The Evolution from Strict Liability to Negligence: When and Why? – Part 1

Anthony Gray*

Tort law has, viewed through a long lens, moved generally from strict to fault-based liability. This move is not (yet) complete; pockets of strict liability remain. It is important to understand this move. Why, and when, did it occur? The questions, and so the answers, may be related. This article attempts some answers. Part 1 charts the gradual but perceptible shift in common law thinking away from "act at peril" philosophy to one where liability lies where it falls, unless fault of another is shown. While of historical interest, this shift is also of contemporary interest. Given that pockets of strict liability remain in our law, what rationale, if any, supports them? If most tort law is now fault-based, why persist with any strict liability? In that context, Part 2 considers application of these trends in the context of the tort of private nuisance, traditionally a tort of strict liability.

I. Introduction

Today, most students studying tort law focus on negligence. This is understandable. Since recognition of a generalised duty of care in 1932, that tort has grown exponentially, at the expense of other torts such as the *Rylands v Fletcher* action and breach of statutory duty. Scholars call for abandonment of some of the original torts in favour of negligence.[1] Those new to tort are apt to assume that liability for tort law is primarily fault-based, and might believe it was always thus. On the other hand, principles of strict liability have long been recognised in the law, applied to make a defendant liable for injuries caused to others in the absence of fault. Strict liability has a much older history than negligence. Pockets of strict liability remain in the law today. This article considers the questions of how and why principles of tort liability generally shifted from strict liability to negligence.

This question is of historical interest. But it remains highly practically relevant given that strict liability continues to exist. A broader discussion of how and why the law moved from strict liability to negligence, particularly in the area of personal injuries, might assist our consideration of whether principles of strict liability have any place in the law of tort today, or tomorrow. For the purposes of discussion, I will focus this discussion in Part 2 of this article on the tort of private nuisance.

Given the ultimate destination of this article, some might wonder whether the article should focus entirely on nuisance, and not include discussion of general trends in the law of tort generally, including the move from strict liability to fault-based principles. My preference is to see nuisance as part of the broader family of tort law, and in that context. The historical perspective is important. My considered decision is to retain the discussion of private nuisance in the broader and deeper context of development of tort law in the common law generally. Thus, it is considered important to understand the broader evolution in tort law, of which nuisance is a part, over the centuries, and to consider the critical tort law question of strict liability as opposed to fault-based liability, placing reform of private nuisance in context. The debate between fault-based and strict liability is fundamental,[2] and clearly not confined to the question of nuisance law.

* Professor of Law, USQ School of Law and Justice.

[1] Christine Beuermann, "Are the Torts of Trespass to the Person Obsolete? Part 1: Historical Development" (2018) 25(3) Tort L Rev 103; Christine Beuermann, "Are the Torts of Trespass to the Person Obsolete?: Part 2: Continued Evolution" (2018) 26(1) Tort L Rev 6.

[2] For definitional purposes, I adopt those used by John Goldberg and Benjamin Zipursky, "The Strict Liability in Fault and the Fault in Strict Liability" (2016) 85(3) *Fordham Law Review* 743, 745: "according to prevailing academic usage, strict liability is liability

In essence, the article has two main purposes. The first is to understand the shift in tort law away from strict liability and in favour of fault-based principles, to see how and why it occurred. This is the focus of Part 1 of the article. The second, related to the first, is to practically apply this knowledge to the specific question of the future of the tort of private nuisance, which has traditionally been described as a tort of strict liability. Thus, the discussion of the move from strict liability to fault-based liability does not occur in the abstract, but has practical consequences for current tort doctrine. This is the focus of Part 2 of the article.

II. The Historical Shift from Strict Liability to Fault-based Liability

A. Roman Times to Middle Ages

The question of liability for wrongs committed to another must be understood in the historical context of the blood feud. Where one individual had caused another injury, the victim would seek to exact physical revenge on the wrongdoer. Vengeance was the objective. Primitive legal systems sought to discourage such actions. They introduced a payment system, whereby one who had wronged another would pay them money. This was designed to be in lieu of physical vengeance.[3] In Roman times, this is evidenced in the *Twelve Tables* (circa 450 BC), containing payments to be made for precise injuries. Through payment of money to the victim, their desire for vengeance would be assuaged, reducing the risk of breach of the peace through violence. Liability was strict.

Vengeance did not entirely disappear from the legal system, however. The payments were designed to punish the wrongdoer, not compensate the victim.[4] Where it was shown that an inanimate object had caused the injury, it was acceptable to exact vengeance against it.[5] This might be through its destruction, removal from the jurisdiction or forfeiture. This ancient action survived through the ages, today known as the deodand.[6] It is evidenced in semi-modern and modern cases continuing to refer to an inanimate object as a "wrongdoer", against which vengeance can legitimately be exacted.[7] If the wrong had been caused by my slave or by my animal, the legal system would be satisfied if I relinquished the culprit to the victim.[8]

An example of strict liability appears in the *Lex Aquilia*, stating a person who has unlawfully killed a slave or a four-footed animal of another will compensate the owner; further, anyone who causes loss to another by "burning, smashing or maiming" unlawfully, must pay them compensation. On its face, liability here is again strict. Ibbetson says, it was "result oriented".[9] There is no mention at this point of concepts of fault or negligence. Jansen notes that Roman law embraced concepts of injuria and damnum in the *Lex Aquilia*. It would only embrace notions of culpa (fault) 150 years later.[10]

---

without wrongdoing. A defendant subject to strict liability must pay damages irrespective of whether she has met, or failed to meet, an applicable standard of conduct Action that causes harm is all that is required. By contrast, fault-based liability is conceived as liability predicated on some sort of wrongdoing. The defendant's liability rests on the defendant having been at fault." And strict liability is distinct from absolute liability, which is liability without any defences.

[3] Roscoe Pound, "The End of Law as Developed in Legal Rules and Doctrines" (1914) 27 *Harvard Law Review* 195, 199; Francis Sayre, "Mens Rea" (1931–1932) 45 *Harvard Law Review* 974, 977; Robert Leflar, "Negligence in Name Only" (1952) 27 *New York University Law Review* 564, 565; Oliver Wendel Holmes Jr, *The Common Law* (1881) 2. Recognition of this philosophy appears in *Merest v Harvey* (1814) 5 Taunt 442, 444; 128 ER 761, 761: "it goes to prevent the practice of dualing, if juries are permitted to punish insult by exemplary damages" (Heath J).

[4] Nils Jansen, "Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extra Contractual Liability" (2004) 24(3) *Oxford Journal of Legal Studies* 443, 448.

[5] Wendel Holmes, n 3, 7; Jacob Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty* (1973).

[6] Finkelstein, n 5.

[7] *The Palmrya*, 25 US 1, 26–27 (1825).

[8] Wendel Holmes, n 3, 20.

[9] David Ibbetson, "How the Romans Did for Us: Ancient Roots of the Tort of Negligence" (2003) 26(2) *University of New South Wales Law Journal* 475, 494.

[10] Jansen, n 4, 448. He notes culpa was introduced as part of the *mores maiorum* of Roman society.

Because the objective of payment of money was to assuage the anger of the victim or their family, not surprisingly it was easy to obtain. It was strict in that the victim did not need to prove the person sued was to blame or at fault. It was enough that the defendant, their animals, or their servants/slaves, caused the plaintiff's injuries.[11] No further investigation was required to make the defendant liable. This was strict liability for another person's injuries.[12] Sayre summarises:

> The law, which was seeking to supplant the blood feud by inducing the victim or his kin to accept money payments in place of taking violent revenge, seemed to concentrate its gaze rather upon the outraged victims or would-be avengers who must be brought under control than upon the actual blameworthiness of the accused.[13]

To some extent, these developments were mirrored in English law. Evidence of strict liability in England appears in *Leges Henrici Primi* of circa 1118. Chapter 8 s 6 notes the phrase *qui inscienter peccat scienter emendet*, he who commits evil unknowingly must pay for it knowingly. The focus was on causation and the victim's injuries, not fault. Examples given include "misfortunes taking place by accident rather than by design" such as a person on a mission meeting death while so engaged (engager liable), if a person should ask someone to visit them, and the person is killed on the way (requester liable), and if someone should lend another their horse and the person lending it comes to grief (owner liable). In each case, liability is strict.[14]

This desire to maintain the peace also explains the way in which the law protected property rights, including actions that we today would call "nuisance". This is particularly evident during the reign of Henry II. Loengard writes:

> No strong king could tolerate the spasmodic upheaval and unjust results of private quarrels and Henry II, when he came to the throne in 1154, intended to be a strong king. Thus the same considerations which gave the impetus to expanded royal protection of peaceable possession of real property – culminating in the Assize of Novel Disseisin – no doubt lay behind the extension of royal jurisdiction to offending acts which later generations characterised as nuisances: the need for securing weaker subjects in the enjoyment of their property and the need for keeping the peace.[15]

Strict liability is evident in 1466s *Case of Thorns* where it was stated "though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer for it, if he could have avoided it".[16] It appears again in 1681 in *Lambert & Olliot v Bessey* with the statement civil liability did "not so much regard the intent of the actor, as the loss and the damage of the party suffering".[17] It can be summarised

[11] Jeremiah Smith, "Tort and Absolute Liability – Suggested Changes in Classification" (1917) 30 *Harvard Law Review* 241, 248: "in very early times there was no occasion to discuss the essential elements of a tort or wrong. Wrong was then not essential to liability. It was enough that the defendant's conduct, although perfectly blameless, had occasioned harm to the plaintiff."

[12] Frederick Pollock and Frederic Maitland, *The History of English Law Volume 2: Before the Time of Edward I* (1895) 468: "law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows;" William Holdsworth, *The History of English Law* (Methuen, 1927) 50: "the doer of deed was responsible whether he acted innocently or inadvertently, because he was the doer."

[13] Sayre, n 3, 977.

[14] After quoting from this list, Sayre concludes "the law thus set forth smacks strongly of liability without fault": Sayre, n 3, 979.

[15] Janet Loengard, "The Assize of Nuisance: Origins of an Action at Common Law" (1978) 37(1) *Cambridge Law Journal* 144, 145.

[16] Hulle v Orynge (1466) YBM 6 Edw IV, folio 7, placitum 18 (Case of Thorns). Strict liability is evident in 1278s *Statute of Gloucester*, whereby a person who killed another in self-defence or by misadventure was held liable, unless they could obtain a pardon from the monarch. Ames discusses an (unnamed) case where a defendant argued although he struck the plaintiff, he did so in self-defence. The Court denied the defence existed and found him liable: JB Ames, "Law and Morals" (1909) 22 *Harvard Law Review* 97, 97; John Wigmore, "Responsibility for Tortious Acts: Its History" (1894) 7 *Harvard Law Review* 315, 319; Smith, n 11, 248. See also *Bessey v Olliot & Lambert* (1681) T Raym 467; 83 ER 244.

[17] *Bessey v Olliot & Lambert* (1681) T Raym 467; 83 ER 244. The Court continued "if a man shoot at butts and hurt a man unawares an action lies … if a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged, ought to be recompensed".

as "action at peril". The structure of the forms of action reinforced this, based on kind of harm done, not the defendant's responsibility for it.[18]

This is consistent with views on the action for nuisance. The word itself is derived from the Latin for harm, *nocumentum*. Again, the focus is clearly on the injury or loss suffered by the plaintiff, rather than the culpability or otherwise of the defendant. This is made clear by Holt CJ in the 1702 decision in *Tenant v Goldwin*:[19]

> Every man must so use his own, as not to do damage to another. And as every man is bound so to look to his cattle, as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office, that it may not flow in upon and damnify his neighbour … a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is, because every man must so use his own as not to damnify another.[20]

Despite this formal position of strict liability, it should be acknowledged that leading torts scholars and legal historians believe it masks reality. They argue that, even though it may not be apparent on the written record, courts were in fact taking into account the blameworthiness or otherwise of the defendant when deciding cases.[21] This assertion is difficult to prove or disprove. Often a jury determined matters in dispute. It is thus difficult to know the extent, if any, to which they had regard to issues of blame or fault in decision-making. Further, historical records are scant, often brief and incomplete, and not entirely accurate. That having been said, there is historical evidence of judges having regard to notions of fault in either determining cases or instructing juries.[22] In contrast, other scholars argue that liability for trespass and case at this stage was strict.[23]

Historical links between tort and crime are well known. Originally in England there was no separate criminal law enforced by the State, so the civil law was the prime way by which wrongs were addressed. Gradually a primitive system of criminal law would develop. At first, it mimicked the civil law, casting obligations in absolute terms. As discussed above, in the time of Henry I there is a record of an approach whereby one who commits evil unknowingly must pay redress for it knowingly, reflecting notions of strict liability. It applied in cases of what we would now regard as criminal law.[24]

However, Bracton suggested a more refined approach to liability questions. He was heavily influenced by his study of Roman law, as well as canon law.[25] Roman law had long known the concepts of *culpa*

---

[18] Eltjo Schrage, "Negligence: A Comparative Historical Introduction to a Legal Concept" in Eltjo Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker and Humblot, 2001) 11; JH Baker, "Trespass, Case and the Common Law of Negligence 1500-1700" in Eltjo Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker and Humblot, 2001) 52.

[19] *Tenant v Goldwin* (1702) 2 Ld Raym 1089; 21 ER 222.

[20] *Tenant v Goldwin* (1702) 2 Ld Raym 1089, 1092–1093; 92 ER 222, 224.

[21] This suggestion appears in the work of Wendel Holmes, n 3, 64: "a more exact scrutiny of the early books will show that liability in general, then at later, was founded on the opinion of the tribunal that the defendant ought to have acted otherwise, or, in other words, that he was to blame;" it is supported by Peter Birks, "Negligence in the Eighteenth Century Common Law" in Eltjo Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker and Humblot, 2001) 183–187; see also David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 1999) 58–63; Donal Nolan, "The Distinctiveness of Rylands v Fletcher" (2005) 121 *Law Quarterly Review* 421, 446.

[22] *Weaver v Ward* (1616) Hob 134, 134; 80 ER 284, 284: "no man shall be excused of a trespass … except it may be judged utterly without his fault;" *Wakeman v Robinson* (1823) 1 Bing 213, 215; 130 ER 86, 87: "if the accident happened entirely without default on the part of the defendant, or blame attributable to him, the action (trespass) does not lie" (Dallas CJ).

[23] Schrage, n 18, 28: "in both actions (trespass and case) the plaintiff who had suffered harm caused by the defendant sought compensation. Throughout the medieval and early modern periods there is a strong focus on the loss suffered by the plaintiff rather than on the wrongful conduct of the defendant … plaintiffs in trespass did not allege fault on the part of the defendants but – what is even more important – defendants hardly ever pleaded that the injury had been caused without their fault or negligence. Defendants simply denied that they were guilty … the jury came to their conclusion … without disclosing why. Approaching the question without the preconception that liability must have been fault-based, it is hard to avoid the conclusion that liability in the writs of trespass and trespass on the case was prima facie strict;" Charles Gregory, "Trespass to Negligence to Absolute Liability" (1951) 37 *Virginia Law Review* 359.

[24] Sayre, n 3, 981.

[25] Sayre, n 3, 987.

(fault) and *dolus* (acting contrary to good conscience). We see in Bracton a suggestion, in considering acts of another, that the *animo* (mind) and *voluntate* (intent) of the person allegedly guilty of wrongdoing might be relevant.[26] Records here are scant. However, there is evidence of acceptance of this philosophy (assessing the culpability of the defendant) in primary and secondary sources of the late 15th and 16th century.[27] It is evident in writings of Grotius of that time.[28] It would also be explained by ecclesiastical influences on the law, where notions of moral blameworthiness were closely connected with questions of intent.[29] These concepts became accepted in the English criminal law.[30] They were noted by later writers,[31] and are now axiomatic in our criminal law.[32] These developments have later parallels in the large number of United Kingdom (UK) criminal provisions that carried with them mandatory death penalties. Even in the early 19th century, about 200 offences carried with them a mandatory death penalty. However, scholars have noted juries and courts responded to this system. The judge would often find a technicality to thwart a conviction. The doctrine of the "benefit of clergy" was utilised to save an accused. Juries refused to convict the accused, though the evidence might be overwhelming at to guilt. These so-called "pious perjurers" avoided what they saw as the inflexibility of the mandatory sentencing rules.

What unites these experiences in criminal law, both in development of the definition of offences, and in sentencing practice, was the need for flexibility in the law. The experience in criminal law was that inflexibility, in treating all offences the same regardless of intention, and providing for mandatory death sentences for many offences, did not meet the ends of justice, as judged by judges and juries.[33]

The interesting question for current purposes is how this affected the civil law. If the criminal law (at least initially) would not take into account the defendant's circumstances, apart from the fact they committed an act that caused another injury, should the law of tort do so?

---

[26] Henry de Bracton, *De Legibus et Consuetudinibus Angliae* (Travers Twiss trans, 1879) 101b.

[27] Yearbook Mich, 6 Edw IV, f 7, pl 17 (1466): "there is no felony, for felony is of malice propense;" Yearbook Hill, 13 Hen VII, fl 4, p 5 (1498): "the question was whether (what happened) should be called mayhem or not … and it seems that it was, because he had a bad intent at the beginning"; Yearbook Trinity 21, Hen VII, f 28, p 5 (1506), stating that a person who accidentally shot another while aiming for something else was not guilty of felony "as he had no intent to kill him" (Rede J). These references appear in Sayre, n 3, 990–991.

[28] Hugo Grotius, *De Jure Belli ac Pacis* (1625) 11, 17.1: "by a wrong, we here mean any fault, whether of commission or of omission, which is in conflict with what men ought to do, either generally or by reason of a special quality. From such a fault, if damage has been caused, by the law of nature an obligation arises, namely, that the damage should be made good" (Francis Kelsey, *On The Law of War and Peace* (Bobbs-Merrill, 1962). Grotius had recanted from previously position supporting strict liability. In his later work, he criticised notions of employers being strictly liable for injuries caused by employees, and strict liability for animals. Nils Jansen notes Grotius never explained why he had shifted from supporting strict liability to a fault-based system of liability: Jansen, n 4, 457–458.

[29] Francis Bowes Sayre, "Public Welfare Offences" (1933) 33 *Columbia Law Review* 55, 68; Sayre, n 3, 983. Sayre notes it was often priests who conducted trials by ordeal. Ames concludes "the ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril": Ames, n 16, 99.

[30] YB Mich, 6 Edw IV, f 7, pl 17 (1466); YB Pasch 13 Edw IV, f 9, pl 5 (1473); YB Hil 13 Hen VII, f14, pl 5 (1498); YB Trin 21 Hen VII, f 28, pl 5 (1506).

[31] Sir Matthew Hale, *Pleas of the Crown* (Atkyns and Atkyns trans, 1682) 38: "if the act that is committed be simply casual and per infortunium, regularly that act, which were it done ex amini intentione, were punishable by death, is not by the laws of England to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act and event, to make the offense capital;" Sir William Blackstone, *Commentaries on the Laws of England 1765–1769* (1768) 21: "to make a complete crime, cognizable by human laws, there must be both a will and an act … as a vicious will without a vicious act is not civil crime; so, on the other hand, an unwarrantable act without a vicious will is not crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will;" Sir Edward Coke, *Third Institute* (1641) 6.

[32] Paradoxically, UK criminal law in the mid-19th century recognised "regulatory criminal offences", where criminal liability could be imposed in the absence of intent: Sayre, n 29; Sayre, n 3.

[33] Desmond Manderson and Naomi Sharp, "Mandatory Sentences and the Constitution: Discretion, Responsibility and Judicial Process" (2000) 22 *Sydney Law Review* 585, 621 note "legislatures throughout the common law world had come to appreciate something of the gravest importance. On the one hand, sentencing discretion is a necessary element in the criminal justice system, and like a bubble of air, it will find its way to the surface one way or another … it is a lesson that was slowly but consistently learnt over the long course of English legal history."

At first, there is evident reluctance to do so, apparently mimicking the experience in the criminal law. Cases of the 17th century reflect judges making a sharp distinction between liability in criminal law, and liability in civil law. An example is *Lambert v Bessey*, where the court adopts strict liability in the civil sphere, but not the criminal:

> If a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum, nisi mens sit rea*.[34]

This distinction also appears in a speech by Sir Thomas Erskine[35] and in Bacon's *Maxims*.[36]

Cases of strict liability appear well into the 18th century.[37] As indicated above, that observation is tempered by the fact that, as noted by some experts, in the hands of the jury, torts apparently imposing strict liability actually involved, or may have involved, consideration of blame or fault. And this may have been occurring for many years while the liability for particular torts was supposedly "strict".

In any event, the kinds of distinctions made in criminal law discussed above began to be applied in the law of tort.[38] Pollock and Maitland explain the amount of compensation a victim received began depending on the circumstances of the defendant's actions, and whether they had been committed intentionally or unintentionally. In the former case, both *wer* and *wite* were paid; in the latter case, only *wer* was paid.[39] As indicated, this may have just formalised what had already been occurring in the jury room.

The development of an action for case, in contrast to the standard trespass action, also facilitated consideration of fault in resolving cases. While actions for trespass were typically considered independent of fault, actions on the case generally involved considerations of fault.[40] The form in which actions on the case were pleaded facilitated this, permitting more detail of the alleged incident to be explained.

B. Seventeenth to Nineteenth Century Development of the Law of Negligence

Again, links with developments of the law during this period with developments during Roman times are evident. As discussed above, at one point Roman law was focused on the injury suffered by the plaintiff, and essentially whether the defendant caused it. If they had, they were required to pay compensation. However, Roman law began to embrace the concept of *culpa*. By the time of the writing of Gaius in the second century AD, it had come to define civil liability:

> A person is understood to kill wrongfully when it occurs by his deliberate act or his fault. And loss caused without wrongfulness is not condemned by any other lex; hence a person who causes some loss without fault or deliberate intent, but by accident, is not punished.[41]

---

[34] *Lambert & Olliot v Bessey* (1679) T Raym 421; 83 ER 220; see similarly *Weaver v Ward* (1616) Hob 135; 80 ER 284, explaining if a person with mental illness killed another, they would escape liability in the criminal law, but would be liable in tort.

[35] "If the proprietor of a York coach, though asleep in his bed in that city, has a drunken servant on the box at London, who drives over my leg and breaks it, he is responsible to me in damages for the accident; but I cannot indict him as the criminal author of my misfortune – what distinction can be more obvious and simple?" (James Ridgway (ed), *The Speeches of the Honourable Sir Thomas Erskine* (1813) 208.

[36] Sir Francis Bacon, *Maxims of the Common Law* (1630) Reg 7: "in capital cases … the law will not punish in so high a degree, except the malice of the will and intention appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him who was the wrongdoer … if a man be hurt or maimed. … An action of trespass lieth, though it be done against the party's mind and will, and he shall be punished in the law, as deeply as if he had done it of malice … so if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof; but if they put out a man's eye, or do him like corporal hurt, he shall be punished in trespass."

[37] *Tenant v Goldwin* (1702) 2 Ld Raym 1089, 1092–1093; 92 ER 222, 224: "everyone must so use his own as not to do damage to another" (Holt CJ).

[38] Some argue cause and effect: "before the general principle of liability for harm could develop, civil liability had to be separated from criminal responsibility and compensation distinguished from punishment": Schrage, n 18, 13.

[39] Pollock and Maitland, n 12, 467.

[40] Ibbetson, n 9, 499.

[41] G 3.2.11; Ibbetson, n 9, 495: "for Gaius … culpa (in conjunction with dolus) had come wholly to displace injuria as the test of whether or not the person who brought about the harm should be liable under the lex."

Gaius's *Institutes* of the second century reflected the transformation of the civil law from a focus on the act to a focus on the actor, in terms of possible liability for causing another injury. These developments were reflected in developments in English case law, over a longer and later time. Before discussing this, some complications in recognising a "law of negligence" must be noted. First, many decisions were made by jurors, who obviously do not provide reasons. They may have been making decisions based on their understanding of negligence, including notions of fault and blame, but there is no record of it. It was not *formally* necessary to prove fault, but some have argued it was *in effect* necessary to obtain compensation from an early time.[42] Kaczorowski concludes that "lacking records of trial proceedings and jury deliberations, conclusive evidence supporting this view (that proof of fault was in fact required to obtain judgment) is non-existent, and hence the view itself will never advance beyond an unprovable hypothesis".[43]

Second, the issue of records more generally. Not all cases were reported, and the reporting is not always complete or accurate. Many matters were determined in local courts, not royal courts.[44] Based on a study of newspaper reports of cases, Oldham concluded the courts were recognising and deciding cases on principles of negligence earlier than the orthodox view would suggest. He cites 1789s *Ammon v Payne* and 1802s *Orde v Beaufoy* for the proposition judges at that time were already directing juries a defendant was not liable for injuries caused to another unless fault was shown.[45]

Third, the word "negligence" commonly appeared in the plaintiff's statement of claim, but not necessarily used as a legal term of art, or an independent cause of action; rather it was a synonym for carelessness, describing acts that might amount to other torts.[46] "Negligence" was sometimes, confusingly, used to describe circumstances where strict liability was imposed.[47] Care must be taken in seizing upon use of the word in earlier cases, without being clear as to the meaning intended when used.[48] It is an easy error to evaluate past cases with today's eyes, assuming the meaning we give to words today is that ascribed to them yesterday.

There is also the complication created by the writ of assumpsit. This was used when a plaintiff was alleging another person (the defendant) had breached an undertaking made to them. While there are obvious analogies with modern contract law, when assumpsit was used, the law did not clearly distinguish

[42] "The pleading requirements of trespass vi et armis may not accurately reflect the proofs that were required to win a jury verdict. Almost a century ago, Charles Wigmore and more recently John Baker and S.F.C. Milsom argued that as early as the sixteenth century, fault or negligence was a factual circumstance plaintiffs had to prove before juries would find defendants guilty": Robert Kaczorowski, "The Common-law Background of Nineteenth-century Tort Law" (1990) 51 *Ohio State Law Journal* 1127, 1169; John Wigmore, *Selected Essays on the Law of Torts* (Little, Brown, 1924) 66: "the evidence seems certain that the rationalization towards the line of present standards began at a much earlier time than has been supposed … there has never been a time, in English law, since (say) the early 1500s, when the defendant in an action for trespass was not allowed to appeal to some standard of blame or fault in addition to an beyond the mere question of his act having been voluntary;" Ibbetson, n 9, 478: "on the face of it, liability in trespass in the Middle Ages was strict; liability in case was more transparently fault-based."

[43] Kaczorowski, n 42, 1169–1170.

[44] Percy Winfield, "The History of Negligence in the Law of Torts" (1926) 42 *Law Quarterly Review* 184, 185.

[45] James Oldham, "The Law of Negligence as Reported in The Times 1785–1820" (2018) 36 *Law and History Review* 383, 390–391.

[46] It is described as a "pleader's adverb" by James Plunkett, "The Historical Foundations of the Duty of Care" (2015) 41(3) *Monash University Law Review* 716, 718. An example of a pleading referring to a defendant "wrongfully, negligently and improperly" doing a particular thing appears in *Vaughan v Menlove* (1837) 3 Bing NC 468, 469; 132 ER 490, 491.

[47] Schrage, n 18, 8; Baker, n 18, 48. Baker cites examples such as *Herbert v Pagett* (1622) 1 Lev 64; *Mors v Slue* (1671) 1 Vent 190; 86 ER 129 and apparent in the judgment of Holt CJ in *Lane v Cotton* (1701) 1 Salk 18. Baker concludes "in all these cases, the word 'neglect', 'negligent' and 'negligently' do not seem to have imported fault in the sense of carelessness, but rather the failure to discharge a strict responsibility"; Peter Birks agrees: Birks, n 21, 219.

[48] One example is *Dale v Hall* (1750) 1 Wils KB 281; 95 ER 619 where Lee CJ explains "everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God, or the King's enemies". As a result, evidence that the defendant had taken "all possible care" did not absolve him of liability (281, 619). This suggests the word "negligence" is not being used in the sense in which it is understood today. It actually reflects strict liability, which in modern parlance is in sharp contrast with negligence.

contract and tort. We can find in assumpsit actions aspects of what we today regard as tort.[49] Of course, notions of "assumption of responsibility" remain important to Australian tort law today in negligence,[50] and underpinned a leading United Kingdom negligent misstatement case.[51] Some argue the whole duty concept is explained by past connections with assumpsit. In other words, that it originally was when the parties were in a prior relationship where one had made an undertaking to another (usually contractual) that duties we now regard as tortious were first recognised, analogous to express undertakings, but considered as implied undertakings to take care in relation to acts (or omissions).[52] Later, it was extended to cases in which the parties were not in a prior relationship, significantly widening the potential scope of tort liability. In other words, some past cases which today we recognise as negligence cases may have been decided in the past based on assumpsit. It is similarly the case that many cases that today we would regard as negligence would have been decided as cases of trespass (at least, in the past, if the injury were direct rather than indirect),[53] or nuisance.[54] We will return to nuisance in the Part 2 of this article. This makes it a challenge to undergo historical analysis of the genesis of negligence as we understand it today, including the question of pinpointing time frames where development occurred.

That said, glimpses of negligence appear in *Weaver v Ward*,[55] where the plaintiff, a soldier, was accidentally injured by another soldier during horseplay. The defendant pleaded in defence it was an accident and he should not be held liable. The Court responded "no man shall be excused of a trespass … except it may be judged utterly without his fault". This suggests liability is fault-based.[56] Similarly, in 1676 in *Michell v Allestry*, the owner of a horse is deemed liable for injuries it caused when brought to a busy public place. This was because it was the defendant's "fault" to bring a wild animal to where mischief would likely be caused.[57] There were advantages for a plaintiff in bringing these actions in case rather than trespass, including costs and vicarious liability.[58] In any event, *Michell* clearly involved an indirect injury. Of course, as discussed above, it is possible juries had been taking into account fault for many years prior to this in determining liability for injuries. Proof is difficult. Cases like *Weaver* and *Michell* show it on the record in the 17th century.

Winfield has a different view. He sees these cases in the mould of *Rylands* strict liability not negligence and fault in the way we would consider those terms:

> One or two other cases on the borderland between commission and omission are perhaps referable to the germs of that very rationale strict liability for dangerous things which is now typified by the *Rylands v Fletcher* rule, and is independent of negligence, though subject to some half-dozen important qualifications. Men who handled deadly weapons, or who took unruly horses into public places, or who infuriated bulls, or let filth escape from privies, could no more complain if the law took a stern view of their carelessness in the seventeenth century than their descendants can at the present day.[59]

---

[49] Percy Winfield, "Duty in Tortious Negligence" (1934) 34 *Columbia Law Review* 41, 55; Kaczorowski, n 42, 1131: "the theory of liability in assumpsit originally sounded in tort because assumpsit generally was brought for injuries caused by the negligent or careless performance of undertakings … as early as 1374, a defendant's liability in assumpsit was predicated on his failure to act with the care or skill the community expected of him."

[50] *Hill v Van Erp* (1997) 188 CLR 159.

[51] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[52] Obviously this limited the liability of the one owing the duty – so in *Winterbottom v Wright* (1842) 10 M&W 109; 152 ER 402 the Court rejected a claim against a mail delivery contractor for injuries he sustained while driving a coach. The plaintiff's contract was with a sub-contractor, not the defendant.

[53] The requirement that trespass applied to direct harm, while case applied to indirect harm, was rejected in *Williams v Holland* (1833) 10 Bing 112, 118; 131 ER 848, 850.

[54] Winfield, n 49, 48.

[55] *Weaver v Ward* (1616) Hob 134; 80 ER 284.

[56] See also *Gibbons v Pepper* (1695) 1 Ld Raym 38; 91 ER 922.

[57] *Mitchil v Alestree* (1676) 1 Vent 295; 86 ER 190.

[58] Kaczorowski, n 42, 1177.

[59] Winfield, n 44, 193–194.

In the footnote accompanying this quote, Winfield cites *Weaver v Ward*, stating:

> [T]he case is instructive as showing that the Court thought that negligence included everything that cannot be reckoned as inevitable accident: the latter seems to have been proved in (citing various cases, including *Mitchel v Alestree*).[60]

Thus some see *Weaver* in the 17th century as the start of recognition of the negligence action, but Winfield cautions that despite the terminology, those cases are in fact like strict liability, and "negligence" was being used in a different sense then than our understanding today. He says that by the mid-18th century those engaged in a common calling, such as attorneys, surgeons or apothecaries, could be held liable in negligence as an independent action.[61] *Coggs v Bernard* in 1703 is often considered a landmark in development of negligence law, though it concerned bailment. Holt CJ referred to the standard of care required, borrowing from Roman concepts of culpa. That case was discussed by Jones in his *Essay on the Law of Bailments*, significant in later development of standardised duty of care and negligence principles.[62]

Though Winfield stated "one can no more seize upon any exact moment for the birth of the tort (of negligence) than one can paint a chameleon",[63] most scholars place the early to mid-19th century as the birth date for the general tort of negligence,[64] despite the cases just cited. The timing is important, because it gives us clues as to the rationale. Some have used the fact it occurred, or accelerated, in the early 19th century at a time when the industrial revolution was occurring in the United Kingdom as indicative, in suggesting a cause and effect relationship:

> The principle eliminating the unintended trespass as a substantive tort and establishing a consistent theory of liability based on fault was developed to confer on industrial enterprise an immunity from liability for accidental harm to others.[65]

Others argue that moral, rather than economic, considerations explain the shift from strict liability to fault-based standards.[66]

A clear shift away from strict liability is evident in mid-to-late 19th century cases. For example, in *Holmes v Mather*[67] and *Stanley v Powell*,[68] the court's view is that where a plaintiff sues a defendant for personal injuries caused by the defendant, the plaintiff can only succeed if they can show either the actions were wilful (trespass) or negligent (negligence). Particular situations in which a duty was owed were identified meticulously. An 1889 book devoted 700+ pages to describing circumstances where a duty was owed.[69] The notion the defendant was liable merely because they caused injury to the plaintiff was becoming anomalous. Obviously, the tort of negligence would substantially gain in prominence,

[60] Winfield, n 44, 194.

[61] Winfield, n 44, 187.

[62] Ibbetson, n 9, 507–508.

[63] Winfield, n 49; having said that, he says "if we select the period from about 1825 onwards … we are not far out":Winfield, n 44, 195.

[64] Wigmore, n 16, 441, 454; Winfield, n 44; Gregory, n 23; G Fletcher, "Fairness and Utility in Tort Theory" (1972) 83 *Harvard Law Review* 537; Ibbetson, n 9, 478. Ibbetson cites the decision in *Williams v Holland* (1833) 2 LJCP (NS) 190; 131 ER 848 as establishing the substantive tort of negligence. In *Vaughan v Menlove* (1837) 3 Bing NC 468 (Tindal CJ, Park and Vaughan JJ); 132 ER 490 all refer to the duty of an owner of property to enjoy the property so as not to injure that of another, in a precursor to later, broader statements about duty of care.

[65] Gregory, n 23, 382.

[66] Richard Epstein, "A Theory of Strict Liability" (1973) 2 *Journal of Legal Studies* 151, 152–153: "for the most part the impulses that supported the thrust towards a system of negligence liability were grounded on moral rather than explicitly economic considerations."

[67] *Holmes v Mather* (1874–1875) LR 10 Ex 261.

[68] *Stanley v Powell* [1891] 1 QB 86.

[69] Thomas Beven, *Principles of the Law of Negligence* (1889), cited in Plunkett, n 46, 728.

given general acceptance by Brett MR in *Heaven v Pender*,[70] before reaching its apogee in *Donoghue v Stevenson*.[71]

This shift is also evident in some of the nuisance cases of the time. Principles of negligence entered into the waters of nuisance. The case of *Hole v Barlow*[72] involved a plaintiff bringing action against a defendant for the burning of bricks on the latter's property near that of the plaintiff. Willes J stated that although individuals had a right to quiet enjoyment of their property, this was subject to the use by others of their land, at least to the extent it was "conducted in a reasonable and proper manner, and in a reasonable and proper place". Notions of negligence were appearing in ostensible cases of nuisance.[73]

Another example is *Tarry v Ashton*.[74] There the plaintiff was walking along a public street, when a lamp attached to the defendant's premises fell on her, causing her injury. The owner had been aware of the deteriorating condition of the lamp, and had engaged repairers shortly prior to the accident. The jury found the defendant was not guilty of any personal negligence. While all members of the court found in favour of the plaintiff on the basis of public nuisance, different views emerged from the court as to the content of the defendant's obligations. Thus, Lush J stated that "a person who puts up or continues a lamp in that position, puts the public safety in peril, and it is his duty to keep it in such a state as not to be dangerous".[75] Quain J agreed that the owner of a lamp which projected onto a public thoroughfare was required to keep it in such a State so as not to injure the public.[76] My reading of these sentiments is that they impose a strict liability upon the defendant.

The position of Blackburn J was narrower. He seemed to require some fault on the part of the defendant. In dicta comments he said:

> If there were a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrongdoer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt … whether or not the occupier would be liable. But if he did know of the defect, and neglect to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down.[77]

As Newark observed, the position of Blackburn J puts a nuisance claim very close to a negligence one, involving questions of fault, while the position of Lush and Quain JJ accords more with strict liability principles in the context of a private nuisance.[78] Subsequent cases would apparently vindicate the position of Blackburn J,[79] though as will be seen in the next section, claims that nuisance *is* and/or traditionally *was* a tort of strict liability continue.

---

[70] *Heaven v Pender* (1883) 11 QBD 503.

[71] *Donoghue v Stevenson* [1932] AC 562.

[72] *Hole v Barlow* (1858) 4 CB NS 334, 345; 140 ER 1113, 1118.

[73] FH Newark, "The Boundaries of Nuisance" (1949) 65 *Law Quarterly Review* 480, 487: "there was a tendency for cross-infection to take place, and notions of negligence began to make an appearance in the realm of nuisance proper. We note an endeavour to introduce the element of reasonableness in *Hole v Barlow*."

[74] *Tarry v Ashton* (1876) 1 QBD 314.

[75] *Tarry v Ashton* (1876) 1 QBD 314, 320.

[76] *Tarry v Ashton* (1876) 1 QBD 314, 320.

[77] *Tarry v Ashton* (1876) 1 QBD 314, 319.

[78] Newark, n 73, 486–487.

[79] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 897: "the occupier or owner is not an insurer; there must be something more than the mere harm done to the neighbour's property to make the party responsible … some degree of personal responsibility is required" (Lord Atkin); 904 "an occupier is not prima facie responsible for an nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability" (Lord Wright); 920, noting the defendants "ought to have had knowledge of the danger, and could have prevented the danger if they had acted reasonably" (Lord Porter); *Caminer v Northern & London Investment Trust Ltd* [1951] AC 88, 99 where Lord Porter concluded the defendants "were free from blame whether the case against them is framed in negligence or nuisance", and Lord Oaksey (104)

Another indicia of this growing influence of principles of negligence, apart from their use in cases being decided on the ostensible basis of nuisance, is that cases containing facts that would suggest a classic instance of nuisance are in fact decided on the basis of negligence, with no mention of nuisance at all. A prime example here is *Vaughan v Menlove*,[80] involving hay on the defendant's land catching fire, and subsequently damaging the plaintiff's house nearby. One would think this would be a straightforward case of private nuisance. However, the concept is not mentioned. Instead, the jury is asked whether the defendant is guilty of negligence. The court cites the longstanding principles that one must enjoy their property so as not to disturb others, but adds that "the care taken by the prudent man has always been the rule laid down",[81] though this concept is conspicuously absent from cases such as *Tenant v Goldwin*.

We have seen the historical shift in general terms away from notions of strict liability, in both of what today we would recognise as criminal law and civil law, to a system based on fault and culpability. These are generally seen as more sophisticated, in permitting decision-makers to consider all of the circumstances of the wrongdoing. The experience of the law was that harsh, inflexible rules such as those involving strict liability in the civil law context, like mandatory sentencing or blanket criminal liability without regard to intent in the criminal law context, did not permit the decision-makers to do justice. Decision-makers found temporary ways around these problems, by secretly taking into account fault when the express law did not contemplate it, or by acquitting accused persons who were very likely technically guilty of the offence with which they had been charged.

But in the longer term, they led to change in legal principle. Fault-based doctrines grew in prominence. The law belatedly recognised that flexibility in application of the law, by considering the particular circumstances of events and culpability as opposed to fixed liability rules regardless of fault, was absolutely necessary in order to achieve justice. However, this recognition was difficult to implement in terms of change to the law. While the exponential growth in negligence doctrine was one response, somewhat paradoxically many of the traditional strict liability rules in the law of tort survived this shift in the common law, risking incoherence in the common law. That law now apparently embraced both fault and no fault-based liability, in circumstances where the rationale for imposition of one or the other was unclear. It is to potential justification for the imposition of strict liability that the article now turns.

III. Strict Liability

A. Continued Examples of Strict Liability

Interestingly, despite these developments up to and including the 19th century, strict liability did not "go gently into that good night". On the contrary, strict liability appeared to reach its zenith, or nadir, depending on one's perspective, in the 1865 case of *Rylands*.[82] The case involved escape of water from a reservoir constructed by contractors on the defendant's land. The water escaped onto the plaintiff's neighbouring property, damaging their mine. The plaintiff sued the defendant for compensation. All three heads of their claim alleged it was the defendant's *negligence* that damaged their property.

A unanimous Court of Exchequer Chamber found for the plaintiff. However, this was *not* based on negligence. It found the defendants had not been negligent in being unaware of latent defects in their

and Lord Reid (104–105) both noted the defendant's duty was to act as "ordinary prudent landholders" would in respect of a tree of theirs overhanging a road. In *British Road Services Ltd v Slater* [1964] 1 WLR 498, Lord Parker CJ noted that "I feel that the present tendency of the law is not only to move further and further away from absolute liability but more and more to assimilate nuisance and negligence".

[80] *Vaughan v Menlove* (1837) Bing NC 468; 132 ER 490.

[81] *Vaughan v Menlove* (1837) Bing NC 468, 475; 132 ER 490, 493 (Tindal CJ, Park J concurring); Bing NC 469, 477; 132 ER 490, 494 (Vaughan J agreed that the conduct of the prudent person had always been the criterion for the jury, but it was "not confined" to them).

[82] *Rylands v Fletcher* (1866) LR 1 Ex 265 (Court of Appeal). It has been described as a throwback to the "medieval" period of strict liability: GHL Fridman, "The Rise and Fall of Rylands v Fletcher" (1956) 34 *Canadian Bar Review* 810, 811. AWB Simpson, "Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v Fletcher" (1984) 13 *Journal of Legal Studies* 209, 214 calls it an "atavistic decision, a throwback or a survival from more primitive times".

soil, and had selected competent engineers and contractors to construct the reservoir. The defendants were "free from all blame".[83] However, the Court noted in the next paragraph that "they must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible".[84] The basis of this statement is not immediately clear. Vicarious liability was irrelevant, because those who constructed the reservoir were contractors, not employees. It is not clear why the court did not accept that sometimes, loss is not compensable because it was not anyone's fault.[85] It seemed determined to provide the plaintiff a remedy. It did so on the basis of strict liability, assimilating this situation to previous cases finding an owner of animals strictly liable for damage caused by it:

> We think that the true rule of law is, that, the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God … the general rule … seems on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property … the case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape.[86]

The Court attempted to distinguish this type of liability from liability for accidents occurring on highways, roads or the sea. This was apparently based on volenti – highway users were aware of the "inevitable risk" associated with such use, in a way that an owner of property was unaware, according to the court.[87] This is unconvincing. Only two judges in the House of Lords heard an appeal; both dismissed it. The words of one, Lord Cranworth, reflect classic throwback to the earliest cases of civil liability. Eschewing the then nascent negligence principle or a duty-based approach to liability, he claimed:

> In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage … and the doctrine is founded on good sense. For when one person, in managing his own affairs, however innocently, damages to another, it is obviously only just that he should be the party to suffer.[88]

Over time this doctrine would not fare well, hopelessly confused by the meaning of concepts like "not naturally there", "likely to do mischief", and "escape". It would subsequently be crimped and limited in the United Kingdom, and its broad language speaking of a generalised principle of liability denied and

[83] *Rylands v Fletcher* (1866) LR 1 Ex 265, 278 (Blackburn J, for the Exchequer Chamber).

[84] *Rylands v Fletcher* (1866) LR 1 Ex 265, 279.

[85] Just sixteen years later in 1881, Holmes claimed "the general principle of our law is that loss from accident must lie where it falls": Holmes, n 3, 59.

[86] *Rylands v Fletcher* (1866) LR 1 Ex 265, 279–280 (Blackburn J, for Willes Keating Mellor Montague Smith and Lush JJ).

[87] *Rylands v Fletcher* (1866) LR 1 Ex 265, 286–287.

[88] *Rylands v Fletcher* (1868) LR 3 HL 330, 341. Both justices agreed with the Court of Appeal. Of course, not all agree with the "justice" of this outcome: Wendel Holmes, n 3, 60: "the undertaking to distribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but … to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbour against the consequences than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning."

scotched.[89] It would eventually be reinterpreted as a sub-rule of private nuisance in its home jurisdiction.[90] In Australia, it would be interred in 1994.[91] Calls persist for the same fate in the United Kingdom.[92] In contrast, it became accepted in the United States, reflected in the Torts *Restatements*.[93]

Liability for escape of "dangerous things" from one's land was not the only instance of strict liability. It existed in vicarious liability, in that if the doctrine applied, an employer would be held liable for actions or omissions of their employee, though the employer was not personally to blame.[94] Similarly, it applied to particular types of business, for example common carriers (for cargo)[95] and innkeepers.[96] Strict liability applied to the owner of wild animals, and those of generally tame class, with known dangerous propensities.[97] Others include so-called "cattle trespass",[98] fire[99] and, maybe, firearms.[100] In addition, the non-delegable duty, or duty to ensure care is taken by others, was recognised.[101] It was generally considered strict, in that a defendant could be liable for its breach, though they personally are not at fault.[102]

Liability for nuisance was traditionally seen as strict.[103] The Court of Appeal stated so in *Rapier v London Tramways Co*:[104] "at common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence

[89] *Read v J Lyons & Co Ltd* [1947] AC 156, 165–166 (Viscount Simon), 172 (Lord Macmillan), 182 (Lord Uthwatt).

[90] *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264.

[91] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

[92] S Tofaris, "Rylands v Fletcher Restricted Further" (2013) 72 *Cambridge Law Journal* 11, 14; Robert Stevens, "Non-delegable Duties and Vicarious Liability" in J Neyers, E Chamberlain and S Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007) 342.

[93] American Law Institute, *Restatement of Torts* (1938) § 519; American Law Institute, *Restatement (Second) of Torts* (1977) §§ 519–520; American Law Institute, *Restatement (Third) of Torts* (2009) § 20.

[94] Of course, the action assumes the employee has committed a legally recognised wrong, and to that extent, might involve fault.

[95] *Coggs v Bernard* (1703) 2 Ld Raym 909, 918; 92 ER 107, 112 (Holt CJ)("this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons who had any dealings with them, by combining with thieves and yet doing it in a clandestine manner as would not be possible to be discovered"; *Forward v Pittard* (1785) 1 TR 27, 33; 99 ER 953, 956: "it appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence, he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies … the true reason is for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil" (Lord Mansfield).

[96] *Calye's Case* (1583) 8 Co Rep 32; 77 ER 520; Winfield, n 49, 44–45 notes the liability of innkeepers and common carriers was "extremely ancient" and had always been strict in nature, given the extent to which customers were effectively required to place trust in them, and the "great temptations" which their occupation held; Winfield, n 44, 186. This philosophy appears in Holt CJ in *Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107. Later common carrier strict liability was placed on a broader policy footing, that "it would naturally lead to make carriers more careful in general": *Proprietors of the Trent Navigation v Ward* (1785) 3 Esp 127, 131; 170 ER 562, 563–564 (Lord Ashurst). Others argue strict liability of common carriers was only established in the late 16th–early 17th century: Kaczorowski, n 42, 1129–1130, citing cases such as *Rich v Kneeland* (1613) Hobart 18; 79 ER 282.

[97] *Beneyt v Brokkere* (1348); *Cox v Burbidge* (1863) 13 CB NS 430; 143 ER 171; *Brackenborough v Spalding Urban DC* [1942] AC 310.

[98] *Anon* (1480) Mich 20 Edw IV, fo 10, pl 10 (Bryan CJ).

[99] *Beaulieu v Finglam* (1401) YB Pas 2 Hen IV, fo 18, pl 6; *Nichols v Marsland* (1874–1875) LR 10 Ex 255, 260; Percy Winfield, "The Myth of Absolute Liability" (1926) 42 *Law Quarterly Review* 37, 46–50.

[100] Frederick Pollock, "Duties of Insuring Safety: The Rule in Rylands v Fletcher" (1996) 2 *Law Quarterly Review* 52, 62.

[101] *Quarman v Burnett* (1840) 6 M&W 499; 151 ER 509; *Woodland v Swimming Teachers Association* [2014] AC 537; [2013] UKSC 66; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

[102] Jonathan Morgan, "Liability for Independent Contractors in Contract and Tort: Duties to Ensure That Care Is Taken" (2015) 74 *Cambridge Law Journal* 109. Beuermann has suggested "conferred authority strict liability" for child sexual abuse claims: Christine Beuermann, "Conferred Authority Strict Liability and Institutional Child Sexual Abuse" (2015) 37 *Sydney Law Review* 113.

[103] *Tarry v Ashton* [1876] 1 QBD 314, 320 (Lush and Quain JJ), *contra* 319 (Blackburn J).

[104] *Rapier v London Tramways Co* [1893] 2 Ch 588.

on my part to say, and to prove, that I have taken all reasonable care to prevent it".[105] Two Court of Appeal decisions in 1944 apparently took inconsistent positions on the question.[106] The traditional strictness of nuisance was then confirmed shortly afterwards by Lord Simonds in *Read v Lyons*,[107] and has been reconfirmed in more recent decisions of the House of Lords.[108] It is reflected in academic discourse on nuisance.[109] This will be discussed in more detail in Part 2 of the article.

B. Justifications for Strict Liability

While it is easy to point to continued application of apparently strict liability in the law from the 19th century to present day, it is much more difficult to rationalise it. It is difficult to decipher a unifying rationale that can satisfactorily explain the circumstances where law imposes (or should impose) strict liability upon a defendant.[110] It is natural to want to do so, in terms of order and coherence in the law. This is arguably what Blackburn J unsuccessfully sought to do in *Rylands*. It was the genius of the judgment of Brett MR in *Heaven v Pender*, and of Lord Atkin in *Donoghue v Stevenson*, to be able to do so for the tort of negligence. It is also a messy exercise, because some think of the leading strict liability decision *Rylands*, and seek to articulate a general proposition from it. One difficulty with such attempts is that, in other contexts, strict liability existed well before it, and in factual scenarios very different from *Rylands*. As Pollock observed, "a rule casting the responsibility of an insurer on innocent persons is a hard rule, though it may be a just one; and it needs to be maintained by very strong evidence, or on very clear grounds of policy".[111] Does such exist?

Several theories have been propounded. As discussed earlier, the suggested rationale for imposition of strict liability upon common carriers (cargo) and innkeepers was the trust individuals necessarily placed in them. However, this is not an acceptable basis to justify strict liability there, but not elsewhere. The liability of a common carrier *to passengers* was not strict[112] – it is difficult to argue someone who uses a common carrier to transport their luggage necessarily places a high degree of trust in that carrier to carry their goods safely, but the same person who uses the common carrier to transport their person does not. Thus, "trust" cannot explain imposition of strict liability in such a case. Similarly, it is hard to argue an innkeeper should be strictly liable as an effective insurer for losses caused to their short-term guests, based again on trust and reliance, when similar strict liability obligations do not apply at common law to property leased long term to a tenant. If anything, a long-term tenant is more reliant on the property owner in terms of safety of premises etc than a short-term one. Yet strict liability was confined to the innkeeper. These distinctions do not survive scrutiny.

---

[105] *Rapier v London Tramways Co* [1893] 2 Ch 588, 599–600 (Lindley LJ, with whom Bowen and Kay LLJ agreed).

[106] Compare, with somewhat similar facts, *Ware v Garston Haulage Co Ltd* [1944] KB 30, 31: "if anything is placed on the highway which is likely to cause an accident through being an obstruction to those who are using the highway on their lawful occasions … and an accident results, there is an actionable nuisance" (Scott LJ, with whom Mackinnon and Goddar LLJ agreed)(CA), and *Maitland v Raisbeck and Hewitt* [1944] KB 689, 691–692: "every person who uses the highway must exercise due care, but he has a right to use the highway, and if something happens to him which, in fact, causes an obstruction to the highway, but is in no way referable to his fault, it is wrong to suppose that ipso facto and immediately a nuisance is created … a nuisance will obviously be created if he allows the obstruction to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot turn it into a nuisance" (Lord Greene MR, with whom Mackinnon and Luxmoore LLJ agreed).

[107] *Read v J Lyons & Co Ltd* [1947] AC 156, 183 (Lord Simonds): "if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict."

[108] *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 299: "liability for nuisance has generally been regarded as strict" (Lord Goff, for the House); *Hunter v Canary Wharf Ltd* [1997] AC 655, 724: "the tort of nuisance is a tort of strict liability in the sense that it is no defence to say that the defendant took all reasonable care to prevent it" (Lord Hope).

[109] Newark, n 73, 486–487.

[110] Albert Ehrenzweig, "Negligence without Fault" (1966) 54 *California Law Review* 1422, 1455; Pollock, n 100, 52.

[111] Pollock, n 100, 55.

[112] Ehrenzweig, n 110, 1430.

Sometimes it was sought to justify the imposition of strict liability based on difficulties that the plaintiff might otherwise have in proving fault.[113] To some extent, this argument persists today.[114] I generally do not favour legal rules based on the ease or otherwise of proving particular matters. Such arguments are often used to cast legal onuses on defendants in criminal matters, for instance, in terms with which I object.[115]

Regarding *Rylands* and its apparent strong reassertion of the "action at peril" principle, at least in the context of escape from land, but for some, intended to be of broader application,[116] it has been rationalised as reflecting current concern at the time with dangers of failing water reservoirs. Parliament had recognised this and began legislating to make reservoir owners legally responsible for failures. There had been multiple deaths from such incidents.[117] Thus, *Rylands* may be explicable as a response to a pressing social need at the time. One could also point to the explosive growth of industry in the industrial revolution of the early 19th century, with the increased attendant risks to others. However, this explanation cannot take us very far. Such growth evidently did not lead to development of strict liability at common law for defective products, for instance, that might have been produced during the boom. It was the negligence principle that would (eventually) deal with this issue comprehensively, and not definitively until 1932. Of course, judges in *Rylands* had an "imperfect sense of (the) reach and power"[118] of the tort of negligence at the time.

Some seek to explain *Rylands* on a legal realism view that the judges represented the views of holders of estates, in rebelling against the consequences of increased industrialisation on their estates. It is said that judges were members of the landed gentry seeking to look after their own.[119] This is said to explain imposition of strict liability on landowners from which something dangerous escapes. However, this is just conjecture, given the dearth of express passages in the judgment reflecting such thought.[120] Others observe that English law was always highly protective of land interests, more so than interests in bodily integrity,[121] and *Rylands* is merely reassertion of this, without broader implications for strict liability in law.[122]

---

[113] *Lane v Cotton* 1 Salkeld 143; 91 ER 133 (year unknown).

[114] John Murphy, "The Merits of Rylands v Fletcher" (2004) 24(4) *Oxford Journal of Legal Studies* 643, 659–660: "to allow the rule in *Rylands v Fletcher* to be swallowed up by the law of negligence would mean that in some cases claimants would face insurmountable evidentiary burdens, burdens, indeed, that may be thought inappropriate as a matter of police and justice."

[115] Anthony Gray, *Presumption of Innocence in Peril: A Comparative Critical Perspective* (Lexington Books, 2017) 52–53.

[116] Pollock, n 100, 56. Pollock criticises *Rylands* for inadequately articulating the evidence or policy reasons for such a broad principle (55); AWB Simpson, "Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v Fletcher" (1984) 13 *Journal of Legal Studies* 209, 213: "(Blackburn J) was quite clearly contending that the basic common law principle of tortious liability was liability without fault." In contrast, not long after *Rylands*, in a case involving the liability of a ship owner for non-negligent damage done to a dock, Blackburn J denied the imposition of strict liability on the owner, emphasising his liability "at common law" would be based at fault: *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 766–767. Recall that the case involved application of legislation specifically stating an owner would be liable for such injuries in cases of wilful conduct or negligence. Thus, it is not clear whether Blackburn J believed in fault-based liability as the general approach, with *Rylands* as an exception involving escapes from land, whether he changed his mind as to the general rule in the time between 1865 and 1877, shifting from strict liability to negligence, or whether he was guided by legislation. As indicated, the legislation in *River Wear* seemingly required wilful act or negligence for liability, while the legislation applicable to *Rylands* type matters imposed strict liability on the property owner. He said the decision in each case was based on the "common law", but it is possible his interpretation of the common law was influenced by his view of the relevant legislation.

[117] Simpson, n 116. He discusses the Bill introduced to Parliament to make reservoir owners strictly liable for escaping water at the time *Rylands* was being heard in the Court of Exchequer (229).

[118] Ezra Ripley Thayer, "Liability without Fault" (1916) 29 *Harvard Law Review* 801, 805.

[119] Francis Bohlen, "Rule in Rylands v Fletcher" (1911) 59 *University of Pennsylvania Law Review* 298, 373, 423.

[120] Robert Thomas Molloy, "Fletcher v Rylands – A Reexamination of Juristic Origins" (1942) 9 *University of Chicago Law Review* 266.

[121] Fridman, n 82, 813.

[122] Molloy, n 120, 292.

Often it is argued that strict liability applies (and should apply) when a person is engaged in "dangerous" or "extra-hazardous"[123] activity. This is the theory with most scholarly support, adopted by Pollock[124] and Leflar.[125] The precise source of the suggestion is unknown. Spanish natural lawyer Molina had suggested a person engaged in dangerous action had thereby implicitly promised to compensate anyone injured by it.[126] However, this is difficult to maintain. Of course, there would be significant argument about what is considered "dangerous", "ultra-hazardous" etc.[127] This has been seen in endless debate in the *Rylands* context about what was something "liable to do mischief it is escapes".

The law of negligence would clearly take into account the nature of the defendant's activities in assessing the standard of care imposed. If an activity were dangerous, the defendant engaging in it would need to do relatively more to meet their duty obligations to others. One fact regularly taken into account in determining the standard of care owed is the seriousness of likely injury. This is analogous to the concept of danger. Thus, although this concept enjoys most support as an explanation for the imposition of strict liability, it still does not adequately explain why the fact of dangerousness does or should lead to special rules of strict liability.

Jansen, writing of German law where strict liability is more prevalent, notes examples where there is strict liability for activities that are not dangerous; alternatively, there are dangerous activities where strict liability is not applied.[128] It is of little consolation that incoherence is not confined to the common law.

Roscoe Pound made this observation:

> There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice, who can bear the loss, and hence to shift the loss by creating liability where there has been no fault.[129]

On the other hand, as Cane says, "the fact that someone could easily absorb a loss does not justify the conclusion that that person ought to be required by the law to absorb it".[130] Further, it is not generally considered legitimate legal reasoning to decide disputes based on which of the parties had insurance.[131]

---

[123] For example, American Law Institute, *Restatement (Second) Law of Torts* (1965) § 519: "one who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm"; the American Law Institute, *Restatement (Third) of Torts* (2009) refers to strict liability for activity "not of common usage which creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors" (§ 20(a) and (b)).

[124] Frederick Pollock, *Essays in Jurisprudence and Ethics* (1882) 122: "there seems to be this common point in all of them (cases of strict liability), that a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours."

[125] Leflar, n 3, 573 claiming the judges "agreed that some types of activity were so dangerous that ordinary care, or even higher degrees of care than ordinary, could not with any assurance guard innocent persons from harm, yet these activities were so necessary or desirable in a civil society … that they should not be prohibited … negligence could not easily be charged to (the entrepreneur) … (courts) concluded generally that if an activity were so ultra-hazardous that normal standards of care could not guard against normal injuries from it, and at the same time not so common in occurrence that people were accustomed to its risks in everyday life, absolute (sic) liability would be imposed for injuries caused by it." This view was endorsed by Judge Posner in *Indiana Harbor Belt Railroad v American Cyanamid Co*, 916 F 2d 1174, 1177 (1990).

[126] Jansen, n 4, , 452.

[127] Peter Cane, "The Changing Fortunes of Rylands v Fletcher" (1994) 24 *University of Western Australia Law Review* 237, 237 refers to the difficulties in defining such concepts, rejecting their use as unattractive; the Law Commission was similarly unimpressed: *Report of the Law Commission on Civil Liability for Dangerous Things and Activities* (1970) (noting the uncertainty of application of the concept), noted by Lord Goff, with whom all Lords agreed, in *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 305; Nolan, n 21, 448.

[128] Jansen, n 4.

[129] Pound, n 3, 223.

[130] Cane, n 127, 243; *Cox v Ministry of Justice* [2016] AC 660, 669; [2016] UKSC 10 "the mere possession of wealth is not in itself a ground for imposing liability" (Lord Reed, for the Court).

[131] *Cox v Ministry of Justice* [2016] AC 660, 669; [2016] UKSC 10 (Lord Reed, for the Court); Compare *Woodland v Swimming Teachers Association* [2014] AC 537, 590; [2013] UKSC 66 (Baroness Hall, with whom Lord Clarke, Lord Wilson and Lord Toulson agreed).

Law and economics scholars have sought to justify the imposition of strict liability.[132] Calabresi and Hirschoff claim that it is appropriate to impose strict liability upon a defendant whenever they were in a better position than the plaintiff to weigh up the difference between expected costs of avoiding the accident, and expected costs of the accident occurring.[133] They not only claim this is the appropriate rule, they claim that this was the underlying basis of strict liability decisions like *Rylands*.[134] Shavell claims that negligence rules are inefficient, because they ignore decisions defendants make about "activity levels", merely requiring the exercise of reasonable care, thus leading to defendants producing "too much" of their product or service. He favours strict liability, because it causes would-be defendants to consider activity levels, in a way that is more economically efficient in terms of resource allocation.[135] There is little sign of judges adopting these arguments in assigning liability in torts cases. They make brave assumptions about availability of the kind of information needed to make these assessments.

The rationale for strict liability is weak. No unifying rationale can explain all instances of strict liability in the law. In itself, this is a weakness. In relation to rationales said to justify some instances, one is the vulnerability of the plaintiff and the extent to which they relied on the defendant. This is hardly justification for imposing strict liability, since the High Court has specifically found these factors will help determine whether a duty is owed in negligence.[136] Next, it is said strict liability is justified because, otherwise, it can be difficult for a plaintiff to prove their case. While these difficulties may be acknowledged in some cases, the law for many centuries has maintained the position it is the one accusing another of wrongdoing who must prove their case. The default position is for the law to do nothing. We know sometimes this means wrongdoers are not called to account, but we accept that, because our abhorrence of punishing the innocent is stronger. This applies in both the criminal and civil context. We mess with burdens of proof at our peril.

The concept of "dangerousness" or "ultra-hazardous" activity is ill-suited to bear the responsibility of justifying imposition of strict liability. These concepts are ill-defined. It is not clear why existing negligence principles cannot already take into account the relative dangerousness of an activity in determining the relevant standard. Nothing about dangerousness warrants imposition of a completely different liability regime. Moreover, the efforts of economists to convince courts of the supposed economic rationale for imposing strict liability have been ignored by most courts. Claims that *Rylands* was decided on a law and economics basis are, frankly, disingenuous. Economics models make unrealistic assumptions, for instance about the ability of anyone to assess the "expected costs" of an accident, or which party is apparently better able to "spread the risk", presumably by insurance. We generally do not frame legal rules based on assumptions about insurance or "deep pockets"; we should not start now.[137]

In summary, none of the claimed justifications for the imposition of strict liability are convincing.

I have considered the implications of my views for some areas of strict liability in tort law, including vicarious liability, elsewhere.[138] In Part 2 of this article, to be published in a forthcoming volume, I focus on an application of them to the tort of private nuisance. Of course, there is always the option, where a legislature wishes to impose strict liability upon a defendant, for example in the environmental context, to do so with legislation.

[132] Richard Posner, "Strict Liability: A Comment" (1973) 2 *Journal of Legal Studies* 205.

[133] Guido Calabresi and Jon Hirschoff, "Toward a Test for Strict Liability in Torts" (1972) 81 *Yale Law Journal* 1055, 1060.

[134] Calabresi and HIrschoff, n 133, 1066.

[135] Steven Shavell, "Strict Liability versus Negligence" (1980) 9 *Journal of Legal Studies* 1, 2.

[136] *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 194 (Gleeson CJ), 225 (McHugh J), 328 (Callinan J).

[137] Cane, n 127, 243: "the limits and defects of tort law as a compensation mechanism are too well-known to need discussion here … the fact that someone could easily absorb a loss does not justify the conclusion that the person ought to be required by the law to absorb it. If we are to make sense of tort law we must treat if primarily as a system of norms of personal responsibility."

[138] Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018).