there can be no showing that defendant actively moved in upon the plaintiff, it follows that the latter must in some way tie his damage to something that the defendant did not do that he *should* have done. Obviously, the defendant must have failed with reference to the performance of some *legal expectation*, and if this is all that is to be implied from the requirement of *wrongdoing*, the only objection to the use of the term is that it is highly confusing.

Kiralfy points out that in many early actions on the Case the conduct complained of was assumed to be already wrongful.⁶⁸ He mentions contempt of court or failure to execute judicial process—acts which are inconsistent with any system of law. Such positive duties are in no way dependent upon any personal misbehavior by defendant, yet a breach of them resulting in damage will give rise to a successful claim in Trespass on the Case.

The most common types of legal expectation with which all persons were obliged to conform in medieval society were those imposed by custom. These customs were numerous, and they were of several varieties. Sometimes they were imposed locally, such as the duty to repair certain walls or to scour ditches or ponds.⁶⁹ It is noteworthy that liability for the spread of fire was imposed through an action on the Case based upon breach of the "custom of the realm," which amounted to an obligation on every man "to keep his fire safe and secure lest through his fire any damage result in any way to his neighbors."⁷⁰ Here the element of "wrong" means no more than a default in performance of the unqualified duty to keep safely. The defendant is sued, not because he has been a careless wrongdoer, but because where he should have followed the exacting requirements of the custom, he did not do so.⁷¹

Mention has already been made of unqualified liability for the trespasses of cattle and for injuries inflicted by domestic

68. A. KIRALFY, *THE ACTION ON THE CASE* 9 (1951).

69. Anonymous, *Y.B.*, 45 Edw. 3, f. 17, pl. 6 (1372).

70. *Y.B.* 2 Hen. IV f. 18, pl. 6 (1401). See A. KIRALFY, *THE ACTION ON THE CASE* 99 (1951).

71. A. KIRALFY, *THE ACTION ON THE CASE* 154 (1951).

animals known to be vicious. The claim for damages done by cattle trespass was traditionally asserted in a suit for Trespass, although the defendant's only default in many of these cases was a failure to confine the animal; and logically nuisance might have been a more appropriate action.⁷² In contrast, claims for the harms of animals known to be vicious were asserted traditionally in an action on the Case based on the custom of the realm.⁷³ Nevertheless, liability was absolute in both instances irrespective of whatever form of action was deemed appropriate.

LIABILITY OF INNKEEPERS, CARRIERS AND OTHER
PERSONS ENGAGED IN COMMON CALLINGS

A common use of Trespass on the Case as a means of exacting recovery for breach of some legal duty grounded on custom is found in suits brought in Case against persons who defaulted in the discharge of some customary duty incident to a public calling in which they were engaged. In his treatment on carrier's liability Beale points out, "From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a 'common' or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment."⁷⁴ Included were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers. Although Beale expressed doubt as to whether unqualified liability existed with respect to all loss and under all circumstances that could be causally attributed to the acts or omissions of persons engaged in common callings,⁷⁵ yet all the cases cited by him indicate that what might appropriately be called a warrantor's liability was almost universally imposed whenever the defendant held himself out in a common calling and the loss could be attributed to some act or omission within the scope thereof.⁷⁶ Denials of liability re-

72. See G. WILLIAMS, *LIABILITY FOR ANIMALS* 188 (1939).

73. *Id.* at 278; A. KIRALFY, *THE ACTION ON THE CASE* 100 (1951).

74. Beale, *The History of the Carrier's Liability*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 154 (1909).

75. *Id.* at 156.

76. The instances mentioned by Beale where the defendant engaged in a common calling was nevertheless exonerated from liability (Beale, *The History of the Carrier's Liability*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 157 (1909)) are situations where the injury could fairly be regarded as outside the scope of the defendant's undertaking. He refers to the jaller who was liable at his peril for a breaking of the jail but not against fire, and the carrier who was responsible for theft on the road, but not against theft at an inn. All these relate, of course, to the *scope* of the defendant's undertaking rather than to the *quality* of his performance.

lated invariably to harms that were outside the scope of his undertaking.

The standard common law form of the suit (which was invariably in Trespass on the Case) against an innkeeper for a loss of goods recites a general law and custom "that common innkeepers must keep all guests staying with him immune from loss of their goods, lest by default of their custody any harm should come to them."⁷⁷ The exercise of reasonable care by the innkeeper afforded no justification.

Holmes suggests that the extraordinary liability of a carrier of goods (which still obtains today, except as modified by statute of administrative regulation) is a residuary form of the absolute liability that was at one time imposed upon *all* bailees.⁷⁸ But whatever the source, the unqualified character of the liability was clear. "If a man delivers goods to a common carrier to carry, and the carrier is robbed of them, still he shall be charged with them, because he had hire for them, and so implicitly took upon him the safe delivery of the goods; and therefore he shall answer for the value of them if he be robbed."⁷⁹

Any person engaged in a common calling was bound to carry on his trade or occupation "rightly and truly as he ought."⁸⁰ By undertaking the special duty he warranted his special preparation for it. It is difficult in these cases to assign a proper role for any claimed absence of blame that might be asserted by the defendant. Certainly it is difficult to find any case where the person engaged in a common calling successfully escaped liability for harm inflicted by establishing that he used a measure of care appropriate to the calling in which he was engaged. Usually the fact that harm was inflicted on plaintiff or his property during the exercise by defendant of his public calling resulted in liability. A good illustration is afforded by the case against a sheriff for non-return of a writ to court. He was held liable notwithstanding his plea that he gave the writ to the coroner, who was robbed. The court replied simply, "The duty to guard was yours."⁸¹

77. A. KRALFY, *THE ACTION ON THE CASE* 151 (1951).

78. O. HOLMES, *THE COMMON LAW*, Lect. 5 (1963).

79. Woodliff's case, as reported in 1 *ROLLE'S ABRIDGMENT* 2.

80. *F.N. B.* 94 d.

81. 41 *ASS.* 254, pl. 12 (1366).

ACTION OF TRESPASS ON THE CASE—SUMMARY

The emergence of the action of Trespass on the Case and the increasingly frequent use to which this action was placed in the fourteenth and fifteenth centuries made possible successful suits based upon neglect to prevent harm. Hence recovery was no longer limited to those situations where the defendant employed force directly against the plaintiff or his possession. Courts thus became familiar with the language of duty, and the term "neglect" made its appearance in the opinions. But the neglected duty was in most instances one which existed independent of the action on the Case and which had little or nothing to do with "fault" as we envisage that term today.⁸² It is more appropriately regarded as an obligation to follow at peril some recognized practice or custom. Indeed, certain areas where liability has remained virtually absolute in England even today are areas in which the action was traditionally Trespass on the Case. Included here are liability for fire, liability based upon the harboring of vicious animals, and the liabilities to which carriers and innkeepers are subject. The close association between the action of Trespass on the Case and the modern conception of negligence was not to appear until after 1800, nearly three hundred years later.

A FUNCTIONAL VIEWPOINT ON THE LATE EMERGENCE OF
NEGLIGENCE

The imposition of virtual no-fault liability in both Trespass and Trepass on the Case in England continuously throughout the middle ages and, in fact, up until the nineteenth century, should not be attributed to some lack of moral sensitivity on the part of English judges. The then current attitude toward fault, or its absence, probably reflected the ethical social and economic needs of the times at least as faithfully as presently prevalent ideas of negligence reflect those of the nineteenth and early twentieth centuries.

It is important to bear in mind that in an earlier society most harms were inflicted intentionally. When such is the situation, conflicts in social and economic values are brought into focus and resolved through determinations as to when and to

82. Winfield & Goodhart point out that an action on the case for negligence itself does not appear clearly until COMYN'S DIGEST (1762). Winfield & Goodhart, *Trespass & Negligence*, 49 L.Q. REV. 359, 364 (1933).

what extent a privilege to assault, to batter, or to trespass should be recognized. The resolution of conflicts here followed the pattern that would be expected in a highly individual society in which the chief source of wealth was the land, which was regarded as sacrosanct.

With respect to inadvertent injuries, we may well remember, first, that these were infrequent and, second, that those accidental injuries which the early courts were obliged to face fell into a few stereotypes, involving specific dangers with which the public was entirely familiar—harms which it greatly feared and which it was eager to suppress. We have mentioned the strict liability for fire. This was the greatest hazard of the medieval towns: a blaze fanned by wind could quickly wipe out a block of wooden houses, yet equipment to fight it was cumbersome and slow.⁸³ Regulations concerning firefighting and the suppression of fire were numerous,⁸⁴ and strict liability imposed against those who were the custodians of flame was to be expected.

The persistence of absolute liability for the trespasses of domestic animals is more difficult to justify in terms of the social and economic needs of the time, for England's economy during the middle ages was dependent equally upon the growing of crops and the pasturage of animals (particularly sheep). Hence some sort of reconciliation of conflicting needs through resort to the phrases of negligence would have been expected in the opinions dealing with this subject. Perhaps the traditional stone fencing disposed in orderly array throughout the English countryside afforded a setting where effective restraint by the owners of cattle and horses imposed no serious hardship upon them. But strict liability here must be regarded chiefly as a vestige of primeval habits that traditionally dominated popular thinking about harm done by animals. At the beginning, vengeance was wreaked upon the offending beast itself, and the unfortunate creature was promptly killed by the victim of its trespasses.⁸⁵ The owner's obligation to surrender it over was absolute at first. There probably developed a practice of compromise whereby the life of the offending animal could be purchased by the owner

83. The Great Fire of London of 1212 resulted in death by burning or by drowning in the Thames of a good tenth of the population of the City. See F. KAY, *THE LIFE AND TIMES OF ALICE PERRERS* 101 (1966).

84. P. KENDALL, *THE YORKIST AGE* 83 (1962).

85. G. WILLIAMS, *LIABILITY FOR ANIMALS* 9 (1939).

through the payment of money.⁸⁶ This in turn resulted in the emergence of a recognized tariff pursuant to which the animal could be reclaimed as of right. Added to this should be noted the tendency of early people to attribute wrongdoing to the beast which had consciously invaded the land and the primitive inclination to readily identify the animal with its owner so that *its* trespass became *his* trespass.

The strict liability that was imposed upon the common carrier was something entirely to be expected during the earlier period with which we are here concerned. Common carriers began to make their appearance about 1400, but they did not become an institution until the middle of the century when there were scheduled journeys between London and other cities as far away as York. Before that time only the wealthiest gentry could afford to keep men in their service to carry their letters or transport their goods to a distance. The average medieval village was almost completely cut off from the rest of the world. Of travel in the modern esthetic sense there was little in the English middle ages.⁸⁷ With villages remote from each other and connected by only the most rudimentary paths, the threat of the highwayman was real and ever present.⁸⁸ The world outside one's own native village appeared strange and menacing, and the safety of one's person and goods could not lightly be entrusted to the professional carrier, who may himself be a stranger to the community and who certainly could easily connive with robbers and then disclaim any responsibility for which he could be blamed. Stratagems by early shippers to protect themselves against imposition by the carriers have become legendary,⁸⁹ and strict responsibility for the safety of both passenger and goods would seem to be the natural demand of the public. The same may be said of the innkeeper who could proffer the only available refuge for the traveler in a strange countryside infested with brigands and thieves, and who might too frequently be a scoundrel himself.

As indicated in the preceding pages, strict liability is the public response that is to be expected whenever the society of a given time and place must deal with specific perils which it has come to recognize as serious threats to its welfare. This was

86. *Id.* at 12.

87. G. COULTON, *MEDIEVAL PANORAMA* 317 (1938).

88. P. KENDALL, *THE YORKIST AGE* 238 (1962).

89. *Id.* at 242.

true of the hazards of fire, the depredations of animals and the risks of misconduct by carriers, innkeepers and others engaged in public callings. And, despite the vague dictum in *Weaver v. Ward*,⁹⁰ strict liability has in practice been the public's answer to mishaps attributable to the use of firearms.

The conception of negligence or liability upon a flexible standard of care is not likely to come into being until society has reached a stage where diverse economic and social needs have emerged and are in lively competition with each other. The formation of a mature set of values of this kind must await the appearance of certain clearly definable human activities in each of which an appreciable number of human beings are engaged. Only as society becomes clustered into meaningful activity groups whose respective needs come into conflict can a situation arise in which a court is faced with a dilemma that obliges it to venture the opinion that the claims of those who are engaged in one activity are to be weighed against the claims of others engaged in another activity,⁹¹ and one activity given preference over the other.

THE EMERGING GROUP INTEREST IN TRAVEL AND TRANSPORTATION

The most significant group interest of the kind suggested above and the one which later was most profoundly to influence the entire basis of tort law was the public need for travel and transportation. Early society was slow to press its claims in this direction. The feudal system restricted the bulk of the people to the small medieval villages in which they were born and from which they seldom strayed during the course of an entire lifetime. Most roads made only for the nearest village, without any more distant horizon in thought. "The average road was a country lane running through deep woods and across sweeps of moor and marsh, unsign-posted, generating forks and branching tracks to puzzle the traveler, sometimes ending abruptly at a ford that had disappeared under high water."⁹²

As the middle ages passed it is doubtful that the state of the roads improved appreciably. In fact, one may surmise that the condition even deteriorated as heavy carts and carriages ap-

90. Discussed at p. 16 *supra*.

91. Malone, *Ruminations on Group Interest and the Law of Torts*, 13 RUTGERS L. REV. 565, 567 (1959).

92. P. KENDALL, *THE YORKIST AGE* 238 (1962).

peared and scored the crude roadways with deep ruts. Up through the seventeenth century the repair of the roads was the responsibility of the local manor, burrough, or hundred which frequently failed its obligation. Horse-drawn traffic proceeding along such ways as these obviously could generate little speed or dangerous highway congestion. The perils of travel lay with the highwayman and brigand and not with upset or collision of vehicles. Within the larger towns the streets were so narrow, so crudely paved, and so ill-adapted to hasty travel that street accidents as we now know them were comparatively rare occurrences.

However, a few cases can be found in the yearbooks as early as the middle of the fourteenth century dealing with injuries through collision or rundown in traffic. Trespass was uniformly the appropriate action. It is particularly noteworthy that terms such as driving "negligently" or "heedlessly and carelessly" appear even in the early proceedings. Yet there is nothing to indicate that any finding of fault was made or even suggested.⁹³ The same appears in several seventeenth century decisions where both the common allegations of force and arms and a claim of "careless handling" can be found.⁹⁴

Beginning in the second half of the eighteenth century there occurred several developments that were to facilitate traffic and transportation substantially in the decades to come and would invite a major readjustment within the law of torts. Foremost was the formulation of a scientific method for road construction. A Scotsman, John Lewis McAdam, proposed the laying of a roadbed of crushed rock with a surfacing of finely broken gravel. The process was relatively simple and inexpensive and it was promptly put into use. This in turn led to the emergence of the turnpike system and made possible the levying of tolls upon traffic as a much needed supplement to the older local maintenance system.⁹⁵ As roads improved so did the character of the vehicles that were to travel upon them. There came into being the stagecoach, the gig, the tallyho and other lighter and faster devices. Under this increased demand road construction was further stimulated and a cycling of progress was under way.

93. These early cases are cited and discussed in A. KIRALFY, *THE ACTION ON THE CASE* 102 (1951).

94. *Id.*

95. 22 *ENCYCLOPAEDIA BRITANNICA Transport* 412 (1957).

Finally in 1835 a general overhauling of all the English highway laws was undertaken.⁹⁶

The first upset or collision decisions near the turn of the eighteenth century and into the nineteenth adopted the traditional position that whenever there is a direct application of force, as where the horse or carriage of the defendant is driven against the plaintiff on the highway, Trespass, and not Trespass on the Case, is the only proper remedy.⁹⁷ However, even in these first cases it is curious to note an urging by counsel of a position—later to prevail—that where it appears the injury was inflicted through negligence only, Trespass on the Case is a proper remedy; while Trespass itself is the only available form of action for an intentional or willful wrong. These arguments were not countenanced by the courts at first.

The first intimation that an action of Trespass on the Case could be appropriately instituted in a collision situation came in 1799 when, in a suit arising from a collision of two boats that resulted from the alleged "incautious, careless, and negligent" management and steering of the defendant's vessel, the court sustained the use of Trespass on the Case.⁹⁸ It is not clear, however, from the three reported opinions in this decision that the court intended to sanction the use of Case whenever the claim is based upon merely negligent wrong. The opinion of Lord Kenyon stressed the fact that the defendants could not be regarded as having done any act at all, since the impelling forces were the wind and the waves. Opinions of the other two Justices, Grose and Lawrence, however, seem to express satisfaction with the use of Trespass as the exclusive writ for intentional wrongs and the availability of Trespass on the Case as a concurrent remedy whenever negligence appears to have been the cause.

The first decision affirming unequivocally the availability of a suit in Trespass on the Case when harm was directly inflicted through negligence was *Rogers v. Imbledon* in 1806.⁹⁹ In the opinion Sir James Mansfield denied that the decision was

96. Laws V & VI, William IV, c. 50. See the excellent discussion in L. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 11-17 (1958).

97. *Hopper v. Reeve*, 7 Taunt. 699, 129 Eng. Rep. 278 (1817); *Leame v. Bray*, 3 East. 593, 102 Eng. Rep. 724 (1803); *Savignac v. Roome*, 6 T.R. 125, 101 Eng. Rep. 470 (1794); *Day v. Edwards*, 5 T.R. 648, 101 Eng. Rep. 361 (1794).

98. *Ogle v. Barnes*, 8 T.R. 188, 101 Eng. Rep. 1338 (1799).

99. 2 B. & P. (n.r.) 117, 127 Eng. Rep. 5687.

opposed to the earlier line of authority, but he suggested that in a "proper case" these authorities should be reconsidered. Nineteen years later the same position was reaffirmed in *Moreton v. Hardern*.¹⁰⁰ This latter decision suggested, without deciding, that where the damage was directly inflicted through negligence (as opposed to wilfulness or intention) the plaintiff may choose Trespass or Case at his option and this observation was accepted as clearly the rule in 1833 in *Williams v. Holland*.¹⁰¹ The result was interesting: if the plaintiff were to elect to stress the direct application of force and to cast his claim as one in Trespass, he would avoid, as we have seen, the necessity of either alleging or proving any negligence or intent on the part of the defendant. The most that could be said under such circumstances is that the defendant might affirmatively set up the plea of inevitable accident.¹⁰² If, on the other hand, the plaintiff were to elect to treat the accident only as a consequence of defendant's negligence and accordingly to proceed in Trespass on the Case, he would be obliged to show affirmatively a duty of care owed by defendant and a breach of that duty, resulting in damage. The plaintiff, by so choosing his remedy, would relieve the defendant of the burden of alleging and establishing any plea of inevitable accident.

It is therefore puzzling as to why a victim who could show a direct application of force and proceed in Trespass would ever choose to undertake needlessly the burden of attempting to establish negligence. Yet such a choice of Trespass on the Case appears to have been made with great frequency in the early cases; and this was true even when, as at first, the attempt brought about a dismissal of the claim. Several reasons for the preference of Case have been suggested. First, the choice of Case could prove to be less costly to the pleader in terms of money. "[I]f in an action of trespass the plaintiff recover less than 40s, he is entitled to no more costs than damages; whereas a verdict of nominal damages only in an action on the case carries all the costs."¹⁰³ Winfield and Goodhart have suggested additionally that a choice of Trespass on the Case offered a strategic advantage to the pleader who may have had reason to

100. 4 B. & C. 223, 107 Eng. Rep. 1042 (1825).

101. 10 Bing. 112.

102. This was affirmed as late as 1842. *Hall v. Fearnley*, 2 Q.B. 919, 114 Eng. Rep. 761 (1842).

103. Lord Kenyon, J. in *Savignac v. Roome*, 6 T.R. 129, 130, 101 Eng. Rep. 470, 472 (1794).

anticipate difficulty in establishing that the injury was inflicted directly. If the pleader could assume safely that the defendant's conduct was not willful, Case would support recovery for either a direct or indirect injury.¹⁰⁴ This writer has some doubt as to whether any such pleading advantage as that suggested would account for the choice of Trespass on the Case in the earlier highway controversies. It is to be remembered that these were cases of collision or running down. Hence the directness of the infliction of injury was nearly always obvious. The writer has found only one decision in this early period in which the plaintiff might reasonably have feared that the injury was inflicted only indirectly and hence that Case would be the appropriate form. This was *Hopper v. Reeve* (1817).¹⁰⁵ In that case the plaintiff was seated in a vehicle that belonged to a third person and which was struck by the defendant's horse. The blow to the vehicle resulted in bodily injuries to the plaintiff. The defendant urged that the bodily injury was indirect. The court held, however, that Trespass, not Trespass on the Case, was the proper action. Indeed, the procedural advantage would seem to dictate a choice of Trespass because under this action it would be immaterial whether the defendant's conduct were intentional, negligent, or neither.

THE ABOLITION OF THE DISTINCTION BETWEEN TRESPASS AND CASE

Up to this point the effect to be given an absence of negligence has become wholly interwoven with the procedural question as to what form of action is appropriate and available. Now we must note that the English Judicature Acts, 1873-1875, wholly abolished the forms of action. A suit is no longer to be designated as Trespass or as Trespass on the Case. Once this step had been taken, what is to become of the former distinction between direct and indirect injury, which had once formed the boundary between Trespass and Case? If this distinction is to persist on the ground that it is substantive, and not merely procedural, are we to conclude that where the injury is direct the plaintiff may still cast upon the defendant the burden of undertaking to show that he was not to blame or that he was "utterly without fault," as was formerly true? Or, conversely, with the actions abolished, are we to conclude that where the

¹⁰⁴. Winfield & Goodhart, *Trespass and Negligence*, 49 L.Q. REV. 359, 365 (1933).

¹⁰⁵. 7 Taunt. 699, 129 Eng. Rep. 278 (1817).

injury is only indirect or consequential the plaintiff must still undertake to establish that the defendant breached his duty of care?

These questions came very near to finding their answer in *Holmes v. Mather*,¹⁰⁶ a running down case that was decided immediately after the adoption of the first Judicature Act. The first part of the opinion of Bramwell, B. is couched in broad language indicating that proof of fault is always essential in a personal injury claim:

“For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with such mischief as reasonable care on the part of others cannot avoid.”

The clear implication here is that the plaintiff must take upon his own shoulders the risk of injury except where he can affirmatively establish fault or negligence. Unfortunately, the acceptance of any such conclusion is sorely embarrassed by other findings in the same opinion.

The declaration in *Holmes v. Mather* was precariously framed in two counts: The first count placed the emphasis on the negligent handling of the horses by the defendant which resulted in his horse's running into plaintiff; while the second count stressed the force and violence of the driving and the direct character of the injury without mention of fault. When the case went to trial the jury found that there was no negligence. Thus the way was open for the court to announce specifically the effect to be given such a finding. But despite the brave language quoted above, the court devoted most of the opinion to an elaboration of the facts leading up to the accident, and it concluded that the injury was not inflicted through any direct application of force by plaintiff and hence the controversy would not have presented facts appropriate to a suit in Trespass had it arisen prior to the Judicature Acts. Indeed, the situation as described by the court resolved itself into a run-away horse picture of the kind that courts had excluded from the realm of a Trespass action a hundred and fifty years earlier.¹⁰⁷

Despite this detraction, the statement quoted above afforded

106. *Exchequer*, 1875; L.R. 10 Ex. 261 (1875).

107. *Gibbons v. Pepper*, 1 Ld. Raym. 38, 91 Eng. Rep. 922 (1695).

the foretaste of an attitude toward the fault requirement that was to dominate later decisions. For this reason alone it deserves special attention. First, it is particularly noteworthy that Bramwell's attention was focused on the problem of injuries occurring on the public roads, and his statements could fairly be interpreted as being relevant only to travel accidents. In this connection we may note that *Holmes v. Mather* was a culmination of perhaps a dozen decisions related to mishaps on the highways over a past period of nearly a hundred years. As the course of traffic litigation moved further into the nineteenth century the courts showed themselves to be increasingly receptive to a duty of care approach evidenced by an expanded employment of Trespass on the Case. By the same token they betrayed an aversion to the older mechanical solution afforded by the action of Trespass. There was no indication of a similar approach in tort litigation outside the field of traffic accidents.

It is difficult to escape the conclusion that the liberality toward the defendant's predicament in the traffic cases was an outgrowth of the practical dilemma for litigation that was shaping up as the roads of nineteenth century England were gradually improved. Courts were faced with the fact that there was a pressing interest in the full utilization of the highways, and that decisions mechanically rendered in favor of victims under the Trespass theory would have a serious adverse effect on highway users.¹⁰⁸ An impressive group interest in travel had emerged and courts were impelled to take it into account. Hence the plaintiff, if he were to recover, must make a presentation with greater appeal than a mere showing that his injury was "directly" inflicted. It became apparent that under the strict Trespass action, no traveler could afford to risk his fortune by making use of the highways. Thus the idea of negligence emerged as an inviting compromise in these cases: let the driver do all that he can to avoid a mishap, and if an accident nevertheless occurs, he will not be held responsible. In this way each traveler received some—but not complete—protection, and all were afforded an opportunity to avoid liability by so conducting them-

108. A good illustration of the absurdity of the Trespass approach in traffic is afforded by *Pearcy v. Walter*, 6 Carr. & P. 232, 172 Eng. Rep. 1220 (1834) where a suit in Trespass was brought for driving a gig against the horse of plaintiff and wounding it, in consequence of which it died. The question of liability was made to depend upon whether defendant drove the shaft against the horse or whether, on the other hand, the horse was driven against the shaft.

selves as to reduce the accident risk to a minimum. In the early nineteenth century cases, then, the courts faced up to the fact that they were called upon to do more than consider the claims of isolated individuals. The task of the law was to adjust conflicts between members of a group of highway users, and the interests of *all* highway users—the interests of the group itself—were at stake.

We can readily gain the impression that Bramwell did not intend that his observations on the necessity of showing negligence in *Holmes v. Mather* should apply generally throughout torts law. The statement quoted earlier can fairly be interpreted as a strong suggestion that members of the public by going voluntarily upon the highways must be deemed to have taken upon themselves the risk that they might be injured by the non-negligent conduct of others. In other words, venturing upon the roads and streets involves a surrender at such places of the traditional rights of citizens to recover for directly inflicted injury without establishing fault. When viewed in this light the highway injury picture can appropriately be regarded as an exception to a general prevailing principle of absolute liability.

INJURIES TO NEIGHBORING LAND OWNERS—FLETCHER V. RYLANDS

This same version of the highway accident as an anomalous situation to be dealt with separately had been propounded at mid-century in the much-discussed litigation of *Fletcher v. Rylands*.¹⁰⁹ This famous case deals, as readers know, with the fault requirement as it affects controversies between adjoining landowners. Its importance lies largely in the fact that it is here for the first time that we find a series of considered judicial elaborations upon the theme of fault in English tort law.

The facts of *Fletcher v. Rylands* are familiar and need be only outlined here. The plaintiff and defendant owned neighboring (although not adjacent) tracts of land in a rural area. The plaintiff's land was operated as a mine, and it was connected with the defendant's tract by a network of ancient subterranean mine workings which had been abandoned and whose presence was entirely unknown to both parties. The defendant undertook to excavate extensively on his own land for a reservoir to serve

109. 34 L.J. Ex. (n.s.) 177 (1865), *rev'd*, *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd*, *Rylands v. Fletcher*, L.R., H.L. 330 (1868).

a mill of which he was proprietor. When the excavation was completed and partly filled, the water broke through the undiscovered passages referred to and flooded the plaintiff's neighboring mine.

The resulting controversy escaped being a simple suit for Trespass only because the force applied by the defendant in filling the reservoir had terminated before the water escaped. Similarly, the claim failed as a nuisance, probably because the injury was not a gradual offense to the senses, as was characteristic of nuisance at that time. Had it been supportable either as a trespass to land or as a nuisance, there would have been no doubt that defendant's liability was absolute.

The case came on for trial at the Liverpool Summer Assizes of 1862, and—a matter of great interest for our purpose—Bramwell was one of the three presiding judges. The opinions clearly betray the unsettled state of the law concerning the role of fault at mid-century. All three Barons (Martin, Bramwell, and Pollock) were impressed with the absence of authority on so fundamental a question as the fault requirement, and all agreed that some basic principle must be extricated. After reaching this point, however, Bramwell finds himself in complete disagreement with his two colleagues. Particularly is he out of accord with Martin, who assumed the role of chief spokesman for the requirement that fault on the part of the mill operator must be discovered or liability must be denied.

Martin's opinion clearly indicates that he was profoundly influenced by the collision and upset cases of the past few decades: ". . . when damage is done to personal property, or even to person, by a collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and if there be no negligence, the party sustaining the damage must bear with it. . . ." ¹¹⁰ The reader may recall that at the time of this pronouncement (1865) it was *not* essential even in the traffic cases that the plaintiff show any breach of a duty of care unless he had rejected Trespass and had chosen Trespass on the Case. Perhaps it was with this in mind that Martin emphasizes that Fletcher's claim could not be brought in Trespass because the damage was not immediate, but consequential. But does he succeed in his effort to justify the fault

110. 34 L.J. Ex. (n.s.) 177, 183 (1865).

requirement by falling back upon the propriety of an action on the Case? Counsel for the plaintiff had shrewdly called attention to suits for the escape of fire and suits for the neglects of carriers and innkeepers, in none of which, as we know, had proof of fault ever been required, yet all are traditionally actions brought as Trespass on the Case. Martin's only answer here is to dismiss each of these frequently initiated claims as being "exceptions from the ordinary rule of law," or as resting on "custom" (although, as we have seen, breach of some customary obligation lies at the very root of an action on the Case).

Bramwell's opinion favoring absolute liability in *Fletcher v. Rylands* is of particular interest, even though it did not prevail at the trial. Bramwell did not attempt to recast the facts so as to indicate that the defendant was chargeable with a trespass (although he was not satisfied that Trespass was inappropriate to the facts). It is immaterial, he declared, whether the water was brought or sent upon the plaintiff's land directly or indirectly. He rested his opinion upon a proposition that would be clearly appropriate only in controversies between neighboring landowners—the plaintiff "had a right to be free from what has been called foreign water—that is, water artificially brought or sent to him by its being sent to where it would flow to him."¹¹¹ Bramwell indicated no interest in formulating some overriding principle of fault or no-fault that could control torts controversies in all their variety. He was content to find a solution that would take care of this specific conflict between neighboring uses of land.

The early collision cases that had so impressed Martin were easily dismissed by Bramwell with the observation that both plaintiff and defendant were in action at the time: "When two carriages come into collision, if there is no negligence in either, it is as much the act of one as of the other that they meet."¹¹²

It is noteworthy that the rationale for separate treatment of highway injuries as advanced above by Bramwell is less sophisticated than the "assumed risk of the highway" approach that we find him adopting a decade later in *Holmes v. Mather*.¹¹³ The argument that negligence was appropriate because both parties were in action on the highway might serve to set apart

111. *Id.* at 181.

112. *Id.* at 182.

113. *See* p. 32 *supra*.

the collision cases by showing that the theory of Trespass was not logically available; but it would not explain situations in which a passive pedestrian or bystander was run down by a moving vehicle.

We know that Bramwell's contention for absolute liability was eventually adopted when the case was reversed by the Exchequer Chamber.¹¹⁴ Blackburn, the author of the opinion on appeal, affirmed Bramwell's thesis and made a substantial elaboration upon it. He announced as a general principle that whenever a person introduces upon his land *any* substance whose tendency is to escape and, in escaping, to injure his neighbor's property, he must restrain it at his peril. The concept of escaping substances, comprehended under Blackburn's formula, would include water (as particularized by Bramwell) and also such traditional escapees as fire, cattle, and filth.

The idea of basing liability upon the act of introducing a harmful substance into the community and thereafter failing to keep it confined, transcended all distinctions between direct and indirect—between Trespass and Case. It also embraced situations that were formerly actionable as "nuisances." A new generality had indeed been born. We cannot conclude, however, that Blackburn entertained any intention of going beyond the area of conflicts between landowners. The traffic cases would continue to be set aside for separate treatment, requiring proof of fault. It is here that Blackburn propounded for the first time the assumption of risk argument which, as we know, was later to be adopted by Bramwell in *Holmes v. Mather*. Blackburn observed:

"But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger; . . . or where a person in a dock is struck by the falling of a bale of cotton which the

114. L.R. 1 Ex. 265 (1866).

defendant's servants are lowering; . . . and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the license of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land."¹¹⁵

The story of the metamorphosis of the principle first announced by Blackburn in *Rylands v. Fletcher* has been told too many times and too well to be repeated here in detail.¹¹⁶ It will suffice to remind the reader that when the controversy was appealed to the House of Lords Blackburn's notion of unrestricted liability for escape was limited in its application to substances and things brought onto land during the course of a "non-natural" user. Thereafter, this cryptic term bore the weight of a long series of policy decisions that followed. The term, *non-natural*, itself, became subjected to what may be pardonably described as a completely non-natural interpretation. It did not indicate something outside the normal course of nature, nor did it even suggest a use or activity that was non-rural in character. An industrial use might be regarded

115. *Id.* at 286.

116. Among the many excellent treatments of the *Rylands v. Fletcher* development are: J. CHARLESWORTH, *LIABILITY FOR DANGEROUS THINGS* (1922); BOHLEN, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298 (1911); F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 344 (1926); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 441 (1894). One of the most recent and comprehensive is Prosser, *The Principle of Rylands v. Fletcher*, in *SELECTED TOPICS ON THE LAW OF TORTS* 135 (1953).

as natural, rather than non-natural, as in the case of mining.¹¹⁷ Prosser, with his happy facility of lighting upon the precise expression, observes that uses that "have the same element of the unusual, excessive, extravagant and bizarre"¹¹⁸ are likely to be classified as non-natural. He adds that the same term is used to characterize "a thing or activity inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings."¹¹⁹

As a result of the natural versus non-natural distinction drawn by Cairns in the House of Lords, the basis of liability becomes fragmented even in the controversies between adjacent landowners. If, in a given case, the damaging agency happened to be fire, we must inquire further whether the flame escaped from a domestic fireplace or whether it resulted from the storage of quantities of combustible substances. Liability would depend upon proof of negligence or intention in the first instance,¹²⁰ while liability would be absolute in the second situation (which involved a non-natural user).¹²¹ Again, was the damage complained of effected through an escape of water? If so, did the water emerge from a hydraulic power main, or from a domestic cistern? We must determine the precise source before we can decide whether absolute liability is or is not appropriate.¹²²

After pondering the sequence of hearings and opinions in *Rylands v. Fletcher*, we emerge with only one clear impression, namely, that English judges at mid-nineteenth century were still grasping with much uncertainty for some satisfactory principle or set of principles upon which tort liability could be made to depend. They appeared to agree that there was no single unexceptionable basis. They were not in accord, however, even on the matter of an acceptable starting point of fault or no-fault. Blackburn appeared to assume that liability was essentially absolute, and he regarded the traffic cases with their proof of fault requirement as exceptions that depended upon the fact

117. *Smith v. Kenrick*, 7 C.B. 515, 137 Eng. Rep. 205 (1849).

118. Prosser, *The Principle of Rylands v. Fletcher*, in *SELECTED TOPICS ON THE LAW OF TORTS* 135, 146 (1953).

119. *Id.* See also Stallybrass, *Dangerous Things and the Non-Natural User of Land*, 3 *CAMB. L.J.* 387 (1929).

120. *Sochacki v. Sas*, 1 All E.R. 344 (1947).

121. *Musgrove v. Pandelis*, 2 K.B. 43 (1919).

122. *Cf. Snow v. Whitehead*, 27 Ch. D. 588 (1884) and *Blake v. Land & Home Property Corp.*, 3 T.L.R. 667 (Q.B. 1887).

that the victim had assumed the risk of non-negligent injury by venturing out into the public streets. And we know that this same approach was evident twenty-five years later in the opinion of Bramwell in *Holmes v. Mather* which we have already considered.¹²³ Martin, on the other hand, began at the opposite end of the spectrum. He held out the fault principle of the collision and the running down decisions as the prototype for all liability. He faced with indifference those recognized instances of absolute liability, such as fire, escape of animals, and the responsibility of carriers and innkeepers, and he shrugged them off as exceptions resting upon timeworn custom.

When we turn to the opinion of Lord Cairns in the House of Lords, embodying as it does the principle of *Rylands v. Fletcher*, as understood in England today, we encounter difficulty in concluding whether the decision should be treated as an expansion of some earlier basic notion of strict liability, or whether, on the contrary, it should be regarded as adding strength to the newer postulate that fault must generally be accepted as a prerequisite to liability. To the extent that the House of Lords accepted Blackburn's thesis and thereby transformed what was formerly a series of isolated rules involving fire or cattle into a generalized principle of liability for escape, their Lordships extended the potential operative ambit of strict liability.

On the other hand, the insistence by the House of Lords that Blackburn's principle be restricted to "non-natural" users strongly suggests that strict liability must be regarded as representing the exceptional situation, and is to be called into play only when dealing with the novel or the unusual.

From mid-century onward the trend toward the fault requirement became precipitous. There was emerging a new industrial society made up of men who ventured their capital on the mass fabrication of goods in mechanized establishments and who transported their products throughout the nation on fast moving steam railways. Society was fast migrating to the urban centers. There was wealth to be had and wages to be earned—but all at high risks in terms of safety. The new society in its dangerous world was viewed by the courts as one that was willing to compromise safety for economic advantage; and negligence afforded the means whereby concessions could be made.

123. See p. 32 *supra*.

A live-and-let-live postulate which was first manifest in the early traffic cases had eventually become the attitude adopted by an entire nation. Indeed, the pendulum of change had made its full swing before the century expired and the courts found themselves pressed to withhold liability for harm inflicted by the industry and transportation enterprises even where fault was obvious. Immunities, sharply limited duties, and elaborate defenses were urged upon the courts, and often with considerable success. But, that is another story.

As the century moved toward its end the dominant role to be played by the fault principle in torts cases became fully recognized by the courts. The requirement of blameworthiness was accepted as though it had never been questioned. The earlier Trespass cases imposing strict liability were lightly dismissed by the judges with the observation that these involved only matters of choice between the available forms of action. They could then proceed to observe that the reforms of the Judiciary Act had made all such distinctions obsolete.¹²⁴ However, the doctrine of *Rylands v. Fletcher*, which had received the blessing of the House of Lords, could not be so lightly dismissed even though its importance could be minimized. At least by 1894, there became evident a conviction by the courts that the *Rylands* decision must be regarded with caution as representing something exceptional and possibly unwelcome. Lindley, L.J., observed,

“That case is not to be extended beyond the legitimate principle upon which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision.”¹²⁵

Lindley's observation was readily quoted by other judges.

Continued aversion to *Rylands v. Fletcher*, confusion as to its meaning, and an insistence that it be confined within narrow limits became clearly evident in the 1946 decision of the House of Lords in *Read v. J. Lyons & Co., Ltd.*¹²⁶ The facts fairly invited an appraisal of the reach of the *Rylands* rule. Plaintiff was an official inspector in defendant's factory, engaged in the manufacture of high explosive shells. While performing her duties within the plant she was injured by the explosion of a

124. *Stanley v. Powell*, L.R. 1 Q.B. 86 (1891).

125. *Green v. Chelsea Water Works Co.*, 70 L.T. 547, 549 (1894).

126. 2 All E.R. L.R. 471 (1946).

shell from causes unknown. Although there was no proof of negligence, the trial judge, Cassels, held that the case was governed by *Rylands v. Fletcher* and he concluded that the defendants were carrying on an ultrahazardous activity and hence were responsible without reference to fault. He regarded the principle as fundamental and as one that was applicable to all who may deal with highly dangerous substances or objects. He traced the parentage of the *Rylands* decision to the earlier rules under which absolute liability was imposed upon the custodian of vicious animals, and he drew liberally from Blackburn's opinion with its broad affirmation of duty to confine dangerous things. Cassels saw no reason why the principle should not have general application without reference to the place of the occurrence or the type of harm suffered by the victim. But he was out of step with the procession of the times. Judgment for the plaintiff was reversed by the Court of Appeal,¹²⁷ and an appeal from this reversal was dismissed by the House of Lords.¹²⁸

The opinions on appeal betrayed without exception a strong distrust of the *Rylands v. Fletcher* doctrine. Four of the seven judges cautiously repeated and emphasized the admonition against extension of the principle made fifty years earlier by Lindley, J., quoted above. One justice of the Court of Appeal (McKinnon) fell back upon an observation of Scrutton, L.J., in an earlier opinion, to the effect that "there are so many exceptions to it (*Rylands and Fletcher*) that it is doubtful that there is much of the rule left."¹²⁹ The opinions redound in expressions of abiding faith in the fault requirement, which is now referred to reverently as the "moral" principle,¹³⁰ while any rule imposing absolute liability was characterized as a "medieval" notion which "the courts in modern times have been vigilant to prevent from breaking bounds and invading areas of the law in which it has no place."¹³¹

Throughout the course of the opinions there is an obvious insistence that there is no single basic principle of strict liability:

"There are instances, no doubt, in our law in which

127. *Read v. Lyons & Co.*, Ct. of App. 1944, 1 All E.R. 106 (1945).

128. 2 All E.R. 471 (1946).

129. *St. Anne's Well Brewery Co. v. Roberts*, 140 L.T. 1 (1928).

130. *See, e.g.*, the opinion of Scott, L.J., in 1 All E.R. 106, 113 (1945).

131. *Id.* at 119.

liability for damage may be established apart from proof of negligence, but it appears to be unnecessary and historically incorrect to refer to all these instances as deduced from one common principle."¹³²

Despite this reassurance, no reader can escape the impression that the writers of all the opinions on appeal were aware that from the standpoint of history they were on unsure ground. Although they were determined to hold the line against any further encroachments upon the territory recently taken over by the fault principle, the variety of reasons advanced by them for a denial of liability is surprising and revealing. Scott, L.J., in the Court of Appeal, emphasized the fact that *Rylands v. Fletcher* involved harms between adjoining landowners and that only persons off the premises enjoy the right of protection against damage innocently inflicted. In the House of Lords Viscount Simon, L.C., found that the secret of *Rylands v. Fletcher* lay in the phenomenon of *escape*. This, to Simon, meant escape from a place where the defendant had occupation and control to some other place where he does not have such occupation and control. The fact that in the case at hand the explosive power once confined within the shell passed violently outside its container and worked injury to the plaintiff's person was not "escape" as the Viscount viewed it. It was further suggested in the same opinion that the manufacture of explosives during wartime was not a "non-natural" user, and hence that it would fall outside the principle as announced by the House of Lords. Lord MacMillan adopted a still different attack. He would limit the *Rylands v. Fletcher* principle to damages to property, as opposed to personal injury. Even had the plaintiff been on neighboring property, he observed, there could be no recovery unless there were injury beyond that to his person.

SUMMARY IN CONCLUSION

As the concept of tort liability gradually emerged from its medieval chrysalis and became nascent in English history it afforded little indication that the existence or nonexistence of defendant's blameworthiness was a matter of much concern to the law. This held not only for the early Anglo-Saxon proceeding, but for its eventual successor, the suit in Trespass, and even

132. 2 All E.R. 471, 474 (1946).

for the later developed action of Trespass on the Case. The suit in Case, however, did introduce the notions of *duty* and *neglect* which were destined to serve as the bases for the eventual appearance of the negligence requirement in the traffic cases later in the nineteenth century.

But despite the initial dominance of the idea of strict liability, there was evident almost from the beginning an intuitive concern by courts for the defendant's blameworthiness or lack of it. One classic seventeenth century decision, *Weaver v. Ward*, suggested that the person sued might escape liability by establishing that he was "utterly without fault." Indications of a similar concern were betrayed by allegations of "heedless" and "careless" driving which appeared quite regularly in pleadings in Trespass cases involving collisions even considerably prior to the nineteenth century, although these were probably quite unnecessary to a right to recover under that action.

In referring to the history of negligence prior to the nineteenth century Professor Winfield observed that "It is a skein of threads, most of which are fairly distinct, and no matter where we cut the skein we shall get little more than a bundle of frayed ends."¹³³ Indeed, this same observation can be made concerning the fault picture throughout the nineteenth century and even up to the present day in England. We are likely to gain a deeper insight into the significance of fault (or the lack of it) by fixing our attention upon the particular type of human activity involved and upon the economic and social demands of the time and place than we can gain by paying reverence to the language of the judges as they have undertaken to serve as spokesmen for their own society.

133. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. Rev. 184, 185 (1926).