

A Brief History of Tort Law

THE HISTORY OF TORTS is equally one of continuity and discontinuity. As far back as 1250 AD English law recognized the right of a victim of an unjustified physical attack to sue his attacker for damages. By 1500, it recognized torts ranging from medical malpractice to defamation. In so doing, it embraced the idea that the law's fundamental tasks include the defining of wrongs and the empowering of victims to initiate court proceedings as a form of recourse. Yet in terminology, substance, and the context in which it operates, tort law has also undergone enormous changes. Courts and legislatures have created new torts and abolished existing ones. The procedures used to litigate tort claims have changed markedly. As recently as 150 years ago, now-standard mechanisms for financing litigation and for protecting against ruinous liability did not exist. Until the mid-twentieth century, tort law was often the legal system's only mechanism for regulating unsafe conduct. Today it operates against a backdrop of extensive federal and state safety regulation.

☞ 2.1 1250–1800: 'Tort' Law Under the Writ System

Although it was not known by the name "tort" until the mid-1800s, tort law has been a part of English law (and later American law) for centuries. Starting in the late 1200s, the Chancery, an office of the English royal government, began making available a document

called the *writ of trespass vi et armis*. Issued in the name of the king, it was provided (for a fee) to persons who alleged they were victims of beatings, robberies, and other wrongs involving force. As issued, the writ would contain a very brief description of the alleged wrong and the damages suffered by the victim, and would order a local sheriff to produce the wrongdoer before a judge so that the wrongdoer could defend himself against the accusations. A victim who successfully pleaded and proved the alleged “trespass” stood to recover damages from the wrongdoer.

The name of the trespass writ conveyed the type of victim to whom recourse was being provided. Although today the term “trespass” refers to interferences with another person’s land or possessions, for much of English history, it was used more broadly as a synonym for “wrong” or “transgression.” (This is the sense of the term employed in the familiar petition from the Lord’s Prayer that our “trespasses” be forgiven.) And yet the use of the phrase *vi et armis*—“with force and arms”—at the same time confined the writ’s availability to transgressions that involved *the direct application of force by the wrongdoer to the victim*. The category of forcible, direct wrongs was in turn broken down by lawyers into subcategories. For example, the victim of a physical beating would seek a writ of trespass *vi et armis* for battery. By contrast, a property owner whose land had been physically invaded by another would ask for the inclusion in his trespass writ of the phrase “*quare clausum fregit*” (literally, a breaking of the plaintiff’s boundaries) to clarify that the wrong he was complaining of was a direct, forcible interference with his property rights—what we would today call a trespass to land.

Because the trespass writ was defined in terms of directness and forcibleness, and *not* in terms of any intention to do harm on the part of the defendant, many *accidental* physical injurings were actionable under the writ as batteries. (As we will see, the term “battery,” like the term “trespass,” means something different today.) For example, in the 1616 decision of *Weaver v. Ward*,¹ the defendant

1. (1616) 80 Eng. Rep. 284 (K.B.).

and plaintiff were participating in a military training exercise when the former accidentally shot the latter. When the plaintiff sued in trespass for battery, the defendant argued that he should not be held liable because he was engaged in a lawful activity and had acted without any intention of harming the plaintiff. The English Court of Common Pleas rejected this argument, explaining that the writ of trespass covered forcible harms committed accidentally. However, the court also identified a potential defense for trespass defendants, stating that a forcible injuring would be excused if the defendant could establish that the injury to the plaintiff was an “inevitable accident” that occurred “utterly without his fault.” Here the court seemed to have in mind a situation in which a defendant could prove that he was exceedingly careful in taking steps to prevent the accident in which the victim was hurt, yet nonetheless caused an injury because of circumstances entirely outside of his control—e.g., the victim of the shooting ‘came out of nowhere’ and stumbled in front of the gun just as it was discharging.

The limitation of the reach of the trespass writ to direct and forcible wrongs was largely driven by jurisdictional considerations. Under medieval conditions, central royal government had only limited authority, and the royal courts competed for litigation business with local and church courts. Accordingly, the royal judges initially confined their attention to disputes of a sort that had potentially broader ramifications. Beatings and physical invasions of land, by threatening to undermine civil order (“the king’s peace”) cried out for the ministers’ attention.

In response to victims’ demands for access to the royal courts, and because the royal government was interested in expanding its authority, the common law’s reach over what is today called tort law soon expanded. Indeed, by about 1400 AD a new writ had been recognized. Because it was crafted to cover instances of wrongful injury that somewhat fit the mold of the original trespass writ, yet did not involve the application of force by the defendant to the plaintiff, it was dubbed the writ of “*trespass on the case*”—a generic name befitting the miscellaneous collection of wrongs that it covered.

In its early years, trespass on the case was invoked by owners of goods against transporters (carriers) for losing or destroying the goods while in transit, by homeowners against neighbors for carelessly permitting fire to spread to the homeowner's property, and by patients and animal owners against doctors and veterinarians for incompetent medical treatment. Although many of these actions arose out of a pre-tort relationship between defendant and plaintiff (e.g., owner and carrier), the case writ could sometimes be invoked by a victim to hold a stranger liable for wrongfully injuring him. An early example of such a claim is provided by the eminent historian J. H. Baker. In *Loghton v. Calys*,² a woman was seriously injured when a pile of logs, which were situated as land adjacent to a public way and carelessly maintained by the defendant, collapsed onto her as she passed by. The allegations contained in the writ, Baker reports, were sufficient to make out a claim for trespass on the case. Later, in the 1500s, the case writ would be expanded to permit other actions, including by those seeking damages for having been libeled or slandered by another.

Although the division of personal injury actions into the categories of 'trespass' and 'case' was an artifact of the royal courts' initially limited jurisdiction, English lawyers would come to insist that it marked a conceptual line between two distinct forms of wrongdoing. They struggled, however, to articulate the precise nature of the distinction. By the early 1700s, the prevailing formulation suggested that the *vi et armis* writ was available only for injurings that involved the *direct* application of force by the defendant to the plaintiff, whereas the case writ was available to remedy injuries caused non-forcibly and *indirectly*. Thus, it was said that a man who, while working on a house, carelessly dropped a plank on a passerby would be subject to liability for a battery via the writ of trespass (direct and forcible harming), whereas the same man would be subject to

2. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 409 n.40 (4th ed. 2002).

liability under the case writ if he were to carelessly drop the plank harmlessly into a public street, only to have a passerby later suffer harm by tripping over it (indirect, nonforcible harming).

Even as judges purported to maintain a sharp distinction between trespass and case, the distinction was being undermined in practice by plaintiffs' lawyers who increasingly sought to frame the claims of certain clients as claims for trespass on the case. These clients were the victims in so-called running-down accidents, e.g., instances in which someone was run over by a horse or a horse-drawn cart, or injured in a collision of vehicles. The lawyer for this sort of victim was confronted with a dilemma because the procedural rules required him at the outset of litigation to frame the client's claim in terms of one of the two writs. Yet he often had to make this choice without knowing critical information that would tell him which writ to use. And if he ended up choosing the wrong writ, the suit could be thrown out of court.

For example, suppose a lawyer invoked the writ of trespass *vi et armis* to sue the owner of a horse-drawn carriage that allegedly ran down his client. If the evidence later revealed that the defendant's horse bolted when unexpectedly spooked, a judge might rule that the suit should have been brought under the 'case' writ because the arguably autonomous intervening action of the horse had rendered the defendant's running-down of the plaintiff indirect rather than direct. Moreover, even if the running-down were conceived as a direct injuring of the victim by the driver, if the driver turned out to be the *servant* of the owner rather than the owner himself, the plaintiff who sued in trespass would find himself with an action only against the likely impecunious servant—the direct injurer. While the law would sometimes permit this sort of victim to *impute* a servant's wrong to his deeper-pocketed master, any claim against the master would be for an *indirect* injuring and thus would have to be brought in 'case.'

In reaction to these and other potential litigation traps, plaintiffs' lawyers argued that all running-down cases—even those that technically fit the definition of a trespass *vi et armis*—should be

actionable in case. After some initial resistance, English common law courts in the 1830s endorsed this line of argument, permitting any claim of *accidental* injury to be brought under the case writ, regardless of whether the injury involved the direct or indirect application of force. In doing so, the courts fundamentally realigned the way that lawyers and judges classified the wrongs we now know as torts. Instead of dividing the world of torts into direct, forcible wrongs and indirect, nonforcible wrongs, the new division was between wrongs that could be committed entirely inadvertently and wrongs that could not be committed completely by accident. This difference would later give rise to the modern divide between “intentional” torts and “unintentional” torts.

✎ 2.2 1800–1870: The Emergence of “Torts” as a Legal Category

The collapse of the direct/indirect distinction in the early 1800s was followed in short order by the rejection of the entire writ system and the notion that injury victims should be required to fit their complaints into the mold of one of the two trespass writs. As a result, lawyerly usage of the term “trespass” to refer to an array of transgressions largely faded by the turn of the twentieth century. At the same time, lawyers were increasingly inclined to place into a separate category legal obligations defined by voluntary agreements as opposed to obligations that accompany activities and occupations irrespective of agreement. The former sorts of obligations were assigned to the new category of “contracts.” (Previously, breaches of contract had been sued upon primarily under the writ of trespass on the case.)

These developments paved the way for the adoption in the late 1800s of the old but sparsely used term “torts” to refer to wrongs involving the breach of obligations not to injure others, apart from obligations determined by agreement. In turn, the domain of torts

was subdivided into the distinct wrongs that we still recognize by name today. For example—in a marked departure from the older writ-system usage described above—“battery” became the name for the wrong of *intentionally* causing a harmful or offensive touching of another. Defamation actions were grouped under the headings of libel (written defamation) and slander (spoken defamation). Physical interferences with land were deemed trespasses to land.

/// 2.3 1870–1980: Modern Tort Law

The shift from the categories of “trespass” and “case” to the new category of “torts” probably did not reflect major substantive changes in the law. The wrongs recognized by the tort law of 1870 were not dramatically different from those actionable under the trespass writs in 1770. But as the twentieth century approached, tort law was beginning to undergo a series of important changes in substance, significance, and the context in which it operated. Four developments are particularly worthy of note here.

2.3.1 Accidents, Negligence, and Products Liability

The first set of significant changes in tort law involved an interrelated set of economic, technological, sociological, and doctrinal changes. Simply put, *accidents* became the most economically and politically salient source of tort suits. The operation of railroads and later motor vehicles produced an unprecedented spate of accidental deaths and injuries. Industrial workplaces were likewise frequently loci of injurious mishaps. Not far into the 1900s, mass-marketed consumer products would begin taking their toll. To be sure, conduct amounting to batteries, nuisances, libels, and frauds remained common enough. Yet in volume and political and

economic significance, accidents causing physical injury emerged as the dominant tort scenario.

Corresponding to these developments was the emergence of “negligence” as a tort in its own right. Prior to 1825, one rarely finds lawyers using the term “negligence” as the name of a legal wrong. Rather, as we have seen, when accidents gave rise to tort claims, they were actionable via the writs of trespass and trespass on the case. Yet, as we have also seen, just prior to the demise of the writ system, judges had extended the reach of ‘case’ to cover harms caused by accident, whether directly or indirectly. By placing accident litigation under the heading of the case writ, judges invited lawyers to think about accident law as a unitary field. And they did so by identifying a generic accident tort defined in terms of the qualities of actions that render unintended or accidental injuries wrongful—qualities such as *carelessness* and *incompetence*. Thus was born the idea that there existed, or ought to exist, a cause of action named “negligence,” which would be defined generically as the breach of a duty to exercise ordinary care so as not to cause harm to those to whom the duty is owed.

In U.S. tort law—which is principally constituted by the appellate decisions of state courts—the judicial opinion that would come to stand as one of the first to recognize negligence as a tort in its own right was written in 1850 by Chief Justice Lemuel Shaw for the Massachusetts Supreme Judicial Court in *Brown v. Kendall*.³ While trying to stop a fight between his own dog and Brown’s dog, Kendall raised a stick over his head, striking and partially blinding Brown, who was standing behind him. There was no evidence that Kendall intended to strike Brown. The trial judge framed the litigation in terms of the old notion of trespass as a direct and forcible injuring. Thus he concluded that the plaintiff could recover unless the defendant was able to convince the jury that he had acted with “extraordinary care.” (Note that the trial judge’s analysis follows that

3. 60 Mass. 292 (1850).

of *Weaver v. Ward*, discussed above, which held that any direct, forcible injuring counts as a trespass but then allowed for an “inevitable accident” defense.) Reversing the trial court, Shaw’s opinion held that, henceforth, all accident litigation in Massachusetts—whether for forcible or nonforcible, or direct or indirect injurings—would proceed under the heading of negligence. An accident victim’s right to recover would therefore hinge on his ability to prove that his injuries resulted from the defendant’s breach of a duty to use ordinary care to prevent injury to another. Thus, if in *Brown* itself, the plaintiff could not establish to a jury’s satisfaction that Kendall was *careless* in the way he went about separating the fighting dogs, he could not recover.

Historians have vigorously debated what significance to attribute to the emergence of the tort of negligence. Some have argued that judges like Shaw were aiming to make it more difficult for plaintiffs to recover under the new negligence law than it had been under the old writ system, in part to protect nascent American industry and thereby promote economic growth. (In providing this analysis, these historians suppose that the number of injurers who could avoid liability under the old trespass writ by establishing that the victim’s injury was an “inevitable accident” was smaller than the number who could avoid liability in negligence on the ground that they had acted with ordinary care.) Others argue that this change in terms and concepts involved mere nomenclature, not substance. Regardless, it is clear that by the late 1800s, “negligence” was regularly being invoked as the name for a generic cause of action applicable to a vast array of accidentally caused injuries.

Many of the most important developments in tort law that occurred between 1870 and 1980 were developments in the law of negligence. The tendency of courts in this period was to expand the reach of negligence. One way this expansion took place was through judicial recognition of expanded duties of care—the identification of new classes of persons toward whom one was obligated to act carefully or the identification of new classes of harms against which certain actors were obligated to take care

not to cause. Other doctrinal changes that helped fuel the expansion included the modification or elimination of certain affirmative defenses that had been available to negligence defendants. Many of these developments are canvassed in Chapters 5 and 6, below.

Although the expansion of negligence was probably the most important doctrinal development in substantive tort law during the period from roughly 1870 to 1980, we should mention here for completeness's sake another doctrinal development of nearly equal importance that would come later. In the 1960s and 1970s, U.S. judges and commentators would develop the doctrine of strict products liability. Under this doctrine, a consumer injured by the use of a product in the ordinary course can recover from any seller of the product, including both manufacturer and retailer, without proving that the seller was careless or inattentive to the danger in question. Instead, the consumer need only prove that the product was “defective”—less safe than it ought to be—and that the defect caused her injury. As explained in Chapter 10, there is a lively dispute today as to whether liability under the products liability doctrine is radically or only subtly different from liability under a regime of negligence. Regardless, it is clear that, with the recognition of “products liability” as a distinct genre of tort liability, suits by consumers against manufacturers and sellers for product-related injuries have come to account for a significant portion of the torts landscape.

2.3.2 Lowered Barriers to Suit, New Claimants, and Deeper Pockets

The second set of changes affecting tort law occurred at the turn of the twentieth century and concerned the elimination or relaxation of rules that had blocked or restricted certain claimants' access to the courts, or limited the resources that might be available to satisfy a successful tort claimant's judgment.

For example, prior to 1850, evidence law treated plaintiff and defendant as “interested parties” who were barred from testifying