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STRICT LIABILITY OR LIABILITY BASED UPON FAULT? ANOTHER LOOK

*Frederick Davis**

I. Introduction

Much of the current literature on tort law assumes the existence of two independent and sometimes contradictory philosophies of liability—one based upon negligence, or fault, and the other simply based upon the more limited question of the defendant's "causal connection" with the injury.[1] The latter is often referred to as "strict" or "absolute" liability, and is said to be the more time-honored theory, whereas liability based upon negligence, or fault, is said to be a relatively modern innovation.[2]

Those who assert the relative modernity of fault as a criterion of liability have increasingly fixed upon the opinion of Chief Justice Shaw in the celebrated case of *Brown v. Kendall*[3] as the fundamental articulation of this "modern" theory. Inasmuch as this decision was handed down as recently as 1850, many scholars have questioned the propriety of staking our fortunes on such an unseasoned philosophy.[4] A major thesis of this article, however, is that fault, as a predicate of liability, has far more venerable credentials than *Brown v. Kendall*, and that it was at least an invisible or assumed element even in the simplistic formulas developed at early common law. A second thesis is that the differences between these supposedly antipodal philosophies, that is, between strict liability and liability based upon fault, are more theoretical than real, and that judicial adoption of one or the other rationale results more from a perception of what is fair in the allocation of the burden of proof than from a conscious judicial choice between compet-

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1. *See, e.g.*, C. Gregory & H. Kalven, Cases and Materials on Torts 547, 548 (2d ed. 1969); R. Posner, Economic Analysis of Law 137–42 (2d ed. 1977); Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 Ga. L. Rev. 963 (1981).

2. See authorities collected in Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 926 (1981). Professor Rabin is highly skeptical of the simplistic assumptions commonly made about the relationships between fault and strict liability.

3. 60 Mass. (6 Cush.) 292 (1850).

4. *See, e.g.*, J. O'Connell, Ending Insult to Injury—No-Fault Insurance for Products and Services *passim* (1975); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 774 (1967).

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ing jurisprudential theories.

In order to establish the validity of these theses it will be necessary briefly to review some critical developments in the evolution of tort liability at common law; to dispute the common assumption that liability based upon negligence evolved directly from the so-called "action on the case"; to illustrate, through examples, how judges and legislators are constantly adjusting the parities between given classes of plaintiffs by subtle and sometimes unsubtle reassignments of the burdens of proof; and, finally, to analyze a few of the more celebrated modern examples of "strict liability" in order to suggest that they may well be sailing under false colors.

II. Some Critical Historical Developments

A. *Early Restrictions on the Scope of Trespass*

The historical evolution of the procedural rituals controlling access to the courts by persons suffering tortious injury has been recounted many times by diligent scholars.[5] The general view appears to be that the early common-law judges discerned an extremely simple test for discriminating between those injured persons who were eligible for judicial assistance in obtaining compensation and those who were not. The test merely looked to whether the plaintiff's injury had resulted from some force having been put into motion by an act of the defendant. If so, the circumstances neatly fitted into one of the writs of trespass, usually trespass *vi et armis*, and the case was judicially submissible.[6] On the other hand, if the injury was the result of a mere *condition* created by the defendant, the harm was said to have indirectly resulted, and there was no formula available to the plaintiff in the form of any writ which would entitle the plaintiff to recover.[7]

The anomalies inherent in a criterion which distinguishes between directly and indirectly inflicted injury, and which permits judicial redress only for the former, have been graphically detailed in a famous article by Professor Charles Gregory.[8] Making an implicit but obvious

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5. See authorities collected in M. FRANKLIN & R. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 26, 27 (3d ed. 1983). *See also* James, *Analysis of the Origin and Development of the Negligence Actions, reprinted in* J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 42 (1975).

6. See authorities collected in W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1–4 (7th ed. 1982) [hereinafter cited as W. PROSSER]. Trespass *vi et armis*—trespass with force and arms—refers to the common-law action for injuries committed with direct and immediate violence or force against one's person or property. BLACK'S LAW DICTIONARY 1348 (5th ed. 1979).

7. E. MORGAN, INTRODUCTION TO THE STUDY OF LAW 79–81 (2d ed. 1948); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 465–66 (5th ed. 1956).

8. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

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analogy to the victims of racial discrimination, Professor Gregory identified those persons suffering from directly inflicted injuries as "Whites," and those indirectly injured as "Blacks."[9] His examples involved a beam which, in the case of White, the defendant had accidentally dropped upon White, with resulting injury to White. In the case of Black, however, the same beam had been left lying in the roadway by the defendant where Black, stumbling over it, sustained the exact same injury as White had. White, having been injured directly by an object put into motion by the defendant, could bring a writ of trespass *vi et armis,* and was therefore entitled to pursue a judicial remedy. Black, however, being unable to establish these conditions, and being able only to show that he had been injured by a *condition* created by the defendant, was not entitled to seek judicial relief. As we would say today, Black was unable to "state a claim upon which relief could be granted." As Professor Gregory put it:

> Poor Black never could understand why White was allowed recovery and he was denied it. Each had sustained the same hurt from the same unintended conduct of the same defendant—the dropping of the beam. The only difference Black could perceive was that White was "lucky" enough to get hit by the beam, so that he was allowed to . . . [submit his case] with no questions asked.[10]

Although this early common-law technique for distinguishing between deserving and undeserving plaintiffs was invidiously discriminatory, it did have (unlike the patterns of racial discrimination to which Professor Gregory made an implicit analogy) some conspicuous administrative advantages. For example, the causation issue, which has proved particularly troublesome in our more sophisticated legal systems,[11] was quickly and easily disposed of under this approach. If the defendant had put into motion a force or an object which produced injury, there was a submissible case, and the reasons or circumstances surrounding the injury rarely mattered. If, on the other hand, the defendant had merely created a condition which, in combination with other circumstances, produced injury, there was no liability exposure at all.

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9. *Id.* at 362–65.

10. *Id.* at 363.

11. A. Becht & F. Miller, The Test of Factual Causation in Negligence and Strict Liability Cases (1961); H. Hart & A. Honoré, Causation in the Law (1959); Epstein, *Medical Malpractice: The Case for Contract,* 1976 Am. Bar Found. Research J. 87, 140–49; Malone, *Ruminations on Cause-in-Fact,* 9 Stan. L. Rev. 60 (1958); Strachan, *The Scope and Application of the "But For" Causal Test,* 33 Modern L. Rev. 386 (1970).

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B. Enter the Writ of Trespass on the Case

As workable and as administratively convenient as the distinction was between directly and indirectly produced harm, it could not survive the assaults of logic, even in a society far less democratic than the one we enjoy today. And so beginning about the thirteenth century, the courts developed the writ of "trespass on the case" in order to permit those suffering injuries merely from *conditions* created by defendants to state claims even though such defendants had not "directly" injured the plaintiffs.[12]

Trespass on the case thereby reduced some of the discrimination suffered by Professor Gregory's Blacks. Blacks could now recover just as much money as Whites, even though they had merely stumbled over the abandoned beams instead of being struck by them. The only difference was that because Blacks had to state claims in terms of trespass on the case, they might also have to prove fault. Whites, on the other hand, were permitted to continue the use of the traditional writ of trespass *vi et armis*, which did not impose such a proof requirement.

Despite the slight parity of recovery opportunity thereby introduced, the English judges continued steadfastly to adhere to the demarcation between directly and indirectly inflicted harm,[13] and because fault was emerging as a necessary element to the writ of trespass on the case, it was arguable that Professor Gregory's Blacks were still not very much better off. Various technical and procedural distinctions were found to be applicable depending upon whether the action was "trespass" or "case."[14] Although there was no visible logic to the continued maintenance of the distinction, its application appears to have caused little difficulty until the late eighteenth century. By that time, however, the permutations and combinations of human conditions generated a tragedy to which the application of the hallowed distinction between directly and indirectly produced harm proved conspicuously troublesome. The question surfaced in 1773 before the Court of Kings Bench in the well-known case of *Scott v. Shepherd*.[15]

In *Scott v. Shepherd*, the plaintiff's eye had been put out by what

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 29 (4th ed. 1971). Trespass on the case refers to the common-law cause of action for recovery from damages that are the indirect results of the defendant's wrongful act, where there was no direct or immediate force involved. BLACK'S LAW DICTIONARY 1347 (5th ed. 1979).

13. *See, e.g*, the much-cited case of Reynolds v. Clarke, 92 Eng. Rep. 410 (1725).

14. *See* A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 298–99 (4th ed. 1962); T. PLUCKNETT, *supra* note 7, at 372–73; B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 83–98 (3d ed. 1923). As is commonly done, this article will use the word "trespass" to refer to trespass *vi et armis* and "case" to refer to trespass on the case.

15. 96 Eng. Rep. 525 (1773).

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may be described as a firecracker (or "squib," as it was then called). The defendant had put the firecracker into motion by lighting it and throwing it from the street into what we might today call a shopping arcade or enclosed mall. If the firecracker had simply landed immediately upon the plaintiff and put his eye out there would have been no problem. The defendant would have been viewed as having put into motion an object which had produced injury to the plaintiff—clearly a situation which was appropriate for the traditional writ of trespass *vi et armis*. The difficulty arose, however, because the firecracker had *not* landed directly on the plaintiff; it had landed, instead, in the shop or booth of someone named Yates who sold gingerbread. Another man named Willis, who was in the shop at the time and who recognized the danger of the thing, immediately seized the firecracker and tossed it across the arcade where it landed in the shop of a competing gingerbread seller named Ryal. Ryal, being no more sympathetic to the firecracker than Willis, in turn threw it into another part of the shopping area where it ultimately exploded in the face of the unfortunate plaintiff.

Chief Justice Blackstone, logically and literally applying the traditional common-law rule, said that no action for trespass would lie because the formula was not satisfied. While the defendant may have been responsible for creating a condition which was the ultimate cause of the plaintiff's injury, he had not put into motion a force which was the immediate and direct cause. For this reason Blackstone was of the opinion that Scott had not stated a claim under the traditional common-law formula for trespass *vi et armis*.[16] He was, however, outvoted by his colleagues on the Court of Kings Bench—De Grey, Gould, and Nares—all of whom concluded that the intervening actions of Willis and Ryal were ancillary to the primary action of Shepherd and that Scott, therefore, had been injured *directly* by an object put into motion by Shepherd.[17]

The case of *Scott v. Shepherd* is significant not only because it is a major decision dealing with the distinction between directly and indirectly produced harm, but also because it raised questions about the logic, if any, for retaining the distinction. After all, if the main reason for placing indirectly harmed plaintiffs in the same position as directly harmed plaintiffs was to erase an illogical discrimination between equally deserving claimants, what useful purpose could be served by continuing to compel such plaintiffs to choose, at the risk of being nonsuited, between a "directly injured" or an "indirectly injured"

16. *Id.* at 526–28.
17. *Id.* at 526, 528–29.

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characterization?

Although the earlier judges who had decreed that there should be no distinction between those directly wronged and those indirectly wronged may not have fully perceived it, later judges were beginning to discern that trespass on the case presented some policy problems that were a little trickier than those faced when recovery was sought on a straight trespass *vi et armis* theory. First, under trespass *vi et armis* there was a clearly responsible defendant whose causal connection with the injury, dropping the beam, was hardly ever in dispute. The rule that where one of two innocent parties must bear the burden of a loss, the person whose act was the immediate occasion of the loss should assume it, seemed unassailably applicable.[18] Hardly anyone stopped to think that since injuries are occurrences which society deplores, the person who caused them is implicitly blameworthy. Under trespass *vi et armis* it was unnecessary to think about that issue because the identity of the culprits and their causal involvement were clear.

Second, under trespass *vi et armis* there existed an automatic limitation on the duration of the defendant's liability exposure. Given the limited technology of the era, the potential period of liability exposure for one who put an object or force in motion was typically only a matter of minutes. The arrow must land fairly soon, the fist must hit quickly, and the beam cannot keep falling forever. Potential defendants in actions based upon trespass *vi et armis* never had to sit around for very long wondering about their possible liability exposure.[19] Either they had directly injured somebody or they had not.

Under the writ of trespass on the case things were not that simple. The defendant may have abandoned the beam in the highway in order to rescue some third party from a highwayman. Or a flood may have caused the abandoned beam to float to the location where it represented a peril to the plaintiff. Similarly, the beam may have lain in the highway, overlooked by countless travelers for a number of years, only to be stumbled over by Black who was traversing the highway at night many years after the defendant had abandoned the beam.

Clearly the simplistic analysis necessary to determine liability under trespass *vi et armis* created, if literally applied, an unacceptable dimension of liability exposure in instances when the harm was indirectly suffered. In order to bring that liability exposure within acceptable limits, common-law judges, either consciously or unconsciously,

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18. The maxim that a person acts at his or her peril was apparently adopted by a number of eminent common-law authorities. O.W. Holmes, The Common Law 82 (1881).

19. Even today, statutes of limitation applicable to intentional torts are typically shorter than those applicable to negligence actions. *See* Davis, *Tort Liability and the Statute of Limitations*, 33 Mo. L. Rev. 170 (1968).

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began as early as the thirteenth century to permit defendants to escape from liability under such circumstances if defendants could show that they had been innocent of any wrongdoing. The wall which a defendant had built some twenty years earlier in fact may have collapsed with resulting injury to plaintiff, and no one could gainsay that but for the condition created by the defendant, plaintiff would not have sustained injury. But to impose liability under such fragile circumstances must have seemed unfair to discerning judges, which accounts for the introduction of the seemingly new requirement—namely that the defendant also be shown to have built the wall with less than due care.[20]

But if parity were to be maintained between actions in trespass and actions on the case, would it not follow that the same conditions (i.e., the defendant's fault or the defendant's unlawful intention) be imposed upon those seeking damages for directly produced harm as are imposed upon those seeking damages for harm indirectly produced? Chief Justice Shaw recognized this need, and recast the requirements for the modern equivalent of trespass *vi et armis* in his famous opinion in *Brown v. Kendall*.[21] Shaw ruled that even in the case of directly inflicted harm, the defendant must be shown to have intended the harmful contact, or at least to have negligently put into motion the force which was the occasion of the plaintiff's injury.

The revisionist view of the requirements for the modern equivalent of trespass *vi et armis* had the technical effect of reducing the liability exposure of directly acting defendants. This conclusion is based upon the assumption that blameworthiness was never a requirement for the application of trespass *vi et armis*. However, that assumption is contradicted by the fact that no dramatic reordering of precautions on the part of potential defendants or classes of defendants took place following the decision in *Brown v. Kendall*.[22] The relative calm with which

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20. Professor Gregory seems to have assumed that, right from the very beginning, some proof of blameworthiness was a requirement for the maintenance of trespass on the case. Gregory, *supra* note 8, at 363–64. The truth probably is that there was little internal consistency in the early cases because the problem was not perceived. Professor Schwartz's warnings about drawing inferences from raw documents and isolated cases as being "perilous" is well-grounded. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1722 (1981).

21. 60 Mass. (6 Cush.) 292 (1850).

22. Shaw's opinion in *Brown v. Kendall* was cited only 36 times in jurisdictions outside Massachusetts during the 115 years following its issuance. SHEPARD'S MASSACHUSETTS CITATIONS, CASES 198 (1967). This relative lack of judicial attention bears comparison to the sensation generated by the English decision of Rylands v. Fletcher, 1 L.R.-E. & I. App. 330 (H.L. 1868). W. PROSSER, *supra* note 12, at 508–14; Gregory, *supra* note 8, at 377. These sharply different judicial reactions to what appear to be the leading opinions dealing with the tension between negligence and so-called strict liability seem to endorse the view of Professor Schwartz that our cohorts have always preferred some sort of blameworthiness as a basis for loss shifting, and that the

the opinion was received suggests that blameworthiness had always been at least an inference drawn from the defendant's involvement with the conditions producing the directly inflicted injury, and that Shaw was merely reflecting a generally shared view that, under modern conditions, more positive evidence of some blameworthiness should be required for defendants to be held responsible for such directly inflicted injuries.[23]

Early common-law judges who did not require the plaintiff to show that the defendant was in any way culpable in order to proceed against the defendant under trespass *vi et armis* may very well have been applying a policy analogous to that which gave rise to the doctrine of res ipsa loquitur. Under that latter doctrine the plaintiff need not identify the specific act of negligence which caused the injuries if, generally speaking, the injuries would normally not have occurred without some sort of negligent conduct or omission, and if the defendant was in substantial control of the circumstances or conditions from which the injury arose.[24] In permitting the plaintiff to recover from a defendant for injuries directly inflicted by a force or an object put into motion by the defendant, a similar inference of culpability was tacitly drawn from the defendant's direct involvement and from a societal expectation that such mishaps should not occur. The aphorism that "accidents don't happen, they are caused," embodies the commonly shared notion that a mishap can only result from some sort of blameworthy conduct.

When the injuries are indirectly inflicted, however, the defendant's involvement and control are more tenuous, and an inference of culpability is more difficult to draw. This is why, in connection with trespass on the case, common-law judges increasingly found it necessary for the plaintiff to establish some element of culpability in addition to a causal connection. But the ascendance of the fault component in trespass on the case also compelled judges to explain why that same component was not required in actions for directly inflicted harm under trespass *vi et armis*. In *Brown v. Kendall*, Shaw made the requirement applicable to both types of actions and shifted the burden of proof to the plaintiff irrespective of whether the harm was indirectly or directly inflicted.[25] What had previously been circumstantially inferred to the point that it was not mentioned as a specific requirement, was now something that

big change in the nineteenth century was a rejection of traditional immunities in favor of expanded liability exposure. Schwartz, *supra* note 1.

23. Professor Rabin has forcefully questioned the assumption that "fault," as a condition to liability, was a nineteenth century innovation formally enthroned by *Brown v. Kendall*. Rabin, *supra* note 2.

24. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1075–92 (1956).

25. *Brown v. Kendall*, 60 Mass. (6 Cush.) at 298.

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had to be established as part of plaintiff's prima facie case. Some culpability had always been associated with the circumstances permitting plaintiff to recover under either trespass *vi et armis* or case. The only change *Brown v. Kendall* made had to do with proof and upon whom the burden lay. Although articulating important changes in the proof requirements associated with the actions descending from both trespass and case, *Brown v. Kendall* was not the radical departure from common-law principles which some observers have claimed.

III. The Fallacy of the "Negligence/Case" Analogy

Although most commentators have correctly emphasized that the distinction between trespass *vi et armis* and trespass on the case was that between directly and indirectly produced harm,[26] a number of judges, perhaps understandably, equated the modern distinction between negligently produced harm and intentionally produced harm to the early common-law distinction between trespass and case.[27] However erroneous, the assumption of this parallel was quite common up until recent times. A good illustration is provided in an excerpt from the well-known case of *Ploof v. Putnam*:

> The claim is set forth in two counts. One in trespass, charging that the defendant by his servant with force and arms wilfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of this duty, negligently, carelessly and wrongfully unmoored the sloop.[28]

The damages claimed were for injuries resulting from the sloop having been subjected to the storm. Whether those injuries were the direct or indirect result of the acts of the defendant's servants presents an interesting characterization choice; depending how one views it, either trespass or case would be appropriate. But the acts of the defendant's servants were the same, so it is clear that the assumption of the attorneys drafting the claim was that if the acts were to be deemed intentional, then trespass was appropriate, but if they were only negligent, then case was the theory. There are many other instances in which the historic antecedent to the currently imposed liability for negligence is referred to as the action for trespass on the case.[29]

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26. W Prosser, *supra* note 12, at 29; Gregory, *supra* note 8, at 362–64.

27. *See, e.g.*, Gentile v. Altermatt, 169 Conn. 267, 284, 363 A.2d 1, 11 (1975), *appeal dismissed*, 423 U.S. 1041 (1976). Even Professor Schwartz agrees that, overall, the affiliation of trespass on the case with negligence "seems fair." Schwartz, *supra* note 20, at 1725.

28. Ploof v. Putnam, 81 Vt. 471, 474, 71 A. 188, 189 (1908).

29. *E.g.*, Green v. Donroe, 186 Conn. 265, 440 A.2d 973 (1982); Harper v. Regency Dev.

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In order fully to appreciate the relationships between trespass *vi et armis*, trespass on the case, intentionally inflicted harm, and negligence, the following chart may be helpful. The chart assumes that the plaintiff sustained injuries from a golf ball over which the defendant had custody and hypothesizes five different sets of circumstances. As the chart indicates, following the circumstances under which recovery would be permitted in *Brown v. Kendall*,[30] modern tort law would permit liability to be imposed in only three of those cases.

The chart demonstrates the thesis of this article: that early common law would have allowed liability to be imposed in the instance of the golf ball carefully but accidentally driven into the plaintiff, because of the irrebuttable presumption that the defendant, under those circumstances, was somehow blameworthy. In the fifth instance, where the golf ball unaccountably explodes and causes injury to the plaintiff, it is doubtful whether many common-law judges, even in the earliest days of the action on the case, would have permitted liability to be imposed. Nevertheless, given the widely held assumption that fault was never a requirement for liability until the nineteenth century, the defendant would be technically subject to liability.

golf ball accidentally but carefully driven into the plaintiff	golf ball deliberately driven into the plaintiff	golf ball unintentionally but carelessly driven into the plaintiff	golf ball carelessly left on a path and plaintiff stumbles over it and is injured	golf ball left on seat of car where it unaccountably explodes, with resulting injury to plaintiff who is passenger
TRESPASS *VI ET ARMIS* OR EQUIVALENT			TRESPASS ON THE CASE	
	BATTERY	NEGLIGENCE		

Chart illustrating the different types of injury-producing circumstances covered by the early common-law writs as compared to those covered under the modern theories of battery and negligence

As the chart indicates, the *theoretical* liability exposure of injury-producing defendants has been reduced under modern tort law. Whether that liability exposure has *in fact* been reduced depends upon whether we believe that common-law judges consistently permitted re-

Co., 399 So. 2d 248, 250 (Ala. 1981); Rushing v. Hooper-McDonald, Inc., 293 Ala. 56, 60, 300 So. 2d 94, 96 (1974) (citing material from appellants' brief); Smitherman v. Superior Court, 102 Ariz. 504, 433 P.2d 634 (1967).

30. 60 Mass. (6 Cush.) 292 (1850).

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covery under the writ of trespass on the case when the defendant was in no way blameworthy. The chart also exposes the fallacy that "negligence" descends from trespass on the case. Because modern tort law makes a categorical election on the basis of the state of mind of the defendant,[31] its coverage is quite different from the earlier law which made that election on the basis of the actual physical circumstances accounting for the injury, a defendant-created "condition," or an object put into motion by the defendant.[32]

Despite that difference, the early common law's concentration upon the circumstantial origins of the injury-producing events can also be viewed simply as a means of avoiding the need for proof of blameworthiness. Issues of culpability seem to have been subsumed through unspoken inferences derived from the circumstances. In this light the supposedly different doctrinal bases for liability which are commonly asserted as features of modern tort law may also be better explained and understood in terms of inferences and proofshifting, and it is to that task that the discussion will now turn.

IV. Judicial and Legislative Adjustments of Loss Shifting through Changes in the Burden of Proof

The argument that liability exposure is frequently expanded or narrowed by judicially imposed shifts in the burden of proof oftentimes camouflaged in terms of doctrinal distinctions can be amply supported by reference to a number of historically celebrated decisions and by a few modern examples.

The well-known seventeenth century case of *Weaver v. Ward*[33] is frequently singled out as evidence of a shift in judicial philosophy. Weaver had been injured directly by a musket discharged by Ward. The applicable writ of trespass *vi et armis* clearly would have permitted the submission of the case on those laconic facts alone, and, in fact, the plaintiff did prevail. Nevertheless, the opinion approved of that triumph in terms of the failure of the defendant to allege freedom from fault with sufficient clarity to overcome a demurrer. The defendant had merely alleged that the shooting was accidental, unfortunate, and against his will. The court held that such allegations, if proved, would still be insufficient to support an inference that the defendant was faultless. The opinion thus reveals that some fault on the part of the defendant was always assumed from the circumstances which generated an injury actionable under trespass *vi et armis*, and that if the defendant's

31. W. Prosser, *supra* note 12, at 140.

32. *See supra* text accompanying note 7.

33. 80 Eng. Rep. 284 (K.B. 1616).

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innocence could be established, the action would not lie. It is noteworthy, however, that the plaintiff still did not have to offer proof of blameworthiness—that issue was seemingly presumed. But, if the defendant could prove that he was *not* blameworthy, then presumably liability would not be imposed. If the defendant's allegations had, in fact, somehow met the test imposed by that seventeenth century Court of Kings Bench, the demurrer would have been overruled, and the defendant would have had the burden of proving absence of blameworthiness. With sufficient proof on that issue adduced, the plaintiff would no longer have been able to rely upon the circumstantial assumption, and would have been put to the test of proving that the defendant was *not* innocent, but, in fact, was at fault.

The law of *Weaver v. Ward* was applied by the trial court in the Massachusetts case of *Brown v. Kendall*. The plaintiff had been injured by the defendant who had apparently struck the plaintiff with a stick while attempting to break up a dog fight. The trial court instructed the jury that on those facts they could find for the plaintiff unless the defendant could establish that he had been exercising extraordinary care, or that the injury was somehow attributable to the contributory negligence of the plaintiff.[34] As in *Weaver v. Ward*, the court was willing to permit the jury to draw some inference of wrongdoing from both the fact of injury and from the fact that the injury had resulted from some direct action on the part of the defendant. However, consistent with the qualification made in *Weaver v. Ward*, the trial court was willing to permit the jury to exonerate the defendant if the defendant could prove that he was free from fault.[35]

In the historic opinion by Chief Justice Shaw, the Supreme Judicial Court of Massachusetts reversed the lower court and redefined where the burden of proof lay. The court ruled that the plaintiff would no longer be entitled to the inference of wrongdoing which the circumstances of the injury would formerly have permitted, but would have to establish some fault or unlawful intention on the part of the defendant.[36]

The change made in the transition from *Weaver v. Ward* to *Brown v. Kendall* involved a shift in the burden of proof, and not in the theory of liability. This is why it is technically incorrect to identify *Weaver v. Ward* as an example of "early common law strict liability."[37] Because

34. 60 Mass. (6 Cush.) 292 (1850). Chief Justice Shaw's opinion recites the instructions of the trial court, which were in remarkable accord with the law of *Weaver v. Ward*. *Id.* at 293–94.

35. *Id.* at 294.

36. *Id.* at 298.

37. W. PROSSER, *supra* note 6, at 15. *But see* Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970). Professor Malone makes a

[illegible]

it recognized the fault issue as decisive when raised by the defendant, the opinion in *Weaver v. Ward* validates the observation that fault had always been an implicit assumption of the circumstantial formula necessary to the issuance of the writ of trespass *vi et armis*, even though it was not an element of plaintiff's prima facie case unless and until proof of innocence (of a type beyond that offered in *Weaver v. Ward*) was established by the defendant.

In this light, *Brown v. Kendall* was nothing more than another step in a procedural evolution, the effect of which was to make it more difficult for injured plaintiffs to recover. This procedural evolution involved the sequential imposition of specific proof requirements upon plaintiffs with respect to issues which, at early common law, had either been ignored or subsumed by the facts. Like the processes of natural evolution, this procedural evolution has never moved evenly on all fronts. Even as late as the 1950's, the English courts had not fully moved away from the view that when the action lies in trespass (as opposed to case) the actor's fault is presumed and, if liability is to be avoided, the actor has the burden of proving innocence. In 1959, however, in *Fowler v. Lanning*,[38] the Queen's Bench Division in effect repudiated *Weaver v. Ward* and lined up with the position taken by Shaw in *Brown v. Kendall*: namely that in an action for trespass, fault or intention to cause contact would no longer be presumed but must be proved.[39]

The doctrine of res ipsa loquitur may also be viewed as a device for retaining, under limited circumstances, the pre-*Brown v. Kendall* view that the circumstances of the injury presuppose some fault on the part of the defendant. Although the status of the doctrine of res ipsa loquitur has been the subject of some extended and lively debates,[40] it can be said with some confidence that when the circumstances suggest that the plaintiff's injury was the result of a limited number of possible but different negligent acts or omissions on the part of the defendant, res ipsa loquitur excuses the plaintiff from pleading and proving exactly

convincing case for the proposition that the significance of *Weaver v. Ward* has been greatly overrated, and that the court really didn't mean what it said in its now famous dictum. Pointing out that no defendant, in the 300 years following the decision in *Weaver v. Ward*, had ever been able to avoid liability through proof of innocence, Professor Malone opines that when the court said "no man shall be excused of a trespass . . . except it may be judged utterly without his fault," it meant that no man shall be excused of a trespass unless he did not intend the *act* which produced the trespass. He cites the examples quoted in the opinion as supporting his view. *Id.* at 17–19.

38. [1952] 1 Q.B. 426.

39. *Id.*

40. *Compare* Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949) *with* Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1 (1951).

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which negligent act or omission produced the injury.[41] Courts have always been disposed to relieve the plaintiff from an impossible burden of proof by permitting the plaintiff to rely upon the doctrine of res ipsa loquitur, when, of course, the circumstances are appropriate.[42] Morever, under the doctrine of res ipsa loquitur, the jury is permitted to discredit evidence of innocence which the defendant may introduce and still base a verdict on the inference from the circumstances that the defendant was guilty of a discrete, if unidentified, negligent act.[43]

In *Cohen v. Petty*,[44] the plaintiff was seeking recovery for injuries sustained when a car driven by the defendant left the highway and hit an embankment. Plaintiff apparently tried her case on a theory derived from the pre-*Brown v. Kendall* era of *Weaver v. Ward* as she failed to offer any evidence of actionable negligence or to plead the application of the res ipsa loquitur doctrine.[45] The defendant offered evidence, to some degree ratified by the plaintiff's own testimony, that he had been the subject of an unforeseeable fainting spell and that this accounted for the loss of control over the vehicle. The trial court, in effect, directed a verdict for the defendant and this was affirmed on appeal.[46]

Cohen v. Petty illustrates how *Weaver v. Ward* might have been decided had the defendant's allegations of innocence in the latter case reached the same compelling level that the defendant's proof of innocence reached in *Cohen v. Petty*. However, since the circumstances in *Cohen v. Petty* appear to meet the requirements for the application of res ipsa loquitur, plaintiff would clearly have been better off submitting her case under that theory. The inference of fault, which the jury may draw from the circumstances when res ipsa loquitur applies,[47] can still support a jury verdict for the plaintiff even when the defendant offers

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41. *E.g.*, McDowell v. Southwestern Bell Tel. Co., 546 S.W.2d 160 (Mo. Ct. App. 1976) (serious damage to subscriber's ear from sharp noise emanating from defendant's telephone lines).

42. *E.g.*, Niman v. Plaza House, Inc., 471 S.W.2d 207 (Mo. 1971). *See* 38 Mo. L. REV. 147 (1973).

43. Cox v. Northwest Airlines, Inc., 379 F.2d 893, 895 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968).

44. 65 F.2d 820 (D.C. Cir. 1933).

45. Plaintiff alleged that the defendant "failed to exercise reasonable care" but her evidence was only that "the automobile suddenly swerved out of the road." *Id.* at 820–21.

46. *Id.* For some years there was a division of authority concerning the submissibility of an action by a passenger against the driver in a one-car accident situation on a res ipsa loquitur theory. *Compare* Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935) *with* Whitley v. Hix, 207 Tenn. 683, 343 S.W.2d 851 (1961). The overwhelming majority of courts today permit such cases to be submitted on a res ipsa loquitur theory provided there is sufficient evidence to support the conclusion that the defendant was driving. *See, e.g.*, Badela v. Karpowich, 152 Conn. 360, 206 A.2d 838 (1965) (res ipsa loquitur applied, but not mentioned in opinion); Johnson v. Foster, 202 So. 2d 520 (Miss. 1967); Lent v. Lent, 543 S.W.2d 312 (Mo. Ct. App. 1976); Tompkins v. Northwestern Union Trust Co., 645 P.2d 402 (Mont. 1982).

47. *See supra* text accompanying notes 40–43.

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probative and compelling evidence of due care. Thus, if the plaintiff had argued that res ipsa loquitur supported an inference that defendant was negligent in *Cohen v. Petty*, the trial court was at least arguably not as free to direct a verdict as it found itself when the plaintiff offered no evidence identifying a basis upon which the defendant might be viewed as negligent.[48]

A further example of how balances may be tipped to favor or inhibit loss shifting by switching burdens of proof is provided by a significant contemporary repudiation of a fundamental rule ordained by Shaw in *Brown v. Kendall.* In that opinion, Shaw not only declared that the plaintiff must sustain the burden of proving some culpability, but also that the plaintiff must establish that he or she was free from contributory negligence as well.[49] This ruling considerably reduced the liability exposure of injury-producing defendants by imposing a significant proof adduction duty on plaintiffs who might, in many circumstances, be unable to meet such an obligation. In fact, in wrongful death cases, many jurisdictions were compelled to generate some engaging if unrealistic fictions in order to make any wrongful death case submissible under that harsh rule.[50]

Although a number of influential jurisdictions remained faithful to Shaw's ruling through the first half of the twentieth century, it was not universally accepted. Today, either by legislation or judicial repeal, Shaw's ruling that the plaintiff must establish freedom from contributory negligence is no longer the law anywhere.[51] This phenomenon evidences a widely shared sentiment that a reassignment of the burden of proof was needed because too many deserving plaintiffs had been unable to recover when they were saddled with the task of pleading and proving freedom from contributory negligence.

Despite this formal *de jure* repudiation of the rule in *Brown v. Kendall* that the plaintiff must plead and prove freedom from contributory negligence, the rule indirectly survives in one of the more controversial areas of tort law, that of the liability of the landowner towards land entrants. Although major attention has been given to the illogic of measuring the defendant's liability exposure in terms of the status of the land entrant (trespasser, licensee, or invitee),[52] a close study of the

48. It is conceivable that the court might have permitted this case to go to the jury on the basis of circumstantial evidence (defendant was driving when the car suddenly left the road), which is what the Connecticut court did in *Badela*, 152 Conn. 360, 206 A.2d 838. The only problem was that the plaintiff's own testimony tended to support the defendant's theory that the cause of the accident was sudden illness rather than negligence. *Cohen*, 65 F.2d at 820–21.

49. *Brown v. Kendall*, 60 Mass. at 297.

50. Davis, *Wrongful Death*, 1973 WASH. U.L.Q. 327, 358 (collecting cases).

51. W. PROSSER, *supra* note 6, at 597.

52. Rowland v. Christian, 60 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); W.

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reported decisions will indicate that the judicial imposition of an obligation to plead and prove a freedom from "look out" contributory negligence is a far more serious obstacle to judgment-seeking plaintiffs than their status assignment.[53] In these so-called "slip-fall" cases the plaintiff is typically injured by an encounter with a dangerous condition on the land of the defendant. Almost all courts require, however, that the plaintiff establish that the injury-producing condition was not readily observable to the plaintiff or to a person exercising ordinary care.[54]

This curious exception to the general rule that the burden of pleading and proving contributory negligence is on the defendant has excited surprisingly little attention. What seems clear, however, is that judges have recognized that in this category of cases plaintiffs would be unfairly advantaged if the defendant were consistently saddled with the task of proving that the condition was open and obvious, and that a more equitable parity in the loss-shifting process would result if plaintiffs were compelled to account for why they failed to avoid encountering the injury-producing condition in such cases.

Another deviation from the general burden of proof assignments ordained by ***Brown v. Kendall*** can be found in the dog-bite cases. Again, a judicial sympathy for the predicaments of dog owners may have compelled an unorthodox assignment of proof responsibilities, but anyone who has tried a dog-bite case knows that such a case is trickier than the normal personal injury suit.[55] Although some courts have declared that they do not adhere to the rule that "every dog is entitled to its first bite," such courts may produce the same result by requiring, as

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PROSSER, *supra* note 6, at 522–23.

53. *See, e.g.*, Moran v. Hartenback, 423 S.W.2d 53 (Mo. Ct. App. 1967). The court held that even though the skylight repairman was an "invitee" or "business visitor," the defendant was not liable when the danger was obvious to the person injured. *Id.* at 56–57.

54. Leslie Four Coal Co. v. Simpson, 333 S.W.2d 498 (Ky. 1960); Nance v. Ames Plaza, Inc., 177 Neb. 88, 128 N.W.2d 564 (1964); Crenshaw v. Firestone Tire & Rubber Co., 72 N.M. 84, 380 P.2d 828 (1963); Farley v. Portland Gas & Coke Co., 203 Or. 635, 280 P.2d 384 (1955); Villano v. Security Sav. Ass'n, 268 Pa. Super. 67, 407 A.2d 440 (1979) (contributory negligence as a matter of law). ***But see*** Wilk v. Georges, 267 Or. 19, 514 P.2d 877 (1973) (defendant could be found negligent in not anticipating that plaintiff might be oblivious of both warning signs and the existence of a perilous surface). Plaintiff has the burden of establishing that his or her obliviousness to the obvious danger was justified. Harbourn v. Katz Drug Co., 318 S.W.2d 226 (Mo. 1958). *See also* Christensen v. Murphy, 296 Or. 610, 678 P.2d 1210 (1984) (overruling Spencer v. B.P. John Furniture Corp., 255 Or. 359, 467 P.2d 429 (1970), which had established landowner immunity for injuries sustained by public officers on the premises). Missouri is typical, and has incorporated this requirement into its mandatory jury instruction in such cases, an element of which requires the jury to find that the "plaintiff did not know and by using ordinary care could not have known of this condition." MISSOURI SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS 193 (2d ed. 1969) [hereinafter cited as JURY INSTRUCTIONS].

55. *See, e.g.*, Sayers v. Haushalter, 493 S.W.2d 406 (Mo. Ct. App. 1973).

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a condition of liability, that the plaintiff establish that prior to the bite which is the subject of the suit, the owner had knowledge of the dog's vicious propensities.[56] While the plaintiff who is able to establish such pre-bite knowledge on the part of the owner enjoys a release from the need to prove negligence,[57] the owner still can assert as a defense that the plaintiff's encounter with the dog was the result of some intervening action for which the owner was not responsible.[58]

On the other hand, when the injury-producing encounter is with an animal less favored by judicial sentiments, there is an opposite tendency to shift the burden of proof on the fault issue back to the owner. For example, a Missouri statute makes owners of animals strictly liable for damages inflicted upon the person or property of another as a result of an encounter on a public highway, but owners are permitted to exonerate themselves by establishing that it was through no fault of their own that the animal escaped from confinement and was wandering on the highway.[59] This statutory provision is a classic modern replay of the proof assignments established by the medieval case of *Weaver v. Ward*.[60] As with the situation in *Weaver v. Ward*, however, it would be incorrect to refer to this statutorily imposed liability as "strict." All that the Missouri statute has done has been to reassign the burden of proof in response to a legislatively perceived need for a better balance between claimants and loss inflicters in this limited situation.

The most significant arenas in which proof reassignments have been imposed, however, are those involving "abnormally dangerous activities," the manufacture and sale of products, and multiple potentially-responsible defendants. The first two categories are commonly described as "exceptions" to the general theory of liability based upon negligence,[61] and are frequently referred to as examples of "strict" or "absolute" liability.[62] While the third category is generally not labeled in those terms, recent developments indicate a close linkage between

56. *See, e.g.*, Gardner v. Anderson, 417 S.W.2d 130 (Mo. Ct. App. 1967). *See also* 33 Mo. L. Rev. 99 (1968).

57. Boosman v. Moudy, 488 S.W.2d 917 (Mo. Ct. App. 1972). *See also* W. Prosser, *supra* note 6, at 708.

58. Wendland v. Akers, 356 So. 2d 368 (Fla. Dist. Ct. App. 1978).

59. Mo. Ann. Stat. § 270.010 (Vernon 1963).

60. 80 Eng. Rep. 284 (K.B. 1616).

61. *See, e.g.*, C. Gregory & H. Kalven, *supra* note 1, at 547.

62. The assumption that "strict" liability and "absolute" liability are synonomous is contradicted by a significant number of decisions which specifically declare that when it comes to liability for defective products, "strict" liability is much narrower in scope and permits defenses not available when the liability is "absolute." Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 879 (Alaska 1979); Vineyard v. Empire Mach. Co., 119 Ariz. 502, 581 P.2d 1152 (Ct. App. 1978); Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 37, 402 N.E.2d 194, 199 (1980). *See also* German, *Seller Beware—Strict Liability but Not Absolute Liability*, 37 Ins. Couns. J. 44 (1970).

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that category and the first two,[63] and it seemed advantageous to consider all three in a single discussion.

V. Strict Liability "Exceptions" from General Negligence Theory: Are They Really "Exceptions"?

Modern theories of strict or absolute liability are commonly traced to the celebrated English decision of *Rylands v. Fletcher*.[64] Some chroniclers have discovered that a satisfaction of Parkinson's law that "work expands to fill the time available"[65] can readily be achieved through a laborious review of the case law in order to determine which American jurisdictions have accepted *Rylands*, which have rejected it, and which, whether or not rejecting it by name, have nevertheless accepted it under a different label.[66] Few scholars have bothered to note, however, that *Rylands v. Fletcher* can easily be viewed as a modern application of the early common-law formula for determining when losses can be shifted under the writ of trespass *vi et armis*, although limited to landowners who have sustained damages to their property as a result of an activity engaged in by another landowner.

Like the law of nuisance, however, the rule of *Rylands v. Fletcher* has a much more claimant-favoring application than the rule of *Weaver v. Ward*.[67] The latter decision, albeit by way of dictum, declared that defendants might exonerate themselves by proving that the injury resulted from no fault of their own. The law announced in *Rylands v. Fletcher*, as well as the law of nuisance, offers no such escape, and it is that feature of the ruling which has doubtless moved so many judges and academics to characterize it as an example of strict or absolute liability.

Nevertheless, other aspects of the rule in *Rylands v. Fletcher* suggest that underneath it all there are presumed elements of culpability for which the judges were unwilling to search and which they were even less willing to identify. That such an assumption of blameworthiness (whether conscious or unconscious) is nevertheless present, is clearly revealed by the willingness of the English courts, as well as at least one American court, to exonerate a defendant otherwise liable under the *Rylands* rule or the *Restatement (Second) of Torts* § 520,[68]

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63. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). *See* Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 Vand. L. Rev. 1623 (1981).

64. 1 L.R.-E. & I. App. 330 (H.L. 1868).

65. Parkinson, *Parkinson's Laws*, 5 S.D.L. Rev. 1 (1960).

66. W. Prosser, *supra* note 12, at 513.

67. 80 Eng. Rep. 284 (K.B. 1616).

68. Restatement (Second) of Torts § 520 (1977).

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if, in addition to the defendant's conduct, an act of God or *vis major* combines with the defendant's activity to produce the injury.[69]

A simple example should make the point. Defendant *A* uses dynamite for blasting. *A* is liable to the plaintiff for damages to the land of the plaintiff resulting from such blasting, no matter how carefully carried on. Defendant *B* stores dynamite on his land and it explodes as a direct result of being struck by lightning during the course of a thunderstorm. Under the English view and the view of at least one American jurisdiction, defendant *B* is not liable to the plaintiff, even though the damages to the land are identical to those which plaintiff sustained as a result of *A*'s activities.

In each case the defendant's conduct was a cause in fact of the plaintiff's injuries. That is, but for the bringing of the dynamite onto their respective lands, the damage to the plaintiff would not have occurred. Why, then, should one defendant be exonerated whereas the other will be held responsible? The only explanation (since the causal involvement of each is identical) is that *B* is more innocent than *A* and for this reason should be relieved of liability. But, since innocence is the reciprocal of culpability, it follows that *A* is somehow more culpable than *B*, and therefore should be held responsible, even though the liability imposing formula renounces fault as a criterion.

To be sure, the *Restatement (Second) of Torts* § 522 rejects the notion that the operation of a force of nature relieves a person engaging in an abnormally dangerous activity from liability.[70] But even the authors of the *Restatement* cannot carry their "no fault" premise to its full logical extent, and so they express no opinion concerning the liability of the persons engaging in an abnormally dangerous activity when the injury results from that activity combined with the intentional action of a third party.[71] Since there is no question concerning the causal connection between the injury and the abnormally dangerous activity, one may legitimately ask why the *Restatement* authors expressed dubi-

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69. Nichols v. Marsland, 2 Exch. D. 255, 260 (1876) (Baron Bramwell: "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable."); Golden v. Amory, 329 Mass. 484, 109 N.E.2d 131 (1952). Other cases supporting the view that a *vis major* exonerates the defendant are collected in W. PROSSER, *supra* note 6, at 732.

70. RESTATEMENT (SECOND) OF TORTS § 522 (1977). The late Dean Prosser chided the position taken by the *Restatement* as unsupported by any substantial authority. W. PROSSER, *supra* note 12, at 521.

71. RESTATEMENT (SECOND) OF TORTS § 522 caveat (1977). In a leading case, one court has taken the position that a deliberate act taken by someone other than the defendant which brings about the very harm considered to justify characterizing the activity as "abnormally dangerous" should exonerate the defendant who is carrying on the abnormally dangerous activity. Pecan Shoppe v. Tri-State Motor Transit Co., 573 S.W.2d 431 (Mo. Ct. App. 1978).

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ety, in this situation, about the liability of the person engaging in the abnormally dangerous activity. It is obvious, moreover, that the *Restatement* authors were making a distinction based upon relative culpability because the substantiality of the combining event is not weighed. The intentional conduct of a third party is sufficiently reprehensible to raise a doubt about the wisdom of retaining the liability exposure of the person engaging in the abnormally dangerous activity, but when the injury results from a purely negligent action of a third party, the liability exposure of the person engaging in the abnormally dangerous activity remains fixed.[72] Since the single factor effecting an immunity on the part of any person engaging in an otherwise injury-producing abnormally dangerous activity is the high degree of culpability of the intentionally acting third party, the only explanation for that immunity is the relative "innocence" of the person engaging in that activity as compared to the deliberate act of the third party. Again, however, as innocence is the reciprocal of culpability, it is clear that persons engaging in that abnormally dangerous activity are, at least implicitly, considered reproachable. This is because their liability exposure is retained when it is joined with conduct of less serious culpability.[73]

In this light, so-called "strict" or "absolute" liability is really liability without the need to prove fault, although it is somewhat more fixed than the liability without the need to prove fault exemplified by the decision in *Weaver v. Ward*,[74] in that proof of innocence, no matter how convincing or persuasive, is no justification or excuse. Nevertheless, in England and in Massachusetts, if defendants engaging in the conduct can establish that the injury was also triggered by a force of nature, they will be excused.[75] Finally, even the *Restatement (Second)* might allow relative innocence to excuse liability if defendants can show that the injury was caused not only by their engaging in an abnormally dangerous activity, but also by the intentional action of a third party.[76]

When attention is shifted to product liability under the principles

72. RESTATEMENT (SECOND) OF TORTS § 522 comment a (1977).

73. *Id.* The English cases exhibit a curious inversion of the American view, at least insofar as the *Restatement (Second) of Torts* represents the American view. Whether it be an animal or a condition on the land, the *vis major* will exonerate the defendant. Baker v. Snell, [1908] 2 K.B. 825, 833–34 (Farwell, J.). However, the malicious act of an intervening third party will exonerate the defendant as regards a condition on the land. Rickards v. Lothian, 1913 A.C. 263 (P.C.). But the malicious intervening act of a third person may not exonerate a person who keeps a wild animal. *Baker v. Snell*, 2 K.B. at 833–34 (Farwell, J.).

74. 80 Eng. Rep. 284 (K.B. 1616).

75. *See supra* text accompanying note 69.

76. *See supra* text accompanying note 71.

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announced under section 402A of the *Restatement (Second) of Torts*,[77] it becomes increasingly clear that here, as well, the new rules of liability exposure result more from shifts in the burden of proof than from any real fundamental change in judicial philosophy.

Let us begin with a quick look at the so-called "production" or "manufacturing" defect cases. In such cases, an unexplained fortuity has resulted in the manufacture and sale of an injury-producing product, which injury has directly resulted from a shortcoming in the product not present in other products of the same line.[78] In these cases the liability imposed by section 402A is not unlike the liability imposed under res ipsa loquitur. The plaintiff is unable to identify the negligent act or omission which caused the defect, but the circumstances clearly suggest that something went amiss. Again, the inference is that "accidents don't happen, they are caused." The only real difference between res ipsa loquitur and section 402A is that the latter relieves the plaintiff of the necessity of alleging any negligence on the part of the defendant.[79] But in two other respects the plaintiff enjoys significant advantages under section 402A. The defendant may not offer proof of innocence or due care, which is traditionally permitted under res ipsa loquitur.[80] Moreover, the defendant may not raise the defense of contributory negligence under section 402A.[81] Nevertheless, the fault issue remains a hidden component even in the manufacturing or production defect cases under section 402A and subtly influences the deciding authority on both the defect and causation issues. If it were truly "strict" liability the plaintiff would be able to state a claim any time a product-

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77. Section 402A states that:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if,

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See also* Davis, *Product Liability under Section 402A of the Restatement (Second) of Torts and the Model Uniform Product Liability Act*, 16 WAKE FOREST L. REV. 513 (1980).

78. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 343 (1974).

79. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); RESTATEMENT (SECOND) OF TORTS § 402A (1965); Krauskopf, *Products Liability*, 32 MO. L. REV. 459 (1967).

80. McKassen v. Zimmer Mfg. Co., 12 Ill. App. 3d 429, 299 N.E.2d 38 (1973).

81. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965). For a criticism of the methodology by which this rule was "restated" see Davis, *supra* note 77, at 535–36.

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connected injury were sustained.

The so-called "design" defect cases make it clearer that fault remains a predicate of liability even though it was theoretically abolished by the language of section 402A. Authorities generally agree that the test employed here is basically a negligence test,[82] and the two federally proposed codes for dealing with the problem make this explicit.[83] Unlike the production and manufacturing defect cases, the design defect cases do not involve a product which is deficient when compared to other products in the same manufacturing line. The design defect cases implicate the entire line of products.[84] The test used to determine whether a product has been defectively designed is whether a reasonable person would put the product into the stream of commerce if he or she had knowledge of its harmful character.[85] The failure to do what a reasonable person would do under the same or similar circumstances is, of course, the standard test for negligence.[86] What, then, is the difference between a case tried under negligence theory and a case tried under section 402A when the injury-producing circumstances involve a defectively designed product?

Again we see that the differences are not so much in the theories of liability as they are in the allocations of the burden of proof. The defendant is not permitted to offer proof of innocence (due care) when the case is tried under section 402A, but, of course, in refuting the plaintiff's explanation of how the injury occurred (causation), the defendant will be able to introduce evidence which may significantly affect the jury's sentiments on that point.[87] Again, under section 402A the defendant may not assert the plaintiff's contributory negligence as a defense.[88] More significant in defective design cases tried under section 402A, however, is the manner in which the negligence issue (would a reasonable person with knowledge of its harmful character have put the product into the stream of commerce?) is handled. Instead of requiring the plaintiff to establish that proposition, as required by the

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82. Fischer, *supra* note 78, at 340; Powers, *The Persistence of Fault in Products Liability*, 61 Tex. L. Rev. 777 *passim* (1983). *See also* Model Unif. Prod. Liab. Act Analysis (Department of Commerce 1979), 44 Fed. Reg. 62, 723–26.

83. Model Unif. Prod. Liab. Act §§ 104(B), (C) (Department of Commerce 1979), 44 Fed. Reg. 62, 714 (1979); S. 2631, 97th Cong., 2d Sess. § 5(b) (1982).

84. Fischer, *supra* note 78, at 343.

85. Phillips v. Kimwood Mach. Co., 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974) (announcing standard and collecting authorities).

86. W. Prosser, *supra* note 12, at 150; Jury Instructions, *supra* note 54, at 118 (Supp. 1978).

87. *See, e.g.*, Brown v. General Foods Corp., 117 Ariz. 530, 573 P.2d 930 (1978) (quality control procedures admissible to rebut proof that moldy banana fragment was encased in Grape Nuts box).

88. *See supra* text accompanying note 81.

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tradition verified in *Brown v. Kendall*, we find, in classic *Weaver v. Ward* style, the defendant charged with the responsibility of establishing innocence. The classic announcement of this shift in the burden of proof was made in the well-known California case of *Barker v. Lull Engineering Co.*:[89]

> [W]e conclude that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.[90]

Another development clearly illustrating that fault remains an implicit factor of liability for defective products under section 402A has been the judicial reaction to the need to accommodate section 402A's theory of liability with principles of comparative negligence when such principles are adopted, either legislatively or judicially, in a particular jurisdiction. Since contributory negligence is not a defense under section 402A, a logical way of dealing with the problem is simply to deny the application of comparative negligence principles to actions based upon that section.[91] The difficulty, of course, is that such a view imposes a more intensive liability exposure upon an arguably less culpable defendant. It hardly seems cricket to impose liability, undiscounted by the plaintiff's contribution, upon defendants whose fault has not been proved, while at the same time permitting defendants whose culpability is undisputed to have *their* liability *reduced* by the amount of that contribution.[92] Most judges who have faced this problem have chosen to permit the defendants to reduce their liability under section 402A by whatever amounts may be attributable to the plaintiff's contributory fault.[93] Although this practice has not occurred without some criticism,[94] it is clearly consistent with the thesis of this discussion that despite the fact that the plaintiff need not prove negligence, an implicit

89. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

90. *Id.* at 431–32, 573 P.2d at 455, 143 Cal. Rptr. at 237.

91. *See* Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo. L. Rev. 431, 442–44 (1978); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 San Diego L. Rev. 337, 356 (1977).

92. The discrimination visited against innocent defendants under the Restatement (Second) of Torts §§ 402A and 520, who must pay out full recoveries to contributorily negligent plaintiffs, whereas their culpable counterparts have the benefit of a setoff, has excited virtually no attention. Davis, *supra* note 77, at 536.

93. *E.g.*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). Other cases are collected at W. Prosser, *supra* note 6, at 819. *See also* Plant, *Comparative Negligence and Strict Tort Liability* 40 La. L. Rev. 403, 406 (1980).

94. *See* Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 355, 579 P.2d 441, 448, 146 Cal. Rptr. 550, 557 (1978) (Mosk, J., dissenting).

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assumption of blameworthiness underlies the so-called "strict" liability under section 402A.

When all is said and done it may well be observed that this discussion and analysis merely restates the well-known historical association between causation and moral responsibility, which is a touchstone of many legal systems.[95] Nevertheless, moral responsibility has certainly not surfaced as a significant rationale for the modern theories of tort recovery not based upon negligence, and a look at the most recent and quite radical development in the product liability area—that of market-share liability—bears this out.[96]

The problem which generated the solution provided by the market-share liability theory is not new to the law of torts, although until quite recently it manifested itself in rare but clearly identifiable instances.[97] The problem presented was that of a plaintiff with a sympathy-provoking injury inflicted by indisputably tortious conduct, but under circumstances in which it was impossible to identify which one of a discrete number of defendants, one of whom must have been responsible, committed the act or created the condition. Since the problem so clearly illustrates the inadequacies of the modern rules which place the burden of establishing the negligent act and identifying the responsible party on the plaintiff, it is one which law teachers and the editors of torts casebooks find conspicuously engaging.[98]

The two leading decisions, *Summers v. Tice*[99] and *Ybarra v. Spangard*,[100] provide exceptions to the modern rules by permitting the plaintiffs to get to the jury without offering proof that any one of the defendants was more than likely the one responsible for the injury. This exception to the otherwise applicable modern rules requiring the plaintiff to identify the defendant responsible for the injury has been called "alternative liability,"[101] and the mechanics of its application very

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95. H. Hart & A. Honoré, *supra* note 11, at 58, 64; Epstein, *supra* note 1, at 160–63. *See also* the remarks of Justice Augustus Hand in Exner v. Sherman Power Constr. Co., 54 F.2d 510, 514 (2d Cir. 1931).

96. *See* Fischer, *supra* note 63.

97. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Ruud v. Grim, 252 Iowa 1266, 110 N.W.2d 321 (1961); Casey Pure Milk v. Booth Fisheries, 124 Minn. 117, 144 N.W. 450 (1913); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926).

98. *See, e.g.*, M. Franklin & R. Rabin, *supra* note 5, at 283–87; C. Gregory, Cases and Materials on Torts 260–61 (3d ed. 1977); W. Prosser, *supra* note 6, at 287–89.

99. 33 Cal. 2d 80, 199 P.2d 1 (1948).

100. 25 Cal. 2d 486, 154 P.2d 687 (1944).

101. "The principle is sometimes referred to as the 'alternative liability' theory." Sindell v. Abbott Laboratories Co., 26 Cal. 3d 588, 598, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136 (1980). But this principle has questionable lineage. None of the three authorities frequently credited with propounding it use the term "alternative liability." *See Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d

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much resemble those necessary for the doctrine of res ipsa loquitur to apply. The main difference between the two is that res ipsa loquitur relieves the plaintiff from having to identify which of several negligent acts or omissions of the defendant might plausibly have caused the injury, whereas alternative liability relieves the plaintiff from having to identify which of two or more equally involved defendants was more than likely the perpetrator of the negligent act or omission.

As a practical matter, *Ybarra v. Spangard* is by far the more controversial of the two leading decisions because it combined both doctrines in a single case, thereby giving the plaintiff the best of both possible worlds. In that case the plaintiff, who had sustained injuries in a hospital during a period in which he had been under anesthesia, was permitted to submit his case to the jury without identifying which of several equally eligible negligent acts had more than likely caused his injury (res ipsa loquitur), and also without establishing which of a number of sequentially involved defendants was more than likely the person responsible for the act or omission (alternative liability).[102]

When compared to the rules applied in *Ybarra v. Spangard*, market-share liability, as exemplified by the leading decision employing it, *Sindell v. Abbott Laboratories*,[103] appears to be a less radical innovation. This is because in most of the incidents arguably calling for the application of the principles of market-share liability, there is little doubt about how the injury occurred, a condition not clear in *Ybarra*.[104] Market-share liability principles need not resolve ambiguities about how the injury occurred; instead, they simply deal with the problem of the unidentified defendant by applying the principle of alternative liability with one significant addition. Those defendants whose products can be shown to have been possible causes of the plaintiff's injuries, and who are unable to show that they could *not* have caused the injury, must assume liability in proportion to their relative shares of

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1; *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687; RESTATEMENT (SECOND) OF TORTS § 433B (1965). The term was apparently first applied to describe this unique proof-shifting device in tort law by the late Dean Prosser. W. PROSSER, *supra* note 12, at 243. Whether consciously or unconsciously, Dean Prosser carried over and applied to tort law a principle of agency law previously unapplied in other fields. That principle forbids a double recovery from both principal and agent on grounds of respondeat superior, and its classical exposition is found in Ewing v. Hayward, 50 Cal. App. 708, 717–18, 195 P. 970, 974 (1920) (Finlayson, J., concurring). Whether legitimate or not, Dean Prosser's invention is apparently here to stay. In addition to the *Sindell* case, see Morton v. Abbott Laboratories, 538 F. Supp. 593, 598 (M.D. Fla. 1982); Starling v. Seaboard Coastline R.R., 533 F. Supp. 183, 187–88 (S.D. Ga. 1982); Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981) (refusing to apply the alternative liability theory and questioning its propriety); Davis v. Yearwood, 612 S.W.2d 917, 920 (Tenn. App. 1980).

102. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d at 687.

103. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

104. *See supra* text accompanying note 102.

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market patronage, rather than in accordance with the normal joint and several liability rules.[105]

Market-share liability, in this light, is nothing more than another example of the judicial capacity to achieve a fairer parity between injured persons and those arguably responsible by simply modifying the rules governing the burden of proof. In *Sindell* this was accomplished through the application of the principles of alternative liability, slightly modified by adjusting the normal contribution rule followed in orthodox cases of joint liability. But even under the controversial market-share liability rules, there is at bottom, as has been shown, a premise of moral responsibility which, in this instance, is a surrogate for proof of causative fault.

VI. ADVANTAGES TO CONCEDING THAT ALL TORT LIABILITY PRESUMES MORAL RESPONSIBILITY

A predictable response to the foregoing propositions might be that the author has made a pedantic mountain out of a semantic molehill. After all, whether we call it strict liability, liability without the need to prove fault, or even the more ponderous "liability based upon a moral responsibility inferred from a circumstantial involvement," the outcome will be the same. Result-oriented judges are not, and need not be, picky about the particular major premise necessary to validate their policy judgments. Every legal realist knows this, and the movement towards section 402A type liability has aptly been described as "strict liability in search of a doctrine."[106] The rebuttal has to be that the more accurate we make our characterizations, the better we are prepared to understand what we are doing, and the better our ability to resolve the problems which arise when the rules governing the shifting of losses are changed or modified.

For example, the manifold difficulties which have beset judges in determining the liability exposure of a product seller for a defect in design[107] might have been avoided had we recognized, from the beginning, that the liability we were imposing was based upon an assumption of moral responsibility rather than the satisfaction of merely neutral conditions. Similarly, accommodating the principles of "strict" product liability with the increasingly popular principles of comparative negligence would have been less painful and less complicated[108] had we conceded that behind the concept of "strict" product liability lay the no-

105. *See* Fischer, *supra* note 63.

106. C. GREGORY & H. KALVEN, *supra* note 1, at 584.

107. *See* Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 557–66 (1980).

108. *See supra* text accompanying notes 88–90.

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tion of a socially unacceptable aberration. Moreover, in formulating jury instructions in product liability cases, we would have been able to provide our jurors with better guidance had we recognized that we were dealing with unreasonable conditions or circumstances. Thus, instead of providing the jury with no guidance as to what is meant by a "defective" product, the jury might well be instructed as follows:

> [A] Your verdict must be for the plaintiff if you believe:
> (1) defendant sold or leased the product in the course of the defendant's business; and
> (2) the product was then defective; and
> (3) plaintiff was damaged as a direct result of such defect.[109]
>
> [B] The term "defect" as used in these instructions means a condition of a product which makes it dangerous to person or property either because:
> (1) some miscarriage in the manufacturing, processing, or repairing of the product rendered it different from other products of the same line or type, *or*
> (2) the product was designed in such a way that a reasonable person who knew or should have known of its harmful potential would not have put it into the stream of commerce.[110]

By the same token, if we had recognized that the rules of so-called "traditional strict liability" as generated by such authorities as the decision in *Rylands v. Fletcher*,[111] and the drafters of the *Restatement of Torts*[112] and the *Restatement (Second) of Torts*,[113] were nothing more than modified and isolated retentions of the rules formerly applicable in what may be called the "pre-*Brown v. Kendall*[114] era," we might better have integrated them into a general theory of tort liability, rather than having to treat them as "anomalies" or exceptions to such a general theory.

All of the ritual phrases incorporated into the formulas of tradi-

109. "Direct result" is designed to avoid the metaphysics of the expression "proximate cause," a term which, if it were banished from judicial lexicons, would not be missed. *See* Vinson, *Proximate Cause Fog Spreads*, 69 A.B.A. J. 1042 (1983). It is unfortunate, in this respect, that Acting Chief Justice Tobriner used the term "proximately caused" in his otherwise admirable formulation of the burden of proof dynamics in a design defect case. *See supra* text accompanying notes 89–90.

110. The formulation rejects the so-called "hindsight" test which has caused undue controversy and has been the occasion of considerable confusion. *See, e.g.*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Davison, *The Uncertain Search for a Design Defect Standard*, 30 AM. U.L. REV. 643, 668 (1981).

111. 3 L.R.-E. & I. App. 330 (H.L. 1868).

112. RESTATEMENT OF TORTS § 519 (1934).

113. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

114. 60 Mass. (6 Cush.) 292 (1850).

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tional strict liability utilize the notion of a departure from a norm established by societal expectations. In his opinion for the inferior Court of Exchequer, in what ultimately became the decision in *Rylands v. Fletcher*, Justice Blackburn declared that a "person who . . . brings on his lands . . . anything likely to do mischief if it escapes" is prima facie answerable for the injuries which result.[115] Upon appeal, Lord Cairns's refinement of that test in the House of Lords employed the term "non-natural" use, and declared that persons who made a "non-natural" use of their land did so at their peril.[116] The original *Restatement of Torts* used the unfortunate term "ultrahazardous"[117] to describe an activity for which the defendant would be strictly liable, the intention being to identify activities and conditions which were extremely and unusually dangerous. The *Restatement (Second) of Torts* has recast that characterization in the term "abnormally dangerous."[118]

Each one of these formulas embodies the same notion behind the liability imposed at early common law under the writ of trespass *vi et armis*, and it would seem that if the English jurists in *Rylands v. Fletcher* had been faithful to the precedent of *Scott v. Shepherd*[119] (ignoring intervening circumstances affecting the conditions generated by defendant's initial act), liability might have been imposed on that basis without the need for the new and enchanting rationale which *Rylands* generated. The main problem in *Rylands* may have been that the damage was the result of a condition created by the defendant rather than an act, and that the damage was to land rather than to the person or to chattels.[120] Under those circumstances the action simply did not fit within the traditional scope of trespass *quare clausum fregit*, trespass *vi et armis*, or trespass on the case.[121]

Curiously enough, these strict liability formulas also depend upon the same talismans necessary for the application of the doctrine of res ipsa loquitur: (1) an occurrence exciting social disapproval (e.g., dynamite explodes); (2) custody or intimate circumstantial involvement by the defendant with the injury-producing activity (e.g., defendant stored the dynamite); and (3) injuries of a type consistent with the social disapproval of the occurrence (e.g., substantial personal injuries or property damage of a foreseeable nature, rather than mink eating their

115. Fletcher v. Rylands, 1 L.R.-Ex. 265, 279 (1866).

116. Rylands v. Fletcher, 3 L.R.-E. & I. App. 330, 339 (1868).

117. Restatement of Torts § 519 (1934).

118. Restatement (Second) of Torts § 519 (1977).

119. 96 Eng. Rep. 525 (1973); *see supra* text accompanying notes 15–17.

120. 3 L.R.-E. & I. App. at 331–32. Even in England there are misgivings about the precise reach and meaning of the decision in *Rylands*. *See* Goodhart, Rylands v. Fletcher *Today*, 72 L.Q. Rev. 184 (1956).

121. *See* Malone, *supra* note 37, at 34–39.

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young). Like the doctrine of res ipsa loquitur,[122] all of these formulas shift attention away from the defendant's conduct and make the paramount consideration the circumstances of the injury.[123] But it is a mistake to assume that we have eliminated "fault" or "negligence" as an implicit premise of liability. All we have removed is the need for the plaintiff to prove a negligent act as a condition to a prima facie case.

A final observation on the curious schizophrenia which has afflicted thinking about tort liability over the past century may be in order. Euclidian geometry and Newtonian physics, when combined with the rise of Darwinism in the late nineteenth century, suggested a universe whose workings were governed by scientific principles within the comprehension and documentation capacity of the human intellect. At the same time, Malthus,[124] Freud[125] and Marx[126] were developing highly persuasive theories about the human condition which tended to downplay the idea of moral responsibility and to explain human behavior in terms of circumstances, incidents, and social conditions unrelated to the exercise of moral choice. The keepers of the legal system (judges, lawyers, and academics) may well have shared the intellectual and philosophical ethos of that era. The search for simpler, more efficient, and seemingly less capricious mechanisms for dealing with recurring or statistically inevitable injury patterns was perhaps spurred by that ethos.[127] And to the extent that strict liability theories appear to offer a less complicated and less discriminatory basis for compensating bodily injury and property damage, the general enchantment with such theories may also be explainable in terms of that same philosophical

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122. Res ipsa loquitur builds upon the circumstances of the injury to infer a causal negligent act or omission, whereas in strict product liability the circumstances are assayed for the purpose of inferring a defect. *Compare* Plato Reorganized School Dist. No. R-5 v. Intercounty Elec. Coop., 425 S.W.2d 914 (Mo. 1968) *with* Winters v. Sears, Roebuck & Co., 554 S.W.2d 565 (Mo. Ct. App. 1977). Both cases permitted recovery for fire damage resulting from an unexplained product ignition. The first was tried on a res ipsa loquitur theory, the second was tried on a strict product liability theory. The parallels are striking. For a case in which the circumstances were insufficient to provide an inference for either strict product liability or res ipsa loquitur, see Brothers v. General Motors Corp., __Mont.__, 658 P.2d 1108 (1983).

123. Davis, *supra* note 77, at 514; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973).

124. T. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (1798).

125. L. TRILLING, FREUD AND THE CRISIS OF OUR CULTURE (1955).

126. *See* P. PHILLIPS, MARX AND ENGELS ON LAW AND LAWS (1980).

127. The popularity and success of workers' compensation legislation is one of the more remarkable results of the theory that compensation for recurring injury patterns should, in effect, be "automated." *See* 1 New York Employers' Liability Commission, First Report (1916), summarized in W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 19–26 (1936). Other systems, based upon the workers' compensation idea have achieved considerable popularity. *See, e.g.*, R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705 (1916).

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milieu.[128] At the same time, one can see that a disenchantment with notions of moral responsibility as a ground for loss shifting was moving a number of leading jurists, including Holmes,[129] to search for more scientific and objective bases for loss shifting.[130] Hence the preference for the seemingly more mechanical and objective tests of so-called "strict liability."

Einstein and Bohr, among others, have shown us the limitations of Euclidian geometry and Newtonian physics.[131] Today the universe appears infinitely more complex and unknowable than it did during the closing years of the nineteenth century. This should give us reason to be cautious about assuming that there is some more accurate, efficient, and socially acceptable mechanism for shifting losses than one grounded in moral responsibility. While economic considerations which deal with cost distribution and safety incentives are extremely important factors in loss-shifting decisions, they should be ancillary to the moral judgment issue and not, as some distinguished scholars would have it,[132] preemptive.

VII. Conclusion

Holmes once said that the life of the law is experience, not logic.[133] I believe that the experience of the twentieth century shows that it is impossible fully to eliminate moral responsibility as a fundamental basis for loss shifting, no matter how often we rephrase the formulas.[134]

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128. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Malone, *This Brave New World—A Review of "Negligence Without Fault,"* 25 S. Cal. L. Rev. 14 (1951).

129. Holmes clearly believed that mechanical rules should be distilled for the purpose of determining when liability should be shifted, and that a jury should be used only in those constantly shrinking circumstances where the rule of conduct has not previously been declared. O.W. Holmes, *supra* note 18, at 123–35; Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927).

130. Professor Jeffrey O'Connell is clearly the most colorful and engaging apologist for a system which awards compensation purely on the basis of the circumstantial origins of the injury, and with recoveries reduced by whatever amounts the economic feasibility of the compensation system requires. *See* O'Connell, *supra* note 4; Fischer, *Products Liability—Functionally Imposed Strict Liability*, 32 Okla. L. Rev. 93 (1979) (collecting citations to many of Professor O'Connell's books and articles on the subject). But Professor O'Connell has some distinguished predecessors. *See, e.g.*, P. French, The Automobile Compensation Plans (1933); Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 Harv. L. Rev. 705 (1916); Smith, *Sequel to Workmen's Compensation Act*, 27 Harv. L. Rev. 235 (1913). *See also* Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 774 (1967).

131. R. Moore, Niels Bohr: The Man, His Science and the World They Changed (1966); P. Michelmore, Einstein: Profile of the Man (1962).

132. G. Calabresi, The Costs of Accidents (1970); Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1 (1980).

133. O.W. Holmes, *supra* note 18, at 1.

134. The one major exception to the view that some level of moral responsibility underlies

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What we are really doing is attempting to maintain a fundamental parity between those who sustain losses and those who carry on the activities which are the occasion of such losses. Although frequently disguised in terms of doctrinal alternatives that seem to eliminate the element of moral responsibility, the parity between loss inflicters and loss sustainers is in fact maintained by shifts in the burden of proof, which may direct attention away from the fundamental premises of liability, but which do not significantly change them.

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all loss shifting mechanisms is the New Zealand system providing public compensation for all personal injuries, however caused or inflicted. Henderson, *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981); G. PALMER, COMPENSATION FOR INCAPACITY (1979); Dahl, *Injury Compensation for Everyone?—The New Zealand Experience*, 53 J. URB. L. 925 (1976); Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977). But that system operates under unique circumstances and conditions and is a subject for a different time and a different place.

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