WANDERINGS IN THE MAZE OF TRESPASS

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A Study in Life, not in Logic

PERHAPS as good a topic as any other that illustrates Holmes' aphorism that the life of the law has been experience, not logic, is the field of trespass, for if pattern there be in the varying strands that comprise the cloth of which trespass is made, it is difficult to find. Seek for a rational and logical plan and the search is fruitless – because it was social circumstances and changing ideas of justice that guided the hands of the Judges who wove that cloth.

By the early eighteenth century there had evolved in English law a doctrine which made employers liable in tort for the wrongful acts of their servants. Originally a rule which limited a master's liability to acts which he had commanded, it was extended by the needs of the times to cover, first, acts impliedly commanded and then, in its final form, established during the nineteenth century, acts done in the course of employment. At about the same time the Courts were cutting and snipping at many of the doctrines coming under the general heading of trespass and they were now faced with the problem of applying respondeat superior to trespass. Since they had made masters liable for the negligent acts of their servants, it was to be expected that the same responsibility would be put upon employers for trespasses. But it did not entirely turn out that way, for a distinction was eventually made between negligent and wilful trespasses. A rule slowly emerged that a master was not liable in trespass for injuries which, though direct, were the result of negligence in his servant – despite the fact that had the defendant caused them himself trespass would have lain. In other words, at the time when this distinction was made, a man could be sued in trespass for injuries caused directly by himself, whether intentionally or negligently, but he could not be sued in trespass on the respondeat superior doctrine if the injuries, though direct, were the result of a lack of care by his servant. In that event, the courts said, case was the proper action, not trespass.

Although some of the earlier cases are conflicting that is what the main later stream of authority establishes. We begin in 1795 with *Morley v. Gainsford*,[1] in which it was held that an action on the case and not trespass was the proper remedy for damage done to the plaintiff's carriage by the negligent driving of the defendant's ser-

[1] 2 H.Bl. 441.

vant. Then in *Gregory v. Piper*[2] the distinction was clearly made in a dictum of Littledale J. in the words:[3] "If the servant on carrying into execution the orders of his master uses ordinary care and an injury is done to another, the master is liable in trespass. If the injury arises from want of ordinary care in the servant the master will only be liable in case." But our principal authority is *Sharrod v. The London and North Western Railway Co.*,[4] an action in trespass against the defendant company for running over the plaintiff's sheep. It was held that trespass did not lie and that if the sheep had a right to be on the railway the plaintiff's remedy was by action on the case for negligence. Parke B., in delivering the judgment of the Court, said that if the act was that of a servant and was negligent, not wilful, case was the only remedy against the master.[5] Trespass would only lie as against the master where the act of the servant was done by his command or was an act which was the necessary natural consequence of an order by the master.[6] This was the simple case of an act done by a servant in the course of his employment, not specifically ordered by the master and though the injury by such an act was direct so far as related to the servant the master was not responsible in trespass.[7]

On the authority of these cases it is possible to put forward the following propositions:

(1) a master could not be sued in trespass for negligent trespasses by his servants;[8]

(2) a master could only be sued in trespass for a servant's intentional trespass when the specific act constituting the trespass had been ordered by him or was the natural and necessary consequence of his order.

Wigmore suggested[9] that this position – that a master could be sued in trespass in that case alone when the specific act had been commanded or was the necessary consequence of that command – resulted from a misconception of the old command test of master-servant vicarious liability. In *Sharrod's* Case itself the reasons given for the decision could not have been more specious. This is what Baron Parke said:[10] "The maxim *qui facit per alium facit per se* renders the master liable for all the negligent acts of the servant in the course of his employment but that liability does not make the

[2] (1829) 9 B. & C. 591. [3] at 594. [4] (1849) 4 Exch. 580.
[5] at 585. [6] at 585–6. [7] at 587.
[8] That this represents the modern law is shown by the judgment of the Full Court of N.S.W. in *McCorquodale v. The Shell Co. of Aust. Ltd.* (1933) 33 S.R. N.S.W. 151 and by the judgment of Cleland J. in *Hillier v. Leitch* [1936] S.A. S.R. 490.
[9] (1894) 7 Harvard Law Review 383, 403. [10] (1849) 4 Exch. 580, 585.

direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant." As is pointed out by Holmes,[11] the maxim *qui facit ... per se* expresses only the the general rule of agency which makes a man liable for acts commanded and in itself is no justification for anything more. The respondeat superior doctrine developed on a public policy basis as an exception to the general rules of agency, liability being imposed not co-extensively with authority as in agency, but in excess of it to cover acts not actually authorized but done within the course of employment. The precise point about the doctrine was that the act of the servant was treated as the act of the master and if this was so in the case of negligence why not also in the case of trespasses? Parke B. attempted to overcome this difficulty by assigning a false reason for the negligence case, the unsoundness of which is quickly exposed by reference to the decisions that no amount of care in the choice of a servant will exonerate a master in an action against him based on his servant's negligence.

Holmes' view was that although Parke B.'s reasoning was bad, his language expresses a natural unwillingness to sanction an allegation that the defendant directly brought force to bear on the plaintiff when, as a matter of fact, it was done by some one else.[12] But this rationalization is not very satisfactory either, because, after all, the same can be said of fraud and other criminal acts of a servant and yet for these a master has been held liable. Yet another explanation was put forward by Lord Parker in *Admiralty Commissioners v. s.s. Amerika*[13] to the effect that trespass did not lie against a master for his servant's wilful act because trespass was a criminal proceeding and no one could be called upon to answer in a criminal proceeding for another's crime. To this it could be replied that the respondeat superior doctrine was a late development in the common law and that by the time it emerged as a settled principle the criminal associations of the action of trespass were much a thing of the past.

Whatever the reason for the rules may have been, it is important to observe their limits, restricting as they do the respondeat superior doctrine. Winfield and Goodhart, writing in the Law Quarterly Review, pointed out that "where, as frequently happens in *running down cases*, the injury was due to the act of the defendant's servant, trespass is almost always inappropriate."[14] *Sharrod's* Case itself involved injuries to sheep caused by a train but Parke B. treated the matter as analogous to highway cases and in his judg-

[11] (1891) 5 Harvard Law Review 1, 20.
[12] *ibid.* at 21.
[13] [1917] A.C. 38, 46.
[14] (1933) 49 L.Q.R. 359, 366.

ment in *Gorden v. Rolt* summed up the authorities with the remark that "if a servant in the course of his master's employ *drives over* another person and does a wilful injury the servant and not the master is liable in trespass."[15] The contention is that the rule is confined to running down cases; if, indeed, it is not, it is impossible to explain assault cases such as *Warren v. Henley*,[16] and *Deaton v. Flew*,[17] the modern successors to *Bayley v. Manchester etc. Railway*,[18] *Seymour v. Greenwood*[19] and *Dyer v. Munday*.[20] It is clear from all these cases that a master is liable in trespass for assaults committed by servants within the course of their employment. It is true that in *Seymour v. Greenwood* (in which an employer was sued for the violent removal of a passenger from the employer's bus by one of his employees) counsel for the defendant argued from Sharrod's Case and cited Hilliard on Torts (Vol. 2 at 524) to the effect that a master was not liable for trespasses done by his servants, but without avail. In the more modern cases no mention is made of the *Sharrod* point at all; the issue revolves round the question whether or not the servant was acting within the course of his employment. Not only has this been so in cases of assault against the person but it occurred also in *Joseph Rand v. Craig*[21] in an action for trespass to land. In that case, since the act of the servants in tipping rubbish on the plaintiff's property could not be regarded as a natural and necessary consequence of their employer's orders (he had, in fact, forbidden dumping on any land but his own) within the *Gregory v. Piper* doctrine and since it was an intentional trespass, the Court of Appeal, if *Sharrod's* Case was not restricted to running down cases, could simply have referred to *Sharrod's* Case and declared for no liability in a master for a servant's intentional trespasses. But the Court did no such thing; its decision was based on the fact that the servants' acts were outside the scope of their employment. It seems reasonable to conclude that *Sharrod's* Case is restricted as suggested. There is no positive authority to that effect but all the cases in which the Sharrod doctrine has been applied have been concerned with collisions on the highway and it has not been applied to other kinds of trespasses by servants.

Logic neither accounts for the rule itself nor for its limited application, in the same way as logic has been disregarded by the Courts in running down cases not involving respondeat superior.

As late as 1803 Lord Ellenborough was able to say in *Leame v. Bray*: "If the injurious act be the immediate result of the force origi-

[15] (1849) 4 Exch. 365, 366. My italics.
[16] [1948] 2 all E.R. 935.
[17] (1949) 79 C.L.R. 370.
[18] (1873) L. R. 8 C.P. 148.
[19] (1861) 7 H. & N. 355.
[20] [1895] 1 Q.B. 742.
[21] [1919] 1 Ch. 1.

nally applied by the defendant and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not."[22] That is, the old medieval principle of strict liability for trespass was still in force. By 1842, however, it is clear from *Hall v. Fearnley*[23] that in an action for injuries received on the highway inevitable accident could be a defence. This was a shift in the law, a slight easing of the burden on the defendant in trespass cases. But it still remained for him if he wished to escape liability to show that his act was not wilful or negligent, not for the plaintiff to impose liability by proving intent or negligence. This would still appear to be the position when *Holmes v. Mather*[24] was decided in 1875, the defendant being absolved from liability because the alleged trespass was not a wrongful act. Bramwell B. stated the law to be: "If the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful."[25]

It is well nigh impossible to decide from the words used in this case whether the court regarded the onus of proof as lying on the plaintiff or on the defendant. Counsel for the plaintiffs in *National Coal Board v. Evans* interpreted *Holmes v. Mather* as having the effect of making the plaintiff prove wilfulness.[26] It is difficult to say, but whatever opinion is held on this point there can be little doubt that at some time towards the end of the nineteenth century or the beginning of the twentieth century a practice arose which did place the burden of proof on the plaintiff in running down cases.[27]

The result has been that in the space of a century for no reasons of logic the old rule of strict liability was relaxed twice, doubtless because of the changing circumstances of the times. Increasing internal commerce, the change in communications from canals and horse drawn vehicles to railways and motor vehicles demanded an easing of the medieval rules of strict liability if the advantages to be derived from these changes were not to be impeded. This idea found expression in Bramwell B.'s words in *Holmes v. Mather*: "For the convenience of mankind in carrying out the affairs of life, people as they go along roads must expect or put up with such mischief as

[22] 3 East. 593, 599. Grose J. expressed himself in similar words.
[23] 3 Q.B. 919. [24] L.R. 10 Ex. 261. [25] at 268–9.
[26] [1951] 2 K.B. 861, 868.
[27] See Winfield & Goodhart (1933) 49 L.Q.R. 359, 376.

reasonable care on the part of others cannot avoid."[28] At the same time the Judges may well have been influenced by conceptions of justice such as that expressed by Dixon J. in *Nickells v. Melbourne Corporation*[29]: "Where harm arises out of the simultaneous enjoyment or exercise of co-existing rights absolute responsibility is unjust and no reconciliation of the conflicting interests can be satisfied unless by reference to negligence or default."

So much for trespasses on the highway. What has happened to the medieval rule in the case of trespasses to the person not on the highway? This is a topic which has disturbed the writers of text books and of articles in legal periodicals as much as any other one issue in the law. In such an action is it sufficient for the plaintiff to show that he has been injured by a direct act of the defendant without proving either intention or negligence, or must he, as part of his case, accept the onus of establishing intent or negligence? We have just seen in reference to highway cases that although the original rule supported the first proposition the modern tendency has been to place the burden on the plaintiff. Has there been the same evolution in other than highway cases? *Holmes v. Mather* and its allied authorities do not incontrovertibly limit their effect to running down cases. At least that was the opinion of Cohen L.J. in *National Coal Board v. Evans*[30] in which the learned Lord Justice stated that he could see no logical reason for placing a limit on the general remarks of Bramwell B. in *Holmes v. Mather* though he found it unnecessary to express any final opinion on the point. Nevertheless it is the writer's contention that the highway cases have developed along special lines of their own in conformity with demands of convenience and justice which do not apply in the same way to other kinds of trespasses to the person.

There is the same starting point, the medieval principle that trespass was actionable whether the defendant was blameworthy or not and even if the act was accidental.[31] Early law simply asked: Did the defendant do the act which caused direct harm to the plaintiff and if the answer was in the affirmative, liability followed, even if the act was an otherwise perfectly lawful one. But the subsequent history of this aspect of trespass was different from the highway cases. The authorities have been pored over and dissected so often[32] that it would be futile to do so again. The view adopted here is that

[28] (1875) L.R. 10 Ex. 261, 267. See, too, Blackburn J. in *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, 286–7.

[29] (1938) 59 C.L.R. 219, 225. [30] [1951] 2 K.B. 861, 875.

[31] Holdsworth, *H.E.L.* vol. VIII, 446.

[32] See (1933) 49 L.Q.R. 359; Fifoot, *History and Sources of the Common Law* 184–195; Gold, 21 *Bell Yard* 5; Beven, *Negligence* 3rd Ed. 533.

during the nineteenth century social factors and changes in outlook and ethical ideas resulted in the acceptance of the defence of unavoidable accident. At least that is what it is contended *Stanley v. Powell*[33] decided. It is true, as Landon points out, [34] that there is no unanimity as to whether this case laid down that the plaintiff must prove wrongful intent or negligence or whether the defendant must show that he was not at fault. Denman J.'s judgment is not clear on the point; it has, in fact, been trenchantly criticized on general grounds. But it is the writer's view that the latter is what the learned Judge intended and is the present law. Such a conclusion is supported by the Court of Appeal's decision in *National Coal Board v. Evans*[35] and by the pronouncement of the Full Court of N.S.W. in *Blacker v. Waters,*[36] a case whose essential facts are strikingly similar to those in *Stanley v. Powell.* The plaintiff brought an action for trespass to the person as a result of being struck in the eye by a fragment of a bullet fired by the defendant at a shooting gallery. It was held by Street C.J., Ferguson and James JJ. that a prima facie case had been established by the plaintiff on proof that the fragment which had injured him had come from a bullet fired by the defendant and that the burden of proving that the injury was neither intentional nor negligent was on the defendant.

The result is a change from the old principle that a man acted at his peril to one based on liability for fault. The rule of the early law was due, partially at least, to the fact that failure to redress injuries of this kind might result in breaches of the peace. When this ceased to be an influential factor, those who argued for the retention of the old law contended on policy grounds that the plaintiff had done nothing whereas on the other hand the defendant had chosen to act and therefore the plaintiff who had no share in producing the damage should be compensated for it as against one whose voluntary conduct had caused it. This argument appeals to one's sense of justice at least in cases such as *Stanley v. Powell* and *Blacker v. Waters,* though different considerations would apply to activities which bring benefit to the general community such as quarrying and the like when it would be necessary to decide not between two individual interests but as between the plaintiff's interest in his personal safety and the community or public interest in getting things done.

It is in fact impossible to generalize as to the soundness or otherwise of this rule. The modern tendency in other parts of the law has been to limit the scope of strict liability and in general make liability in tort

[33] [1891] 1 Q.B. 86.
[34] Excursus B to Pollock's *Law of Torts,* 14th Edn. at 140–1.
[35] [1952] 2 K.B. 861.
[36] (1928) 28 S.R. N.S.W. 406.

for personal injuries dependent on fault[37] although here, too, it is important not to overstate the case. As Lord Simonds very pertinently remarked in *Read v. Lyons*[38] there is not one principle to be applied with rigid logic to all cases. Certainly if the tendency of today is towards liability for fault, decisions such as that in *Morris v. Marsden*[39] must be placed amongst the exceptions for in that case Stable J. held the defendant liable for an assault committed while he was suffering certifiably from mental illness. Since the learned Judge found as a fact that although the defendant knew the nature and quality of his act he did not realize that it was wrong, there could be no moral blameworthiness attached to the defendant and he ought not therefore to have been held responsible if liability depends on fault. As one of the proponents of that theory, Dean Ames, writing some years ago, prophesied that English courts would, sooner or later, apply to the lunatic the ethical standard of liability.[40] So far his prophecy has proved false, perhaps because Ames did not sufficiently appreciate that the attitude of English courts was more inductive than deductive and that English law had not yet reached a theory of tort liability that could "be applied with rigid logic to all cases." Certainly the law of trespass is no warrant for dogmatic generalization, for life and the practical needs and convenience of the community have had a far greater influence in its present formulation than abtsract reasoning and logical processes.

[37] See *Read v. Lyons* [1947] A.C. 156 Contra Denning L.J. in *White v. White* [1950] P. 39, 59.
[38] at 180.
[39] [1952] 1 T.L.R. 947.
[40] Law and Morals (1908) 22 Harvard Law Review 97, 99.