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# NEGLIGENCE: BLACKSTONE TO SHAW TO ? AN INTELLECTUAL ESCAPE IN A TORY VEIN

E. F. Roberts†

As an admiring lay observer, I have always considered that W. S. Gilbert's Lord Chancellor, when he declared that the law is the true embodiment of everything that's excellent, stated no more than the truth. If it has a single fault or flaw, I lay that to the unfortunate intrusion of the human element—a fallibility and unreasonableness of mankind that enters to disturb the law's own august order of right and reason. This, I think, the law itself feels. In its accumulated wisdom, work of the best minds for many centuries, the law moves—and not without resource and dexterity—to minimize the damage men can do its processes by being men.

James Gould Cozzens<sup>1</sup>

Law review articles are more often than not precise dissertations about observable phenomena—to wit, statutes, cases and the like, to which are appended evaluations of the social significance of such phenomena. *Caveat emptor*, this piece seeks to evoke a mood, a feeling for the situation, which broods over the American scene. This is the notion that law is social engineering. Exaggerating somewhat the influence of this idea in every day practice, I have attempted to evoke an image of how this very idea has undermined traditional legal folk-ways and presages a new epoch in American law. Throughout I have used, or perhaps abused, the English for counterpoint. Looked at as an intellectual escapade, a search for the subliminal as well as the articulate, it may afford irritation enough to catalyze the reader into formulating his own judgment on the matter.

## I

### THE ESTABLISHMENT OF ORDER

Students of the law of torts are well aware that the specific tort of negligence is a relatively recent development. Indeed, in modern times, at least one English authority questioned the very existence of negligence as a particular tort.<sup>2</sup> Be that as it may, we do tend to divide torts into two large divisions, namely, intentional and unintentional torts. Under the first category we tend to think of assault, battery, and false imprisonment while, in the second, negligence looms large. Still, we vaguely recall that around 1800 no such way of looking at the law of torts existed; the forms

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<sup>1</sup> Cozzens, Notes on a Difficulty of Law by One Unlearned in It, 1 Bucks County L. Rptr. 302 (1952).

<sup>2</sup> Salmond, Jurisprudence § 5 (6th ed. 1920). Compare Salmond, Torts 405 (13th ed. 1961); Winfield, Torts 167-68 (7th ed. 1963).

of action still prevailed and torts were divided upon the basis of two remedies, either trespass or case. Further, we may even recall that, while trespass more or less involved assault, battery, and false imprisonment, and negligence fell under the action on the case, nonetheless, trespass was broad enough to include injuries which were neither intentionally nor negligently inflicted. In short, trespass entailed, if only peripherally, a taint of liability without fault.

This particular notion of liability without fault was eradicated from American law in 1850 when Chief Justice Shaw enunciated the leading opinion in *Brown v. Kendall*.<sup>3</sup> It was not formally erased from English jurisprudence until 1959, if it be erased at all, by a *nisi prius* opinion in Queen's Bench.<sup>4</sup> This lag of more than a century gives rise to the query, Why? Why should England follow the American lead a century later? More particularly, why should England follow the American lead at a time when American courts are said to be emasculating the principles of traditional negligence law and themselves meandering toward a kind of liability without fault.<sup>5</sup> Thereby hangs a tale. In order to appreciate the comparative evolution of the concept "negligence" on either side of the Atlantic, however, it will be necessary to return to what one favorite children's television serial so nicely calls "those days of yesteryear." In our case, yesteryear marks the end of the eighteenth and the dawn of the nineteenth century.

Conventional wisdom has long insisted that "trespass *vi et armis*" was a particular remedy for harms inflicted upon a victim by the direct application of force, particularly wrongs such as assault, battery, and false imprisonment. Further, it has generally been accepted that "trespass on the case" was developed to remedy wrongs perpetrated without the direct application of force.<sup>6</sup> This conventional wisdom can easily be illustrated by recourse to an opinion of Lord Kenyon in 1794. The immediate case involved a highway collision between two horse drawn vehicles caused, according to plaintiff, because defendant "then and there so furiously, negligently and improperly drove the said cart and horse."<sup>7</sup> The problem

<sup>3</sup> 60 Mass. (6 Cush.) 292 (1850).

<sup>4</sup> *Fowler v. Lanning*, [1959] 1 Q.B. 426. See *Letang v. Cooper*, [1964] 3 Weekly L.R. 573 (C.A.).

<sup>5</sup> E.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). See also Restatement (Second), Torts §§ 519-20 (Tent. Draft No. 10, 1964).

<sup>6</sup> E.g., Prosser, Torts 37 (1941): "Trespass was the remedy for all forcible, direct injuries, whether to the person or property. Trespass on the case . . . developed as a supplement . . . designed to afford a remedy for obvious wrongful conduct resulting in injuries which were not forcible or not direct." Salmond, Torts 5 (13th ed. 1961): "Trespass . . . was the remedy for all forcible and direct injuries . . . . Case, on the other hand, provided for all injuries not amounting to trespasses—that is to say, for all injuries which were either not forcible or not direct, but merely consequential."

<sup>7</sup> *Day v. Edwards*, 5 T.R. 648, 649, 101 Eng. Rep. 361, 362 (K.B. 1794).

of law arose because plaintiff had elected to proceed on a theory of trespass on the case and defendant had countered by demurring, insisting that the harm having been immediate, case was inappropriate. Lord Kenyon sustained the demurrer and, almost as if sad to see counsel still falling into error on the point, purported to succinctly state the appropriate law.

The distinction between the actions of trespass *vi et armis* and on the case is perfectly clear. If the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon the act, an action upon the case is the proper remedy.<sup>8</sup>

And in insisting upon the clear-cut distinction, as he did in *Day v. Edwards*, Lord Kenyon was heeding the earlier policy pronouncement of Lord Raymond that, "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion."<sup>9</sup>

Blackstone, in his capacity as judge, had already agreed with the pronouncement of Lord Raymond, citing it as very just. Blackstone also thought that there existed a "settled distinction" between the two forms of action, and, like Lord Kenyon, he believed that "where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case."<sup>10</sup> In fact, a number of judges during the last half of the eighteenth century had come to believe that this was the distinction between the two forms of action. In *Scott v. Shepherd*, for example, while disagreeing with Blackstone as to the application of the rule, Chief Judge De Grey agreed that the "question is, whether the injury is the direct and immediate act of the defendant . . ."<sup>11</sup> Widespread currency, moreover, was given to Judge Fortescue's dictum that "if a man throws a log into the highway, and in that act hits me, I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case . . ."<sup>12</sup>

It may very well be, however, that time has distorted the images thus reflected down through several score of years. I say this because other arguments, other methods of classifying the decided cases then on hand, can be found in the contemporary reports. *Scott v. Shepherd*,<sup>13</sup> for example, involved a defendant who had thrown a primitive hand-grenade into a marketplace where it landed on the stall of a gingerbread man, who, it is said, instinctively threw it away from himself, so that it landed on the

<sup>8</sup> Ibid.

<sup>9</sup> Reynolds v. Clark, 1 Str. 634, 635, 93 Eng. Rep. 747, 748 (K.B. 1726).

<sup>10</sup> Scott v. Shepherd, 2 Black. W. 892, 894, 96 Eng. Rep. 525, 526 (C.P. 1773). See also 3 Blackstone, Commentaries 123 (1900).

<sup>11</sup> Scott v. Shepherd, supra note 10, at 899, 96 Eng. Rep. at 528.

<sup>12</sup> Reynolds v. Clark, supra note 9, at 636, 93 Eng. Rep. at 748.

<sup>13</sup> Scott v. Shepherd, supra note 10.

stall of another gingerbread man, who again reacted instinctively and threw it away, until, in its awkward trajectory, the infernal device exploded in the plaintiff's face. Plaintiff sued the defendant in trespass but the question arose whether the injury was in fact direct, since, after the missile left the defendant's hand, new force and direction was applied to it by the intermediate actors. Both Blackstone and De Grey insisted that the distinction between trespass and case was whether the force was direct or not; still they disagreed in the application of this principle to the case at hand. Blackstone thought that plaintiff should have instituted an action on the case, reasoning that the missile injured plaintiff only as a consequence of the actions of the intermediate actors. De Grey, however, believing the middle men to have acted instinctively, could not see how they added anything to the equation: it was as if the grenade had bounced off several walls before it exploded in plaintiff's face.

Thus it was that one judge saw the harm as a mere consequence and the other as a direct result of the defendant's act. If this were all there was to it, one could fairly say that the debate between the two of them had an aroma of logic-chopping about it. The fact of the matter is, however, that, while disagreeing among themselves as to the application of their principle, both Blackstone and De Grey were asserting the validity of their principle in a simultaneous debate with yet another member of the bench who was putting forth a different idea altogether. Judge Nares was of the opinion that trespass would lie here, but in his mind it made no difference whether the harm had been direct or consequential. If the original act had been "unlawful" trespass would lie in any event. In fact, said Judge Nares "The principle I go upon is what is laid down in Reynolds and Clark, Stra. 634, that if the act in the first instance be unlawful, trespass will lie."<sup>14</sup> To which Blackstone had several arguments by way of rebuttal.

First, Blackstone undermined the authority cited by his colleague, observing that "something of that sort was put into Lord Raymond's mouth in Stra. 635."<sup>15</sup> Indeed Blackstone had a point here because, while Strange's report does carry the quotation, Lord Raymond's reports do not.<sup>16</sup> Then, having questioned the authority for the proposition, Blackstone proceeded to illustrate that it did not adequately sum up the decided cases. If, for example, it was "unlawful" to throw a log into the road and hit someone with it, it was equally "unlawful" to throw it into the road and later have someone fall over it. Yet in the first instance it was agreed that

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<sup>14</sup> Id. at 893, 96 Eng. Rep. at 526.

<sup>15</sup> Id. at 894, 96 Eng. Rep. at 526.

<sup>16</sup> Compare 2 Ld. Raym. 1399, 92 Eng. Rep. 410 (K.B. 1726), with Fort. 212, 92 Eng. Rep. 822 (K.B. 1726).

trespass lay while in the second, case: it was not the unlawfulness of the act, therefore, that explained the difference, but the directness of the harm that ensued from the act. Again, it was unlawful to falsely imprison someone; yet, if he suffered consequential damages, such as the forfeiture of a recognizance, the victim might maintain case for these special damages.<sup>17</sup> Taking into account all of the cases, therefore, the only consistent distinction was that between direct and consequential harm.

This idea was not new with Blackstone when he came to decide *Scott v. Shepherd*: rather, he was expressing something that Blackstone the scholar had already put forth in his lectures on the Common Law.<sup>18</sup> Had Judge Nares seen fit, it might have been interesting had he examined some of the authority dredged up by Blackstone to support his thesis. Had Judge Nares done so, he would have found that Blackstone had relied on two cases. The first of these, *Bourden v. Alloway*,<sup>19</sup> was an action of false imprisonment brought on a theory of case instead of the usual action of trespass. It did, therefore, involve the precise problem, what was the distinction between trespass and case? Nonetheless, in end result the case seems to stand for the proposition that, as far as the Common Pleas bench was concerned in the eighteenth century, it didn't really make much difference. Indeed, turning to the Reprints, one can still find a classic headline affixed atop the statement of this case: "*Quaere*; whether an action on the case, or trespass *vi et armis*, must lie for causing a person to be arrested and carried to prison without cause."<sup>20</sup>

The case is even more revealing than this, however, because it seems to indicate that the judges were not particularly interested in arresting a judgment because of a mistake in selecting between the two forms of action. Further, it would seem that the bench felt that either theory might be used if the pleader selected his words carefully. Thus we find a certain Mr. Bains saying that "he had heard from this Court, that there is but little difference between the one and the other; and that almost all trespasses might be turned into actions on the case at the plaintiff's election."<sup>21</sup> In fact, in this action, plaintiff alleged some special damages, which, in the minds of the bench, allowed plaintiff to proceed in case, despite counsel's objection that where the damage was immediate the existence of some special or consequential damages would not convert the action to case. The upshot of all this is, interestingly enough, that the case hardly supports Blackstone's iron-bound dichotomy. Indeed, he apparently

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<sup>17</sup> *Bourden v. Alloway*, 11 Mod. 180, 88 Eng. Rep. 975 (K.B. 1709).

<sup>18</sup> 3 Blackstone, Commentaries 123 (1900).

<sup>19</sup> *Bourden v. Alloway*, supra note 17.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

cited it, not for the result, but for that part of Mr. Bain's speech in which that learned advocate suggested that "the true difference is this: trespass is . . . an *immediate injury*; case, where the injury is collateral . . ." <sup>22</sup>

Blackstone's second authority turns out to have been *Reynolds v. Clark*,<sup>23</sup> which he said established the line between the two forms of action. Yet this is the very case upon which Judge Nares relied to establish that the real question is whether the act was lawful or unlawful, and if unlawful, then trespass would lie even if the harm was merely consequential. Whereupon we find issue joined over something we ought to be able to investigate and, perchance, by reading *Reynolds v. Clark* for ourselves, resolve with whom the better argument lay. This, however, may soon turn out to be a futile endeavor. The reasons for this remain to be seen.

*Reynolds* involved nothing more than a neighborhood row which started when defendant entered plaintiff's land, tinkered with a spout which was part of the drainage system, the upshot of which was that when it did rain the water ran under plaintiff's house and began to undermine it. Plaintiff sued defendant in trespass but it turned out that defendant had a right to enter plaintiff's land to look after the drains. Plaintiff persisted, however, in the theory that it was still trespass. It appears that the court was unanimous in holding that the wrong was actionable only in case. The damage did not occur at the entry, since this was not trespass upon the land, nor did it occur when defendant tinkered since in itself nothing detrimental immediately happened. It was not until it rained and the water started to flow under the house that anything untoward developed, this as a consequence of defendant's ineptitude. It would thus appear that Blackstone was on solid ground in saying that the case was authority for the proposition that the distinction between trespass and case did revolve around the relative directness of the resultant harm.

But what of the alleged statement by Raymond that had the act been unlawful defendant would have been liable in trespass? True enough in this sense: had plaintiff been a trespasser to begin with, he would have been liable for the entry itself and for all of the harm that resulted therefrom, whether it was direct or consequential.<sup>24</sup> But then this would have been an "intentional tort." Paradoxically, trespass would then lie properly

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<sup>22</sup> *Ibid.*

<sup>23</sup> 1 Str. 634, 93 Eng. Rep. 747 (K.B. 1726).

<sup>24</sup> Restatement (Second), Torts § 162 (Tent. Draft No. 2, 1958):

The rule stated in this Section carries the liability of the trespasser to greater length in terms of what is commonly called "proximate cause," or "legal cause," than the rules usually applied to one who is not a trespasser on land . . . . The explanation is in part historical, and due to the persistence until quite recent years of the older rule of strict liability for all trespass to land and its consequences.

in *Bourden v. Alloway*, since, for an intentional tort, defendant would have been liable for the direct harm, the actual imprisonment, and the special harm, such as the forfeiture of the recognizance.<sup>25</sup> That is, there is an inchoate concept here, not quite explicit, that makes rational *both views* and renders them compatible. It was not necessary, therefore, for Blackstone to dismiss Lord Raymond's dictum as never having really been said: it could have been placed in context. But, and this is the key, it would have been necessary to draw a distinction between intentional torts and negligent torts and this way of categorizing things was as yet unknown. The trouble was that the structure or method of order, using simply the dichotomy direct versus consequential, was not adequate to handle the several different problems involved.

Concomitantly, a counter-strain, present in *Bourden v. Alloway*, already portended more trouble. This is so because if our suggested rationalization is right, that case was wrongly decided. Being an intentional tort, plaintiff could properly have used trespass and have collected for both the direct and consequential damages. This would be the real application of Raymond's concept that if the act be unlawful then trespass lies for all of the resultant harm. But in *Bourden* it may not have been in plaintiff's own interest to rely on trespass if the damages were relatively slight. This was so because full costs were awarded only if the damages came to more than 40s<sup>26</sup> in a trespass suit, whereas they were awarded to any successful suitor in actions on the case no matter how small the verdict. Added to the conceptual confusion, therefore, there was a practical incentive on the part of counsel to throw actions into the case category by hook or by crook.<sup>27</sup> All of which meant that new ways of looking at torts would have to be developed before this confusion could be cleared up.

In addition, if our rationalization be correct, the whole debate between Blackstone and De Grey in *Scott v. Shepherd* itself was wasted effort: it did not matter whether the harm was the direct result or not.

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<sup>25</sup> Childs v. Lewis, 40 T.L.R. 870 (K.B. 1924).

<sup>26</sup> Pitts v. Ganice, 1 Salk 10, 11, 91 Eng. Rep. 10, 11 (K.B. 1689): "When plaintiff had an election to bring either trespass or case, the latter is preferable, as the statute . . . does not in that action prevent the recovery of the full costs if the damages are under 40s." Accord, Savignac v. Roome, 6 T.R. 125, 129-30, 101 Eng. Rep. 470, 472-73 (K.B. 1794).

<sup>27</sup> The reader should be aware that costs in England are a different matter than in America.

Costs include all those expenses of litigation which one party has to pay the other. They must be carefully distinguished from "fees" which have to be paid by a litigant to the officers of the court . . . . In England a litigant rarely brings or defends an action without realizing that costs are a major consideration and that they may greatly exceed the actual sum in dispute.

Goodhart, "Costs," 38 Yale L.J. 849, 849-50 (1929), reprinted in Goodhart, *Essays in Jurisprudence and the Common Law* ch. X (1931).

Further, Judge Nares was quite correct when he said that the act being unlawful, the actor was liable for both the direct and consequential results, if by unlawful Nares meant that the actor had perpetrated an intentional tort. But this kind of thinking simply was not in vogue. *Granted then the contemporary premises*, it would appear in the light of *Reynolds v. Clark*, that Blackstone was right, in so far as anyone could be "right" in imposing some kind of rational order on the various discordant opinions then available.

It ought to be remembered, moreover, that Blackstone was the first man since Bracton to have undertaken to write a treatise on the whole law of England. More importantly the treatise was the culmination of his lectures at Oxford which were the first modern effort to reduce the Common Law to something that could be taught through a study of underlying principles. Holdsworth has noted that "Two words describe the leading characteristics of Blackstone's mind—order and system."<sup>28</sup> It was system he introduced into the study of the common law by imposing order on the disparate cases and thereby "he summed up and passed on to future generations of lawyers . . . both the principles of the many disparate parts of which the English legal system had come to consist, and of the relations of these parts to one another."<sup>29</sup>

## II

### THE MODIFICATION OF ORDER

Blackstone's was a triumph of logic: he managed to come up with a system of order which appeared adequately to explain the decided cases. Indeed, it would appear that the secret to his success was his ability to state a relatively simple rule which explained these cases, a rule which then came to be believed because it did appear to explain disparate cases and thereby did create order out of chaos. Once established, of course, the existence of order then hinged on the continued belief in the rule itself; until some more satisfactory explanation was forthcoming order and belief were synonymous. If this be true, therefore, we should expect to find almost fanatical devotion to the rule, even when it did not work, until such a time as a new set of mental constructs was developed to replace it with a new order. Let us return to the cases and see whether this was the situation.

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<sup>28</sup> 12 Holdsworth, *History of English Law* 718 (1938).

<sup>29</sup> *Id.* at 702. See also Hanbury, *The Vinerian Chair and Legal Education* (1958): "The insistence on the fundamental distinction between the actions of trespass and case, enunciated by Blackstone the professor, was . . . reiterated by Blackstone the judge." *Id.* at 33. "In *Scott v. Shepherd* he had an opportunity to translate his academic instruction into practical reality . . . . The majority of later jurists would probably prefer *errare cum platone.*" *Id.* at 49.

In 1799, just four years after his precise dissertation in *Day v. Edwards*, Lord Kenyon was presented with the intriguing case of *Ogle v. Barnes*.<sup>30</sup> Defendants had mismanaged their vessel and it had collided with plaintiff's ship. Plaintiffs had sued and had obtained a verdict at trial. The action, however, had been one on the case and defendants moved in arrest of judgment: after all, the harm had been direct, *Day* was controlling, and the law was quite clear. Faced with what appeared to be a hopeless situation, Erskine spoke against the motion, rendering articulate a whole new approach to the subject. Apparently having reflected on the import of the lawful-unlawful dichotomy, he reasoned that there were two lines of cases involved: wilful torts and negligent torts. Further, he argued, while trespass was the proper remedy for wilful torts, case lay for negligence. On the authorities, however, it would appear that the plaintiffs had the better of the argument. What had wilfulness to do with it? Did not trespass lie for direct harm whether the act was wilful or negligent? Indeed, was it not self-evident that "if A. in attempting to strike B. by accident strike C., C. may maintain trespass, because the injury is immediate."<sup>31</sup>

*Ogle* led to two surprises. First, of course, was the very modern dichotomy which Erskine used when pressed to the wall. The second one was even better: Lord Kenyon found in Erskine's favor but maintained his own principles in the process! This he did by distinguishing *Day v. Edwards*, which, after all, involved bad driving, a positive act, whereas the instant case involved the failure to steer the vessel, an omission. Lord Kenyon may have been satisfied that he had stood fast for principle but the result of the case can only have undermined the precise dichotomy so recently established.

King's Bench in 1803 sought to reimpose Blackstone's order in *Leame v. Bray*,<sup>32</sup> another vehicular accident case in which plaintiff had been nonsuited after proceeding in trespass. Removing the nonsuit which he himself had granted at trial, Lord Ellenborough attempted to quash Erskine's heresy once and for all:

The true criterion seems to be, according to what Lord C. J. de Grey says in *Scott v. Shepherd*, whether plaintiff received an injury by force from the defendant . . . . *It is immaterial whether the injury be wilful or not.*<sup>33</sup>

Following on the footsteps of *Day v. Edwards*, this would seem to have been sufficient to restore order.

Within three years rumblings of discord were abroad again. Sir James

<sup>30</sup> 8 T.R. 188, 101 Eng. Rep. 1338 (K.B. 1799).

<sup>31</sup> *Ogle v. Barnes*, supra note 30, at 190, 101 Eng. Rep. at 1339.

<sup>32</sup> 3 East 593, 102 Eng. Rep. 724 (K.B. 1803).

<sup>33</sup> *Leame v. Bray*, supra note 32, at 599, 102 Eng. Rep. at 726.

Mansfield, Chief Justice of Common Pleas, opened the door again by a well placed dictum. In still another vehicular accident case, plaintiff initiated an action on the case but was met by a demurrer. The court took the unusual step of warning defendant that it was of a mind to *overrule* it, suggested that he plead over, and, it is interesting to note, counsel heeded the advice. Still, Sir James warned counsel that they should not think that this action overruled *Leame v. Bray* although "upon a proper case . . . it should be reconsidered."<sup>34</sup> Not to be outdone, Lord Ellenborough of the King's Bench thereupon let fly at *nisi prius* the suggestion that it might be "worthy of consideration, whether . . . the party may not waive the trespass and proceed for the tort?"<sup>35</sup>

It would appear that it was now generally recognized that there were two kinds of torts, intentional and inadvertent, and, moreover, that the direct-consequential rule did not adequately afford a system of order. Still, the strong language of Blackstone, De Grey, and Kenyon appeared to be good law and, granting the concept of *stare decisis*, this proved to be a stumbling block on the path to any sweeping structural reorganization. We find, instead, that subterfuge became the order of the day; witness cases such as that handled by Sir James. Indeed, if one likes dates, it would appear that in 1825 subterfuge was officially approved, so that after 1825 negligence cases could be prosecuted on the case whether the harm was direct or consequential. It was in 1825, after all, that Judge Holroyd allowed himself to say that, "In cases where there is no ground of action, except the trespass, perhaps case will not lie; but where actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case."<sup>36</sup>

After 1825 the waters become muddy indeed: Kenyon's iron rule is the law in the books but in practice case lies for negligence even where the harm is direct. Order having dissolved, it was only a matter of time until some new device should be created to re-institute some kind of order. This

<sup>34</sup> *Rogers v. Imbleton*, 2 Bos. & Pul. N.R. 117, 119, 127 Eng. Rep. 568, 569 (C.P. 1806).

<sup>35</sup> *Hall v. Pickard*, 3 Camp. 187, 170 Eng. Rep. 1350 (K.B. 1812).

<sup>36</sup> *Moreton v. Hardern*, 4 Barn. & Cres. 223, 228, 107 Eng. Rep. 1042, 1044 (K.B. 1825). Moreton involved an action on the case against the three proprietors of a coach line after their servant had run down plaintiff with a team and coach. At trial, however, it developed that one of the three proprietors was driving the rig at the time. As to the driver-proprietor, trespass lay, and, argued defendant, trespass was the remedy against all three. The court seemed to think that while trespass did lie against the one, the other two were liable in case. This, however, would have required two actions since trespass and case could not be joined in one action at that time. Thus as a practical matter, allowing the use of case against all three made a great deal of sense. Further the case might easily have been limited to its peculiar facts: needless to say, it was not. Indeed, some authorities select 1825 as the birth date of negligence as a distinct action evolving out of the morass of trespass and case. E.g., Winfield, *Torts* 167 (7th ed. 1963). See also Winfield & Goodhart, "Trespass and Negligence," 49 L.Q. Rev. 359 (1933): "But *Williams v. Holland* (1833) laid down emphatically a rule that had really been indicated in *Moreton v. Hardern*."

was done in *Williams v. Holland*,<sup>37</sup> when, after a vehicular collision, a plaintiff threw caution to the winds and, despite *Day* and *Leame*, adopted case as a vehicle for recovery. Defendant's motion for nonsuit was overruled and, explicitly, now, plaintiffs were told that in negligence cases they should henceforth have the election either to cite the impact and sue in trespass or cite the alleged negligence of the defendant and the consequential damages wrought thereby and proceed in case. Lip-service was paid to *stare decisis*, however, because neither *Day* nor *Leame* was overruled. Instead, *Day* was distinguished on the ground that it involved an intentional tort, since defendant there had driven "furiously" as well as negligently; while *Leame* was limited to its precise issue, since after all it only established that trespass lay and said not a word about case.

*Williams*, interestingly enough, superimposed a new order upon an old one: it did not purport to wipe the slate clean of old learning. Indeed, after *Williams* the structure of the tort process was a four-fold division, a combination of two categories with divisions thereof running across one another. Thus, it was established that only trespass lay for intentional and direct harm.<sup>38</sup> For intentional but indirect harm case was appropriate.<sup>39</sup> Prior to *Williams*, trespass lay for direct inadvertent harm and case for indirect inadvertent harm, but now plaintiff had the option always to proceed in case for inadvertent harm.<sup>40</sup>

### III

#### ORDER RECONSTITUTED

Thus far we have assumed that English and American tort law were pretty much parallel in their development. Indeed, up through 1833 they were; in fact, *Williams v. Holland* had been anticipated by an American opinion.<sup>41</sup> In 1850, however, the two systems split asunder after Chief Justice Shaw's leading opinion in *Brown v. Kendall*.<sup>42</sup> There it will be recalled, defendant had tried to separate a pair of battling dogs and, in

<sup>37</sup> 10 Bing. 112, 131 Eng. Rep. 848 (C.P. 1833). See also M. J. Prichard, "Trespass, Case and the Rule in *Williams v. Holland*," [1964] Camb. L.J. 234. This article appeared while the current one was going to print and for those interested in the origins of *Williams*, presents an interesting analysis of the early cases.

<sup>38</sup> *Savignac v. Roome*, 6 T.R. 125, 101 Eng. Rep. 470 (K.B. 1794); *Day v. Edwards*, 5 T.R. 648, 101 Eng. Rep. 361 (K.B. 1794); *Weeton v. Woodcock*, 5 M. & W. 586, 151 Eng. Rep. 248 (Ex. 1839). Accord, *Kelly v. Lett*, 13 Nedell Law 50 (N.C. 1851). See *Fleming, Torts* 18 n.14 (2d ed. 1961); *Winfield & Goodhart*, supra note 36, at 366.

<sup>39</sup> E.g., *Adams v. Hemmenway*, 1 Mass. 145 (1804). There defendant intentionally shot plaintiff-owner's ship captain, necessitating a return to port so that the profits of the voyage were lost. Vis-à-vis the wounded ship's master it was a trespass; as to the plaintiff-owner, whose interest was economic, the harm, while deliberately inflicted, was only consequential.

<sup>40</sup> The change can be illustrated. See M. J. Prichard, supra note 37, at 251.

<sup>41</sup> *Dalton v. Favour*, 3 N.H. 465 (1826).

<sup>42</sup> 60 Mass. (6 Cush.) 292 (1850); Restatement, Torts § 18 (1934).

order to do so, raised his cane over his shoulder preparatory to striking a mighty blow for peace. Instead of swatting the dogs, however, defendant only succeeded in striking plaintiff, who, it appears, was standing behind him. Plaintiff sued in trespass, citing the bare facts and omitting to charge defendant with either intent or negligence. The trial judge instructed the jury that defendant was liable for the trespass notwithstanding the absence of intent unless he had persuaded them that he had exercised such extraordinary care that the incident could be considered an "inevitable accident." The jury were not persuaded, judgment was entered for plaintiff, but a new trial was ordered upon appeal.

In substance, Chief Judge Shaw, declared that plaintiff had either to plead intent, *i.e.*, battery, or negligence: in either case, it was incumbent upon him to prove it. *Leame v. Bray* was repudiated: that case, after all, had held that trespass lay for the direct infliction of harm and that it was "immaterial" whether the injury was wilful or not. Still, Shaw was hardly bound by a case decided after *Independence*. Thus, torts was divided into two broad categories, intentional torts and negligence, in which form they have evolved in America down to the present day.

Americans thereafter tended to drop "trespass" and to think in terms of assault, battery, and false imprisonment on the intentional side of the ledger and in terms of negligence on the other side. In England, however, trespass still existed in no man's land, *Leame v. Bray* not having been overruled. Its very existence contributed to several differences in thinking between England and America which have continued until our day. Thus, the approach to battery differs, as does the problem of strict liability versus negligence.

To illustrate differences in thinking about battery, let us suppose two hypothetical situations: first, D-1 forcibly pours poison down P-1's throat and, second, D-2 slips poison into P-2's tea and P-2 subsequently consumes the tea. In America, both D-1 and D-2 have committed batteries: both have intentionally inflicted harm upon their respective victims.<sup>43</sup> An Englishman would agree that the first incident was a battery.<sup>44</sup> To him, however, the second would not constitute a battery since, after all, the wrongdoer did not touch the victim and directly introduce the poison into his system: rather, it was accomplished by guile and even then the harm arose only as a consequence of the victim actually drinking the poisoned tea.<sup>45</sup> Thus, whereas the American associates battery with intent and is impatient with hairsplitting over whether the harm is direct or not, the

<sup>43</sup> *Commonwealth v. Stratton*, 114 Mass. 303 (1873).

<sup>44</sup> *McDonald v. Associated Fuels, Ltd.*, [1954] 3 D.L.R. 775 (B.C.S. Ct.).

<sup>45</sup> *E.g.*, Street, *Torts* 19 nn.3, 5 (3d ed. 1963); Winfield, *Torts* 151 n.37, 163-64 (7th ed. 1963).

Englishman still thinks in terms of battery as a form of trespass, involving both intent and direct harm. Fundamental differences in conceptual outlooks, therefore, inevitably lead to differences in practical result in their application to the second hypothetical situation.

In the area of negligence proper, *Leame v. Bray* created still another problem: granted a case similar to *Brown v. Kendall*, for example, why couldn't plaintiff proceed in trespass and collect without proving either intent or negligence upon defendant's part. Carried to its logical conclusion, of course, this would entail making defendant liable without fault. It would appear, however, that no one really carried things quite that far. Witness the trial judge in *Brown v. Kendall* itself who was willing to exonerate the defendant if he could prove "inevitable accident." And, this was precisely how English law treated the problem, "inevitable accident" coming to mean that defendant could escape liability by undertaking to prove the exercise of due care.<sup>46</sup> In substance, therefore, the only real difference between trespass and negligence was the allocation of the burden of proving due care.

Peculiarly enough, highway accident cases, the precise descendants of *Leame v. Bray*, were treated differently. In these cases, a la *Brown v. Kendall*, injured plaintiffs had either to sue for negligence or, if they elected trespass, to prove not only the direct impact but negligence as well. This came as a result of *Holmes v. Mather*<sup>47</sup> in 1875, a decision clouded in considerable mystery. Indeed, it was probably "bad law" in the sense that there were no precedents for creating such exceptional treatment for highway cases.<sup>48</sup>

It was not until 1959 when all of this came to a head with the recent decision by Judge Diplock in *Fowler v. Lanning*.<sup>49</sup> There a victim of a shooting accident initiated an action of trespass, carefully omitting to allege intent or negligence. It appears certain that there was no question of intent but that plaintiff simply wanted to put the onus of proving due care upon the defendant. In this he failed because Judge Diplock, after reviewing a considerable body of precedent, cited the highway cases and then concluded that, rather than the exception, they were the rule. In short, more than a century later, England adopted the rule enunciated by Chief Judge Shaw in *Brown v. Kendall*. Henceforth, or so it would appear,

<sup>46</sup> *Stanley v. Powell*, [1891] 1 Q.B. 86. For a collection of authorities, see Winfield, supra note 45, at 146 n.14.

<sup>47</sup> L.R. 10 Ex. 261 (1875).

<sup>48</sup> Winfield & Goodhart, supra note 36, at 378; Winfield, supra note 45, at 147.

<sup>49</sup> [1959] 2 Weekly L.R. 241 (Q.B.). See also *Letang v. Cooper*, [1964] 3 Weekly L.R. 573, 577 (C.A.) (Lord Denning): "When the injury is not inflicted intentionally but negligently, I would say that the only cause of action is negligence and not trespass."

torts in England fall under the broad heads of intent and negligence, and perforce, the action of trespass and its hint of strict liability for the direct infliction of harm has been put to rest at last.

#### IV

##### ORDER ITSELF INVESTIGATED

Why, it should occur to the reader, should 1850 Massachusetts have put things flatfooted into either the intentional or negligent tort camps and be done with it? In a recent law review article, Professor Gregory has come up with an answer: because, he says, American judges in the mid-nineteenth century "disliked the imposition of liability without fault and reacted against any manifestation of this notion."<sup>50</sup> But why did American judges dislike liability without fault? Because, responds Gregory, "many of our judges believed that the development of this young country under a system of private enterprise would be hindered and delayed as long as the element of chance exposed enterprisers to liability for the consequences of pure accident, without fault of some sort."<sup>51</sup>

The difficulty with this explanation is, first of all, that it assumes that the defendant who accidentally dropped a plank from a scaffolding was liable even if he had exercised due care. The fact of the matter is that even in *Brown v. Kendall* the trial judge instructed the jury that defendant could exonerate himself by proving inevitable accident. Indeed, it now seems quite possible that the lawyers of the day did not really believe in strict liability.<sup>52</sup> In fact, *Brown v. Kendall* did not remove strict liability from the law: it was not then there. What Chief Judge Shaw actually did was to re-allocate the onus of proof of negligence so that, as a practical matter, trespass for negligent harm ceased to have any significance. *Brown* was not, therefore, a total revolution: rather it tidied up the law of torts, removing the eccentric allocation of the burden of proving due care.

If, perforce, Gregory may have overstated the change, the problem of "why" remains re the change that was made. Gregory, of course, suggests that Chief Judge Shaw was activated, as a good social engineer, by

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<sup>50</sup> Gregory, "Trespass to Negligence to Absolute Liability," 37 Va. L. Rev. 359, 365 (1951).

<sup>51</sup> *Ibid.*

<sup>52</sup> We shall soon see that lawyers and law professors are apt to have very different views about this. See note 102 *infra*. Holmes, of course, did not accept the view that trespass meant strict liability for negligent infliction of direct harm. And see Diplock, J., in *Fowler v. Lanning*, [1959] 2 Weekly L.R. 241, 244 (Q.B.): "But however true this may have been of trespass in medieval times—and I respectfully doubt whether it ever was—the strict principle that every man acts at his peril was not applied in the case of trespass to the person even as long ago as 1617." This reflects the work, perhaps, of Winfield, "The Myth of Absolute Liability," 42 L.Q. Rev. 37 (1926); see Wigmore, "Responsibility for Tortious Acts: Its History-III," 7 Harv. L. Rev. 441, 443 (1894). See also the same article expanded in reprint, 3 *Select Essays in Anglo-American Legal History* 505 n.5 (1909)

an urge to aid "free enterprise." This makes his solution sound close to a conscious tilting of the scales; a change perpetrated explicitly to aid the business community. This action, done today, would have a certain color of bias attached to it. But, done as it was in 1850, indeed, done before the words "free enterprise" had even entered the vocabulary,<sup>53</sup> was it quite so bold? That is, in Chief Judge Shaw's own time, set in his own cultural milieu could not the change have been inspired by a somewhat broader perspective? *Brown* itself, after all, did not involve industry; it involved private persons and a dog fight. Rather than simply promoting "General Motors," is it not more accurate to say that Chief Judge Shaw saw the change in moral terms as well, as a sound policy not only for business but for every man? Taken at its own face value in its own period, was not the rule almost inevitable?

Holmes also addressed himself to *Brown v. Kendall*. He noted, however, that the rule prior to *Brown* was inconsistent in a sense. That is, where a private person dropping a plank might be liable in trespass if it hit a passerby, a master was liable only if his servant had been negligent in dropping the plank.<sup>54</sup> To remove this difference in treatment a choice had to be made between making both liable either in trespass or for negligence. Positing the question in this "either/or" posture, Holmes had no trouble coming down on the side of negligence. It was clear to him that the law had outgrown strict liability, if indeed it had ever existed, and a man was currently responsible only for harm he either intentionally or negligently inflicted.

In order to find a rationale for this result, Holmes addressed himself to the plight of the victim of a pure accident who now was left without a remedy. In Holmes' mind there was a "general principle of our law . . . that loss from accident must lie where it falls . . ." <sup>55</sup> This was true because accidents are bound to occur in any active society: but action ought to be encouraged, and certainly not discouraged by imposing upon the actor the burden of compensating the victims of accidents. After all, "the public generally profits by individual activity."<sup>56</sup> The law, therefore, should not get involved in the accident arena—there was nothing good to be accomplished there. "State interference," of course, "is an evil, where it cannot be shown to be a good."<sup>57</sup> In short, Holmes saw the evolution of tort law as a reflection of *laissez-faire* policy.<sup>58</sup>

<sup>53</sup> The word did not appear in Webster, *New International Dictionary* (2d ed. 1934); it is now in the third edition. Webster, *New International Dictionary* (3d ed. 1961).

<sup>54</sup> Holmes, *The Common Law* 77-82, 88-96 (1881).

<sup>55</sup> *Id.* at 94.

<sup>56</sup> *Id.* at 95.

<sup>57</sup> *Id.* at 96.

<sup>58</sup> E.g., Bentham's dictum: "The Motto, or Watchwords of government on these occasions, ought to—Be Quiet." Bentham, *Manual of Political Economy* ch. I. (1865).

To Gregory, therefore, the substance of change was clear: negligence aided free enterprise and free enterprise was the "good" of the era. To Holmes, however, negligence meshed quite nicely with all of the basic presuppositions of the society as then constituted; not merely did it subsidize business but it accurately reflected the mores, morals, and myths of the whole society. Where Gregory sounds like an economic determinist, Holmes plays the role of cultural determinist. Before evaluating either, however, let us see how English commentators reacted to similar developments.

*Holmes v. Mather*,<sup>59</sup> it will be recalled, adopted the rule of *Brown v. Kendall* for highway accident cases, thereby creating "unique" treatment for them as opposed to direct harm negligently inflicted elsewhere. The English commentators, however, did not accept the change as "politic."<sup>60</sup> Indeed, Winfield regarded it as an "exceptional rule" the origin of which was "rather obscure."<sup>61</sup> To prove its apparent bastardy, he argued that it must have been derived from either or both of two improper parents. First, it may have been an application of the principle that the owner of cattle, driving them down a road, was not liable if some of the animals trespassed upon adjoining property unless the property owner could prove negligence.<sup>62</sup> This principle was hardly relevant, however, since vehicles were not cows, and even drawing the analogy, it explained only half of the collision cases. That is, both vehicles and cows might meander off the highway and do damage to adjoining property owners, but cows did not run headlong into one another on the highways. Second, and perhaps more likely, the decision in *Holmes v. Mather* was premised upon some previous expressions by Lord Blackburn of a theory about the proper allocation of the risk of loss attributable to highway accidents.<sup>63</sup> This, however, was even worse than the cow analogy because, as Winfield pointed out, both expressions were *dicta*.

Rather than reflect on the possible social significance of the doctrine, therefore, we find Winfield matching precedents and concluding that the change was "bad law." More interesting still, the "big picture" is expressed by the judges, first by Lord Blackburn in several *dicta*, and then by Baron Bramwell as the *ratio decidendi* for *Holmes v. Mather*. Hence, Baron Bramwell concluded that: "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect,

<sup>59</sup> L.R. 10 Ex. 261 (1875).

<sup>60</sup> Holmes, *supra* note 54, at 89.

<sup>61</sup> Winfield, *Torts* 228-29 (2d ed. 1943).

<sup>62</sup> *Goodwyn v. Cheveley*, 4 H. & N. 631, 635-42, 157 Eng. Rep. 989, 991-93 (Ex. 1859).

<sup>63</sup> *Fletcher v. Rylands*, L.R. 1 Ex. 265, 286-87 (1866); *River Wear Comm'rs v. Adamson*, 2 App. Cas. 743, 767 (1877).

or put up with, such mischief as reasonable care on the part of others cannot avoid."<sup>64</sup> In short, the loss of accidents will lie where it happens to fall, albeit the axiom here takes on the coloring of an assumption of the risk principle. Indeed, it sounds very much like assumption of the risk when Lord Blackburn originated it, theorizing that "those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury . . . ."<sup>65</sup> Be that as it may, this sounds very much like Holmes' Common Law.<sup>66</sup>

Intriguingly, the non-highway cases were left open until 1891—and during this intervening period one could argue that trespass lay for the direct infliction of harm regardless of the exercise of due care. In that year, however, *Stanley v. Powell*<sup>67</sup> seems to have established, at the very minimum, that inevitable accident, *i.e.*, the exercise of due care, was a defense in trespass. Even this was regarded by some commentators as a departure from what they regarded as the "true" doctrine of strict liability.<sup>68</sup> From 1891-1959, in theory, of course, trespass continued to lie for direct harm inflicted in non-highway case, albeit subject to the defense of inevitable accident. Bullen and Leake continued to carry a practice form for pleading trespass without an allegation of either intent or negligence.<sup>69</sup> Winfield and Goodhart wrote a law review article encouraging the use of trespass as a gambit to shift the onus of proving due care onto the defendant.<sup>70</sup> The most recent edition of Salmond's hornbook insisted that the distinction between trespass and negligence was of "great practical importance."<sup>71</sup> But, and this is critical, Judge Diplock discovered that notwithstanding all of this, "in the 68 years which have passed since *Stanley v. Powell* there must have been many cases where the injury to the plaintiff was the direct consequence of the act of the defendant himself. But no *practitioner* seems to have thought, and certainly no court has decided, that to do so would affect the onus of proof."<sup>72</sup>

It seems, therefore, that in England the bar itself had come to visualize torts as intentional or negligent wrongs: the trespass ploy was, until

<sup>64</sup> *Holmes v. Mather*, L.R. 10 Ex. 261, 267 (1875).

<sup>65</sup> *Fletcher v. Rylands*, *supra* note 63, at 286-87.

<sup>66</sup> See notes 55-56 *supra*.

<sup>67</sup> [1891] 1 Q.B. 86.

<sup>68</sup> E.g., Pollock, *Torts* 128-34 (Landon, 15th ed. 1951). Landon was so irate that he labelled the author of the opinion "an undistinguished puisne judge" who obtained his position "per stirpes and not per capita." *Id.* at 133; Salmond, *Torts* 319 n.10 (13th ed. 1961), "If the case is correct, the law on this point has taken a departure from the earlier precedents . . . ." At 319 n.12 however, the current editor says that Landon "perhaps goes too far" in his remarks about the judge.

<sup>69</sup> Bullen & Leake, *Precedents of Pleading* (11th ed. 1959).

<sup>70</sup> Winfield & Goodhart, *supra* note 36, at 359.

<sup>71</sup> Salmond, *Torts* 320 (13th ed. 1961).

<sup>72</sup> *Fowler v. Lanning*, [1959] 2 Weekly L.R. 241, 249 (Q.B.). [Emphasis added.]

*Fowler v. Lanning*, an academic idea. The academics, in turn, were nit-picking precise precedents and were not indulging in sociological, to say nothing of economic investigations of the law. Indeed, in the main, academic interest lay in teaching precise case handling skills rather than indulging in sociological investigations, to say nothing of actually encouraging social engineering. In point of fact, the high point of all this may have been reached when Professor Goodhart condemned the American practice of collecting appellate briefs because such materials took the students' minds off the job at hand, namely, digesting the opinions themselves.<sup>73</sup> Indeed, a kind of intellectual parole evidence rule operated in English academic circles whereby the meaning of law was confined to the opinions themselves, and extrinsic data, whether economic or sociological, was inadmissible.<sup>74</sup>

If Americans tend to look to academic commentators to discover the underlying import of cases, where shall we look if English academics insist on avoiding such discourse *in print*? The answer, perforce, must be to the judges themselves. And, perhaps, Lord MacMillan can come to our aid, despite his own assertion that "Lordship's are not called on to rationalize the law of England."<sup>75</sup> Hence:

Whatever may have been the law of England in early times I am of opinion that, as the law now stands an allegation of negligence is in general essential to the relevancy of an action of reparation for personal injuries. The gradual development of the law in the matter of civil liability is discussed and traced with ample learning and lucidity in Holdsworth's History. . . . Suffice it to say that the process of evolution has been from the principle that every man acts at his peril . . . to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others.<sup>76</sup>

Which, of course, is nothing more than Holmes' thesis, which, naturally enough, Lord MacMillan cites.<sup>77</sup>

Where are we then other than on some kind of intellectual merry-go-round? We have seen, first, that *Fowler v. Lanning* was not decided until more than a century after *Brown v. Kendall*. We have sampled academic opinion on both sides of the Atlantic, again noting a decided difference in flavor. Whereas American academics tend toward the "big-picture," English academics tend to tidy-up the cases and annotate them.<sup>78</sup> Still, we

<sup>73</sup> Goodhart, "Determining the Ratio Decedendi of a Case," 40 Yale L.J. 161, 172 (1930), reprinted in Goodhart, *Essays in Jurisprudence and The Common Law* 13 (1931).

<sup>74</sup> The flavor of this can easily be obtained by comparing Llewellyn, *The Bramble Bush* (1960), and Williams, *Learning the Law* (7th ed. 1963). See also Roberts, Book Review, 7 J. of the Soc'y of Public Teachers of Law 227 (1963).

<sup>75</sup> *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471 (H.L.).

<sup>76</sup> *Id.* at 476.

<sup>77</sup> *Id.* at 478.

<sup>78</sup> Although it was not planned to serve this purpose, the recent assault on conflict of

have seen that, in practice, the lag evidenced by *Fowler v. Lanning* may be an illusion: that is, that English lawyers were in reality acting along lines indicated in *Brown v. Kendall* ages ago. If this be so, and Judge Diplock finds that it was, then English academic writing has been most misleading. Finally, we have seen that, whereas the crystallization of the philosophy of torts has tended to be an academic function in America, in England the real feel for the "big picture" may better be gleaned from the opinions themselves. As a matter of fact, the English don's intellectual parol rule to which we have already adverted, taken in its English context, makes a great deal of sense.

Thus far the impression is, that whereas the English academics are Blackstonian still, American academics are social engineers: the former read at times like the Votaries of the canon law of some defunct theocracy, whereas the latter reek with the hardy smell of pragmatic planners. In practice, however, "negligence" in the two systems comes down to pretty much the same thing. Indeed, the development of the action of negligence has followed similar lines of evolution on both sides of the Atlantic, as a moment's reflection will readily indicate.

The idea that negligence hinges on the reasonable man's behavior is common to both systems. That this standard is an objective one, illustrated in *Vaughan v. Menlove*,<sup>79</sup> and there is no wrong if the actor performed after the manner of the reasonable man, illustrated in *Blyth v. Birmingham Waterworks Co.*,<sup>80</sup> is axiomatic in both systems. The cases illustrating this, after all, are English decisions but are also common teaching tools in both systems.<sup>81</sup>

Defining "duty" has had a similar history. In both systems during the nineteenth and early twentieth centuries the law concerned itself with an effort to define as a matter of law the duty owed in each and every possible contingency, such as, for example, Mr. Justice Holmes' magnificent ruling that the reasonable automobile driver should stop, look, and listen upon meeting a railway crossing.<sup>82</sup> The text books in both systems began to become glutted with rules pertaining to duty until the whole thing began to collapse under its own weight.<sup>83</sup> Frustrated by this exercise in futility, each system has tended to re-analyze duty in terms

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laws made by P.R.H. Webb, Reader in Conflicts, University of Nottingham, and myself may well illustrate the difference in approach. Webb & Roberts, "Conflict in Conflicts," 9 Vill. L. Rev. 193 (1964).

<sup>79</sup> 3 Bing. N.C. 468, 132 Eng. Rep. 490 (C.P. 1837).

<sup>80</sup> 11 Exch. 781, 156 Eng. Rep. 1047 (1856).

<sup>81</sup> Compare Gregory & Kalven, Cases on Torts 73, 95 (1959); Street, Torts 122 (3d ed. 1963); Wright, Cases on Torts 197, 206 (2d ed. 1953).

<sup>82</sup> *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927).

<sup>83</sup> E.g., Pollack, Torts xix (1st ed. 1897); Wharton, Negligence xi-xii (2d ed. 1878).

of "foreseeability" and each has had its *Palsgraf* case.<sup>84</sup> Naturally enough, once foreseeability became the test of duty, each system saw the old privity barriers tumble and *Winterbottom v. Wright* buried in the debris.<sup>85</sup>

One startling difference remains in the treatment of proximate causation, which in America, at least, remains a morass.<sup>86</sup> In England, of course, it is common knowledge that the concept of foreseeability has been applied to this problem as well.<sup>87</sup> This particular difference may be accidental, however; that is, it is probably attributable to the demise of the jury in England.<sup>88</sup> While intellectually sound and indeed inevitable, granting the presuppositions of what constitutes negligence,<sup>89</sup> American courts have continued to avoid the crystallization of the foreseeability test into the law because, in dealing with it on an *ad hoc* basis, the problem thereby remains a subliminal tool with which to control juries in the realm of fact finding.

Technically, therefore, the two systems of negligence law are compatible. Even so, the current thrust of change, inherent in each system, has tended to split them asunder. The English, having posited duty in terms of foreseeability, have begun to refine still further the concept of negligence. A serious re-examination of the interests which ought to be protected if foreseeability is the test is now underway. Thus, some years ago, the English courts ruled that since it was foreseeable, negligent infliction of emotional harm was actionable.<sup>90</sup> More recently, still working in terms of what a reasonable man ought to foresee, these courts have opened the door to recovery for pure economic loss occasioned by negligence.<sup>91</sup> Granting the fault principle, English judges are expanding the interests subject to that principle.

In America, however, attention is not focused as much on the refinement of the fault idea as it is on the abolition of the principle in some areas. Taking products liability as an example, the thrust has been to

<sup>84</sup> Compare *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); *Hay v. Young*, [1943] A.C. 92 (Scot.).

<sup>85</sup> Compare *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *M'Alister v. Stevenson*, [1932] A.C. 562 (Scot.).

<sup>86</sup> E.g., Gregory, "Proximate Cause in Negligence—A Retreat From Rationalization," 6 U. Chi. L. Rev. 36 (1938); Prosser, "Palsgraf Revisited," 52 Mich. L. Rev. 1 (1953). See also Fleming, "Remoteness and Duty: The Control Devices in Liability In Negligence," 31 Can. B. Rev. 471 (1953); Wright, "The Law of Torts: 1923-1947," 26 Can. B. Rev. 46 (1948).

<sup>87</sup> *Hughes v. Lord Advocate*, [1963] A.C. 837 (Scot.); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Co. Eng'r (The Wagon Mound)*, [1961] A.C. 388 (P.C.).

<sup>88</sup> Jackson, *The Machinery of Justice in England* 65 (3d ed. 1960). Only two per cent of civil actions are tried by jury today. See *Ward v. James*, *The Times* (London), Jan. 26, 1965, p. 16, col. 1.

<sup>89</sup> Goodhart, "Liability and Compensation," 76 L.Q. Rev. 567 (1960).

<sup>90</sup> *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (C.A.).

<sup>91</sup> *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*, [1963] 2 Weekly L.R. 101 (H.L.).

convert *res ipsa loquitur* from a procedural aid to a substantive rule,<sup>92</sup> culminating now in the frank avowal that strict liability *in tort* exists in the case of a defective product.<sup>93</sup> In substance, Judge Traynor has been proved right when he objected that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings."<sup>94</sup> Fault may be the predominant theory still, but it is clear that "the crest of its dominance is past."<sup>95</sup>

A new climate of thought, therefore, abounds among American judges and lawyers relative to the law of torts. Rather than an application of the moral idea of "fault" to legal relations, torts is becoming a device with which to allocate the burden for paying for losses attributable to accidents in our urban society. It is now commonplace to observe that the trend is toward absolute liability: "compensation," "loss distribution," and "insurance" are now predominant ideas in the law. This is not only true in the legal periodicals,<sup>96</sup> it is equally evident if one takes the trouble to examine the recent trend in casebooks.<sup>97</sup>

Why should the American view have changed? This change may be due in large measure to the fact that the Supreme Court of the United States performs political as well as legal duties. That is, we have witnessed an obvious judicial evolution whereby our Basic Law has been steadily re-interpreted to keep it in steps with the times. Indeed, the judges of that court appear to be not so much lawyers as judicial statesmen. By manipulating legal rules as an architect would building materials, they are constantly engaged in a gigantic plan of social engineering with the Basic Law. The inevitable intellectual fall-out of this particular function, however, has been the American tendency to see all law in terms of social engineering.

At the same time, America is a capitalist society and the concepts of the market place loom large in its intellectual arsenal. Events are inter-

<sup>92</sup> Compare *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). See Seavey, "Res Ipsa Loquitur: Tabula in Naufragio," 63 Harv. L. Rev. 643 (1950).

<sup>93</sup> *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), 49 Cornell L.Q. 354 (1964). See also *Beck v. Spindler*, 256 Minn. 543, 99 N.W.2d 670, 682 (1959) (dictum).

<sup>94</sup> *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion).

<sup>95</sup> F. James, "Torts," (Practising Law Institute, American Association of Law Schools, Significant Developments in the Law During the War Years, Series 1, No. 10, 1946).

<sup>96</sup> E.g., Gregory, "Trespass to Negligence to Absolute Liability," 37 Va. L. Rev. 359 (1951); James, "Accidental Liability Reconsidered: The Impact of Liability Insurance," 57 Yale L.J. 549 (1948). See also Ehrenzweig, *Negligence Without Fault* (1951); Friedmann, "Social Insurance and the Principles of Tort Liability," 63 Harv. L. Rev. 241 (1949).

<sup>97</sup> Compare the traditional format of Seavey, Keeton & Thurston, *Cases on Torts* (1950), with Gregory & Kalven, *Cases on Torts* (1959).

preted in terms of their effects on the market place. The fusion, therefore, of social engineering, the offshoot of constitutional law, with the insights of the market place, heavily scented with outright economic determinism, has given rise to a peculiarly American outlook on the law of torts. Let us return to Chief Judge Shaw, and look at *Brown v. Kendall* as seen today by a typical American commentator:

While it is pure speculation, one of Chief Justice Shaw's motives underlying his opinion appears to have been a desire to make risk-creating enterprise less hazardous to investors and entrepreneurs . . . . Judicial subsidies of this sort to youthful enterprise removed pressure from the pocket-books of investors and gave incipient industry a chance to experiment on low-cost operations without the risk of losing its reserve in actions by injured employees.<sup>98</sup>

This, however, is only half the story.

At the same time that social engineering and economics were combining to form the American outlook, two other ingredients were heightening the effect. First, *stare decisis* never became the force in American thinking that it was in England. This was inevitable, perhaps, because the early American courts set themselves to the task of modifying—*i.e.*, changing—the Common Law to fit its new environment. Once set in this flexible role, the die was cast. Second, the very educational processes in America serve to reinforce the engineering *cum* economics without *stare decisis Weltanschauung*. In a perceptive article some years ago in the *Cornell Law Quarterly*, Professor Goodhart illuminated this phenomenon:

But the American law school does not teach American law, for there is no such law. "The national law school," Judge Pound has said, "teaches 'general legal principles' which are assumed to be uniform, although state rules vary." The method is primarily the method of comparative law . . . . The teacher must guide the student in his choice between conflicting cases, and, in doing so, he tends to lay down a general principle himself by which to test the cases . . . . The English teacher emphasizes what the judge has said: the American professor explains what the judge should have said.<sup>99</sup>

All of which led Professor Goodhart to conclude that the American system was evolving away from the common law toward something more akin to the civilian.

The culmination of all these factors can easily, if rather arbitrarily, be isolated under the heading "policy oriented jurisprudence." That is the precedents are not binding, economics are vital, social engineering is the judge's function, and law is a dynamic task, the exercise of which will lead to a better society. The question is not what *is* the law but what

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<sup>98</sup> Gregory, *supra* note 96, at 368.

<sup>99</sup> Goodhart, "Case Law in England and America," 15 *Cornell L.Q.* 173, 189-90 (1930), reprinted in Goodhart, *Essays in Jurisprudence and the Common Law* 50, 69-70 (1931).

*ought* the law to be. The real problems are those of goals, and goals are determined by the contemporary values of the affluent society. Those goals, or so it would seem in this mechanical age, are to distribute the loss attributable to accidents across the whole society by dropping fault in favor of strict liability and shifting the quest from that for wrongdoers to that for a risk-bearing enterprise which can, insurance-wise, spread the risk of loss over the consuming public.

## V

## PROJECTION IN FUTURO

What then is the point of all this? There are several. First, the perceptive reader ought to have noted a radical difference between the early and later sections of this article. The early sections were devoted to a study of the precise case by case evolution of certain cases, typifying perhaps the Common Law genre. We saw that change occurred, yet the change was one of slow evolution within the dialectic itself wherein cases were distinguished into oblivion obliquely rather than bludgeoned to death by abrupt about-faces.

This approach to law reflected the mood of the era in which negligence crystallized the fault morality of the day into the mainstream of the legal system of the day. That morality may have been convenient for, or even subservient to the business community, but this is irrelevant: what matters is that it was the prevailing ethic. In short, the law in the cases came to reflect the prevailing ethic and to channel it into an efficacious device with which to order human conduct civilly: the judges incorporated contemporary ideas into the law of torts. The system was such, however, that the judges had to accomplish this discretely within the interstices of the decided cases.

The American experience roughly paralleled the English until quite recently. The difference indicated by *Brown v. Kendall* was largely academic. Now, however, the American judges have begun to question the efficacy of the fault principle. This emphasis on insurance and loss distribution may only reflect a growing new ethic in security-conscious mid-twentieth century America as fault reflected the ethos of the nineteenth. In short, the process of molding the law to reflect the contemporary ethos is merely repeating itself.

This re-structuring of the law in terms suitable to the contemporary cultural milieu is so all pervasive that even the "truths" of legal history vary with the times. We have seen, for example, that Judge Diplock doubted whether strict liability ever existed,<sup>100</sup> and, in this regard, he

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<sup>100</sup> Fowler v. Lanning, [1959] 2 Weekly L.R. 241, 244.

followed Holmes.<sup>101</sup> C. H. S. Fifoot, however, has observed that strict liability's existence came to be doubted only when the fault principle came into its own. In short, he suggests that the fault oriented school saw history in terms compatible with their own conceptions of law, and he denominated these studies as a "fascinating realm of wish-fulfillment."<sup>102</sup> Following Fifoot for a moment, we should expect that scholars in America, shifting toward absolute liability, will reinterpret history in terms of strict liability, rendering negligence a mere mutation. Gregory, perforce, may be one of these.<sup>103</sup> The truth can never be known because it lies in the outlook, the concepts of the lawyers of a bygone era, and not, apparently, in cases susceptible to two readings.

There is nothing very startling about this phenomenon of change: what is worrisome is the mechanics by which the change is being accomplished. If *stare decisis* is dead in America, or at least mortally wounded, the traditional brake, represented by the necessity of playing the dialectical game, has been removed from the equation. Where the common-law judge could gradually make adjustments, measured in decades, his American contemporary, unmindful of dialectical good taste, can change overnight. The danger here is that, whereas the common-law judge necessarily envisioned his role as one of gradually channeling society as new ideas developed,<sup>104</sup> the American judges may be tempted to create the channels into which society must subsequently evolve.

This danger is symbolized, perhaps, by the current emphasis on "policy": the cases ought to effectuate "good policy." But as Balzac observed, policy has no conscience. Who then decides what constitutes good policy? Has society generally decided that the costs of any given product ought to contain an insurance to cover this liability? Perhaps. If this be so, it can be effectively argued that the American courts are creating law in the "grand style,"<sup>105</sup> and thereby filling a vacuum left by the legislature. Indeed, it can be argued that the English jurists can maintain their pure negligence ideas simply because the *welfare state* has provided state insurance schemes to fill this need.<sup>106</sup>

<sup>101</sup> Holmes, *The Common Law* 89 (1881).

<sup>102</sup> Fifoot, *History and Sources of the Common Law* 187 (1949).

<sup>103</sup> See note 52 *supra*.

<sup>104</sup> Compare "Law maintains order in society but cannot create it," P. Jackson, *Book Review*, 27 *Camb. L. Rev.* 248, 249 (1964), with "There is good reason . . . to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future," Prosser, *Torts* 14-15 (1964). There is obviously, a subtle slading here, and a question of degree, instead of a clear-cut difference. It is, however, a real problem. E.g., Llewellyn, *The Common Law Tradition* 15 (1960). In another context, the question is developed in Griswold, "Of Time and Attitudes—Professor Hart and Judge Arnold," 74 *Harv. L. Rev.* 81, 91 (1960).

<sup>105</sup> Llewellyn, *The Common Law Tradition* 62 (1960).

<sup>106</sup> Friedman, *supra* note 96, at 258.

Be that as it may, the question remains whether the game is worth the candle. That is, after the need to use tort law to distribute loss has been fulfilled, the case technique used will still remain imbedded in the judicial veins. Will this policy-oriented law, interested more in broad generalizations than in precedent, prove to be a blessing or a curse? One thing is certain: it is not common law. Whether this legal rationalism, as it might better be called, is good or bad cannot be answered now, however, because we cannot predict whether it will institutionalize some kind of brake on its own momentum.

Further, two comments I garnered from English acquaintances might highlight how slippery a problem this may prove in practice. To those who feel that recent developments are too blatantly the product of unrestrained judicial legislation, a certain justice in the House of Lords warned me that the law, in order to maintain its channeling efficacy, had to change more rapidly in fast developing times. To those who feel the pace too slow, an extreme left wing law don severely criticized the emergence of policy as a value test of law, arguing that once policy became the shibboleth of change there was no breathing space in the gathering momentum of change during which to reflect on its direction. But these reactions are oversimplified because they fail to draw a crucial distinction. There is a subtle distinction we ought to bear in mind before arriving at our own individual judgments on the law's "progress." Change is forever with us and, witness the evolution of the common law from *Day v. Edwards* to *Stanley v. Powell* to *Fowler v. Lanning*, change can be accommodated within the common-law dialectic. Still, the common-law *institution itself*, the working techniques of the judges and lawyers, is itself subject to change. We have, therefore, to make up our minds about two very different questions. First, whether the new trend toward strict liability is healthy. Second, whether the trend toward a policy oriented judicial institution is healthy. Thus, re-quizzing my two commentators, I suspect each would answer "yes" to the first interrogatory and "no" to the second. But then again, they are both English.

As of the moment there is no clear answer in America to the second problem because the distinction we have just drawn is not made. Instead, quizzing Americans, one finds a sense only of a feeling, either that the law is changing too rapidly or not rapidly enough. The trouble is that these answers reflect only the relative liberalism or conservatism of the respondents relative to the social changes imminent in the law and shed no light on the attitude toward the institutional revolution.

There is, however, one avenue that might profitably be explored by those who would maintain in more pristine form the negligence idea.

American negligence is ambivalent because it seeks to perform two functions. One, it is designed to regulate human conduct by enforcing the reasonable man standard. Two, it is becoming an insurance scheme for the benefit of victims of faulty lawnmowers, exploding bottles, medical malpractice, vehicular accidents involving trucks owned by corporations, and innumerable other things. The trouble is that it is questionable whether tort law can serve two masters. Even granting that the current development of strict liability can be made to appear compatible with some vestiges of the fault principal, the law's expense and the law's delay render tort lawsuits a tremendously wasteful insurance scheme.

It might make more sense in the long run, therefore, to return to traditional concepts of negligence. Granted how far the feeling has gone that corporate defendants ought to pay, this might necessitate eliminating the jury in civil cases in order to restore a more disciplined perspective. Granted, likewise, the prevailing urge to sue which is upon us,<sup>107</sup> the public might have to be disciplined by adopting a rule imposing total costs upon the unsuccessful plaintiff. At the same time victims of accidents might be more efficiently cared for by socialized medicine, and if crippled, maintained by welfare payments. In short, the current oblique or subliminal drift of tort law might be made explicit. The time, however, does not yet appear propitious. Until political thinking changes, therefore, it appears that the courts are a panacea for certain blots upon the public welfare and are, in fact, functioning as a general haven for reform movements.<sup>108</sup>

We have seen that order was imposed by Blackstone with his elementary direct-consequential rule appended to explain things. Order was muddied again when new ideas of intent and negligence gained credence, but it was restored when the fault principle was seized upon to create a new order in *Brown v. Kendall*. Order in America is again muddy because new ideas are abroad concerning the function of negligence. It remains to be seen who will create a viable synthesis which will accommodate these new strains and afford the basis of yet another system of order. My own reaction is that the next fifty volumes of the *Cornell Law Quarterly* will be more interesting even than the first because on their pages will be reflected the development of this new system of order.

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<sup>107</sup> The number of judges may afford some index of the volume of litigation; in England there are twenty-one judges sitting full time hearing appeals. In New York alone, there are thirty-four. Karlen, *Appellate Courts in the United States and England* 139 (1963).

<sup>108</sup> This, quite obviously, is a paraphrase of Mr. Justice Harlan. *Reynolds v. Sims*, 377 U.S. 533 (1964) (dissenting opinion). The reader would not be far wrong to suspect that an analogical matrix exists involving this article and recent developments in constitutional law.