

## University of St. Thomas Law Journal

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Volume 11  
Issue 3 *Spring 2014*

Article 6

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2014

# The Emergence and Doctrinal Development of Tort Law, 1870–1930

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### Bluebook Citation

G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870-1930*, 11 U. St. Thomas L.J. 463 (2014).

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## ARTICLE

# THE EMERGENCE AND DOCTRINAL DEVELOPMENT OF TORT LAW, 1870–1930

G. EDWARD WHITE\*

### INTRODUCTION

This article emphasizes three themes. The first of those is the emergence of the law of torts from its early nineteenth-century origins as an amorphous collection of civil actions not arising out of contract to an integrated subject, one that rapidly came to be treated as a basic common law field. Two parallel developments can be associated with that emergence: the interest of American legal commentators, practitioners, and courts in developing comprehensive principles of law around which common law fields could be organized and the proliferation of civil actions for personal injuries suffered in industrial mining, factory, and transportation accidents in the late nineteenth and early twentieth centuries.

The second and third themes are connected to doctrinal challenges faced by those who sought to articulate the governing principles of tort law and apply them across a range of cases from the 1870s through the 1920s, a period in which the industrializing tendencies of late nineteenth- and early twentieth-century American society precipitated more accidental injuries, most notably in workplace settings and from negligently manufactured products that injured users, consumers, or bystanders.

One doctrinal challenge in industrial accident cases was the problem of “faultless” accidental injury, namely injury caused by exposure to the machinery or products of an industrial civilization for which no one other than the injured person was deemed responsible. Sometimes victims of accidents failed to recover in tort because the persons who had injured them were not negligent; sometimes because their own negligence had contributed to their injuries or they were deemed to have “assumed the risk” of those injuries;

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and sometimes because they were injured by the negligence of a fellow employee and were thus unable to sue their employers.

Initially the late nineteenth-century law of torts treated such injuries as *damnum absque injuria*, injuries for which there was no legal remedy, and justified that treatment by emphasizing that the losses caused by industrial enterprises should lie where they fell, where negligence could not be shown, because the freedom to conduct such enterprises was basic to American society and should be encouraged. But as the nineteenth century gave way to the twentieth, the sheer number of workplace accidents, and the minimal sums recovered by victims, resulted in some, and ultimately most, American states replacing tort law with a system of workers' compensation for workplace injuries that was cause-based rather than based on fault.<sup>1</sup>

The emergence of workers' compensation might have evolved into a general treatment of accidents through statutory compensation systems, or at least in the reduction of accident cases adjudicated by the tort system. But instead the amount of personal injury litigation continued to increase in the first two decades of the twentieth century. Several factors contributed to this increase, including the growth of urban populations, new members of the legal profession who found personal injury litigation lucrative, especially because of the practice of contingent fees by which lawyers took a percentage of jury awards in exchange for not billing litigation clients, and the emergence of defective products suits by consumers, users, and even bystanders against the manufacturers of those products. The article reviews those developments.

The other doctrinal challenge was connected to another way in which late nineteenth-century tort law sought to limit the scope of liability for accidental personal injuries. That was through doctrines of causation. Not only were injuries that could be factually traced to another person's conduct deemed not to give rise to liability unless that conduct was negligent, some injuries that could be so traced were treated as outside the ambit of recovery and thus another example of *damnum absque injuria*. The doctrines that accomplished this designation of certain injuries as unaccountable were factual and legal, or proximate, causation.

Factual causation posited that for liability in tort to ensue, a prospective defendant's conduct had to be the principal cause of another's injury. Unless the injured person could show that but for the conduct of the defen-

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1. Throughout this chapter I am using the term "cause-based" to describe tort liability based solely on a causal connection between a defendant's conduct and an injury to a plaintiff. Cause-based liability does not require that the defendant's conduct be negligent or intentional. The term "cause-based" was not employed by late nineteenth- and early twentieth-century courts or commentators to describe liability without intent or fault. The term they employed was "act at peril" liability. The first sustained use of the term "cause-based" to characterize a standard of tort liability of which I am aware came in Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 78-79 (1993).

dant he or she would not have been injured, there was no recovery. This meant that when there were multiple causes of an accident, the burden was on plaintiffs to satisfy, by a preponderance of the evidence, the “but-for” test for factual causation. Even when that test was satisfied, plaintiffs needed to show that the *negligence* of another party was the factual cause of their injuries; cause-based liability was confined to only a few areas of tort law.

But even when a defendant’s negligence was the factual cause of a plaintiff’s injury, *damnum absque injuria* could still result. This was when the causal connection between the negligence and the injury was sufficiently remote, or unforeseeable, such that the defendant’s negligence was deemed not to be the proximate cause of the plaintiff’s injury. The doctrine of proximate causation tended to be invoked in three kinds of fact patterns: where injuries suffered by plaintiffs were of an unforeseeable type or extent; where plaintiffs’ injuries were foreseeable, but the injuries occurred in an unforeseeable manner; and where the particular victim of an injury was in a class of victims whose exposure to the risks caused by a defendant’s negligence was unforeseeable.

Like negligence itself, factual and legal causation were liability-limiting doctrines, designed to ensure that many of the risk-creating activities and products of an industrializing society would be insulated from accountability in tort. But as industrial accidents proliferated, creating many more fact patterns for lawyers and judges to confront, the application of principles of causation across a range of cases became more difficult, so much so that the integrity of the doctrine of proximate causation, in particular, seemed to be threatened. At one point Judge Benjamin Cardozo, then Chief Judge of the New York Court of Appeals, attempted sharply to reduce the use of the doctrine in negligence cases. But the consequence of Cardozo’s effort, and comparable efforts to erect negligence as a comprehensive organizing principle in tort, was not the achievement of doctrinal integrity for the field of torts, but something like the opposite.

Such, in overview, is the ground covered by this article. Two larger jurisprudential questions hovered around the doctrinal issues that were recurrently raised in personal injury cases between 1870 and 1930. One was what legal principles were foundational to tort liability, and thus foundational to the field of torts itself. The other was how those defining principles could retain their intelligibility over a larger and larger range of personal injury cases. In particular, how could the scope of liability for personal injury be kept to manageable limits and “faultless” victims yet be compensated for their injuries?

The remaining sections of the article detail the principal ways in which American tort law responded to those doctrinal and jurisprudential challenges. Section I sketches the state of the “law of Torts” in the early 1870s, when commentators began to write casebooks and treatises on tort law and

to identify doctrinal principles that would serve to define Torts as a common law field. Section II describes the emergence of Torts as a basic common law subject, taught in law schools and covered in treatises. Tort law's emergence was produced by a transformation of the way in which common law subjects were conceived and presented in law school courses and treatises, together with a proliferation of civil actions for personal injury in late nineteenth- and early twentieth-century America. Section III discusses tort law's response to the proliferation of personal injury suits by analyzing the central doctrinal challenges of the American tort system in the late nineteenth and early twentieth centuries. Those doctrinal challenges centered on the relationship of the negligence principle—the principle that accidental injury should not be compensated unless it followed from a defendant's being found legally at fault—to the proliferation of accidents causing serious injuries in the workplace and transportation sectors of industrializing America.

Four doctrinal challenges and responses are reviewed in Section III. One was the puzzle caused by the interaction of the doctrine of *damnum absque injuria* and the growing number of workplace and transportation sector accidents. A second was the relationship of the principle that liability in personal injury cases should presumptively be based on negligence to “multiple fault” cases, where both negligent defendants and injured plaintiffs had contributed to the plaintiffs' injuries. After several years of the application of traditional tort defenses to allow negligent employers to avoid liability for workplace accidents suffered by their employees, perceptions of the increasingly dangerous character of early twentieth century American workplaces caused legislatures to take a number of workplace injury cases out of the tort system.

A third doctrinal challenge was whether tort law should become the principal field governing injuries to the users and consumers of defective products. A fourth was whether doctrines of causation, both factual and “legal” (or “proximate”), should be used to limit the liability of negligent tortfeasors whose conduct contributed to, but did not solely cause, personal injury, or whose conduct produced injuries that were unforeseeable in their type or extent, occurred in an unforeseeable manner, or were inflicted upon unforeseeable classes of persons. In the late 1920s and early 1930s an effort was made first by Judge Benjamin Cardozo in the case of *Palsgraf v. Long Island R.R. Co.*,<sup>2</sup> then by the American Law Institute in its First Restatement of Torts,<sup>3</sup> to decide all such “unforeseeable” personal injury cases by subsuming the proximate causation inquiry in a negligence inquiry, but that effort received considerable criticism and failed to gain doctrinal traction.

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2. 162 N.E. 99 (N.Y. 1928).

3. RESTATEMENT OF TORTS § 281 cmt. g, illus. 3 (1934).

Finally, the Conclusion discusses the implications of the ALI's failed effort to summarize the governing principles of tort law in the late 1920s and early 1930s. The episode revealed that at the very moment when personal injury cases were generally understood as being primarily governed by a system of tort law emphasizing the negligence principle and liability-limiting doctrines of factual and proximate causation, the defining doctrinal features of tort law remained, in the terms employed by the ALI to justify its project of restating common law subjects, "complex" in their composition and "uncertain" in their application.<sup>4</sup>

## I. A SNAPSHOT OF THE FIELD OF TORTS AT ITS ORIGINS

In 1870 Nicholas St. John Green, a Boston practitioner, was asked to give a course in "Torts" at Harvard Law School. Green was thirty-nine years old at the time; he had graduated from Harvard College in 1851 and shortly thereafter had entered law practice in Boston. He had enlisted in the Union Army when the Civil War broke out, serving as a Union Army paymaster in Norfolk, Virginia. After the war Green returned to practice as a solo practitioner, a status he retained after his 1870 appointment as a lecturer at Harvard Law School and instructor at Harvard College. Green remained in both positions for the next three years, teaching Torts each year.<sup>5</sup> Green's 1870 course on Torts was the first time the subject was taught at Harvard.

It was customary in the early 1870s for professors at Harvard to use treatises on legal subjects as the required books for their classes. The case method of instruction had been introduced by Dean Christopher Columbus Langdell in his 1871 casebook on contracts,<sup>6</sup> the first half of which had appeared in 1870,<sup>7</sup> but Langdell was alone among his Harvard colleagues, and indeed in the entire legal academy at the time, in using a casebook in his classes.<sup>8</sup> Green therefore sought out a Torts treatise for classroom use.

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4. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 70, 66-77 (1923) [hereinafter *ALI Proceedings*]. The discussion of "uncertainty" and "complexity" in the law was probably written by the American Law Institute's first director, William Draper Lewis of the University of Pennsylvania School of Law.

5. Green taught Philosophy and Political Economy at Harvard College. In 1873 he resigned his Harvard positions to become a professor of law at Boston University Law School. For more detail, see BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906*, at 347-48 (Daniel Ernst & Thomas A. Green eds., 2009); PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 152-71 (1949); Philip P. Wiener, *The Pragmatic Legal Philosophy of N. St. John Green (1830-76)*, 9 J. HIST. IDEAS 70, 73 (1948).

6. C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS* (Boston, Little, Brown 1871).

7. CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (Boston, Little, Brown 1870).

8. When Green left Harvard in 1873 to teach at Boston University Law School, its dean, Melville Bigelow, allegedly said that Green had left because he disliked Langdell and disliked his case method of instruction, feeling that Langdell did not give students enough opportunity to

There were two treatises on the “law of Torts” available to Green at the time. One was Francis Hilliard’s *The Law of Torts*, issued by an American publisher, Little, Brown, in 1859. The other was Charles G. Addison’s *Wrongs and Remedies: The Law of Torts*, whose first edition was published in England in 1860. Both Hilliard and Addison’s books gave attention to a variety of topics that eventually came to be excluded from the field of torts. Addison’s coverage included the wrongful seizure and conversion of chattels, bailments, easements, adultery, and seduction; Hilliard’s included attention to general rules of pleading and evidence. Both authors defined torts as the entire gamut of civil wrongs that did not arise out of contract.

Green resolved to use Addison’s book, but in a severely abridged edition, which Green himself authored, that was published by Little, Brown in 1870. In the preface to his edition, Green rationalized omitting large chunks of Addison’s original coverage:

[A] large portion of the matter which [Addison’s 1860 edition] contained (as for instance the chapters on bailments, easements, patents, and copyrights, and much of the text relating to evidence, pleading, and practice) seemed to fall more properly within branches of instruction taught by others, while the full citation of English statutes, and the special adjudications upon them, appeared to be almost valueless to the American student.<sup>9</sup>

In a review of Green’s edition of Addison’s work, Oliver Wendell Holmes Jr. said that Green’s rationale “may convince the practicing lawyer, as a comparison has convinced us, that he, as well as the students, will do better to buy this cheap little book than the bulky and costly volume from which it is abridged.”<sup>10</sup>

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discuss the cases he selected. Bigelow’s statement was reported in Wiener, *Evolution and the Founders of Pragmatism*. Kimball disputes Wiener’s explanation, which was based on recollections of Green’s son in the 1940s. Kimball suggests that Green left Harvard because he was passed over for a professorship at Harvard Law School in 1873, when James Barr Ames was appointed. In Kimball’s view, Green was well positioned to receive the professorship, having successfully taught Torts and Criminal Law for the past three years, being the only one of nine Harvard Law School lecturers who participated in law school faculty governance during 1871 and 1872, and having written some well received scholarship in those years. Green did not receive the appointment, Kimball surmises, because he drank to excess. Kimball bases his suggestion on a newspaper report that Green’s premature death in 1876 was a suicide and on handwritten notes in the Harvard University archives that describe Green as a “drunkard.” KIMBALL, *supra* note 5, at 347–48, 348 nn.5, 8.

9. Leon Green, *Preface to CHARLES G. ADDISON, THE LAW OF TORTS*, at iii (Boston, Little, Brown 1870). Green’s name did not appear on the title page of the 1870 edition of Addison, and his preface was unsigned.

10. Oliver W. Holmes Jr., Book Review, 5 AM. L. REV. 340, 340 (1871) (reviewing Charles G. Addison, *WRONGS AND REMEDIES, ABRIDGED FOR USE IN THE LAW SCHOOL OF HARVARD UNIVERSITY* (Nicholas St. John Green ed., 1870)). Holmes identified Green as “the able lecturer at Cambridge” for “whose use [the abridged 1870 edition of Addison] was prepared.” *Id.* at 341. Holmes was an editor and frequent contributor to the *American Law Review* in the 1870s, and many of his notes and reviews were unsigned. He identified himself as the author of the review of

Holmes went on to say “all that has been omitted” from Green’s abridgement of Addison “will be found better done in other common books.”<sup>11</sup> But a fundamental problem with Addison’s treatise, Holmes felt, was that it lacked a core subject. Torts, at least as presented by treatise writers, seemed to Holmes simply a residual category of law, a grab-bag of civil actions not arising out of contract that could include anything from “all the wrongs remedied by the actions of trespass, trespass on the case, and trover,” to “actions for deceit,” to “seduction.” In 1871 Holmes was prepared to conclude that “Torts is not a proper subject for a law book” because its collection of actions lacked any common features except not being crimes and not emanating from contractual relations. Addison, by simply cataloguing all the actions that possessed those features, had not approached the subject “philosophically,” which Holmes equated with “writ[ing] a treatise as if it were an integral part of a commentary on the entire body of . . . law.”<sup>12</sup>

## II. TORTS EMERGES AS A COMMON LAW SUBJECT

The episode involving Green, Addison’s treatise, and Holmes’s review presents us with a snapshot of the state of the law of Torts in 1871, when Harvard Law School had made a decision to offer the course but the only treatises on the subject included topics that seemed more appropriately grouped in other fields, and Holmes was prepared to doubt whether Torts was a proper subject for treatises at all.

All that changed by the early years of the next decade, when Holmes himself offered a course in Torts at Harvard Law School, using a Torts casebook prepared by his colleague James Barr Ames, a devotee of Langdell’s case method.<sup>13</sup> By then Torts had not only begun to establish itself as a basic course in the curriculum of law schools, but Holmes and others had begun to treat it “philosophically,” extracting foundational themes and principles that defined the subject.

### A. *From a “Manual” to a “Philosophical” Organization of Common Law Subjects*

The emergence of Torts as a discrete legal field, with a core subject matter and distinctive doctrinal issues, had come comparatively late in the history of American legal education. Of the five courses that were estab-

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Green’s 1870 edition of Addison in copies of volume 5 of the *American Law Review* that he preserved in his papers.

11. *Id.*

12. *Id.* Holmes concluded his review by suggesting that Green might be capable of approaching Torts “philosophically,” describing Green as “the able lecturer for whose use this abridgement was prepared, and who is achieving [such a desired] success at Cambridge.” *Id.*

13. The casebook was JAMES BARR AMES & JEREMIAH SMITH, *A SELECTION OF CASES ON THE LAW OF TORTS* (Cambridge, Harvard Law Review Publishing 1893).



lished as mandatory requirements for the first year of law school by Harvard in 1873, four of those courses—Civil Procedure, Contracts, Criminal Law, and Property—had been included in the curriculum of Harvard and other law schools from the early nineteenth century on.<sup>14</sup> For the placement of Torts in that group to take place, two apparently unconnected developments in American legal history needed to converge. Understanding that convergence requires a closer look at the materials of legal education and the legal profession, and at the rapid growing exposure of Americans to accidents related to industrialization in the decades after the Civil War. In an 1872 review of Langdell's 1871 edition of *Cases on Contracts*, Holmes pointed out that there was "nothing of . . . the 'manual method'" in Langdell's arrangement of the cases he presented.<sup>15</sup> By "manual method" Holmes meant the listing of a case in accordance with the subject matter it concerned or the status of the parties involved, such as coal, insurance, charterers, or services.<sup>16</sup> This approach was characteristic of legal treatise writers from James Kent's *Commentaries*, which first appeared in 1826, well into the 1870s. Writers covering the subject of contract law, for example, organized their discussions of topics around such categories as innkeepers, seamen, drunkards or spendthrifts, slaves, infants, and married women.<sup>17</sup> Writers on actions in tort similarly emphasized subject matter categories, such as public corporations and officers, public ways, carriers, personal services, and management of property.<sup>18</sup>

Langdell had chosen a different approach, organizing the cases he presented doctrinally, or as Holmes put it, "philosophically." Langdell's 1871 Contracts casebook created three doctrinal divisions: mutual consent cases, consideration cases, and conditional contracts cases. The last two divisions were further subdivided into jurisdictional and chronological clusters. The great bulk of Langdell's cases came from England, Massachusetts, or New York and were sequenced over time, so that students could observe

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14. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 454, 458 (1921) (listing "Pleading Practice and Evidence," Contracts, Criminal Law, and Real Property as being offered by Litchfield Law School [Connecticut], the most prominent law school in the first three decades of the nineteenth century, and Harvard between 1835 and 1838). The introduction of Torts as a basic course at Harvard, and the sequencing of the curriculum between first-year and second-year courses, was first formalized in the *Harvard Law School Catalog 1873-74*. For more detail on the placement of Torts in the basic first-year curriculum at Harvard, see KIMBALL, *supra* note 5, at 208-09.

15. Book Notices, 6 AM. L. REV. 353, 353 (1872) (reviewing C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS (1871)).

16. *Id.* at 354.

17. For illustrations, drawn from contracts treatises published between 1827 and 1878, see WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 58-67 (1994).

18. THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE, at vii-xxi (New York, Baker, Voorhis 1869).

the evolution of the concepts of offer, acceptance, and consideration that Langdell considered basic to contract formation.

The technique of arranging legal fields around fundamental doctrinal categories, themselves reflecting overarching principles that served to define a field, had not been adopted by any other American treatise writer when Langdell issued his contracts casebook, and only Langdell had chosen to center a legal book on cases, accompanied by few notes or explanations. Previous works primarily used cases as illustrations of the numerous “manual” categories their authors cataloged.<sup>19</sup>

Holmes praised Langdell’s approach, finding it exceptionally promising in two respects. First, he thought that Langdell’s chronological presentation of cases underscored the evolutionary quality of legal doctrine, in which doctrinal principles were continually modified in their application over time. Second, he believed that Langdell had taken a step toward the philosophical organization of legal subjects by recognizing, as Langdell put it in the preface to his 1871 edition of *Cases on Contracts*, that “the number of fundamental legal doctrines is much less than is commonly supposed,” so that “the same doctrine [made] its appearance in . . . many different guises.” By “classif[y]ing and arrang[ing]” doctrines so “that each should be found in its proper place, and nowhere else,” mastery of a subject “would cease to be formidable.”<sup>20</sup> Langdell sought to do that by reclassifying the “manual” categories of previous contracts treatises into the analytical categories of offer, acceptance, and consideration.

If Holmes was enthusiastic about Langdell’s approach to the subject of Contracts, why, a year earlier, had he concluded that Torts could not be approached in a similar manner? In fact, within a few years of reviewing Green’s edition of Addison, Holmes changed his mind and began an effort to arrange the subject of Torts “philosophically.” But in the years of 1870 and 1871 he may have been doubtful that such an effort could be undertaken because of a feature of “Torts” cases that apparently distinguished them from Contracts cases.

Langdell had found the presentation of Contracts cases through the “manual” method far too cluttered and repetitive, distracting readers from principles around which the subject could be organized. But he, and the manualists, had no difficulty recognizing the distinctiveness of their subject matter: all the cases involved contracts, and members of the public knew, in a general sense, what a “contract” was, even if they might not appreciate the technicalities of contract formation. “Torts” were a different matter. Civil wrongs not arising out of contract did not seem to have any common features except their non-criminal, non-contractual status. They ranged from

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19. See KIMBALL, *supra* note 5, at 89 (“[O]nly [those cases] which seemed to afford the best illustrations of the doctrine under consideration” would be “incorporate[d] . . . in the text.” (internal quotations omitted)).

20. LANGDELL, *supra* note 6, at vi–vii.

damage caused by the bursting of reservoirs, to false statements that lowered the reputation of others, to dog bites suffered by passersby on public streets. The only common feature of Torts cases seemed to be their association with certain civil writs—most commonly trespass, trespass on the case, slander, and libel.

By the 1850s the writ system of pleading had begun to be modified in many American jurisdictions, primarily in the direction of allowing lawyers, who had failed to match the strict requirements of writs to the particular facts giving rise to a civil action, an opportunity to refile their cases without prejudice.<sup>21</sup> Whatever the basis for that reform,<sup>22</sup> it was accompanied by commentary suggesting that the writ system was inconsistent with a “philosophical” ordering of legal fields. As early as 1859 Hilliard had concluded that actions in tort had been characterized by “a singular process of inversion,” in which *remedies* (the procedural requirements of the writs) were substituted for *wrongs* (the substantive elements of an action). Hilliard found it “difficult to understand how so obviously unphilosophical a practice became established.” Emphasis on the requirements of the writs “consider[ed] wrongs as merely incidental to remedies . . . instead of explaining [the elements of the wrongs] themselves,” which for Hilliard “reverse[d] the natural order of things.”<sup>23</sup>

Holmes was of a similar view, concluding that “if [the writs] had been based upon a comprehensive survey of the field of rights and duties, so that they embodied in a practical shape a classification of the law” they could have been the basis of a “philosophical” ordering of legal subjects. But the writs were “so arbitrary in character, and owe[d] their origin to such purely historical causes,” that they were useless for that purpose.<sup>24</sup>

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21. For example, the writ of trespass was required if a party’s injuries had been “directly” inflicted, whereas in cases where a defendant had “indirectly” caused injuries to incur, the proper writ was trespass on the case. For more detail on the modification, and eventual abolition, of the writ system of pleading between 1848 and the 1870s, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 340–48 (1st ed. 1973); ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 52–55 (1952).

22. Historians have reached different conclusions about the basis for mid nineteenth-century modifications of the writ system. Compare MILLAR, *supra* note 21, at 53–54 and FRIEDMAN, *supra* note 21, at 345–47 (suggesting that reforms in civil procedure were an effort to head off the prospect that state legal systems founded on the common might be replaced with legislative codes, and were also responses to the arcane technicalities of the writ system), with G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 9–11 (2d ed., 2003) (suggesting that the technical requirements of the writs actually functioned as the equivalent of the substantive elements of legal doctrines; that mastering those requirements was a way in which lawyers could demonstrate their professional competence; and therefore one would not have expected established lawyers to urge modification of the writ system unless its technical requirements were not being rigorously adhered to).

23. 1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS*, at v (Boston, Little, Brown 1859).

24. Book Notices, 5 AM. L. REV. 359, 359 (1871) (reviewing *THE CODE OF PROCEDURE OF THE STATE OF NEW YORK, AS AMENDED TO 1870* (John Townshend ed., 10th ed., 1870)).

In his *Law of Torts* treatise Hilliard attempted to show that the subject “involve[d] principles of great comprehensiveness” that were “not modified or colored by diverse *forms of action*.”<sup>25</sup> But in Holmes’s opinion Hilliard had been no more successful than Addison in that effort. Despite his recognition that a “philosophical” organization of the subject of Torts required an emphasis on the nature and elements of each of the existing civil wrongs not arising out of contract, with a view toward extracting the defining principles of the field, Hilliard’s compilation of “tort actions” was still partially driven by procedural remedies rather than the wrongs themselves. He still had difficulty separating wrongs that sounded distinctively in tort from those that were encompassed by other fields of law; he had included chapters on crimes and property and chapters on evidence and damages in his treatise. So, Holmes noted in his 1871 review, had Addison.<sup>26</sup>

Thus a prerequisite to the emergence of Torts as an independent field of law, for Green and Holmes in the early 1870s, was the derivation of overarching principles that defined the subject. By 1873 Holmes felt able to derive such principles. In an article entitled *The Theory of Torts* he announced that “an enumeration of the [civil, non-contractual] actions which have been successful, and of those which have failed, defines the extent of the primary duties imposed by [tort] law.” His canvassing of tort writs had revealed three classes of successful actions: those exemplified by cases stemming from the escape of water in reservoirs or wild animals, in which liability attached regardless of the state of mind of the defendant; those such as assault, battery, or fraud, where a culpable intent to commit the act was a prerequisite for liability; and another class of cases in which a showing of culpability was also required to make out a successful action, but culpability (better understood as accountability) was not based on intent but on an assessment of the social utility of the defendant’s conduct, that assessment being grounded on “motives of policy . . . kept purposely indefinite.” The last class of cases Holmes labeled “modern negligence” cases.<sup>27</sup> Torts was thus a branch of law that contained three standards of civil liability: absolute liability, intent, and negligence.

Holmes began his article by saying that “[t]he worst objection to the title Torts . . . is that it puts the cart before the horse, that legal liabilities are arranged with reference to the forms of action allowed by the common-law for infringing them.”<sup>28</sup> But having demonstrated that the tort writs could be classified by reference to substantive standards of liability, Holmes con-

25. HILLIARD, *supra* note 23, at vii (emphasis in original).

26. Green had also remarked on this tendency, noting in the preface to his 1870 edition of Addison that the subject of Torts was “usually treated of under the titles of the various forms of action which lie for the infringement of . . . rights which avail against persons generally, or against all mankind.” Green, *supra* note 9, at iii.

27. Oliver W. Holmes Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 659–63 (1873).

28. *Id.* at 659.

cluded that “there is no fault to be found with the contents of text-books on this subject,”<sup>29</sup> provided that the contents were subject to a “philosophical” arrangement.

The above discussion of contracts and torts casebooks and treatises in the years immediately following the Civil War has sought to demonstrate that despite the surfacing of works on “the law of Torts” as early as the late 1850s, and despite Harvard Law School’s decision to offer a course in Torts, and then make Torts a basic first-year course, between 1870 and 1873, Torts had struggled to establish itself as a discrete legal subject. Part of that struggle, the discussion suggests, can be attributed to the conventional organization of legal fields around the writs associated with them and by means of a manual method of categorizing cases in a field by their subject matter or by the status of the parties. The writs employed for civil actions not arising out of contract were diffuse and the types of actions similarly varied. Moreover, actions in tort, unlike those in property or contract, typically did not involve persons in frequent, ongoing relations with one another, preventing the status of litigants from being a convenient basis for classifying torts cases.

The result, Green, Holmes, and Hilliard recognized, was that neither the writs employed in torts cases nor the categories employed by manualists seemed to provide a basis for a “philosophical” organization of the field of tort law. Hilliard, while believing that Torts should be treated as a discrete common law subject, had “much diffidence as to the *execution*” of that belief in his 1859 treatise,<sup>30</sup> and that work, like Addison’s, ended up including in its coverage material that Green and Holmes felt properly belonged in other areas. Even after Green abridged large sections of Addison’s treatise in the hope of covering topics that seemed “philosophically” connected, Holmes concluded that Torts was not a proper subject for a law book.

But once Holmes discovered that tort cases could be grouped into three liability regimes, tracking the “primary duties imposed by the law,” he no longer found any “fault . . . with the contents” of works covering the subject of Torts.<sup>31</sup> Holmes had done for Torts something comparable to what Langdell had done in his Contracts casebook: reduce the numerous civil actions not arising out of contract to analytical categories. Holmes’s methodology was designed to accomplish the same goal as Langdell’s: to show that the number of fundamental torts doctrines was much less than commonly supposed. Holmes demonstrated that the crucial feature linking diverse tort cases was not the writs they employed but the standard of civil liability to which the defendant was subjected. Just as Langdell reduced the manual categories of contract law to the far more comprehensive analytical catego-

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29. *Id.* at 660.

30. HILLIARD, *supra* note 23, at v (emphasis in original).

31. Holmes, *supra* note 27, at 660.

ries of offer, acceptance, and consideration, Holmes reduced tort cases to illustrations of absolute liability, intentional harm, and modern negligence.

Torts emerged as a discrete legal subject once legal commentators concluded that it could be organized “philosophically” because all cases sounding in tort had common elements. One could argue that a shift on the part of commentators from a “manual,” writ-based organization of common law fields to the sorts of organizations employed by Langdell and Holmes might have been sufficient for the late nineteenth-century appearance of Torts as a subject that law schools came to consider basic and lawyers incorporated into their practices. But something more than a change in the ways in which materials of legal study were organized would appear necessary for the emergence of Torts. From a field not offered for study by Anglo-American lawyers, nor treated as a professional specialty before the Civil War, Torts evolved into a basic course in the Harvard Law School curriculum by 1873, and for the remainder of the century a slew of Torts casebooks and treatises appeared in America. Why had tort law evolved from a poorly defined residual common law category to a mainstream legal subject?

### *B. The Proliferation of Personal Injury Actions in the Late Nineteenth Century*

Here we turn to the second development that needs prominent emphasis in a history of the late nineteenth-century emergence of a tort law as a discrete common law subject. That development takes us to the other end, as it were, of the American tort system. We have thus far been focusing on the upper ends of that system, where civil actions not arising out of contract were defined, classified, and analyzed by commentators who sought a comprehensive doctrinal organization of the field of tort law. Now we turn to the lower ends of the system, where tort actions were generated in the first place. That requires an investigation of the sort of injuries that gave rise to common-law actions for civil damages at the time Torts emerged as a discrete legal field.

#### *1. Data on Personal Injuries*

Was there a significant increase in the number of Americans injured in civilian life after the Civil War? And, if so, was the growth of tort law a response to this increased number of injuries? The leading study of the legal system’s response to accidental injury in the late nineteenth century, John Fabian Witt’s *The Accidental Republic*,<sup>32</sup> has answered both questions in the affirmative. But although Witt’s conclusions seem intuitively plausible, he acknowledges the sizable obstacles to recovering accurate information

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32. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

about the number of injured persons in the American population during the years in which tort law was first conceived as a discrete field.<sup>33</sup>

Several factors contribute to the paucity of reliable information about the number of injuries that might have resulted in tort actions and their potential increase during the latter years of the nineteenth century. As a preliminary matter, injuries needed to be reported in some fashion to become public information, and in the nineteenth century there were few institutions, such as the Federal Census, state bureaus of labor statistics, or state railroad commissions, charged with compiling information about injuries. The U.S. Census only began reporting accidental deaths in 1850, and only began to particularize the settings of those deaths (railroads, mining, and “injuries by machinery”) by 1870.<sup>34</sup>

Moreover, all the institutions that catalogued deaths or injuries needed to rely on those events being reported by affected persons or their relatives. Most historians have surmised that self-reporting resulted in injuries being significantly under-reported. And when one recognizes that for many nineteenth-century Americans, “age-old sources of injury, illness, and premature death had been more or less integrated into the fabric of everyday life,” and “appeared to be caused by some combination of natural forces, acts of God, and fate,”<sup>35</sup> injury and death may not have seemed, in many instances, worth reporting.

But our concern is not so much with the incidence of injury and death in the late nineteenth-century American population as a whole, as with the incidence of injuries that might have prompted those injured to seek legal redress. This brings us into a realm in which perceptions about injuries, compensation for those injuries, and the role of the legal system as a means for providing that compensation came to affect the response of injured persons in the late nineteenth century.

Here the data are more extensive. Late nineteenth- and early twentieth-century commentators on accidental injuries, and injury rates, thought that the United States had a much higher rate of accidental railroad, streetcar, and mining injuries than European nations; thought that accidental injuries associated with railroading, streetcar riding, mining, and the industrial workplace were dramatically increasing over time; and believed that such injuries were not to be explained as the natural fortuities of life but as the product of the increasingly risky environment of work in an industrializing environment in which transportation increasingly took place by railroad or streetcar.<sup>36</sup>

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33. “It is notoriously difficult to measure accidental injury and death rates during the nineteenth century.” *Id.* at 25.

34. *Id.* at 26.

35. *Id.* at 28–29.

36. For illustrations of late nineteenth- and early twentieth-century commentators reaching those conclusions, see *id.* at 26–29, 225–26 nn.28–44.

At the same time, commentators were recognizing the larger number of personal injury cases brought in the courts.<sup>37</sup> Not only was the volume of those cases remarked upon, so was the novelty of the causes of action advanced. Moreover, government studies revealed that many of the claims originated from injuries suffered in industrial workplaces.<sup>38</sup> Hilliard had noted, in his 1859 treatise, the “very large and increasing proportion of actions in tort” and the accompanying growth of novel theories for recovery.<sup>39</sup> Thomas Cooley introduced his 1879 treatise on Torts by remarking that “more frequent controversies” involving tort law were emerging because of the “powerful tendency” of the “new inventions and improvements” made in transportation and industrial enterprise to create, along with “new occupations,” new risks to workers.<sup>40</sup> Reports of the Massachusetts Bureau of Statistics and Labor in 1871 and 1872, and an 1890 report of the Eleventh U.S. Census, found that railroad workers, passengers on railroads and streetcars, miners, and textile workers had disproportionately high incidents of accidental injuries and deaths in those decades, and that most of their accidents were caused by exposure to railroad or streetcar travel or to industrial machinery.<sup>41</sup>

## 2. *Limits on Personal Injury Suits Before the Civil War*

It does not require much of a causal leap to conclude that the higher incidence of accidents in late nineteenth-century America, coupled with the growing perception among members of the public that a connection existed between those accidents and the increased dangers to which industrial workers and the public generally were exposed, might have resulted in more personal injury cases being brought in the courts. But there were other factors contributing to the burgeoning of tort litigation in the years after the Civil War.

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37. One study of litigation in New York City has found that in 1890 the number of accident cases brought in the state courts was eight times the number brought in 1870, and that in 1910 tort cases made up 40.9 percent of a state trial court’s docket, whereas in 1870 they made up 4.2 percent. RANDOLPH E. BERGSTROM, *COURTING DANGER* 20 tbl. 4 (1992). A study of litigation in Boston in roughly the same time period concluded that only “a dozen or so” lawsuits were filed in the Boston Superior Court for “alleging damage caused by the negligent operation of a horsecar,” whereas in 1900 there were more than 800 torts suits for damage caused by the operations of streetcars. ROBERT A. SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880–1900*, at 105 (1981).

38. For illustrations, see the studies cited *infra* note 41.

39. HILLIARD, *supra* note 23, at x, 83–84.

40. THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 1 (Chicago, Callaghan 1879).

41. MASS. BUREAU OF STATISTICS OF LABOR, REPORT 484–85, 504–05 (1871); MASS. BUREAU OF STATISTICS OF LABOR, THIRD ANNUAL REPORT 422–23 (1872); WITT, *supra* note 32, at 26–27, 225 n.28.



a. *Antebellum Understandings of “Personal Injury”*

Against the backdrop of dramatic post-Civil War increases in tort actions for personal injury, historians have recently investigated the state of personal injury claims in the late eighteenth and early nineteenth centuries. Their findings reveal a starkly different universe of claims from that which emerged after 1870. A variety of factors combined to create that universe.

First, personal injury suits in late eighteenth- and early nineteenth-century America tended to be brought not by the injured victims but by third parties, and were typically for the loss of domestic services or for the expenses incurred by third parties in the treatment of the victims. Second, not all third parties who suffered pecuniary losses because of injuries to others were eligible to recover. Loss of services actions were conceptualized as part of the law of domestic relations, which, as we have seen, pivoted around Blackstone’s typology of relationships within households: those of master/servant (including master/slave), husband/wife, and father/child. Only masters, husbands, and fathers were deemed responsible for the care and maintenance of servants, wives, and children, so only persons holding the status of masters, husbands, or fathers could file claims for “domestic” personal injuries. Thus, personal injury claims cannot be understood as sounding in tort in late eighteenth- and early nineteenth-century America. Injured servants, wives, and children could not bring personal injury suits themselves, nor could they bring third-party claims for damages they might have incurred because of injuries to masters, husbands, or fathers.<sup>42</sup> The idea of something like a right in individuals to obtain compensation for personal injuries brought about by the acts of others appears neither to have been prominent in the consciousness of injured Americans nor an entrenched feature of the legal system. When such injuries were thought of as prompting legal redress, it was because of their adverse effects on others who were thought of as dependent on the services of the persons injured.

b. *Witness Disqualification Rules*

But even had individuals who suffered personal injury because of the conduct of others been inclined to seek recovery through the legal system, they would have faced formidable barriers in bringing personal injury claims. One barrier was evidentiary. Moderns coming into contact with the

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42. Between 1846 and 1869 the limitation of third-party claims to husbands and fathers was replaced in twenty-nine states by wrongful death statutes. Wrongful death statutes inverted the beneficiaries of third party suits when husbands and fathers died, allowing “widows and next of kin” to recover. “Next of kin” was a term of art employed when a person died without a will: it did not include husbands or wives. Thus, instead of third-party suits for the loss of services being limited to husbands and fathers (as well as masters), the wrongful death statutes limited such suits to wives, children, and dependents. For more detail, see John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 *LAW & SOC. INQUIRY* 717 (2000).

legal system may find it difficult to grasp that, until the latter half of the nineteenth century, witness disqualification rules prevented individuals, and many persons closely associated with them, from giving testimony in court where the individuals were parties to lawsuits. The witness disqualification rules were based on the principle that anyone with an interest in the outcome of litigation lacked the “Integrity and Discernment” required of witnesses.<sup>43</sup> This meant, in a large number of potential cases, the persons most capable of giving testimony as to how they were injured were barred from doing so. Injured persons considering tort suits thus needed to construct the narrative of their claims exclusively from testimony of disinterested witnesses. In the case of many accidents, this meant relying on the fortuity of strangers being present when the person was injured; in workplace injury cases, it might mean relying on the testimony of fellow workers who had few incentives to testify against their employers.<sup>44</sup>

The witness disqualification rules were still in place in most states into the 1850s, but beginning with Connecticut in 1848, northern states began to admit party testimony, and by 1857 New York and Massachusetts had followed. By the 1870s the rules had been abolished in most states.<sup>45</sup> This did not result, however, in changing the incentives for employees to testify against their employers, or in necessarily expanding the opportunities for injured persons to fortify their suits through witness testimony.

### c. *Other Barriers to Personal Injury Suits*

One of the striking features of late nineteenth-century personal injury law was the absence of mining accidents as the basis for tort claims. As early as the 1870s, deaths from mining injuries had been identified as numerous and growing. But a sample of Pennsylvania torts cases before 1900, digested by the West Publishing Company, found six such cases arising out of mining injuries, as compared with 203 cases involving injuries to persons on or near railroad tracks. Given the large bituminous coal and anthracite coal mining operations in Pennsylvania in the nineteenth century, so small a sample suggests a disinclination on the part of miners to bring lawsuits for workplace injuries. Witt, noting the marked discrepancy between nineteenth-century mining injury and railroad injury cases in Pennsylvania, at a time when miners had no workers’ compensation, speculates that fear of

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43. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 86–87 (Garland Publ’g, Inc. 1979) (1754). For more detail on the witness disqualification rules and their eventual abolition, see WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 24–25, 60, 156 (Stanley N. Katz ed., 1975); John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 *COLUM. L. REV.* 1168, 1174–76 (1996). See also WITT, *supra* note 32, at 56–57.

44. For more detail, see Kenneth S. Abraham, *The Common Law Prohibition on Party Testimony and the Development of Tort Liability*, 95 *VA. L. REV.* 489 (2009).

45. NELSON, *supra* note 43, at 156–57; George Fisher, *The Jury’s Rise as Lie Detector*, 107 *YALE L.J.* 575, 673–74, 709–711 (1997).

employer reprisals, and the dominant market positions of mining companies, functioned to sharply reduce the number of miner personal injury plaintiffs, who would likely be bringing suit against their employers.<sup>46</sup>

One might extend Witt's hypothesis further, and speculate that the bargaining position of most industrial laborers, when coupled with the retention of "master/servant" deference workplace relationships in the mines, factories, and railroads of the late nineteenth century, served to limit the number of personal injury suits arising out of workplace injuries. In the West Publishing Company sample of Pennsylvania cases, the 203 railroad cases did not include work accidents: they were brought by non-employees of the railroads.<sup>47</sup>

The barriers in the mining and mill cases may well have been more cultural than evidentiary, but even after the abolition of the witness testimony rules, the late nineteenth-century law of evidence posed obstacles to plaintiffs seeking to advance personal injury suits. One of the most formidable of those obstacles was the so-called *res gestae*<sup>48</sup> doctrine, a component of the hearsay rule, which, with notable exceptions, excludes from testimony statements that could not be corroborated by the direct testimony of a witness. The *res gestae* rule first made its appearance in early nineteenth-century contracts cases.<sup>49</sup> It barred from testimony any out-of-court statements that were not "contemporaneous with" events that formed the basis of lawsuits.<sup>50</sup>

In personal injury suits arising out of accidents, the *res gestae* rule, when interpreted strictly, often ended up barring the introduction of eyewitness testimony crucial to the success of the plaintiffs' claims. Virtually all post-accident statements by servants or agents of companies who were defendants in torts suits were not permitted to be introduced as evidence against the companies, whether the corporate defendants were mines,<sup>51</sup> railroads,<sup>52</sup> stagecoaches,<sup>53</sup> or steamboats.<sup>54</sup> This was so even when the state-

46. Witt also states that tort actions by employees of textile mills in the early to mid nineteenth century were rare for the same reasons. WITT, *supra* note 32, at 55–56.

47. For more detail, see *id.* at 54–56.

48. Latin for "things done," meaning, with respect to the testimony of witnesses in civil litigation, statements made contemporaneously with the events that precipitated the litigation, such that they could be said to "spring out of" those events. 1 FRANK S. RICE, THE GENERAL PRINCIPLES OF THE LAW OF EVIDENCE WITH THEIR APPLICATION TO THE TRIAL OF CIVIL ACTIONS AT COMMON LAW, IN EQUITY AND UNDER THE CODES OF CIVIL PROCEDURE OF THE SEVERAL STATES 375 (Rochester, Lawyers' Co-operative Pub. Co, 1892).

49. See, e.g., Salem India Rubber Co. v. Adams, 40 Mass. (23 Pick.) 256, 265 (1839). For more detail on the application of the *res gestae* doctrine to tort cases in the late nineteenth century, see WITT, *supra* note 32, at 57–58.

50. RICE, *supra* note 48, at 375.

51. Lincoln Coal Mining Co. v. McNally, 15 Ill. App. 181, 184–85 (Ill. Ct. App. 1884).

52. Forsee v. Alabama Great S. R.R. Co., 63 Miss. 66, 72 (1885).

53. Maury v. Talmadge, 16 F. Cas. 1182, 1184 (D. Ohio 1840), cited in Mobile & Montgomery R.R. Co. v. Ashcraft, 48 Ala. 15 (1872).

ments were made only minutes before or after the accident.<sup>55</sup> The *res gestae* doctrine also served to exclude “dying declarations” by plaintiffs, typically treated as an admissible exception to the hearsay rule, unless those declarations were made contemporaneously with the accident that caused death.<sup>56</sup> Even plaintiffs’ or agents’ descriptions of plaintiffs’ suffering as a result of accidents were not admissible unless they constituted “spontaneous exclamations” made when the accident took place.<sup>57</sup>

Thus it was not merely the relatively late conceptualization of accidents causing personal injuries as events that could trigger a torts suit by the injured person, as opposed to that person’s employer, wife, or next of kin, that served to retard the emergence of a relatively large universe of first-party personal injury cases and an accompanying body of tort law. But by the 1870s, the number of first-party personal injury suits was growing as an empirical matter, and over the next two decades that growth was substantial enough that commentators were decrying it.<sup>58</sup>

### 3. *The Emergence of Contingent Fees in the Nineteenth Century*

A common feature of first-party suits arising out of accidents was that the plaintiffs often lacked substantial assets. That in itself was yet another reason for injured persons not to sue in tort for their damages: they could not afford to hire lawyers. The problem of impecunious persons being able to gain access to the legal system in order to secure redress from wrongs allegedly done to them was by no means a new one. For example, a 1649 critique of the English legal system suggested that given the “references, orders, and appeals” that typically accompanied the efforts of citizens to

54. *Ready v. Steamboat Highland Mary*, 20 Mo. 264 (1855), cited in *Mobile & Montgomery R.R. Co.*, 48 Ala. at 15.

55. See, e.g., *Mobile & Montgomery R.R. Co.*, 48 Ala. at 15 (“a moment before the accident”); *Barker v. St. Louis Iron Mountain & S. Ry. Co.*, 28 S.W. 866, 867 (Mo. 1894) (“[eight] or [ten] minutes after the [accident]”).

56. In *Louisville and Nashville R.R. Co. v. Pearson*, 12 So. 176, 179 (Ala. 1893), the plaintiff’s husband, a railroad worker, was fatally injured when the wheels of a railroad car ran over him. The car wheels were lifted off him before he died, and he said that the “handhold” keeping the car in place had failed. The Alabama Supreme Court held that since his statement had been “made after the car was removed from over the body,” it was “no part of the main fact” of the accident, and thus inadmissible under the *res gestae* rule.

57. See RICE, *supra* note 48, at 377–85. Rice maintained that “apparent abuses resulting from receiving descriptive declarations of pain [by injured plaintiffs] in negligence cases” had led to the “opinion. . . that a party seeking to recover damages on account of his own suffering cannot give in evidence, in his own behalf, his own descriptive declarations of suffering, as distinguished from apparently spontaneous manifestations of the distress.” *Id.* at 384. The witness disqualification rules did not bar testimony from persons about what they saw, as opposed to what they may have said when seeing something. But if the witnesses in fellow servant cases were co-employees, it might have been detrimental to them to testify.

58. An 1897 article in the *Yale Law Journal* on “personal injury litigation” stated that “slight wrongs or injuries that ordinarily were never noticed hitherto” had become the “foundation for False claims of enormous damages” constructed by “perjury.” Eli Shelby Hammond, *Personal Injury Litigation*, 6 *YALE L.J.* 328, 332 (1897).

vindicate their legal “rights,” the “price of right is too high for a poor man . . . [it would be] better for [many inhabitants of the population] to sit down by the loss, than to seek for relief.”<sup>59</sup> In 1814 an American commentator noted that one response to the dilemma of “parties not monied” was those parties stipulating for their attorneys “taking what are called contingent fees,” percentages of legal awards. That commentator believed that contingent fees “[were] tolerated . . . at an early period,” and “[had] become common.”<sup>60</sup>

The principal justification for contingent fees was that they provided opportunities for impecunious persons to gain access to the courts. But their very existence raised the issue of a potential conflict of interest between lawyers and clients. It had been this feature of contingent fees that had caused them to be disapproved of in England. In fact the barring of contingent fee contracts as champerty,<sup>61</sup> or in penal statutes directed at lawyers and other persons, had been a consistent doctrine of English law since the Middle Ages. English courts were still employing the champerty doctrine to bar contingent fee contracts as late as the 1860s.<sup>62</sup>

The reaction of nineteenth-century American courts and legislatures to contingent fee contracts was somewhat different. Between 1824 and 1898, nineteen states permitted attorney-contingent-fee contracts in the face of the champerty doctrine.<sup>63</sup> Nine states continued to outlaw such contracts relatively deep into the nineteenth century,<sup>64</sup> but by the turn of the twentieth they were distinct outliers. The general acceptance of contingency fee contracts by lawyers can be seen in the invalidation, by the courts of three ex-Confederate states, of a 1915 Congressional statute that sought to limit the contingent fee percentages of attorneys representing property owners in those states who had had their property confiscated by the Union govern-

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59. JOHN WARR, *THE CORRUPTION AND DEFICIENCY OF THE LAWS OF ENGLAND SOBERLY DISCOVERED* 102 (1649), *reprinted in* *THE PAMPHLETS OF JOHN WARR* (Stephen Gedley and Lawrence Kaplan eds., 1992).

60. HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES*, at xx (1814) (reprinted edition, Stanley Katz et al. eds., 1972). The fullest discussion of the use of contingent fee contracts in early nineteenth-century America is Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 *DEPAUL L. REV.* 231, 234–48 (1998).

61. Champerty was defined as a bargain by a third person with a party to a suit, by which the third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a portion of the proceeds or subject sought to be recovered. The early efforts to make champerty illegal, as well as unethical, were not only directed at lawyer practices. A more common early target was the practice of persons financing potential claimants to the property of others so that they could secure a portion of the property for themselves.

62. *See* *Kennedy v. Broun*, 175 Eng. Rep. 1292, 1299 (1862); *Hilton v. Woods*, 4 L.R. Eq. 432, 435 (1867).

63. For more detail, see Karsten, *supra* note 60, at 239.

64. *Id.*

ment during the Civil War.<sup>65</sup> The statute was invalid, those courts reasoned, because Congress had no power to dictate the contingent fee rules of states.<sup>66</sup>

Thus, a series of developments coalesced to create a much more favorable environment for the filing of tort claims for personal injuries in the latter decades of the nineteenth century and the first two decades of the twentieth. The evidentiary obstacles of the witness disqualification rules and the *res gestae* doctrine were surmounted as those rules were altered. The number of accidents involving persons who were not employees of the enterprise whose mechanisms injured them increased as railroads and streetcars replaced stagecoaches and horse cars.<sup>67</sup> And lawyer-contingent-fee contracts ceased to be outlawed in most states, enabling injured impecunious persons opportunities to retain legal advice in bringing tort suits.

#### 4. A Specialized Personal Injury Bar

The final development contributing to the late nineteenth- and early twentieth-century explosion of personal injury torts suits arising from accidents was the emergence of what amounted to a specialized bar of personal injury lawyers. Not only did the number of lawyers in the United States grow by over 125 percent between 1870 and 1900, in the years between 1890 and 1900 the number of white native-born lawyers with one or more foreign-born parents grew by 80 percent, whereas the number of all lawyers grew by 28 percent. In some areas the growth figures were even higher.

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65. The statute, 38 Stat. 996 (1915) is cited in *Ralston v. Dunaway*, 184 S.W. 425 (Ark. 1916).

66. *Moyers v. City of Memphis*, 186 S.W. 105, 112–13 (Tenn. 1916); *Black v. O'Hara*, 194 S.W. 811, 813 (Ky. 1917); *Lay v. Lay*, 79 So. 291, 292 (Miss. 1918). The Arkansas Supreme Court upheld the statute in *Ralston*, 184 S.W. at 427.

67. SILVERMAN, *supra* note 37, at 105 (finding that in 1880 approximately twelve suits were filed in Boston courts for injuries arising out of negligent operation of a horsecar, and in 1900, after the introduction of electric streetcars in Boston, there were 1,400 suits for negligent operation of streetcars). Injuries caused by streetcar accidents accounted for 25.9 percent of all personal injury suits brought in New York City in 1890. BERGSTROM, *supra* note 37, at 21.

One reason for the higher incidence of streetcar accidents than railroad accidents in the 1880s and 1890s very probably lay in the different methods for constructing railroad and streetcar lines. Railroad construction began with railroads securing rights of way for their lines, which amounted to clearing spaces for their tracks from which members of the public were barred. In contrast, streetcar lines ran over city streets that also served as spaces for pedestrian and vehicular traffic, and passengers on streetcars typically mounted and dismounted from the cars all along their routes, sometimes when cars were in motion.

With the introduction of automobiles on city streets in the first decade of the twentieth century, traffic patterns became even more crowded and chaotic. There is a remarkable film, taken from an automobile riding through San Francisco city streets in 1908 (just before the earthquake of that year which destroyed much of the city), which shows the automobile weaving its way through traffic that included cable cars, street cars, horses and horsecars, other automobiles, and pedestrians, the last group mounting and dismounting streetcars and horsecars and crossing cable car and streetcar lines without any restriction. The film can be seen at the San Francisco Cable Car Museum.

Lawyers in New York City increased by 49 percent in the same decade, with the number of white native-born children of immigrants who were lawyers increasing by 85 percent. In Buffalo, New York, the growth in the number of lawyers with one or more foreign-born parents was 170 percent.<sup>68</sup>

Thus, one can observe, in the last three decades of the nineteenth century, a dramatic increase in the number of tort claims brought for accidental injuries that occurred in industrial and urban environments, and an equally dramatic increase in the number of individuals entering the legal profession, especially persons whose parents were immigrants. Determining the precise causal relationship between those two phenomena remains elusive, but it seems clear that the presence of additional lawyers, some from the sorts of backgrounds from which many late nineteenth-century industrial laborers came, would have made it easier for persons injured in accidents, whatever their social or economic status, to consider filing claims. The contingent fee system was, in fact, designed to facilitate the acquisition of legal representation for impecunious injured persons.

There is also reason to think that by the turn of the century, when increased immigration from southern and eastern Europe was generating nativist opposition in many quarters, new second-generation immigrant lawyers would not have had easy access to the more established sectors of state and local bars. They would have needed to compete for clients, and personal injury litigation, with its contingent fee practices now firmly in place, was a potential means of generating work.<sup>69</sup>

Evidence from urban areas in the late nineteenth and early twentieth centuries suggests that aggressive solicitation of clients by plaintiffs' lawyers in personal injury cases, and comparably unscrupulous practices by defense lawyers in those cases, became visible to bar associations, legal commentators, and courts. A report issued by the New York State Bar Association in 1880 denounced the use of contingent fees by personal injury lawyers as "disreputable, unworthy, demoralizing and tending to degrade the profession and impair the administration of justice." Plaintiffs' lawyers, in particular, were engaging in "barratrous speculations" in the hope of se-

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68. These figures, based on census records, are taken from WITT, *supra* note 32, at 60 tbl. 2.1.

69. JOHN HIGHAM, *STRANGERS IN THE LAND* (1955) (the classic work on late nineteenth-century American Nativism). In a 1992 edition of *Strangers in the Land*, Higham acknowledged that not all opposition to immigration was based on nativist sentiment. Higham, *Strangers in the Land* 4 (1992 ed.) As we have seen, opposition in state bars to contingent fee contracts preceded the waves of European immigration in the late nineteenth century. But many second-generation lawyers nonetheless had difficulty finding work with established firms, and as a result turned to personal injury work as a way of attracting clients.

The Online Etymology Dictionary states that the term "ambulance chaser," referring to attorneys who aggressively solicited representation from injured persons, first appeared in American newspaper articles in 1897. See *Etymology of Ambulance*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?search=Ambulance+chaser> (last visited Jan. 19, 2015).

curing “enormous verdicts,” and were soliciting cases and advertising their services “at the expense of all . . . professional dignity.”<sup>70</sup> Twenty-eight years later, an address reported in the New York State Bar Association’s *Proceedings* sounded similar themes. Personal injury litigation, the speaker felt, was “marked by a lower tone of professional ethics at the Bar and by a greater absence of abstract justice on the Bench than any other class of litigation.”<sup>71</sup> The decision by Harvard Law School to offer a course in Torts, and shortly thereafter to make the course a basic requirement of its curriculum, can be seen as an acknowledgment that civil wrongs not arising out of contract, particularly accidental injuries occurring in urban industrial environments, were emerging in the American legal landscape. But because of the intellectual inclinations of legal scholars and practitioners in the last decades of the nineteenth century, adding Torts to the curricula of law schools, or tort litigation as a specialty in law practice, was felt to require more than simply recognizing the proliferation of personal injury suits, or even the general increase in accidental injuries among the American population. When Holmes had initially concluded that Torts was not a proper subject for a law book, it was because he saw no overarching “philosophical” organization of the multiple tort actions that were emerging. When, shortly thereafter, he revised his view, it was because he felt he had been able to classify tort actions in accordance with the standards of liability governing them: intent, strict liability, or fault; the last standard being the equivalent of what he called “modern negligence,”<sup>72</sup> a standard based on “motives of policy . . . kept purposely indefinite.”<sup>73</sup>

For Torts to emerge as a distinct branch of law, then, it needed not only a common set of cases recognizable as tort actions, but a common set of legal principles from which lawyers, judges, and commentators could derive resolutions of those cases. And in the course of formulating those principles, late nineteenth-century participants in the world of tort law encountered what is best described as a doctrinal challenge. The next two sections describe the nature of that challenge and the evolution of tort doctrine and commentary in response to it.<sup>74</sup> As that process evolved between

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70. Samuel Hand, *Annual Address from the President*, 3 N.Y. ST. B. ASS’N PROC. 67, 78–79 (1880).

71. Elon R. Brown, *Some Faults of Legal Administration*, 31 N.Y. ST. B. ASS’N PROC. 142, 142 (1908).

72. Holmes, *supra* note 27, at 653.

73. *Id.* at 659.

74. My analysis in those sections tracks, and in some places supplements, that set forth in WITT, *supra* note 32, at 43–51, 63–70. In particular, I agree with Witt that the doctrinal challenge faced by late nineteenth-century tort law was less that of reconciling accidental injury in industrial settings with the assumption that most accidental injuries were “nobody’s fault” than of coping with the apparent facts that, although industrial accidents seemed to be significantly increasing, many of them happened in situations where blame could not readily be attached to either the victim or the agency causing the injury. As we will see, some commentators on industrial accidents maintained, as late as the 1880s, that accidents were always the result of the fault of the



the 1870s and the 1920s, the doctrinal edifice of tort law, once thought capable of “philosophical” organization by Holmes, became increasingly messy.

### III. DOCTRINAL CHALLENGES IN PERSONAL INJURY CASES

#### A. *The Negligence Principle and “Faultless” Accidental Injury*

We have noted that Holmes’s conceptualization of tort law in the 1870s had recognized that the legacy of civil, non-contractual actions accumulated before that decade contained cases in which liability for damages had been imposed on quite different grounds. One ground, stretching far back in time, emphasized the intent of persons to inflict injury on others, whether the injury was physical or, in the case of libel and slander suits, reputational. Another ground, which Holmes felt should be minimized, was cause-based: damage caused by the escape of wild animals, the flooding of land adjacent to dams or reservoirs, the storage of dynamite that exploded, or the release of noxious fumes or odors. Liability in those cases was “act at peril,” not based on intent or carelessness. Then there was the third set, “modern negligence” cases.

By the time he published *The Common Law* in 1881, Holmes had concluded that the best way for tort law to respond to the increased number of personal injury claims arising out of industrial accidents was to treat virtually all accidental injuries as being governed by a negligence-based standard of liability, in which one asked whether the actions or inactions of persons who had caused injuries to others had violated a standard of reasonable care. Holmes operationalized that standard in the hypothetical figure of “a prudent man” who had acted or failed to act in “circumstances [in which he] would have foreseen the possibility of harm.”<sup>75</sup> If the action or inaction of a person could reasonably have been expected to unduly cause a risk of harm to that person or others, it was negligent. If that negligent conduct caused accidental injuries to others, tort law would award damages to the injured parties.

As a practical matter, Holmes’s insistence that most accidental injury cases be governed by a negligence standard considerably narrowed the potential ambit of tort liability for industrial accidents. Holmes was aware of

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victim or injurer. Witt contrasts this commentary with early twentieth-century accident studies, which suggested that most accidents were unavoidable consequences of the hazards of industrial enterprise. See *id.* at 63–64. Not all historians would describe the late nineteenth century as a period when Americans came to realize that more accidents were happening, but often in circumstances where identifying someone at fault was difficult. See, e.g., LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 352 (3d ed., 2005) (characterizing mid nineteenth-century America as follows: “People lived with calamity: they had no sense (as would be true in the twentieth century) that *somebody* was always responsible [for accidents]—either the state or a private party.”).

75. OLIVER WENDELL HOLMES, *THE COMMON LAW* 96 (Cambridge, Harvard Univ. Press 2009) (1881).

that, and embraced the situation as a matter of social policy. “The general principle of our law,” he maintained, “is that loss from accident must lie where it falls.” Two policies undergirded that “general principle.” One was that the alternative, to make “any act . . . which set in motion or opened the door for a series of physical sequences ending in damage” a basis for imposing tort liability on the actor, was undesirable because “the public generally profits by individual activity,” and thus “there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.” Cause-based liability without a showing of intent or fault was thus bad policy unless one wanted “to make the power of avoiding [harm] a condition of liability.” There was “no such power,” Holmes believed, “where the [harm] cannot be foreseen.”<sup>76</sup>

Holmes was saying that if one approached the question of the appropriate standard of liability for tort cases from the perspective of potential injurers, it made no sense to discourage people from choosing to act in situations where they could not foresee the risks of their actions. And if one approached the question from the perspective of potential victims, Holmes felt, the same policy should govern. This was because if victims wanted to be compensated for injuries they suffered from accidents in which no one was at fault, the only way that could be accomplished was through an act at peril, or cause-based, standard of liability. But such an approach would treat tort law as the equivalent of “a mutual insurance company against accidents” that “distribute[d] the burden of its citizens’ mishaps among all its members.” There was no such company, Holmes believed, because “the prevailing view is that [the] cumbrous and expensive machinery [of the state] ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo.” Such “[s]tate interference [was] an evil, where it cannot be shown to be a good.” If people wanted to insure themselves against accidental injuries, Holmes noted, they could do so “better and more cheaply” through “private enterprise.”<sup>77</sup> On what today we would call both efficiency and justice grounds, placing the costs of “faultless” accidental injuries on those who had caused them made little sense.

The logical extension of Holmes’s view that the prevailing standard of tort liability in accidental injury cases should be negligence was that those pockets of cause-based liability already recognized in torts suits were anomalous. Holmes did not call for the abolition of act-at-peril liability in such cases as the escape of wild animals or activities that were deemed ultra-hazardous or nuisances, but he did treat act-at-peril liability as exceptional and resisted its extension to other cases.<sup>78</sup> But the premise with which

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76. *Id.* at 94–95.

77. *Id.* at 95–96.

78. He arguably went even further in *The Common Law*, arguing that intent or fault had always been the standards of liability in torts except “in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reac-

Holmes began his discussion of accidental injury cases—that “the general principle of our law is that loss for accident must lie where it falls”—presented judges who decided tort cases, and scholars who wrote about their decisions, with an obvious difficulty.

The difficulty lay in cases where industrial accidents resulted in personal injuries, but the attribution of negligence—“fault” based on a lack of prudent foresight about risks that resulted in injuries—could not readily be made to any party connected to the accident. Heavy machinery in factories unaccountably started up or shut down, injuring workers. Streetcars collided with pedestrians in conditions of limited visibility. Railroad cars derailed from tracks because of hidden defects in the tracks’ formation. Sections of mines collapsed simply because excavations had taken place in adjacent areas, injuring or killing miners. Cinders emitted by steam-powered engines blew through the windows of railroad cars. Live trolley car or telegraph wires, strung overhead, broke and fell on city streets.<sup>79</sup>

All of the above accidents occurred with some frequency in late nineteenth- and early twentieth-century America, causing injury to numerous persons. From one perspective, it seemed unjust to allow the losses from those accidents to lie where they fell—on victims—because the only way in which the victims had contributed to their injuries was in happening to be in the path of the hazards. On the other hand, to place cause-based liability on the enterprises associated with the hazards ran counter to Holmes’s arguments that the public benefitted from such enterprises and that potential victims could take out private insurance against accidents. So it appeared that if late nineteenth-century tort law was going to play any serious role as a system providing legal redress for injuries suffered in industrial accidents, it needed to address the problem of faultless accidental injury. As the subject of Torts emerged in legal education, and personal injury cases arising out of industrial accidents mushroomed in the courts, the doctrinal corpus of American tort law and accompanying commentary came to reflect tensions caused by the problem of faultless accidental injury in a system dominated by liability based on negligence.

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tion.” *Id.* at 89. Holmes did not specify the “creative epoch” to which he was referring, but it was clear that he felt that the “period of solvent philosophical reaction” had just recently gotten underway, thanks to the work of himself and his contemporaries, such as Langdell and Green.

79. By the 1880s employers of factory workers, and common carriers, had come to the conclusion that they would be facing personal injury suits from employees or others on a sufficiently regular basis to take out liability insurance. The first American company to offer employers such insurance, Employers Liability Assurance, came into existence in Boston in 1886. That same year twenty-six textile manufacturers formed their own insurance company, the American Mutual Liability Insurance Company. For more detail, see KENNETH S. ABRAHAM, *THE LIABILITY CENTURY* 28–33 (2008).

### 1. *Damnum Absque Injuria* Cases

The first illustration of those tensions can be seen in the concept of *damnum absque injuria*, a loss without a legal remedy. That concept had appeared in the earliest American treatises and casebooks on tort law: Hilliard's *The Law of Torts*,<sup>80</sup> Thomas Shearman and Amasa Redfield's *Treatise on the Law of Negligence*,<sup>81</sup> Green's edition of Addison's *The Law of Torts*,<sup>82</sup> Francis Wharton's *Treatise on the Law of Negligence*,<sup>83</sup> James Barr Ames's *Selection of Cases on the Law of Torts*,<sup>84</sup> and Cooley's *Treatise on the Law of Torts*.<sup>85</sup> It is suggestive that at the very moment when lawyers and legal scholars were recognizing a sudden increase in the courts of personal injury actions not arising out of contract, those who sought to set forth the organizing principles of the new field of tort law chose to emphasize that one of those principles was that not all persons who suffered personal injuries would secure redress.<sup>86</sup>

The reasoning of commentators seeking to justify the concept of *damnum absque injuria* was revealingly circular. Thomas Cooley asserted that actors who did what was "right and lawful for one man to do" could not be held accountable if their actions injured others *because* what they were doing was a "proper exercise . . . of [their] rights" and thus could not inflict legal wrongs.<sup>87</sup> Shearman and Redfield maintained that so long as someone was "engaged in a lawful business," he was not "responsible for an injury

80. Hilliard gave illustrations of what he called injuries without legal remedies. HILLIARD, *supra* note 23, at 119–21.

81. SHEARMAN & REDFIELD, *supra* note 18, at 156.

82. ADDISON, *supra* note 9, at 2, 43.

83. FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 360 (Philadelphia, Kay & Brother 1874).

84. Ames called injuries for which there was no legal remedy "excusable trespasses," such as those from "accident and mistake." JAMES BARR AMES, A SELECTION OF CASES ON THE LAW OF TORTS 56–76 (Cambridge, n.p. 1874).

85. COOLEY, *supra* note 40, at 80–81.

86. Robert Rabin argued that the wide acknowledgment of the concept of *damnum absque injuria* in the late nineteenth century is best understood as evidence of a pervasive "no liability" standard for many civil injuries, based on a belief that few persons engaging in activities owed duties to avoid injuring others. Robert Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 115 GA. L. REV. 925, 928 (1985). Such duties, Rabin suggests, were associated only with situations in which the parties were in contractual relations or with certain highly dangerous activities, such as blasting or keeping wild animals. Thus, rather than seeing the growth of a negligence standard for tort law as tending to limit liability, Rabin argues that negligence, when established against the background of no liability, represented an extension of liability in tort.

I agree with Rabin that many nineteenth-century commentators associated duties with contractual relations. But I would suggest that what Rabin characterizes as a quite large regime of "no liability" for civil injuries not arising out of contract is better understood as a regime in which faultless civil injuries arising out of exposure to the conditions of industrial life were uncommon, and consequently there was no general theory of how law should respond to such injuries. No theory is not the same as a theory of no liability.

87. COOLEY, *supra* note 40, at 21.

caused purely by inevitable accident.”<sup>88</sup> Addison stated that when an injury was the result of a “lawful act, done in a lawful manner,” there was “no legal injury,” and hence “no tort giving rise to an action for damages.”<sup>89</sup> All of those explanations begged the question of what was “right and lawful.” One could have begun with the opposite premise: that any actions that caused harm to others were unlawful, thereby exposing the actors to damages for the harm unless excused.

Not all the commentators who believed that tort law needed to recognize the concept of *damnum absque injuria* advanced tautological arguments for its existence. We have seen that Holmes granted that cause-based liability was a theoretical possibility, just as he acknowledged that the “state might conceivably make itself a mutual insurance company against accidents,”<sup>90</sup> distributing the risk of accidental personal injury among all its citizens. Those options were not illogical; they were simply bad policy, given the prevailing view that losses from accidents should lie where they fell, and that state interference was an evil when it could not be shown to be a good. Other judges and commentators sought to link *damnum absque injuria* to an effort to avoid the administrative costs that would be incurred if injured persons could recover in tort from anyone who caused their injuries,<sup>91</sup> or to the negative effects a system of cause-based liability would have on industrial enterprise.<sup>92</sup>

But perhaps the clearest justification of *damnum absque injuria* as a core element of tort law, for late nineteenth- and early twentieth-century contemporaries, was that alternatives to a negligence-based standard of liability seemed to move inexorably toward more and more state involvement with industrial accidents. If every time an actor that caused an accident in the late nineteenth-century industrializing environment was subjected to tort liability, those contemporaries believed, the courts would be supervising the conduct of all the enterprises whose risky machinery was felt to be the central force driving up accident totals. The owners of those enterprises, and the operators of that machinery, would need to decide whether they could justify continuing the operations of their enterprises in the face of cause-based liability for those operations.

## 2. Res Ipsa Loquitur Cases and Cause-Based Injury Cases

So at the onset of the emergence of Torts as an independent legal subject, there seemed to be strong policy reasons why accidental injuries should be governed by a negligence standard rather than a strict liability

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88. SHEARMAN & REDFIELD, *supra* note 18, at 3.

89. ADDISON, *supra* note 9, at 2.

90. HOLMES, *supra* note 75, at 96.

91. Clarke Butler Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335 (1902).

92. *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873) (“We must have factories, dams, canals and railroads.”).

standard. But if negligence served the purpose of narrowing the potential ambit of tort liability for the sorts of injuries that seemed to be rapidly on the increase, it did not provide a full explanation for why, when a participant in the industrializing environment of late nineteenth-century America was accidentally injured through no fault of his or her own, and could not show that the injury could be traced to negligence of anyone else, the losses for that injury—typically economic as well as physical—should fall on the injured person. “A system of laws which permit[s] no recovery in so large a percentage of deaths and injuries,” the Ohio Bar Association announced in 1913, “is unjust.”<sup>93</sup>

Evidence that that intuition was widely shared in the late nineteenth and early twentieth centuries can be seen in the emergence of tort doctrines that made it easier for plaintiffs to win accidental injury cases. One was the doctrine of *res ipsa loquitur* (the thing speaks for itself), which, in cases where the accident that had occurred was deemed to be the kind that did not occur in the absence of negligence, a presumption of negligence was created by the fact of the accident, and the burden shifted to defendants to show that they had not been negligent.<sup>94</sup>

### B. *The Negligence Principle and “Multiple Fault” Cases*

Another was the retention of cause-based liability in a series of cases in which it had traditionally been imposed, such as flooding damage to property upstream of dams, the use or storage of explosives, the release of noxious substances into the air, the escape of wild animals, and hunting on someone else’s land. To those negligence standard exceptions was added the responsibility of common carriers, which included railroads, steamboats, stage coach lines, and cable and trolley cars, to exercise “the utmost care” to protect the safety of their passengers.<sup>95</sup>

Cases governed by cause-based or utmost care standards of liability, nonetheless, remained exceptional as tort actions proliferated in the late nineteenth century. Meanwhile, as the doctrinal corpus of tort law encompassed larger numbers of cases, courts confronted accidental injury cases in which they struggled to achieve doctrinal integrity for different reasons. In

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93. Wallace D. Yaple, *Worker’s Compensation, the Ohio Law*, 34 OHIO ST. B. ASS’N. PROC. 45, 49 (1913).

94. Illustrations of *res ipsa* cases were accidents caused by exploding boilers, falling telegraph wires, scaffolds, or bricks; collapsing buildings; landslides; bolts that loosened; elevators that unexpectedly crashed; and cinders from steam engines that blew into railroad carriages. For a collection of American cases invoking *res ipsa* in such cases between 1868 and 1895, see WITT, *supra* note 32, at 242–43 n.151. Witt points out that other late nineteenth- and early twentieth-century courts refused to apply *res ipsa* in similar accident settings. *See id.*

95. *See id.* at 66. The “utmost care” standard for common carriers was grounded on contracts of safe passage between them and their passengers. Courts did not impose that standard on carriers when their accidents injured bystanders: in those cases negligence governed.

those cases the problem was not that both the victim and the injurer were “faultless,” but that they may have both been at fault.

### 1. *Contributory Negligence and “Last Clear Chance” Cases*

In “multiple fault” cases late nineteenth- and early twentieth-century courts were charged with applying some doctrines they had inherited from earlier decades. The most ubiquitous of those doctrines was contributory negligence, which posited that any degree of fault on the part of plaintiffs in personal injury cases barred them from recovery, even where the fault of defendants who had injured them was deemed to be qualitatively greater. When Shearman, Redfield, and Cooley collected torts cases in their 1869 and 1879 treatises, they found that all but three states barred plaintiffs even where their negligence was comparatively slight.<sup>96</sup>

There was, however, an 1842 English case in which the plaintiff had left a donkey tied up on a public highway, but was allowed to recover damages when a servant of the defendant drove a team of horses and a wagon into the donkey. One of the judges who decided that case stated “the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway” was “no answer to the action.” That judge, and another, grounded recovery on causation: the donkey may have been in the wrong place, but it was the defendant’s servant’s lack of care in driving the horses too fast that caused the accident.<sup>97</sup>

In 1895, in a case where the engineer of a railroad train had negligently failed to notice a man sleeping on a railroad track, a North Carolina court allowed the man to recover, stating that the “test rule” it had employed was “he who has the last clear chance, notwithstanding the negligence of the adverse party, is considered solely responsible.”<sup>98</sup> The court added that the last clear chance rule had been adopted “in almost all of the Southern and Western states.”<sup>99</sup>

By 1901 the last clear chance doctrine had been recognized by commentators as a limitation on contributory negligence, even though commentators recognized that a causation rationale for the doctrine posed analytical difficulties.<sup>100</sup> Subsequently, early twentieth-century commentators reformulated the basis for the last clear chance doctrine. It was, Francis Bohlen said in 1908, “a separate limitation of legal liability quite distinct from proximity of causation.” It was applied in cases where a “plaintiff’s danger and his inability to help himself were known to the defendant,” or in cases where “the defendant, had he been on the alert, as he should have been,

96. See SHEARMAN & REDFIELD, *supra* note 18, at 37–38; COOLEY, *supra* note 40, at 676–78.

97. *Davies v. Mann*, 152 Eng. Rep. 588, 589 (1842).

98. *Pickett v. Wilmington & W.R. Co.*, 23 S.E. 264, 266 (N.C. 1895).

99. *Id.*

100. See, e.g., William Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1889).

could have discovered [the danger].”<sup>101</sup> It was best understood, Herbert Goodrich concluded in 1918, as “an exception to the rule of contributory negligence” based on “sound policy and justice.”<sup>102</sup>

## 2. *Assumption of Risk Cases*

The last clear chance doctrine was just one of several ways in which late nineteenth- and twentieth-century American courts and legislatures sought to ameliorate the harsh policy consequences of rigid applications of the contributory negligence rule. But the rule remained in place throughout the 1920s, providing another basis for limiting the ambit of recovery in personal injury cases. So did two other rules whose origins can be traced back to the decades before personal injury litigation exploded and Torts came to be taught as a basic course in law schools.

The first of those rules was the doctrine of assumption of risk, which held, according to an 1895 article by Charles Warren, that “[o]ne who knows of a danger arising from the act or omission of another, and understands the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure.”<sup>103</sup> Warren described assumption of risk as all-encompassing in its application, available in any negligence case. But the doctrine had originated in cases that suggested it was a version of the contract law principle that one could waive a right to enforce provisions in contracts, that it was confined to the relations of masters and servants, and that such waivers could be invalidated as against public policy.

In the course of discussing the liability of a master to his servants for “defective condition[s] connected to their service,” Hilliard, in the 1866 edition of his treatise, had speculated that it might not extend to instances in which such a condition was known to a servant, and that servant continued in the service. In such instances, Hilliard concluded, the servant “assumed the risk himself” of injuries resulting from the defective condition.<sup>104</sup> It was as if by continuing in service, servants had entered into an implied contract with their masters to expose themselves to the dangers of their employment.

That conception of assumption of risk was followed by Shearman and Redfield in their 1870 treatise on negligence and by Thompson in his 1880 torts treatise. Shearman and Redfield described assumption of risk as “but a branch of the general law of waiver,” confined to master-servant cases in which the allocation of the risks of service was made through implied con-

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101. Francis Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 238, 259 (1908).

102. Herbert Goodrich, *Iowa Applications of the Last Clear Chance Doctrine*, 5 IOWA L. BULL. 36, 38 (1919–1920).

103. Charles Warren, *Volenti Non Fit Injuria in Acts of Negligence*, 8 HARV. L. REV. 457, 459 (1895).

104. 2 HILLIARD, *supra* note 23, at 467.



tracts between masters and servants.<sup>105</sup> Thompson also considered assumption of risk a limited doctrine, confined to master-servant cases and cases involving carriers and their passengers. It was akin, he felt, to the “[w]aiver of a [r]ight of action” in contract cases.<sup>106</sup>

But in several cases in which defendants in personal injury suits had sought to enforce waivers, nineteenth-century courts had invalidated them. This was particularly true in two contexts: cases in which employers sought to enforce waivers by employees and cases in which railroads sought to use contractual waivers to limit their liability to passengers or employees. The waivers were invalidated on three public policy grounds: it was against the state interest in the health and safety of its citizens to allow negligent persons who injured others to contract out of their tort liability, the waivers were products of a setting in which the parties were in unequal bargaining positions, and allowing enterprises who served the public to contract out of their liability reduced their incentives to conduct their activities safely.<sup>107</sup>

But those cases were primarily directed at express waivers of liability; at the same time commentators were urging the expansion of what came to be called implied assumption of risk. Thompson, for example, noted the “unequal situation of the laborer and his employer,” on which the invalidation of express waivers was grounded,<sup>108</sup> but also felt that the assumption of risk doctrine was “capable of expansion into other relations than those of master and servant.”<sup>109</sup> By the late 1870s Francis Wharton had plotted out that expansion. Wharton did not think that “contracts to relieve a party from the consequences of his negligence” would generally be upheld in American courts, and doubted whether all servants were competent to enter into contracts. He therefore felt that the assumption of risk doctrine was not grounded in the fiction of an implied contract between masters and servants. Instead it was based on the general principle that “a party cannot recover for injury he incurs in risks, themselves legitimate, to which he intelligently submits himself.” Rather than being thought of as based on contract or the master-servant relationship, Wharton felt the doctrine “[was] common to all suits for negligence based on duty.”<sup>110</sup> It was a way of acknowledging that one party understood either that another party had no duty to safeguard him against particular risks or, alternatively, that he was knowingly and voluntarily assuming risks created by the other’s negligent conduct.

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105. SHEARMAN & REDFIELD, *supra* note 18, at 121.

106. 2 SEYMOUR D. THOMPSON, *THE LAW OF NEGLIGENCE NOT RESTING IN CONTRACT* 1147 (St. Louis, F.H. Thomas and Co. 1886).

107. For illustrations of courts and commentators employing those rationales in waiver cases between 1865 and 1907, see WITT, *supra* note 32, at 243–44 nn.166–75.

108. THOMPSON, *supra* note 106, at 1025.

109. *Id.* at 1148.

110. WHARTON, *supra* note 83, at 169.

Formulated in those terms, the assumption of risk doctrine was neither confined to explicit or implied contract cases, nor to master-servant cases. As Francis Bohlen put it in a 1906 article, assumption of risk “applie[d] equally to any relation voluntarily assumed—contractual or not.” In fact its greatest applicability, Bohlen suggested, was to industrial workplace injury cases. In such cases the doctrine came into play when an employee was “placed in a position where he must either encounter some probable . . . danger, or else give up his employment.” If the employee chose to remain at work and was injured by that danger, he was said to have assumed the risk and was barred from suit.<sup>111</sup>

In a 1900 case Holmes, then Chief Justice of the Supreme Judicial Court of Massachusetts, had invoked the assumption of risk doctrine to bar recovery for injuries suffered by an employee of an axe and tool company when a hatchet from a defective hatchet rack fell on him.<sup>112</sup> The employee had noticed that hatchets regularly dropped off the rack and had informed his employer that if he engaged in painting in the vicinity of the rack, one was likely to fall on him. “He was answered, in substance,” Holmes wrote, “that he would have to use the racks or leave [his employment.]”<sup>113</sup> The employee remained at work and in the course of his painting, a hatchet fell from the rack, injuring him. Holmes held that the employee “appreciated the danger . . . [and] took the risk,” and that even if his employer was negligent in allowing the rack to remain in a condition where hatchets could be expected to fall from it, the employee was barred from suit. This was even though the “fear of losing his place” had been the reason the employee decided to paint in the vicinity of the rack.<sup>114</sup>

Bohlen cited Holmes’s hatchet rack case as an illustration of the sweep and strength of the assumption of risk doctrine.<sup>115</sup> It applied to bar the employee even though there was no contract between the employer and employee specifying the risks of work at the axe and tool company, and even though the employee was a wage earner, not a servant of the employer. It applied even though its effect was to diminish the incentives of employers to provide safe conditions in their workplaces so long as they informed their employees of the risk of those conditions.

Most tellingly, the assumption of risk pivoted on a particular view of the industrial marketplace and its participants. In seeking to advance reasons for the doctrine’s broad sweep, Bohlen referred to the “economic conditions” of early twentieth-century America, in which “as yet there is normally no dearth of work for competent workmen.” If “one job is danger-

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111. Francis H. Bohlen, *Voluntary Assumption of Risk* (pts. 1 & 2), 20 HARV. L. REV. 14, 14 (1906); 20 HARV. L. REV. 91, 115 (1906).

112. See *Lamson v. American Axe & Tool Co.*, 58 N.E. 585, 585 (Mass. 1900).

113. *Id.*

114. *Id.*

115. Bohlen, *supra* note 111, at 108.

ous,” Bohlen surmised, “another can probably be found.”<sup>116</sup> That observation suggested that the worker in the hatchet rack case could have readily left his employment and found an alternative, less dangerous occupation, so his remaining on the job could have been understood as a deliberate choice. Bohlen also referred to a “known tendency of American workmen to take desperate chances touching their safety,” so that their exposing themselves to risks could be seen as “mere thoughtless recklessness or disinclination to leave a position in other respects satisfactory.”<sup>117</sup> The fact that those arguments appeared to contradict one another—if American workers were both “thoughtless” about risk-taking and aware that they could readily secure less dangerous jobs, why would one conclude that their deciding to remain in risky work amounted to deliberate choices—demonstrated the possibility that those choices might well have been a product not of the marketability of workers but of their limited bargaining power.

Bohlen had a final argument, one that highlighted the philosophical basis on which late nineteenth- and early twentieth-century scholars had sought to erect an integrated doctrinal structure for tort law featuring negligence as the principal standard of liability. Assumption of risk, Bohlen maintained, embodied “the individualistic tendency of the common law, which . . . naturally regards the freedom of individual action as the keystone of the whole structure.” Actors within the tort system were “free to work out [their] own destinies.” They were not protected “from the consequences of [their] voluntary actions.” Indeed “[i]n the law of torts . . . the idea of any obligation to protect others was abnormal.”<sup>118</sup> This “freedom of individual action” was the reason why losses from faultless accidental injuries should lie where they fell, so that the freedom to engage in beneficial but risky activities could be encouraged. It was also the reason why, in multiple fault or assumption of risk cases, losses also ought to fall on accidentally injured victims. Those persons had either carelessly contributed to their injuries or voluntarily exposed themselves to the risks of their occurring.

Bohlen’s belief that any obligation to protect others was “abnormal” in the law of torts brings one close to the fanciful caricature of Holmes’ approach to “modern negligence” cases in *The Common Law* that no one ought to be liable to anyone for anything.<sup>119</sup> But it is clear that however much theorists might have welcomed the creation of a doctrinal superstructure for tort law that fostered individual freedom and restricted liability as much as possible, late nineteenth- and early twentieth-century courts and

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116. *Id.* at 115.

117. *Id.*

118. *Id.* at 14.

119. Or, as Grant Gilmore once put it, “[U]nder what circumstances and to what extent should A be liable to B for damage or loss which B has suffered as a result of whatever it is that A has done . . . ? Holmes’s answer was clear cut: over the broadest possible range A should not be held to any liability at all . . . .” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 55 (1977).

legislatures were not cooperating. Not only did courts initially take pains to subvert the unqualified application of the contributory negligence rule, and declare contracts relieving persons for liability for their negligence void as against public policy, eventually, when faced with the implications of a broad application of contributory negligence and assumption of risk in industrial workplace settings, twentieth-century legislatures enacted workers' compensation statutes bypassing the tort system.<sup>120</sup>

### 3. "Fellow-Servant Rule" Cases

A similar disinclination to accept the full implications of another doctrine limiting the opportunities of industrial workers to recover for personal injury claims can be seen in late nineteenth- and early twentieth-century courts and legislatures' response to the "fellow servant rule." That rule, first articulated in an American court in an 1842 Massachusetts case involving a suit by a railroad worker against his employer,<sup>121</sup> announced that contracts between employers and employees could allocate responsibility for accidental injuries to employees in the performance of their jobs. Such contracts typically provided that employees would be responsible for the "natural and ordinary risks and perils incident to the performance of such services." Those included "the carelessness and negligence of those who are in the same employment." When the employee in the Massachusetts case, injured by the negligence of a co-worker, sought recovery against his employer, the court upheld the limitations in his employment contract. It stated that doing so would "best promote the safety and security of all parties concerned," since employees were in as good a position as their employers to note the risks of their jobs and to take precautions against them.<sup>122</sup> The court added that in the case of dangerous jobs, the employees' wages were likely to be increased to reflect that fact.<sup>123</sup>

As workplace negligence suits increased in the late nineteenth century, the fellow-servant rule created difficulties for those who were seeking to organize the subject of tort around a few comprehensive principles. The rule appeared anomalous in two respects. First, it was inconsistent with those cases in which courts had invalidated efforts on the part of enterprises to contract out of their tort liability through waivers. Second, it ran counter to the principle that employers in negligence cases were treated as vicariously liable for the torts of employees within the scope of their employment. The intersection of the fellow servant rule with vicarious liability meant that if

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120. For more detail on early twentieth-century worker's compensation and their constitutional validation by the United States Supreme Court, see WITT, *supra* note 32, at 163–86.

121. See *Farwell v. Boston and Worcester R.R. Corp.*, 45 Mass. (4 Met.) 49, 49 (1842). The English Court of Exchequer had adopted the fellow-servant rule five years earlier in *Priestly v. Fowler*, 150 Eng. Rep. 1030, 1033 (1837).

122. *Farwell*, 45 Mass. (4 Met.) at 57–58.

123. See *id.* at 58.

third parties were injured through the negligence of employees, they could recover against employers, but if employees themselves were injured, they were barred from suit. Although some late nineteenth-century commentators regarded the vicarious liability of employers as running counter to the general tendency of tort law to require intentional harm or negligence as a prerequisite for recovery,<sup>124</sup> vicarious liability had been recognized as an integral feature of tort suits in employment settings well before the late nineteenth-century proliferation of tort suits.<sup>125</sup>

By the 1880s state courts and the United States Supreme Court had found a way to limit the scope of the fellow-servant rule. The rule was treated as not applying to a class of cases in which, although an employee was injured through the negligence of another employee, the two employees occupied different “grades,” or were in different “departments,” of the industry, so that the employee responsible for the injury could be designated a “vice principal” of the corporation, making it responsible for injuries created by his negligence. But after a promising start on the Supreme Court in an 1884 case,<sup>126</sup> the “vice principal doctrine” was gutted by a Court majority nine years later.<sup>127</sup>

The opinion in the Court’s 1893 case revealed that it was not really about the intricacies of the vice principal doctrine; it was about whether the fellow-servant rule should be used as a basis for limiting the vicarious liability of employers. Once late nineteenth- and early twentieth-century courts and commentators became attracted to the idea of negligence-based liability being an organizing principle of accidental injury cases, the absolute basis of employer vicarious liability seemed, potentially, a glaring anomaly, and the fellow-servant rule provided a way in which employers could potentially avoid having to pay for most of the accidental injuries suffered by their employees. But this meant, as courts and commentators recognized, that in many cases the losses suffered by employees accidentally injured in the course of their jobs would fall on the employees themselves. Employees’ fellow-servants would typically lack the assets to pay for those losses, and a more solvent party, the employer industrial corporation, would not be amenable to suit.

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124. In 1890 John Dillon called the vicarious liability of masters for the negligence of their servants “not based on natural justice.” John Dillon, *American Law Concerning Employer’s Liability*, 24 AM. L. REV. 175, 176 (1890).

125. See, e.g., *Philadelphia & Reading R.R. Co. v. Derby*, 55 U.S. 468, 485–86 (1852) (discussing vicarious liability and respondeat superior in the context of a stagecoach accident).

126. See *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U.S. 377, 394–95 (1884) (determining that a fellow employee and conductor of a train was actually a general manager of the train, and as a result the fellow employee was acting in a capacity that did make the employer liable for its negligent acts).

127. See *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 383–84 (1893) (discussing how the “vice principal doctrine” is only applicable across different departments of a company and not within a single department of the company). For more detail on the *Ross* and *Baugh* cases, see WHITE, *supra* note 22, at 51–55.

In the end, the vice principal doctrine was a judicial effort to limit the impact of the fellow-servant rule that never really got off the ground. But there were other ways of negating the rule, and in the last years of the nineteenth century and the early years of the twentieth century state legislatures and Congress turned to them. An 1856 Georgia statute, limited to railroad accidents, provided a model: railroads would be liable for accidents to their employees caused by the negligence of other employees. By 1911, twenty-five states had abolished the fellow-servant rule, and in 1906 the Federal Employers' Liability Act went even further, abolishing not only that rule, but also the doctrine of contributory negligence in cases where railroad workers were injured in interstate commerce. When an injured worker sued his employer for negligence under the act, he could recover all or a portion of his damages, even if his negligence had contributed to his injury. If he were injured by the negligence of a co-worker, his employer was vicariously liable.<sup>128</sup>

### C. *Towards Workers' Compensation*

The very success of contributory negligence, assumption of the risk, and the fellow-servant rule in limiting the liability of employers—and consequently the recoveries of workers accidentally injured in industrial workplace cases—coupled with the dramatic late nineteenth-century increase in industrial accidents and deaths, had resulted in courts, commentators, and legislatures recognizing that shoring up the doctrinal integrity of a tort system featuring the negligence principle, and defenses based on it, had created something of a “humanity and justice” crisis in the universe of industrial accidents. As accidental injuries to workers and third parties grew in numbers, the damage recoveries of those two classes of plaintiffs remained small.<sup>129</sup> Meanwhile, encounters of the public with the heavy machinery of industrial corporations grew in numbers as those corporations gained in wealth, and part of the profitability of those corporations came from their limited liability for accidents their products or workers caused.

In 1910 the New York state legislature concluded that the only way to address the growing crisis of accidental injuries caused by industrialization was to remove one set of those injuries from the tort system. It enacted a statute that allowed workers injured in the course of their employment to recover damages from their employers regardless of fault. In exchange, the

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128. For the changes instituted by the Federal Employer's Liability Act, see Pub. L. No. 219, 34 Stat. 232 (1906) and Pub. L. No. 100, 35 Stat. 65 (1908).

129. See the studies of cases in Alameda County California from 1880 to 1910 in Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351, 354–55, and Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901–1910*, 34 AM J. LEGAL HIST. 295, 303–07 (1990). See also PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* 34–42 (2000).

workers agreed to forego tort claims against the employers, and their damages were limited to lost wages and medical expenses: pain and suffering were excluded. An administrative board adjudicated claims under the statute, so that they remained out of the courts.<sup>130</sup> By 1920, forty-two of the existing forty-eight American states had adopted what is now called workers' compensation legislation.<sup>131</sup>

Workers' compensation statutes, and other efforts to supplant the common law's negligence-based treatment of employee injuries, were immediately challenged on constitutional grounds with initial success. The New York statute was invalidated in 1911,<sup>132</sup> a Montana statute the same year,<sup>133</sup> and three years earlier the Supreme Court struck down the first version of the Federal Employees' Liability Act.<sup>134</sup> The constitutional basis for invalidation varied. The New York Court of Appeals found the New York statute an unconstitutional redistribution of the property of employers to employees because recovery under the statute was not based on fault: employers were responsible for injuries suffered by their employees even if the employers had not been at fault, and even if the employees had been. To do so, courts reasoned, was to extend employer responsibility in situations where the employer had not caused employee injuries. That made the statutes the equivalent of a legislative taking of property from A and giving it to B, the archetypal nineteenth-century example of constitutionally invalid legislation.<sup>135</sup>

Another ground was that chosen by the Montana Supreme Court in striking down Montana's workers' compensation statute. That legislation, as well as the 1910 New York statute, had given employees injured on the job a choice of electing workers' compensation remedies, with their strict liability standards and their limited damages, or traditional remedies in tort, which required a showing of negligence but did not place comparable limits on damages. The Montana Supreme Court concluded that since remedies were elective under the statutes, the employer was not necessarily gaining a *quid pro quo* for being subjected to liability without fault. As a result, the statutes amounted to a taking of the employer's property without due process of law. Since employers gained no direct benefits from the statutes, they amounted to redistributions.<sup>136</sup>

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130. Act of June 25, 1910, ch. 674, 1910 N.Y. Laws 1945–51. Germany had adopted worker's compensation in 1884, and England in 1897. Previous efforts to pass worker's compensation statutes in American states had failed in New York (1898), Maryland (1902), Massachusetts (1908), and Montana (1909). For more detail on state workers' compensation statutes in the late nineteenth and earlier twentieth centuries, see 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKER'S COMPENSATION LAW* 2–9 (2002).

131. WITT, *supra* note 32, at 127.

132. See *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 448 (N.Y. 1911).

133. See *Cunningham v. Nw. Improvement Co.*, 119 P. 554, 566 (Mont. 1911).

134. *Howard v. Illinois Cent. R.R. Co.*, 207 U.S. 463, 504 (1908).

135. *Ives*, 94 N.E. at 449 (Cullen, C.J., concurring).

136. *Cunningham*, 119 P. at 566. See WITT, *supra* note 32, at 181–82.

The United States Supreme Court found the 1906 Federal Employees' Liability Act constitutionally defective for yet another reason. That statute had altered the common law of employers' liability for all injured employees of common carriers operating in interstate commerce. It was not essential, to gain coverage under the Act, that an employee actually be involved with interstate commerce, only that the carrier be. The Supreme Court found that extension of Congressional regulatory power unwarranted under the Commerce Clause because the statute could reach intrastate as well as interstate accidents.<sup>137</sup>

But workers' compensation was an idea whose time had come. The early decades of the twentieth century saw the emergence of the Progressive movement, with its emphasis on the increased role of state governments as caretakers of disadvantaged persons, and of organized labor. Workers' compensation was seen by its proponents as enlisting the state to improve the condition of industrial laborers. Within less than a decade after being successfully challenged in the courts, workers' compensation statutes had passed constitutional muster. In three 1917 decisions, the Supreme Court sustained the New York statute passed in response to its 1911 invalidation, as well as statutes from Iowa and Washington.<sup>138</sup> It took only another decade for workers' compensation to sweep through the states.<sup>139</sup> No single reform of the common law of torts had previously had a comparable effect in America, and none has since.

#### *D. Bringing Products Liability Cases into the Ambit of Tort Law*

The abolition, through workers' compensation statutes and the Federal Employees' Liability Act, of the three doctrinal linchpins of negligence-based tort liability in industrial accident cases—contributory negligence, assumption of risk, and the fellow-servant rule—meant that the boundaries of the subject of Torts would significantly change after the first decade of the twentieth century. A whole subset of industrial accidents, those emanating from workplaces in states and railroad journeys that crossed state lines, had been removed from state court dockets and were being adjudicated by workers' compensation boards or the federal courts under the FELA.

But despite the loss of many industrial accident cases, the corpus of tort law did not shrink in the first two decades of the twentieth century; it expanded. Nor did the negligence principle, despite being abandoned in the

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137. *Howard*, 207 U.S. at 498–99. Congress responded, in the same year, with a redrafted statute that now applied only to employees who had been injured when engaged “in commerce between any of the several States,” which the Supreme Court eventually sustained. *Mondou v. New York, New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 7, 58 (1912).

138. *See* *N.Y. Cent. R.R. Co. v. White*, 243 U.S.188, 196–200 (1917) (New York); *Hawkins v. Bleakly*, 243 U.S. 210, 212–16 (1917) (Iowa); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234–37, 246 (1917) (Washington).

139. U.S. BUREAU OF LABOR STATISTICS, NO. 496, WORKMEN'S COMPENSATION LEGISLATION OF THE UNITED STATES AND CANADA AS OF JANUARY 1, 1929, at 6–8 (1929).



recovery systems of workers' compensation and significantly modified in FELA cases, diminish in importance. At approximately the same time as the number of workplace accidents decided by traditional common law tort principles decreased, another set of accidents, whose salience was magnified by changes in tort doctrines themselves, emerged. And at the same time the idea of cause-based tort liability, which had come to be thought of by late nineteenth-century courts and commentators as archaic, revived itself as early twentieth-century conceptions of causation replaced nineteenth-century conceptions.

### 1. *The Abandonment of the Privity Rule in Products Cases*

By the close of the first decade of the twentieth century two developments in the American economy that were to have a great impact on the state of that economy in future decades were in place. One was the mass-market distribution of products from manufacturers through retailers to consumers. The other was the entrance of the automobile industry into mass markets. Motorized vehicles, initially specialty items designed for high-end buyers, had come to be manufactured on assembly lines and offered at comparatively reasonable prices to the entire population. Both of those developments were to have profound effects on tort law.

A 1932 study of automobile accidents found that by the 1920s, motor vehicle accidents were the cause of one-third of all accidental deaths in the United States, and 30 percent of all personal injury suits filed in the more populous urban areas of the nation arose out of accidents involving motor vehicles.<sup>140</sup> But until 1916 most persons injured in automobile accidents were unable to bring claims against the manufacturers of the vehicles for injuries they incurred in those accidents. The reason was the so-called "privity" rule, which limited the tort liability of manufacturers to persons in privity of contract—that is, who had entered into contractual relations—with them.

#### a. *Winterbottom v. Wright as Precedent*

One of the more influential early formulations of the privity rule came in an 1841 English case, *Winterbottom v. Wright*,<sup>141</sup> in which the defendant, "a contractor for the supply of mail-coaches," had entered into a contract with the Postmaster General's office to hire a mail coach to convey mail from Hartford to Holyhead in the county of Chester. Under the terms of the contract the defendant took on "the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach."

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140. COLUMBIA UNIV. COUNCIL FOR RESEARCH IN THE SOC. SCIS., REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 17–20 (1932).

141. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402, 402–03.

Winterbottom, a mail coachman, “hired himself . . . to drive and take the conduct” of the mail coach from Hartford to Holyhead.<sup>142</sup>

On August 8, 1840, Winterbottom was driving the Postmaster General’s mail coach when the coach “gave way and broke down,” throwing Winterbottom from his seat and severely injuring him. He sued Wright, the contractor, arguing that the contract between him and the Postmaster General had provided that Wright would keep the coach in a safe condition, and Wright had violated it by allowing the coach to be in a “frail, weak, infirm, and dangerous state,” resulting in its collapse and Winterbottom’s injuries.<sup>143</sup>

All of the judges at the Court of Exchequer ruled that Winterbottom was not in privity of contract with Wright and therefore could not maintain an action against him.<sup>144</sup> One judge stated “if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action.” Unless “we confine the operation of such contracts as this to the parties who entered into them,” the judge concluded, “the most absurd and outrageous consequences, to which I can see no limit, would ensue.”<sup>145</sup> Another judge added that “[t]his is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*.”<sup>146</sup>

Although it was not entirely clear from the pleadings, *Winterbottom* was an action in tort, with plaintiff’s counsel arguing that “the accident . . . happened through the defendant’s negligence and want of care.”<sup>147</sup> In *Winterbottom* no such action was possible, the judges ruled, because the plaintiff was not in privity of contract with the defendant.

*Winterbottom* came down at a time when tort actions in negligence were not common in England and in which the Postmaster General was not deemed to be accountable for accidents caused by persons that office hired to deliver the mail. However, by the first decade of the twentieth century in America, transportation accidents were the leading cause of personal injuries, and tort suits for those injuries based on negligence were routine. Moreover, the mass marketing of products through chains of distribution, in which manufacturers sent their products to affiliated retailers who sold them to consumers, had become ubiquitous. A notable example was the American automobile industry. After Henry Ford adopted the practice of manufacturing Ford cars on assembly lines, then selling them to the general public through retail outlets, other American automobile manufacturers followed suit.

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142. *Id.* at 402–03.

143. *Id.* at 403.

144. *Id.* at 405.

145. *Id.* at 404–05.

146. *Id.* at 405.

147. *Winterbottom*, 152 Eng. Rep. at 404.

b. *MacPherson v. Buick and the Abandonment of Privity*

In 1910 Donald MacPherson, a resident of Galway Village in upstate New York, purchased a 1911 Buick Model 10 “runabout” motor car from the Close Brothers dealership in Schenectady. The car had two front seats, a double-sized “rumble seat” at the back, and thirty-inch wooden-spoked wheels with air-filled rubber tires. The wheels had been made by the Imperial Wheel Company, which used hickory wood, the same material used in wagon wheels. Each wheel had twelve spokes, which Imperial visually inspected at its factory before painting them (in order to prevent shrinkage) and assembling them on a wheel. Wheels were then sent to the Buick factory where they were assembled on to motorcars. Buick did not inspect the wheels before attaching them to the car frames, but it did subject all its cars to road tests before offering them for sale.<sup>148</sup>

After purchasing his Model 10 Buick, MacPherson, who owned a grave marker and headstone business in Galway, drove it around upstate New York, on gravel country roads, from May to December 1910. He then stored the car in his barn from that December to May 1911. Often on his journeys, MacPherson carried gravestones in the rumble seat of his car. The Model 10 advertised itself as capable of reaching speeds of fifty miles per hour, the typical speed of motorcars at that time being fifteen to twenty.

Two months after MacPherson resumed using his car in the late spring of 1911, a friend of his, John Carr, asked him for a ride to the hospital in Saratoga Springs to get an infected hand treated. In late July of 1911 MacPherson picked up John Carr and his brother Charles, then drove east and north toward Saratoga Springs, a distance of about eighteen miles from the Carrs home.

As MacPherson and the Carrs approached the outskirts of Saratoga Springs on a road paved with crushed granite, MacPherson was traveling about thirty miles per hour when he encountered a stretch of road with loose gravel, about four inches deep, that had been spread on the section by a maintenance crew. The Buick skidded on the gravel, MacPherson lost control, and the car slid off the road to the right, striking a telephone pole with its right front bumper. The impact caused the Buick to spin round 180 degrees and topple upside down into a three-foot ditch. The Carr brothers were thrown from the Buick, but MacPherson was pinned in the car. The Carrs were not seriously hurt, but MacPherson broke his right wrist, cracked some ribs, and received lacerations on his face, above his right

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148. In describing the facts of *MacPherson* I have drawn upon the record presented on appeal to the New York Court of Appeals in Case on Appeal [Joint Appendix]. Transcript of Record, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) [hereinafter *MacPherson Record*]. For an argument that the actual facts in *MacPherson* were distorted in Judge Benjamin Cardozo’s opinion for the Court of Appeals, see James A. Henderson, Jr., *MacPherson v. Buick: Simplifying the Facts While Reshaping the Law*, in *TORTS STORIES* 41 (Robert L. Rabin & Stephen D. Sugarman eds., 2003), which relies heavily on the trial record.

eye.<sup>149</sup> Motorists and passersby came to the scene of the accident, and eventually a motorist took MacPherson and the Carrs to the Saratoga Springs hospital, where MacPherson was treated for his injuries and released. Before leaving the scene of the accident, he had picked up two broken wooden spokes from the grass near the side of the road, and bystanders recovered additional spokes near where the Buick lay.<sup>150</sup>

After recuperating from his injuries, MacPherson, concerned that the damage he suffered in the accident might affect his future as a stonecutter, resolved to consider suing the Buick Motor Company in tort. Although immediately after the accident he had made no mention of any change in the car's condition prior to its encountering the patch of gravel on the road,<sup>151</sup> MacPherson, in the course of discussing a lawsuit, now recalled that prior to the accident he had heard an unusual sound in the rear of the car, and had felt the left rear of the car collapsing. He and his lawyer concluded that the sound was consistent with the left rear wheel of the car breaking. The fragments of wheel spokes that MacPherson and others found at the accident scene provided possible support for that theory.<sup>152</sup>

MacPherson brought suit against the Buick Motor Company in a trial court in Saratoga County in 1912, and the court dismissed his suit for lack of privity. On appeal, the Appellate Division of the New York Court of Appeals reversed and remanded for a new trial, concluding that the absence of privity was no bar.<sup>153</sup> When the case was retried before a Saratoga County jury in 1914, MacPherson and counsel for Buick gave incompatible accounts of how the accident occurred. MacPherson, backed up by Charles Carr as a witness<sup>154</sup> (Carr had been sitting in the rumble seat), claimed that he was driving between eight and twelve miles per hour when he heard a noise and the rear end of the car suddenly collapsed, throwing the car into a

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149. *MacPherson Record*, *supra* note 148, at 21 (testimony of Donald MacPherson). MacPherson said that his right eye was "torn apart entirely, laid down from the eye brow." *Id.* He also said the following about the effect of the accident on his eyesight:

Prior to this time I wore glasses, but my eye sight was good. I could get glasses that I could see with. I haven't been able to do so since. My eye sight is failing fast, since the accident . . . I can't tell people in the middle of the street.

*Id.* at 24. But the doctor who patched up MacPherson immediately after the accident testified that "the eye was not implicated" in the accident; "it was the flesh above the eye over the forehead, to the right of the eye." *Id.* at 160 (testimony of Dr. Waldo H. Sanford). An eye specialist whom MacPherson subsequently consulted testified that "I examined [MacPherson's] eyes last May. I found them perfectly normal. I could find nothing the matter with them." *Id.* at 278 (testimony of Dr. Leo F. Adt).

150. The facts in the last several paragraphs are taken from *MacPherson Record*, *supra* note 148, at 15–36 (testimony of Donald MacPherson).

151. One witness at the trial, who had given Donald MacPherson a ride back to his home after he had been treated at the Saratoga Springs hospital, testified that MacPherson had told him that he "did not know" how the accident had occurred; that "the first thing he knew he was in the ditch." *Id.* at 302 (testimony of Bert Richmond).

152. *Id.* at 19, 26–28 (testimony of Donald MacPherson).

153. *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224, 227–28 (App. Div. 1912).

154. *MacPherson Record*, *supra* note 148, at 43 (testimony of Charles Carr).

ditch.<sup>155</sup> Buick maintained that MacPherson was driving about thirty miles per hour when he encountered a gravel patch on the road, skidded, and in the course of skidding off the road the Model 10 struck a telegraph pole, breaking the spokes of the wheel and turning the car over.<sup>156</sup>

Based on the recollections of eyewitnesses to the 1911 accident, Buick's reconstruction of the facts was the more accurate one. MacPherson's and Charles Carr's claims that the Model 10 skidded off the road because its left wheel broke seem hard to reconcile with MacPherson's testimony that he had slowed from twelve to eight miles per hour when he encountered the gravel patch. A car traveling at that speed, on entering four inches of gravel piled on a road, would very likely have come to a halt.<sup>157</sup>

But then a series of events occurred that would result in *MacPherson v. Buick Motor Company* emerging as a transformative case in twentieth-century tort law. First, the jury at the 1914 trial chose to believe MacPherson's account, and therefore found that Buick had manufactured a car with a defective wheel that they had not sufficiently inspected.<sup>158</sup> Since the privity issue had already been resolved in MacPherson's favor in the first trial, this meant that unless Buick could convince the Appellate Division that the jury verdict was contrary to the evidence presented at trial, it was a foregone conclusion that the verdict would be affirmed on appeal. Yet Buick resolved to appeal the trial court decision anyway, because it recognized the significance of a conclusion that the liability of automobile manufacturers extended beyond persons with whom they were in privity of contract, and wanted to challenge that conclusion in New York's highest court, the Court of Appeals.

That decision on Buick's part resulted in the second significant event in the history of the *MacPherson* case. Rather than appealing on the ground that the jury verdict was contrary to the evidence, Buick appealed solely on the privity issue.<sup>159</sup> At first glance, that choice seems puzzling. There was no chance the Appellate Division, which only two years earlier had concluded that lack of privity did not bar MacPherson from recovering against

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155. *Id.* at 29 (testimony of Donald MacPherson).

156. Buick produced three witnesses, all of whom were driving in cars near the scene of the accident, who estimated MacPherson's speed just before the crash at about thirty miles per hour, possibly higher, and speculated that the Buick had skidded after it encountered the gravel and hit the pole. *Id.* at 137–38, 145–46 (testimony of Willard J. Miner); *Id.* at 156 (testimony of Dr. Waldo H. Sanford); *Id.* at 170, 172–73 (testimony of Archibald H. Thompson). Both those arguments were noted by the Appellate Division in *MacPherson v. Buick Motor Co.*, 145 N.Y.S. 462, 462–65 (App. Div. 1914).

157. Four witnesses for Buick testified that they believed that if the car was going only eight miles an hour when it encountered the gravel, it would have stalled out. *MacPherson Record*, *supra* note 148, at 143 (testimony of Willard J. Miner); *Id.* at 204, 206 (testimony of John E. Hodgman); *Id.* at 290 (testimony of Alvin E. Kipp); *Id.* at 344–46 (testimony of J. A. P. Ketchum).

158. *Id.* at 406. There was no opinion at the trial court level. *Id.* at 425.

159. Brief of Appellant, 6–100, *MacPherson v. Buick*, 145 N.Y.S. 462 (App. Div. 1914).

Buick, would change its views the second time around. And there was strong evidence that Buick's reconstruction of the facts of the accident—which had MacPherson driving at a much higher speed, skidding, and hitting a telephone pole—accounted for the damage to the wheel spokes, the scrape on the telephone pole, and the flipping over of the Model 10 in a much more credible fashion than MacPherson's and Carr's account.<sup>160</sup>

Yet Buick not only chose not to argue that the jury verdict was contrary to the evidence presented at trial, it stated in its brief to the Appellate Division that the accident occurred because the left rear wheel of the Model 10 “broke down while [it] was traveling on a State Road, at about fifteen miles an hour or less, and [MacPherson] was injured.”<sup>161</sup> These may have been facts the jury found, but they were not consistent with Buick's account of how the accident occurred, and when MacPherson's brief repeated his explanation of the account, Buick's brief did not seek to contradict that explanation.

Why might Buick have decided to concede facts on appeal that it had sought to controvert at the trial, in effect not challenging the jury verdict? It apparently thought that even if it secured a new trial on the weight of evidence issue, it was not likely to win a judgment before another Saratoga County jury. Moreover, it was arguably far less interested in avoiding paying a damage judgment to Donald MacPherson than having the New York Appellate Division on record for the proposition that purchasers of automobiles could win damage judgments directly against the manufacturers of those automobiles. The privity issue was the crucial one for Buick, and so it reargued that issue before the Appellate Division in order to lay the grounds for a further argument to the New York Court of Appeals.

Buick's decision resulted in a Saratoga County jury's findings of fact in the 1912 trial becoming accepted by the Court of Appeals when it considered whether the privity bar to owner or consumer suits for injuries from defective products should be retained. The Court of Appeals' version of the facts of the Model 10's accident, set forth by Justice Benjamin Cardozo in 1916, was even more favorable to MacPherson than MacPherson's own account. Cardozo wrote

The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car, it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer.

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160. In his opinion at the Appellate Division, Justice Henry T. Kellogg stated that “the verdict of the jury has established that the wheel collapsed under the circumstances claimed by the plaintiff . . . . We cannot say that the verdict was against the weight of the evidence.” *MacPherson*, 145 N.Y.S. at 463.

161. *Id.* at 462; Brief of Appellant, *supra* note 159, at 3.

There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted.<sup>162</sup>

In Cardozo's description of the facts, the Model 10 "suddenly collapsed," the wheel was "made of defective wood," and "its defects could have been discovered by reasonable inspection." There was actually no evidence presented at trial, other than MacPherson's and Carr's testimony, that the car "suddenly collapsed." There was no evidence at all that the wheel was "made of defective wood." Even a well-constructed wheel with hickory wood spokes might well have been broken when it collided with a telephone pole at a rate of speed which might have been as much as thirty miles per hour.

As for Cardozo's statements that the wheel was defective, and that its defects could have been discovered by reasonable inspection, those statements were dubious as well. As we have seen, the Imperial Wheel Company inspected the hickory spokes on the wheels it manufactured before painting them in the process of assembling its wheels. When the wheels arrived at Buick's factory, there was really no opportunity for Buick to inspect them, since paint would have obscured any visible defects in the spokes. But Buick road-tested all its cars after assembling them so that any defects in wheels would probably have emerged from that testing. In addition, MacPherson had driven the Model 10 on back roads, carrying heavy loads, between May and December of 1910 and again between May and late July of 1911.<sup>163</sup> If there had been a defect in the Model 10's left rear wheel, it very likely would have revealed itself in that interval. In short, the wheel that broke in the accident in which MacPherson was injured was very likely not defective, and Buick, once it received assembled wheels with painted hickory spokes from a wheel manufacturer, had no realistic way of identifying defects in the wheels other than road testing vehicles with wheels, which it had done.

Cardozo's statement of the facts, however, was distinctly advantageous from another perspective. If *MacPherson* were made to appear as if the wheel that injured the plaintiff had clearly been defective and Buick was clearly negligent in failing to discover the defect, the only reason Donald MacPherson would not have been able to recover damages against the Buick was that the privity rule barred his suit. Thus, in Cardozo's version of *MacPherson*, it arose out of a scenario in which an innocent driver had been injured when his car collapsed because of a defect that the manufacturer could easily have discovered on inspection. Cardozo faced a scenario with clear justice implications: either a deserving plaintiff was going to recover from the party that had injured him or he was going to have to bear the

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162. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

163. See *MacPherson Record*, *supra* note 148, at 16-17 (testimony of Donald MacPherson).

costs of his injuries because of a rule whose applicability to the facts of the case seemed dubious.

Thus after reciting his version of the facts, Cardozo was able to move quickly to an analysis of the privity rule. As numerous commentators have pointed out, Cardozo's opinion in *MacPherson* was an artful exercise in the reading of precedent, designed to create the impression that a massive change in tort law was a modest extension of the logic of prior decisions. Earlier New York cases had created an exception to the privity rule for "inherently dangerous" products, such as poison.<sup>164</sup> Subsequent cases had seemingly extended the exception to products, such as scaffolds, that were not inherently dangerous in themselves but became so when negligently manufactured. Cardozo used those cases to argue that the true inquiry in defective products cases was whether the manufacturer of a product could be reasonably expected to foresee that if the product was negligently made, it was dangerous. He applied that test to automobiles, asking whether automobile manufacturers could reasonably be expected to foresee that defects in a vehicle might pose dangers to those who rode in it. The answer to that question was obviously yes.<sup>165</sup>

But a 1915 decision of the U.S. Court of Appeals for the Second Circuit, which included New York, held, in a fact setting strikingly similar to that of *MacPherson*, that the privity rule barred a suit against an automobile manufacturer for negligently failing to discover a defective wheel.<sup>166</sup> Cardozo noted that case, stating that it was a "decision to the contrary" and that there was a "vigorous dissent."<sup>167</sup> His principal emphasis, however, was on the privity rule, and its irreconcilability with the recognition that if a manufacturer had placed on the market a product that had the capacity to injure others if negligently made, the manufacturer should be responsible for damage the product caused. The liability of the manufacturer was in tort, not in contract, and thus contractual defenses were irrelevant. As Cardozo put it,

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger . . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully . . . . In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, arises out of con-

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164. Cardozo gave special emphasis to the poison case of *Thomas v. Winchester*, 6 N.Y. 397 (1852), calling the decision a "landmark of the law." *MacPherson*, 111 N.E. at 1051.

165. For a collection of several comments on Cardozo's opinion in *MacPherson*, see ANDREW L. KAUFMAN, *CARDOZO* 269–74 (1998).

166. *Johnson v. Cadillac Motor Co.*, 221 F. 801 (2d Cir. 1915).

167. *MacPherson*, 111 N.E. at 1053–54.



tract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.<sup>168</sup>

Cardozo had one last rhetorical flourish in *MacPherson*, designed to dispose of the *Winterbottom* precedent:

The maker of this car supplied it for the use of purchasers from the dealer . . . . The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of a developing civilization require them to be.<sup>169</sup>

With its decision in *MacPherson* the New York Court of Appeals signaled that tort law would be the principal arena for personal injury suits by users or consumers injured by defective products against the manufacturers of those products. Moreover, the *MacPherson* standard for recovery in defective products cases—that a product be one imminently capable of danger to others if negligently made, and that the injured person be in a foreseeable class of victims—suggested that in a twentieth-century economy in which products were increasingly distributed to consumers through retailers, and in which nearly all products were capable of doing harm if defective, the number of defective products suits might increase in a rate comparable to that of the increase in workplace injuries suits between 1880 and 1910. At the very time that workers' compensation legislation was taking personal injury cases out of the common law torts system, the approach Cardozo outlined for defective products cases paved the way for those cases to replace them.

Cardozo had grounded liability in defective products cases firmly on the negligence principle; the pioneering features of *MacPherson* stemmed not from that but from the extension of manufacturer liability beyond retailers to foreseeable users, consumers, and bystanders. In this respect *MacPherson* reinforced the late nineteenth- and early twentieth-century equation of tort law's growth with liability premised on negligence. This was even though workers' compensation statutes allowed workers to recover from their employers when the employers were not negligent, or the workers were. A workers' compensation analogy in the law of defective products—cause-based liability for defectively manufactured or designed products that resulted in injuries, even if the defects could not have been discovered or prevented by the exercise of reasonable care—was not within

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168. *Id.* at 1053.

169. *Id.*

the consciousness of courts or commentators in the first two decades of the twentieth century. The idea of “strict” liability in defective products was to await future generations.

*E. Causation and the Limitation of Negligence-Based Liability in Personal Injury Cases*

*1. Damnum Absque Injuria and Factual Causation*

*MacPherson* reveals twentieth-century tort law poised at the outset of its expansion as the American economy grew and diversified, causing personal injuries in its wake. Tort law had shed some of the awkward features of its origins, such as its arguably derivative relationship to contract law or status duties and its remnants of cause-based liability, which by the first decade of the twentieth century was generally regarded as confined to a few areas, such as the escape of wild animals or nuisances, that were best understood as historical relics. But one puzzle of tort law in its formative years remained troublesome for its early twentieth-century practitioners: the problem of *damnum absque injuria*, or how to determine when injuries were remediless.

We have seen that one of the ways in which late nineteenth-century commentators had sought to emphasize the importance of grounding tort liability on either intentional conduct or negligence had been the argument that if an activity was not engaged in negligently, it was “lawful” and thus insulated from liability. One of the bases of that argument had been that a lawful activity could not be treated as “causing” injury to others, because to treat it in that fashion would be to unduly restrict the rights of persons to act as they choose. Legal causation, according to that view, could only be connected to intentional or negligent acts.

This was a view of causation that in one respect flew in the face of common sense, because it was apparent that many persons were injured because they were exposed to risks generated by the activities and products of industrial society. But for those activities being engaged in, or those products distributed, the injuries would not have occurred. Cause-based liability in tort, in fact, was built on this commonsense view of causation. One of the reasons why Holmes and others resisted cause-based liability in tort law was that they acknowledged that in an industrial society there were numerous activities, beneficial to the public at large, that inevitably generated risks, and if the risks of an activity could not be prevented by the exercise of reasonable care, it was better to let losses from exposure to those risks lie where they fell than to place them on those who engaged in the activity.

Workers’ compensation legislation was premised on a different assumption about the relationship between engaging in an activity and bearing the costs of that activity’s exposure of others to risks. Instead of

assuming that if an activity was “lawful” (had been conducted free from negligence) those engaging in it should not pay the costs of others who were injured from exposure to its risks, workers’ compensation schemes made the opposite assumption, at least with respect to workplace injuries. The schemes assumed that as between employers and employees, the former were in a better position to bear the costs of workplace injuries to the latter. “In a better position” meant more solvent, but also possibly more capable of reducing the risks of workplace injuries by hiring more competent employees or improving their training. Injured employees, however, could recover their damages from on-the-job injuries whether they were competent, well trained, or not, and whether the injuries were the results of their own negligence, that of fellow employees, or not. Employer liability in workers’ compensation programs was cause-based.

There was thus no distinction between factual and “legal” causation in workers’ compensation. But that distinction remained a central principle of early twentieth-century tort law outside the area of workplace injuries. If an employee of a corporation injured a third person, that person could only recover against the corporation if the employee had acted negligently. The employer’s liability was vicarious, not based on negligence, but it was only triggered by the employee’s negligent conduct. Thus many personal injuries caused by the exposure of Americans to risks generated by the activities and products of early twentieth-century American civilization remained remediless in tort because they were cause-based as distinguished from negligence-based.

The distinction between factual and legal causation highlighted this feature of many early twentieth-century personal injuries. All such injuries had causes in the sense that but for some antecedent event’s having taken place, the injury would not have occurred. In one case<sup>170</sup> a motorman drove a trolley car over its mandated speed, placing the car in a position along the trolley line that resulted in its being in the path of a chestnut tree in the borough of Sugar Notch, Pennsylvania. The tree fell, damaging the car and injuring the motorman. When the motorman sued Sugar Notch for improper maintenance of the tree, the borough argued that the motorman should be barred from recovery because his negligence in speeding had contributed to his injuries.

The court held that the speeding was the “but for” or “factual” cause of the motorman’s injuries.<sup>171</sup> But the speeding did not increase the risk of a tree’s falling on the car: that might have happened even if the trolley had been driven at the appropriate speed, or if it had been stopped at a station. There were other risks increased by the speeding, such as the derailling of the trolley, collisions with other trolleys, and injury to passengers. How-

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170. *Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899).

171. *Id.*

ever, those risks had not occurred, so the motorman's speeding was not a legal cause of the accident. The motorman was allowed to recover.<sup>172</sup>

## 2. *Non-negligent Risks and Factual Causation*

As numerous cases in which non-negligent risks associated with industrial activities or products emerged in the form of personal injury suits in late nineteenth- and early twentieth-century America, courts, judges and commentators found themselves using the language of causation as a justification for the absence of recovery in such cases. The language of causation seemed particularly appropriate because the injuries *were* caused by the activities or products in question; they were just not caused by the *negligent* operation of those activities or manufacture of those products. The activities or products were the factual but not the legal causes of the injuries. There was an important difference between cause-in-fact and what came to be termed proximate, or legal causation, as opposed to remote causation. Proximate causation occurred when the foreseeable risks that made an actor negligent were the same or similar risks that caused an injury, even if the injury may have occurred in an unexpected way. In contrast, risks that were factually connected to an actor's conduct, but unforeseeable, or of a different order from those that made the actor negligent, were remote causes of an injury, and the injured party could not recover.

As more cases involving accidents with causal chains that led back to an actor's conduct, but not necessarily to that actor's negligent conduct, were brought in the courts, judges and commentators sought to derive a doctrinal formula that would capture the distinction between factual and proximate causation and be applicable across a large range of cases. That task proved elusive, and the term proximate, when contrasted with remote, seemed to be highly subjective, even conclusory. In 1928 a case came before the New York Court of Appeals that provided a tempting opportunity for that court to revisit the relationship between causation, a negligence-based standard of tort liability, and *damnum absque injuria*, and to reaffirm that causation inquiries in torts cases should be subsumed in inquiries about negligence

## 3. *The Negligence Principle and Proximate Causation: The Palsgraf Case*

### a. *The Unexpected Facts of Palsgraf*

The case was *Palsgraf v. Long Island R.R. Co.*<sup>173</sup> A single mother who worked as a custodian, Helen Palsgraf, was waiting to board a train at the East New York station (near Atlantic Avenue in Brooklyn) with her daughter

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172. *See id.*

173. 162 N.E. 99 (N.Y. 1928).

ters on Sunday, August 24, 1924. The three were bound for Rockaway Beach. While Helen Palsgraf stood on the platform, another train was departing the East New York station (for Jamaica, Queens), and two men raced toward it in an effort to board its rear car. A guard stationed on the train, an employee of the Long Island Railroad, assisted the men as they jumped aboard the train as it began to gather speed. One of the men seemed unsteady, and another guard, standing on the platform, pushed him from behind. In the process a package the man was carrying was knocked to the ground. The package contained fireworks, but a newspaper covered the fireworks. As the package fell to the ground, it exploded.<sup>174</sup>

The explosion from the fireworks sent some shock waves through the station, causing a large weighing scale located near Helen Palsgraf to topple over, striking her. She was not seriously injured, but she was very upset by the incident, fearing for the safety of her daughters, as well as for herself.<sup>175</sup> When she sued the Long Island Railroad, a jury found that the guard had been negligent in dislodging the package and that his negligence was the proximate cause of the scale's toppling from the fireworks explosion. The Long Island Railroad appealed the jury's verdict to the Appellate Division and, eventually, to the New York Court of Appeals. Once again Judge Cardozo was presented with an opportunity to re-frame early twentieth-century tort law. In this instance the opportunity came in the relationship between negligence and causation.

As negligence-based liability was emerging as the dominant liability standard in early twentieth-century tort cases, with cause-based liability coming to occupy a marginal position, an additional analytical problem surfaced in some negligence cases. In the late nineteenth century, negligence inquiries served a twofold function in cases where industrial activities or products caused injuries to others. Resolving the issue of whether the activity or product that caused an injury had been negligently engaged in or manufactured could also be said to have resolved causation issues: if the activity or product was "lawful" (not negligent), something other than the defendant's conduct had caused the injury, and the plaintiff was remediless.

*b. The Puzzle of the Scope of Liability Where Negligent Conduct Resulted in Unexpected Harm*

Causation issues did not seem so easily resolved in cases where the conduct of a defendant was negligent, but criteria similar to those employed in determining the negligence issue also seemed to be affecting the relationship between the defendant's negligence and injury to the plaintiff. In a

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174. The best overview of *Palsgraf*, which includes an investigation into the possible discussion of that case at a meeting of the American Law Institute, which Judge Benjamin Cardozo attended, is KAUFMAN, *supra* note 165, at 286–303.

175. Helen Palsgraf's emotional reaction to the accident included a stuttering condition. KAUFMAN, *supra* note 165, at 287.

1921 English case, *In re Polemis*,<sup>176</sup> stevedores hired by the charterer of a ship were loading heavy cases of benzine from one hold to another by means of a sling. They had erected wooden boards over the entrance of one of the holds in order to facilitate the loading process. When the sling containing the cases of benzine was being hoisted up, either the rope doing the hoisting or the sling itself came into contact with the boards, causing one board to fall into the hold. As it did, contact between the board and some substance in the hold caused a spark and an immediate rush of flames. Apparently the hold had filled with benzine vapors from the cases. Benzine is highly flammable, so that when the spark ignited the vapors, the ensuing fire was large enough to eventually destroy the ship.

When the owners of the ship sued the charterers for the ship's loss, arbitrators determined that the stevedores' actions in allowing the sling or rope to come into contact with the boards were negligent, and ruled that the owners could recover full damages even though it was unforeseeable that the loss of a ship from fire would have resulted from negligently causing a board to drop into one of the ship's holds. All three judges of the Court of Appeal, who heard the case on appeal from the arbitrators' decisions, agreed that the owners could recover for the loss of the ship. Once it had been established that the stevedores were negligent in causing a board to drop into the hold (the Court of Appeal was required to accept the arbitrators' finding of negligence), all the judges ruled that even though it was not foreseeable that the falling of a board into a ship's hold would result in a spark and fire, the damage from fire was "directly" caused by the negligent dislodging of the board, and that was all that was necessary to place the loss on the charterers.

*Polemis'* conclusion that once negligence was established, a negligent defendant was responsible for any and all damage that "directly" ensued was, from one perspective, consistent with late nineteenth-century treatise writers' conclusion that negligence was the determinant of whether liability could be cause-based. If negligence existed, and a causal connection between the negligence and injuries to others could be established, liability could spread as far as that causal connection. If negligence could not be established, no amount of causal connections between an industrial activity or a product and injuries to others yielded liability. In both instances negligence not only set the threshold of liability, it determined its potential scope.

But as American courts encountered more cases in which negligent acts had unforeseeable consequences that were nonetheless causally connected to those acts, extending liability in such cases seemed inconsistent with basing tort liability on negligence. This was because from its first appearance as a major principle of tort law, negligence had been identified

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176. *In re Polemis & Furness, Withy & Co.*, 3 K.B. 560 (1921).

with “reasonable” conduct, and reasonableness with something like prudent foresight. Individuals did not have to protect others from all the risks their activities generated, just the foreseeable risks. They did not have to take all possible precautions to prevent risks from their activities from occurring, just reasonable precautions based on how serious the risks were, how likely they were to happen, and how easily they could be prevented.

So in the ship fire case, if the only risk of a board’s falling into a ship’s hold was that it might cause a spark that, if the hold contained highly flammable material, might cause a fire that could consume the ship, the stevedores would probably not have been negligent for dislodging the board. Few falling boards cause sparks, and few holds of ships have highly flammable contents. Thus the risk of fire from the falling board was unforeseeable. Yet the suit was for damage from fire, not the foreseeable damage to the ship’s hold from contact with the board.

It was this apparent asymmetry between the variables that affected negligence inquiries and “direct” tests for liability when negligent acts caused unforeseeable injuries that would prompt the Privy Council to overrule the ship fire case in 1961, substituting a “foreseeability” test for the “direct” test.<sup>177</sup> But before that occurred, *Palsgraf* seemed to present an opportunity to undermine direct causal liability in negligence cases in another way, and Cardozo seized that opportunity.

*c. Cardozo’s Solution: Subsuming Proximate Causation in Negligence*

As *Palsgraf* worked its way up to the Court of Appeals, the jury and lower courts agreed on two points. First, the jury concluded that the guard’s action in pushing one of the men onto the train and dislodging the package was negligent. A majority of the Appellate Division agreed with that finding.<sup>178</sup> Second, the jury concluded that the guard’s negligence had caused Helen Palsgraf’s injury, although it did not make any finding as to how far Ms. Palsgraf was from the package when it exploded. A 3-2 majority of the Appellate Division also upheld the causation finding.<sup>179</sup>

When Cardozo described the facts of the accident in his opinion for the Court of Appeals, he said the scales that struck Ms. Palsgraf were “many feet away” from the site of the explosion, and that she was standing “at the other end” of the railroad platform.<sup>180</sup> There was testimony from at least two other sources, however, that Ms. Palsgraf was approximately twenty-five to thirty feet from the explosion, and possibly even closer, as Judge

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177. *Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Company Ltd*, [1961] A.C. 388 (P.C.) (appeal taken from New S. Wales).

178. See WILLIAM H. MANZ, *THE PALSGRAF CASE* 50, 69 (2005).

179. See *id.* at 69.

180. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

William Andrews noted in his dissent.<sup>181</sup> Cardozo may have thought that standing twenty-five to thirty feet from the site of an explosion was “many feet away,” but it was clearly close enough to be within the explosion’s range.<sup>182</sup>

In addition, Cardozo concluded that even if “[t]he conduct of the defendant’s guard” was “a wrong in its relation to the holder of the package” that was dislodged, it was “not a wrong in its relation to [Ms. Palsgraf], standing far away.”<sup>183</sup> But that was not what the jury found. It found that the guard’s act was negligent towards Ms. Palsgraf. In concluding otherwise, Cardozo was claiming that no reasonable jury could have made that finding.<sup>184</sup>

Cardozo gave two reasons for his conclusion that the Long Island Railroad was not liable for Helen Palsgraf’s injuries. One was that the guard owed no duty to Ms. Palsgraf because “[t]he risk reasonably to be perceived defines the duty to be obeyed,” and there was no reason for the guard to suspect that a package wrapped in newspaper, if dislodged, was at risk of exploding. The only foreseeable risk was damage to the contents of the package.<sup>185</sup>

The other reason was that once it had been determined that the guard owed no duty to protect Ms. Palsgraf from the risk of an explosion, “[t]he law of causation, remote or proximate,” was “foreign to the case.” Even if one assumed that “negligence . . . in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary” (here Cardozo cited the *Polemis* case), there was “no occasion to consider what damage might be recovered if there [was no] finding of a tort.”<sup>186</sup> Asking and answering the duty question in negligence cases (a question of law for the court) made it possible to avoid questions of causation in a range of cases. For “the risk reasonably to be perceived define[d] the duty to be obeyed,” which meant that there was no liability in negligence for unforeseeable risks. The same inquiry about the foreseeable consequences of engaging in activities or distributing products that clarified the issue of negligence could clarify the issue of proximate causation.

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181. See *Palsgraf* Record 19, 37, 40, 248 N.Y. 339 (1928). For Judge Andrews’s estimate of the distance, see *id.* at 356.

182. MANZ, *supra* note 178, at 101–02 argues, with the aid of eyewitness testimony, drawings, and maps, that Helen Palsgraf was about ten feet away from the scene of the explosion.

183. *Palsgraf*, 162 N.E. at 99.

184. In the brief submitted to the Court of Appeals, Matthew W. Wood, Helen Palsgraf’s attorney, noted that the trial court had treated both the negligence and proximate causation issues as questions for the jury, and the jury had resolved them in Palsgraf’s favor. Wood also cited two cases in which the Court of Appeals had stated that proximate cause was a question of fact. Brief for Respondent at 5–6, *Palsgraf* 162 N.E. 99.

185. *Palsgraf*, 162 N.E. at 100.

186. *Id.* at 101.



By focusing on duty in negligence cases, defining duty in terms of foreseeable risks, emphasizing that questions of proximate causation were antecedent to the duty inquiry, and treating duty as a question of law for courts, the approach Cardozo announced in *Palsgraf* had the potential to eliminate a number of difficult issues of proximate causation in negligence cases. But the proximate causation issue was not so easily disposed of. For *Palsgraf* was not simply a case where the defendant was not liable to the plaintiff because the risks that injured the plaintiff—risks from an explosion—were unforeseeable at the time the defendant acted. *Palsgraf* was a case in which there was a large risk of some kinds of injuries created by the guard's careless dislodging of the package—injuries to the contents of the package itself—and a smaller risk of other kinds of injuries from the package falling to the ground, injuries from an explosion because the package contained fireworks. The fact that the latter injuries were unforeseeable because the package gave no notice of its contents did not mean that the risk of an explosion was not present when the package was dislodged. It was, on the contrary, a risk related to the package being dislodged, and it was a risk to Helen Palsgraf because she was in the vicinity of the explosion. All of those conclusions were consistent with the jury's findings that the guard was negligent in dislodging the package and that the explosion had caused Ms. Palsgraf's injury.

One of the goals of late nineteenth-century legal commentators had been to order the field of torts around comprehensive principles that could straightforwardly be applied across a range of cases. Negligence, defined as reasonable care under the circumstances, regarded in most instances as a question of fact for juries, and applied to the conduct of both plaintiffs and defendants, was one such principle. By insisting that liability in most industrial accident cases be predicated on findings of negligence, courts and commentators felt that they might prevent late nineteenth- and early twentieth-century accidental injury cases from overwhelming the tort system. But that goal proved elusive in two respects. Workplace accidents proliferated to such an extent, and resulted in such inadequate remedies for injured workers, that ultimately those cases were largely removed from the courts. Meanwhile the attempted simplification of tort law around the negligence principle seemed threatened by the issues of factual and legal causation.

Cause-based liability was disfavored by those who sought to systematize the field of tort law as it proliferated in the late nineteenth century, but it appeared to re-emerge in cases where negligence had been found, but the scope of a negligent defendant's liability potentially extended to cases where the type, extent, or manner of a victim's injury was unforeseeable, despite being causally connected to the defendant's conduct. *Palsgraf* introduced another category of unforeseeable plaintiffs: the unforeseeable victim.

Cardozo's subsuming proximate causation inquiries sought to eliminate two of those categories of unforeseeable plaintiffs. If the risks that made a defendant negligent were not ones connected to the foreseeability of harm of a certain type, or to a particular class of victims, there would be no recovery. Cardozo conceded that "one who launches a destructive force" might be liable "if the force, though known to be destructive, pursues an unexpected path,"<sup>187</sup> and the *Palsgraf* analysis appeared to continue to permit liability where the kind of injury suffered by a plaintiff was foreseeable, but the extent was not. Cardozo also acknowledged that "the range of reasonable apprehension" in negligence cases might be a question for the jury, so that proximate cause issues were not wholly subsumed in negligence inquiries. But *Palsgraf* inadvertently revealed that by the late 1920s proximate causation had ceased to be anything like a principle that could be consistently applied across a range of torts cases. Andrews's dissenting opinion stated that "[w]hat we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."<sup>188</sup>

*d. The ALI's Effort to State Cardozo's Solution as a Comprehensive Principle Governing Personal Injury Cases*

The emergence of modern American tort law may be said to have culminated with a development that took place in approximately the same time interval in which *Palsgraf* was working its way from the trial court up to the New York Court of Appeals. A year before Helen Palsgraf and her daughters stood on the platform of the East New York railroad station, a group of judges, practitioners, and legal academics had formed an organization, the American Law Institute, that was dedicated to articulating the governing principles of common law fields in a fashion that would render the law of those fields less uncertain and complex. The method chosen for this task was the commissioning of Restatements of common law subjects, to be produced by reporters, legal academics selected because of their prominent scholarship in a field, and advisers, members of the Institute. It was initially anticipated that the Restatements—which were conceived as "black letter" summaries of the doctrinal principles governing a field—would be accompanied by treatises, written by the reporters, that would survey the field in greater detail. The Restatements were expected to contain, in addition to the black letter portions, illustrations of black letter propositions, commentary by the reporter, and some case citations.<sup>189</sup>

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187. *Id.* at 100.

188. *Id.* at 103.

189. For the emphasis of the American Law Institute's founders on responding to what they perceived as the increasing uncertainty and complexity of common law fields and doctrines, see

Torts was on the Institute's list of common law subjects for which Restatements would be prepared, and Francis Bohlen, who would move from the University of Pennsylvania law faculty to Harvard in 1925, was appointed the reporter. By the 1920s Bohlen had come to believe that a useful way of thinking about tort law was to identify the "social interests" whose "invasion" was reflected in particular tort claims.<sup>190</sup> Cardozo had also become attracted to the idea of laws protecting various "social interests,"<sup>191</sup> and he suggested, in *Palsgraf*, that looking at the case that way might clarify why the guard's alleged negligence toward the passenger carrying the package of fireworks should not be made a basis for finding him negligent toward Ms. Palsgraf. "In this case," Cardozo wrote,

the rights that are said to have been violated, the interests said to have been invaded, are not even of the same order . . . . If there was a wrong to [the passenger helped on to the train], which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to someone else.<sup>192</sup>

The Appellate Division was hearing *Palsgraf* when Bohlen and a group of Advisers met for a three-day meeting to discuss a tentative draft of the Restatement of Torts on "Negligence." The advisers included Judge Learned Hand, then on the U.S. Court of Appeals for the Second Circuit, Professor Edward Thurston of Yale Law School, and several others. Cardozo, a member of the Institute, had been actively involved in the Torts Restatement, but had declined being described as an adviser. The particular portion of the draft on which Bohlen sought advice was the liability of a negligent defendant to an unforeseeable plaintiff. Bohlen's draft, following what he understood to be established doctrine,<sup>193</sup> argued that when C, who was deemed negligent because his conduct posed foreseeable risks to B, also caused unforeseeable harm to A, A should not recover. He quoted one scholar as stating that "[t]he interest of the plaintiff which is injured must be

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*ALI Proceedings*, *supra* note 4, at 70, 77. For more detail on the founding of the American Law Institute, see G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 *LAW & HIST. REV.* 1 (1997).

190. See FRANCIS H. BOHLEN, *STUDIES ON THE LAW OF TORTS* (1926).

191. In his 1927 book, *The Paradoxes of Legal Science*, Cardozo wrote that determining negligence "[i]nvolved at every turn . . . the equilibration of social interests . . . ." BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 72 (1927).

192. *Palsgraf*, 162 N.E. at 100.

193. See, e.g., HENRY TERRY, *SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* 542-49 (1884).

the same as, or at least of the same sort as, that which the defendant should have realized was imperiled by his conduct.”<sup>194</sup>

*Palsgraf*, of course, had presented precisely that issue. It is not known whether those who attended the meeting, which took place from October 20 through October 23, 1927, were aware that the Appellate Division was hearing the *Palsgraf* appeal on October 21. Cardozo did not attend the first three days of the meeting, but he attended on October 23, and a transcript of the meeting involved Cardozo in an extended discussion with Bohlen, Hand, and Thurston about three hypothetical cases posited by Bohlen.<sup>195</sup>

Bohlen’s second hypothetical was as follows:

I am driving along a driveway and see a box which looks to me not like an ordinary paper box but a package wrapped up, obviously a thing of value . . . . It does in fact contain some high explosive which [the owner] is having brought to him for blasting purposes . . . [I carelessly run over the box] and the resulting explosion wrecks [the owner’s] house and does injury to him.<sup>196</sup>

In the discussion of that hypothetical, Cardozo eventually took the position that

If I run down the box the only interest invaded is the ownership in that box. I run the risk of causing any damage to the box which may happen, no matter how valuable . . . . But I have not been negligent towards any other interest, that is, to the adjoining property . . . I think that the general statement that it must be negligent with respect to the interest covers it all . . . . If I destroy a box in your private road in the absence of some warning, I have not the slightest reason to think it threatens undue injury to the building or any other property.<sup>197</sup>

Then there was a third hypothetical:

A negligently drives on the street to the danger of persons on the street, including B. He strikes (unexpectedly and without reason to know what it contains) a box containing dynamite. It explodes; a piece of debris strikes a person washing windows ten stories above the pavement. He falls, injuring B. Is A liable to B?<sup>198</sup>

Cardozo answered yes.<sup>199</sup> In his view A would be liable to B because one of the risks that made him negligent in driving was that of injuries to

194. RESTATEMENT § 2(2), Note to Advisers (Restatement Draft No. 18-R, 1927) in American Law Institute, “Torts Preliminary Drafts 17–26 (1941), in Harvard Law School Archives. The preliminary drafts were discovered by Andrew Kaufman in the course of preparing his biography of Benjamin Cardozo. See KAUFMAN, *supra* note 165, at 653.

195. The hypotheticals and some excerpts from the discussion are set forth in KAUFMAN, *supra* note 165, at 289–93, taken from a memorandum of the discussion supplied by Professor Warren Seavey in the Torts Preliminary Drafts materials, Harvard Law School archives.

196. *Id.* at 290.

197. *Id.* at 291.

198. *Id.* at 293.

199. *Id.*

persons on the street, of which B was one. The fact that B ended up not being injured by A's car, but by an explosion caused by A negligently hitting a box of dynamite whose explosion resulted in a window washer's falling on B, was immaterial. In Cardozo's view the danger to B had merely taken an unexpected and unforeseeable path.

It seems clear from Cardozo's response to Bohlen's second hypothetical that he was searching for a rationale for finding no liability when the conduct of a party caused foreseeable risks to one person, and were thus negligent, but ended up causing unforeseeable injuries to another person. Because the box on the driveway containing dynamite gave no notice of its contents, the only large risk of driving negligently over it was damage to the box. The risk of damage to the adjoining house, some distance away, or to the owner of the house occupying it were risks of a different order because it was not foreseeable that the box would explode. As Cardozo put it, the interest in the ownership of the box was different from the interest in ownership of the house.

When, in *Palsgraf*, Cardozo sought to apply the proposition that risks of a different order from those that made an actor negligent should yield no liability when they caused injury, he grounded the proposition on negligence rather than on the relationship between large and small risks in causation cases. It is not clear why he came to develop a confidence that by reframing unexpected harm cases in terms of duty, risk, and reasonable foreseeability, tort law could avoid the logical and practical quagmires of "proximate" causation.<sup>200</sup> Although insisting that the question of whether a defendant owed a duty to a particular plaintiff needed to be resolved before any analysis of causation took place might at first blush appear to offer courts an escape from having to address causation issues, that goal was not actually realized by Cardozo's *Palsgraf* formulation. This was because "the risk reasonably to be perceived," which for Cardozo defined "the duty to be obeyed," was an inquiry that included assessments about causation, even though it suggested otherwise.

There was no question that the act of the guard in dislodging the package had caused the explosion, and the explosion had toppled the scale on to Helen Palsgraf. But-for the guard's act, Palsgraf would not have been injured. There was also no question that the guard's act in dislodging the package was negligent: the jury had found it to be. If the package had had a label on it that said, "Danger-Fireworks," no one could have maintained that the guard could not have reasonably foreseen that if it fell near the

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200. Andrew Kaufman, who is probably more familiar with Cardozo than anyone, has stated that "[w]hy Cardozo preferred a duty to a causation analysis [in *Palsgraf*] cannot be decisively determined." KAUFMAN, *supra* note 165, at 301. I suspect that by the late 1920s Cardozo, like many of his contemporary judges and torts scholars, had found the issue of "proximate" causation in negligence cases an intractable puzzle, and was attracted to ways in which the issue might be avoided.

tracks of a train, where it could be run over, it might explode, and no one could have maintained that a person standing ten feet from the site where the package fell would have been an unforeseeable victim of the package's exploding.

Cardozo's formula of the "risk reasonably to be perceived" defining "the duty to be obeyed," in which risk was a term of relation, was actually a formula that included an analysis of causation. Because the package had no label, the large risk of its being dislodged was that it would be damaged. But there were other, smaller risks connected to that large risk. One was that unknown, but valuable contents of the package would be damaged. Another was that the package would be damaged not only from a fall but also from being blown apart in an explosion because it contained an explosive substance. Put another way, the large risk was that the package and its contents would be damaged. Should it matter how they were damaged?

Cardozo framed the central issue in *Palsgraf* as whether a defendant who was negligent because he caused foreseeable damage to the property of A (the guard's dislodging the passenger's package) should also be liable for unforeseeable damage (injuries from toppling scales) he caused to the person of B (Helen Palsgraf), standing far away from the site of the damage. But the issue could also have been framed as "should a guard who negligently causes an explosion in a railroad station be liable for injuries from that explosion suffered by a passenger standing near the site of the explosion?" The problem with framing the issue in the latter fashion was not that it was an erroneous statement of the facts of *Palsgraf*. The problem was that if one answered yes to that framing of the issue, the prospective liability of the guard—and thus the Long Island Railroad—to persons injured by negligently caused explosions in a railroad station was vast. That problem underscored the fact that proximate causation was an issue of public policy, and the distinction between remote and proximate causes a liability-limiting device.

Cardozo's effort to remove "the law of causation, remote or proximate" from *Palsgraf*, and hopefully other future negligence cases where unforeseeable harm occurred, thus failed. His approach wrongly pretended that causation issues were subsumed in negligence issues whenever negligent acts resulted in unforeseeable injury. But Francis Bohlen and the Advisers of the Restatement of Torts were attracted to Cardozo's formulation, and phrased it as a general principle of negligence law, using *Palsgraf* as an illustration.

Section 281 of the First Restatement of Torts ran as follows:

STATEMENT OF THE ELEMENTS OF A CAUSE OF ACTION FOR NEGLIGENCE

The actor is liable for an invasion of the interest of another, if (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with regard to the

other, or a class of persons within which he is included, and (c) the actor's conduct is a legal cause of the invasion . . . .<sup>201</sup>

Comment (c) clarified the "risk to the class of which plaintiff is a member":

In order for the actor to be negligent toward the other, his conduct must create a reasonable risk of harm to the other individually, or to a class of persons—as for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that in fact it causes harm to a person of a different class, to whom the actor could not have reasonably anticipated injury, does not make the actor liable to the persons so injured.<sup>202</sup>

The first illustration of Comment (c) was a case in which:

A, a passenger of the X Railway Company, is attempting to board a train while encumbered with a balky and apparently fragile package. B, a trainman of the Company, while assisting A, does so in such a manner as to make it probable that A will drop the package. A drops the package, which contains fireworks, although there is nothing in its appearance to indicate it. The fireworks explode. The force of the explosion knocks over a platform scale thirty feet away, which falls upon C, another passenger waiting for a train, and injures her. X Railway Company is not liable to C.<sup>203</sup>

#### CONCLUSION: THE UNCERTAINTY AND COMPLEXITY OF PERSONAL INJURY LAW IN THE 1930S

We have noted that it was the hope of the founders the American Law Institute that restating the governing principles of common law fields would eliminate the uncertainty and complexity that had unfortunately surfaced in early twentieth-century American law. By confining the scope of liability in negligence to foreseeable risks that caused injuries to foreseeable classes of persons, the Restatement of Torts was seeking to reduce uncertainty and complexity in a field that seemed increasingly characterized by it. But the reaction of commentators after the publication of the Restatement in 1934 suggested that goal had not been realized.

Leon Green had been one of the Advisers to the Restatement of Torts, and had participated in the discussion of Bohlen's third hypothetical. He had taken the position that A, who had negligently driven on a street and stuck a box containing dynamite, should not be liable to B, a person on the street who had been injured, when a window washer, hit by a piece of debris from the exploding box, fell on him. The risk of being injured by some-

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201. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

202. *Id.* at § 282.

203. *Id.* at § 283.

one located ten stories above the street, Green maintained, was “[n]ot one of the risks within the scope of the duty” to drive carefully.<sup>204</sup>

In a 1930 article on *Palsgraf*, Green argued that Cardozo’s opinion in that case had retreated to “‘pat’ phrases and formulas,” including “risk” and “foreseeability.” *Palsgraf*, for Green, was a case about the “adjustment by government of risks which . . . cannot be eliminated from the hurly-burly of modern traffic and transportation.” It should have openly been decided on risk allocation grounds: instead, Cardozo had “transported” his analysis “into the realm of metaphysics.”<sup>205</sup> And when the First Restatement of Torts appeared, Green gave it a critical review, claiming that the Restatement’s treatment of negligence was “inaccurate and misleading,”<sup>206</sup> and its treatment of causation “ridiculous.”<sup>207</sup> In general, Green thought that “the lawyers and judges who have to do with tort cases” would “find very little in the Restatement . . . that they can use . . . and much that is wholly incomprehensible.”<sup>208</sup>

If the founders of the American Law Institute had sought to use Restatements of common law subjects as a means of making the doctrinal principles governing those subjects more certain and less complex, the reaction to the publication of Restatements, which began in the early 1930s, suggested that those goals were elusive. Without accompanying treatises, the black-letter propositions of the Restatements provided little guidance, underscoring the fact that abstract statements of common law rules were not much use without attention to the factual contexts in which those rules were applied. This seemed particularly true in Torts, where stating the elements of an action in negligence provided little clue as to how juries might decide negligence issues in actual cases.

Moreover, despite Cardozo’s efforts in *Palsgraf*, the concept of “legal” causation continued to trouble courts and commentators in tort suits. The dangers posed by industrial activities and products tended to radiate beyond first-party users, raising issues about the scope of liability for defendants whose activities could be said to have caused injuries of an unexpected type or extent, or in an unexpected manner, or to unexpected victims. The use of the language of causation in late nineteenth-century cases and treatises had often been a means of showing that a defendant, in engaging in an activity or putting a product on the market, had not acted negligently and thus injuries caused by the activity or product were *damnum absque injuria*. But as more cases emerged in which defendants could be shown to be negligent, and the injuries complained of seemed to be unforeseeable or remote, the

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204. Memorandum by Warren Seavey, Harvard Law School Archives, *quoted in* KAUFMAN, *supra* note 165, at 293.

205. Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789, 801 (1930).

206. Leon Green, *The Torts Restatement*, 29 ILL. L. REV. 585, 602 (1935).

207. *Id.* at 607 n.33.

208. *Id.* at 597.



relationship between negligence and causation seemed more difficult to describe. In both *Palsgraf* and the First Restatement of Torts an effort was made to describe that relationship in a fashion that would ensure that unforeseeable harm would not be compensated even where a defendant had been negligent in some fashion.

No sooner had that effort been made than it was attacked as ignoring what was really going on in causation cases. Those cases involved questions of risk allocation, critics pointed out, and the positing of comprehensive rules of causation was a quixotic enterprise. By 1933 Fowler Harper's Torts treatise described proximate cause cases as being governed by "considerations of fairness, justice, and social policy which . . . frequently have their basis in vague feelings or intentions of what is proper and desirable,"<sup>209</sup> and by 1941 William Prosser had concluded that "[p]roximate cause cannot be reduced to absolute rules," so that the "fruitless quest for a universal formula" of causation needed to be abandoned.<sup>210</sup>

Causation cases arising out of negligence actions thus raised the recurrent jurisprudential issues that accompanied the emergence of Torts as a basic common law subject. First was the issue of fashioning foundational legal principles that defined Torts as a field. Conditioning liability in personal injury cases on negligence had been singled out, by late nineteenth- and early twentieth-century courts and commentators, as one such foundational principle, which served to confine tort liability to manageable limits and to perpetuate the doctrine of *damnum absque injuria*. But as personal injury cases proliferated, more appeared in which a defendant's conduct could be shown to be negligent, but the causal connection between that defendant's conduct and a resultant personal injury to a plaintiff appeared "remote" or unforeseeable, raising the question of whether injuries in such cases should be compensated under the negligence principle or treated as injuries without remedies.

Cardozo's opinion in *Palsgraf*, and the First Restatement of Torts's adoption of Cardozo's position, had attempted to resolve that dilemma by treating the "proximate causation" inquiry in negligence cases as simply a version of the negligence inquiry, so that if the type or extent of an injury, or the manner in which it occurred, or the class of victim injured, was unexpected, the injured party could not recover. This would have the effect of reducing the scope of tort liability in personal injury cases, since all injuries that were not "reasonably foreseeable" would be treated as *damnum absque injuria*. But the problem with that formulation was that the question of which injuries were "unexpected" consequences of negligent conduct, and which were "foreseeable" risks of that conduct, seemed unanswerable in the

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209. FOWLER HARPER, *THE LAW OF TORTS* 258 (1933).

210. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 319, 320 (1941).

abstract, and seemed to reduce itself to a policy inquiry, or what Andrews had termed “not logic, but practical politics.”

What Green had demonstrated about Cardozo’s subsuming proximate causation inquiries in negligence inquiries could have been shown for any other “absolute rules” in Torts. The effort on the part of Bohlen and his Advisers to reduce tort law to a series of black-letter doctrines had only demonstrated the squishiness of those doctrines as guidelines for deciding cases. From its nineteenth-century origins, tort law had started as a collection of diverse personal injury actions, then passed through phases in which commentators sought to systematize its doctrines and organize the field around the negligence principle, to emerge in a state in which the meaning of negligence seemed elusive outside of the facts of individual cases and the concept of “legal” causation, so vital in the limiting of tort liability as the ambit of personal injury in industrial accidents widened, became equally elusive. By the late 1950s Leon Green would describe tort law as “public law in disguise”: a field less characterized by overarching doctrinal principles than by the goal of providing remedies for “the every day hurts inflicted by the multitudinous activities of our society.”<sup>211</sup>

As Torts emerged as an independent, and basic, common law subject, its governing principles seemed to illustrate the very characteristics of American common law fields that had prompted the members of the American Law Institute to launch their Restatements. The cumulative efforts of courts and commentators to formulate foundational principles of tort law, and to address the tension between keeping tort liability within manageable limits while providing compensation to faultless injured persons, had only demonstrated that the results of those formulation efforts were uncertain, and the tension between letting losses lie where they fell and compensating faultless injured people for their injuries was complex. Tort law was poised for new formulations, which over the next four decades would be influenced by revivals of cause-based liability.<sup>212</sup> Those revivals, however, have proved as incapable of generating comprehensive principles of tort law as the efforts described in this article,<sup>213</sup> and perhaps at this juncture in the history of personal injury actions in America we should conclude that the law of Torts is endemically uncertain, and endemically complex.

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211. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959); Leon Green, *Tort Law Public Law in Disguise II*, 38 TEX. L. REV. 257, 269 (1960).

212. For more detail, see WHITE, *supra* note 22, at 197–207, 244–46, 286–87.

213. *See id.* at 248–80.

