

## TRESPASS: HIGH COURT VERSUS COURT OF APPEAL

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In the bewildering complex of activities which is modern society, it has become one of the tacitly accepted (indeed expected) hazards of life that innocent bystanders will be injured by the conduct of others. Frequently the victim will be unable to point to the exact cause of the injury. As a consequence, since he has the onus of proving not only that a duty of care is owed to him, but also that that duty (and its associated standard of care) was breached by the behaviour of the defendant, he will fail to establish a case in negligence. The courts, however, have taken cognisance of the injustice that sometimes would result to the plaintiff from paucity of evidence and have evolved the device of *res ipsa loquitur*.

This maxim means that where an accident was of a kind that would not normally occur in the absence of negligence, then the accident itself is sufficient evidence to raise an inference of negligence on the part of the defendant. It is clear that the plaintiff thereby avoids a non-suit, but views have differed as to what effect the maxim has on the burden of proof. The English courts have inclined to the view that it has the effect of shifting on to the defendant the burden of disproving negligence. But this would mean that, if the defendant failed to adduce sufficient evidence to this end, the court would be bound to direct a verdict against him. The Australian High Court has, on the whole, diverged from this view, and pronounced that the burden of proof is always on the plaintiff. Although it is true that the original inference of negligence would justify a finding for the plaintiff, this cannot be directed by the court. A verdict for the defendant given in circumstances where the defendant has failed to adduce evidence sufficient to rebut the original inference that negligence is more probable than not can be set aside on appeal, only if it is shown to be unreasonable. Such a verdict would not be set aside where the defendant has answered the inference of negligence by showing that the occurrence of the accident was equally consistent with the absence as with the presence of negligence, for then the plaintiff would not have proved his case on the balance of probabilities as he is always required to do.<sup>1</sup>

It is clear, then, that although a plaintiff's plight is considerably

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<sup>1</sup> The English approach is illustrated by *Moore v. Fox* [1956] 1 Q.B. 596. The contrasting view taken in Australia is exemplified by the judgment of Dixon J. in *Fitzpatrick v. Cooper* (1935) 54 C.L.R. 200, and by some useful propositions set down by Evatt J. in *Davis v. Bunn* (1936) 56 C.L.R. 246.

alleviated when he relies on *res ipsa loquitur*, in Australia the burden of proof still rests on him. Moreover, it must be remembered that the maxim will not even be available where the exact cause of the accident emerges from the evidence. When this is the case the dispute will resolve itself into whether that cause was due to the defendant's negligence, the onus of proving this being on the plaintiff.<sup>2</sup> There will be many situations where the injured person can point to the cause of the accident; for such examples one has only to look to the decided cases such as *Blacker v. Waters*<sup>3</sup> where the plaintiff, while watching the defendant at a shooting gallery, was struck in the eye by a piece of lead ricocheting from a bullet fired by the defendant. In such circumstances it may be too difficult for the plaintiff to establish the defendant's negligence without the aid of an evidentiary inference such as is provided by *res ipsa loquitur*. The practitioner seeking redress for the injury suffered by his client will look to a cause of action in which the defendant would have to justify his conduct. It is the purpose of this article to discuss whether the practitioner may find such a cause of action in trespass.

Traditionally, trespass in its original form is said to have denoted the close association between crime and tort: it was a sanction against forcible breaches of the peace.<sup>4</sup> The fundamental substantive distinction between trespass *vi et armis* and trespass on the case or 'case' (from which the modern tort of negligence is derived) was not between intentional and unintentional injury, but rather between direct and indirect injury. Thus trespass would lie only when physical injury was direct, but it was available whether this direct injury was intentional or unintentional, and the defendant was not exempt from liability simply because he did not intend the harm that occurred.<sup>5</sup> Where the injury was consequential, case alone would lie, and case was available even if the consequential injury was intentional. However, case was available also where the injury was direct, provided it was not intentional.<sup>6</sup> A further distinction was that where the injury was due to the trespass of a servant, case alone, and not trespass, was available against the master, unless the injury resulted from a specific command of the master.<sup>7</sup> Finally, trespass was action-

<sup>2</sup> See *Barkway v. S. Wales Transport Co.* [1950] A.C. 185; *Mummery v. Irvings Ltd* (1956) 96 C.L.R. 99, 121.

<sup>3</sup> (1928) 28 S.R. (N.S.W.) 406.

<sup>4</sup> For a recent reappraisal of this 'classical' view of trespass, see S.F.C. Milsom, 'Trespass from Henry III to Edward IV' 74 *Law Quarterly Review* 195, 407, 561.

<sup>5</sup> *Leame v. Bray* (1803) 3 East 593. For other authorities see: Winfield and Goodhart, 'Trespass and Negligence' 49 *Law Quarterly Review* 359-66.

<sup>6</sup> *Williams v. Holland* (1833) 10 Bing. 112. For the historical background to this case, see Pritchard, 'Trespass, Case, and the Rule in *Williams v. Holland*' [1693] *Cambridge Law Journal* 234. A helpful diagram illustrating the immediate-consequential, wilful-negligent antitheses in trespass and case is set out at p. 251.

<sup>7</sup> *Sharrod v. L. & N.W. Ry.* (1849) 4 Ex. 580 which was recently approved in *Esso Petroleum Co. Ltd. v. The Southport Corporation* [1956] A.C. 218, 244, (*per Lord Tucker*).

able *per se*, whereas proof of damage was usually essential in case.<sup>8</sup>

These distinctions between trespass and case have been clearly established. However, until recently it was still debatable in both England and Australia whether trespass was a tort of strict liability.<sup>9</sup> Would trespass lie in the absence of both intention and negligence? If it would not, it still remained unclear whether the onus was on the plaintiff to prove intention or negligence or the defendant was required to justify his conduct by proving the absence of these elements. In case, by contrast, there was no doubt that the onus lay on the plaintiff to prove fault on the part of the defendant, whether negligence or wrongful intent. From a practical point of view, the placing of the burden of proof often is unimportant at trial because the facts of the case clearly indicate negligence or otherwise. But in some cases the facts are not so clear, and it is then that the burden of proof assumes importance.<sup>10</sup>

In 1960 the law was still sufficiently ambiguous to encourage a plaintiff who complained of the manner in which an operation had been performed on his ear and sued his doctor to include in his declaration a count in trespass to the person, seeking thereby to cast upon the defendant the burden of disproving negligence. The defendant moved to have the count struck out on the ground that, to sustain it, the plaintiff must plead facts involving either intentional or negligent conduct on his part. The trial judge referred the matter to the Full Supreme Court of New South Wales. Unfortunately (from the academic point of view), the parties settled the matter before the hearing.<sup>11</sup>

It appears that the relevant law has developed along different lines in England and Australia. Before examining the differing trends it is

<sup>8</sup> Trespass to land served the function of determining disputed rights in land as well as protecting the land from damaging interference. Likewise, trespass to the person could protect a person's dignity as well as his physical security. But it is still unsettled whether trespass to chattels is actionable *per se*: See *Everitt v. Martin* [1953] N.Z.L.R. 298.

<sup>9</sup> The debate referred to was purely academic in England, for *Stanley v. Powell* [1891] 1 Q.B. 86 and *National Coal Board v. Evans* [1951] 2 K.B. 861 clearly indicated that liability in trespass was based on fault. In Australia, however, *Williams v. Milotin* (1956-57) 97 C.L.R. 465, as we shall see *infra*, left the matter in doubt even though *Stanley v. Powell* was cited *arguendo*.

<sup>10</sup> 'Circumstances may easily occur where, although a plaintiff may be unable to prove the defendant guilty of a fault, equally the defendant may be unable to show he was blameless.' Professor Derham and Mr. Mendes da Costa, 'Absolute Liability' 1 *New Zealand University Law Review* 37, 54. See also Sutton, *Personal Actions at Common Law* 58-9, where the practical significance of the onus of proof is illustrated.

<sup>11</sup> Note in (1960) 33 *Australian Law Journal* 322, and a further note in (1961) 34 *Australian Law Journal* 309; discussed in 23 *Modern Law Review* 674. At first blush, it would appear that as the plaintiff had given his consent to the operation, there was no unauthorized use of force against his person. But the very negligence complained of may well have transformed an authorized activity into a non-authorized one.

useful to outline the main views propounded with respect to fault and burden of proof in trespass.

First, it could be argued that liability in trespass was strict, *i.e.*, provided the injury was direct, the plaintiff could succeed in trespass irrespective of the defendant's lack of intention or negligence.<sup>12</sup> The defendant could avoid liability only if the act involved was not his voluntary act at all, but rather an act involuntarily induced by a third party or natural forces.<sup>13</sup> There was no liability if the injury was an 'inevitable accident' in that sense. This view could be held subject to the qualification that where the plaintiff had consented to the risk of purely accidental harm he could not recover damages in the absence of both negligence and intention.<sup>14</sup>

A second view, and one which received the support of most text-writers, contended that liability in trespass was not strict because although in trespass it was necessary for the plaintiff to prove only the direct physical act of interference, it was then open to the defendant to excuse this interference by proving that it was an 'inevitable accident'.<sup>15</sup> This did not mean proving that the injury was the result of an involuntary act but rather that it was not avoidable by the greatest care and skill on the part of the defendant, or, in another view, simply that the injury was not the result of lack of due care.<sup>16</sup> But if the trespass occurred on the highway the burden of proving negligence rested on the plaintiff.<sup>17</sup>

<sup>12</sup> The view in this paragraph is proposed *e.g.*, by Mr. Landon, editor of *Pollock's Law of Torts* (15th Ed.), Excursus B, 128. The notion of strict liability in trespass can be supported by reference to a fragmentary line of judicial and other comment in early cases. The susceptibility of many of these cases to partisan treatment is demonstrated in Fifoot's *History and Sources of the Common Law*, Ch. 9.

<sup>13</sup> *Weaver v. Ward* (1616) Hobart, 134, could be taken as consistent with this view: a defendant is only excused where he is judged 'utterly without his fault. As if a man by force take my hand and strike you . . .'

<sup>14</sup> Highway cases, in which fault was considered relevant, could be explained on this basis: Blackburn J. in *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, 286-7; the Law Times Report of *Holmes v. Mather* (1875) 33 L.T. 361, 363; and *Gayler and Pope v. Davies* [1924] 2 K.B. 75 (a case of trespass to property adjoining the highway).

<sup>15</sup> This approach was favoured by Professors Winfield and Goodhart, 'Trespass and Negligence' 49 *Law Quarterly Review* 359. It was argued that in collision cases prior to 1866 no reference was made to voluntary assumption of risk to justify the relevance of fault, *e.g.* *Wakeman v. Robinson* (1823) 1 Bing 213. Under the general issue the defendant could prove that the trespass was not his act. Matters of excuse, such as inevitable accident, could be specially pleaded and proved by the defendant: *e.g.*, *Knapp v. Salisbury* (1810) 2 Camp. 500 and *Hall v. Fearnley* (1842) 3 Q.B. 919. If there were any doubt regarding trespass off the highway, it was clear from *Holmes v. Mather* L.R. 10 Ex. 261 at 268 (Law Reports version), *Stanley v. Powell* [1891] 1 Q.B. 86 and *National Coal Board v. Evans* [1951] 2 K.B. 861 (trespass to goods) that where negligence is negatived no action in trespass will lie.

<sup>16</sup> The higher standard of care is expressed by Lord Esher M.R. in *The Albano* [1892] P. 419, 429.

<sup>17</sup> *i.e.*, the highway cases were only exceptional as regards burden of proof. This shift in the burden of proof is attributed by Winfield and Goodhart partly to a

A third possible view was the one established in America that trespass would not lie for personal injury in the absence of negligence (or intention), and the burden of proving negligence rested on the plaintiff whether the trespass occurred on the highway or elsewhere.<sup>18</sup>

## THE LAW IN ENGLAND

In England the third view received clear judicial endorsement in 1959 in *Fowler v. Lanning*.<sup>19</sup> It was held in that case by Diplock J. that a statement of claim which simply alleged 'A shot B' disclosed no cause of action in trespass, because, as

the onus of proof of intention or negligence on the part of the defendant lies upon the plaintiff, then, under the modern rules of pleading, he must allege either intention on the part of the defendant, or, if he relies upon negligence, he must state the facts which he alleges constitute negligence.<sup>20</sup>

The learned judge considered that strict liability in trespass, if it ever existed, ceased to be the law at least by 1617. He relied on *Weaver v. Ward*<sup>21</sup> where it was said that 'no man shall be excused from trespass . . . except it may be adjudged utterly without his fault' for the contention that a plaintiff would fail if it should appear that the defendant had committed no negligence. Although in the early nineteenth century it was settled by such cases as *Knapp v. Salsbury*<sup>22</sup> and *Hall v. Fearnley*<sup>23</sup> that 'inevitable accident' had to be specially pleaded by the defendant, Diplock J. did not consider that this conclusively indicated that the burden of proving 'inevitable accident' rested on the defendant, but rather that the issue had to be raised, as a matter of pleading, by the defendant. He challenged the view that the highway cases were an exception to the general law of trespass in placing the burden of proving negligence on the plaintiff. Indeed, he used those very cases which were most often cited

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dictum of Lord Blackburn in *River Wear Commissioners v. Adamson* (1877) L.R. 2 App. Cas. 743, 767, (a case of damage to a pier occasioned by a vessel), and partly to a confusion in practice between trespass and negligence.

<sup>18</sup> This view had been expressed judicially in Canada by Clyne J. in *Walmsley v. Humenick* [1954] 2 D.L.R. 232. <sup>19</sup> [1959] 1 Q.B. 426. <sup>20</sup> *Ibid.* 440.

<sup>21</sup> (1617) Hob. 134: The Court had said at the end of its judgment that the defendant would not be liable if he had pleaded circumstances to show that the accident 'had been inevitable, and that the defendant had committed no negligence'. Diplock J. considered the word 'inevitable' superfluous. Fifoot took a similar approach in his *History and Sources of the Common Law*, p. 191: "Fault," "inevitable accident," and "negligence" are words used indiscriminately without reflection and almost without meaning.' It is noteworthy, however, that Diplock J. makes no attempt to deal with various other early authorities which point to strict liability. But he was of course supported by *Stanley v. Powell* and *National Coal Board v. Evans*. <sup>22</sup> (1810) 2 Camp. 500. <sup>23</sup> (1842) 3 Q.B. 919.

to demonstrate the exceptional category of highway accidents (cases such as *Holmes v. Mather*<sup>24</sup>, and the dictum of Blackburn J. in *Fletcher v. Rylands*<sup>25</sup>) as examples of the state of the law with respect to the burden of proving negligence in *all* cases of trespass to the person.

The conclusions reached in *Fowler v. Lanning* of course made it doubtful whether a plaintiff would achieve any practical advantage by suing in trespass for an unintentional direct injury instead of in negligence. Since 'negligence' now had to be proved in trespass anyway, had the tort of trespass for unintentional injury become obsolete? Before the subsequent case of *Letang v. Cooper*<sup>26</sup> an English lawyer could have raised two points in favour of trespass.

First, there might be different periods of limitation for the two causes of action, depending on the wording of the relevant Act, and, if trespass were limited after a longer period, this would be a distinction of great practical importance.<sup>27</sup>

Secondly, 'negligence' in trespass might not necessarily involve the same ingredients which constitute the tort of negligence. This latter tort, as we saw earlier, requires proof of an independent duty of care owed by the defendant to the particular plaintiff and a breach of this duty causing damage. 'English law does not recognise a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one's carelessness.'<sup>28</sup> It is settled that if A commits a breach of duty towards B, but causes injury to C, C has no cause of action in negligence against A.<sup>29</sup> However, as A has been 'careless', may not an action lie against him in trespass?<sup>30</sup> In addition to proving a duty relationship in negligence, it is necessary also to prove damage. We have seen that trespass is actionable *per se*. If A due to unintentional but careless conduct spits in B's face, an action in negligence will not lie in the absence of material damage; but may not an action in trespass be available to protect the plaintiff's dignity?

<sup>24</sup> (1875) L.R. 10 Ex. 261, 268. This was a highway case. But Diplock J. preferred the Law Reports version which did not restrict the ruling of Brambell B. regarding the relevance of fault to highway cases by the insertion of the phrase 'in cases such as the present'.

<sup>25</sup> (1866) L.R. 1 Ex. 265. Diplock J. pointed out that Blackburn J. was not restricting his opinion that a plaintiff must prove want of care to highway cases as he includes plaintiffs 'who by licence of the owner pass near to warehouses where goods are being raised or lowered': although Blackburn J. explained such cases as examples of voluntary assumption of risk, this was, according to Diplock J., an *ex post facto* rationalization of settled law with general application.

<sup>26</sup> [1964] 3 W.L.R. 573.

<sup>27</sup> This was the issue in *Letang v. Cooper*.

<sup>28</sup> *Bottomley v. Bannister* [1932] 1 K.B. 458, 476 *per* Greer L.J.

<sup>29</sup> *Hay (or Bourhill) v. Young* [1943] A.C. 92, 108 *per* Lord Wright.

<sup>30</sup> This problem is referred to by Street, *Law of Torts* (3rd Ed.) 14-15, where there is also a reference to the related problem as to whether the rules governing remoteness of damage in negligence are applicable to negligent trespass.

Professor Street forecast as follows:

The judge's instinct will be that if a plaintiff is the victim of carelessness he should succeed on the tort of negligence or fail. He will strive to deny the continuance of different rules in trespass when the effect would be to give a remedy in trespass for careless conduct in circumstances where an action in negligence would fail. What remains uncertain is how far a judge will feel free to attain his objective when to do so entails ignoring the historical origins and basis of trespass.<sup>31</sup>

The conflict which Professor Street anticipated between authority and policy is strikingly illustrated by contrasting the judgment at first instance and the judgments of the Court of Appeal in the case of *Letang v. Cooper* in 1964.<sup>32</sup> The plaintiff, whilst sunbathing on a piece of grass in a car park, was injured when a car driven by the defendant went over her legs. The plaintiff issued a writ claiming damages for loss and injury due to the defendant's negligence and/or the commission by him of a trespass to the person of the plaintiff, this writ being issued more than three years after the occurrence of the accident. The relevant English statute<sup>33</sup> provided that the limitation period for tort actions was six years 'provided that in cases of actions for damages for negligence nuisance or breach of duty . . .' the limitation period was only three years. The plaintiff's claim, therefore, was that her action in trespass was not caught by the proviso.

The question was whether it was still possible to bring an action of trespass to the person as an alternative to an action in negligence since the abolition of the old forms of action in 1873. Elwes J. at first instance decided that it was possible to bring such an action. He relied on *Gibbs v. Guild*<sup>34</sup> and *Fowler v. Lanning*. The latter case in his opinion firmly established that 'trespass to the person as a cause of action had neither been abolished nor fallen into desuetude'.<sup>35</sup> Thus the question became simply whether, as a matter of statutory interpretation, the description 'actions for damages for breach of duty' covered the plaintiff's action in trespass. The learned trial judge held that it did not because in trespass, which is actionable *per se*, a plaintiff is not concerned to prove the breach of a particular duty owed to him and damages resulting therefrom (as in negligence) but only 'a direct injury done to the plaintiff by a positive act'.<sup>36</sup> While the defendant in such a case must be proved to be in breach of a 'general duty not to inflict injury to anybody', to fit this within the description

<sup>31</sup> *Ibid.* 15.

<sup>32</sup> The judgment of the court of first instance is reported in [1964] 2 W.L.R. 642.

<sup>33</sup> Limitation Act 1939 section 2, as amended by section 2(1) of Law Reform (Limitation of Actions, etc.) Act 1954. The proviso was only concerned with actions where damages claimed consisted of or included 'damages in respect of personal injuries to any person'.

<sup>34</sup> (1882) 9 O.B.D. 59, 67 *per* Brett L.J.

<sup>35</sup> [1964] 2 W.L.R. 642, 647.

<sup>36</sup> *Ibid.* 645.

'breach of duty' was 'not to use the language of precision known to the law'.<sup>37</sup>

His Honour was plainly discomfited by this conclusion:

However strange it may appear that a plaintiff with a perfectly good remedy in negligence after a running-down accident should also have a concurrent remedy in trespass, it is in my opinion impossible for a court of first instance at this time of day to decide that he has not.<sup>38</sup>

The Court of Appeal reversed the decision of Elwes J. primarily on the ground that the learned judge was mistaken in his opinion that there were two concurrent causes of action available to the plaintiff on the facts pleaded. The true position was that the plaintiff's action was statute-barred because it was an action in negligence. This conclusion was reached in the following manner.

Lord Denning M.R. (with whom Danckwerts L.J. concurred) held that where the injury is inflicted not intentionally but negligently, the only cause of action available today is negligence and not trespass. He refused to be guided by the old forms of action and the subtle distinctions between trespass and case which we discussed earlier. The forms of action 'did at one time form a guide to substantive rights; but they do so no longer'.<sup>39</sup> The factual situation alleged in the statement of claim would formerly have afforded a plaintiff remedies in either trespass or case. But today

instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of an action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action . . . in trespass to the person . . . . If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence.<sup>40</sup>

Another point was that if trespass were available in these circumstances, 'it would be actionable without proof of damage; and that is not the law today'.<sup>41</sup> In other words, as damage resulting from negligence would have to be proved, the action could not be an action in trespass because trespass is actionable *per se*.

<sup>37</sup> *Ibid.* 647. It is noteworthy that Elwes J. refers to *Fowler v. Lanning*. If he accepted that a plaintiff must prove 'negligence' in trespass, this 'negligence' was not apparently the same thing as the breach of a particular duty of care in the tort of negligence.

<sup>38</sup> *Ibid.* 647.

<sup>39</sup> [1964] 3 W.L.R. 573, 577.

<sup>40</sup> *Ibid.* 577. Lord Denning cuts down trespass to what was considered to belong to it exclusively, *i.e.* direct intentional injuries. He pruned off direct unintentional injuries, as these were already covered by case (*Williams v. Holland*). But we are still left with the distinction between direct and indirect in the area of intentional injuries, because trespass would still be restricted to *direct* intentional injuries, whereas *indirect* intentional injuries are still presumably covered by an action derived from case, *e.g.* *Wilkinson v. Downton* [1897] 2 Q.B. 57.

<sup>41</sup> *Ibid.* 577.



Diplock L.J. also decided for the plaintiff. He pointed out that since 1873, whenever the name of a form of action is used to describe a cause of action it is describing a factual situation which gives one person a cause of action against another. The factual situation alleged in the instant case disclosed a cause of action, the remedy for which, before 1873, could have been obtained by the form of action of either trespass or trespass on the case. So today this factual situation could be described as a cause of action either in trespass or in negligence. 'But that does not mean that there are two causes of action. It merely means there are two apt descriptions of the same cause of action'.<sup>42</sup> Since the present cause of action could be described as negligence it fell within the statutory proviso, even though it could also be called by another name. Indeed, it was preferable to call it 'negligence'. It could not be argued that as actual damage was an essential element in negligence, and not in trespass, a cause of action for unintentional as distinct from intentional trespass is not equally aptly described as a cause of action for negligence; for where trespass is unintentional, it is necessary to prove negligence, *i.e.* a duty of care to avoid causing damage. But even if this point of damage were a real distinction between trespass and negligence, the Act was concerned with conduct where injuries were in fact incurred, and, where this was the case, every factual situation which fell within the description of trespass to the person is equally aptly described as negligence.<sup>43</sup>

It is worthy of note that the Court of Appeal also rejected the argument of Elwes J. with respect to the meaning of the phrase 'actions for damages for breach of duty'. The Court held that the plaintiff's action was barred under this heading also because every tort involved a breach of duty—*i.e.*, a duty not to injure one's neighbour in a way forbidden by law.<sup>44</sup>

Whatever may be said of the reasoning in these judgments, cer-

<sup>42</sup> *Ibid.* 581. See criticism of the reasoning of Diplock L.J. by J. A. Jolowicz [1964] *Cambridge Law Journal* 201-2.

<sup>43</sup> Diplock L.J., in his conclusion that the facts pleaded made it an action for negligence within the Act, said that, in this respect, he agreed with Adam J. in the Victorian case of *Kruber v. Grzesiak* [1963] V.R. 621. But, as will be seen later, Adam J. did not say that there was but one cause of action with two possible labels. Rather, there were two distinct causes of action, one of the distinctions being that trespass is actionable *per se*. He then went on to hold that the term 'negligence' in the relevant statute covered an action in trespass in which, because the injury is unintentional, negligence must be proved by the plaintiff.

<sup>44</sup> Thus Lord Denning considered that even if an action for trespass was available it fell within the phrase 'breach of duty', and Diplock L.J. considered that as there was only one cause of action, whether it be called negligence or trespass, it fell within the description. Authorities supporting this conclusion were *Billings v. Reed* [1945] K.B. 11, 19, and *Kruber v. Grzesiak* (*supra*). Prior to these decisions, the text-writers, influenced by the Tucker Committee Report which had preceded the legislation, tended to consider that trespass was not covered by the description in question.

tainly the result is a sensible one in the context of limitation. As Diplock L.J. pointed out:

The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depends on oral testimony. This mischief . . . is the same in all actions in which damages are claimed in respect of personal injuries.<sup>45</sup>

But as far as the law of torts in England is concerned the result is that, if Lord Denning is correct, trespass and negligence cannot be said to overlap in the area of unintentional injury because trespass is a cause of action restricted to intentional wrongs, not merely as a matter of practice but as a matter of law. If Diplock L.J. is correct, the result is also that only one cause of action is available for direct negligent injuries, but this may be called either 'negligence' or 'trespass' because the essential ingredients are the same, *i.e.*, the infliction of direct personal damage as the result of a failure to exercise reasonable care.

### THE LAW IN AUSTRALIA

In Australia the starting point is *Williams v. Milotin*<sup>46</sup> decided in 1957, *i.e.*, before *Fowler v. Lanning*. The plaintiff was injured by the defendant's motor car and brought an action for damages four years after the accident. The relevant South Australian Act<sup>47</sup> barred actions in trespass to the person and battery after three years and actions which might formerly have been brought in the form of actions on the case after six years. The defendant argued that the plaintiff's claim was in trespass and therefore barred, but in the Supreme Court of South Australia Ligertwood J. gave judgment<sup>48</sup> for the plaintiff. He held that the plaintiff's substantial cause of action in a highway case such as this was in negligence. He also made the suggestion that with the development of negligence as an important tort the meaning of the terms 'trespass to the person' or 'battery' should be confined to intentional injuries, leaving negligent injuries to come under the tort of negligence irrespective of whether the personal injuries were inflicted on the highway or elsewhere. This suggestion is in line with both *Fowler v. Lanning* and *Letang v. Cooper*.

Ligertwood J.'s decision was affirmed on appeal by the High Court in a unanimous judgment<sup>49</sup> which repays detailed study. It was held that as the plaintiff had relied on the essential ingredients of the tort of negligence his action was in negligence and accordingly was

<sup>45</sup> *Op. cit.* 582.

<sup>46</sup> (1956-57) 97 C.L.R. 465.

<sup>47</sup> Section 36 of the Limitation of Actions Act 1936-1948.

<sup>48</sup> [1957] S.A.S.R. 228.

<sup>49</sup> The court consisted of Dixon C.J., McTiernan, Williams, Webb, Kitto JJ.

not barred. But far from saying that trespass was not available and that such a cause of action was restricted to intentional injuries, the Court said that the present action might have been framed as an action in trespass, for the actual facts of the case (the plaintiff was directly hit by the defendant as a result of the defendant's negligence) fulfilled the requirements of both trespass and negligence. If it were alleged the defendant intended to hit the plaintiff directly, trespass alone would have been available; and if the damage had been caused indirectly by the defendant, or by his servant, the plaintiff's remedy would have been in case alone. But on these facts two causes of action arose 'which were not the same now and never were'.<sup>50</sup> The point was that the plaintiff had relied in his pleadings on the essential ingredients of the tort of negligence, i.e., (1) special or particular damage, and (2) want of due care. These were not essential ingredients of the tort of trespass, which required only direct violation of the person. The Court added:

It is true that in the absence of intention of some kind or want of due care, a violation occurring in the course of traffic in a thoroughfare is not actionable as trespass. [This] is perhaps a modification of the general law of trespass to the person. But it does not mean that trespass is the same as actionable negligence occasioning injury.<sup>51</sup>

These propositions are clearly inconsistent with the recent English decisions discussed earlier.<sup>52</sup> First, it cannot be said with Lord Denning that if a defendant inflicts direct injury unintentionally the plaintiff has no cause of action today in trespass, his only cause of action being in negligence. Secondly, it cannot be said with Diplock L.J. that negligence and trespass are simply two apt descriptions of the same cause of action where a direct injury is unintentionally caused through lack of reasonable care. It was not so difficult for the English courts to reason thus after *Fowler v. Lanning* had held that either intention or negligence is an essential ingredient of trespass to the person wherever the injury occurs. The High Court was clearly not prepared to accept an historical analysis such as that which Diplock J. was to make in that case.

Dixon C.J. in 1938 had spoken of the highway qualification in *Nickells v. Melbourne Corporation*<sup>53</sup> a case concerning trespass to land. His Honour said that

to break and enter another's close is trespass to land, and the user of a highway has no right to invade the possession of a frontager. But involuntary trespass to land is not always an actionable wrong. Just

<sup>50</sup> *Op. cit.* p. 474. Cited with approval in Salmond on Torts (13th Ed.) p. 8.

<sup>51</sup> *Ibid.* 474.

<sup>52</sup> It is notable that, although *Williams v. Milotin* was cited in argument before the Court of Appeal in *Letang v. Cooper*, no reference is made to the case in any of the judgments.

<sup>53</sup> (1938) 59 C.L.R. 219.

as in trespass to the person and in trespass to goods it has come to be the law that an unintentional injury to or interference with another's person or property on the part of the user of a highway is not actionable in the absence of negligence, so, if, in the course of any reasonable use of a public way, a man unintentionally damages neighbouring premises, the law does not hold him liable as a trespasser unless he has been guilty of negligence.<sup>54</sup>

This suggested that liability in trespass on the highway was not strict. The plaintiff apparently was required to prove the defendant's negligence.<sup>55</sup>

It is not clear whether the High Court in *Williams v. Milotin* thought that trespass to the person committed off the highway was a tort of strict liability. If the highway cases were an exception the plaintiff did not have to prove negligence in non-highway cases, but could the defendant escape liability by disproving negligence or proving that the violation was the result of an 'inevitable accident'? No clear answer is given to this question by the High Court.<sup>56</sup>

On the other hand, the Full Supreme Court of New South Wales in *Blacker v. Waters* in 1928, in dealing with a case of trespass to the person in a non-highway context, held that

the trespass to the plaintiff's person was complete, on proof that the lead which entered his eye came from the bullet fired by the defendant at the target, and the defence was that it was not actionable as it was neither intentional nor the result of negligence . . . The burden of establishing that it was neither intentional nor the result of negligence lay . . . upon the defendant.<sup>57</sup>

Again, in *Exchange Hotel v. Murphy*<sup>58</sup> in 1947 the Supreme Court of South Australia held that

<sup>54</sup> *Ibid.* 225.

<sup>55</sup> As we have seen, this was certainly the view of Ligertwood J. in *Milotin v. Williams*. His Honour had voiced the same opinion in *A.N.A. v. Phillips* [1953] S.A.S.R. 278, a case involving trespass to land adjoining the highway: 'If the damage complained of results from alleged negligence on the highway the plaintiff cannot alter the burden of proof by making an allegation in trespass.'

<sup>56</sup> It may well be argued that the court considered that even in highway cases the burden of disproof of negligence is on the defendant, for, after stating that in these cases there was no liability 'in the absence of negligence' (a phrase neutral on the burden of proof point), it goes on to say that if the plaintiff had chosen to discard negligence and damage as ingredients in his cause of action 'it might be said that his cause of action was brought in trespass'. It follows therefore that as negligence is not an 'essential ingredient' of trespass on the highway, and it is also stated that in the absence of negligence, an unintentional violation is not actionable in trespass, the burden of disproof of negligence must rest on the defendant. On the other hand, the court may have held that the plaintiff's cause of action was not in trespass because even though the plaintiff had to prove want of due care he had coupled this allegation with one of special or particular damage, which was not essential in trespass but which was the gist of negligence.

<sup>57</sup> (1928) 28 S.R. (N.S.W.) 406, 410. This statement was not strictly necessary to the decision.

<sup>58</sup> [1947] S.A.S.R. 112.

when the action is properly brought on the ground of trespass to the person, which is clearly the case here, if the defendant is to escape liability he must 'affirmatively prove that he was not negligent': *Salmond*.<sup>59</sup>

The position in Australia since *Fowler v. Lanning* has become more complicated. The question which the Court of Appeal had to answer in *Letang v. Cooper* in 1964 had already received an answer in Victoria in 1963 when Adam J. handed down his judgment in *Kruber v. Grzesiak*.<sup>60</sup> The Victorian Limitation of Actions Act 1958 is in the same terms as the English Act on this point. Adam J. held that the description 'action for damages for negligence' included not only actions for negligence but also actions for unintentional trespass to the person in which proof of negligence is a necessary element. The proposition that where the trespass is unintentional negligence is an essential ingredient was supported by reference to *Fowler v. Lanning*, *Williams v. Milotin* and *Nickells v. Melbourne Corporation*. Clearly *Fowler v. Lanning* supports this view; but as we have seen the High Court in *Williams v. Milotin* declared that want of due care is *not* an essential ingredient of unintentional trespass, though in its absence trespass on the highway would not lie. It has been noted that the comments in *Nickells v. Melbourne Corporation* were restricted to highway cases. Adam J. does not suggest that there is no separate cause of action for unintentional trespass (such a suggestion would be precluded by the High Court decision in *Williams v. Milotin*), but he reaches a conclusion similar to that reached in the later Court of Appeal decision by the less drastic method of liberally construing the word 'negligence' in the statute to cover both the torts of negligence and 'negligent trespass'.<sup>61</sup>

The learned judge in *Kruber v. Grzesiak* was trying to reap the benefit of two different worlds. In maintaining, as he did, the essential distinction between trespass and negligence in regard to damage (*i.e.*, trespass is actionable without proof of damage whereas in negligence damage is the gist of the action), he complied with *Williams v. Milotin*. In accepting that negligence must be proved by the plaintiff in unintentional trespass he complied with *Fowler v. Lanning*. But he did not refer to the problem raised by the fact that in ordinary parlance the establishing of negligence would involve proof of

<sup>59</sup> *Ibid.* 117.

<sup>60</sup> [1963] V.R. 621.

<sup>61</sup> We pointed out earlier that although Diplock L.J. in *Letang v. Cooper* approved of the conclusion of Adam J. that the plaintiff's cause of action fell within the description 'negligence', there are distinct differences in the reasoning of the two judges. Adam J. was also prepared (in view of the rather strained interpretation of 'negligence' to cover trespass) to include the plaintiff's action in the description breach of duty, as he considered all torts arise from a breach of duty, in this case a breach of a general duty 'not to inflict direct and immediate injury to the person of another either intentionally or negligently'. *Ibid.* 623.

damage, unless 'negligence' in trespass is something different from the tort of negligence. Lord Denning saw this apparent inconsistency and thought it was impossible to talk about a trespass in which 'negligence' had to be proved as this would mean trespass could not lie without proof of damage.

*Kruber v. Grzesiak* followed a trend which had already become evident in Canada and New Zealand<sup>62</sup> and which might have resulted in a conclusion similar to that eventually reached in *Letang v. Cooper*. For it seemed likely that a satisfactory resolution of the problems inherent in the judgment of Adam J. could only have been made by the same judicial stroke of cancellation that Lord Denning employed in *Letang v. Cooper* when he declared that trespass to the person was no longer available as a remedy where the defendant's conduct was unintentional.

However, in *McHale v. Watson*<sup>63</sup> in 1964 Windeyer, J. sitting in the original jurisdiction of the High Court, showed no inclination to deviate from the pattern already furnished by the decisions in *Blacker v. Waters* and *Williams v. Milotin*. The infant plaintiff had been injured when she was struck by a sharpened piece of metal thrown by the infant defendant. The claim against the defendant was framed both in trespass to the person and in negligence. The plaintiff argued that the action in trespass was properly founded by demonstrating that the injury was the immediate result of the defendant's act and that it was upon the defendant to disprove intention or negligence. Although his Honour said

the distinction between trespass and case, important though it still is for some purposes . . . has I think little practical consequence for adjudication upon the facts of this case<sup>64</sup>

he deemed it necessary, following extensive argument by counsel, to examine the issues of law raised by the plaintiff's argument. It was conceded before him, and he agreed, that the plaintiff could not succeed in trespass if the defendant's act was unintentional and without negligence. Hence the vexing question left unresolved by the High Court in *Williams v. Milotin* as to whether liability for trespass in non-highway cases was strict has been explicitly answered in the negative. Having accepted that liability in trespass depended on fault, Windeyer J., then had to decide whether it was for the plaintiff to prove intention or negligence or for the defendant to prove absence of culpability.

His Honour discarded the views stated in *Fowler v. Lanning*, and concluded that the defendant had the onus of disproving intention

<sup>62</sup> *Walmsley v. Humenick* [1954] 2 D.L.R. 232; *Beals v. Hayward* [1960] N.Z.L.R. 131.      <sup>63</sup> (1964) 38 A.L.J.R. 267.      <sup>64</sup> *Ibid.* 268.

and negligence. He found direct authority for this view in *Blacker v. Waters*, as previously referred to.<sup>65</sup> He also referred to *Williams v. Milotin* in this context but it has already been submitted that this case gave no clear indication of the type of liability in non-highway cases, still less as to the burden of proof.<sup>66</sup>

Although Windeyer J. rejected the conclusion reached in *Fowler v. Lanning* without a great deal of discussion, a critical appraisal of the reasoning of Diplock J. justifies his Honour's view of the English case. *Weaver v. Ward* was cited by Windeyer J., but not merely to show that trespass to the person required fault. The sentence 'No man shall be excused of a trespass except it be adjudged utterly without his fault', was taken by his Honour as meaning that the burden of disproving this fault lay upon the defendant. Such an approach finds support in the cases prior to 1852 which Diplock J. held to be neutral on the question of burden of proof. We saw that he explained the cases of *Knapp v. Salsbury* and *Hall v. Fearnley* as examples of the old rules of pleading whereby an issue had to be raised by a special plea, even though the burden of proof lay on the plaintiff. Conceding that the cases themselves are inconclusive with respect to the placing of the burden of proof, it is more convincing to argue that the defendant had the burden of proving the issue raised by his special plea. In *Hall v. Fearnley* the Court, relying on the same cases which Diplock J. considered inconclusive<sup>67</sup> said

The act of the defendant was prima facie unjustifiable and required an excuse to be shown . . .<sup>68</sup>

In order to challenge the view that the highway cases were an exception to the general law of trespass in placing the burden of proving negligence on the plaintiff Diplock J. relied on certain judicial statements to the effect that a plaintiff had to prove negligence in trespass. But on examination it is clear that these statements were based on an underlying assumption that the plaintiff had to prove negligence only when he had consented to accidental harm, for in the absence of such consent the defendant would have been strictly liable in trespass, *i.e.*, it was not so much the placing of the burden

<sup>65</sup> *Supra*.

<sup>66</sup> It may be remarked that once again no express statement is made as to the burden of proving negligence in trespass on the highway, although the authorities clearly indicate that the plaintiff has this onus. See Ligertwood J. in *Milotin v. Williams* and *A.N.A. v. Phillips*; the attitude of Dixon J. in *Nickells v. Melbourne Corporation*. And note comment of Street C.J. in *Elliott v. Barnes* (1951) 51 S.R. (N.S.W.) 179.

<sup>67</sup> *E.g. Knapp v. Salsbury*.

<sup>68</sup> (1842) 3 Q.B. 919, 922 (*per* Wightman J.). Lord Denman C.J. states at p. 921: 'If the accident had resulted entirely from a superior agency, that would have been a defence, and might have been proved under the general issue; but a defence admitting that the accident resulted from an act of the defendant would not have been so proveable.' *i.e.* such a defence would only be *proveable* under a special plea.

of proof that was noteworthy but the relevance of fault at all. This was the view of Blackburn J. in *Fletcher v. Rylands*<sup>69</sup> and probably the view of Bramwell B. in *Holmes v. Mather*.<sup>70</sup> Diplock J. alluded to this problem when, referring to Lord Blackburn's statement in *River Wear Commissioners v. Adamson*<sup>71</sup> and the judgment of McCauley J. in *Gayler & Pope Ltd v. Davies*,<sup>72</sup> he suggested that 'there is a special rule as respects trespass to land adjoining a highway'. This implies that liability for trespass to land is strict but that trespass to land adjoining the highway will not lie in the absence of fault.

### THE PRESENT POSITION IN AUSTRALIA

In highway cases in Australia it is accepted that the burden of proving intention or negligence lies with the plaintiff. In non-highway cases, the High Court in *McHale v. Watson* has expressed the view that the burden of disproving fault is on the defendant.<sup>73</sup> In this view the High Court is supported by the Full Supreme Court of N.S.W.,<sup>74</sup> and a plausible argument for the rejection of *Fowler v. Lanning*. But the view adopted in *McHale v. Watson* contrasts sharply with the attitude of Adam J. in *Kruber v. Grzesiak* where, it will be remembered, his Honour accepted *Fowler v. Lanning in toto*. It is necessary to remark upon this, for in *McHale v. Watson* Windeyer J. was sitting in the original jurisdiction of the High Court and therefore his pronouncements would not necessarily be binding on the Supreme Courts of the various States, even if they enjoyed a status higher than *dicta*.<sup>75</sup> The nature of our hierarchy is such, however, that a conclusion based on an historical review of an area of law by a High Court judge will be very persuasive authority indeed.

#### Policy Versus Authority:

Apart from the question of judicial authority, is it *desirable* for Australian courts to follow the lead given by the English courts?

<sup>69</sup> (1866) L.R. 1 Ex. 265, 286-7.

<sup>70</sup> (1875) 33 L.T. 361, 363. Mr. Landon's views on the matter are too widely known to require exposition and accordingly we provide but the briefest of resumés. In *Fletcher v. Rylands* (1865) 3 H. & C. 774, Bramwell B. had said that in trespass it was no defence that the defendant was not negligent. Thus the Law Times Report of *Holmes v. Mather* which restricts Bramwell B.'s view that in the absence of intention or negligence there is no action in trespass to highway cases is more readily acceptable than the Law Report of the case which purports it to be a general statement. <sup>71</sup> (1876) 2 App. Cas. 743, 767. <sup>72</sup> [1924] 2 K.B. 75.

<sup>73</sup> A statement of Devlin J. in *Southport Corporation v. Esso Petroleum* [1953] 3 W.L.R. 773, 781 supports the Australian position.

<sup>74</sup> *Blacker v. Waters*. <sup>75</sup> In *R. v. Sodeman* [1936] V.L.R. 99, McFarlane J. hinted that if the judgment of Dixon J. in *R. v. Porter* 55 C.L.R. 182 had to be interpreted as an essay to change the law, he would not follow him. Dixon J. was sitting in the original jurisdiction of the High Court. Note that *Kruber's* case was not referred to by Windeyer J.



### A Single Concept of Liability:

The result in *Fowler v. Lanning* has been praised as a further release from the grasp of the old forms of action and the distinctions which attended them, e.g. regarding burden of proof.<sup>76</sup> As one learned writer said:

If the modern law of torts is to escape completely from the shackles of the old forms of action, then it is necessary to get away from the idea that each tort has its own peculiar rules, whether it be burden of proof or the nature of the defence or some other rule. This is particularly necessary when two or more torts overlap and can apply to the same set of facts . . . The trend towards a limited general theory of liability in tort is apparent from the steady increase in the capacity of negligence.<sup>77</sup>

However, the search for a single theory of liability is complicated by the various aims underlying the law of torts. After a full discussion of the law Glanville Williams concluded that his 'attempt to find a coherent purpose in the present law of tort cannot be said to have met with striking success'.<sup>78</sup> Accordingly, when there is an area in the common law which could develop in one way or another, in order that this development might be guided it is useful to inquire which theory of the function of law ought to be adopted.

### Compensation or Deterrence:

It would seem that the general theoretical trend has been from strict liability to fault liability. The former basis of liability is primarily concerned with protecting the plaintiff's security regardless of the defendant's fault and thus embodies a compensatory aim. If A causes injury to B, A should compensate B regardless of fault. By contrast the latter basis of liability is primarily concerned with protecting the defendant's freedom of action, provided his conduct is not morally culpable. If A causes injury to B, the loss should only be borne by A if his conduct is blameworthy: he should then suffer the loss both as a matter of justice and for the purpose of deterring such conduct in the future.

### Highway Cases:

In cases of trespass on the highway the English and Australian courts are at one in requiring the plaintiff to prove fault on the part of the defendant. But the notion of personal fault is an alien concept in relation to the highway accidents which typify the inevitable risks which attend our modern life. 'The ordinary running-down case is

<sup>76</sup> Thus Clyne J. in *Walmsley v. Humenick* [1954] 2 D.L.R. 232, 244 considered it curious 'that since the passing of the Judicature Acts a situation should arise where on the same facts the plaintiffs' action must fail if it is framed in negligence, but might succeed if it is brought in trespass'.

<sup>77</sup> Dworkin, 'The Case of the Misguided Missile' 22 *Modern Law Review* 538.

<sup>78</sup> 'The Aims of the Law of Tort' [1951] *Current Legal Problems* 137, 172.

one of casual inadvertent negligence, for which a deterrent system is comparatively ineffective, and in respect of which the demand for ethical retribution is weak.<sup>79</sup> Moreover, the purposes of deterrence and retribution can only be effectively served, if at all, when the individual defendant himself has to pay for the loss he inflicted by his culpable conduct. The modern practice of compulsory insurance defeats these purposes as it is not the defendant who ultimately bears the loss but the insurance company. The loss is spread over the whole body of policy-holders insured against the risk involved and this body comprises all those members of the community who enjoy the benefits of the use of vehicles on the highway.<sup>80</sup>

If, as the legislature has clearly indicated, insurance against liability on the highway is desirable, it is difficult to see why the plaintiff's recovery should be contingent upon fault. Can the common law adapt itself to present-day needs? Professor Fleming suggests that

the most effective device for transforming tort law from its one-time admonitory to its new compensatory and loss-distributive purpose is to encourage the encroachment of strict liability and its ultimate displacement of our existing accident law based on the outmoded rules of negligence.<sup>81</sup>

Of course, if our courts had accepted and developed a rule of strict liability under the heading of trespass, it would have still depended on the terms of the relevant legislation imposing compulsory insurance whether a means of distributing the loss would have been thereby afforded, *i.e.*, if the legislature imposed insurance against liability for negligence alone, a blameless defendant would not be covered for any action in trespass that might be brought against him. But it is no longer open to our judges to foster strict liability in trespass on the highway. The tort of trespass presented the last opportunity the courts had to reduce or extinguish the notion of fault by allowing claims in trespass to succeed where claims in negligence would have failed. But even if the courts had retained the notion of the defendant acting at his peril on the highway the plaintiff would have had to prove a *direct* injury to establish the trespassory act, and much undesirable argument would probably have taken place on the subtle distinction between direct and consequential injury.<sup>82</sup>

<sup>79</sup> *Ibid.* 173.

<sup>80</sup> See Sir John Barry, 'Compensation Without Litigation' 37 *Australian Law Journal* 339, 344.

<sup>81</sup> *Law of Torts* (3rd Ed.) 295.

<sup>82</sup> See *Hutchins v. Maughan* [1947] V.L.R. 131, 133, where it is suggested the distinction has no logical basis. *Scott v. Shepherd* (1773) 2 Black W. 892 (the squib case) reveals how difficult the application of the distinction can be. As already pointed (*supra*) if a strict liability theory persisted then as the injury has to be direct, a master could not be liable in trespass for harm inflicted by his servant. This would clearly be a severe limitation on the scope of strict liability.

## Non-Highway Cases:

Until *McHale v. Watson* it was theoretically possible in Australia to adopt the principle of strict liability in non-highway trespass. It is appropriate, therefore, to ask whether this would have been desirable.

If the courts had decided that the defendant in non-highway situations must act at his peril, then the loss might well be shifted from a blameless plaintiff to a blameless defendant who would have no means of distributing the loss. Why should A be liable for a blameless act causing direct injury to B? It has been argued that A should be liable simply because he acted and did not have to act. The requirement of fault liability in such a case 'puts the ordinary peaceable citizen at the mercy of the exuberantly active one'.<sup>83</sup> But it is undesirable that the law should adopt a policy that would induce an individual to be static rather than active because he knows that if he actively causes a direct injury he will be liable regardless of his lack of culpability. Also, it cannot be argued in favour of strict liability that

when the injury is a direct one, in practice the position is usually such that the defendant could, or should, have known that his act was likely to inflict damage upon another.<sup>84</sup>

As this will not always be the defendant's position (the evidence may show that in fact it was not), it seems curious to argue that the defendant is liable because direct acts are *usually* of a type likely to inflict damage even though this particular act was outside that category.

The 'directness' requirement may be used in another way: to justify placing the burden of disproof of negligence on the person who caused the direct injury. Pollock suggested that

when a man's act is the apparent cause of mischief, the burden of proof is on him to show that the consequence was not one which by due diligence he could have prevented. But so does (and must) the burden of proving matter of justification or excuse fall in every case on the person taking advantage of it. If he were not, on the first impression of the facts, a wrongdoer, the justification or excuse would not be needed.<sup>85</sup>

We must add to this that the placing of the onus of disproof on the defendant relieves partially at least the problem postulated at the beginning of this essay, *i.e.* where the doctrine of *res ipsa loquitur* is inapplicable in a negligence suit because the cause of the accident is known. If it is established that A while firing at a rabbit accidentally shot his gardener B, the cause of the accident is known, and B

<sup>83</sup> Cited by Mr Landon in *Pollock's Law of Torts*, 129 from Beven, *Negligence*, 2nd Ed., 566, in criticism of *Stanley v. Powell*.

<sup>84</sup> Mr Landon, *ibid.*, 130.

<sup>85</sup> Pollock, *op. cit.* 98 (15th Ed.).

cannot rely on the 'res' to establish a *prima facie* case of negligence. B then has the task of proving facts which show A's negligence even though these facts may be peculiarly within the knowledge of A himself, e.g., A was wearing his reading glasses at the time, had seen the gardener arrive a short time before, had not used the gun for years, had reason to suspect the gun was defective, etc. Some of the relevant facts may be exposed at the trial or before the trial by means of interrogatories, but it would seem fairer if A had the ultimate burden of justifying conduct which has caused direct injury to an innocent person.<sup>86</sup> Even if *res ipsa loquitur* is available, we have seen that it is not strictly accurate to say that the defendant has the burden of proving absence of negligence.

Even if the argument that the defendant ought to disprove his fault be accepted, all exigencies will not have been covered. There will be cases where the defendant can prove his injury-causing conduct blameless. The innocent plaintiff will have suffered a loss for which there will be no compensation.

#### Conclusion:

It is suggested that legislation should be resorted to in order to clarify and modernize the law. Of course, it is one thing to make general arm-chair suggestions and quite another to propose a detailed plan and put it into effective practice. The proposals about to be put forward are a general guide to a reform which we submit is overdue and desirable even though its implementation might present serious legislative and administrative problems.<sup>87</sup>

1. The abolition of fault liability for injuries arising out of road accidents, and the introduction of a system of insurance similar to worker's compensation, would remove the inconsistency created by a fault-liability theory living together with a compulsory insurance scheme.

2. Despite Lord Denning's view that the tort of unintentional trespass to the person is obsolete, it is reiterated that in its Australian formulation it still has a useful role to play in cases off the highway. But we saw that a person may still be left without compensation if the

<sup>86</sup> It might be argued that the plaintiff's statement of claim in *Fowler v. Lanning* should have been held to disclose a cause of action in trespass, despite the plaintiff's failure to allege negligence, because '*res ipsa loquitur*'. Even if the plaintiff were given the advantage of this inference of negligence, the cause of the accident might be explained at the trial, and the relevance of *res ipsa loquitur* would disappear. Diplock J. apparently considered that only if the circumstances in which the defendant shot the plaintiff were set out with greater particularity could the doctrine apply. But this again would probably indicate the cause of the accident, and *res ipsa loquitur* would be inapplicable. One of the primary purposes of the doctrine is to aid a plaintiff who does not know how the accident occurred. See [1959] *Cambridge Law Journal* 34-35; 75 *Law Quarterly Review* 162.

<sup>87</sup> Arguments against a change in the law are set out in 'Liability Without Fault' 37 *Australian Law Journal* 209.

defendant can disprove his culpability. Hence it would be ideal if some provision could be made to aid a plaintiff who is injured as a result of an ordinary non-negligent unintentional act.

It may be possible to envisage in the future a scheme whereby such a person could receive compensation from a government fund. This would mean that the loss would be distributed over the whole community by means of taxation rather than restricted to a sector of the community distinguished by its activity. From a practical point of view it would be necessary to have the fund joined as co-defendant with the person who caused the injury, and only when the defendant justified his conduct would compensation be provided from the fund. The requirements of retribution, deterrence and compensation would thus be satisfied in all cases. The defendant would be personally liable if he was culpable; he would make no reparation if not culpable, but compensation would still be available from the fund; if he was blameworthy but was unable to pay the judgment debt, the fund would have to make up the balance due to the plaintiff.