

Common Law Reasoning and the Foundations of Modern Private Law

MICHAEL LOBBAN⁺

Introduction

During the century and a half after the writing of William Blackstone's *Commentaries on the Laws of England* (1765–9), the common law of obligations was transformed from a system which the modern lawyer would find strange and unfamiliar to one which seems largely to speak his own language. A number of factors lie behind this transformation. Within the legal world, this era saw the conversion into questions of law of a large number of matters which had hitherto been treated as ones of fact to be left to juries.¹ At the same time, there was a transformation in legal literature, as treatise writers sought to draw principled maps of the common law which would show its doctrines to be coherent and consistent.² Outside the courtroom, the century after 1750 witnessed massive population growth coupled with rapid urbanisation, the development of new industrial and commercial pursuits, and the rise of increasingly integrated global markets. This meant that when litigants — who had largely avoided the courts in the

⁺ Professor of Legal History, Queen Mary, University of London. This is a slightly revised version of the keynote address I gave to the annual conference of the Australian Society of Legal Philosophy at the University of Auckland in 2006. I am grateful to the Society for its invitation, and to the University of Auckland for appointing me a Hood Foundation Distinguished Visitor. I am also grateful the British Academy for the award of a Research Readership, during the tenure of which I undertook much of the research used in this article. It will be appearing at greater length in my contribution to the Victorian volumes of the *New Oxford History of the Laws of England*.

¹ The beginnings of this development may be linked to the practice of lawyers during the lean years of the mid eighteenth century trough in litigation of spinning out their work to maintain their incomes. See David Lemmings, *Professors of the Law: Barristers and Legal Culture in the Eighteenth Century* (2000).

² See A W B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632–79; Michael Lobban, 'The English Legal Treatise and English Law in the Eighteenth Century' in S Dauchy, J Monballyu and A Wijffels (eds), *Auctoritates* (1997) vol XIII, 69–88.

mid eighteenth century³ — came flooding back to the courts from the last decade of the eighteenth century, courts were presented with kinds of questions they had not encountered before.

In this context, common lawyers looked to find rules to guide the conduct of the public and the decisions of judges. It was an innovative pursuit. For the early modern common lawyer, the law of obligations was made up of a collection of disparate remedies. Lawyers learned the forms of action to use for various disparate situations, rather than being told the principles which lay behind them. But by the early nineteenth century, a taxonomy based on the alphabet or on forms of action no longer seemed adequate. Lawyers now wanted to arrange the material of this area of law according to rules and principles. In seeking to articulate these rules, judges were influenced by treatise writers and intellectuals, since they could see the broader picture denied to judges who focused on the instant case. Philosophical reflection and analysis could map out an ideal system of obligations, based on set first premises, which would explain the nature of the problem and deduce consequences. Given the paucity of English legal literature, and the unsystematic nature of the common law, the obvious intellectual influences on the developing common law of obligations were newly read civilian works. It has therefore been pointed out that in contract law, the works of natural lawyers — and most especially Robert-Joseph Pothier's *A Treatise on the Law of Obligations, or Contracts*⁴ — made lawyers conceptualise the law of contract as an obligation imposed by the will of the parties. In tort, Romanistic ideas on fault have also been argued to have filtered into English law, though here the mode of transmission is harder to demonstrate.⁵

Judges were clearly often influenced by the language of these writers.⁶ It was not merely the writers of treatises who wished to see the law as a body, which could be articulated in terms of clear rules.⁷ Judges had

³ For trends in litigation, see Christopher Brooks, *Lawyers, Litigation and English Society since 1450* (1998).

⁴ (William David Evans trans, 1802 ed) [trans of: *Traité des obligations*].

⁵ See David Ibbetson, "'The Law of Business Rome': Foundations of the Anglo-American Tort of Negligence' (1999) 52 *Current Legal Problems* 74–109; James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2006).

⁶ See R H Helmholz, 'Use of the Civil Law in Post-Revolutionary American Jurisprudence' (1991–2) 66 *Tulane Law Review* 1649.

⁷ For an argument which sees the judges as often engaged largely in problem solving in ways which defy the categorisation of theorists and treatise

the same ambition. As John Austin pointed out, a judge's decision was 'commonly determined [not only by a consideration of the case before him, but] by a consideration of the effect which the grounds of his decision may produce as a general law or rule.'⁸ Judges were not merely engaged in equitable adjudication. Rather, they aimed to articulate rules and doctrines which would form part of a coherent and integrated system. This article will explore how the judges attempted to do this, in areas of law which were either new or were in the process of being radically transformed in the nineteenth century.

Early nineteenth century judges did not have much in the way of theory to guide them on how to do this. There were, by 1830, two juristic views to draw on. The first theory, initially elaborated by common lawyers in the seventeenth century, held that the common law contained a set of timeless fundamental principles, which chimed both with natural law and community morality. According to this view, the common law had the answer to any question which could be put before it, but it required the expert reasoning of judges debating cases in the courtroom to discover the solution. Seventeenth century writers such as Sir Edward Coke therefore spoke of the common law as a system of 'artificial reason', controlled and interpreted by lawyers.⁹ If, by the eighteenth century, many common lawyers laid greater stress on custom and natural law than on artificial reason, they remained in no doubt that the common law was a matter of expert learning rather than natural reason. According to such a view, law was what the judges thought it was. In coming to their conclusions, judges reflected not on its source, but on its content.¹⁰ The second theory, which was of more recent pedigree and which came by the mid nineteenth century to be associated especially with John Austin, identified law not by its content, but only by tracing it to its source. For Austin, all positive law was

writers, see Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003).

⁸ John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law* (Robert Campbell ed, 5th ed, 1885) vol II, 621.

⁹ For the seventeenth century view, see Michael Lobban, *A History of Legal Philosophy in the Common Law World, 1600-1900* (2007) chapter 2. One might see Ronald Dworkin as a modern heir of this tradition. For a recent discussion linking Dworkin with an older tradition, see David Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24 *Oxford Journal of Legal Studies* 39–67.

¹⁰ For a view of the common law as the custom of the judiciary, see A W B Simpson, 'The Common Law and Legal Theory' in his *Legal Theory and Legal History: Essays on the Common Law* (1987) 367–8.

to be understood as the command of a sovereign, which could be issued, directly or indirectly, through judicial decisions. Once issued, such commands were laws, regardless of the quality of their content.

The problem for late eighteenth and nineteenth century judges was that neither view was particularly helpful for their purposes. The ancient common lawyers' view, which saw law in terms of the reasoning of judges solving cases after the event, seemed unable to provide a system of rules to guide conduct, which could be explained as a coherent unity. Equally, the presumption that the law already had the material to solve any question which could be set was hard to sustain in a world which seemed constantly to be generating novel problems. By contrast, the Austinian view, which did provide a theory of rule generation, was aimed more at the citizen and the student of law than at the judge. It was useful to remind the citizen that whatever a court said was authoritative, valid and binding, and would ultimately be backed by coercion. But, unlike the ancient common lawyers, Austin offered very little in the way of a theory of adjudication. He did not give any useful guide to judges in telling them how to develop the content of the law. Like Hart's later version of positivism, Austin's source based theory presented a dichotomy. Where rules could be identified as established by precedent or legislation, they should be followed; where no such rule existed, judges had the discretion to create a new one. 'Where there is no rule in the system applicable to the case,' Austin wrote, 'the judge virtually makes one, if he decides at all, or decides on any general ground.'¹¹

For Austin, formally speaking there was no law until the judge had issued his ruling. Judges, in his view, did not 'find' the law, as older common lawyers thought. Nonetheless, Austin did give brief indications of the sources of law judges might use. The judge, he said, could derive the rule from custom, maxims of international law, or his own view of utility. He could equally 'derive the new rule, by consequence built on analogy, from a rule or rules actually part of the system.'¹² Equally, a rule could be announced by a judge at the end of a process of discussion with those learned in law. As Austin saw it,

[t]he judiciary law made by the tribunals, is, in effect, the joint product of the legal profession, or rather of the most experienced and most skilful part of it: the joint product of the tribunals themselves, and of the private

¹¹ Austin, above n 8, vol II, 638.

¹² *Ibid* 638–9.

lawyers who by their cunning in the law have gotten the ear of the judicial legislators.¹³

These brief indications — which were in any case not published until after Austin's death in 1859 — were not very helpful to judges who wanted to know how to exercise their discretion. If the positivist version was able to define the outer edges of the law — by relating all legal rules to a sovereign — in a way which the Cokean version could not, it was unable to tell the judges how to develop the law. This meant, ironically, that while the Cokean version, which did not lay any stress on rules, promised some kind of organic unity found in the reasoning or custom of the judiciary, the Austinian version, which did want to define the body of law, promised only the formal unity that all legal rules — however unrelated they were to each other — were all derived from the same sovereign parent. It did not tell the judges how to develop rules which would have a substantive unity.

In what follows, it will be seen that judges were aware that they were developing a body of rules, which was expanding and adapting to new situations. They were aware that they were deciding novel cases, whose solutions were not simply to be found in the annals of common law jurisprudence, or in an extant natural law. They were aware of making determinations which would create new rules of law. Thus far, they were subscribers to the Austinian project. But in developing policy, they were equally aware of the need to maintain coherence in law, and to adapt it to the needs of the community. In so doing, they followed a method which had long been used by common lawyers, and which had been identified by Sir Matthew Hale in the seventeenth century. Although Hale shared with Coke the view that legal reasoning was a matter to be left to the artificial reason of judges and not to the natural reason of philosophers, he also saw law as a system of rules rooted in a positive origin.¹⁴ In Hale's view, when judges

¹³ Ibid 645.

¹⁴ In his 'Reflections on Hobbes' Dialogue between a Philosopher and a Student of the Common Laws', Hale commented on the instability, uncertainty and 'varietie in ye Judgemts and opinions of Men touching right and wrong'. He proceeded: 'to avoid that greate uncertainty in the application of reason by particular persons to particular Instances; and to ye end that Men might understand by what rule and measure to live & possess; and might not be under the unknowne arbitrary, uncertaine Judgemt of the uncertaine reason of particular Persons, hath been ye prime reason, that the wiser Sort of the world have in all ages agreed upon Some certaine Laws and rules and methods of administration of comon justice.' Matthew Hale, 'Reflections on Hobbes' Dialogue', in Sir William Holdsworth, *A History of English Law* (1924) vol V, 503.

were faced with cases for decision, they should firstly follow settled rules and precedent. If this did not settle the matter, they were to reason from analogy, and only in the last resort use simple reason.¹⁵ For Hale, who compared the common law with a human body which grew over time, the foundations of the common law were to be traced to ancient agreements. If this was appropriate for a discussion of the law of real property or the Constitution, it proved harder to find ancient ‘foundational’ laws in the area of obligations. Judges from the eighteenth century seeking to describe the law as a body of rules in this area therefore had to identify the first principles which defined their subject matter. Once these principles were uncovered, they could build on the law using the methods Hale had outlined.

In what follows, we shall explore how judges fleshed out the law, in two key areas of growth: insurance law and the law of negligence. Beginning with insurance law, it will be seen that judges were able early to identify the first principles, or foundations, of their subject, both in eighteenth century legislation and in a custom of merchants which they could incorporate into law. On these foundations, they developed a body of law using a number of distinct forms of reasoning. Four types in particular may be identified, two of which were broadly ‘analytical’ forms of reasoning, and two of which were broadly ‘normative’. The first ‘analytical’ form was what might be called a formalist approach. This sought to identify the nature of the subject matter and deduce consequences from its nature. For example, the very definition of a contract as the voluntary engagement of two wills entailed analytical consequences which could be figured out. One consequence was that a contract could not be made until an offer had been accepted. The second type of reasoning was what might be called a functionalist approach. Here, judges determined the purpose of a practice, and analysed which consequences were entailed by that purpose. But this kind of reasoning had its limits. While analysis might lay the foundations for a choice, by articulating what the issues were, it did not dictate substantive answers. Judges therefore also resorted to normative reasoning. This normative reasoning was not, however, reasoning on the morality as contained within the law. It was reasoning with reference to ideas which derived from outside the law. Sometimes, this took the form of invoking general moral principles, which entailed looking at the relative merits of the plaintiff and defendant. Who had, in ethics or justice, a better claim? But as often it entailed looking to broader policy reasons, considering the potential consequences of any decision for society as a whole.

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Lobban, above n 9, 88–9.

By contrast, with the law of negligence, judges had much greater difficulty in identifying the foundations of their doctrine. There was no 'positive' origin to be located in legislation, nor was there an established practice which could give shape to their law. Rather, they had to seek underlying principles as they were responding to new problems generated by social and economic change. In the mid nineteenth century, judges looked to define their subject by recognising only duties which could be derived from, or be seen to be analogous to, those torts which had been established and settled by common law doctrine. But anchoring the law only in analogy from established positive authority proved unsatisfactory; and by the later nineteenth century, a number of judges and jurists began to attempt to define the first principles of their law in a more theoretical way. They aimed to identify the foundations, at least of the law of negligence, through a process of legal analysis, rather than positive imposition. As shall be seen, it was only in the twentieth century that common lawyers began to agree about the foundational principles of the law of negligence. But as will be seen, this proved only a starting point for the development of a body of rules, and not its end.

The Law of Insurance

Insurance was clearly a new area of law in the eighteenth century. Although much of the content of contract law was developed and elaborated in the late eighteenth and nineteenth centuries, contractual issues had been before the common law courts almost since their foundation. The same cannot be said of insurance, which was a branch of the law of contract. This law developed from the late eighteenth century, in response to the development of the marine insurance business centred on Lloyds Coffee House, as well as the rise of fire and life insurance companies in the eighteenth century. This area of law is worthy of study since it constituted a body of rules developed by judges self-consciously seeking to lay down rules which would promote efficiency in a growing commercial sector. Moreover, the rules laid down in this era and developed in the nineteenth century were codified in the *Marine Insurance Act 1906* (UK), which in effect digested the rules of law settled by over a century's practice. It is an area which shows common lawyers developing a set of relatively certain and stable rules.

Insurance law had from the outset a theoretical unity, for treatise writers from all over Europe acknowledged the contract of insurance to have a particular purpose. As John Wesket put it in 1781,

The *fundamental Principle* of Insurance is simply, INDEMNITY: ie an *Obligation on the Part of the Insurer, for a Consideration received, to reinstate the Insured in the Value of the Property he may lose or be damaged, according to the Terms and Intent of the Contract.*¹⁶

Strictly speaking, there was no *analytical* reason why this should be so. An insurance contract could equally well have been defined as a contract to pay on the happening of a certain event. So defined, an insurance contract could be used for gambling purposes. Indeed, it was frequently so used in the mid eighteenth century.¹⁷ Insurance derived its particular character as an indemnity contract — its theoretical unity — from two sources. Firstly, commercial practice — or the custom of merchants — determined the nature of the contract. That is, merchants agreed that indemnity was the point or purpose of insurance. Secondly, it was settled as a matter of positive law. In England, statutes of 1746 and 1774 declared that insurance contracts could not be used for gambling, and that one could only recover on an insurance contract if one had an ‘insurable interest’ in it. The nature or purpose of the contract of insurance was thus defined by legislation. In other areas of commercial law, the foundation of a doctrine might come from the incorporation by courts of a rule of the custom of merchants.

With the initial parameters set by positive law, judges and jurists could work out the consequences by engaging in analytical reasoning on the nature of the subject. For instance, in 1802, in *Lucena v Crawford*,¹⁸ the House of Lords had to decide what constituted an insurable interest. In his answer to the question put to the judges, Lawrence J noted that it followed from the nature of the contract, as one of indemnity, rather than gaming, that the assured had to be somehow interested in the preservation of the thing insured. But he did not have to be an owner: ‘To be interested in the preservation of a thing,’ he said, ‘is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction.’¹⁹

¹⁶ John Wesket, *A Digest of the Theory, Laws, and Practice of Insurance* (1781) viii-ix (emphasis in original). Cf J A Park, *A System of the Law of Marine Insurances* (3rd ed, 1792) 1.

¹⁷ See Geoffrey Clark, *Betting on Lives: the Culture of Life Insurance in England, 1695-1775* (1999).

¹⁸ (1806) 2 Bos & P NR 269; 127 ER 630.

¹⁹ Ibid 302, 643. He continued: ‘The property of a thing and the interest deviseable from it may be very different: of the first the price is generally

Analysing the nature of the transaction also helped determine the rule that such contracts were ones of utmost good faith. As Lord Mansfield recognised, the insurer had no way of knowing any number of special facts pertaining to the subject matter of insurance, which lay wholly within the knowledge of the assured. Since this knowledge was relevant both in determining whether the insurer would accept the risk and at what premium, the courts settled that there was a duty on the assured to disclose all material facts he was aware of. If there was any concealment of relevant facts, the policy was void since the risk run was different from the one the insurer intended to undertake.²⁰

If analysing the nature of a problem could generate a substantive answer, jurists might still remain uncertain about how to give an analytically satisfactory explanation of the answer thereby derived. For example, there was some disagreement in the nineteenth century over the doctrinal basis of the duty of the assured not to make misrepresentations. One school of thought stated that full disclosure was a condition precedent to the attaching of any liability on the part of the insurer. Such an approach rooted the assured's duty in contract. It was based on an implied term that the assured would substantially disclose all material facts known to him. Another school of thought saw the failure to disclose as a kind of constructive fraud, entirely separate from the contract. There were problems with both views, since the duty to disclose did not fully 'fit' the broader rules of either doctrine. Nor was this merely a scholarly headache about elegance and where to fit the doctrine in a taxonomy. For according to the 'condition precedent' view, any misstatements about future events or expectations might be taken to vitiate the contract. But the same result would not apply if the 'constructive fraud' interpretation were taken.²¹

the measure, but by interest in a thing every benefit and advantage arising out of or depending on such a thing, may be considered as comprehended'.²⁰ See *Carter v Boehm* (1766) 3 Burr 1905; 97 ER 1162. As Joseph Arnould put it, the assured was 'the natural and sole depository of much of that information, a *full* and *true* communication of which is absolutely essential to the underwriter, in order that he may form a right judgment of the nature of the risk, and the proper rate of premium. Hence, on the true principles of equity and justice, the concealment of misrepresentation by the assured, whether wilful or not, of any such facts as might reasonably be supposed to have influenced the underwriter in taking the risk or fixing the rate of premium, will avoid the policy': Joseph Arnould, *A Treatise on the Law of Marine Insurance and Average* (2nd ed, 1857) vol I, 541 (emphasis in original). He cited continental texts which confirmed this view.

²¹ This was so at least after mid nineteenth century courts dealing with the law of misrepresentation in contract generally had determined that only

Jurists on both sides of the Atlantic puzzled over this conundrum for a number of decades, but no English case came along definitively to settle whether a non-fraudulent false ‘promissory’ representation voided a policy. The issue was ultimately settled by legislation, when Chalmers’ *Marine Insurance Act 1906* (UK) opted for the second view, which made the rule in insurance echo that developed in the broader area of contract law. This legislation, we may say, imposed a choice not between policies but between doctrines. In this area, then, the full doctrinal consequences were thus not settled by an initial decision — and it could take decades for the doctrinal consequences of a decision to be settled by theorists.

With the nature of the insurance contract established, judicial reasoning could often be straightforwardly analytical. For example, the rules on deviation developed in the 1820s were largely based on analysing what constituted a deviation, and what an abandonment of a voyage. Judicial reasoning could also be functionalist. For instance, the decision made at the start of the nineteenth century to allow insurance for lost profits, was based on looking at the purpose of insurance. In *Barclay v Cousins*, addressing whether profits could be insured, Lawrence J noted that although such insurance was illegal on the continent, ‘[f]oreign writers upon insurance, whose doctrines form the greatest part of our law on this subject... [did not treat it as] inconsistent with the true nature and design of such a contract.’²² In his view, it was only a choice of positive law in France and Holland to forbid such insurance. For Lawrence J, if the goods insured did not arrive at port, the shipper lost not only the goods, but the benefits he might have obtained had his money been invested in an undertaking not subject to the perils. This was clearly bad for business. He ruled:

It is surely not an improper encouragement of trade to provide that merchants in case of adverse fortune should not only lose the principal adventure, but that that principal should not in consequence of such bad fortune be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce by their having the means of preserving their capital entire, which would continually be lessened by the ordinary expenses of living, if there were no means of

misrepresentations of existing fact were actionable. See *Jorden v Money* (1854) 5 HL Cas 185.

²² *Barclay v Cousins* (1802) 2 East 544, 548; 102 ER 478, 479.

replacing that expenditure in case the returns of their adventures should fail.²³

This reasoning was clearly one aimed at a ‘policy’ goal: but it was the policy implicit in the purpose of the activity which helped shape the outcome.

Judges who fashioned the law of insurance also made broader policy choices, which looked beyond elaborating the purpose of the practice implicit in the foundations defined by law. They sometimes rerouted the law by looking at the social or economic purpose of the practice. This is evident for instance in the determination in the mid nineteenth century that life assurance was not, after all, a contract of indemnity. Early nineteenth century courts took a different view. In 1807, in *Godsall v Boldero*,²⁴ the King’s Bench ruled that an insurer did not have to pay out the holder of a policy on the life of the deceased Prime Minister, William Pitt, which was taken out to cover a debt he owed the assured. This was because the assured had already been paid for his loss out of a parliamentary grant; so that he would profit if he was paid the insurance as well.²⁵ But in 1854, the Exchequer Chamber overruled the case. Parke B declared that a life policy was only a policy to pay ‘a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life ... This species of insurance in no way resembles a contract of indemnity.’²⁶ The judges in the case were aware that life assurance was used as a mode of saving. Life policies could not be treated in the same way as marine ones, since they were routinely renewed — and even sold on — and since the event of death (unlike the loss of a ship) was always ultimately certain. In effect, the law was modified to facilitate the social practice. It was considered that in 1807, the court had extended a marine rule by analogy to a life policy, whereas in fact, life assurance was something different.

Policy reasons also induced the courts to handle the principle of good faith differently in life assurance. Context again mattered. By the mid nineteenth century, money was often lent on the security of a life policy. Where the sum insured was very high, insurers would spread the risk by reinsurance. In these cases, questions about the health and lifestyle of the person whose life was covered were sent to that person and to medical referees he chose. But what would happen if they lied, or withheld

²³ Ibid 547; 479.

²⁴ (1807) 9 East 72; 103 ER 500.

²⁵ Ibid.

²⁶ *Dalby v India &c Life Assurance Co* (1854) 15 CB 365, 387.

information, when answering the questions on the form? Courts had to determine whether the person taking out the insurance was to be liable for the accuracy of these statements, as they would be if the subject of the insurance were goods on a ship. In 1857, Lord Campbell answered,

there is no analogy between the statements of the [person whose life is insured] ... or the referees in the negotiation of a life insurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy.²⁷

Whereas marine policies were vitiated if the assured made any untrue statement, the same would only apply in life cases if there was an express condition in the policy affirming the truth of the statement. Why did the analogy with marine insurance not work? It could be said that since the assured here was in no better position to know the true facts than the insurer, and was often not better placed to discover the truth, there was no reason to make the accuracy of the statements a condition precedent. Ultimate good faith by this token would only be required where knowledge lay within the breast of the assured; or in cases where he had the duty to discover the true facts. Why not impose such a duty on the assured here? Two reasons might be suggested. Firstly, courts were reluctant on moral grounds to allow life insurance companies to collect premiums over a period of years, and then refuse to pay when the death occurred. Secondly, courts felt that this kind of assurance could not be carried out if such risks were thrown on the assured. The risks of deception were better borne by insurance companies than the assured.

These doctrines in life assurance developed as a result of policy-oriented reasoning by judges. But we can also find examples of pure 'moral' reasoning in insurance cases. This can be seen in the treatment of one of the requirements of good faith in marine cases. It was much debated in the mid nineteenth century whether a marine insurance policy was vitiated by the non-disclosure of facts known to an agent of the assured. It was clear enough that if an agent involved in effecting the insurance failed to disclose something known to himself or his employer, the insurance would be voided. But what if one of the assured's general agents, who had nothing to do with the insurance, failed to tell his employer a material fact? Did this count as a concealment or non-disclosure by the assured? Unlike the question of 'promissory representations', this was not a question which could be resolved doctrinally. It required a more overt normative choice;

²⁷ *Wheulton v Hardisty* (1857) 8 El & Bl 232, 270; 120 ER 86, 101.

and it got its test case. The problem was raised in 1886 in *Blackburn, Low & Co v Vigors*,²⁸ where the plaintiffs had insured their ship on a 'lost or not lost' policy with the defendants. Unbeknown to them, the ship had been lost before the policy was effected. In seeking insurance, they had initially used another firm of brokers, who had heard rumours of the loss but failed to disclose this to the plaintiffs. The latter in the end effected their insurance through another set of brokers, who were equally ignorant of the loss. The problem for the Court of Appeal and House of Lords was whether the plaintiffs as principals were to be held to have had the knowledge of their first set of brokers, so that they were liable for non-disclosure. The question involved the principle of law that what was known to an agent was known to his principal.

In the Court of Appeal, the dissenting Lord Esher found for the plaintiffs. He gave a remarkable statement of the moral foundations of the common law. '[E]very general proposition laid down by judges, as a principle of law, as distinguished from an enactment by statute,' he said, 'is the statement of some ethical principle of right and wrong applied to circumstances arising in real life, that is, in the life of social intercourse or in the life of business.'²⁹ This seemed to define the whole common law as a system of morals. He proceeded to argue that if a principal was always deemed to know everything in the mind of his agent, the law would often 'mark him with gross injustice, with an unwarranted stigma; the law would countenance a gross violation of a simple rule of right and wrong.'³⁰ Lord Esher's view was that it would simply be unfair or unjust to hold the principal liable here. By contrast, the majority found for the defendant. Lord Justice Lindley held firstly that it was necessary to prevent fraud, that an assured should not be able to recover on an insurance if 'someone, whose moral if not legal duty'³¹ was to inform them of a material fact had deliberately failed to do so. For, secondly, he felt that it would not be *fair* for the assured to require the underwriters to pay under these circumstances. Although the assured was morally innocent, it would not be right for him to 'take advantage of the ignorance in which he has been improperly kept by one who ought to have told him the truth.'³² Lord Justice Lindley and the majority clearly took a different view of the moral issue at stake from Lord Esher.

²⁸ (1886) 17 QBD 553.

²⁹ *Ibid* 558.

³⁰ *Ibid* 558–9.

³¹ *Ibid* 577.

³² *Ibid*.

In the law of insurance, then, we can see the development of a system of law, sufficiently coherent to be codified in 1906. It grew as courts, with the significant help of domestic, American and continental treatises, sought to develop principles set by legislation and commercial practice. That is, the goals of the practice were not 'internal' to the law, or capable of being deduced from analysis of human interaction. In developing this area of law coherently, judges remained aware of the social purpose of the practice, which explains their divergent treatment of life and marine policies. Although they bore in mind the purpose of the practice, and the need for all legal developments to be coherent within it, when hard cases came along, the answers they gave were not determined either from within the law, or even more broadly from within the 'practice'. Judges could simply invoke their idea of purely moral standards in setting a rule.

The Law of Negligence

In contrast with the law of insurance, the foundations and scope of the law of negligence — indeed of the law of tort more broadly — remained disputed throughout the nineteenth century, and remain disputed to this day. Here, the judges did not flesh out the edges of a relatively determined area of law with policy or moral choices. If the law of insurance developed and expanded on principles which could be found stated relatively clearly in treatises dating from the eighteenth century, the law of negligence was developed by judges lacking a basic blueprint. It is often argued that judicial thought was constrained both by the forms of action and by the role of the jury, both of which restricted the scope for the development of substantive law.

Since the forms of action only fell into decline after 1854 and the civil jury remained alive and kicking until the First World War, this would suggest there was little opportunity to develop a theoretical substantive law of torts until at least the second half of the nineteenth century.³³ In fact, the quest for a modern law of torts predates the decline of forms of action. Blackstone, for instance, arranged the law of tort more around interests than actions, arranging the law of private wrongs in terms of remedies for the violation of rights he had set out in the first two books. According to his view of tort, the mere violation of the right to security, liberty or property

³³ See Michael Lobban, 'The Strange Life of the English Civil Jury, 1837–1914' in John Cairns and Grant McLeod (eds), *The Dearest Birthright of the People of England: the Jury in the History of the Common Law* (2002) 173–215.

generated a right of action against the infringer. This was to some degree a Lockean view, which saw a person's life, liberty and estate as forms of property to be protected.

Blackstone's model seemed to describe a regime of strict liabilities. And in fact, the common law of torts left little room for discussions of fault in the eighteenth century. In this world, if a person trespassed on another's land or took his chattels, if he defamed another, or if he polluted the land of his neighbour, it was no defence that he had not intended any harm. Even the action on the case for negligence was not based on a notion of fault, but on the premise that the defendant had neglected to perform a duty he had. The duty which derived from the common custom of the realm to keep one's fire safely was a strict one.³⁴ The duty innkeepers had (by common custom) to keep their guests' goods safe was almost as strict.³⁵ The only kinds of cases where questions of reasonable skill or care were properly raised were those involving people who exercised a 'common calling', such as medical practitioners and attorneys. This was because they were not strictly bound to cure the patient or win the case, but only to act with the requisite level of skill. In each case, the form of action was the action on the case for negligence, since the harm was not occasioned by an act, but by the failure to perform a duty.

What sparked the transformation of torts and the birth of a distinct tort of negligence was not a positive piece of legislation or the incorporation of a new practice. It was the product of events, which altered the kind of harm which was most central to lawyers' minds. The characteristic eighteenth century harm discussed in treatises and digests involved one person's private sphere being invaded by the act of another. The eighteenth century view of tort might thus be said to have been understood as a system of corrective justice simple, in which any disturbance of the existing set of rights had to be corrected by the person who invaded the right.³⁶ Blackstone did not devote any space to discussing causation. Nor did he spend time on

³⁴ See John Comyns, *A Digest of the Laws of England* (1780), tit. 'Action upon the Case for Negligence', A6. See also *Turberville v Stamp* (1697) 12 Mod 152; 88 ER 1228.

³⁵ They were liable for the safety of their clients' goods, although 'if the Guest is robbed by his Servant or Companion, the Innholder shall not be chargeable; because it was his Guest's Fault to have such Persons with him'. Anonymous, *A Treatise of Trover and Conversion, or the Law of Actions on the Case for Torts and Wrongs* (2nd ed, 1721) 389.

³⁶ Compare the view of Richard Epstein in 'A Theory of Strict Liability' (1973) 2 *Journal of Legal Studies* 151.

defences such as inevitable accident, whose nature and meaning has so intrigued tort scholars and historians.³⁷ Questions of causation and blame seemed relatively unimportant where the paradigm of harm was an external invasion of one's private space.

By the early nineteenth century, there was much more focus on accidental harms which occurred in the public sphere. Here, questions of fault and causation were central. Why did this transformation occur? The crucial impetus for change was the road transport revolution, which generated a large number of coach accidents.³⁸ Two novel questions arose. The first question centred on the nature of the coach proprietor's liability to his passengers who were injured in a crash. To determine whether the liability should be strict, or one based in fault, the courts had the choice of analogies. If coach masters were seen as analogous to attorneys or surgeons, they would be required only to ensure that an appropriate level of skill was used. But if an analogy was drawn between the carriage of persons and the carriage of goods by stagecoach, then liability would be strict. For it had been settled (as a matter of policy) in the eighteenth century that common carriers were insurers of the goods they transported. When early nineteenth century courts looked at these questions, they decided that liability should not be strict, essentially for policy reasons. If liability were strict, no-one would run coaches.³⁹

A second problem concerned the coach master's liability to bystanders who were injured by his coach. This problem generated much debate over the form of action to be used, for it was not clear whether the harm caused was direct (and hence suitable for the action of trespass) or indirect (and hence suitable for an action on the case). An action on the case for negligence seemed preferable, often because the coach proprietor who was sued as vicariously liable for his careless driver had himself committed no act. By framing the action in this way, the question put was not whether the defendant had done a wrongful *act* but whether the harm resulted from his *neglect* to do something.

In the context of collisions, courts were aware of the need to rethink their notions of 'neglecting' to act. After all, no accident in the public

³⁷ See Robert J Kaczorowski, 'The Common-Law Background of Nineteenth Century Tort Law' (1990) 51 *Ohio State Law Journal* 1127, 1169.

³⁸ See M J Prichard, 'Trespass, Case and the Rule in *Williams v Holland*' [1964] *Cambridge Law Journal* 234.

³⁹ 'Culverwell v Eames and Billett' (1823) *The Times* (London), 29 May 1823, 4a.

sphere was monocausal. As one court put it, where there were collisions on water, it was evident they might be caused by ‘the state of the tide, or ... any other circumstance which persons of competent skill could not guard against’.⁴⁰ Strict liabilities were evidently unsuitable for the world of the public road, where risks were generated by everyone. Thus a fault element came in, with the notion that the defendant had generated unusual risks by his conduct. Having developed this view in the action on the case, the courts applied the same fault standard to cases brought in trespass. This was so even though the form of pleading (and early nineteenth century precedents) suggested that where an ‘act’ had been proved, the defendant would be liable without fault.⁴¹ Whatever the form of action chosen, where a collision occurred in a public place, it was not enough to claim that there had been a direct harm caused, but there had to be some fault.⁴² If an Englishman’s home was his castle, and his body his temple, once he left his home and went into the world, he entered a world of risks.

The transformation in thinking about negligence was thus initially driven by a novel but extremely pressing social problem: the problem of how to ensure road safety. The new litigation forced the courts to adapt their forms of action, and the substantive rules they represented. Road transport litigation forced the courts to recognise that, in practice, strict liability for road accidents simply would not work. An accident occurred in the context when two parties were exercising their right to use the public road. Liability could only attach if one was at fault. In other words, thinking about the situation before them made courts modify and develop doctrine. It was not solely a matter of making policy (though we can find strands of policy choices). Nor was it a matter solely of doctrinal reasoning. But the result was that the action on the case for negligence was generalised beyond its eighteenth century limited bounds. The focus was now squarely on the defendant’s failure to take care, as a result of which the plaintiff had been harmed.

Once the action on the case for negligence had been established, it seemed to have no outer edges. Its ambit seemed unlimited in scope. It

⁴⁰ *Lack v Seward* (1829) 4 Car & P 106, 108; 172 ER 628, 628.

⁴¹ *Leame v Bray* (1803) 3 East 593; 102 ER 724.

⁴² This was definitively settled only in *Stanley v Powell* [1891] 1 QB 86. Once the action on the case for negligence was used to hold defendants liable for fault, it was clearly illogical to hold parties strictly liable simply because the action was brought in trespass. The courts therefore reinterpreted the hitherto very narrow defence in trespass of inevitable accident to bring it into line with the negligence standard.

expanded rapidly in the 1820s and 1830s. In some areas, the doctrine was used where the situation seemed to demand it, as where there had been accidents in the street, for instance if cellar flaps were carelessly left open. But judges also used the notion of negligence or fault to impose duties, for policy reasons. Where carriers limited their liability for goods by contract, courts held that this did not exclude liability for negligence.⁴³ Where statutes authorised railways to run locomotives, they were held not authorised to run them negligently.⁴⁴ Where statute had abolished the common law strict liability for keeping one's fire, the courts imposed a duty not to keep one negligently.⁴⁵ The law was not shaped by a coherent sense of the scope of the doctrine. Rather, negligence was a handy tool judges could use for any number of purposes.

By 1840, the doctrine of negligence seemed open-ended. Judges now worried that the word 'negligence' was being used too loosely, making the law uncertain. Judicial fashion changed as judges tried to set limits to the doctrine. They did this by anchoring liability in the breach of identifiable duties. By 1860, Erle CJ observed 'it essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence.'⁴⁶ Judges sought to identify duties which could be linked to the interests protected by the old forms of action. A duty to ensure passenger safety was recognised, which was analogous to contractual duties, or to duties imposed by those exercising a 'common calling'. A duty not to sell dangerous goods was recognised, which was a version of the duty not to deceive by fraud. The duty to take care to avoid collisions was seen as analogous to the interests protected by the old action of trespass. A duty not to leave hazardous items in public places was recognised, and analogised to nuisance. These were distinct duties with distinct standards of liability, some being more strict, some less.

Why did the courts begin to use the language of duty? It would be difficult to argue that it was thanks primarily to intellectual stimuli. It is certainly true that judges in the 1820s used the Roman language of *culpa*, as a vehicle with which to expand the scope of negligence. But *culpa* was simply a label. In the mid-century, judges were not seeking to explore the

⁴³ *Bodenham v Bennett* (1817) 4 Price 31; 146 ER 384.

⁴⁴ *Aldridge v The Great Western Railway Co* (1841) 3 Man & G 515; 133 ER 1246.

⁴⁵ *Vaughan v Menlove* (1837) 3 Bing NC 468; 132 ER 490.

⁴⁶ *Marfell v The South Wales Railway Company* (1860) 8 CB NS 525, 534. Erle CJ dissented in this case, holding there was no duty imposed by a statute to fence a railway from an adjoining tramway.

notion of duty as elaborated by writers in the natural law tradition, but were trying to rein back the law to what interests they could define from the common law. It would also be hard to argue for a direct influence of Austin's analytical jurisprudence here, since the change in language and approach predates the publication of his lectures. Nor was there any English treatise tradition to help out. This is not to say that judges might not have been aware of Benthamic, Austinian or even Pandectist ideas. But it is to say that the direct influence cannot be demonstrated. By contrast, there were evident *policy* choices in operation. The policy-driven expansion of the 1820s was reined in by a policy-driven contraction in the mid-century. Thus, the reasoning in the cases most influential in limiting the scope of negligence — *Winterbottom v Wright*⁴⁷ in 1842 and *Langridge v Levy*⁴⁸ and *Priestley v Fowler*⁴⁹ in 1837 — were consequentialist, policy orientated. In *Priestley*, Lord Abinger found it unthinkable that every servant should be able to sue his master if he caught a cold from damp bedsheets. In *Winterbottom*, the same judge was horrified by the idea that 'every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action.'⁵⁰ The development of the defences of voluntary assumption of risk and common employment were also patently informed by policy choices. Thus, the very retreat to doctrinal analogy was itself a policy choice, to prevent the open-ended growth of tort.

This approach led to a restrictive view of the scope of tort which was held by many judges. This approach put identifiable duties, rather than a broader concept of fault, at the heart of doctrine, anchoring both the law of negligence and the wider law of tort in distinct duties not to interfere with rights in person and property. The interests protected were those already defined as worthy of protection by the old common law. To be actionable, according to this view, the wrong committed had to be capable of being seen as a trespass, a nuisance, a breach of contract or a fraud. This narrow definition of duties may have reflected a desire by the judiciary to restrict the freedom of juries, who were often perceived to be too willing to award large damages against defendants (such as railway companies or employers) who were considered to be able to afford them.⁵¹ But this approach was also

⁴⁷ *Winterbottom v Wright* (1842) 10 M & W 109; 152 ER 402 ('*Winterbottom*').

⁴⁸ *Langridge v Levy* (1837) 2 M & W 519; 150 ER 863.

⁴⁹ *Priestley v Fowler* (1837) 3 M & W 1; 150 ER 1030 ('*Priestley*').

⁵⁰ *Winterbottom* (1842) 10 M & W 109, 114; 152 ER 402, 405.

⁵¹ See David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 175–81.

related to the desire of judges to find clear rules which could be positively traced in the history of the common law, and then explained by analysis. The duties identified were hence ones which could be traced through historical precedents. The duty-based approach could also explain why some liabilities were strict, and others not. According to this approach, if the tort was committed in the public domain, where parties assumed a risk by their interaction, liability was only imposed if there was a degree of fault. But if an outsider interfered with the rights of an individual exercised in his personal domain, liability was likely to be strict. As Blackburn J put it in *Fletcher v Rylands*:

Traffic on the highways ... cannot be conducted without ... some inevitable risk; and that being so, they who go on the highway ... may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and ... they [cannot] recover without proof of want of care or skill occasioning the accident.⁵²

But a man whose mine was flooded by a reservoir on another's land had not taken on himself any risk.⁵³ Where one took risks, as in the public sphere, no one else insured the safety of one's person or his property.

This restrictive approach to tort did not see this branch of law as unified by any single animating principle. As Sir John Salmond put it, reflecting on the decisions of nineteenth century courts, tort law consisted 'of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility.'⁵⁴ The duties imposed by the law of tort could be expanded by analogy. Analogy could be so creative, as in *Lumley v Gye*,⁵⁵ in effect to invent a new tort. But by and large, judges were reluctant to be too creative in inventing wholly new torts. Those who adhered to the theory which saw tort as based on a set of positive, identifiable duties, also developed a 'mechanical' view of its operation,⁵⁶ which again had the effect of reducing the discretion of a jury. Analysis explained that where a duty had been breached, the defendant was liable for damage done. Supporters of the 'mechanical' view had a narrow view of causation: the defendant was held to have 'caused' the

⁵² *Fletcher v Rylands* (1866) LR 1 Ex 265, 286–7.

⁵³ *Ibid.*

⁵⁴ J W Salmond, *The Law of Torts* (4th ed, 1916) 9.
⁵⁵ [1853] 2 El & Bl 216; 118 ER 749.

⁵⁶ Cf the use of this word (attacking an Austinian approach) in Frederick Pollock, *The Expansion of the Common Law* (1904) 4.

damage if he was the last wrongdoer prior to the harm occurring.⁵⁷ They also had an expansive view of damages. Once it was shown there was a duty breached, and harm caused, the defendant was liable for the full extent of the damage, however unforeseeable the result.⁵⁸

This mid-century rationalisation did not, however, close off the judicial debate about what tort law was about. In the second half of the century, another approach to tort emerged, which challenged the mechanical approach. This theory sought a single animating principle behind the law of tort. It made fault the central notion, holding the defendant liable for any foreseeable or intentional harm done to the plaintiff. This theory emerged initially through a process of analysis which sought to give greater coherence to the working of negligence. It had already been settled that a defendant was only liable in negligence for harms done in the public sphere — such as nuisances caused when water leaked and froze — if the harm caused had been foreseeable.⁵⁹ But if this was so, it seemed odd to a number of judges that the defendant's liability should not also be limited to foreseeable damages. As early as 1850, Chief Baron Pollock speculated whether 'a person guilty of negligence is responsible for all the possible consequences, which he could never have foreseen, and which no one would have anticipated?'⁶⁰ By the 1870s, courts began to act on these doubts, considering that defendants should be liable only for foreseeable damages.⁶¹ At the same time, anxiety developed as to the very narrow view of causation taken by some mid-century judges. If the fault in negligence was the failure to foresee and avoid a risk, why did not liability attach when the 'natural and probable' consequence of one's act

⁵⁷ This meant that if one party's negligence had provided the opportunity for another to commit a wrong, he could not be liable. As James LJ commented in 1870, '[s]uppose the bailee of a key carelessly allowed the key to fall into the possession of a man who committed a burglary, and by means of that key opened a box which contained valuable property. It is scarcely possible to hold that the negligence of the bailee with regard to the key would be followed by responsibility for the loss of every article obtained by the burglar through the instrumentality of the key.' *Re United Service Company: Johnston's claim* [1870] LR 6 Ch App 212, 218.

⁵⁸ *Smith v The London and South Western Railway Company* (1870) LR 6 CP 14.

⁵⁹ This was the element of fault in *Blyth v The Company of Proprietors of the Birmingham Waterworks* (1856) 11 Ex 781, where the duty breached was akin to nuisance.

⁶⁰ *Greenland v Chaplin* (1850) 5 Ex 243, 246.

⁶¹ *Sharp v Powell* (1872) LR 7 CP 253.

was another act by a third party causing injury to the plaintiff.⁶² Some judges began to see that anchoring duties in established protected interests did not explain the principles of liability in negligence. The law was to be made sense of not by listing the duties, but by explaining fault more broadly.

A new theory therefore put foreseeable harms at the centre of the doctrine of negligence, and downplayed the concept of duty. It was given its first famous exposition by Brett MR in *Heaven v Pender*⁶³ in 1883, famously foreshadowing *Donoghue v Stevenson*.⁶⁴ A duty to use ordinary care and skill arose, he said

whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other.⁶⁵

In contrast with the first approach, this one sought to make sense of the law by thinking in the abstract about what negligence meant, morally and philosophically. Defendants were not liable because the wrong they had committed was similar in kind to an established ancient one, but because their lack of care had generated harm which needed correction. Such a view of torts would not be anchored to positive rules already established. It also significantly saw the moral nature of fault as central. It is no surprise that the morally minded Brett MR played such a large part in its early evolution.

The first *theorist* in England to develop this view (and to extend it more broadly) was Frederick Pollock. In the first edition of his textbook on torts in 1887, Pollock argued that tort law involved ‘the technical working out of a moral idea by positive law, rather than the systematic application of

⁶² *Bowen v Hall* (1881) 6 QBD 333, 337–8. Lord Coleridge dissented, pointing out that if the defendant maliciously attempted to induce a breach of contract, this was not actionable; while if he succeeded in inducing a breach of contract without malice, this was not actionable. It struck him as odd that ‘if the damage which is not actionable be joined to a motive which is not in itself actionable, the two together form a cause of action’: at 343.

⁶³ [1883] 11 QBD 503.

⁶⁴ [1932] AC 562.

⁶⁵ *Heaven v Pender* [1883] 11 QBD 503, 509.

any distinctly legal conception.’⁶⁶ Liability for negligence thus rested on the moral censure which came from blameworthy conduct. Anyone who failed to control foreseeable risks, said Pollock, ‘will scarcely be held blameless by the moral judgment of his fellows.’⁶⁷ The notion of moral fault was seen to a higher degree, Pollock explained, in the area of intentional torts (what he called personal wrongs). Indeed, Pollock felt he had found a unifying principle for all tort law: ‘All members of a civilized commonwealth,’ he said, ‘are under a general duty towards their neighbours to do them no hurt without lawful cause or excuse.’⁶⁸ This looked like a system of corrective justice, which would be timeless in that it could accommodate new as well as old harms. For Pollock, a theory of negligence was the route into a new moral theory of tort.

The weakness of Pollock’s general theory of torts was that it could not explain the content of the common law. It had no real room for strict liabilities. Where tort law corrected wrongs to property (through trespass to land or conversion actions), there was little moral blame attached. The law simply made it an absolute duty not to meddle with another’s property. Pollock felt these liabilities were a historical anomaly, which dated from the confusion of cases whose aim was to try title to property, and those seeking to correct harms. This explanation hardly helped give coherence to the law, since jurists were simply not able to say that settled rules imposing strict liabilities had to be dispensed with in favour of a fault-based view.⁶⁹ His theory required judges to break free of the inherited historical quirks and to apply doctrines which punished what he considered to be moral fault. But as *Bradford Corporation v Pickles*⁷⁰ showed, they were prepared to do neither, which left the unity of the system holed beneath the waterline. Moreover, when it became clear that the judiciary would not accept his broader theory — for instance by accepting the principle of prima facie torts — he was prepared quietly to let it drop.

⁶⁶ Frederick Pollock, *The Law of Torts: a Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (1887) 12.

⁶⁷ *Ibid* 11.

⁶⁸ Frederick Pollock, *The Law of Torts: a Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (13th ed, 1929) 1.

⁶⁹ Pollock did however note that with the demise of old forms of action, ‘a rational exposition of the law of torts is free to get rid of the extraneous matter brought in ... by the practical exigency of conditions that no longer exist.’ *Ibid* 15–6.

⁷⁰ [1895] AC 587.

By contrast, his theory that there was a single tort of negligence gained greater support. Pollock's definition, included in the first edition of his textbook in 1887, stated that 'every one is bound to exercise due care towards his neighbours in his acts and his conduct, or rather omits or falls short of it at his peril.'⁷¹ Pollock also stated that 'negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care.'⁷² By this was meant that a person was under a duty towards another to take care if he could foresee that his careless action might injure that other person. Pollock's main concern was thus to hold defendants to account when they harmed others through blameworthy conduct. The notion of 'duty' was required only to explain the distinction between situations where a party voluntarily chose to take action affecting another — in which case he might be liable for harmful consequences — and situations where he did not choose to act, where no liability for the consequences of any omission was imposed by the general law.

From Pollock's perspective, the main problems courts would face would not be understanding the duty, but considering whether it had been breached. 'What is due care and caution under given circumstances,' he wrote, 'has to be worked out under the head of negligence ... generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, and prudence.'⁷³ This was to suggest that the level of care needed would be fleshed out — and standards of conduct would be set — by the judge or jury interpreting the community's expectations or values.⁷⁴ Pollock's theorisation of Brett MR's approach in *Heaven v Pender* was taken up by Lord Atkin in 1932 in *Donoghue v Stevenson*. Like Pollock, Lord Atkin felt there was 'some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances'; and

⁷¹ Pollock, above n 66, 353; Pollock, above n 68, 451.

⁷² Pollock, above n 68, 453–4. Cf Pollock, above n 66, 355: 'provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care.'

⁷³ Pollock, above n 66, 24; Pollock, above n 68, 27.

⁷⁴ Pollock may have shared his friend Holmes's view that questions of negligence could be left to the jury where a judge had no clear views on the matter and felt it should be left to community experience; but '[a] judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary circumstances far better than an average jury'. O W Holmes, *The Common Law* (1881) 124.

like Pollock he felt that liability was ‘based upon a general public sentiment of moral wrongdoing for which the offender must pay’.⁷⁵ His definition, whose paternity he traced to Brett MR, spoke of a duty to take ‘reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour’, who was famously defined as one who was ‘so closely and directly affected by my act that I ought reasonably to have them in contemplation’ when acting.⁷⁶

Two years after this case, Percy Winfield (who endorsed Pollock’s approach to negligence) argued that the entire idea of *duty* – which was endorsed by Lord Atkin – in fact served no useful purpose in the law of negligence. As he explained, courts in negligence cases asked plaintiffs to show two things. First, they were asked to prove a duty existed: ‘show us facts which indicate that the defendant was bound to act with reasonable care’.⁷⁷ Second, they were asked to prove breach: ‘[s]how us facts which indicate that the defendant has not exercised reasonable care and which indicate it sufficiently to enable us to say that there is a *prima facie* case to go to the jury’.⁷⁸ For Winfield, the first question had no purpose except as a means of removing questions from the control of generous juries.⁷⁹ The statement of the breach of duty was ‘a mere converse statement of the meaning of duty’.⁸⁰ Rather than invoking the concept of duty, he said, it was enough to ask the plaintiff to ‘[p]rove that the defendant has harmed you by not acting as a reasonably careful man would have behaved in similar circumstances, and you have then made out your case.’⁸¹ Since the duty was to behave as a reasonably careful man would, and the breach was not doing this, the requirement of stating a duty was superfluous.

The broad approach to negligence gained wide academic support by the 1930s, with the leading tort textbooks in England and the House of Lords endorsing it. But the academic triumph did not translate immediately to the courtroom. The broad proposition of *Donoghue v Stevenson*, that there was a general duty of care, rather than a series of situations in which such a duty had been recognised, did not gain full judicial acceptance until

⁷⁵ *Donoghue v Stevenson* [1932] AC 562, 580.

⁷⁶ *Ibid.*

⁷⁷ Percy Winfield, ‘Duty in Tortious Negligence’ (1934) 34 *Columbia Law Review* 41, 61.

⁷⁸ *Ibid.*

⁷⁹ *Ibid* 61 and note.

⁸⁰ *Ibid* 61.

⁸¹ *Ibid* 43.

1970.⁸² When it was, the House of Lords was far from willing to abandon the notion of duty. Rather than asking only the questions Pollock and Lord Atkin had in mind — whether the defendant had a duty toward the plaintiff because a reasonable man in his position would foresee the harm, and whether the defendant had breached that duty by acting carelessly — courts also considered whether those who clearly *could* have foreseen harm *should* have done so. This raised the normative question of whether a duty should be imposed in the circumstances. At the very moment it was endorsing Lord Atkin's dictum, the House of Lords therefore also stated that the existence of a duty of care might depend on whether it was 'fair and reasonable' to impose a duty on the defendant.⁸³ Pollock's theory seemed to make the scope of negligence too broad, and just as they had in the mid nineteenth century, judges wanted to put limits on its ambit. How was this to be done? In 1978, in *Anns v Merton London Borough Council*,⁸⁴ Lord Wilberforce seemed to endorse the notion that a prima facie duty of care arose, where harm was foreseeable, but stated that it could be displaced if the court felt there were any considerations which 'ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.'⁸⁵ Policy would therefore act as a brake. But within a decade, the same court had doubts about this formulation, and was again using the language of duties, as a means to set limits.⁸⁶ In 1990, in *Caparo Industries Plc v Dickman*,⁸⁷ Lord Bridge of Harwich (endorsing the position taken in the High Court of Australia in *Sutherland Shire Council v Heyman*⁸⁸) stated:

⁸² The key cases were *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1027.

⁸³ *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1038.

⁸⁴ [1978] AC 728.

⁸⁵ *Ibid* 751–2. This went further than Lord Reid's qualification in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1027 that the principle 'ought to apply unless there is some justification or valid explanation for its exclusion'.

⁸⁶ Eg, '[t]he true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case'. *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, 240. [1990] 2 AC 605.

⁸⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.⁸⁹

Alongside foreseeability of damage, and the proximity of the relationship, courts were to consider (at least in novel cases)⁹⁰ whether it was fair, just and reasonable to impose a duty. Deciding whether it was fair to make a defendant liable was, as one judge put it, an ‘exercise of judicial pragmatism which is in my view the same as judicial policy’.⁹¹

This short examination of the history of negligence reveals that judges and jurists remained uncertain about the foundations and scope of their subject. Lacking a positive foundation for this area of law, whether given by custom or statute, they had to search for one through analysis. The theory of duty put forward by Brett MR and Pollock seemed to explain the nature of negligence and to set out a duty which was fully comprehensive. It seemed to open the way for a system of corrective justice which would need no complex structure of rules. As modified by Winfield, it did not even need the concept of a duty, since the only duty required by the law of negligence was to pay compensation for harms resulting from one’s fault. Yet it was soon evident to many jurists that the law of negligence could not operate as a formal system of corrective justice.⁹² In practice, it was bound to generate a body of law reflecting positive choices about what counted as fault. What constituted blameworthy or unreasonable conduct needed to be established, either from jury determinations or judicial pronouncements. If breach was (as Winfield saw it) the mirror image of duty, identifying breaches would flesh out the meaning of the duty. Since it was evident that not *all* foreseeable harms were blameworthy, courts and commentators in the second half of the twentieth century restored the focus on duty. It would be for courts to settle whether a duty existed in a particular type of situation.

⁸⁹ *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618.

⁹⁰ Where a duty was already established by precedent cases, this was not necessary: see eg the comment of Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd* (No 1) [1995] 2 AC 145, 181.

⁹¹ *Alcock v Chief Constable of Yorkshire Police* [1992] 1 AC 310, 365 (Parker LJ).

⁹² For a recent theory of tort as a system of formal corrective justice, see Ernest Weinrib, *The Idea of Private Law* (1995).

If the theorists had found a unifying principle for the law of negligence, it still had to be developed and applied in the courtroom by judges making positive decisions. In developing the law, judges would of course use the tools Hale had taught them to use, following precedent, analogy and reason. As with the nineteenth century law of insurance, tort law could expand by analogising from similar situations, looking to what was morally fair between the parties, or looking to policy or consequentialist considerations.