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PRIESTLEY V. FOWLER (1837) AND THE EMERGING TORT OF NEGLIGENCE

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Abstract: *Priestly v. Fowler* has long been noted as the source of the doctrine of common employment. This Article, however, argues that the case is better understood in the context of the then-emerging independent tort of negligence—specifically, as an unsuccessful attempt to require of masters a duty of care towards their servants. The Article re-examines the facts, arguments, personalities, and various reported versions of the case in tracing the effort to establish a new duty of care. The Article traces, as well, to another case, *Hutchinson v. York*, the true origins of the common employment doctrine. Finally, the Article compares the perspectives of nineteenth century authorities to those of modern writers in establishing how *Priestly* came to be detached from its true significance.

INTRODUCTION

Although it may fairly be presumed that workmen have always been involved in accidents during the course of their employment, *Priestley v. Fowler*[1] is the first known recorded decision of an employee having sued an employer for work-related injuries.[2] Consequently, the

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[1] 3 Murph. & H. 305 (Ex. 1837) The decision is reported by four different sources. The *Murphy & Hurlstone* version is the most detailed, offering a brief account of both the assize trial and the arguments presented to the Court of Exchequer. Accordingly, it will be utilised exclusively unless otherwise noted.

[2] Working from the 1840 diaries of the philanthropic Earl of Shaftsbury, his biographer recounted that Lord Ashley sponsored two actions by injured employees against their

case has become familiar to several generations of legal commentators, most of whom repeat by rote the accepted wisdom that the opinion originates the doctrine of common employment,[3] and censure in often colourful terms the ideology they deem displayed in Abinger, C.B.'s ruling.[4]

Recently, a handful of studies have reassessed the decision within its historical context. Brian Simpson, for example, demonstrated how changes in the Poor Law precipitated the litigation.[5] Richard Epstein divined from lack of direct prior precedent the existence of an "ironclad rule" precluding employers' liability to their servants for industrial accidents.[6] In contrast, Terrance Ingman, in a pair of articles, asserted that the judgment controverted an already established employers' liability for workplace injuries, while also laying the groundwork for the defence of *volenti non fit injuria*.[7] Expressing skepticism, R.W. Kostal was unconvinced of the case's significance, deeming it the "unreliable precedent of an unreliable judge."[8] Each of these treat-

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masters. All that is known about the first is that the action settled out of court. The second involved a factory girl named Elizabeth Cottrell who was grievously injured when her dress was caught on an unfenced shaft. Before Rolfe, B. at the 1840 Liverpool Summer Assizes, the defendant factory owner Samuel Stocks conceded liability for £100, plus £600 in costs for the redoubtable advocate (and later Court of Common Pleas judge) Cresswell Cresswell. *See* EDWIN HODDER, THE LIFE AND WORK OF THE SEVENTH EARL OF SHAFTSBURY, K.G. 301, 347 (1866); A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 128 (1995). Variant perceptions on the absence of such cases prior to 1837 are set forth *infra* in note 258.

[3] A representative list includes formidable legal historians among its members. *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 471 (3d ed. 1990) (1971) ("it was held in 1837 that an employee could not sue his master for the negligence of a fellow employee"); W.R. CORNISH & G. DE N. CLARK, LAW AND SOCIETY IN ENGLAND 1750-1950, at 496–98 (1989); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162 (1930) ("In *Priestley v. Fowler* the famous or infamous doctrine of common employment was first laid down.").

[4] For instance, Friedman and Ladinsky's appraisal that the opinion was "diffuse and unperceptive," linked to "the onrush of the industrial revolution." Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 269, 270 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

[5] *See* SIMPSON, *supra* note 2, at 100–34.

[6] *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 777 (1982).

[7] Terence Ingman, *A History of the Defense of* Volenti Non Fit Injuria, 26 JURID. REV. 1, 8–9 (1981) [hereinafter Ingman, *History*]; Terence Ingman, *The Rise and Fall of the Doctrine of Common Employment*, 23 JURID. REV. 106, 108–09 (1978) [hereinafter Ingman, *Rise and Fall*].

[8] *See* R.W. KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM 1825-1875, at 268 (1994).

ments, however, works from the time-honoured premise that *Priestley* was the source of the defence of common employment.

Diverging from conventional scholarship, this Article demonstrates that *Priestley* is better understood within the framework of the emerging independent tort of negligence as an unsuccessful attempt to fashion a duty of care on behalf of masters towards their servants.[9] Specifically, it will argue that Charles Priestley's counsel sought to emulate the arguments (and hence the success) of two Assize verdicts that had extended the customary limitations of liability for negligence earlier that same year: *Vaughan v. Menlove*[10] and, to a lesser extent, *Langridge v. Levy*.[11] The Article will then illustrate how some thirteen years later, *Hutchinson v. York, Newcastle & Berwick Railway Co.*[12] (and its companion decision *Wigmore v. Jay*),[13] truly produced the doctrine of common employment in England.[14] This is an assessment with which a plurality of Victorian jurists, as well as the vast majority of contemporary treatise writers agreed. Nevertheless, because of the character of the opinion that Abinger, C.B. had issued in *Priestley*, a revisionist interpretation developed over time and *Priestley*, rather than *Hutchinson*, came to stand for the source of the defence. The Article concludes by evaluating more recent reconsiderations of *Priestley* and revealing their general inaccuracy.

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[9] Unsuccessful in the immediate sense that Charles Priestley's injuries were uncompensated. In a later work, the author will illustrate how nineteenth century English appellate court judges laboured assiduously to extend this non-liability for personal injuries to their servants. At the same time, the narrow window of liability which did (rarely) prevail may be said to originate in *Priestley*.

[10] 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837).

[11] 2 M. & W. 519, 150 Eng. Rep. 863 (Ex. 1837).

[12] 5 Ex. 343, 155 Eng. Rep. 150 (1850).

[13] 5 Ex. 354, 155 Eng. Rep. 155 (1850).

[14] In the United States, where the defence is known as the fellow servant rule, its clearest statement was articulated by Shaw, C.J. in *Farwell v. Boston & Worcester Railroad Corp.*, 45 Mass. 49 (1842), although the principle was first enunciated in *Murray v. South Carolina Railroad*, 26 S.C.L. (1 McMul.) 385 (1838).

I. The Case of *Priestley v. Fowler*[15]

On May 30, 1835, Charles Priestley,[16] a servant of butcher Thomas Fowler of Market Deeping, was ordered to conduct mutton to market. The meat was placed in a wagon driven by William Beeton, another of Fowler's employees.[17] Priestley was to accompany the cart only as far as Buckden, some twenty miles from Peterborough, where he was to sell some quantity of the loaded provisions. Beeton would then continue on to London to vend the remainder.

The four-horse team could not move the van and "jibbed," meaning that they stopped in their tracks and would not move forward. Turning to the nearby Fowler, Beeton protested that "he ought to be ashamed of himself for sending such a dangerous load." Fowler responded by calling Beeton "a damned fool for saying anything of the sort." Although present during the exchange, Priestley held his peace.[18] Following this ominous start, the wagon soon embarked on

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[15] Following Simpson's lead, this section utilises the following newspaper accounts to supplement the pre-Court of Exchequer exegesis of the case: Boston, Louth & Spalding Herald, July 19, 1836; Doncaster, Nottingham & Lincoln Gazette, July 19, 1836; Gainsborough, Isle of Axholme, Louth & Lindsay Advertiser, July 19, 1836; Lincoln, Boston & Newark Tuesday's Gazette, July 19, 1836; Lincoln, Rutland & Stamford Mercury, July 22, 1836; Lincolnshire Chron. & Gen. Advertiser, June 5, 1835; Lincolnshire Chron. & Gen. Advertiser, July 22, 1836; Northampton Mercury, July 23, 1836. Unless otherwise indicated, the pre-appellate account is drawn collectively from the above sources.

[16] Two individuals surnamed Priestley had previously litigated related issues. *Underhill v. Priestley* (1781) reported a claim against one Thomas Priestley for negligently driving a loaded cart, while *Priestley v. Watson*, 3 C. & M. 691, 149 Eng. Rep. 938 (Ex. 1834), recounted the suit by a Joseph Priestley challenging Brotherton township's Poor Law assessments against the Aire & Calder Navigation Company. The former opinion may be found in James Oldham, 2 The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 1137 (1992). The latter case was determined in the Court of Exchequer one term before Lord Abinger was appointed Chief Baron.

[17] None of the accounts make clear who loaded the wagon with the "peds" (i.e., hampers) of mutton.

[18] Diverging from the other four accounts, *Murphy & Hurlstone* reported that the "plaintiff remonstrated, on account of the cart being overloaded, and too weak to bear the load, and it being dangerous to go by it." *Priestley*, 3 Murph. & H. at 305. Although arguments before the Court of Exchequer would later make heavy weather over Priestley's acquiescent riding in the van, the discrepancy over the complaint's source is immaterial. Whether Priestley or Beeton, Priestley either was of the opinion, had confirmed his opinion, or was given notice of Beeton's opinion, that the van was overloaded. Relying on the *Murphy & Hurlstone* report, Ingman's account in *Rise and Fall* was rightly taken to task as "incorrect" by Simpson. Simpson, *supra* note 2, at 107 n.28; *see* Ingman, *Rise and Fall*, *supra* note 7. Kostal was likewise mistaken. *See* Kostal, *supra* note 8, at 260.

its journey, propelled into motion by some of Fowler's other employees.[19]

Nearing Peterborough, Beeton and Priestley heard a cracking noise as the cart rolled over some stones. Consequently, they had the van inspected by Gideon Lucas, owner of the King's Head Inn. The perusal, conducted by lantern light because they had departed Market Deeping at nine thirty at night, revealed nothing amiss with the cart. Nevertheless, while traversing the mile south from Peterborough towards Norman Cross, the wagon's front axle cracked along a third of its length and gave way, overturning the vehicle. Beeton was pulled ahead of the van's collapse by the horses, escaping substantial harm. Priestley was less fortunate: some four hundredweight worth of mutton fell on him, resulting in a broken thigh, a dislocated shoulder, and various other injuries.

As was customary upon the occurrence of such accidents,[20] Priestley was taken to the closest public lodging, in this case the King's Head Inn from which he and Beeton had recently departed. Lying "in a very precarious state," Priestley remained at the inn for nineteen weeks, during the course of which he was treated by two surgeons. Exactly what happened during this convalescence period remains open to conjecture, but the total cost of Priestley's care and treatment, a hefty £50,[21] was paid by his father, Brown Priestley.[22] During the Lincoln Summer Assizes of 1836, Charles Priestley (as a minor through his father) sued his master Fowler for compensation relating to his accident.[23]

On July 18, 1836, the action was tried before Park, J.,[24] who by all accounts was a sound judge, although given to occasional losses of

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[19] Simpson intimated that the cart might have been loaded by unidentified mutton suppliers. *See* SIMPSON, *supra* note 2, at 103.

[20] This is demonstrated, among other cases, by *Tomlinson v. Bentall*, 5 B. & C. 738, 108 Eng. Rep. 274 (K.B. 1826), and *Lamb v. Bunce*, 4 M. & S. 274, 105 Eng. Rep. 836 (K.B. 1815).

[21] A considerable amount, especially when compared to the annual £80 medical budget of the parish union that presented the charge to Priestley. *See* SIMPSON, *supra* note 2, at 126.

[22] *See id.* at 127. Simpson ventured that "some discreet arrangement" might have been entered into by Brown Priestley, the innkeeper, and the surgeons. *Id.*

[23] "The present action was brought to recover the amount of the expenses for which the father had been put in consequence of this lamentable occurrence." NORTHAMPTON MERCURY, July 23, 1836.

[24] In relating the events of trial, Kostal inadvertently identified the jurist as Parke, B. rather than Park, J., possibly because Bartrip and Burman identified the jurist as "Parke, J."

temper.[25] Serjeant Edward Goulbourne[26] and Mr. Nathaniel Clarke[27] represented Priestley, while Serjeant John Adams[28] and Mr. Andrew Amos[29] acted as counsel for Fowler.[30]

Priestley pleaded two grounds in support of his claim against his master, a latent defect and the van's overloading. The declaration stated that when Fowler had "directed" the plaintiff to accompany the mutton to market "in" the van, Fowler was under a duty "to use due and proper care that said van should be in a proper state of repair" and "not be overloaded, and that the plaintiff should be safely and securely carried thereby." As a result of Fowler having breached this

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P.W.J. BARTRIP & S.B. BURMAN, THE WOUNDED SOLDIERS OF INDUSTRY 104 (1983); KOSTAL, *supra* note 8, at 262, 262 n.45. The error is significant because Park, J. in both the *Priestley* assize case and the Court of Common Pleas case of *Vaughan v. Menlove*, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837), fostered master/servant liability. As will be seen below, Parke, B. took the opposite approach. *See infra* notes 115–116 and accompanying text.

[25] *See* E. FOSS, A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND 1066-1870, at 496–97 (1870) (describing Park, J.'s "only drawback" as "a certain irritability about trifles, which too frequently excited the jocularity of the bar"); 15 DICTIONARY OF NATIONAL BIOGRAPHY 216 (Oxford University Press CD-ROM, version 1.0, 1995) ("[a]s a judge, though not eminent, he was sound, fair, and sensible, a little irascible, but highly esteemed"). A popular yarn represented Park, J. as the illegitimate son of George III, to whom he bore a resemblance. *See* MICHAEL GILBERT, THE OXFORD BOOK OF LEGAL ANECDOTES 234 (1986).

[26] Coronet and Lieutenant in the Royal Horse Guards, and Tory M.P. for Leicester during the course of *Priestley*. *See* 7 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 25, at 283. Simpson mistakenly reported Goulbourne's legislative career as "M.P. for Ipswich." SIMPSON, *supra* note 2, at 102 n.8. Although not egregious, the oversight is relevant. Had Goulbourne successfully contested representation for Ipswich in 1832, he would have been a colleague of Sir James Scarlett (later Abinger, C.B.), who was returned for Norwich in that same election. *See* 17 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 25, at 890.

[27] Afterward a county court judge. *See* SIMPSON, *supra* note 2, at 102 n.9.

[28] Also the author of a legal text. *See* J. ADAMS, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE ACTION OF EJECTMENT AND THE RESULTING ACTION FOR MESNE PROFITS (2d ed. 1818).

[29] A respected lecturer on jurisprudence, Amos would become the first Professor of Law at the University of London (later University College), then the Downing Professor at Cambridge University from 1849 to 1860. *See* 1 DICTIONARY OF NATIONAL BIOGRAPHY 366–67, *supra* note 25.

[30] No evidence exists of how such expensive legal talent was retained, although Simpson surmised that a contingency fee may have been arranged for Priestley. SIMPSON, *supra* note 2, at 102. Kostal concurred, adding that "the number of lawyers in towns like Lincoln was on the rise in this period," thereby "increasing the chance that one of their number would become interested in Priestley's predicament." KOSTAL, *supra* note 8, at 261 n.34. This begs the question of how Fowler, as a defendant unable to proceed under a contingency fee, could have afforded his counsel, and raises the conjecture that those costs contributed to his subsequent bankruptcy. *See Priestley v. Fowler*, 3 Murph. & H. 305, 305 (Ex. 1837); LINCOLNSHIRE CHRON. & GEN. ADVERTISER, Jan. 24, 1837.

duty, the van had broken down and the plaintiff was harmed. No allegation was made as to negligent actions or omissions, nor of the existence or violation of a duty towards Charles Priestley by anyone in Fowler's employ.[31]

Throughout the trial, Serjeant Goulbourne emphasised the overloading claim, with contrary evidence presented by the parties as to the weight both properly and actually borne by the wagon. Evidence was also given as to the extent of the axle's defect prior to the accident. In putting Priestley's case to the jury, Goulbourne played to their sympathies, remonstrating the unprincipled behaviour of the "wealthy butcher" defendant towards the plaintiff who "was one of a large family," and asking for not only reimbursement of medical expenses, but also recompense for Priestley's pain and suffering:

> [T]hat a very opulent tradesman, a man in a very large way of business like the defendant, should have driven this poor lad into court, for he would say that not only justice, but also in common humanity, he ought to pay the pecuniary damages his client had sustained, and also some remuneration for the suffering he had undergone, and the deprivation under which he was now labouring and would labour for the rest of his days.[32]

Opposing the claim, Serjeant Adams denied that the cart had been overloaded, noting that Priestley had continued on the journey after first witnessing Beeton's protest, and then hearing the cart crack near Peterborough. Nor could Fowler be held liable, Adams continued, as he was only bound to use "such ordinary care and diligence as he would use over himself," and the defendant had been satisfied as to the state of his property.[33] In any event, Serjeant Adams asserted that as a legal matter, Fowler as a master was not liable to his servant Priestley. This was because there was "no such case in the books,"[34] and for good reason: "[I]f the defendant was responsible in this case, every master was liable to any accident that might occur to his servant about his work."[35] No evidence reveals the possible negligence of Priestley's fellow servants ever being raised or at issue during the trial.

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[31] *See Priestley*, 3 Murph. & H. at 305.

[32] LINCOLNSHIRE CHRON. & GEN. ADVERTISER, July 22, 1836.

[33] *See id.*

[34] *Id.*

[35] LINCOLN, BOSTON & NEWARK TUESDAY'S GAZETTE, July 19, 1836.

Without identifying a related judgment, Park, J. disagreed with Adams's contention "that there is no such case on the books," and refused to nonsuit the plaintiff, opining that "the defendant is liable."[36] At the same time, he pointed out that the jury could consider Priestley's acquiescence in light of the wagon's condition, and granted Adams permission to move the full court in Westminster should the jury enter a verdict against his client.[37] Next, instructing the jury, Park, J. stated that Fowler could not be held liable for a hidden defect in the wagon. Instead

> the only question here was,—and it was one of fact—was the van shamelessly overladen; was it laden unsafely and to a dangerous degree; and, if so, was the master acquainted with the fact? . . . if the jury were of opinion that the accident was occasioned by the 'pigheadedness' of the defendant in overloading the van they would find for the plaintiff.[38]

After deliberating for less than half an hour, the jury awarded Charles Priestley a sizeable £100.[39]

During the following Michaelmas Term of 1836, Serjeant Adams obtained a rule to arrest the judgment on the ground "that there was nothing in the declaration to throw any liability on the master."[40] Adams also moved for a new trial, but this part of the rule was abandoned when Fowler became bankrupt.[41] As a result, the arguments

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[36] LINCOLNSHIRE CHRON. & GEN. ADVERTISER, July 22, 1836.

[37] *See id.*

[38] *Id.*

[39] *Id.* Subtracting the medical expenses of £50, Priestley received £50 in damages. While no evidence exists as to Priestley's yearly wages, it was probably not more than the few pounds earned annually by domestic servants, thus equating the damages to as many as ten years' pay. *See* ANN KUSSMAUL, SERVANTS IN HUSBANDRY IN EARLY MODERN ENGLAND 35–39 (1981).

[40] *Priestley*, 3 Murph. & H. at 305. In the *Law Journal* account, Adams moved "on the ground that the declaration did not allege that it was the duty of the plaintiff to go in the van." *See* Priestley v. Fowler, 7 L.J. Ex. 43 (1837).

[41] *Priestley*, 3 Murph. & H. at 305. The latter part of the motion is not addressed by other law reports.

presented on January 16, 1837 before the full Court of Exchequer[42] were confined solely to the motion in arrest of judgment.[43]

Showing cause, Serjeant Goulbourne began by conceding that a probable issue[44] was whether Priestley had been required to ride in the van, or had been at liberty to walk alongside it. Such concern was vitiated when the Court of Exchequer intimated the sufficiency of the declaration on this subject.[45] Next, after acknowledging that the suit was "a case of the first impression" without "precedent exactly in point,"[46] Goulbourne declared that the action was "maintainable on general principles of law,"[47] analogising Priestley's situation to that of "an ordinary coach passenger."[48] To this, Abinger, C.B. raised the distinction that a coach passenger had no means of knowing the coach's condition, whereas a servant could make his own inspection.[49] Serjeant Goulbourne averred that as in the coach/passenger situation, the master/servant relationship was contractual.[50] The servant paid consideration with his labour, and the master was in turn duty bound "not to expose him to risk in performing these services."[51] Because

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[42] In addition to Abinger, C.B., were Parke, Bolland, Alderson, and Gurney, B.B. *See* E. Foss, 9 The Judges of England: With Sketches of Their Lives 62 (1864).

[43] At this point the four reports diverge in their treatment of counsel's arguments. *Murphy & Hurlstone* and *Meeson & Welby* offer significantly similar and detailed accounts, the *Law Journal* an abbreviated version, and the *Jurist* none at all.

[44] Bolstering the *Law Journal* report that plaintiff's counsel showed cause at an earlier time. *See Priestley*, 7 L.J. Ex. at 43.

[45] Priestley v. Fowler, 3 M. & W. 1, 2, 150 Eng. Rep. 1030, 1031 (1837).

[46] *Priestley*, 3 Murph. & H. at 305.

[47] *Priestley*, 3 M. & W. at 2, 150 Eng. Rep. at 1031.

[48] *Priestley*, 3 Murph. & H. at 305–06.

[49] Moreover,

> a master, knowing a room to be infectious, puts a servant to sleep there, and the servant incurs a disease, the master would be clearly liable; but it would be otherwise if he had put him in a room where the windows were broken, and the place otherwise so obviously ruinous, as that he himself could actually see its condition; in the latter case you would hardly say that the master would be liable for an injury that resulted to the servant.

Id.

[50] The reports are distorted on this point. In *Meeson & Welsby* and the *Law Journal*, Abinger, C.B. made this contractual analogy while in *Murphy & Hurlstone* it is raised by Serjeant Goulbourne in response to Abinger, C.B.'s query. *See Priestley*, 3 M. & W. at 3, 150 Eng. Rep. at 1031; *Priestley*, 7 L.J. Ex. at 43; *Priestley*, 3 Murph. & H. at 306.

[51] *Priestley*, 3 Murph. & H. at 306. *Meeson & Welby* reported that Goulbourne further extended the coach/passenger comparison by positing whether recovery would be affected for a coach passenger who noticed that "the coachman was intoxicated or the horses un-

the jury had found for the plaintiff, two inferences had to be "intended," or drawn. First, that "it was the master's duty to provide a proper vehicle," and second, "that the master knew the van was overloaded."[52]

Plaintiff's counsel concluded his averments by arguing that even if brought in assumpsit, the action would have alleged the same basis for recovery because the law implied a promise "co-extensive" to the violations of duty alleged under case in the declaration. In response, the Chief Baron opined that liability would exist in those circumstances if either the master had "maliciously designed" to injure his servant, or he had "positively guaranteed" his safety. Seizing upon this opening, Serjeant Goulbourne stated that after the verdict "it will be intended that the master was aware of the danger, and that he denied to the servant that there was any danger."[53] Parke, B. then posed a hypothetical: "Suppose I send my servant on the roof, to clear away the snow; if the roof gives way am I liable?" Serjeant Goulbourne replied that the present case differed because "it is not a mere state of insufficiency; for the overloading of the cart is a positive act, which occasions the accident."[54] At no point during the repartee did either Serjeant Goulbourne or the Exchequer Barons touch on the likelihood of Priestley's injury originating from the oversight of a fellow servant.

In arrest of the judgment, Serjeant Adams contended that the plaintiff had improperly framed his action in case rather than in assumpsit.[55] This error was dispositive, for in order to maintain an action, five circumstances had to exist:

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ruly." Parke, B. responded that under those circumstances the duty to carry the passenger safely would only extend as far as the conditions known to the passenger, i.e., that of a drunken driver with a rambunctious horse. Abinger, C.B. added that a "stage-coachman" who knowingly drove a recalcitrant horse would also be barred from recovery. *Priestley*, 3 M. & W. at 3, 150 Eng. Rep. at 1031.

[52] *See Priestley*, 3 Murph. & H. at 306. *Meeson & Welby* offered a different version wherein Goulbourne admitted that "[i]t does not appear on the face of the declaration, that the plaintiff knew the van was overloaded, and it cannot be intended after verdict: on the other hand, it does not appear that the defendant knew it." *Priestley*, 3 M. & W. at 3, 150 Eng. Rep. at 1031. Relying upon this report of the case, Haines castigated Goulbourne for sloppy lawyering. *See* B.W. Haines, *English Labour Law and the Separation From Contract*, 1 J. LEGAL HIST. 262, 284 (1980). Using the *Murphy & Hurlstone* version, Kostal agreed. *See* KOSTAL, *supra* note 8, at 262.

[53] *Priestley*, 3 Murph. & H. at 305.

[54] *Id.*

[55] Because the action alleged was "in the nature of a contract," it should have been brought in assumpsit. Instead, the plaintiff had sought relief in case, which as a tort required common-law liability to exist between master and servant. *Id.*

> First, that the van was overloaded, by defendant's order. Second, that plaintiff was ignorant of its being overloaded. Third, there must be an order by the defendant, to plaintiff, to go on the van. Fourth, that it was necessary for the plaintiff to do so, in order to perform his duty in respect of the goods. And, fifth, that the order shall be a lawful command which the servant is bound to obey.[56]

The action having raised three of Adams's prerequisites to liability, the Barons of the Exchequer engaged defendant's counsel in a protracted discussion of whether Priestley was required to ride in the wagon or could have walked alongside it, then intended that the declaration was sufficient on this point.[57] Serjeant Adams concluded his advocacy by proclaiming that "there is nothing in the declaration which shews that this was anything more than a mere accident; and for a mere accident which happens in a master's service, the master is not responsible."[58] As with the arguments presented by his opposing counsel, Adams never raised the prospect of vitiating his client's liability due to the intervening act of a fellow servant.

Instead of rendering a decision on the day of argument, the Court of Exchequer reserved judgment, presenting its opinion on November 23, 1837.[59] For the Court,[60] Abinger, C.B. delivered a rambling opinion arresting the judgment.[61] The Chief Baron began by dismissing as a matter of law the assertion that Fowler's knowledge of overloading could be intended after verdict.[62] The only issue to be decided was both narrow and clear: whether "the mere relation of

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[56] *Id.* at 305–07.

[57] That Serjeant Adams raised this issue after the Court of Exchequer had already disposed of it during Serjeant Goulbourne's appeal lends additional support to the *Law Journal* report that Goulbourne had spoken on a previous occasion. *See Priestley*, 7 L.J. Ex. at 43.

[58] *Id.*

[59] The ten month delay, according to Simpson, "suggests some difficulty in achieving unanimity." SIMPSON, *supra* note 2, at 107; *see also* LINCOLN, RUTLAND & STAMFORD MERCURY, Jan. 20, 1837 ("[t]he Court would take time to look into the case, as it was a nice one, and involved some important consequences").

[60] Whose constituency had not been altered in the interval. FOSS, *supra* note 42, at 62.

[61] With one minor exception, the opinion is related verbatim in all the reported versions.

[62] In so doing, Abinger, C.B. "was not evaluating evidence, but determining as a matter of law whether knowledge could be 'intended' after verdict." SIMPSON, *supra* note 2, at 107 n.28. Kostal and Ingman nevertheless took Abinger, C.B. to task for ignoring evidence submitted at trial. *See* KOSTAL, *supra* note 8, at 263; Ingman, *Rise and Fall*, *supra* note 7, at 108–09.

master and servant" implied a common-law duty "on the part of the master, to cause the servant to be safely and securely carried." Lacking "precedent for the present action," the Court was at "liberty to look at the consequences of a decision the one way or the other."[63]

Deciding "the question upon general principles," Abinger, C.B. cautioned that if legal culpability was upheld under these circumstances "the principle of that liability will be found to carry us to an alarming extent."[64] He then put forward a number of examples in dicta illustrating the magnitude to which such a rule would cause principals to be responsible to their "inferior agents":

> If the owner of the carriage, therefore, is responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who stands behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for the drunkenness, neglect, or want of skill in the coachman.[65]

Even more distressing to Lord Abinger was that the rationale of the case could be broadened further, allowing, for example, a master to "be liable to the servant, for the negligence of the chambermaid, in putting him into a damp bed."[66] In other words, Abinger, C.B. clearly foresaw that permitting Priestley to recover directly against his master in this novel action would open the floodgates to vicarious liability, entitling servants injured by their peers to recover against their common masters. Because the consequences of such an extension would

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[63] *Priestley*, 3 Murph. & H. at 307.

[64] *Id.* at 308.

[65] *Id.*

[66] In addition, Abinger, C.B. anticipated that

> [t]he master would also be liable for the acts of the upholsterer for sending in a crazy bedstead, whereby the servant was made to fall down, while asleep, and injure himself; for the negligence of the cook in not properly cleansing the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to health; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and servant in ruins.

Id.

engender both "inconvenience" and "absurdity," general principles provided "a sufficient argument" against liability.[67]

Acknowledging that the master/servant relationship bound the master directly to "provide for the safety of his servant . . . to the best of his judgment, information, and belief," the Chief Baron emphasised that it could "never" imply an obligation for the master "to take more care of the servant than he may reasonably be expected to do of himself." At the same time, the servant was "not bound to risk his safety in the service of his master" and was free to "decline any service in which he reasonably apprehend[ed] injury to himself."[68] This was because servants were in as good, if not better positions, than their masters to appreciate possible hazards.[69]

Lord Abinger concluded with a last policy argument against upholding the jury's verdict. Allowing this action "would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master," and which offers much better protection against injuries "than any recourse against his master for damages could possibly afford."[70]

II. *Priestley v. Fowler*, Negligence, and Common Employment

A. *The History of Negligence Before* Priestley v. Fowler

In a series of articles published over the decade 1926–35, Percy Winfield traced the history of negligence both as an independent tort

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[67] *Id.*

[68] *Priestley*, 3 Murph. & H. at 307. In the *Law Journal* report, Abinger, C.B. cited the irrelevant case of *Levinson v. Kirk*, 1 Lane 65, 145 Eng. Rep. 303 (Ex. 1610), a suit by a merchant against a servant for not paying customs duty on his consignment of goods. *Priestley*, 7 L.J. Ex. at 43.

[69] *See Priestley*, 3 Murph. & H. at 308. Thus "the plaintiff must have known, as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely." *Id.* Haines explained this passage by stating that

> the reasoning of the court seems to be that the master was not liable because, had he got into the van instead of his servant he could not have brought an action, as it was possible for him to see the van was overloaded and therefore the servant could have seen it also, and both could have refused to ride.

Haines, *supra* note 52, at 282. More accurately, the Court of Exchequer meant that (1) even if Fowler did not agree with his judgment, Priestley did not have to ride in the van if he thought it overloaded, and (2) when Priestley (and of course, not Fowler) heard the axle crack near Peterborough, he should not have continued riding.

[70] *Priestley*, 3 Murph. & H. at 308.

and as a mode of committing a tort.[71] Acknowledging that liability for inadvertence had existed in cases from the time of the Year Books,[72] he set the temporal boundary for the rise of negligence as a separate tort at the point when three ingredients had been present: (1) a legal duty by the defendant towards the plaintiff; (2) a breach of that duty by either inadvertence or insufficiently advertent conduct; and (3) the plaintiff sustaining harm as a consequence of the defendant's breach of duty.[73] Winfield concluded that although all three theories necessary for a separate doctrine were present prior to the second quarter of the nineteenth century,[74] they were not yet distinctly enumerated as principles.[75] Then, because industrial machinery, and in particular railways, "killed any object from a Minister of State to a wandering cow," negligence evolved from having been only a method through which various torts were committed into "an independent tort which sprang from the action upon the case."[76]

Prior to industrialisation, Winfield explained, inadvertent injury gave rise to civil liability for the violation of five distinct types of duty. These duties emanated from: (1) a public calling such as an innkeeper, common carrier, surgeon or farrier; (2) a public office, most commonly a sheriff; (3) a bailment; (4) a prescription or custom, such as omitting to provide beer for the beadle of a hundred; and (5) the control of dangerous things, such as unruly animals or fire.[77] With the exception of the last category, which was grounded in a "custom of the realm," these duties involved an undertaking which equated the individual's status with his attendant obligations.[78]

According to Winfield, performing an act defined by specific status—for example shoeing a horse—pre-supposed a proper use of

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[71] *See generally* Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934) [hereinafter Winfield, *Duty*]; Percy H. Winfield, *The History of Negligence in the Law of Tort*, 42 L.Q. REV. 184, 195 (1926) [hereinafter Winfield, *History*]; Percy H. Winfield, *Law of Tort*, 51 L.Q. REV. 249 (1935); Percy H. Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37 (1926) [hereinafter Winfield, *Myth*]; Percy H. Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 13 (1931); Percy H. Winfield & Arthur L. Goodhart, *Trespass and Negligence*, 49 L.Q. REV. 359 (1933); *see also* PERCY H. WINFIELD, PROVINCE OF THE LAW OF TORT (1931).

[72] *See generally* Winfield, *Myth*, *supra* note 71; Winfield & Goodhart, *supra* note 71.

[73] *See generally* Winfield, *Duty*, *supra* note 71.

[74] "To fix dates is to invite instant criticism, but we are not far out if we select the period from about 1825 onwards as the most fruitful." Winfield, *History*, *supra* note 71, at 195.

[75] *See id.* at 185.

[76] *See id.* at 195, 185; Winfield, *Duty*, *supra* note 71, at 41.

[77] *See* Winfield, *Duty*, *supra* note 71, at 44–48.

[78] *See id.*

care. When injury resulted, it gave rise to liability regardless of intent. Whether the farrier was imprudent or sadistic was irrelevant: the point was that the plaintiff had taken his horse to the blacksmith and that its shoe was improperly fitted. Winfield therefore maintained that prior to the nineteenth century, negligence was almost never mentioned, although "the idea of it is implied."[79]

C.H.S. Fifoot,[80] M.J. Prichard,[81] and J.H. Baker[82] have each in turn demonstrated the understated nature of Winfield's description of pre-nineteenth century negligence as a "skein of threads" yielding "little more than a bundle of frayed ends."[83] Instead, each successively traced distinct trends in negligence liability back to the fourteenth century.

Fifoot asserted that the "prime factor" in the transformation of negligence into an independent tort was "the luxuriant crop of 'running-down' actions" created by the economic prosperity of the late eighteenth and early nineteenth centuries.[84] Thus, instead of the industrial machinery of the second quarter of the nineteenth century, it was the road machinery of the preceding fifty years that "multiplied accidents and fertilised litigation," propelling forward the doctrine of negligence.[85]

Prichard moved Fifoot's chronology forward by asserting that a "thin trickle" of running-down actions from the late seventeenth century "should be regarded as the beginnings of the tort of negligence."[86] Examining these suits, Prichard maintained that plaintiffs brought their actions in case, alleging a form of negligence in the at-

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[79] *See id.* at 44–45.

[80] *See* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 154–66 (1949) [hereinafter FIFOOT, HISTORY AND SOURCES]; C.H.S. FIFOOT, JUDGE AND JURIST IN THE REIGN OF VICTORIA 31–56 (1959) [hereinafter FIFOOT, JUDGE AND JURIST].

[81] M.J. PRICHARD, SCOTT V. SHEPHERD (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE (1976) [hereinafter PRICHARD, SCOTT V. SHEPHERD]; M.J. Prichard, *Trespass, Case and the Rule in* Williams v. Holland, 1964 CAMBRIDGE L.J. 234 [hereinafter Prichard, *Trespass*].

[82] *See* BAKER, *supra* note 3, at 465; J.H. Baker, *Introduction* to II THE REPORTS OF SIR JOHN SPELMAN (J.H. Baker ed., 1977), *in* 94 SELDEN SOC'Y 23, 224–30 (1977).

[83] Winfield, *History*, *supra* note 71, at 185.

[84] *See* FIFOOT, HISTORY AND SOURCES, *supra* note 80, at 164.

[85] *See* FIFOOT, JUDGE AND JURIST, *supra* note 80, at 32. Curiously, Fifoot did not discuss running-down cases in his writings. Instead, *Govett v. Radnidge*, 3 East. 62, 102 Eng. Rep. 520 (K.B. 1802), a negligence action for carelessly loading a hogshead of treacle, is discussed in both works.

[86] *See* Prichard, *Trespass*, *supra* note 81, at 235.

tendant *cum* clauses due to two procedural reasons. First, plaintiffs were unable to join trespass and case actions because the first were considered appropriate for claims of directly caused harm, the latter for consequentially engendered injury. Second, pleading trespass engendered a significant risk for defendants to avoid liability by averring that although the injury was direct, their servants' driving caused it.[87] Last, Prichard demonstrated that a likely origin of negligence is the 1676 case of *Mitchil v. Alestree*,[88] which describes the defendant's liability as arising out of his servants' carelessness.[89]

Finally, Baker established how *Mitchil* "was only a significant step to later eyes" because traces of negligence as an independent tort can be seen as far back as the thirteenth century.[90] Among the better known pre-seventeenth century cases that Baker refers to in support of this proposition is the fifteenth century "Case of the Thorns,"[91] most often referred to in modern textbooks for the proposition of strict liability. Contrary to this commonly held misconception, the now-discovered record reveals that the action "as pleaded went only to intention; and the remarks of the judges in rejecting it do not assume strict liability."[92] Accordingly, lack of intention, and thus non-negligent behaviour, was clearly offered and recognised as a defence as early as the fifteenth century.

This most recent treatment, by Baker, harmonises the prior studies by explaining that the sparsity of pre-nineteenth century negligence actions is attributable to the governing procedural forms of action.[93] Specifically, if a plaintiff was injured by an intentional harm he would sue in trespass. If the harm was non-forcible, then assumpsit was available when a prior relationship between the parties caused the injury, for example, if the defendant was a common carrier. Barring

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[87] *Id.* at 241.

[88] 1 Vent. 295, 2 Lev. 172, 3 Keb. 650 (1676).

[89] Prichard, *Trespass*, *supra* note 81, at 234–38. Pritchard's "thin trickle" thesis is confirmed by the presence of a number of "negligence-between-strangers" cases at *nisi prius* before Lord Mansfield. *See* OLDHAM, *supra* note 16, at 1119–21.

[90] BAKER, *supra* note 3, at 457 (citing thirteenth century Plea Roll cases).

[91] Hulle v. Orynge, Mich. 6 Edw. IV, fo. 7, pl. 18 (1466); BAKER, *supra* note 3, at 457.

[92] BAKER, *supra* note 3, at 457.

[93] *Id.* at 461–64; *see* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 35–37 (1768) (delineating the proper procedural method for framing pleadings in accident cases). The explanation may originate, as do many other insightful ones, with the venerable S.F.C. Milsom. *See* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 283–313 (2d ed. 1981).

such a relationship, the plaintiff could only sue in case because of the indirect nature of the injury.

Until the late eighteenth century these type of harms were usually caused by fire or dangerous animals, and each in turn was governed by its own procedural forms. As a result, the number of cases specifically asserting negligence was reduced to a small handful, leading "legal historians to the conclusion that negligence could not have been actionable *per se*."[94] In addition, if defendants did manage to raise the issue of fault, they did so before a jury after having first pleaded the general issue of "not guilty." Due to defendants' explanations not usually being recorded, the extent of pleading an absence of negligence as a defence prior to the late eighteenth century is not clearly known.[95]

Despite reservations over the extent of the existence of an independent tort of negligence prior to the nineteenth century,[96] these scholars do not take exception to Winfield's theory that a general duty of care extending to individuals not in pre-existing relationships did not arise until the second quarter of the nineteenth century. Specifically, Winfield avowed that "the year 1837 marked a turning point"[97] with the cases of *Vaughan v. Menlove*[98] and *Langridge v. Levy*.[99] Building upon principles set forth in these decisions, Winfield cultivated a "contract fallacy" theory[100] under which negligence-based duties of care evolved as an alternative to extending already recognised

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[94] BAKER, *supra* note 3, at 462.

[95] *See id.* at 456.

[96] Although cautioning that more evidence is necessary to support this view, Simpson is "inclined" towards the "hypothesis" that "what happened in the nineteenth century was not the substitution of new law for old law, but the creation of law where there had been none before." A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of* Rylands v. Fletcher, 13 J. LEGAL STUD. 209, 215 (1984). Simpson has subsequently hypothesised that the dearth of case law prior to the nineteenth century resulted from the standards of liability having been left to juries. Specifically, that defendants would plead the general issue (meaning, "not guilty") and then give their stories in evidence. In this circumstance, there is virtually no information on what judges said to juries. Correspondence on file with author.

[97] *See* Winfield, *Duty*, *supra* note 70, at 54, 51.

[98] 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837).

[99] 2 M. & W. 519, 150 Eng. Rep. 863 (Ex. 1837).

[100] This term was coined by Prichard. *See* PRICHARD, SCOTT V. SHEPHERD, *supra* note 81, at 30.

liabilities arising from either the five pre-industrial type duties or individual contractual agreements.[101]

In *Vaughan v. Menlove*,[102] the plaintiff sued his neighbour at *nisi prius* for damages arising from "wrongfully, negligently, and improperly" keeping a haystack in contravention of his "duty."[103] After the defendant pleaded not guilty, Patteson, J. instructed the jury to consider whether the fire had been occasioned by the defendant's gross negligence. He also instructed the jury to bear in mind that the defendant "was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances."[104] A £5 verdict was entered for the plaintiff. Soon thereafter the defendant obtained a rule *nisi* for a new trial on the ground that the jury should have been directed to consider whether the defendant had acted to the best of his judgment, rather than whether he had been grossly negligent with reference to an uncertain standard of ordinary prudence.[105] After noting that this was a case of first impression, the Court of Common Pleas, through Tindal, C.J., upheld the trial court upon the long-lived and sweeping principle that everyone has a duty to use their land so as not to injure others.[106] Concurring in a separate opinion, Park, J. reasoned that "[a]lthough the facts in this case are new in specie, they fall within a principle long established."[107]

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[101] *See* Winfield, *Duty*, *supra* note 70, at 54. *See generally* C.G. Addison, Wrongs and Their Remedies, Being A Treatise on the Law of Torts 5 (1860); C. Collett, A Manual of the Law of Torts, and of the Measure of Damages 6–13 (2d ed. 1866).

[102] 3 Bing. at 468, 132 Eng. Rep. at 490.

[103] The haystack or "hay-rick" was constructed on the defendant's side of the boundary between the parties' land, in close proximity to the plaintiff's cottages. When the hay spontaneously ignited, the plaintiff's buildings caught fire and were burned down. *See id.*

[104] *Vaughan*, 3 Bing. at 471, 132 Eng. Rep. at 492. This direction was the first annunciation of the objective, or "reasonable man" standard in negligence actions. *See* Simpson, *supra* note 2, at 108. In the *nisi prius* report, Patteson, J.'s jury instructions are given as follows:

> You will say whether the defendant has acted as a man of ordinary skill and prudence would have acted, or whether through his negligence and carelessness the plaintiff's property has been consumed. . . . if you think that by his injudicious want of care the injury has been occasioned, he is liable in this action.

7 Car. & P. 525, 173 Eng. Rep. 232 (1836).

[105] *Vaughan*, 3 Bing. at 468, 132 Eng. Rep. at 490–91.

[106] *Id.*

[107] *Id.*

In *Langridge v. Levy*,[108] the defendant gun merchant sold a rifle to plaintiff's father, knowingly misrepresenting that the respected craftsman Nock had made it for the late King George IV. Subsequently, the younger Langridge used the gun, which exploded, causing him injury. An action in case was brought before Alderson, B. at the 1836 Somersetshire Summer Assizes, the declaration alleging that "the defendant was guilty of great breach of duty," violation of warranty, and knowing deceit.[109] Baron Alderson left the jury to decide on the existence, breach, and possible scienter of the warranty, but did not charge them as to the possible violation of a duty of care.[110] Consequently, the jury found a £400 general verdict for the plaintiff. In Michaelmas Term, 1836, Levy's counsel obtained a rule *nisi* for arresting the judgment on the grounds that an action on the case was inappropriate where the parties lacked privity of contract, and that in any event "no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise."[111]

The motion to arrest judgment was argued before the Court of Exchequer in Hilary Term, 1837. Plaintiff's counsel showed cause by contending that actions on the case were "peculiarly applicable" to circumstances where harm arose from a contractual breach upon which the injured party could not directly sue.[112] This was because even in the absence of privity between the parties, the law "imposes" a duty upon an individual furnishing "that which by his misconduct may become dangerous to another" to take "reasonable care" that the article not cause injury.[113] When a breach of this duty of reasonable care caused harm, the plaintiff could sue upon either the duty arising out of the contract, or the one imposed by law. Hence "the present case may be rested on both these grounds."[114]

Discharging the rule in arrest of judgment, the Court of Exchequer held that lack of privity most assuredly prevented the plaintiff

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[108] 2 M. & W. at 519, 150 Eng. Rep. at 863.

[109] *Id.*

[110] *Langridge*, 2 M. & W. at 521, 150 Eng. Rep. at 864.

[111] *Langridge*, 2 M. & W. at 521–22, 150 Eng. Rep. at 864.

[112] *Langridge*, 2 M. & W. at 522, 150 Eng. Rep. at 865.

[113] In so arguing, counsel was presumably referring to *Dixon v. Bell*, 1 Stark. 287 (1816), wherein an action was sustained against a defendant who had entrusted his loaded gun to a servant who then accidentally shot plaintiff's son. *Langridge*, 2 M. & W. at 524–25, 150 Eng. Rep. at 866.

[114] *Langridge*, 2 M. & W. at 522, 526, 150 Eng. Rep. at 865.

from recovering directly upon the contract. Nonetheless, Parke, B. ruled that an implied duty arose from the affirmative act of falsely misrepresenting the gun's safety. By doing so, the defendant had created a dangerous situation—and thus a duty—where none had previously existed.[115] Parke, B., however, explicitly rejected the broad principle of duty suggested by plaintiff's counsel:

> We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability . . . and we should pause before we made a precedent by our decision.[116]

Thus, although approving liability within the narrow context of a defendant having knowingly created a danger, the Court of Exchequer explicitly rejected any broader expansion of a general duty of care.

B. Priestley v. Fowler *as a Negligence Action*

The judicial decision in *Priestley* is best understood within the circumstances of the emerging independent tort of negligence as a failed attempt to create a duty of care on behalf of masters towards their servants.

To begin with, the only viable claim available to Charles Priestley was a suit in negligence, whether against Fowler directly or vicariously through a fellow employee. This was because as a pauper casually injured in Peterborough, Priestley had no recourse against his presumed parish of settlement, Market Deeping.[117] At the same time, having undertaken payment of his son's medical bills "voluntarily" (meaning, without either a promise of repayment from an overseer or approval of such expenses by the medical union's Board of Governors), Brown Priestley lacked grounds for legal redress against the

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[115] *Langridge*, 2 M. & W. at 529, 532, 150 Eng. Rep. at 867–68.

[116] *Langridge*, 2 M. & W. at 530, 150 Eng. Rep. at 868. The Exchequer Chamber affirmed "on the ground stated by Parke, B." Langridge v. Levy, 4 M. & W. 337, 338–39, 150 Eng. Rep. 1458, 1459 (Ex. 1838).

[117] *See* SIMPSON, *supra* note 2, at 123–27.

Peterborough overseers.[118] The same could be said for the younger Priestley if he had paid the bill himself with funds borrowed from his father. Nor was redress available from Fowler through the established master/servant relationship, for this did not encompass a right to medical attendance in the absence of an express agreement.[119] Consequently, suing Fowler in negligence offered the Priestleys their only hope for recompense.

The most closely analogous method for recovering in negligence was to assert that the master/servant relationship was similar to one of the established pre-industrial undertakings in which duty bound the parties' actions.[120] Because Priestley was hurt while riding on a van, Serjeant Goulbourne likened his position to that of a passenger conveyed by a common carrier, a stagecoach. This assertion was alleged successfully in the declaration and at trial, but was rebuffed at oral argument by Abinger, C.B.[121] A related avenue for recovery in negligence was through a contractual relationship, and so Goulbourne put a clever spin on Abinger, C.B.'s rebuke, trying to establish a contractual connection in the master/servant relationship equivalent to that of a coach and passenger.[122] Combined, these contentions explain why Abinger, C.B.'s opinion began with a rejection of an obligation arising from both the "mere relation of master and servant" as well as from "contract."[123]

A second method of founding responsibility for negligence was to claim that a general duty of care extended from Fowler to Priestley, a notion inaugurated earlier that same year by the Court of Common Pleas in *Vaughan*.[124] Although no explicit proof links the two cases, a good deal of inference suggests that their convergence was hardly coincidental.[125] Sitting on the *Vaughan* court was Park, J., who had tried

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[118] *Id.*

[119] Other reasons are set out *infra* note 157.

[120] It is instructive that in prefacing his arguments Goulbourne stated that "there is no precedent exactly in point," while Abinger, C.B.'s opinion was absolute in insisting that "there is not precedent for the present action." Priestley v. Fowler, 3 Murph. & H. 305, 306–07 (Ex. 1837).

[121] *See id.* at 305–06.

[122] Thus, he concluded that if brought in assumpsit the law would have implied a promise "co-extensive" to the violations of duty alleged under case in the declaration. *Id.* at 306.

[123] *Id.* at 307.

[124] *See* 3 Bing. at 474–76, 132 Eng. Rep. at 493.

[125] *Cf.* SIMPSON, *supra* note 2, at 108 (referring to the concurrence as "odd").

Priestley's assize case. Recognising a member of the Bench sympathetic to extending liability, it would have been in Goulbourne's best interests to hear the arguments presented in the case. Coupling the fact that the arguments in *Vaughan* were conducted only days before those of Adams in *Priestley*, with the plausible Law Journal report that Goulbourne had shown cause at an earlier time than his adversary, it seems conceivable that he had taken the opportunity to observe the arguments for the rule *nisi* in Common Pleas. At the very least, it would not have been difficult for a well-connected Serjeant at Law to receive information about the case.[126]

More significant are the implicit references in *Priestley* to *Vaughan*. For example, Goulbourne's declaration that in the absence of precedent Priestley's suit "was maintainable on general principles of law,"[127] might have been influenced by the Court of Common Pleas's upholding liability in its own case of first impression because, in Park, J.'s words, "Although the facts in this case are new in specie, they fall within a principle long established."[128] Moreover, Abinger, C.B.'s ruling in *Priestley* that the standard of any master's duty of care was purely subjective "to the best of his judgment, information, and belief,"[129] seems a direct rebuttal to the objective standard issued in *Vaughan* of "using such reasonable caution as a prudent man would have exercised under such circumstances."[130]

Finally, three reasons may explain why no citations to *Vaughan* appear in *Priestley*. First, although arguments in *Vaughan* were conducted prior to those in *Priestley*, the decision was not delivered until a week afterwards. Consequently, Goulbourne may have been reluctant to cite a case whose ultimate disposition was uncertain. Second, even if he knew the result, Goulbourne may not have wanted to rely on a judgment involving Park, J. before the Court of Exchequer owing to possible animosity against the assize verdict. Third, while it seems certain that in the ten months they reserved opinion in *Priestley* the Barons of the Exchequer became aware of *Vaughan*, judicial rivalry may have prevented them from acknowledging the existence of a conflicting opinion that they were powerless to overrule.

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[126] How frequently advocates relied upon word-of-mouth remains open to conjecture. It bears reminding, however, that the reports would not have been published until well after the Chief Baron had delivered his opinion in *Priestley*.

[127] *Priestley*, Murph. & H. at 305.

[128] *Vaughan*, 3 Bing. at 476, 132 Eng. Rep. at 493.

[129] *Priestley*, 3 Murph. & H. at 308.

[130] *Vaughan*, 3 Bing. at 475, 132 Eng. Rep. at 493.

The most novel way of affixing a duty of care on Fowler was to allege that it was implied by law even in the absence of a pre-existing relationship or of privity of contract. This theory also made its debut that same year, in *Langridge*.[131] As with *Vaughan*, it seems more than fortuitous that the principles presented both by Serjeant Goulbourne and by the Barons of the Exchequer in *Priestley* were intertwined with those of *Langridge*. The motion arresting judgment in *Langridge* was argued before the Court of Exchequer only days prior to its parallel in *Priestley*. Again, if not physically present, it was likely that Goulbourne procured intelligence regarding the case. As an advocate who would soon appear before the same court to argue a similar motion, he would have been foolish to ignore that opportunity.

Goulbourne's arguments before the Court of Exchequer confirm this hypothesis. Goulbourne argued that his client could maintain an action in either assumpsit or case because the law implied "co-extensive" duties,[132] emulating the statement by plaintiff's counsel in *Langridge* that "the present case may be rested on both these grounds."[133] Priestley's counsel also averred that after verdict it had to be intended that Fowler had known of the van's overloading, thus creating a dangerous situation for which he was liable.[134] This was patterned after the argument in *Langridge* that the law "imposes" a duty upon an individual furnishing "that which by his misconduct may become dangerous to another" to take "reasonable care" that the article should not cause injury.[135]

The *Langridge* decision was rendered in April; *Priestley* necessitated an additional seven months before making its appearance. Abinger, C.B., Alderson, B., and Parke, B., each sat the bench for both cases. The Chief Baron rendered the *Priestley* decision, Alderson charged the assize jury in *Langridge*, and Parke, B. rendered the opinion on appeal. They were certain to have discussed these cases, and in the ten month period intervening argument and decision, Parke, B. had more than ample opportunity to justify the reputation that he "exercised a potent, if not preponderant, influence" on the Excheq-

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[131] 2 Murph. & H. at 519, 150 Eng. Rep. at 867–68.

[132] *Priestley*, 3 Murph. & H. at 306.

[133] 2 M. & W. at 523, 150 Eng. Rep. at 865.

[134] *Priestley*, 3 Murph. & H. at 306.

[135] 2 M. & W. at 525, 150 Eng. Rep. at 866.

uer,[136] particularly over the substantive area of employers' vicarious liability.[137]

Parke, B.'s sway manifested itself in both Exchequer opinions. During Goulbourne's January argument in *Priestley*, Abinger, C.B. opined that liability existed when a master either knowingly exposed his servant to an existing risk or, in the absence of knowledge, "positively guaranteed" his safety.[138] Parke, B.'s April *Langridge* decision explicitly rejected broad principles of duty, upholding recovery on the narrow ground that because the defendant had created a dangerous situation, he was duty bound not to cause the plaintiff harm.[139] In November, Abinger, C.B.'s *Priestley* opinion began by dismissing the assertion that Fowler's knowledge of overloading could be intended after verdict, but was silent as to whether Fowler's having commanded Priestley to ride in the van after Beeton's remonstrance implied a guarantee.[140]

The absence of citations to *Langridge* in *Priestley* is not surprising. Goulbourne, as before, would not have wanted to found his arguments on an appellate decision of uncertain result, much less so an assize verdict in which Alderson, B. nonsuited the plaintiff while taking great care to avoid sanctioning the creation of a novel liability theory. Moreover, after Parke, B. had so vehemently denied plaintiff's liability theory in *Langridge*, the Court of Exchequer certainly would not have wanted to dignify it by reference.

Therefore, as demonstrated both by the arguments presented before the Court of Exchequer as well as the grounds of its decision, *Priestley* was an unsuccessful attempt to create a master/servant duty of care, and did not directly address the issue of fellow servant liability.

C. *The Rise of Common Employment*

In the thirteen year interval between the Court of Exchequer's rulings in *Priestley* and those in *Hutchinson v. York, Newcastle & Berwick*

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[136] 15 Dictionary of National Biography, *supra* note 25, at 226; *see also* P.S. Atiyah, The Rise and Fall of Freedom of Contract 369 (1979) (observing that Parke, B. plied "a dominating influence in the Court of Exchequer").

[137] The more notable being *Quarman v. Burnett*, 6 M. & W. 499, 151 Eng. Rep. 509 (Ex. 1840), and *Joel v. Morrison*, 6 Car. & P. 502, 172 Eng. Rep. 1338 (Ex. 1834).

[138] 3 Murph. & H. at 306.

[139] 2 M. & W. at 530, 150 Eng. Rep. at 866.

[140] *See* 3 Murph. & H. at 307.

Railway Co.[141] and *Wigmore v. Jay*[142] wherein the defence of common employment was born "naked and unashamed,"[143] no reported English case addressed the doctrine.[144]

Hutchinson was an action brought under the Fatal Accidents Act[145] by the widow of a railway labourer killed when the carriage in which he was conveyed collided with another of the defendant's carriages.[146] On a special demurrer before Pollock, C.B. and Parke, Rolfe, Alderson, and Platt, B.B., plaintiff's counsel averred that "[t]he only reported case bearing on the point" was *Priestley*.[147] That decision, he argued, stood for the proposition that masters were not liable to servants who could protect themselves using "common prudence and caution," but that otherwise "why should a servant be without remedy in cases where a stranger may sue?"[148] Defence counsel responded that Hutchinson's claim could not prevail in light of the Court of Exchequer's previous ruling in *Priestley* because, unlike a passenger, a servant "virtually undertakes all ordinary risks" incident to his service.[149] Without citing any legal basis, he then asserted that "it is difficult to see why a master should be responsible for the acts of his servants inter se."[150] Following Parke, B.'s observation that a related case (meaning *Wigmore v. Jay*) had just been decided at *nisi prius*, *Hutchinson's* disposition was delayed six months so that the actions could be determined together.[151]

Delivering the opinion for the Court of Exchequer, Alderson, B. echoed defence counsel's assertion, observing that the case at bar was

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[141] 5 Ex. 343, 155 Eng. Rep. 150 (1850).

[142] 5 Ex. 354, 155 Eng. Rep. 155 (1850).

[143] A. BIRRELL, FOUR LECTURES ON THE LAW OF EMPLOYERS' LIABILITY AT HOME AND ABROAD 26–27 (1897); *see also* A.H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950, at 288 (1980) (noting that it was *Hutchinson* that "really established the rule").

[144] Although the Supreme Judicial Court of Massachusetts, in *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49 (1842), would do so conclusively. The assertion by Kostal that the Assize case *Armsworth v. South Eastern Ry.*, 11 Jur. 758 (1848), indirectly raised the issue is addressed below. *See infra* notes 254–257 and accompanying text.

[145] Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., c. 93.

[146] *Hutchinson*, 5 Ex. at 343, 155 Eng. Rep. at 150.

[147] *Hutchinson*, 5 Ex. at 346–47, 155 Eng. Rep. at 152.

[148] *Id.*

[149] *Hutchinson*, 5 Ex. at 348, 155 Eng. Rep. at 153.

[150] *Id.*

[151] The assize decision in *Wigmore v. Jay* was, regrettably, unreported. Parke, B.'s remark appears only in the *Law Journal* report. *See* 19 L.J. Ex. 296 (1850).

"undistinguishable in principle from" *Priestley*.[152] Although Alderson, B. believed that the decision in *Priestley* only went to Fowler's (non)duty to Priestly as it related to the alleged overloading of the van, he nevertheless extrapolated the underlying principles in Abinger, C.B.'s dicta to the proposition that "a master is not in general liable to one servant for damage resulting from the negligence of another."[153] This was because workers assumed these risks as part of their contracts of service.[154] The only exception to this rule was when a master exposed his servant to unreasonable harm by hiring incompetent fellow-workers. This exclusion not having been proven at trial in the case at bar, Alderson, B. granted the demurrer denying widow Hutchinson's claim.[155] Thus, the Court of Exchequer re-interpreted and extended the *ratio* of *Priestley* to create the doctrine of common employment—a legal defence which had neither been raised by counsel, nor utilised before in any reported English decision.

The awaited companion case to *Hutchinson, Wigmore v. Jay*,[156] was likewise a Fatal Accidents Act suit arising from a workman's death. In *Wigmore*, a bricklayer died in the collapse of scaffolding knowingly erected with an unsound ledger pole under a foreman's supervision. At the conclusion of trial before Pollock, C.B. at the Middlesex Sittings after Michaelmas Term 1849, the defendant broadly claimed without elucidating "on the authority of *Priestley*," that the action could not be maintained. The Chief Baron agreed, directing a verdict for the defendant because he had not personally attended the scaffolding's construction.[157]

Arguing for a new trial before the Court of Exchequer, Wigmore's counsel, Watson, made a clever attempt to avoid the apparent obstruction created by *Priestley*, while also making use of the recent holding in *Hutchinson*. Mr. Watson asserted that *Priestley* was inapplicable because the duty therein alleged "was similar to that of a common carrier."[158] Moreover, *Wigmore* involved the unequal status of a bricklayer and his supervising construction foreman rather than the interaction of fellow-servants. Next, alluding to *Hutchinson*, counsel

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[152] *Hutchinson*, 5 Ex. at 349, 155 Eng. Rep. at 153.

[153] *Id.*

[154] *Hutchinson*, 5 Ex. at 350, 155 Eng. Rep. at 154.

[155] *See Hutchinson*, 5 Ex. at 349, 353, 155 Eng. Rep. at 154–55.

[156] 5 Ex. at 354, 155 Eng. Rep. at 155 (1850).

[157] *Hutchinson*, 5 Ex. at 354, 356, 155 Eng. Rep. at 156.

[158] *Wigmore*, 5 Ex. at 357, 155 Eng. Rep. at 156.

maintained that his client's claim was also dissimilar in that it was grounded in "a duty that arises out of the contract of service" not to use faulty equipment rather than in a master's general duty.[159]

Unswayed by Watson's reasoning, Pollock, C.B. equated Wigmore's claim in principle with the "doctrine laid down" in *Priestley* and affirmed in *Hutchinson*. He therefore denied the motion on the ground that the plaintiff had not proven the foreman either deficient in skill or improperly employed.[160] By so holding, the Court of Exchequer limited a master's liability to his servant to instances which involved his personal, rather than vicarious actions.[161] Once again, the rationale for denying the plaintiff's claim had not been raised by defence counsel at trial or on appeal.

Eight years after *Hutchinson* and *Wigmore* were handed down by the Exchequer, the House of Lords "firmly and finally established"[162] the doctrine of common employment, for both England and Scotland, in the jointly rendered decisions of *Bartonshill Coal Co. v. Reid & McGuire*[163] by providing a precedent that was "accepted without qualms by almost all the English judges."[164] The identity of the Law Lords was of signal importance. *Reid* was argued before Cranworth, L.C., who sat as the sole Law Peer (but who rendered the decision from without the wool sack);[165] *McGuire* was heard and decided before Lord Chancellor Chelmsford and Lords Brougham and Wensleydale. Cranworth, as Rolfe, B., had participated in *Hutchinson* (but not in *Wigmore*);[166] Wensleydale, as Parke, B., had sat the bench in each of the Court of Exchequer's decisions in *Priestley*, *Hutchinson*, and *Wig-*

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[159] *Id.*

[160] *See Wigmore*, 5 Ex. at 357–58, 155 Eng. Rep. at 156–57.

[161] *See Wigmore*, 5 Ex. at 358, 155 Eng. Rep. at 157.

[162] A.H. RUEGG, A TREATISE UPON THE EMPLOYERS' LIABILITY ACT, 1880, at 7 (1882).

[163] 3 Macq. 265, 300 (1858). Although the House of Lords delivered two separate opinions, only the first (which controlled the second's resolution) is typically referenced.

[164] CORNISH & CLARK, *supra* note 3, at 498. The decision would, however, meet with much reproach, especially from Scottish commentators who viewed it as a form of legal imperialism. Typical are the fulminations of A.D. Gibb. *See* A.D. GIBB, LAW FROM OVER THE BORDER: A SHORT ACCOUNT OF A STRANGE JURISDICTION 58–59, 99–100 (1950). The validity of the view from over the Tweed, although for reasons other than those traditionally given, will comprise a future article by this author.

[165] Following the demise of Darby's brief ministry. *See* 17 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 25, at 160.

[166] Sitting in the Court of Exchequer from 1839 until he was appointed a Commissioner of the Great Seal in June, 1850, about a month after *Hutchinson*. *Id.* at 159–60.

more.[167] Neither referred to *Priestley*, and citations to English cases for the proposition of common employment, when they were given, were to *Hutchinson*.[168] This glaring absence of reference to *Priestley* was repeated in the rulings given by Lords Cranworth and Wensleydale, respectively, in a trio of House of Lords appeals from both Divisions of the Inner House of Scotland's Court of Session that carved out limited exceptions to the doctrine of common employment.[169]

III. The Subsequent History of *Priestley v. Fowler*

A. *Contemporary Views of* Priestley

Few Victorian jurists explicitly discussed *Priestley v. Fowler*. The majority of those who did, however, referenced the case for the general absence of a duty of care by a master towards his servant rather than for the doctrine of common employment. In so doing these judges, not surprisingly, followed Parke, B., who had sat the bench in both *Priestley* and *Hutchinson v. York*, and whose rulings in *Quarman v. Burnett*[170] and in *Joel v. Morrison*[171] attested to his authority in the field of employers' vicarious liability. In *Metcalfe v. Hetherington*,[172] wherein the issue was responsibility for a ship collision, Baron Parke explained the decision in *Priestley* as that "the Court considered the allegation of

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[167] Lord Wensleydale of Walton was elevated to a peerage in tail male by patent on July 23, 1856, a month after oral argument in *Reid*, despite Lord Cranworth's having assiduously promoted the government's position that it was empowered to confer a lifetime peerage upon his erstwhile Court of Exchequer colleague. *See* 15 Dictionary of National Biography, *supra* note 25, at 226; Letters Patent Creating the Right Honourable Sir James Parke Knight, Baron Wensleydale (1856).

[168] Thus, Cranworth, L.C.: "The principle of the law of England I take to have been enunciated in the case of *Hutchinson* . . . ." *Bartonshill*, 3 Macq. at 276. Parenthetically, Lord Cranworth appended the entire *Farwell* opinion to his judgment in *McGuire*, thus raising the interesting question of whether the real villain in the development of common employment was not Abinger, C.B., but rather the redoubtable Lemuel Shaw. This seems plausible because the eight year gap between *Farwell* and *Hutchinson* was sufficient for knowledge of the former to have crossed the Atlantic. Such a scenario also raises the possibility that the "influence" which is normally thought to have proceeded in only one direction during this period, from England towards America, might in fact have also went the other way.

[169] *See* Weems v. Mathieson, 4 Macq. 215 (1861); Brydon v. Stewart, 2 Macq. 30 (1855); Paterson v. Wallace & Co., 1 Macq. 748 (1854).

[170] 6 M. & W. 499, 151 Eng. Rep. at 509 (Ex. 1840).

[171] 6 Car. & P. 502, 172 Eng. Rep 1338 (Ex. 1834).

[172] 11 Ex. 257, 156 Eng. Rep. 826 (1855).

duty as altogether insufficient, the declaration not stating facts from which duty could be inferred."[173]

Illustrative of the judiciary tracking Parke, B.'s lead are the opinions given by Crompton and Blackburn, J.J. in *Mellors v. Shaw & Unwin*.[174] At the Yorkshire Lent Assizes before Keating, J., the plaintiff, a collier, alleged that he had been injured when descending a shaft that had been knowingly constructed in an unsafe manner by the defendant mine owners, one of whom was also the on-site manager. After Keating, J. declined to nonsuit the plaintiff, the jury returned a £150 verdict, finding that Shaw and Unwin had been personally negligent in the matter. Defendants' counsel obtained a rule to enter a nonsuit or in arrest of judgment on the ground that the declaration did not sustain a cause of action.[175]

At oral argument before the King's Bench the following Easter Term, both parties' counsel relied upon *Priestley* for the same proposition, namely that the declaration would be unsupportable if Mellors had actually known about the defect. They disagreed, however, on whether the declaration alleged Mellor's ignorance of the defect sufficiently so as to make a prima facie claim. Neither side raised the possibility of the shaft having been either built or maintained by plaintiff's fellow servants.[176] In discharging the rule, Crompton, J. reflected "that the rule laid down in [*Priestley*], that a servant on entering the service of an employer takes upon himself the risks of the service, does not apply where there has been personal negligence in the master which causes the injury to the servant."[177] Blackburn, J. added that "[t]he ground of the decision is that there was no warranty on the part of the master that the carriage should be free from defects or that no injury should happen to his servant."[178]

Accordingly, when decisions referenced precedents for the principle of common employment, as a matter of course they cited to *Bar-*

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[173] *Metcalfe*, 11 Ex. at 270, 156 Eng. Rep. at 832.

[174] 1 B. & S. 437, 442, 445, 121 Eng. Rep. 778, 780–81 (K.B. 1861).

[175] *Mellors*, 1 B. & S. at 437, 439, 121 Eng. Rep. at 779.

[176] *Mellors*, 1 B. & S. at 440, 442, 121 Eng. Rep. at 779–80. Plaintiff was represented by Messrs. Mainsty and Quain, defendants by Mr. T. Jones (of the Northern Circuit).

[177] *Mellors*, 1 B. & S. at 443, 121 Eng. Rep. at 780. He expressed a similar view in *Clarke v. Holmes*, 7 H. & N. 937, 938, 946, 158 Eng. Rep. 751, 754–55 (Ex. 1862), a decision upholding liability for personal negligence in failing to fence dangerous machinery.

[178] *Mellors*, 1 B. & S. at 446, 121 Eng. Rep. at 781.

tonshill Coal Co. v. Reid & McGuire or *Hutchinson*.[179] Especially noteworthy in this regard is the decision by Alderson, B. (secure, perhaps, in having announced *Hutchinson*'s opinion) in *Wiggett v. Fox & Henderson*,[180] an appeal from a verdict given under Lord Campbell's Act for the death of a worker engaged in erecting a tower for the Crystal Palace. Making the rule absolute on the ground that the deceased was in common employment with the negligent actors, Baron Alderson held that "[t]he true principle is, in our opinion, to be found in" *Hutchinson*, namely, "that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow servant whilst they are acting in one common service."[181]

More ample evidence of *Priestley*'s restriction as a precedent is found in contemporary treatises where the actual decision is cited for either the general proposition that no implied duty of care extended from masters to their servants, or for the specific holding that a master was not held responsible for an unknown wagon defect.[182] A representative sampling includes treatises published by R.J. Browne in 1843,[183] (Lord) P. Fraser in 1846,[184] C.G. Addison in 1847,[185] J.B. Hertslet in 1850,[186] Melville Bigelow in 1875,[187] C. Petersdorff in 1876,[188] J.

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[179] As in *Wright v. London & North Western Ry.*, 1 Q.B.D. 252, 257 (1876), or *Ashworth v. Stanwix*, 3 El. & El. 701, 121 Eng. Rep. 606, 607 (K.B. 1860). See, as well, the arguments made by counsel in *Tarrant v. Webb*, 18 C.B. 797, 139 Eng. Rep. 1585, 1586 (C.P. 1856).

[180] 11 Ex. 832, 156 Eng. Rep. 1069 (1856).

[181] *Wiggett*, 11 Ex. at 838, 156 Eng. Rep. at 1072.

[182] *See* W.C. Spens & R.T. Younger, The Law of Employers and Employed as Regards Reparation for Physical Injury 65 (1887). The authors quote the testimony of Mr. C.P. Ilbert of the Indian Legislature before the Select Committee on Employers' Liability in July 1876 as: "I do not think that any distinct rule is laid down on the case. *Priestley v. Fowler* is cited as an authority for the rule for which it is not in reality an authority." *Id.*

[183] R.J. Browne, A Practical Treatise on Actions at Law 184 n.o (1843).

[184] 2 P. Fraser, A Treatise on the Laws of Scotland 426 (1846).

[185] C.G. Addison, A Treatise on the Law of Contracts, and Rights and Liabilities ex Contractu 740 (1847).

[186] C.J.B. Hertslet, The Law Relating to Master and Servant: Comprising Domestic and Menial Servants and Clerks, Husbandmen, and Persons Employed in the Different Manufactures 8–9 (1850).

[187] M.M. Bigelow, Leading Cases on the Law of Torts 707 (1875).

[188] C. Petersdorff, A Practical Compendium of the Law of Master and Servant 44 (2d ed. 1999) (1876). Perhaps not surprisingly for, as will be shown below, Petersdorff had represented the widow Armsworth.

Paterson in 1885,[189] W.H. Roberts and G.H Wallace in 1885,[190] F. Pollock in 1887,[191] and H. Fraser in 1888.[192]

Perhaps the clearest example of nineteenth century practitioners' understanding of *Priestley* appears in T. Beven's 1889 treatise on negligence, wherein he expatiates at length that the decision comprises no more than a failed negligence action.[193] For, although "the germ of the law laying down the master's immunity" might be traced to *Priestley*, the actual decision went only to the issue of whether Fowler had either overloaded the van or kept it in poor repair.[194] Thus, "[t]he decision merely enunciates the broad proposition . . . that there is no duty implied by law in certain cases for the master to take those precautions for the safety of his servant that he would be held to with regard to strangers."[195] Moreover, "the legal relationship of fellow servant as affecting their employer is not raised, since the case does not even suggest that the defendant had another servant other than the plaintiff."[196] This was because "the element of negligence of one servant causing danger to another was entirely absent."[197] Consequently, "the duty of the master to the servant with regard to the employment of fellow servants . . . was first formulated by Alderson, B. in *Hutchinson*,"[198] while *Bartonshill Coal* "was the starting point of a large number of decisions the general effect of which was indefinitely to extend" the doctrine of common employment.[199]

As with judges, treatise writers of that period likewise cite to other cases, usually *Bartonshill Coal* or *Hutchinson*, for the genesis of the

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[189] J. PATERSON, NOTES ON THE LAW OF MASTER AND SERVANT, WITH ALL THE AUTHORITIES 56 (1885).

[190] SIR W.H. ROBERTS & G.H. WALLACE, THE DUTY AND LIABILITY OF EMPLOYERS AS WELL TO THE PUBLIC AS TO SERVANTS AND WORKMEN 136–38 (3d ed. 1885).

[191] SIR F. POLLOCK, THE LAW OF TORTS 84 n.x (1887).

[192] SIR H. FRASER, A COMPENDIUM OF THE LAW OF TORTS 110 (1888).

[193] T. BEVEN, PRINCIPLES OF THE LAW OF NEGLIGENCE 370–72 (1889) [hereinafter BEVEN, PRINCIPLES]. Beven initially raised this point in an earlier treatise. *See* T. BEVEN, THE LAW OF THE EMPLOYERS' LIABILITY FOR THE NEGLIGENCE OF SERVANTS CAUSING INJURY TO FELLOW SERVANTS 19–20 (1881) [hereinafter BEVEN, EMPLOYER'S LIABILITY].

[194] BEVEN, PRINCIPLES, *supra* note 193, at 370–71.

[195] *Id.* at 372.

[196] *Id.*

[197] *Id.* at 375.

[198] *Id.* at 356.

[199] BEVEN, PRINCIPLES, *supra* note 193, at 378.

common employment doctrine.[200] Some studies of employers' liability, which included sections on common employment, did not even allude to *Priestley*.[201]

B. *Revising* Priestley

Despite a plurality of nineteenth century judges and a vast majority of coterminous treatise writers correctly reading *Priestley* as a failed attempt to create master/servant liability, that decision rather than the one in *Hutchinson* eventually came to represent the origin of common employment.[202]

This was due to a combination of four reasons.[203] First, by delineating all the possible undesirable consequences of upholding liability in *Priestley*, Abinger, C.B. played to the fears of future judges against creating new forms of employers' accountability.[204] Second, in denying a master/servant duty of care based upon "general principles" of political economy that catered to prevailing notions of class perspec-

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[200] *See, e.g.*, ADDISON, *supra* note 101, at 248; BEVEN, EMPLOYERS' LIABILITY, *supra* note 193, at 20–21; BEVEN, PRINCIPLES, *supra* note 193, at 356, 378; M.M. BIGELOW, ELEMENTS OF THE LAW OF TORTS FOR THE USE OF STUDENTS 302 (1878); J. PATERSON, A COMPENDIUM OF ENGLISH AND SCOTTISH LAW 273 (1860); PATERSON, *supra* note 189, at 49; PETERSDORFF, *supra* note 188, at 44 (also citing to *Priestley*).

[201] *See, e.g.*, BEVEN, EMPLOYERS' LIABILITY, *supra* note 193. *See generally* W. BOWSTEAD, THE LAW RELATING TO WORKMEN'S COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACTS 1897 & 1900 (1901); A. MACDONALD, HANDYBOOK OF THE LAW RELATIVE TO MASTERS, WORKMEN, SERVANTS AND APPRENTICES, IN ALL TRADES AND OCCUPATIONS (1868); A. PARSONS & T.A. BERTRAM, THE WORKMEN'S COMPENSATION ACTS, 1897 AND 1900 (1900); A. ROBINSON, EMPLOYERS LIABILITY UNDER THE WORKMEN'S COMPENSATION ACT, 1897 AND THE EMPLOYERS' LIABILITY ACT, 1880 (1898).

[202] This view was consistently held by Pollock, C.B. *See, e.g.*, Waller v. S. E. Ry. Co., 2 H. & C. 102, 110–11, 159 Eng. Rep. 43, 46 (Ex. 1863) (referring to the decision where common employment was in "principle laid down for the first time"); Riley v. Baxendale, 6 H. & N. 445, 448, 158 Eng. Rep. 183, 184 (Ex. 1861) (The doctrine in *Priestley* "ought not to be trenched upon. Servants are often far better judges than their masters of the dangers incident to their employment, and whether their fellow servants are trustworthy persons."); Vose v. London & Yorkshire Ry. Co., 27 L.J. Ex. 249, 2 H. & N. 728, 734, 157 Eng. Rep. 300, 303 (1858) (declaring that "[t]he law must have been the same long before it was enunciated in this Court in the case of *Priestley*").

[203] The author will delineate the larger story of how and why the doctrine of common employment gained its ascendancy in a future work.

[204] Of whom the Exchequer Barons were a particularly warm audience. Examples of their rulings quashing the extension of the independent tort of negligence are: *Riley*, 158 Eng. Rep. at 183; Dynen v. Leach, 26 L.J. Ex. 221 (1857); Roberts v. Smith, 2 H. & N. 213, 157 Eng. Rep. 89 (Ex. 1857); *Metcalfe*, 11 Ex. at 257, 157 Eng. Rep. at 1367; Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

tive, *Priestley* was attractive to judges who would later expand, often creatively, upon its reasoning.[205] Third, the hypothetical extrapolations enumerated in Abinger, C.B.'s dictum, in combination with the general principles upon which the decision itself was based, provided judges with fertile ground from which to grow further the defence of common employment.[206] Fourth, some judges, as well as legal commentators, were simply confused about the facts precipitating *Priestley*[207] and thus believed that the actions of fellow servants were involved.[208] In contrast, Alderson, B.'s ruling in *Hutchinson* was staid, dispassionate, constructed narrowly, and in reality involved the negligent actions of fellow servants.[209]

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[205] Amongst those principles, which "owe[d] an obvious debt to the *lingua franca* of political economy," Cornish and Clark enumerated that servants were familiar with the risks of their employment and that they were thus free not to encounter known dangers. CORNISH & CLARK, *supra* note 3, at 498.

[206] This was certainly the understanding espoused by Brett, L.J. when giving testimony before the Select Committee on Employers' Liability in July 1876. *See* SPENS & YOUNGER, *supra* note 182, at 66. His explanation, as reproduced by Spens and Younger, was that

> Lord Abinger, who had been one of the greatest advocates ever known at the bar, had an advocate's talent, which mainly consists in the invention of analogies, and there never was a more perfect master of that art than Lord Abinger, and he took it with him to the bench; and I think it may be suggested that the law as to the non-liability of masters with regard to fellow servants arose principally from the ingenuity of Lord Abinger in suggesting analogies in the case of *Priestley v. Fowler.*

Id.

[207] "*Priestley v. Fowler* was one of those unsatisfactory cases in which, under the old system, the question did not arise upon what were the real facts, but upon how they were stated on the record." BEVEN, PRINCIPLES, *supra* note 193, at 370 n.3 (quoting Brett, L.J. in response to question 1922, giving evidence before the House of Commons Committee on Employers' Liability, 1877).

[208] For example, T.W.S. Firth reasoned that "the van was overloaded by the negligence of other servants of the master" and that Priestley attempted "their negligence [to] be imputed to the master, so as to make him liable." T.W.S. FIRTH, ON THE LAW RELATING TO THE LIABILITY OF EMPLOYERS FOR INJURIES SUFFERED BY THEIR SERVANTS IN THE COURSE OF THEIR EMPLOYMENT 18 (1890); *see also* C.Y.C. DAWBARN, EMPLOYERS' LIABILITY TO THEIR SERVANTS AT COMMON LAW AND UNDER THE EMPLOYERS' LIABILITY ACT 1880 AND THE WORKMEN'S COMPENSATION ACTS 1897 AND 1900, at 2 (1903) (describing the accident as occurring after the waggon had been "overloaded by the negligence of another fellow servant"). In contrast, Simpson suggested that mutton suppliers might have done the loading. *See* SIMPSON, *supra* note 2, at 103.

[209] To be expected, perhaps, from a man described as having been "a strong churchman of moderate tendencies" and "a humane judge." 1 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 25, at 243.

The recasting of *Priestley*, however, proceeded in a slow, nonlinear progression, as a minority of judges began to equivocate on the significance of the decision. For example, Bowen, L.J. in *Thomas v. Quartermaine* refers to "the much canvassed case of *Priestley v. Fowler*, and a series of decisions following in its train,"[210] while Erle, C.J. in *Tunney v. Midland Railway Co.* declared that "[t]he rule has been settled by a series of cases, beginning with" *Priestley* "that a servant undertakes all ordinary risks of employment, including those arising from fellow servants.[211] On occasion, two judges gave different views of *Priestley* within the same opinion.[212] Thus, the ruling's significance was recast and expanded so as to originate the doctrine of common employment.

The same phenomenon was paralleled in treatises. As a group, legal commentators moved from narrowly utilising *Priestley* to illustrate masters' general nonliability to their servants, to vacillating on the decision's significance,[213] to eventually stating the now-received wisdom that *Priestley* originated the doctrine of common employment.[214]

A good illustration of the evolution of this revisionist view can be seen by comparing the three editions of Spike's treatises on master/servant law. The first edition, published in 1839, reports *Priestley* as going to the lack of duty of masters towards their servants, adding almost as an afterthought, that it may also apply to "other servants."[215]

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[210] 18 Q.B.D. 685, 692 (1887).

[211] 1 L.R.C.P. 291, 296 (1865).

[212] Compare, for example, the reasoning provided by Erle, C.J. with that of Willes, J. in *Lovegrove v. London, Brighton & South Coast Railway Co.*, 16 C.B. (N.S.) 669, 688, 693, 143 Eng. Rep. 1289, 1297, 1299 (C.P. 1864).

[213] Among the prominent waverers was J.W. Salmond. *See* J.W. SALMOND, THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 92 (1907) (stating that the doctrine of common employment was initially applied in *Priestley*, but "first definitely formulated" in *Hutchinson*).

[214] *See, e.g.*, J.F. CLERK & W.H.B. LINDSELL, THE LAW OF TORTS 57 (1889). This representation continued through many editions, the most recent of which was published in 2000.

[215] E. SPIKE, THE LAW OF MASTER AND SERVANT, IN REGARD TO DOMESTIC SERVANTS AND CLERKS 43 (1839).

> By the relation of master and servant, no contract is implied, and therefore no duty created, on the part of the master, to make good to the servant any damage arising to him from any vice or imperfection (unknown to the master) existing in the article or thing used in his service, or from the mode of using the same; nor for the negligence of his other servants.

The second edition, published in 1855,[216] initially cites *Priestley* for the proposition that servants were bound to take as much care as their masters,[217] repeats verbatim the paragraph on *Priestley*,[218] and then discusses *Hutchinson*, *Wigmore*, and *Skipp v. Eastern Counties Railway Co.*[219] to illustrate the defence of common employment, especially as a bar to actions brought under Lord Campbell's Act.[220] The third and final edition, published in 1872 (under Spike's name, but in fact written by fellow Inner Temple barrister C.H. Bromby),[221] repeats the aforementioned and adds in relation to the doctrine of common employment that *Priestley* is "usually regarded as the leading case upon this branch of the law."[222]

C. *Other Interpretations of* Priestley

Brian Simpson offered the most cogent, as well as functional, explanation of Priestley's suit,[223] demonstrating that the action was "a move to fill in a gap in a protection which had formerly existed."[224] In sum, this "gap" developed after passage of the 1834 Poor Law Amendment Act[225] which brought in its wake new methods of economical management for relieving the destitute. These included the merging of parishes to pool medical providers, offering paupers loans rather than providing for assistance, and requiring local Board of

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Id.

[216] E. SPIKE, THE LAW OF MASTER AND SERVANT, IN REGARD TO CLERKS, ARTIZANS, DOMESTIC SERVANTS, AND LABOURERS IN HUSBANDRY (2d ed. 1855).

[217] Thus, "a paid servant is bound to observe with care and diligence the interests of his master, and to exercise the same vigilance and attention as the master himself would have." *Id.* at 22.

[218] *Id.* at 50; *see also id.* at 50–52 (quoting the opinion at length).

[219] 9 Ex. 223, 156 Eng. Rep. 95 (1853).

[220] SPIKE, *supra* note 216, at 52. All three issued from the Exchequer.

[221] E. SPIKE, THE LAW OF MASTER AND SERVANT, IN REGARD TO CLERKS, ARTIZANS, DOMESTIC SERVANTS, AND LABOURERS IN HUSBANDRY (3d ed. 1872).

[222] *Id.* at 60.

[223] *See* SIMPSON, *supra* note 2, at 100–34. Simpson's analysis seems to have been either inspired or anticipated by Kostal. *See* KOSTAL, *supra* note 8, at 260–61 ("[t]he very fact that a lawsuit was commenced indicates that Priestley had taken a dim view of the relief available to him under the recently reformed Poor Laws"); *id.* at 261 n.33 ("More research needs to be done to determine how Poor Law reform affected labourers and their families.").

[224] *See* SIMPSON, *supra* note 2, at 117.

[225] (Poor Law Amendment Act), 1834, 4 & 5 Will. IV, c. 76.

Guardian approval prior to ministering casual accident victims.[226] Although two of Simpson's interpretations of the related case law are suspect,[227] his insightful reasoning that changes in the Poor Law stimulated Priestley's lawsuit is convincing.

Nonetheless, the dearth of pre-*Priestley* precedent evidences to Richard Epstein "an ironclad rule of breathtaking simplicity: no employee could *ever* recover from *any* employer for *any* workplace accident—period."[228] This "ironclad rule" reflected a communal understanding that

> an employee should be grateful for the opportunity of gainful employment. . . . In a society in which disease and injury were rampant, and life itself fragile and short. . . . Why should the legal system intervene on behalf of those fortunate enough to gain employment when there were countless others, far worse off, who would gladly trade places with them?[229]

However appealing (and paradoxical that the politically libertarian) Epstein's melodramatic explanation may be to those inclined towards the Marxist school of historical inquiry,[230] it nonetheless begs the question of why industrial accidents were unique among the panoply of work-related grievances. Had servants been that intimidated and repressed, they would never have taken any action against

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[226] *See* SIMPSON, *supra* note 2, at 123–27.

[227] Namely, that as of 1837 case law (1) was settled that servants injured during the course of their service gained settlements in the parishes of their employment, and (2) had been unclear on the question of a master's liability to provide medical assistance for his injured servants. The former is an accurate statement of the law prior to 1795, but fails to account for ensuing rulings made by Ellenborough, C.J.'s King's Bench, which took the opposite position, denying settlements to incapacitated servants. *See, e.g.*, R. v. Inhabitants of Sudbrooke, 4 East 356, 102 Eng. Rep. 867 (K.B. 1803). As to the latter, Simpson is correct that by the time of Queen Victoria's ascension the law was settled that masters were not legally responsible for providing medical treatment to their ailing servants unless they themselves solicited or acquiesced in the care. The law was, however, also settled at an earlier date. See, for example, the unequivocal statement of J. Chitty. J. CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 459 (2d ed. 1834); *see also* FRASER, *supra* note 184, at 423–25; SPIKE, *supra* note 221, at 53–57.

[228] Epstein, *supra* note 6, at 777. *See generally* ROBERTS & WALLACE, *supra* note 183, at 179–80.

[229] Epstein, *supra* note 6, at 777.

[230] Most prominently, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977).

their masters. Yet, servants frequently sued for wages,[231] hauled their masters before magistrates to complain of ill treatment and to compel contractual adherence,[232] and even brought actions for libel when references endangered their future employment.[233] It should also be noted that rioting and striking were not unknown occurrences among disaffected workers. Nevertheless, Epstein's explanation might well be an accurate depiction of judicial attitudes and class perspective during the nineteenth century.[234]

The frequency with which servants pursued judicial action against their masters outside the context of work-related injuries also diminishes the otherwise persuasive argument that posits prohibitive litigation costs as the reason workers did not seek legal redress for their harms. The most compelling support for this assertion is put forth by Bartrip and Burman who explain that because the older local courts—such as the Liverpool Court of Passage—often had jurisdictional limitations below £5, workmen were forced to seek redress in one of the central courts where costs, fees, and legal expenses made litigation unlikely. Legal aid was also a remote option because impecunious plaintiffs still had to obtain a lawyer's certificate affirming their claims as viable. As a result of this requirement "a vicious circle was created whereby an applicant came to court for gratuitous legal services because he could not beg for a lawyer's services," only to find "that he must beg or pay for a lawyer's certificate before the court

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[231] A fact attested to by the inclusion of methods to allege and defend these claims in the younger Chitty's pleading manual. *See* J. CHITTY, PRECEDENTS IN PLEADING WITH COPIOUS NOTES ON PRACTICE, PLEADING AND EVIDENCE 148–51, 351–56 (1836).

[232] Utilising, among other provisions, the Regulation of Servants and Apprentices Act, 1746, 20 Geo. II, c. 19, which empowered magistrates to hear, determine, and remedy claims of refusal or non-payment of wages between masters and servants in husbandry hired for one year or longer at less than £10; or small craftsmen, labourers or artificers contracted for under £5. *R. v. Inhabitants of Polesworth*, 2 Barn. & Ald. 483, 106 Eng. Rep. 442 (K.B. 1819), and *Lowther v. Radnor*, 3 East 113, 103 Eng. Rep. 287 (K.B. 1806), are among the cases which demonstrate the statute's frequent usage.

[233] Although not with great success, due to damages only being recoverable when the character given was patently false, slanderous, and malicious. See, for example, *Kelly v. Partington*, 4 Barn. & Ad. 700, 110 Eng. Rep. 619 (K.B. 1833), which denied a suit by a shopwoman against her former master for libel in issuing an unflattering character, because actual malice had not been shown. Nevertheless, some plaintiffs did succeed. For instance, in *Fountain v. Boodle*, 3 Q.B. 5, 114 Eng. Rep. 408 (1842), the Queen's Bench sustained a libel verdict against a master on the evidence that he had recommended the governess/plaintiff on two prior occasions.

[234] As argued persuasively in Michael J. Klarman, *The Judge Versus the Unions: the Development of British Labour Law, 1867-1913*, 75 VA. L. REV. 1487 (1989).

would hear him."[235] Still, in spite of these difficulties in bringing suit, Bartrip and Burman suggest that the "unsensational reporting" of *Priestley* "indicate[s] that such cases had come to court before, at the Assize level."[236]

While this last hypothesis has not been substantiated, it goes hand-in-hand with Terrance Ingman's assertion that *Priestley* countered an already established employers' liability.[237] Specifically, he contends that cases of "ill-treatment of apprentices, the health and welfare of servants, and the working conditions of seamen," were "consistent with an employer's duty of care prior to 1837."[238] Although this assertion is given more case law support in his unpublished doctoral thesis[239] (which is cited with approbation by Bartrip and Burman),[240] it is nonetheless incorrect.

To begin with, the legal status of menial servants, apprentices, and seamen were significantly different. Next, the apprentice cases are irrelevant as they involve harm that was caused intentionally, not through inadvertence.[241] The seamen and apprentice cases are likewise extraneous as their working conditions were governed by custom which varied from that which regulated servants.[242] In addition, the cases Ingman cited in proof of the contention that employers were bound to care for their workers are unsupportive of that proposition.[243] *Lamb v. Bunce*[244] held that medical care for casual paupers is

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[235] *See* BARTRIP & BURMAN, *supra* note 24, at 25–28; John M. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 377 (1923); *see also* KOSTAL, *supra* note 8, at 261 (noting the rise in popularity of contingency arrangements during the Victorian period).

[236] *See* BARTRIP & BURMAN, *supra* note 24, at 25.

[237] *See generally* Ingman, *Rise and Fall*, *supra* note 7.

[238] *Id.* at 109.

[239] *See* Terrence Ingman, The Origin and Development up to 1899 of the Employer's Duty at Common Law to Take Reasonable Care for the Safety of his Employee (1972).

[240] *See* BARTRIP & BURMAN, *supra* note 24, at 104–05, 104 n.20.

[241] *See* Wilkins v. Wells, 2 Car. & P. 231, 172 Eng. Rep. 104 (Ex. 1825); Winstone v. Linn, 1 B. & C. 460, 107 Eng. Rep. 171 (K.B. 1823).

[242] Legislation also altered the status and treatment of seamen as distinct from that of servants. Thus, the ruling by Denman, C.J. in *Kitchen v. Shaw*, 6 Ad.& E. 729, 112 Eng. Rep. 280, 281–82 (K.B. 1837), that the Regulation of Apprentices Act, 1766, 6 Geo. 3, c. 25, which allowed a magistrate to jail certain servants for absenting themselves from service without permission, was not applicable to (domestic) servants.

[243] *See* Limland v. Stephens, 3 Esp. 269, 170 Eng. Rep. 611 (K.B. 1801) (holding that master had no action against seaman for desertion where desertion was necessary to his well being); Woolf v. Clagett, 3 Esp. 257, 170 Eng. Rep. 607 (C.P. 1800); Watson v. Christie 2 Bos. & Pul. 224, 126 Eng. Rep. 1248 (C.P. 1800) (finding defendant captain liable for assault on plaintiff seaman).

the responsibility of the parish where the "infirm and indigent body is found."[245] *Cooper v. Phillips*[246] represented the proposition that masters were only liable for medical attendance that they directly solicited for their servants.[247] Perhaps most telling is the absence of citation by Bartrip and Burman to the handful of cases in Ingman's thesis that even more clearly contradict his assertion.[248]

Moreover, as an example involving Lord Kenyon demonstrates, the reluctance of Abinger, C.B.'s Court of Exchequer to create new master/servant duties in the absence of precedent was not atypical. In *Carrol v. Bird*,[249] domestic servant Carrol brought an action on the case by her husband against her former employer Bird for not providing her with a reference. The declaration stated that after being dismissed by Bird, Carrol applied to a Mrs. Stewart who "was ready and willing" to hire her upon receipt of an acceptable character. Carrol alleged "that it was the duty of the defendant by law to have given her such character as she deserved," but "that the defendant, not regarding such her duty, wholly refused to give her any character whatever," resulting in Carrol's continued unemployment. Kenyon, C.J. asked plaintiff's counsel upon opening the proceedings "[i]f they had any precedent for this action, or had ever known of such an action being maintained?" Receiving a negative response, Lord Kenyon declared the action unsustainable, for "in the case of domestic and menial servants, there was no law to compel the master to give the servant a character."[250]

In a second article drawn from his thesis, Ingman asserts that *Priestley* allowed the development of the defence of *volenti non fit injuria*.[251] Simpson disagrees with Ingman, opining that Lord Abinger de-

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[244] 4 M. & S. 274 (1815).

[245] *Id.*

[246] 4 Car. & P. 581, 172 Eng. Rep. 834 (K.B. 1831).

[247] *Id.*

[248] *See* BARTRIP & BURMAN, *supra* note 24, at 25; Ingman, *supra* note 239.

[249] 3 Esp. 202, 170 Eng. Rep. 588 (C.P. 1800).

[250] *Id.* An analogous rejection of an unknown duty also occurred within the context of criminal negligence. Thus, the King's Bench in *In the Matter of Anon., Overseer of Anon*, 3 Ad. & E. 552, 111 Eng. Rep. 524 (1835), declined to grant a criminal information against an overseer who refused to vaccinate the parish's paupers for small-pox, even after one had died. Its reasoning was that although "these unfortunate occurrences would not have taken place" had the overseer acted otherwise, because there was "no law which prescribes that precautionary measures" had to be taken, the administrator was not answerable. *See id.*

[251] *See* Ingman, *History*, *supra* note 7.

cided the case upon the "individualistic notions of fault and responsibility" between employers and employees rather than on a type of "contractual theory" implicit in *volenti*.[252] Both are correct, as their explanations are not exclusive. While Simpson's assertion accurately describes the actual ratio of *Priestley*, Ingman's interpretation delineates some future ramifications of the decision.

Convinced that *Priestley* was both analytically and technically poor, R.W. Kostal is sceptical regarding the case's importance, instead believing it to be the "unreliable precedent of an unreliable judge."[253] In support of his contention, Kostal cites the little known case of *Armsworth v. South Eastern Railway*,[254] brought under the Fatal Accidents Act[255] following a railway worker's death through the negligence of his fellow employees. The action was tried at the Surrey Summer Assizes before Parke, B. who instructed the jury that it could find the defendant company vicariously liable if its servants were at fault. A verdict was returned for the widow Armsworth.[256] Because neither Parke, B. nor either side's counsel cited *Priestley* or "any other case indicating that *respondeat superior* did not apply in circumstances where one of an employer's servants inadvertently caused injury to another," Kostal concluded that *Priestley*'s decision was "unreliable."[257]

Several flaws undermine Kostal's reasoning. First, at the time of trial, *Priestley* was the only recorded decision of an employee suing his employer for accidental injury.[258] Thus, beyond *Priestley*, no precedent

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[252] *See* SIMPSON, *supra* note 2, at 109.

[253] KOSTAL, *supra* note 8, at 268, 263.

[254] 11 Jur. 758 (1848).

[255] Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., c. 93.

[256] *Id.*

[257] *See* KOSTAL, *supra* note 8, at 267.

[258] Although so recognised by commentators for almost a century, Bartrip and Burman found this claim questionable but were unable to refute it, despite their plausible hypothesis that similar cases existed at the assize level. BARTRIP & BURMAN, *supra* note 24, at 24–25. More than a century earlier, citing dicta in *Gallagher v. Piper*, 16 C.B.(N.S.) 677, 143 Eng. Rep. 1289 (C.P. 1864) (Willes, J.), and in *Vose v. London & Yorkshire Rly. Co*, 157 Eng. Rep. at 300 (Pollock, C.B.), Beven made a similar assertion. *See* BEVEN, EMPLOYERS' LIABILITY, *supra* note 193, at 19. These judges might have had in mind *Newby v. Wiltshire*, 2 Esp. 739, 170 Eng. Rep. 515 (K.B. 1784), which addressed the related claim by a parish officer against a farmer for the medical costs occasioned by a casual injury to his servant under circumstances strikingly similar to those of *Priestley*. The catalogue of treatise writers who recognised *Priestley*'s novelty includes: DAWBARN, *supra* note 208, at 2; ROBERTS & WALLACE, *supra* note 190, at 179–80; SALMOND, *supra* note 213, at 91; E.R. TURNER, A TREATISE ON THE EMPLOYERS' LIABILITY ACT 1880, at 9 (1882). While testifying before the Select Committee on Employers' Liability in July 1876, one witness responded as follows to Pollock, C.B.'s

existed for either counsel to cite.[259] Next, and of more consequence, is Kostal's interpreting the ruling in *Priestley* as one going to vicarious liability when the actual basis of the decision went only to a master's direct negligence towards his servant. It was because of this limitation that *Priestley* was irrelevant to the litigants as a precedent. Third, Parke, B.'s jury instructions indicate that he may have believed the Fatal Accidents Act, with which he was not familiar, further sanctioned liability in these circumstances.[260] This confusion, perhaps surprising in a jurist as esteemed as Parke, B., was noted at the time by at least one treatise writer.[261] From those same instructions it may also be inferred that, in the dozen years since *Priestley*, Parke, B. may have been sufficiently influenced by successful railway passenger litigation to believe that contrary to Abinger, C.B.'s fiery dictum, "the mere relation of master and servant" could indeed imply a common-law duty "on the part of the master, to cause the servant to be safely and securely carried" when conveyed on his master's railway.[262] Lastly, contrary to having been "unreliable," Abinger, C.B.'s dictum was very cleverly worded, providing fodder for successive judges to expand the doctrine of common employment.[263] Regardless of which explanation is correct, Parke, B.'s jury instructions clearly indicate that as late as

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comment from *Vose*: "All I can say is, that there is no trace of it in the law books at any earlier date than this, and no reference appears to have been made to it by the counsel" for Fowler, "[y]et it is hardly possible that he should not have referred to such a rule if it existed." SPENS & YOUNGER, *supra* note 182, at 66.

[259] A stronger argument for Kostal to have made would have been the one set forth above, namely, that in giving House of Lords decisions on common employment, neither Parke nor Rolfe (as Law Peers) cited *Priestley*. Nonetheless, this assertion would also have failed for the reasons that follow below in text. *See infra* notes 260–265 and accompanying text.

[260] "I am called on for the first time, to assist in the trial of a case arising under a statue passed last year, which has made a great change in the law of England." *Armsworth*, 11 Jur. at 760.

[261] Thus, in the second edition of his treatise, Spike noted in relation to *Priestley*: "This important judgment, every word of which may be considered deserving of attention in any case where it is sought to hold a master liable for an injury received by a person in his employ, has recently been questioned in actions under Lord Campbell's Act." SPIKE, *supra* note 216, at 52. It may also be inferred from the discussion in Hertslet. *See* HERTSLET, *supra* note 186, at 9. It hardly seems coincidence that the cases mentioned, in which liability was firmly denied, issued from the Exchequer.

[262] *Priestley*, 3 Murph. & H. at 307. Thus, "[w]ith this sort of action we are familiar; for every day persons bring actions against railway companies, coach proprietors and private individuals for accidents resulting from mismanagement or negligence of their servants." *Armsworth*, 11 Jur. at 760.

[263] *See supra* notes 204–208 and accompanying text.

1848 a jurist who carried great influence in delineating the boundaries of employers' vicarious liability harboured no doubt as to the viability of a worker recovering at common law against his master for injuries received from a fellow servant.

Finally, Kostal's analysis implicitly raises the traditionally held interpretation of *Priestley* as establishing the doctrine of common employment.[264] The basis of this widely held wisdom lies in the plethora of examples employed by Lord Abinger in delineating the "absurdity" of allowing recovery.[265] Abinger, C.B.'s hypotheticals certainly contemplated suits by servants against their masters for the negligence of their fellow employees based on a theory of vicarious liability, and thus inspired later appellate judges in creating the common-law defences of common employment and *volenti*. Yet, no matter what liability nightmare had haunted the Chief Baron, the actual ruling of the case went only to a master's direct liability to his servant for his own negligence. In addition, the plaintiff never once asserted that anyone other than Fowler caused his injuries. In point of fact, the identity (or even existence, for it is possible that Charles Priestley did so himself) of the individuals who loaded the wagon was never presented in evidence.

Conclusion

This Article has demonstrated how *Priestley v. Fowler* is best understood within the framework of the emerging independent tort of negligence as a failed effort to extend master/servant liability, rather than as establishing the doctrine of common employment. In so doing, it illustrated that *Hutchinson v. York* was the true source of the defence, and that this was the standard contemporary estimation. The Article also described how, incrementally, *Priestley* came to be incor-

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[264] Because *Priestley* can only be unreliable in failing to preclude vicarious liability in *Armsworth* if it created the defence of common employment. *See* Michael Lobban, The Common Law and English Jurisprudence 1760–1850, at 285–86 (1991).

[265] Warning that in the future masters would be

> liable to the servant, for the negligence of the chambermaid, in putting him into a damp bed, for that of the upholsterer for sending in a crazy bedstead, whereby the servant was made to fall down, while asleep, and injure himself for the negligence of the cook in not properly cleansing the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to health; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and servant in ruins.

Priestley, 3 Murph. & H. at 308.

rectly understood as originating common employment. Lastly, the general inaccuracy of other interpretations was demonstrated. Accordingly, if *Priestley* was "the notorious father of an infamous line of precedents,"[266] the progeny were illegitimate.

[266] LOBBAN, *supra* note 264, at 285–86.