CHAPTER 1

DEVELOPMENT OF LIABILITY BASED UPON FAULT

"Tort" comes from the Latin word "tortus," which means twisted, and the French word "tort," which means injury or wrong. A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy. This area of law imposes duties on persons to act in a manner that will not injure other persons. A person who breaches a tort duty has committed a tort and may be liable to pay damages in a lawsuit brought by a person injured because of that tort.

Over the years, tort law has been principally a part of the common law, developed by the courts through the opinions of the judges in the cases before them. Within some areas of tort law, however, statutes have long been common—e.g., trespass to real property, limitation of actions, wrongful death actions; and in recent years the legislature has had an increasingly more significant role in modifying the common law.

Modern Tort Law—Beyond the Casebooks Into the Field of Public Debate. From the time this casebook began with its first edition in the early 1950's, tort law was of concern primarily to law students, law professors, and attorneys who practiced in the field. The public, in general, knew very little, if anything, about the subject. In the past few decades, however, this has changed quite dramatically. Prior to coming to law school, you probably read about healthcare providers who were unable to obtain affordable medical malpractice coverage, about people injured through someone else's fault who could not recover compensation because the cost of the lawsuit would have been more than they could recover, or about manufacturers going out of business or declining to put new and useful products on the market, all because of problems in the area of "tort law."

The Federal Government and all state governments have examined these issues and legislation affecting tort law has multiplied in recent years. As you study the law of torts, you may find that you will be reading news stories about the subject from a new perspective. You may decide that many stories oversimplify the tort system and perhaps miss critical points. It is important to pay attention to these stories because the subject you are studying is dynamic, complex, and at the center of major public policy debates.

In studying the subject, you should consider the major purposes of tort law: (1) to provide a peaceful means for adjusting the rights of parties who might otherwise "take the law into their own hands"; (2) to deter wrongful conduct; (3) to encourage socially responsible behavior; (4) to restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury; and (5) to vindicate individual rights of redress. Should people always be compensated when they have been injured by the action of another? If your answer to this question is in the affirmative, think about whether it is always necessary to have a trial, with a plaintiff, a defendant, and
lawyers. On the other hand, if tort law should not compensate every person who is injured by another, what are appropriate rules and standards to determine whom to compensate and under what circumstances? This is the primary problem to which the law of torts addresses itself. Consider also how tort law evolves to meet changing circumstances—the great virtue of the common law. See Schwartz, Silverman & Goldberg, Neutral Principles of Stare Decisis in Tort Law, 58 S.C. L.Rev. 317 (2005) (suggesting principles for departure from traditional common law concepts).

The casebook will explore the system that has been accused of having caused these crises. Evaluate it carefully, and remember that you are not only learning a legal subject, but also becoming an educated citizen who can and should participate in the debate about the direction tort law should take through the 21st century.

Historical Origins. Historians have differed as to how the law of torts began. There is one theory that it originated with liability based upon "actual intent and actual personal culpability," with a strong moral tinge, and slowly formulated external standards that took less account of personal fault. O. Holmes, The Common Law, Lecture I (1881). It seems quite likely that the most flagrant wrongs were the first to receive redress.

Another, and more generally accepted theory, is that the law began by imposing liability on those who caused physical harm, and gradually developed toward the acceptance of moral standards as the basis of liability. Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv.L.Rev. 315, 383 & 441 (1894). Ames, Law and Morals, 22 Harv.L.Rev. 97 (1908). An alternative theory is that there has been no steady progression from liability without fault to liability based on fault. The difference between no-fault periods and fault-based periods is, rather, one of degree. Isaacs, Fault and Liability, 31 Harv.L.Rev. 954, 965 (1918).

Certainly at one time the law was not very much concerned with the moral responsibility of the defendant. "The thought of man shall not be tried," said Chief Justice Brian, in Y.B. 7 Edw. IV, f. 2, pl. 2 (1468), "for the devil himself knoweth not the thought of man." The courts were interested primarily in keeping the peace between individuals by providing a substitute for private vengeance, as the party injured was just as likely to take the law into his own hands when the injury was an innocent one. The person who hurt another by unavoidable accident or in self-defense was required to make good the damage inflicted. "In all civil acts," it was said, in Lambert v. Bessey, T.Raym. 421, 83 Eng.Rep. 220 (K.B.1681), "the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."

Forms of action. In the early English law, after the Norman conquest, remedies for wrongs were dependent upon the issuance of writs to bring the defendant into court. In the course of the thirteenth century, the principle was established that no one could bring an action in the King's common law courts without the King's writ. As a result of the jealous insistence of the nobles and others upon the prerogatives of their local courts, the number of writs that the King could issue was limited, and their forms were strictly prescribed. There were, in other
words, "forms of action," and unless the plaintiff's claim could be fitted into the form of some established and recognized writ, the plaintiff could not seek money damages in the King's courts. The result was a highly formalized system of procedure that governed and controlled the law as to the substance of the wrongs that might be remedied. You may learn more about how the forms of action affected the law of procedure in your civil procedure classes.

Two common law writs are the genesis of tort law—the writ of trespass and the writ of trespass on the case, often called action on the case. Here, "trespass" is used in the general sense of doing something to hurt or offend someone rather than the more specific sense of harming someone by intruding onto their land.

The form of action in trespass originally had a criminal character. It would lie only in cases of forcible breaches of the King's peace, and it was only on this basis that the royal courts assumed jurisdiction over the wrong. The purpose of the remedy was at first primarily that of punishment of the crime; but to this there was added later the satisfaction of the injured party's claim for redress. If the defendant was found guilty, damages were awarded to the successful plaintiff, and the defendant was imprisoned, and allowed to purchase his release by payment of a fine. What similarity remains between tort and crime is to be traced to this common beginning. See Woodbine, The Origin of the Action of Trespass, 33 Yale L.J. 799 (1923), 34 Yale L.J. 343 (1934); F. Maitland, The Forms of Action at Common Law, 65 (1941).

The writ of trespass on the case developed out of the practice of applying, in cases in which no writ could be found in the Register to cover the plaintiff's claim, for a special writ, in the nature of trespass, drawn to fit the particular case. Historians have differed as to the origin of this practice. Attempts to trace it are found in C. Fifoot, History and Sources of the Common Law: Tort and Contract, 66–74 (1949), and Kiralfy, The Action on the Case, Chapter I (1951).

Whatever may have been its origin, it was through this action on the case, rather than through trespass, that most of modern tort and contract law developed. Thus, in the field of tort law, actions for nuisance, conversion, deceit, defamation, malicious prosecution, interference with economic relations, and the modern action for negligence all developed out of the action on the case.

The distinction between trespass and case lay in the direct and immediate application of force to the person or property of the plaintiff. Trespass would lie only for direct and forcible injuries; case, for other tangible injuries to person or property. The classic illustration of this distinction is that of a log thrown into the highway. A person struck by the rolling log could maintain trespass against the thrower, since the injury was direct and immediate; but one who came along later and was hurt by stumbling over the stationary log could maintain only an action on the case. Leame v. Bray, 3 East 593, 102 Eng.Rep. 724 (1802).

Note that the distinction was not one between intentional and negligent conduct. The emphasis was upon the causal sequence, rather than the character of the defendant's wrong. Trespass would lie for all forcible, direct injuries, whether or not they were intended, while the
action on the case might be maintained for injuries intended but not forcible or not direct. There were two additional significant points of difference between the two actions. Trespass, because of its quasi-criminal character, required no proof of any actual damage, since the invasion of the plaintiff’s rights by the criminal conduct was regarded as a tort in itself; while in the action on the case, which developed purely as a civil remedy, there could ordinarily be no liability unless actual damage was proved. Also, in its earlier stages trespass was identified with the view that liability might be imposed without regard to the defendant’s fault, while case always had required proof of culpability: either a wrongful intent or wrongful conduct (negligence).

The criminal aspect of trespass disappeared in 1697, when the statute of 5–6 William & Mary, c. 12, abolished the fine and left the action as an exclusively civil remedy. Out of adherence to precedent, however, the courts continued to allow the action even though no real injury was suffered. They were, however, disinclined to extend the scope of trespass beyond the existing precedents, perhaps because of the belief that punishment was primarily the function of the criminal law and the civil action should be used only to compensate for harm done. This explains why in modern law there is a requirement of proving actual damages except in cases of assault, offensive but harmless battery, false imprisonment, and trespass to land. If harm was done, the injured party could still sue in case and recover, even though the defendant’s wrong did not amount to a trespass. If no harm was done, the recovery of punitive damages in a civil action was limited to the most flagrant cases, where the criminal law did not apply or was not effective as a deterrent.

**Hulle v. Orynge**
*(The Case of Thorns)*

King’s Bench, 1466.
Y.B.M. 6 Edw. IV, folio 7, placitum 18.

BRIAN. In my opinion if a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others. As in the case where I erect a building, and when the timber is being lifted a piece of it falls upon the house of my neighbor and bruises his house, he will have a good action, and that, although the erection of my house was lawful and the timber fell without my intent.

Similarly, if a man commits an assault upon me and I cannot avoid him if he wants to beat me, and I lift my stick in self-defense in order to prevent him, and there is a man in back of me and I injure him in lifting my stick, in that case he would have an action against me, although my lifting the stick was lawful to defend myself and I injured him without intent.

**NOTES AND QUESTIONS**

1. This passage, translated from the Norman French, is one of the few bits and fragments of the early English law of torts that have come down to us. Although Brian, who became Chief Justice of the Court of
Common Pleas in 1471, was apparently only arguing as counsel in this case, he appears to have been summarizing accepted law.

**Weaver v. Ward**

King's Bench, 1616.


Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded, that he was amongst others by the commandment of the Lords of the Council a trained soldier in London, of the band of one Andrews captain; and so was the plaintiff, and that they were skirmishing with their muskets charged with powder for the exercise in re militari [in a military matter], against another captain and his band; and as they were so skirmishing the defendant casualiter & per infortunium & contra voluntatem suam [accidentally and by misfortune and against his will] in discharging his piece did hurt and wound the plaintiff, which is the same, & c. absque hoc [without this], that he was guilty aliter sive alio modo [otherwise or in another manner].

And upon demurrer by the plaintiff, judgment was given for him; for though it were agreed, that if men tilt or turney in the presence of the King, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatick kill a man, or the like, because felony must be done animo felonico [with a felonious mind]; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatick hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification, prout ei bene licuit [as is properly permitted to him]), except it may be judged utterly without his fault.

As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt.

**NOTES AND QUESTIONS**

1. This is the earliest known case in which it was clearly recognized that a defendant might not be liable, even in a trespass action, for a purely accidental injury occurring entirely without his fault. Note that the burden rests upon the defendant to plead and prove his freedom from all fault.

2. The next two centuries saw a gradual blurring of the distinction between trespass and case. The procedural distinction is now long antiquated, although some vestige of it still remains in jurisdictions retaining common law pleading in a modified form. Modern law has almost entirely abandoned the artificial classification of injuries as direct and indirect, and looks instead to the intent or negligence of the wrongdoer.

3. The first step was taken when the action on the case was held to cover injuries that were merely negligent but were directly inflicted, as in Williams v. Holland, 10 Bing. 112, 131 Eng.Rep. 848 (1833) (plaintiff's cart
was overturned by collision with wheel of defendant's gig, which was engaged in a race with another gig). Although this left the plaintiff an election between trespass and case, the action of case came to be used quite generally in all cases of negligence, whether direct or indirect, while trespass remained as the remedy for intentional injuries inflicted by acts of violence. Terms such as battery, assault, and false imprisonment, which were varieties of trespass, gradually came to be associated only with intent, and negligence emerged as a separate tort. The shift was a slow one, and the courts seem to have been quite unconscious of it at the time. When in the nineteenth century the old forms of action were replaced in most jurisdictions by code procedure, the new classification remained. Prichard, Trespass, Case and the Rule in Williams v. Holland, Cambridge L.J. 234 (1964). There was occasional confusion, and some talk, for example, of a negligent battery, as in Anderson v. Arnold's Ex'r, 79 Ky. 370 (1881), but, in general, these old trespass terms are now restricted to actions involving intentional conduct.

4. Although we no longer have "forms of action," it usually is helpful from the vantage point of advocacy to place one's claim under a tort label that will be familiar to the court—e.g., "battery," "assault," "negligence," "defamation," "nuisance"—and that is still the common practice in both state and federal courts.

5. With certain exceptions, actions for injuries to the person, or to tangible property, now require proof of an intent to inflict them or of failure to exercise proper care to avoid them. As to the necessity of proving actual damage, the courts have continued the distinctions found in the older actions of trespass and case. Thus, whether damage is essential to the existence of a cause of action for a particular tort depends largely upon its ancestry in terms of the old procedure.


Brown v. Kendall
Supreme Judicial Court of Massachusetts, 1850.
60 Mass. (6 Cush.) 292.

This was an action of trespass for assault and battery. *** [Two dogs, owned by plaintiff and defendant, were fighting. Defendant tried to separate them by hitting them with a stick. In doing so he backed up toward the plaintiff, and in raising his stick over his shoulder, struck plaintiff in the eye, injuring him.]

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case.***

[The trial judge, refusing to give requested instructions to the contrary, instructed the jury that if hitting the dogs was a necessary act
which defendant was under a duty to do, defendant was required to use only ordinary care in doing it; but if it were only a proper and permissible act, defendant was liable unless he exercised extraordinary care; and that the burden of proving the extraordinary care was on the defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C.J. This is an action of trespass, vi et armis, brought by George Brown against George K. Kendall, for an assault and battery. *** The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long- vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass vi et armis lies; if consequential only, and not immediate, case is the proper remedy. [Cc]

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These dicta are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. *** [Evidence showed that the striking of plaintiff was not intentional, but rather done as he was backing up and plaintiff, behind him, was moving forward.]

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85 to 92; [c]. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. [Cc] In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both
plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. ***

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary, (that is, as before explained, not a duty incumbent on the defendant,) then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. [Cc]

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have
intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

NOTES AND QUESTIONS

1. Why a new trial? Why not simply a judgment for the defendant?

2. What has gone on in the law since Hulle v. Orynge in 1466? How would Justice Shaw have decided Weaver v. Ward?

3. This decision is the earliest clear statement of the rule commonly applied: liability must be based on legal fault.

4. While Brown v. Kendall dealt with a defendant who was separating dogs, many tort defendants in Massachusetts at the time were industrial employers. Does this fact, plus the social policy of the time, have a bearing on the legal change reflected in the opinion? See Schwartz, The Character of Early American Tort Law, 36 U.C.L.A. L. Rev. 641, 667–670 (1989).

5. In some jurisdictions, the old distinction between trespass and case survived into the Twentieth Century, in the form of decisions holding that if the injury is one for which trespass would lie, the defendant must sustain the burden of proving that he was not at fault, while if only case would lie the burden of proving fault is on the plaintiff. The distinction was not finally abandoned in England until Fowler v. Lanning, [1959] 1 Q.B. 426.

Cohen v. Petty

Court of Appeals of the District of Columbia, 1933.

Groner, Associate Justice. Plaintiff's declaration [complaint] alleged that on December 14, 1930, she was riding as a guest in defendant's automobile; that defendant failed to exercise reasonable care in its operation, and drove it at a reckless and excessive rate of speed so that
he lost control of the car and propelled it off the road against an embankment on the side of the road, as the result of which plaintiff received permanent injuries. The trial judge gave binding instructions [directed a verdict], and the plaintiff appeals.

There were four eyewitnesses to the accident, namely, plaintiff and her sister on the one side, and defendant and his wife on the other. All four were occupants of the car. Defendant was driving the car, and his wife was sitting beside him. Plaintiff and her sister were in the rear seat. **After passing the Country Club, and when somewhere near Four Corners and five or six miles from Silver Spring, the automobile suddenly swerved out of the road, hit the abutment of a culvert, and ran into the bank, throwing plaintiff and her sister through the roof of the car onto the ground.

Plaintiff's sister estimated the speed of the car just before the accident somewhere between thirty-five and forty miles an hour, and plaintiff herself, who had never driven a car, testified she thought it was nearer forty-five. The place of the accident was just beyond a long and gradual curve in the road. Plaintiff testified that just before the accident, perhaps a minute, she heard the defendant, who, as we have said, was driving the car, exclaim to his wife, "I feel sick," and a moment later heard his wife exclaim in a frightened voice to her husband, "Oh, John, what is the matter?" Immediately thereafter the car left the road and the crash occurred. Her sister, who testified, could not remember anything that occurred on the ride except that, at the time they passed the Country Club, the car was being driven about thirty-five or forty miles an hour and that the occupants of the car were engaged in a general conversation. The road was of concrete and was wide. Plaintiff, when she heard defendant's wife exclaim, "What is the matter?" instead of looking at the driver of the car, says she continued to look down the road, and as a result she did not see and does not know what subsequently occurred, except that there was a collision with the embankment.

Defendant's evidence as to what occurred just before the car left the road is positive and wholly uncontradicted. His wife, who was sitting beside him, states that they were driving along the road at the moderate rate of speed when all of a sudden defendant said, "Oh, Tree, I feel sick"—defendant's wife's name is Theresa, and he calls her Tree. His wife looked over, and defendant had fainted. "His head had fallen back and his hand had left the wheel and I immediately took hold of the wheel with both hands, and then I do not remember anything else until I waked up on the road in a strange automobile." The witness further testified that her husband's eyes were closed when she looked, and that his fainting and the collision occurred in quick sequence to his previous statement, "Oh, Tree, I feel so sick." The defendant himself testified that he had fainted just before the crash, that he had never fainted before, and that so far as he knew he was in good health, that on the day in question he had had breakfast late, and had had no luncheon, but that he was not feeling badly until the moment before the illness and the fainting occurred. **
The sole question is whether, under the circumstances we have narrated, the trial court was justified in taking the case from the jury. We think its action was in all respects correct.

It is undoubtedly the law that one who is suddenly stricken by an illness, which he had no reason to anticipate, while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence. [Cc]

In the present case the positive evidence is all to the effect that defendant did not know and had no reason to think he would be subject to an attack such as overcame him. Hence negligence cannot be predicated in this case upon defendant’s recklessness in driving an automobile when he knew or should have known of the possibility of an accident from such an event as occurred.

As the plaintiff wholly failed to show any actionable negligence prior to the time the car left the road, or causing or contributing to that occurrence, and as the defendant’s positive and uncontradicted evidence shows that the loss of control was due to defendant’s sudden illness, it follows the action of the lower court was right. Even if plaintiff’s own evidence tended more strongly than it does to imply some act of negligence, it would be insufficient to sustain a verdict and judgment upon proof such as the defendant offered here of undisputed facts, for in such a case the inference must yield to uncontradicted evidence of actual events.

Affirmed.

NOTES AND QUESTIONS

1. Defendant, asleep on the rear seat of an automobile, unconsciously pushed with his foot against the front seat in which plaintiff, the driver, was sitting. Plaintiff’s arms were forced off the wheel, the car crashed into a culvert and overturned, and plaintiff was injured. Is defendant liable? Lobert v. Pack, 337 Pa. 103, 9 A.2d 365 (1939) (defendant not liable because he did not act with volition). The Restatement (Third) Reporters note that the cases are “impressively unanimous” in finding no liability for injuries that occur due to an actor’s sudden and unforeseeable seizure or loss of consciousness. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 11(b), comment d (2010) and Reporters’ Notes thereto.

2. Defendant, driving an automobile, fell asleep at the wheel. The car went into the ditch and injured the plaintiff. Is defendant liable for his conduct while he is asleep? What if he knew that he was getting sleepy and continued to drive? Is this not always the case? At least one court has found that falling asleep at the wheel of a car is always negligence unless the driver was suddenly overcome with illness. Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925). Defendant became so frightened when she realized that her brakes were not working that she fainted and was thus unconscious when she collided with plaintiff’s car. Liability? Kohler v. Sheffert, 250 Iowa 899, 96 N.W.2d 911 (1959) (fact that she was unconscious at time of collision did not excuse previous negligence in causing the situation that frightened her).
3. Knowing that he was subject to epileptic seizures, driver had a seizure while driving and lost control of the car, which ran into the plaintiff and injured him. Is driver liable? Eleason v. Western Casualty & Surety Co., 254 Wis. 324, 35 N.W.2d 301 (1948) (liability based on testimony that driver knew he was subject to "spells" that could render him unconscious even though he did not know he had epilepsy). What if he had never had a seizure before? Moore v. Capital Transit Co., 226 F.2d 57 (D.C. Cir. 1955), cert. denied, 350 U.S. 966 (1956) (no liability because never had spell before and no reason to anticipate).

4. A patient was given prescription drugs and discharged from the hospital, without being warned that they would impair his mental and physical abilities. The patient drove his automobile, lost control and struck a tree, injuring his passenger. Is the driver liable to his passenger? Is his doctor? Is the manufacturer of the drugs? Cf. Kirk v. Michael Reese Hospital and Medical Center, 117 Ill.2d 507, 111 Ill. Dec. 944, 513 N.E.2d 387 (1987) and McKenzie v. Hawaii Permanente Medical Group, Inc., 98 Haw. 296, 47 P.3d 1209 (2002).

5. Do you agree with the result of the principal case? What about the argument that anyone who drives an automobile should bear the risk that others will be injured if he loses consciousness while driving, and should be liable for their loss? In a case where an epileptic had an unanticipated seizure, plaintiff's counsel argued most strongly that since defendant had liability insurance, he should bear the risk. Do you find this argument for strict liability persuasive? See Hammontree v. Jenner, 20 Cal.App.3d 528, 97 Cal.Rptr. 739 (1971). The court rejected this contention.

**Spano v. Perini Corp.**

Court of Appeals of New York, 1969.

25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527, on remand,


FULD, CHIEF JUDGE. The principal question posed on this appeal is whether a person who has sustained property damage caused by blasting on nearby property can maintain an action for damages without a showing that the blaster was negligent. Since 1893, when this court decided the case of Booth v. Rome, W. & O.T.R.R. Co., 140 N.Y. 267, 35 N.E. 592, 24 L.R.A. 105, it has been the law of this State that proof of negligence was required unless the blast was accompanied by an actual physical invasion of the damaged property—for example, by rocks or other material being cast upon the premises. We are now asked to reconsider that rule.

The plaintiff Spano is the owner of a garage in Brooklyn which was wrecked by a blast occurring on November 27, 1962. There was then in that garage, for repairs, an automobile owned by the plaintiff Davis which he also claims was damaged by the blasting. Each of the plaintiffs brought suit against the two defendants who, as joint venturers, were engaged in constructing a tunnel in the vicinity pursuant to a contract with the City of New York.***

It is undisputed that, on the day in question (November 27, 1962), the defendants had set off a total of 194 sticks of dynamite at a construction site which was only 125 feet away from the damaged
premises. Although both plaintiffs [also] alleged negligence in their complaints, no attempt was made to show that the defendants had failed to exercise reasonable care or to take necessary precautions when they were blasting. Instead, they chose to rely, upon the trial, solely on the principle of absolute liability ***

The concept of absolute liability in blasting cases is hardly a novel one. The overwhelming majority of American jurisdictions have adopted such a rule. [Cc] Indeed, this court itself, several years ago, noted that a change in our law would "conform to the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass". [C]

We need not rely solely however upon out-of-state decisions in order to attain our result. Not only has the rationale of the Booth case [c] been overwhelmingly rejected elsewhere but it appears to be fundamentally inconsistent with earlier cases in our own court which had held, long before Booth was decided, that a party was absolutely liable for damages to neighboring property caused by explosions. (See, e.g., Hay v. Cohoes Co., 2 N.Y. 159; Heeg v. Licht, 80 N.Y. 579.) In the Hay case (2 N.Y. 159, supra), for example, the defendant was engaged in blasting an excavation for a canal and the force of the blasts caused large quantities of earth and stones to be thrown against the plaintiff's house, knocking down his stoop and part of his chimney. The court held the defendant absolutely liable for the damage caused ***

Although the court in Booth drew a distinction between a situation—such as was presented in the Hay case—where there was "a physical invasion" of, or trespass on, the plaintiff's property and one in which the damage was caused by "setting the air in motion, or in some other unexplained way," [c], it is clear that the court, in the earlier cases, was not concerned with the particular manner by which the damage was caused but by the simple fact that any explosion in a built-up area was likely to cause damage. Thus, in Heeg v. Licht, 80 N.Y. 579, the court held that there should be absolute liability where the damage was caused by the accidental explosion of stored gunpowder, even in the absence of a physical trespass (p. 581):

"The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. *** The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, *** In such a case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application."

Such reasoning should, we venture, have led to the conclusion that the intentional setting off of explosives—that is, blasting—in an area in which it was likely to cause harm to neighboring property similarly results in absolute liability. However, the court in the Booth case rejected such an extension of the rule for the reason that "[t]o exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between
conflicting rights, but an extinguishment of the right of the one for the benefit of the other” [c]. The court expanded on this by stating, “This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this.”

This rationale cannot withstand analysis. The plaintiff in *Booth* was not seeking, as the court implied, to “exclude the defendant from blasting” and thus prevent desirable improvements to the latter’s property. Rather, he was merely seeking compensation for the damage which was inflicted upon his own property as a result of that blasting. The question, in other words, was not whether it was lawful or proper to engage in blasting but who should bear the cost of any resulting damage—the person who engaged in the dangerous activity or the innocent neighbor injured thereby. Viewed in such a light, it clearly appears that *Booth* was wrongly decided and should be forthrightly overruled.

[The court then remanded the case to the appellate division to determine the sufficiency of the evidence on causation because the appellate division had affirmed the trial court judge on the sole ground that no negligence had been proven and thus had no occasion to consider whether the blasting caused the plaintiffs’ damage.]

**NOTES AND QUESTIONS**

1. The early common law absolute or strict liability of the Weaver v. Ward type has persisted stubbornly in connection with trespass to real property and has been excised only in mid-Twentieth Century. Thus, in *Randall v. Shelton*, 293 S.W.2d 559 (Ky.1956), defendant’s truck ran over a large stone in the gravel highway and the tire cast it out so that it hit plaintiff, who was standing in her yard, and injured her. The appellate court found no negligence and held that the defendant’s motion for judgment notwithstanding the verdict should have been granted. To do this, it had to overrule an earlier Kentucky case in which a runaway street car invaded plaintiff’s property and did damage. The special rule for trespass explains some of the early New York cases discussed in the opinion of the principal case.

2. The procedural distinction long made in New York, between an action of trespass for blasting causing physical invasion by casting rocks on the plaintiff’s land, for which there was strict liability, and the action of nuisance for vibration or concussion that shook plaintiff’s house to pieces, which would require proof of negligence, was denounced as a marriage of procedural technicality with scientific ignorance. This distinction, abandoned by New York in the principal case, has lost its significance in states that apply strict liability to blasting operations because blasting is an abnormally dangerous activity. See, e.g., *Stocks v. CFW Construction Co., Inc.*, 472 So.2d 1044 (Ala.1985). The question of strict liability for damage by blasting and other activities that have been deemed extrahazardous or abnormally dangerous is considered at greater length in Chapter 14.
3. For the present, it is sufficient to note that this case represents one type of situation in which strict liability may be applied, without any showing of intent or negligence, by the majority of the courts that have considered the question. This has sometimes been called absolute liability, or liability without fault. The first Restatement of Torts § 519 (1938) conferred the name of “ultrahazardous activities” upon these cases. The drafters of Restatement (Second) of Torts § 519 (1977) concluded that a better name is “abnormally dangerous activities,” since the emphasis is more upon the abnormal character of what the defendant does in relation to the surroundings than upon the high degree of danger. That label was retained by the drafters of Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20 (2010).

4. Strict liability also has been imposed upon manufacturers of products when defects in their wares have caused injury. This position is now generally followed when the defect causing the injury is due to an error in the manufacturing process. There is less agreement as to the application of strict liability for failure to use a safer design or to warn of dangers. This application of strict liability to products liability is discussed in Chapter 15.

5. Strict liability involves a good many issues that are to be considered later in Chapters 14 and 15. For present purposes, note merely that there are three possible bases of tort liability:
   A. Intentional conduct.
   B. Negligent conduct that creates an unreasonable risk of causing harm.
   C. Conduct that is neither intentional nor negligent but that subjects the actor to strict liability because of public policy.

6. These will be considered in turn, which will carry us through Chapter 15. The remainder of this book covers particular fields of case law in which special problems arise, and in most of which intent, negligence, and strict liability are all involved and intermingled as possible bases for recovery.