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Torts in Verse: The Foundational Cases

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I. INTRODUCTION

In teaching Torts to first year law students for a period of some forty years, one learns much—not only about Torts but about the learning process itself. One comes to anticipate the "problem areas" which typically plague the students each time through the course, as well as the analytical pitfalls most often ensnaring them. One comes to expect the more or less standard questions about particularly puzzling points of Tort law, and some of the more commonly made erroneous assumptions. Although (thankfully) each academic year may at any moment bring forth a dazzling original student observation or inquiry, most of what occurs is, as it were, "preprogrammed."

The experienced Torts instructor strives constantly to improve teaching performance each year. It is through trial and error, of course, that the instructor eventually settles into a unique teaching routine, an approach to the materials which differs in some manner from every other instructor's approach. That routine is derived from continuing observation of what appears to work (and fail) in attracting student attention and in enhancing student understanding. What facet of a particular case should be emphasized to bring the student out "on the bottom line"? How most effectively should that emphasis be administered—through questions, through analogy, through example, through a "story," or through seizing upon some fact in the case to indelibly implant the situation in the student's mind? These and numerous other concerns claim the instructor's attention both in covering a case and in struggling with one ever-present question: How might that case be more successfully "taught" the next time around? An instructor not consistently engaged in that struggle is an instructor who should not be teaching Torts.

One point promptly emerging from even the most minimal teaching experience focuses upon the importance of employing some degree of humor in the classroom. This does not mean humor for the mere sake of humor, but rather humor focused upon a substantive point and facilitating the student's retention. In general, law (especially Torts) offers an ideal environment for a light touch, frequently accomplished by "humanizing" the facts of the studied

case. Often, it may be no more than applying a fictional name to an actor in the case, or analogizing the facts to some current event then popular with the pundits. Such devices serve the student in identifying the case itself and, more crucially, in retaining the analysis employed to resolve its issues.

The suggestion is not that the instructor become a stand-up comic, for that is neither appropriate nor necessary. However, the law is a dry subject for study (Oliver Wendell Holmes, Sr., likened it to "eating sawdust without butter"); and even the slightest efforts at mirth redound in immediate student interest. Decades of observation, feedback from generations of students, and grading thousands of examinations, all yield a common conclusion: Law student retention is considerably assisted by humanizing the materials. Time so expended by the instructor is amply repaid with a more interesting course and more appreciative students.

One sure-fire example of the suggested approach consists of reducing the materials to rhymes. Although by no means a poet, I was always impressed by the good-natured student response elicited by my torturing one of the assigned cases into verse. The unsophisticated nature of the effort mattered little; indeed, the worse the verse, the more enjoyment it seemed to evoke. An apparently dry case, inspiring minimum classroom interest, could almost always be enlivened by an effort to summarize in rhyme. Virtually without exception, the homily would receive refreshed laughter, additional attention, and perhaps even an attempt to improve upon my awkward verse (which I always encouraged). Almost unfailingly, individual students would drop by the podium at the conclusion of class to request a copy of the "poem." Many of them over the years attested to the assistance they believed they derived from those constructs for study purposes. Retaining the verse, with their case brief and class notes, they affirmed, aided immeasurably in recapturing the flavor of classroom analysis as they prepared for the examination. Although, during my years of teaching, I attempted to construct verses for only a few of the cases, I eventually came to wonder about the feasibility of adding to the number.

This small effort attempts to satisfy my curiosity. It contains a "verse," "rhyme," or "poem" for each of the truly foundational cases ordinarily studied in first year Torts. The arrangement assumes a

typical Torts casebook's order of presentation, but is fairly flexible. Each entry initially sketches the selected case's significance to the body of Tort law and then follows with the verse. The "rhymes" themselves are admittedly (indeed, intentionally) contrived and pedantic, seeking to elicit groans—but hopefully groans of recognition and familiarity. Ideally, the student will most "enjoy" a verse while reading and studying the case itself; indeed, some verse references make little sense otherwise.

From long experience in the classroom, I know that an effort to humanize law can be a valuable student aid. I only hope that, by virtue of this effort, others will become converts to the cause.

II. INTENTIONAL TORTS-PHYSICAL HARMS

A. *VOSBURG V. PUTNEY*, 50 N.W. 403 (WIS. 1891)

Vosburg has long been the classic case illustrating the intentional tort of a battery causing physical harm. The students were in a schoolroom when the defendant "reached across the aisle with his foot, and hit with his toe the shin of the plaintiff." Although treated by the local physician, the injury worsened and rendered the limb useless. On the trial for battery, a medical witness testified that the kick had caused microbes to enter a previous wound on plaintiff's leg, resulting in destruction of the bone. On the trial, the jury found a special verdict that although defendant intended no harm to the plaintiff, he was nevertheless liable for the injury. On appeal, the court agreed that defendant had committed a battery: "No implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful."

It was eighteen hundred and eighty-nine,
The students were late, the teacher on time.

"Come in," she bid, "forget the water,"
"I hereby call this class to order."

February in Wisconsin: all ice and snow,
Old Waukesha High: the wood stove aglow.

On one aisle, Vinny Vosburg, a farmer's son,
A life of illness, and devoid of fun.

Little Peter Putney, across the way,
An artistocrat, of pranks and play,

As decorum descended upon the class,
Peter's foot moved blindingly fast.

The kick made contact, with Vinny's shin,
The touch was slight, no desire to offend.

Suddenly, Vinny cried out a capella:
"Peter Putney punted my patella!"

To the doctor, poor Vinny, anguish and pain,
Diagnosis: "Microbes—you'll not walk again."

Next, to the law, all settlement aborted,
A jury's verdict: "The tibia was torted."

"But why?" Peter pouted, "this result bodes awful!"
"Even so," said the court, "Your kick was unlawful."

"Unlawful? How so? I had no intent!"
"Likewise," said the law, "you had no consent."

B. *MOHR V. WILLIAMS*, 104 N.W. 12 (MINN. 1905)

Casebooks typically employ *Mohr v. Williams* to introduce the liability limitation of "consent" into the Tort law of battery. In *Mohr*, the plaintiff expressly consented for the doctor to operate on her right ear. During the course of the treatment, after plaintiff was anesthetized, the doctor decided that the left ear was in worse condition and operated on it instead. Plaintiff sued the doctor in battery, and the court held the consent insufficient to justify the surgery. The court reasoned that if the surgery was performed without the plaintiff's consent, it was "wrongful" and thus "unlawful."

To the doctor's advice, Plaintiff said "What?"
"My ear is hurting—it hurts a lot!"

The doctor sighed, and tried once more:
"You need surgery, as I said before!"

"Your ossicles are shot, they have this disease,
You'll blow out your brains, if ever you sneeze."

Inquired the Plaintiff, none too pleased:
"What did you say, about my knees?"

The doctor again, now in frustration:
"I said—You require an operation!"

Finally—message received, and accord struck:
The doctor would operate, and remove the muck.

The agreement, however, specific and clear:
An operation only, on Plaintiff's right ear.

In treatment room, Plaintiff on the table:
"Count backwards, as long as you're able."

The anesthesia worked, the patient was out,
Then, the doctor encountered a doubt.

"Actually," he mused, on examination:
"Her left ear is the abomination."

Now in a quandry, a defining decision:
In which ear, should he make the incision?

He debated within: which ear to pursue,
The one of consent, or the one with the goo?

He went with his heart, he cleaned out the latter,
Plaintiff would understand, it would not matter.

But Plaintiff now awake—and exasperated:
"My condition, you have only exacerbated!"

"I was most beautiful, in a left profile,
With that ear carved, I cannot smile."

She sued the doctor, in battery yet:
"It was my consent, you never did get."

To the doctor's dismay, the judges all agreed:
"You never obtained, the consent you did need."

"Consent for the one, does not cover the other,
Otherwise, you might sculpture her brother."

"The left and the right, are not the equivalent,
It is immaterial, that you were not malevolent."

"What you did was unlawful, it was wrong,
A battery committed that she'll suffer long."

Said the court to Plaintiff: "judgment affirmed!"
"What?" cried Plaintiff, "I look like a worm?!"

C. *HART V. GEYSEL*, 294 P. 570 (WASH. 1930)

The *Hart* case is a well-known illustration of the battery scenario in which the contact consented to was criminal in nature, and raises the issue whether the consent operates in such a case to prevent plaintiff from recovering for his injury. In *Hart*, plaintiff voluntarily participated in a criminal prizefight and was killed by a blow struck by the defendant, his opponent. Following what at that time constituted the "minority" rule, the Washington court held that although the fight was criminal conduct, plaintiff's consent to participate still barred a recovery in his behalf.

Plaintiff blinked his eyes, shook his head,
This guy was tougher, than they said.

It was only Round One, hardly begun,
Yet already, Plaintiff was having no fun.

He bobbed, he weaved, he danced about,
Yet, still Defendant's blows found him out.

He tried floating like a butterfly, stinging like a bee,
But his wings were heavy, he flopped like a flea.

Defendant kept advancing, his gloves ever ready,
As Plaintiff tottered—increasingly unsteady.

Plaintiff feinted with his right, a left jab he threw,
Only to stumble, when he stepped on his shoe.

Defendant was ready, he drew back his right,
Prepared to give Plaintiff, a long good night.

Plaintiff saw it coming, but could not move,
Riveted to the spot, like a tongue in groove.

When fist hit jaw, a resounding crack,
Plaintiff knew nothing, flat on his back.

The referee came, raised Defendant's hand,
Declared him winner, a brute of a man.

Much later that night, as janitors did their thing,
They discovered Plaintiff, still prone in the ring.

"What about this guy?" one called to another,
"Do you suppose, he ever had a mother?"

Plaintiff's wife, informed of the matter,
Wept at first, but then started to chatter:

"You know," she said, "when you think of his plight,
"He's worth more now, than before the fight!"

She instituted action, they call it a suit,
Seeking damages, from the boxing brute:

"He knew nothing, of defending himself,
You took advantage, now I'm bereft."

Defendant just chuckled, leering in glee:
"Watch it toots, don't mess with me!"

Defendant's lawyer, equally in bliss,
Filed a motion, the suit to dismiss.

The court acceded, and the case was done:
"You cannot from tragedy, extract such fun."

"The fight in issue, though declared a crime,
That matters not, in this place and time."

"If one consents, and then comes to grief,
The law proclaims, that he has no beef."

The conduct was criminal, irrelevant you see,
From civil liability, the Defendant goes free.

So, if in the future, fighting enters your head:
Are you worth less alive, than you would be dead?

D. *MCGUIRE V. ALMY*, 8 N.E.2D 760 (MASS. 1937)

The common law of Torts has long refused to excuse the insane actor from liability for the consequences of his conduct. In general, it is immaterial whether liability sounds in intent or negligence, and the type of insanity receives little consideration. *McGuire v. Almy* is a famous case making the point and discussing the law's policy reasons for its position. The plaintiff in *McGuire* was a nurse employed to care for the insane defendant. During one of defendant's "violent attacks," she struck plaintiff on the head with a broken piece of furniture as plaintiff was attempting to subdue her.

A crash, a bang, a cry of rage,
Defendant's status: hard to gauge.

As insane, it seemed, as one could be,
Locked in a room, by means of a key.

Plaintiff, a nurse, was hired to care,
To make Defendant happy there.

In truth, however, there was no telling,
She was sometimes quiet, sometimes yelling.

About the most, Plaintiff could do:
Keep her calm, and at times subdue.

It was far from easy, for either one:
A life of despair, a job without fun.

Plaintiff's presence, Defendant resented,
Would do her harm, if not prevented.

On one occasion, violence unbounded,
From Defendant's room, agony resounded.

Plaintiff looked in, observed the scene,
It was evident: Defendant was mean.

"Wow!" thought Plaintiff, "what disarray,"
"I must," she said, "clear it away."

She entered the room, and hesitated,
She was, with reason, intimidated.

Defendant glared, table leg raised,
Prepared to strike, anger unfazed.

Plaintiff approached, with fear and dread,
Defendant swung, and crushed her head.

Plaintiff to the law: "I must complain."
Defendant's response: "I am insane."

Of Defendant's defense, Tort law said "No,"
"There are some places, we will not go."

"It appears to us, no real debate:
The insane should pay, for what they break."

"Too," said Torts, with a degree of awe:
"We have seen the carnage, of criminal law."

"Measuring in detail, one's mental capacity?
We'd sooner fathom, one's degree of chastity."

"Here, Defendant's intent was perverse:
She sought to hurt, her attending nurse."

"That is sufficient, it is our conclusion,
No matter what, her mental delusion."

To the insane, it appears, Torts doesn't care,
To those who are injured, it seems only fair.

E. *COURVOISIER V. RAYMOND*, 47 P. 284 (COLO. 1896)

Courvoisier is a case often employed by Torts casebooks to illustrate the liability limitation of "self defense," and to emphasize the pivotal standard of defendant's reasonable perception of the situation in which he acts. The case was one in which a group of rioters sought entrance to defendant's premises, with defendant expelling them by use of a gun. While attempting to keep the rioters at bay, defendant shot the plaintiff police officer who advanced on him through the mob in an effort to restore order. The appellate court reversed a jury charge which conditioned defendant's liability upon whether he was actually being assaulted by the plaintiff officer. The court emphasized the mob atmosphere in which defendant was acting and his reasonable belief as to his physical safety.

Nothing is worse, being awakened at night,
By a bunch of folks, who want to fight.

Demanding entrance, to one's store,
Throwing rocks, and plenty more.

Chants, and jeers, and insults in excess,
By strangers, and ruffians, and other pests.

For the Defendant, a night of horror,
Not at all certain, he would see tomorrow.

Those in the crowd, he was convinced,
Intended violence, at his expense.

Defendant fretted, praying for the sun,
Finally, however, going for his gun.

He had no choice, he later said,
A little longer, and he'd be dead.

Brandishing pistol, he hoped to dissuade,
But the rioters, seemed even less afraid.

Next, the gun he pointed, in the air,
And fired a shot, he knew not where.

The sound of shooting, at that location,
Plaintiff heard, at the tramway station.

Plaintiff responded, a police officer true:
He knew precisely, what he must do.

He walked through the mob, calling ahead:
"Stop! Police! No shooting, I said!"

Defendant puzzled: Who was approaching?
One of the rioters, now encroaching?

He shaded his eyes, drew a careful bead,
Shooting the Plaintiff, who began to bleed.

When taken to law, the trial judge defaulted:
"Defendant loses, unless by Plaintiff assaulted."

On appeal, however, the court got it right:
"The jury must view, Defendant's plight."

"If he thought Plaintiff, one of the assembled,
Perhaps, it was for his own life he trembled."

"If that be the case, the jury might say,
Defendant was entitled, to fire away."

So, all police officers, best heed the call:
Avoid large crowds, they're lethal to all.

And if a mob scene, you seek to diffuse,
You may be tomorrow's obituary news.

F. *BIRD V. HOLBROOK*, 130 ENG. REP. 911 (C.P. 1828)

Virtually every Torts casebook has featured *Bird v. Holbrook* for introducing the problem of defending property rights by means of a deadly mechanical device. In this presentation of both English law and society, *Bird* involved the plight of one "who occupied a walled garden in the parish of St. Phillip and Jacob, in the county of Gloucester," and "grew valuable flower-roots, and particularly tulips of the choicest and most expensive description." When "robbed of flowers and roots from his garden," defendant "placed in the garden a spring gun, the wires connected to which were made to pass . . . to some tulip beds, . . . and across three or four of the garden paths." Subsequently, "a pea-hen . . . had escaped, and after flying across the field above mentioned, alighted in the Defendant's garden." A nineteen-year-old "youth" attempted to retrieve the bird for the owner's servant by climbing the wall. "The bird took shelter near the summer-house, and the boy's foot coming in contact with one of the wires, close to the spot where the gun was set, it was thereby discharged, and a great part of its contents, consisting of large swan shot, were lodged in and about his knee-joint, and caused a severe wound." The youth then sued the garden owner for his injury.

The scene was pastoral, of storybook perfection,
An English garden, walled off for protection,

Its grounds enshrouded by nature's inscription:
Roots and tulips of choicest description.

The luxuriant unfolding of a profuse panorama:
An unlikely setting for stealth and drama.

Yet, there it was in this picturesque nook,
That a thief entered and its bounties partook.

Flowers, roots, all expensive concessions,
And all ripped away from rightful possession.

The Lord of the manor, beside himself with grief,
Of overwhelming purpose: He wanted that thief.

So, to that end, he mounted a gun,
Its wires, through the garden did run.

Alas, however, the gun knew no season,
It would shoot anyone, for any reason.

On this occasion, it shot a youth,
One who believed in right and truth.

His only sin, his reason for trespass:
His effort to impress a fetching lass.

Her pea-hen had escaped, a freedom bid,
Into Defendant's garden, there it hid.

She was frantic, flustered, and much appalled,
"Don't worry," said Plaintiff, "I'll scale the wall."

With a single bound, he made good his boast,
Without reason, to expect harm from his host.

There in the flowers, the herbs, and the roots,
He sadly discovered that a spring gun shoots.

"Ouch!" he exclaimed, for he could not flee,
The gun had shot him, square in the knee.

Later, in sadness, Plaintiff limped to the law:
"From pretty lasses, no smiles do I draw."

"I am now lame, I must hop about,
I cannot dance, or twist and shout."

Plaintiff's lawyer did rant and rave:
"Of the deadly gun, no notice he gave!"

That complaint found a receptive court:
"It now well seems this Lord did a Tort."

"Thieves ripped off my roots!" Defendant blurted,
"Even so," said the court, "you over asserted."

"The protection of property, with deadly force:
Neither law nor Christianity can soundly endorse."

"A gun without notice," said the court in conclusion,
"Assumes the risk of a mere trespasser's intrusion."

To the next lad, who aspires to impress:
Just dial 911—they rescue hens best!

G. *VINCENT V. LAKE ERIE TRANSPORTATION CO.*, 124 N.W. 221 (MINN. 1910)

The limits of "necessity" in excusing the infliction of personal harm or property damage has historically caused confusion in the study of Tort law. The *Vincent* case is the most famous instance of the issue, and appears in many casebooks. There is a taste for every view of the case, and there is spirited debate among the scholars. The case featured a scenario in which defendant's ship was unloading at plaintiff's dock when a violent storm developed, making it impossible for the ship to leave the dock when the unloading operations were completed. Accordingly, defendant's servants made certain that the ship remained moored to the dock while the storm raged. The force of the storm tossed the ship against the dock so as to cause damage, and the dock owner sued. Although the court reasoned that the storm had rendered it necessary for defendant to remain moored at the dock, it held that defendant must nevertheless pay the plaintiff for the damage done.

It was a storm, of inordinate wrath,
Both its occurrence, and its aftermath.

It wreaked such havoc, there in Duluth,
To those of prudence, and the uncouth.

Its path was wide, strewn with disaster,
Winds of velocity, and even faster.

To this day, sailors recount its violence,
Deafening gusts, then, an eerie silence.

It was as though, the fury of nature,
Sought new descriptive nomenclature.

On the water, the harbors, and shore,
Complete destruction, and then more.

As waves smashed, centrifugal force,
Taking all matters, within their course.

Defendant's steamship, lay at a dock,
Attempted departure, but access blocked.

Alternative limited, Defendant made haste,
He moored to the dock, frayed lines he replaced.

"I'll ride out this storm," he thereby proclaimed,
As he kept his lines taut, and tautly maintained.

Throughout the night, the waves crashed,
Hurling the ship, as the dock it smashed.

As day dawned, a scene depressing,
Plaintiff gasped, the sight distressing.

"My dock!" he cried, in great despair,
"Much of it, is no longer there!"

Then to Defendant, he made his demand:
"Before you go, I want money in hand!"

"The blame is not mine," Defendant voiced,
"That storm of the ages, left me no choice."

"Had I departed the dock, and drifted away,
I'd be on the bottom, this very day."

"When nature calls, we all must do,
A damaged dock, is her gift to you."

To the law, the Plaintiff next went:
"My dock is hurt, to great extent."

"Why should I suffer lamentation,
To cover the costs of his salvation?"

The court, figuratively, paced the floor,
It pondered pensively, then some more:

"Defendant did right, to moor his ship there,
He acted with prudence, also with care."

"Had he ventured out, into the weather,
He'd have been dashed, like a floating feather."

"And yet, and yet, somehow, some way,
It's just not right for Plaintiff to pay."

"He did nothing, but his dock supply,
A point the Defendant, cannot deny."

"There must, we think, be give and take,
Defendant must pay, for what he breaks."

"His ship he preserved, at Plaintiff's expense,
It seems only fair, that he make recompense."

The rule of the case, to both teacher and student:
You may have to pay, no matter how prudent.

III. STRICT LIABILITY AND NEGLIGENCE

A. *SCOTT V. SHEPHERD*, 96 ENG. REP. 525 (K.B. 1773)

The common law "Forms of Action" possess a distinctive and lasting significance in the law of Torts. Two of those "forms," "Trespass" and "Case," dominated the early law of civil wrongs, and wreaked considerable havoc via their machinations in the common law courts. Eventually, the courts determined that a plaintiff must sue for a "direct" or "immediate" harm to himself by employing the procedural writ of Trespass. For "indirect" or "consequential" harms, only the writ of Case would suffice. In illustrating the English courts' classifications of harms as "direct" or "indirect," most Torts casebooks present the judicial debate from the famous case of "the lighted squib," *Scott v. Shepherd*. There, the defendant (Shepherd) threw a lighted squib, "made of gun powder," into a crowded "market-house" on "the evening of fair day at Milborne Port." Defendant threw the squib upon the "standing" of one Yates, but Willis picked up the squib and threw it upon the standing of Ryal, who in turn "threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff [Scott] then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes." Scott sued Shepherd for his injury by bringing the writ of Trespass, and two famous English judges debated whether the wrong to Scott was "direct" or "indirect."

The historic fair, held in Milborne Port,
Invited mischief of miscellaneous sort.

One Shepherd, on the evening in issue,
Constructed a squib, capable of fissure.

Lighting the missile, Shepherd cast it toward Yates,
But Willis stood, as though guarding the gates.

Willis propelled the squib toward one Ryal,
Who tossed it with force, across the aisle.

There, the bomb burst, in the face of Scott,
Who cried in anguish: "My eye I've not got!"

Scott sued Shepherd, for loss of vision,
Proceeding in Trespass, a contested decision.

"Your harm," pleaded Defendant, "was consequential,"
"For recovery, the writ of Case was essential."

Judge Blackstone endorsed that paradox:
He distinguished the squib from a diverted ox.

Any harm, he urged, from Shepherd to Scott,
Was indirect—only a consequential plot.

Blackstone, however, was in dissent,
His football analogy, rejected and spent.

Speaking for the court: Judge DeGrey,
His was the opinion that carried the day:

"I disagree that Scott's injury was indirect,
Indiscriminate harm was Shepherd's effect."

"Casting the squib, the original act,
Continued the trespass as a legal fact."

"And the bomb, bursting in air,
Harming whomever, still was there."

"That," my friend, "equals direct contact,"
"The result far worse, than a mere cataract."

Thus spoke DeGrey, applying facts to rule,
The Forms of Action: they were very cool.

And in gratitude, Scott uttered a reply,
Blinking away tears, in his one good eye.

"Thank you for justice," is what he said,
"Even without one eye, I am still ahead."

And the rule for all time, always to apply,
Wherever squibs sizzle, and burst in the sky:

"From Shepherd to Willis to Ryal to Scott,
Though Trespass it is, Case it is not."

B. *BROWN V. KENDALL*, 60 MASS. 292 (1850)

At the common law, the writ of Trespass lay for directly inflicted harm, and no negligence on the part of the defendant need be shown. Direct harm equaled Trespass equaled liability without fault. Only under the writ of Case, the procedure for pursuing indirect harm, was the plaintiff required to show negligence in order to carry his burden of proof. This rule controlled American law as well until the mid-1800s. Chief Judge Lemuel Shaw, a legendary judge on the Supreme Judicial Court of Massachusetts, receives most of the credit for changing that rule. In the famous case of *Brown v. Kendall*, defendant dog owner sought to stop his animal from fighting plaintiff's dog by beating them with a stick. Raising the stick to strike the dogs, defendant inadvertently hit the plaintiff in the eye. Because the loss of his eye had resulted from direct contact with defendant's stick, plaintiff brought his action under the writ of Trespass. The Massachusetts high court's opinion was written by Chief Judge Shaw, a judge reportedly possessed of coarse features and gruff manner, and widely known for sharply rebuking lawyers who appeared before his court. Shaw rejected plaintiff's argument that direct injury enabled him to recover in Trespass without a showing of defendant's negligence. Rather, Shaw dismissed plaintiff's case, on grounds that he had failed to carry his burden of proof.

It was in Massachusetts, 1850 the year,
Dogs were prolific, they roamed everywhere.

On the day in question, a day of reflection,
Two dogs walked, in opposite directions.

As they met on the path, one dog swore an oath:
"This sidewalk is not big enough for us both!"

The animals commenced scratching and biting,
Each owner attempting to stop the fighting.

As the melee worsened, Kendall tried a trick,
He started beating the dogs, with a large stick.

As he positioned himself, and raised his staff,
The stick struck Brown, who was standing aft.

"My eye!" cried Brown, "the retina is detached!"
"Sorry," offered Kendall, departing with dispatch.

His subsequent suit, Brown brought in Trespass,
For direct ham, he knew recovery would be fast.

When the case reached the highest court,
It appeared Defendant was sure to abort.

But from the bench, Judge Shaw did assault:
"Plaintiff!" he screamed, "you alleged no fault!"

Brown, struck dumb, can't believe his ears,
Trespass equals liability—it has for years.

"That," he explains, "means I am the victor."
"That," yells Shaw, "is dicta, dicta, dicta!"

Then, as Brown watches, in utter disbelief,
Shaw suddenly stands, and tears up his brief.

"Without negligence," Shaw shouts to the roof,
"Plaintiff has failed to carry his burden of proof!"

Brown is stunned, having lost the decision,
He thereby becomes law's legacy of derision.

From under the patch, of his damaged eye,
A tear trickles down, as he begins to cry.

"What good is a rule, if it fails in the crunch?
My eye suffered contact, and it hurts a bunch!"

"That fact, for centuries, was enough for the law:
Damages from the Defendant, it would withdraw."

"Now comes a Judge, mean, cranky, and gruff,
And, lo, direct contact is no longer enough."

"Rather, he yells, negligence is the test,
Why is that? Who says that is best?"

"One lesson, however, I have learned in defeat,"
"From now on, friend, I'll let the big dog eat!"

Muttering, sobbing, slinking sorrowfully away:
"It may be law now, but it wasn't yesterday!"

A case for the ages, providing analytical traction,
As the law bids farewell, to the Forms of Action.

IV. NEGLIGENCE

A. *VAUGHAN V. MENLOVE*, 132 ENG. REP. 490 (C.P. 1837)

The concept of negligence begins as a common sense term from everyday language and becomes elaborated in legal application. In determining whether the actor's conduct was negligent, does Tort law employ an objective or a subjective standard of measurement? The issue is of historic significance and presents an assortment of ensuing ramifications. *Vaughan v. Menlove*, one of the most famous English Torts cases, is renowned for its early consideration of the issue and for establishing, in general, an objective yardstick: "the ordinary reasonable person." The case featured a defendant (Menlove) who owned a hay rick near the premises of the plaintiff. Although continuously warned about the danger of spontaneous combustion, Defendant did nothing to prevent it, and the resulting fire spread to the plaintiff's land where it destroyed his houses. When sued for the damage, Menlove pleaded that he had done his best in maintaining the haystack, and that his conduct should be judged according to whether he had acted in good faith. Instead, the trial court charged the jury that it was to determine defendant's negligence by finding whether he had acted as a prudent person under the circumstances. The appellate court affirmed the trial court's charge, and the case is hailed as having established an "objective measure" of negligence.

A famous character in negligence law:
A man named Menlove, of shock and awe.

Menlove constructed—upon his own ground:
A haystack—so firm and pleasingly round.

A neighbor, in passing, became quite alarmed:
"That rick could combust, and burn my farm!"

Frequently thereafter, many others repeated:
"Your haystack may well become overheated."

Menlove, hearing these warnings of dire:
"I'll take my chances on the chances of fire."

One day, however, five weeks having passed,
Spontaneous combustion, and a terrific blast.

The resulting flames, raced like the wind,
They knew no boundary, no foe nor friend.

Plaintiff's belongings, his houses and such:
Reduced to ashes, as if by Satan's touch.

Plaintiff viewed in grief his total devastation:
"Menlove," he charged, "you owe compensation."

The lawsuit was heated, a novel issue pressed:
By what standard must Menlove be assessed?

Defendant offered a subjective table:
"Did I act the best I was able?"

"If I perform to the limits of my ability,
I cannot be charged with legal liability."

But the law rejected that position so put:
"We'd sooner judge by the length of your foot."

Rather, held the court, a more uniform plan:
The yardstick was that of the "prudent man."

"Ordinary prudence," so it proclaimed,
The standard of care henceforth maintained.

To the jury, those who try civil litigation:
"Employ a figment of the law's imagination."

To society's Menloves—born slow of hand:
"You best do better than you can!"

B. *BREUNIG V. AMERICAN FAMILY INSURANCE CO.*, 173 N.W.2D 619 (WIS. 1970)

The "ordinary reasonable person" standard of negligence law yields on occasion to some qualifications. One who acts under a sudden mental incapacity, for example, might obtain relief from the objective standard requirement. To succeed, however, the actor must demonstrate that she possessed no forewarning of her susceptibility to the incapacitating condition. Minus such demonstration, the actor must meet the "reasonable person" mandate. Such was the plight of the actor, one Erma Veith, in the popular case, *Breunig v. American Family Insurance Co.*

A bright white light on the car ahead,
Entranced Erma Veith, so she later said.

Pursuing that light, a miracle did unfold:
Of Erma's steering wheel, God took control.

Under the influence of celestial propulsion,
Erma now operated by divine compulsion.

She met a truck, and responded in scorn:
She hit the gas, so she'd become airborne.

Why, Erma, would you seek elevation?
"Batman!" she replied, "my inspiration!"

Moreover, at trial, other evidence of panic:
She had previously invoked the Duo Dynamic.

Once to her daughter, she had commented:
"Batman is good; your father is demented."

The law held sympathy for Erma's plight:
After all, mankind has long yearned for flight.

Soaring above, slipping gravity's attraction,
Many have aspired to that satisfaction.

Still, the law cautioned, the limits were great:
"Was Erma forewarned of her delusional state?"

On this issue, the evidence appeared strong:
"She had known of her condition all along."

She experienced a vision, at a shrine in a park:
When the end came, she would be in the Ark.

Indeed, she would assist, in sorting them out:
Those to be saved, and those not devout.

Knowing all this, said the court in conclusion,
She might well expect, she'd suffer delusion.

In her condition, a state most bizarre,
Erma was negligent, to drive a car.

And to Erma, a lesson of universal appeal:
"Nothing can emulate the Batmobile!"

C. *ECKERT V. LONG ISLAND R.R.*, 43 N.Y. 502 (1871)

On occasion, negligence law must appraise the conduct of one who foresaw the risk which injured him. Even so, he proceeded to injury and then approaches the law for assistance. In certain instances, Tort law early concluded that such an actor may recover from a negligent defendant; *i.e.*, that his conduct was that of the "ordinary reasonable person." The classic instance features the actor injured or killed in plunging to the rescue of a small child imperiled by a negligently speeding train. The Torts casebooks typically offer the 1871 case of *Eckert v. Long Island R.R.*

The errant train, approached its prey:
A small child, on the tracks at play.

At that juncture, prospects appeared bright:
A missing member in one family this night.

The infant continued at his distractions,
The engine consumed the track in fractions.

Moment by moment, the hope at most:
The child would be a friendly ghost.

At the last instant, enter a stranger:
Elmer Eckert, realized the danger.

Leaving the spot where he had stood,
Weighing the "can't" against the "should."

From aside, came the cry of "Never!"
From Elmer: "No one lives forever!"

Elmer and locomotive—a race of death,
In the balance—the tot or himself?

Elmer and train—a simultaneous arrival,
Somehow, he threw the kid to survival.

That night, one family missed a member,
Their only solace: A hero to remember.

Likewise, from the law's perspective:
Had Elmer, from due care deflected?

It is never safe to race a train,
Typically, one should refrain.

At times, however, the price is great,
A child's life—its going rate?

The train's fault placed the kid in danger,
Why put the loss on a courageous stranger?

One imperils, and the other saves,
The Knight recovers from the knaves.

D. *ROBINSON V. PIOCHE, BAYERQUE & CO.*, 5 CAL. 460 (1855)

Robinson is a famous example of an early court's refusal to focus on plaintiff's individual shortcomings in order to bar his recovery against a defendant who had left an uncovered hole in a public sidewalk. Rejecting defendant's defense that plaintiff had been intoxicated when he fell, the court responded that "a drunken man is as much entitled to a safe street, as a sober one, and much more in need of it."

It was a hole, there was no doubt,
Not a small crack, running about.

There in the sidewalk, in plainest sight:
A yawning abyss, a pedestrian's plight.

Left by Defendant, or his workers for sure,
Uncovered, unprotected, and most insecure.

No light, no sign, no caution at all,
Impending disaster, awaiting a call.

As Plaintiff approached, an irregular gait:
First he would scamper, then he would wait.

Lurching to, then lurching fro,
His face alight, a fiery glow.

But happy, jovial, and most jolly:
"Let's all have, a party, by golly!"

The problem was, as all could tell,
Plaintiff, already, had partied well.

His words a slur, his hiccups aplenty,
Clearly, he had hoisted, a few too many.

The hole he approached, oblivious to danger,
As to doom he thought, an unlikely stranger.

As his foot descended, into depression deep,
His cell phone emitted, an ominous bleep.

Down he plummeted, into the vast cavity,
There was no escaping, the law of gravity.

His knees buckled, his head hit the ground,
The breaking of bones sounded, all around.

When, months later, he was able to speak,
His first exclamation: "I deserve a treat."

The court agreed, brooding and pensive:
"We know your ordeal has been expensive."

Defendant agape, Plaintiff he did debunk:
"He can't recover! The guy was drunk!"

"To one intoxicated, there is no obligation,
His own conduct authors his devastation!"

Said the court: "You are right—to a degree,
He was out of his gourd, and could not see."

"But," the court reasoned, "it is that fact,
That places your liability, on a fast track."

"Of all the people, who in life go astray,
The drunk, most of all, needs a public way."

"A way not encumbered, with holes or debris,
But rather, from danger, is completely free."

"Most men, now and then, imbibe just a bit,
At that point they need, a sidewalk most fit."

"A sidewalk assured, always to be there,
Not one moving, or in grave disrepair."

"Let the word be, let everyone know:
A drunk is special, and we treat him so."

So if in the sidewalk, a hole you dispense:
"Drunk as a Skunk," is no valid defense.

E. *UNITED STATES V. CARROLL TOWING CO.*, 159 F.2D 169 (2D CIR. 1947)

Judge Learned Hand's opinion in *Carroll Towing Co.* was assured of immortality when Professor (now judge) Richard Posner selected it as illustrating an economic interpretation of negligence in Torts cases. Judge Hand emphasized "probability," "gravity," and "burden of adequate precautions," to determine whether plaintiff had been negligent in failing to require a bargee's presence on its barge during working hours. Finding in the affirmative, the judge held that plaintiff's contributory negligence must be counted against him in his suit against the tug towing the barge at the time it broke loose from its moorings and crashed into a tanker. No Torts casebook would dare omit *Carroll Towing Co.*

While Defendant was towing Plaintiff's barge,
The latter came loose, and drifted at large.

By tides and traffic, the barge was directed,
Against a tanker, from which it deflected.

The tanker's propeller pierced the barge's hull,
Which began to leak, like the thinnest skull.

"Damage, you see," exhorted Plaintiff's claim,
Looking with fervor, for someone to blame.

"Had Defendant used care, my barge would be,
Moored to the flotilla, and puncture free."

"Instead it now leaks, a terrible condition.
An oozing barge, is one out of commission."

"My profits are down, I cannot survive,
Without compensation, my barge will dive."

The law quite dubious, of Plaintiff's assertion:
"The true cause, was your bargee's desertion."

"While no general rule, decides this case,
His conduct in context, we cannot erase."

"The month was January, the days brief,
Port activity—ferocious beyond belief."

"War conditions, with barges in and out,
The waters treacherous, dangers all about."

"In this setting, both 'P' and 'L' loomed great:
Precautions were essential, they could not wait."

"Yet, for twenty-one hours, your bargee abdicated,
His excuse for his absence: all fabricated."

"Although the barge, must not be his jail,
No reason for leaving, did he ever avail."

"Thus, our decision, and it's all we do say:
It was not due care, that he was away."

"Next time, we advise, this point uppermost:
Engage a bargee, who remains at his post."

"Either that, or rather, you might always try:
A bargee who looks angelic, when he tells a lie!"

F. *TITUS V. BRADFORD, B. & K. R. CO.*, 20 A. 517 (PA. 1890)

On occasion, Tort law attaches weight to custom for setting the standard of care in negligence cases. *Titus* is a famous old case in which the court termed custom "the unbending test" for determining whether defendant railroad was negligent in placing "a broad-gauge car upon a narrow-gauge truck." Holding that the railroad's employee could not recover for his work-related injuries, *Titus* is often used to illustrate the early view held by some courts on the conclusiveness of custom in the negligence calculation.

All seemed right, as the train set out,
All details checked, no room for doubt.

Plaintiff, in his perch, atop a car,
Scanned the country, near and far.

He felt secure, in his lofty place,
A smile of elation, across his face.

As a brakeman, he seemed to know,
When to coast, and when to slow.

The train gathered speed, Plaintiff could tell:
"She's doing ten, and running well!"

On a curve, however, the car did sway,
As Plaintiff attempted, to move away.

The car tipped over, a gruesome fact,
As Plaintiff jumped, onto the track.

Alas, he landed directly in harm's way,
Indeed, the next car, preempted his stay.

The cause of it all, Plaintiff did construct:
A broad-gauge car, on a narrow truck.

In contriving, such a dangerous affair,
Defendant railroad, showed lack of care.

How could it not, promptly ascertain,
That this was no way, to run a train?

From a jury verdict, Defendant appealed,
Not yet convinced, that its fate was sealed.

Stacking cars on trucks, a part of the trade,
All railroads did it, Defendant displayed.

How could it know, how better to act,
When what it did, was custom intact?

On this point, too, the court did light,
Seeking to distinguish, wrong from right.

"Custom," the court said, "the unbending test,
For what trains do most, they also do best."

No jury, it thought, could ever dare say,
That customary conduct, is a negligent way.

Plaintiff's fate: an unhappy consequence,
We best speak of him, in the past tense.

So, if hit by a train, best remember the song:
"Crazy man! Have you been doing this long?!"

G. *OSBORNE V. MCMASTERS*, 41 N.W. 543 (MINN. 1889)

The Tort defendant's violation of an appropriate criminal statute has long been used by courts to set the standard of care in a negligence case. In a sense, then, the criminal statute "codifies" the negligence standard—to the extent, indeed, of constituting defendant's conduct "negligence per se." Early opponents contested the notion that a criminal statute, saying nothing about either negligence or civil responsibility, could be so employed. The favorite casebook entry of *Osborne v. McMasters* illustrates the controversy, and comes down on the side of conclusively using the criminal statute in the negligence context. The case involved a defendant druggist whose clerk sold plaintiff's intestate a poison without a proper label (in violation of a criminal provision), and the intestate's resulting death.

The corner drug-store, a delectable spot,
A place to feel better, when you're not.

With perfumes, powders, and magazines,
Some of the latter, perhaps obscene.

Small tables, chairs, and the soda fount,
A multitude of flavors, some at discount.

Reds, blues, and hues in profusion,
Placing an order: real confusion.

Whipped cream, nuts, other confections,
Selected, added, and blended perfection.

Cappuccino, Mocha, and even Espresso,
To be ordered for sipping, or rather to go.

An oasis of fun, unmitigated delight,
No place for those who wish to fight.

But also the locus for important matters:
Druggists who advise on active bladders.

Medicines, devices, prescriptions galore:
Each less legible than the one before.

Plaintiff requested a container of tonic,
She sought to feel strong, even supersonic.

The clerk, however, filling her order,
Supplied a bottle of poison water.

Its label was bereft of cautionary tones,
No red flag, no skull, and no crossbones.

Rather, a message in yellow display:
"Drink it all, and have a nice day!"

As she read, Plaintiff's heart beat faster,
Little she knew: a prescription for disaster.

She gulped down the contents, without delay,
Confident that relief was well on the way.

Instead, however, of the balm expected,
Acute pain struck, like lightening deflected.

She clutched her stomach, and looked around,
Her last sight of the living, as she hit the ground.

In the corner, she noticed, a guy with a beeper,
He looked familiar, she thought: The grim reaper!

When it was over, and the lawsuit matured,
At least Plaintiff's lawyer was happily cured.

He sued for negligence, as he promptly said:
"A statute was breached, and my client is dead."

"The statute required that poisons be labeled,
Not scattered about, as horses unstabled."

"And although the statute is criminal law,
It offers a standard for negligence to draw."

The court agreed, as rationale it evolved:
From statutory standard, negligence devolved.

Not negligence, mind you, of just any day,
Rather, said the court, "Negligence per se."

So when next you stand at the soda fount,
Attempting to decide, and calories to count,

Don't take it lightly, when the clerk does chime:
"Name your poison—you're taking up my time!"

H. *VESELY V. SAGER*, 486 P.2D 151 (CAL. 1971)

Vesely was one of the first cases to hold that a retail establishment selling liquor in violation of a criminal statute could be held civilly liable to one injured by the liquor consumer. The case involved the owner of a mountain lodge who continued to serve alcohol to an obviously intoxicated customer who then negligently drove down the mountain striking plaintiff's car. Plaintiff brought the action for his injuries against the lodge owner.

"Hit me again!" cried the customer in glee,
Drinking all night, now well past three.

Defendant's lodge: the bar's location,
All drinks served, without hesitation.

The patron chugging, emulating a fool,
He also kept toppling, from off the stool.

Chasing a chaser with another chaser,
Blanking his mind like a large eraser.

Asked Defendant: "What is your next accounting?"
Slurred the patron: "Driving down this mountain."

At 5:00 A.M., he finally croaked like a toad:
"Give me one last drink, and one for the road!"

Staggering and singing at the top of his lungs:
"Coming 'round the mountain when she comes!"

He started the car, skidding out of the lot:
"I think I'll see just what she's got!"

His eyes glazed, and his tongue free:
"Why, I'm as fast as Little E.!"

Perhaps so, but not nearly as alert,
As the Plaintiff, he promptly hurt.

Inquired Plaintiff, with abject outrage:
"Why this drunk, did I engage?"

"Who let you out? Who set you loose?
Someone needs to roast his goose!"

Defendant appeared, no hanging back:
"Why me," he inquired, "do you attack?"

"He was drinking, and I was but selling,
It's not my fault, you took a shelling."

"I did serve the booze, but then he drank,
His act intervened, and protects my flank."

Protested Plaintiff: "That can't be right,
You released a rum demon into the night."

The case then advanced, to judicial decision,
The court deftly worked, some long division.

"A drunk by one, is a drunk too many,
For each of them causes damage aplenty."

"He may well have drank, after you supplied,
But that brings no victory, to your side."

"You well knew of his wasted state,
Yet, you continued to inebriate."

"You also knew, his intention to drive,
You might as well cast a hand grenade live."

"By your conduct, it is thus our deduction:
You released a weapon of mass destruction."

"You cannot respond to such devastation,
Via a paltry claim of no 'proximate causation.' "

So if in the future, a party you unfold,
Beware a guest who chugs the punch bowl.

I. *BALTIMORE & OHIO R.R. V. GOODMAN*, 275 U.S. 66 (1927)

One of the most famous developments in negligence law was the steadfast effort by Justice Oliver Wendell Holmes, Jr., to curtail the jury's prominent role in setting the standard of care. In his classic book, *The Common Law*, Holmes had early argued that many familiar standards of conduct should be reduced to rules of law. The trial judge should then apply those rules in routine cases, Holmes proposed, rather than leaving that function to the jury. Many years later, when Holmes ascended to the Supreme Court, he found the perfect case in which to refurbish his proposal, and he seized the opportunity. In *Baltimore & Ohio R.R. v. Goodman*, a motorist was struck by a train in attempting to cross the tracks, and one of the issues was whether the motorist had exercised due care as he drove over the crossing.

The railroad crossing—freighted with confusion,
In every direction—some sort of occlusion.

For motorists endeavoring to cross the tracks,
What to watch? Their fronts or their backs?

Peering to the north, attempting decision,
A section house, blocked out all vision.

Was a train approaching, fast or slow?
By looking up track, no one could know.

Nathan Goodman discovered this plight,
As he neared the crossing—was a train in sight?

He slowly proceeded, having cut his power,
When killed by a train, at sixty miles an hour.

To the widow's lawsuit, jury compassion:
Her husband had acted in careful fashion.

But the railroad appealed, and succeeded:
To the Supreme Court, the case proceeded.

At that point, a famous Justice explained:
Goodman, for his own death was blamed.

Sometimes, said Holmes, quick on the draw:
Standards of conduct became rules of law.

Holmes' opinion, with no Court division,
Reversed with finality, the lower decision.

From now on, there would be no doubt:
If a driver can't see, then he must get out.

If in the car he remains, while inching across,
When struck by the train, driver bears the loss.

The result was automatic—a rule of law,
Not for the jury—to hem and to haw.

To obey law, one must know in advance,
Not after the fact, and all happenstance.

Certainty in law—that is the goal,
May the search for it ever unfold!

Holmes to law: The heritage does glisten,
Drivers at tracks: "Stop, Look, and Listen!"

J. *BYRNE V. BOADLE*, 159 ENG. REP. 299 (EX. 1863)

A Tort's plaintiff must ordinarily carry the burden of proving defendant's negligence; *i.e.*, that the defendant failed to act as the ordinary reasonable person in the circumstances. Plaintiff's failure to carry that burden typically results in an adverse summary judgment. On fairly rare occasions, however, a trial court may conclude that mere circumstantial evidence is strong enough to give rise to an inference of defendant's negligence. There, the court may permit plaintiff's case to go to the jury with the instruction that the jury may, but need not, find the existence of negligence. On such occasions, the court may say that the case is controlled by the "doctrine" of "res ipsa loquitur," Latin for "the thing speaks for itself." The birthright case for that doctrine was the 1863 English case of *Byrne v. Boadle*, where plaintiff was struck on the head by a barrel of flour being lowered by a rope from the defendant's warehouse. In that case, the famous English jurist, Chief Barron Pollock, coined the phrase, "res ipsa loquitur."

A pedestrian on the sidewalk—a healthy pace,
His thoughts all focused—low carbs embraced.

A sense of well being—a perfect hour,
When struck from above by a barrel of flour.

The impact was great—the force of a wreck,
Pedestrian's condition: a head but no neck.

"From whence," the inquiry, "did that barrel descend?"
"Defendant's warehouse," the reply, "end over end."

Pedestrian to the law, its aid to implore:
"I need assistance, my neck to restore."

When called into court, Defendant did snort:
"He has proved no negligence; hence, no Tort!"

The Law, Judge Pollock, was somewhat aloof:
Not quite so certain about the burden of proof.

"Surely my Lord, not a scintilla was shown!
Unless, the occurrence was fault on its own."

"There are certain cases," Pollock exuded,
"Where 'Res Ipsa Loquitur' may be concluded."

"What does that mean?" Defendant demanded.
"The thing speaks for itself," Pollock expanded.

"How else, but fault, could the barrel escape?
If Defendant knows, let him extrapolate!"

Otherwise, a "rule," to Defendant's dismay:
An inference of fault may come into play.

How else could Plaintiff ever deign to show,
What happened above, when he was below?

"Barrels," opined Pollock, "don't fly in the air,
In the absence of fault, somewhere, up there."

Just as is true, when pigs start to fly:
Someone must first have opened the sty.

"In these circumstances, a jury may say:
'Defendant was negligent, and he must pay.' "

"I thank you," enthused Plaintiff, "my neck does too!"
Smiled Pollock benignly, "It was the least I could do."

When quizzed, therefore, about fluency in French,
Plaintiffs' lawyers disclaim, but "Latin is a cinch!"

K. *LARSON V. ST. FRANCIS HOTEL*, 188 P.2D 513 (CAL. 1948)

Larson is a famous "modern" case in which the California court refused to apply "res ipsa loquitur" for lack of the necessary prerequisites. The case featured a pedestrian on the sidewalk struck by a chair which fell from a window in the defendant hotel, "as a result of the effervescence and ebullition of San Franciscans in their exuberance of joy on V-J Day." Because plaintiff had no way of showing negligence on the part of the hotel, he relied upon the principle of res ipsa loquitur.

The place and the day, both glorious settings:
Gave rise to a case of fears and fretting.

The place: the St. Francis, of legendary acclaim,
The respite of presidents, and others of fame.

With baskets of fruit, and beds that are turned,
Any extravagance, for which one may yearn.

Where whims are accorded, and tastes indulged,
A place, accordingly, where expense accounts bulge.

Where pets are attended with inordinate care,
And guests are pampered with savior faire.

No coin is circulated without first being polished,
The crassness of money thus largely abolished.

And on a day of celebration, unlike any other,
A day of gratitude, for each father and mother.

In the war of all wars: our troops had prevailed,
Against an enemy of stealth, its heart now impaled.

An enemy who sought, by clandestine act,
Our soil, our freedom, our people, to attack.

An empire, they boasted, of the rising sun,
Reduced to rubble, now there were none.

All was right in the heavens, a blissful glow,
Except for the Plaintiff, walking down below.

His heavens were cloudy, obscured from clear view,
Until an armchair unbounded, came crashing through.

The chair struck the Plaintiff, great force and impact,
He staggered about, lurching forward and back.

From whence did it come? No way to tell,
From one of the windows, in the hotel.

Plaintiff pondered pensively, how best to sue?
To the hotel, he said: "It's *res ipsa* on you!"

"You must have been negligent, what else could it be?
The thing speaks against you, and not against me!"

"For armchairs to fall, from your windows and such,
Those things can be lethal, and they hurt very much."

But the court was unpersuaded, as courts often are,
When legendary institutions, appear at the bar.

"This doctrine you use, this thing about 'speaking,'
You take it too far, we think you are freaking."

"You first must establish, that without Defendant's fault,
The chances of what happened, stood precisely at naught."

"But here you have faltered, no such chances at best,
This chair likely thrown, by some visitor or guest."

"No one contends, the hotel could prevent that,
Why, sooner train a mouse, to beat up on a cat."

"There are times, assuredly, when *res ipsa* will fly,
But in this case, we hold, it does not apply."

Mused the Plaintiff: "how strange and how quaint,
Chairs fly from their windows, but negligent they ain't."

Though all manner of debris, may fall unabated,
The St. Francis forever: "Triple A Rated."

V. PLAINTIFF'S CONDUCT

A. *BUTTERFIELD V. FORRESTER*, 103 ENG. REP. 926 (K.B. 1809)

At the common law, a plaintiff who was himself at fault was permitted to recover nothing for harm suffered at the hands of a negligent defendant. This "100% defense" doctrine of Contributory Negligence is commonly attributed to Lord Ellenborough's decision in the case of *Butterfield v. Forrester*. There, it appeared that the defendant, in making repairs on his house, had placed a pole across a part of the adjacent public road, and that the plaintiff, emerging from "a public house," violently rode his horse into the pole "and was much hurt." Although there was no evidence of intoxication, the English court refused to allow plaintiff's recovery for his injuries.

In the township of Derby: Defendant's abode,
It was located close by the side of the road.

Finally one day, after years of neglect,
Defendant observed: "This place is a wreck!"

Some repairs, he decided, were in desperate order,
To keep out the wind, the snow, and the water.

The materials arrived: lumber—a huge load,
In preparation, Defendant blocked off the road.

His pole, however, only part way extended,
To leave public passage, he fully intended.

Preparations completed, near the end of the day,
Diners arrived not far distant, at "Ye Olde Buffet."

The menu was announced: "All you can eat!"
As the diners cheered and stomped their feet.

Among those patrons, a man named Benny,
Of the family Butterfield, who always ate plenty.

Hours went by, there seemed no end:
Benny at the food bar, again and again.

Consuming all in sight, an incredulous amount,
Benny waddled out, his poor horse to mount.

Benny Butterfield, of inordinate proportions,
Hit the saddle, like a whale in contortions.

With violent jabs, Benny spurred his steed,
Hurdling 100 yards, with blinding speed.

But Big Benny's journey proved pointedly brief,
As equine hit pole, and came powerfully to grief.

Lying in the road, belching in pain,
Benny vowed never, to eat whey again.

And the horse, mangled creature, hide and hair,
Opined woefully: "this hardly seems fair!"

Yet, from this squalor, the common law relates,
A requiem of remonstration, for all heavyweights:

"If without care, Plaintiff incurs obstruction,
He recovers zilch for his own destruction."

The heedless horseman, it thus resulted,
Left court that day, with injury insulted.

And the Defendant, though clearly at fault,
Bore a liability, that equaled naught.

Thus born on that day, though not in a stable:
Contributory negligence, a common law fable.

B. *DAVIES V. MANN*, 152 ENG. REP. 588 (EX. 1842)

Over time, the common law created some famous exceptions to its "100% defense" rule of contributory negligence; *i.e.*, the rule that a plaintiff, even slightly at fault, recovers nothing from a defendant no matter how negligent the latter may be. Perhaps the most important of those exceptions was the "Doctrine of Last Clear Chance." Under that doctrine, the party possessing the last clear opportunity to avoid the accident, notwithstanding the other party's negligence, was held fully responsible for what happened. The doctrine's origin lay in the English case of *Davies v. Mann*, featuring a plaintiff who placed his donkey in the public way to graze. Although at fault, the donkey owner was permitted to recover from a defendant whose wagon negligently struck and killed the animal.

Plaintiff turned his donkey into the street,
"There," he instructed, "go and eat."

With its feet in fetters, the beast ambled about,
Grazing clumsily, as though afflicted with gout.

At this juncture, from the top of the hill,
Defendant's wagon descended at will.

The beast of burden simply had no chance:
Struck by the wagon at a smartish glance.

"You struck my ass!" cried Plaintiff in dismay,
"Your ass," said Defendant, "was in harm's way."

"No need," added Defendant, "to go to the law,
Its course is settled: no damages will you draw."

"For injury suffered, partly from Plaintiff's fault,
Defendant's negligence yields precisely naught."

Even so, the Plaintiff sought law's aid anyway,
As he reasoned: "new rules appear every day."

Indeed, Plaintiff would give thanks he persisted,
For "this case is different," the law insisted.

"Although Plaintiff negligently his ass did manage,
Defendant could not wilfully take an advantage."

"If he could by due care avoid the harm,
To Plaintiff he owes one ass for his farm."

"What," screamed Defendant, "do you now advance!?"
"The doctrine," said the law, "of the last clear chance."

"The last opportunity—pivotal and inclusive:
If it is not utilized, then it bodes conclusive."

"A man in the road, lying there as dead,
You may not proceed to crush his head."

"And if you spy grave peril on the wing,
May you act with your brain in a sling?"

"We think not; nay, rather we are sure:
The chance you must use to stay secure."

On occasion, therefore, it augurs clear:
One must spin silk from a sow's ear.

When in the future, you imperil an ass:
It may be yours, if you don't act fast.

C. *HARTFIELD V. ROPER*, 21 WEND. 615 (N.Y. 1839)

Although today much disfavored, an early rule of the common law actually served to expand the "100% defense" of contributory negligence. Focusing upon people who enjoyed particular relationships to each other, *e.g.*, parent-child, the law would impute the parent's custodial negligence to the child in order to bar the injured child's recovery from a negligent defendant. This rule of "imputed contributory negligence" applied to a number of other relationships, including drivers and passengers, bailors and bailees, and husbands and wives. Although today abolished for most relationships in most jurisdictions, the early (and famous) New York case of *Hartfield v. Roper* is typically employed to illustrate imputed negligence.

Mrs. Hartfield exclaimed: "I must go to the store."
Mr. Hartfield responded: "I shall watch Cicero snore."

But little Cicero, aged two or three,
Awoke and cried, at his father's knee.

"Oh wow!" said the father, "kid, suck your thumb,
Or, I'll pinch your nose and blow out your eardrum!"

But Cicero continued, he yelled and he cried,
"I know!" said his dad, "let's go outside!"

Father and son, on a hill in the snow,
When the father spied a snow path below.

"That's a great place to play," he promptly reflected,
"Come Cicero, to the snow path!" he then directed.

As the child played, engrossed in his fun,
The father slipped away, and began to run.

Back into the house, he dashed with glee:
"I'll have two beers before he misses me!"

But, of course, two beers became three,
And then there appeared, a game on T.V.

Cicero, in the path, was most occupied,
As Roper's sleigh swayed from side to side.

The sleigh tossed the child, into the air like a ball,
With Roper singing "dash away, dash away all!"

Now, Mrs. Hartfield returned from her chore,
To discover her husband asleep on the floor.

"You lout!" she exclaimed, bounding outside,
To find her small son, more dead than alive.

Eventually, however, Cicero recuperated,
From Roper, he wished, to be compensated.

But Roper refused, and continued singing:
Something about "sleigh bells are ringing!"

"You see, you young lad, either two or three,
There is no way in law you can ever sue me."

"Sure I was careless, I ran right over you,
But the thing is, your loutish dad was too."

"He was your keeper, your agent in fact,
As he left you there, to play in the track."

"His fault is your fault, father to son,
Under the law, you are both as one."

"Imputed, his negligence is, you see,
And bars recovery, by you from me."

Said the New York court, of Cicero's suit:
"Roper is right, your action won't compute."

"If for justice, you continue to pout,
Sue your father, that careless lout!"

"Tell him this night, at the dinner table:
'You best pay me, all you are able.' "

"If he resists, then file your suit,
He will not again, call you 'cute.' "

"When you then win, impound the house:
Leave him the cat, and perhaps a mouse."

"While he dines on whey, downstairs in gloom:
You'll enjoy a pizza buffet, up in your room!"

"And if he defaults, in paying some sum:
Sit on his fist, and lean back on his thumb."

When he yelps, in great pain and despair,
A message to fathers: "To your child be fair!"

D. *LAMSON V. AMERICAN AXE & TOOL CO.*, 58 N.E. 585 (MASS. 1900)

The common law companion of contributory negligence, the doctrine of Assumption of the Risk bars plaintiff's recovery for injury from a risk created by defendant, if plaintiff: (1) possessed knowledge of the risk, and (2) had a free choice on whether to encounter it. In those circumstances, the law insists, plaintiff expressly or impliedly assumes the risk from defendant's negligent conduct and may not recover. The doctrine's origin lay in the workplace accident, operating to bar recovery by employees for injuries arising from risks of their employment. This was the context in which Judge Holmes applied the doctrine in the turn-of-the-century case of *Lamson v. American Axe & Tool Co.* There, the plaintiff, an employee who painted hatchets, was struck by a falling hatchet due, as plaintiff contended, to an unsafe drying rack.

The hatchets glistened, all in a row,
Painted by Plaintiff, seated below.

This job he had held, as everyone knew,
Long before Noah, his Ark, and the zoo.

A man of perfection, a craftsman of pride:
The hues of his hatchets, never looked dyed.

Rather, trim, bright, and beautifully cast,
Colors proportioned, and painted to last.

Lately, however, things had changed,
Improvements effected, all rearranged.

New racks, where the hatchets dried,
Once painted by Plaintiff, and set aside.

The problem, from Plaintiff's perspective:
Those racks were unsafe, even defective.

He complained heatedly: "The hatchets may fall!"
But his bosses, conceitedly, reacted hardly at all.

A supervisor intoned, gruff and low:
"Paint the hatchets, or pack up and go."

Either face the risk, or chance starvation,
That kind of choice lacked equalization.

Plaintiff stayed on the job, continuing to paint,
He prayed almost constantly to his patron saint.

His prayers came back, marked "return to sender,"
"Oh my!" cried Plaintiff, "I have no defender!"

Shortly thereafter, one day at his desk,
Plaintiff was painting, the thing he did best.

Above him, a noise, a strange sort of sound,
Before he could move, a hatchet plunged down.

"I think it missed me," the Plaintiff first said,
A coworker remarked: "There's an axe in your head!"

It cleaved his skull, and bisected his brain,
Now he could think, and then think again.

"What I think," Plaintiff managed to say:
"My employer should pay, should pay."

In the courts of law, Plaintiff did not prevail,
His twice-thought argument simply failed.

"At the work bench," said the judges, "you need not stay,"
"You are free," they insisted, "to walk smartly away."

"You knew the danger, yet stayed the course,
Now, don't complain like the end of a horse."

One judge in particular, Holmes, J., did insist:
"It was a perfect example of assuming the risk."

An "occupational hazard," we might call it today,
OSHA would promptly lock the employer away.

But at that time, few did care,
In that early day, of laissez-faire.

One took his choice, his chance as well,
And then the results, what ere befell.

So, when working at a job, you despise in totality,
At least give thanks: You're no split personality!

Or stifled by a group, suppressing your identity,
Go the extra mile, and don't split the infinity!

E. *MURPHY V. STEEPLECHASE AMUSEMENT CO.*, 166 N.E. 173 (N.Y. 1929)

The doctrine of Assumption of the Risk has received considerable criticism, suffering attacks upon both its historical basis and its logic. Although often termed a "disfavored defense," assumption of the risk makes an appearance in many modern cases. The doctrine received one of its most famous applications in Chief Judge Cardozo's decision of *Murphy v. Steeplechase Amusement Co.*, a nonworkplace context. The case frequently appears in Torts casebooks, and Cardozo's language is often quoted.

A party, an outing, a day of no woe:
For Plaintiff, his sweetheart, and others in tow.

To Coney Island, they all journeyed in tandem,
For food, fun, and amusements of abandon.

To impress his friends, Plaintiff uttered a whopper:
"I've always wanted to ride The Flopper!"

At first, they all stood, watching the sight:
A moving belt upon which to stand upright.

Then, they boarded the contraption in glee,
But down it threw Plaintiff, busting his knee.

Some time later, Plaintiff hobbled into court:
"That machine was defective," he snidely did snort.

"It was a danger, it jerked as it started,
That was the reason, gravity I departed."

In the courts below, Plaintiff carried the round,
"The law must protect him," those courts found.

When, however, the case went up on appeal,
It encountered a judge of great analytical zeal.

As he viewed it, "Plaintiff took a chance:
He well knew of the danger in advance."

How could he deem the venture quite proper,
When he boarded a device named "The Flopper"?

The risk, the jerk, which he now berated,
Were the very hazards he anticipated.

Plaintiff yearned a thrill of lively levitation,
Not some retreat for quiet meditation.

Even his sweetheart, his torrid romance,
She testified in part: "I took a chance."

Seeking intrigue, adventurers roam,
The timorous? They may stay at home.

If, on the contrary, one ventures about,
He may not quibble, when fate finds him out.

Today it's a knee, tomorrow an arm,
But from the law, expect no alarm.

Even more so for injury, preceded by lying:
The law does not yield, should he lie dying.

Reversing the judgment Plaintiff had attained,
Chief Judge Cardozo had done it again!

"That man is unreal," Plaintiff did decree,
"Perhaps the Flopper should bust his knee!"

F. *LI V. YELLOW CAB CO. OF CALIFORNIA*, 532 P.2D 1226 (CAL. 1975)

Over the years, a number of states had legislatively modified the common law's "complete defense" rule of contributory negligence, substituting some form of comparative fault. It was not until the 1970s, however, that state courts undertook to effect the change. Although its statute had traditionally been held expressly to adopt the common law rule, California was among the first states experiencing the judicial change. Tort casebooks typically feature *Li v. Yellow Cab Co.*, a case involving an automobile collision caused by the negligence of both drivers. In a famous "reinterpretation" of the state statute (as distinguished from a decision of unconstitutionality), the California Supreme Court held itself not concluded by the legislative mandate, but rather free to change the common-law rule. Some authorities viewed the court's *Li* approach as dangerously close to "statutory nullification."

There once was a driver named Li,
One day she was late as could be.

She made a left turn, seeking gas,
In front of a cab, speeding fast.

When Li sued for her injuries wrought,
Said the cabbie, "It was partly your fault."

Under a statute, he urged in defense,
Careless plaintiffs could take no offense.

The trial court concluded without doubt:
"Plaintiff helped bring this harm about."

The state supreme court took the case,
"Injustice" it there sought to replace.

From inception, the court did confess:
"Complete defense" had been the test.

That rule, though, the court did assault:
"Liability, it does not measure by fault."

"And the statute that stood in the way:
It does not, after all, we now say."

"Its intent sought not to conclude,
For change, it was only prelude."

"Although valid, we do now opine:
Misconstrued for a very long time."

Thus, the court now found itself free,
To declare rather what the rule *should* be.

That perspective left little doubt:
Proportionality promptly won out.

Under this approach, the court asserted,
Fault and responsibility were converted.

Any damages plaintiffs now would recover:
First diminished by their fault to another.

This would be right, and it would be fair,
And it would untangle a major snare.

When "justice," is the true aspiration,
Why fret the fears of nullification?

So, when you next drive your car,
Whether hither and yond, or far,

Either seeking or suffering gas,
Be sure you don't carelessly pass.

Or fairness, you will find your nemesis,
For the law has now left the premises.

VI. MULTIPLE DEFENDANTS: JOINT & SEVERAL LIABILITY

A. *MATTER OF OIL SPILL BY THE AMOCO CADIZ*, 954 F.2D 1279 (7TH CIR. 1992)

Once Tort law decided it could apportion negligence between plaintiffs and defendants, then the issue became that of apportionment among joint or multiple tortfeasors. This has proved a bewilderingly complicated problem thus far yielding no perfect solution. One instance of the issue arises when one of several tortfeasors settles with the plaintiff, leaving the remaining defendants demanding a reduction in their share of the damages. If a decrease is found appropriate, is the amount to be determined by the sum actually received by plaintiff from the settling tortfeasor or by an amount reflective of the settling tortfeasor's share of negligence? A modern casebook presentation of the problem is *Matter of Oil Spill by the Amoco Cadiz*, the environmental disaster resulting from the break-up of the oil bearing Amoco Cadiz and the spoilage resulting to 180 miles of French seashore. The injured parties obtained a judgment against Amoco and then settled with ABS, the agency that annually recertified the tanker. Upon that settlement, Amoco demanded a reduction in its judgment, requiring the court to discuss the matter of how such a reduction might be measured.

In fourteen-hundred and ninety-two,
Columbus sailed the ocean blue.

In nineteen-hundred and ninety-two,
The ocean black: a big oil spew.

Hence, the fable of the Amoco Cadiz:
Whence it sailed, and where it is.

Heritage of pride, historic fortitude,
Now entombed in a grave of crude.

The builders, the owners, the ABS:
All implicated, but none confess.

Miles and miles of French seashore,
No fish, no tourists, no birds of yore.

Barren, windswept, desolate and raw,
Appealing only to the sharks of law.

When it's all over, this century or next,
Still no blame—only a per curiam complex.

Plaintiffs sued Amoco, and received an award,
Then ABS settled for what they could afford.

Amoco now protests the entire production,
From its judgment, it desires a reduction:

"From ABS, you have recouped some costs,
We shouldn't be liable for what you haven't lost."

"The reduction sought, for the suit you brought:
It should be equal, we think, to ABS's fault."

The court conceded reduction for the unseaworthy tub:
"But the amount of the decrease, Aye, there's the rub!"

" 'Negligence share,' presents dual complications:
Both inefficiency, and lack of full compensation."

" 'Settlement amount,' too, is not what we long,
We cannot say, however, it is lopsidedly wrong."

"That approach, then, we shall leave in place,
For, shiver me timbers, it is not a disgrace."

Were Popeye the Sailor still sailing today,
He'd need extra spinach to resolve this affray.

Even more than Olive Oil, that comely wench,
Should this conundrum he seek to quench.

And poor Columbus, neither whence nor hence:
His nautical compass, he might well dispense.

So take heed, settle up, pay the French their due,
Or, go and scream into the night: "Sacre Bleau!"

VII. CAUSE IN FACT

A. *NEW YORK CENTRAL R.R. V. GRIMSTAD*, 264 F. 334 (2D CIR. 1920)

One of the essential elements of a negligence case is that of "Cause in Fact." The plaintiff must prove it more likely than not that, had defendant not committed the alleged act of negligence, plaintiff would not have suffered his harm. In the trial court, plaintiff must present sufficient evidence for the judge to at least conclude that reasonable people could differ on defendant's causation. Only then, should the judge submit the case to the jury. On occasion, an appellate court will decide that the trial judge reached an erroneous conclusion, and thus reverse his submission of the case to the jury. A legendary casebook example of the point is *New York Central R.R. v. Grimstad*, a case in which a sea captain was thrown overboard when his barge was struck by a tug. The captain's wife unsuccessfully attempted to save him with a small line, and charged that her husband drowned due to the barge owner's failure to equip it with life buoys.

Angell Grimstad, barge captain supreme,
Anchored in Brooklyn, quiet and serene.

Suddenly from larboard, a jolting charge:
Captain Grimstad had left the barge.

Wife Elfrieda, out of the cabin like a shot,
"Angell!" she called, "what have you got?"

But nothing on deck appeared out of order,
Until Angell she spied, ten feet in the water.

Elfrieda panicked, it was like a bad film,
The fact was: The Captain could not swim!

"Angell!" she shouted, "tread water if you can!"
But the hearty seaman just raised his hands.

Back to the cabin, to obtain a small line,
Upon return, no Angell could she find.

Apparently, the sum of all dread:
The Captain was in over his head,

"My Captain, My Captain!" Elfrieda called out,
"Because of this, I'll be rich without doubt!"

To the judicial system, Elfrieda did go,
Under FELA, negligence she must show.

"No problem," said she, "life buoys were missing,
But for their absence, my Captain I'd be kissing."

"Let the jury decide," the trial judge opined:
"Let's see what those reasonable folks find."

The jury, on the evidence, much travail:
"Plaintiff wins! Elfrieda does prevail!"

The barge owner expressed dissatisfaction:
"Plaintiff's case deserved no such action."

The appellate court, too, saw no debate:
"This evidence made the jury speculate."

"Had a buoy been present, no one could find,
Elfrieda might have reached it, in any less time."

Thus, the trial judge had erred, most remiss,
He should have granted, the motion to dismiss.

A reasonable jury, could not have abided,
Precisely what this jury had already decided!

For all the Elfriedas, who can't understand:
It is the law's way—not that of mortal man.

For the future, however, one thing clear:
The fallen Angell is no longer here.

No longer afloat, only his bones,
Now the property of Davey Jones.

B. *SUMMERS V. TICE*, 199 P.2D 1 (CAL. 1948)

The traditional cause-in-fact mandate requires plaintiff to carry the burden of proving a better than 50-50 chance that, but for defendant's negligent act, plaintiff would not have suffered his injury. That requirement encounters difficulty in a case where two defendants are concurrently negligent, the negligence of only one causes plaintiff's injury, but it is impossible to show which wrongdoer was actually responsible. In that instance, of course, plaintiff cannot prove a better-than-50% chance on the part of either negligent defendant. The most famous casebook example of the quandary was the California case of *Summers v. Tice*, involving two bird hunters negligently shooting in the direction of a third hunter, with one of the shots putting out his eye. Because the contents of the bird shot in each gun were identical, plaintiff could not prove which of the two defendants actually shot him. The California Supreme Court met the difficulty by shifting the burden of proof from plaintiff to defendants, requiring each defendant to absolve himself if he could. Neither defendant could carry that burden, of course, and both defendants were held liable for plaintiff's entire harm.

The sun was shining, the day was nice,
For hunters Summers, Simonson, and Tice.

They arrived at the field, shotguns in hand,
Summers instructed, on just where to stand.

"Keep in line," he commanded, "do not scatter,
Or you'll be wondering: What is the matter?"

No sooner said, than Summers did chance,
A triangle to create, by way of his stance.

Hunters on guard, a quail flushed at random:
Both Simonson and Tice fired in tandem.

Their shots both streaking across the sky,
Striking Summers, one put out his eye!

Summers now screaming: "I just cannot see,
precisely why, you dolts would shoot me!"

He sued them both, Summers was mad,
And against both, a judgment he had.

Defendants appealed: "No concert of action,
No joint tortfeasors: his argument lacks traction."

The supreme court agreed, one justice to another:
"The eye shot came from one gun or the other."

Nevertheless, those judges ruminated:
Denied recovery equaled justice abated.

Defendants were negligent—they misfired,
Plaintiff was injured—his retina retired.

True, only one Defendant fired the shot,
And the other Defendant, clearly did not.

For either actor, a fifty-fifty proposition,
Under the rule: a no-cause disposition.

Yet allowing the shooters to walk unperturbed,
Would leave a poor victim blindly disturbed.

What an injustice, an outright miscarriage!
A result the judges did deftly disparage.

Appropriate, therefore, some procedural ruse:
The burden of proof–that's pretty obtuse.

From Plaintiff, the burden they neatly retracted,
Upon Defendants, that same burden they exacted.

Neither shooter could himself exonerate,
Thus each shooter bore the entire weight.

"Justice," it appeared, cut in only one direction:
Against two hunters, for one hunter's protection.

In California, it seems, when they hunt in thirds:
The safest place by far is with the birds.

C. *KINGSTON V. CHICAGO & N.W. RY.*, 211 N.W. 913 (WIS. 1927)

As distinguished from alternative (either-or) tortfeasors, there is also the instance of concurrent (both) tortfeasors. The classic illustration remains the *Kingston* case in which defendant railroad negligently set one fire which joined with another fire of unknown origin, the united fires then consuming plaintiff's house. Defendant argued that because plaintiff's house would have been consumed by the other fire anyway, plaintiff could not show that, but for defendant's negligence, plaintiff would not have suffered the damage. The Wisconsin court first held that only if the unknown fire was of nonhuman origin would the negligent railroad be excused. Then, the court shifted the burden of showing the true origin of the unknown fire from the plaintiff to the defendant. Because defendant could no more make that showing than could plaintiff, the court imposed liability for plaintiff's entire loss.

The enchanted forest, a delightful spot,
Not too cold, and yet not too hot.

There, the Plaintiff constructed her dwelling,
There, one day she heard much yelling.

What transpired, it was later related:
Two fires united, formerly separated.

Then, as one, the holocaust advanced,
Consuming everything within its expanse.

One thing destroyed: Plaintiff's abode,
Everything lost: even a porcelain commode.

Plaintiff escaped, and then sought to find,
The origin of the fires which had entwined.

One source was clear: a railroad employee,
But the other fire: no certain pedigree.

Answered the railroad, with a degree of glee:
"You would have suffered your loss without me!"

"The other fire would have laid your house waste,
But for my negligence, you would still be displaced!"

Once again, therefore, the "but for" test would fail,
Under its influence, Plaintiff could not prevail.

What to do—Plaintiff's loss seemed unfair,
How might the law demonstrate its care?

"First," said the court, sans any signs of humility,
"Only a non-human fire excuses railroad liability."

If Defendant could not prove that the case,
The fact of liability, it would then surely face.

Defendant knew nothing of the other fire's cause,
The court thus imposed liability without pause.

Marching off, analytically, into that good night,
The law again instanced: might makes right.

When building a house, in forest enchanted,
You might wish to leave one wall slanted.

Then, if a fire should smoulder and explode,
Perhaps it would leapfrog your porcelain commode!

VIII. AFFIRMATIVE DUTIES

A. *BUCH V. AMORY MANUFACTURING CO.*, 44 A. 809 (N.H. 1898)

One of the most controversial rules of Tort law is the so-called "no duty of affirmative action" rule, the doctrine refusing to impose a legal obligation to go to the aid of a stranger in distress. This refusal to require one to be a Good Samaritan is of ancient origin and has attracted much debate, both legal and philosophical, over a long period of time. Although qualified by a number of exceptions, the doctrine retains its bite, and is traditionally illustrated by the New Hampshire court's early decision in the *Buch* case. There, the law refused to impose liability on defendant mill owner for an eight-year-old child who was injured by machinery while trespassing on defendant's premises.

The days were good, the days were bad:
For the fathers, and the sons they had.

The fathers relaxed, they took it easy,
The sons labored, both hot and greasy.

How those conditions came to prevail,
Stands entrenched as a historic tale.

At bottom, it seems, lay the agent of survival:
"We fathers worked to procure their arrival."

"Now, it seems to us only fair,
The little urchins should do their share."

One might think "justice" would have objected,
But justice, apparently, protected the protected.

In any event, this was the oft-told story,
At the time Billy Bob Buch came to glory.

A lad of eight years, but advanced for his days,
Billy Bob trespassed, frequently and unfazed.

On the day in issue, he "visited" Defendant's mill,
Although told to leave, he remained there still.

While amidst the machinery, he did stand,
One of the devices, ripped off his hand.

Billy Bob now realized, but a trifle late,
The consequences he faced as his fate:

"With only one hand," he did foresee:
"A wallpaper hanger, I shall never be!"

"This was unnecessary," he viewed in hindsight,
"Defendant could well have relieved my plight!"

But the common law, Billy Bob was to find,
Had long resisted, complaints of his kind:

"You may deem Defendant a monster of sorts,
But you may expect no assistance from Torts."

"The priest and the Levite, who passed on by:
No wrong to one donkey-jacked and left to die."

"The Good Samaritan: a model most impressive,
But the law alas: a standard far more regressive."

"The duty to do no harm, the law imposes,
The duty to prevent harm, this case discloses."

"A broad gulf, between hurting and protecting,
That gulf, Billy Bob, you have failed in bisecting."

Billy Bob wailed, in resigned surrender:
"Oh gee! I could've been a contender!"

B. *COGGS V. BERNARD*, 92 ENG. REP. 107 (K.B. 1704)

One limitation upon the "no duty of affirmative action" rule is the so-called "undertaking exception." Although defendant may have originally been under no legal duty to assist plaintiff, should defendant voluntarily "undertake" to lend assistance, he may expose himself to liability if he fails to perform his undertaking with reasonable care. This exception, and its uncertain reach, takes its beginnings from the ancient English case of *Coggs v. Bernard*, involving a defendant who volunteered to assist plaintiff in moving casks of brandy, only negligently to damage the casks and resulting in "great quantities" of plaintiff's brandy being lost. As early as 1703, the Kings Beach permitted plaintiff to recover for his loss.

Wine is pleasant, but brandy more dandy,
An English Lord desired his quantity handy.

The brandy in issue, stored in large casks,
Their rearrangement did prove no mean task.

The Lord struggled in vain, to move the containers,
Defendant offered his aid, no mention of retainers.

The Lord was touched, by help so fortuitous,
Especially impressed that it came so gratuitous.

"Good fortune smiles," the Lord introspected,
No reason to think, the offer should be rejected.

Instantly, however, at Defendant's machinations,
The Lord discovered cause, for grave reservations.

Grappling hooks managed, with such a whack,
In one cask there developed, a sizeable crack.

As the Lord cried, "Wait, Stop!" in vain,
His brandy flowed out, like the river Seine.

Before Defendant had desisted his assistance,
Great quantities of grog, had ceased existence.

The Lord now bemoaned his loss in shock:
"My brandy, my brandy, it's all on the rocks!"

Defendant shrugged, departing the disorder:
"Did you deem me to be a common porter?"

"I owed you no duty, nor now remuneration,
For, from you I received zero consideration."

But the Lord sued, a Plaintiff he became:
"Two, I believe, can play at this game!"

The English judges displayed deep compassion:
"No man his brandy should lose in such fashion!"

"It is one thing, to promise and not perform,
Only a nudum pactum would thereby be born."

"But in this case, Defendant clasped the casks,
And then mis-performed his voluntary tasks."

"From nonfeasance to misfeasance: however fine,
This Defendant's conduct crossed that line."

"From undertaking came duty, as night follows day,
From gratuity to violation, and Defendant must pay."

Plaintiff was pleased: "Let's hoist one for the giffer!"
He possessed, however, neither brandy nor sniffer.

"Henceforth," he mused, "if it's too good to be true,
I think I shall retire, and simply drink up my brew!"

C. *H.R. MOCH CO. V. RENSSELAER WATER CO.*, 159 N.E. 896 (N.Y. 1928)

Even with the "undertaking" exception in place, one group of cases remaining largely outside the rationale of that exception are the so-called "waterworks cases." Those are the cases in which a private water company contracts with the municipality to supply water to the fire hydrants, proceeds to act under the contract, and then fails to maintain sufficient water pressure to prevent a citizen's property from being consumed by fire. In the famous *Moch Co.* case, Chief Judge Cardozo set the tone by refusing to allow the property owner to recover from the water company. Although the defendant had undertaken to provide the water service, Cardozo found that its conduct constituted only "nonfeasance" and that it owed "no duty" to the property owner.

The night was dark, the sirens shrill,
An illuminating glow, just over the hill.

A most dangerous fire, out of control,
Leaping, it appeared, to each grassy knoll.

To Plaintiff's warehouse, it leaped unimpeded,
Destruction complete, and warehouse deleted.

The firefighters tried, they performed their best,
They uncoiled their hoses, poised to suppress.

Alas, however, they found fire hydrants dry,
All expectations, those hydrants did defy.

What manner of deceit, all did inquire:
Fire hydrants, without water for fire?

Some type of joke, a Halloween prank?
Not to a Plaintiff, whose business just sank.

"Indeed!" cried Plaintiff, "a joke it is not,
My warehouse gone, my creditors are hot!"

"Defendant is liable, an incontrovertible fact,
It owes me damages, both Tort and contract!"

The water company denied, cool and detached:
"We owed you no duty, our water to dispatch."

The case went to law, in just that condition,
Each side resolute: intrenched in position.

The courts of the day, were on the issue divided,
That conflict would cease, once Cardozo decided.

Judge Cardozo's word carried inordinate weight,
Not only in New York, but throughout every state.

When he resolved an issue, in a particular way,
Resolved in that manner, the issue tended to stay.

For water companies, he evidenced a soft spot,
Both for what they did, and for what they did not.

Defendant's contract, he said, only ran to the city,
If others suffered from its breach, that was a pity.

No obligation to them, was ever intended,
A crushing burden, should it be so extended.

Focusing next, on Plaintiff's argument in Tort,
That position too, Cardozo proceeded to thwart.

Defendant's conduct, he inquired, how far did it go?
Commission or omission? One simply must know.

Answering his own query, as he was wont to do,
Cardozo concluded no wrong had come through.

Rather, he opined, a mere benefit denied,
A benefit to which duty had never applied.

Property owners to this day understand,
It is best to maintain fire insurance at hand.

If your warehouse burns, and your goods are fried,
No "wrong" has occurred, only "a benefit denied!"

And if to the law you should then try to go:
Cardozo was here—and the answer is "No."

If next you find, your insurance agents won't pay:
They at least will wish that you have a nice day.

D. *TARASOFF V. REGENTS OF UNIVERSITY OF CALIFORNIA*, 551 P.2D 334 (CAL. 1976)

Yet another well-established exception to the "no duty of affirmative action" rule in Torts involved parties occupying a "special relationship" to each other. That relationship removes the Good Samaritan "stranger in distress" element from the situation, and many actors are held liable for failing to protect others with whom they enjoy a relationship. There is the case, however, in which the "special relationship" exists, not between the defendant and the imperilled plaintiff, but rather between the defendant and one who threatens plaintiff's safety. Would that case impose a duty upon defendant to protect plaintiff, or would it fall to the law's traditional position denying one's duty to protect another from the wrongful conduct of a third party? The *Tarasoff* case was one of the first to impose such a duty under the "special relationship" exception. There, the California court held a psychotherapist liable for failing to warn plaintiff of a threat made against her by the psychotherapist's patient who later murdered the plaintiff.

A psychotherapist's job is never easy.
Each day he hears woes from the queasy.

One patient feels unloved by his mother,
Another, extremely jealous of her brother.

The doctor, on occasion, cries out within:
"Will no one, ever, feel good again?"

But then he recalls his need for fine things,
All those comforts that much money brings.

He turns refreshed, to his next patient's fears:
A guy with a big mouth, and ever larger ears.

This patient, however, alarms with his vent:
To kill a young woman, his announced intent.

The doctor calls police, and they briefly detain,
But to them, the patient appears quite sane.

Two months later, the patient did act:
His intent became the unspeakable fact.

For the victim's parents, there is no consolation,
Once they learn of the doctor's prior conversation.

"How could you not," in grief they persist,
"At the least inform us of this horrible risk?"

"You need a lesson," they avowed in awe,
"For your misdeeds, we're calling the law!"

"I am remorseful," the doctor exclaimed,
"But I fear no law," he further proclaimed.

"The law understands, there simply is no way,
Doctors can report all risks their patients convey."

"Our patients we encourage to vent their frustrations,
That therapy we view among our first obligations."

"If patients knew we then would report,
They never to us would dare to resort."

This legal debate: an analytical abyss,
Would the law go that way, or this?

In its resolve, the court first conceded:
"The therapist's fears we have well heeded."

"We understand you cannot always predict,
It would be like hitting the wind with a stick."

"Yet, you can, we believe, identify some cases,
Deserving of follow-up on a precautionary basis."

"There are two elements that create this blip:
First, foreseeability, and second, relationship."

To the psychotherapist, this we command:
"You must always do, the very best you can!"

"In this case, that standard you breached,
Against you, this judgment we reached."

We leave the doctor struggling, a patient to remember:
"He was going to shoot Santa, and abolish December!"

E. *ROBERT ADDIE & SONS (COLLIERIES), LTD. V. DUMBRECK*, [1929] A.C. 358

No rule is ingrained more strongly into the common law than that of "no duty to trespassers." An owner or occupier of land, ancient law long held, enjoys total immunity for harms befalling others who come onto his land without any legal right to do so. Stemming from the days of feudalism, it is believed, the sanctity of land ownership leaves the trespasser in a highly disfavored legal position, even though injured by negligently maintained conditions on the premises. "Robert Addie's Case" is frequently employed to illustrate the harshness of the position, denying recovery to the father of a four-year-old boy killed while playing on defendant's premises by a heavy horizontal wheel and an endless wire cable.

Little Danny Dumbreck, the tyke in issue,
Warned many times: "Wheel's gonna get you!"

Little Danny, of course, paid no heed,
For in his world, there was no need.

People take care of kids, do they not?
Why, who would hurt a 4-year-old tot?

The answer came, swift and deadly,
At Danny's funeral, they sang a medley.

Defendant's wheel, it appeared: a fatal affair,
Even though he knew: many kids played there.

Danny's father sued, he sought to capitalize,
On the English court's penchant to categorize:

"Not a trespasser at all," Plaintiff did decree,
"Rather, a more favored entrant: a licensee."

"Defendant's field was a virtual playground,
Providing amusement for children all around."

"In knowingly maintaining that situation,
Defendant issued, at law, an invitation."

"To a licensee: nothing short of a trap,
Liability, I plead, should be a snap."

The court sympathized without hesitation,
But it still rejected Plaintiff's formulation.

To the judges, as their opinions articulated,
Defendant ill deserved being manipulated.

For he had strived, with much force and care,
To keep away those, with no business there.

Danny Dumbreck ignored all protestations,
A classic trespasser, with all ramifications.

For countless generations: a lesson bestowed,
Landowner to trespasser: "No duty is owed!"

Danny's father knew, as his warnings reveal,
Great danger to Danny, playing on the wheel.

Yet Danny continued, his father knew he would,
His trespasses upon Defendant, up to no good.

Landowners are special, no one can deny,
They enjoy great favor in the legal eye

And the wheel still turns, even to this day:
In sight of a small grave, not far away.

F. *HYNES V. NEW YORK CENTRAL R.R. CO.*, 131 N.E. 898 (N.Y. 1921)

Over time, the courts have developed a number of modifications on the common law's "no duty to trespassers" rule. One of those limitations is the so-called "causal relation" exception: In situations bearing no causal relation between the fact of the trespass and the harm to the trespasser, then the "no duty" rule does not apply. Thus, if it cannot be said that "but for" the trespass, the harm would not have occurred, the causal relation exception may permit the trespasser to recover for the landowner's negligence. *Hynes* offers the classic illustration of the exception, with Chief Judge Cardozo insisting as well that the plaintiff actually was not a trespasser. The case featured a boy trespassing upon the railroad right-of-way and being electrocuted by the railroad's negligently maintained electrical wires. As the boy stood on a plank nailed to the railroad's bulkhead, poised to dive into the public waters, the wires fell from defendant's pole and killed him.

It was sweltry and hot, a solar day in July,
No hint of a breeze, not a cloud in the sky.

Harvey Hynes and two pals, desperate for relief,
Sought the Harlem River, to assuage their grief.

They swam to a bulkhead, on a railroad right-of-way,
They there found a spring board, upon which to play.

Attached to the bulkhead, one end of the board,
The other end over water, the launch to afford.

Harvey stood for an instant, poised for his dive,
This his last endeavor, for he would not survive.

High tension wires, suddenly took leave of a pole,
Of both springboard and Harvey, the wires took hold.

As body and wires, were propelled through the air,
Both pals gave thanks, they weren't standing there.

Harvey's heirs sued the railroad: "Negligence" they blurted,
Two courts turned them down: "Trespasser" they asserted.

"If on another's property, and wrongfully there,
No obligation is owed, and no duty to care."

Finally, as all famous cases then did go,
To the desk of the master: Judge Cardozo.

The fabled jurist was shocked, by a result so sad,
This land entrant was a child, and only a "lad!"

Actually, this child was swimming: on a public way,
His trespassing on the springboard? A mere "by-play."

Had the springboard been vertical, recovery no doubt,
Why, because horizontal, should it not also work out?

In this analytical fashion, Cardozo soared:
Harvey was not a trespasser, on the board.

If not on the board, then not on the land!
Injured in the water, no legal quicksand!

Plaintiffs with their verdict, everything intact,
Yet, still they hesitated—just one small fact:

"What is the difference?" they wished to know:
"By-play on the board, and fore-play below?"

Imagine Judge Cardozo, as he smiled and replied:
"If you don't know that, then recovery denied!"

G. *HERRICK V. WIXOM*, 80 N.W. 117 (MICH. 1899)

The *Herrick* case features a traditional limitation upon the "no duty to trespassers" rule, the so-called "perceived trespasser" exception. There, a small boy sneaked under a circus tent to watch a performance, only to be struck in the eye by a part of a giant firecracker exploded by clowns in the ring. Rejecting the circus' reliance upon the no-duty rule, the Michigan court reasoned that "[t]he presence of the plaintiff was known, and the danger to him from a negligent act was also known."

The circus is a staple of American lore,
All children yearn its sights to explore.

The animals, the food, the antics galore,
Who, on his plate, could wish for more?

A small boy, with such visions, one crucial day,
Slipped under the tent, without money to pay.

Once inside, he watched with delight:
Two clowns in a ring, about to fight.

One to the other: "Hey, I know what!
Let's shoot a firecracker on this very spot!"

A "bomb" they hauled out, and lit the fuse,
The firecracker exploded, no one was excused.

The little trespasser attempted to dodge,
But in his eye, the errant bomb did lodge.

"An eye-popping performance!" he yelled in pain,
As his eye felt explosion, again and again.

When it was over, he found himself blinded,
"Those clowns," he said, "should have minded."

The circus he sued, for needed assistance,
But the circus defended, inordinate resistance:

"You cannot recover for our wrong,
For you were a trespasser all along."

"Although negligent, our clowns may have been,
You yielded your rights, when you slipped in."

But Plaintiff's lawyer was no superficial fool,
He knew considerably more than the general rule:

"If wrongs," he replied, "you wish to compare,"
"Then consider this: You knew he was there!"

"If on one's land, a trespasser he discovers,
For later negligence, the trespasser recovers."

"This is true, even though at the time,
You may have thought he had paid his dime."

"He was one of a crowd, toward whom you owed care,
It is quite irrelevant, you deemed him rightfully there."

As he received his sustenance, pound for pound,
The little trespasser's good eye looked all around.

To his lawyer, standing in proud reflection:
"Thank you, for knowing the rule's exception!"

"When in law school, you instanced dedication,
You remembered you were there for education."

"You read assignments, you thought on your own,
You avoided social gatherings, at your professor's home."

"You went much deeper than many do,
You never defected, though one of few."

"You never lost sight, and you struggled on,
After many colleagues had come and gone."

"You rejected advice to live a well-rounded life,
Rather, you sharpened your mind like a knife."

"To cut through the stuff, for which many settle,
You went to the core, you showed your metal."

"And today here you stand—the subject of awe:
A student in perpetuity—an exemplar at law!"

H. *ROWLAND V. CHRISTIAN*, 443 P.2D 561 (CAL. 1968)

It was, naturally, the California Supreme Court that first advocated ignoring the common law's traditional categories of land entrants (trespasser, licensee, invitee) and assessing the landowner's duty in accordance. In *Rowland*, the court purported to abolish those distinctions, and to hold all entrants entitled to the same duty: the landowner's exercise of reasonable care under the circumstances. The case featured a "social guest" (traditionally classed as a licensee) injured by a defective water faucet handle in defendant's apartment, and typically appears in most Torts casebooks.

It wouldn't do to ask, why Plaintiff was delighted,
When into Defendant's apartment, he was invited.

For her part, Defendant had no shame:
"With Bristol Cream, I'd do it again!"

After all, in this day, and in this society,
It is fun to mock, old notions of propriety.

In any event, it was in the bathroom,
Where Plaintiff's glee, dissolved to gloom.

In seeking to turn a sharp broken handle,
Plaintiff's nerves and tendons it did dismantle.

Waiving in pain his shredded hand,
Plaintiff reacted like any real man:

Forgetting completely his original intent,
At the Defendant, he commenced to vent:

"For this you'll pay!" he did expound,
Running in circles, round and round.

It did appear, he was going to sue,
No romance now—no tender adieu.

Defendant's lawyer, not overly concerned:
"A social guest," he astutely discerned.

"As such," the lawyer did expound,
"The premises, he takes as found."

But more than law, he should have known:
The indigenous state, this court called home.

For in California, it often appears,
The jurists look beyond the years.

This court, it resulted, felt no awe,
As it casually revoked the common law.

Those categories, where land entrants fell:
In a progressive society, no one could tell.

"What matters it?" the court implored,
"That a trespasser may seek reward?"

"Landowners know, all entrants come,
But our law is sensitive, even to a bum."

"To all is due, the owner's due care,
So that all may feel, protected there."

If romance goes south, an unfortunate event,
The licensee may say: "I'm still glad I went!"

To those romantics, who may be distraught:
It's just California law: the law of the "ought!"

IX. PROXIMATE CAUSE

A. *IN RE* POLEMIS & FURNESS, WITHY & CO., [1921] 3 K.B. 560

When defendant is negligent, that negligence in fact causes plaintiff's harm, and plaintiff's own conduct does not disqualify his recovery, it is at that juncture that the element of "Proximate Cause" may rear its countenance as a liability limitation. Here the student encounters the legendary "concantations of events" that may separate defendant's fault and plaintiff's injury in an effort to determine whether the "causal chain" is sufficiently strong for liability. The second most famous case in "proximate cause," *In re Polemis* ideally sets the stage for the academic debate between "direct consequences" and "risk rule" for resolving the issue. The English court staked out a position that continues to loom large in the scholarship, offering the less restrictive approach to the matter. There, defendant's servant negligently dropped a plank into the hold of plaintiff's ship, the plank striking something below to cause a spark, which then ignited petrol vapors present in the hold due to leaking containers. Although the fire was held an unforeseeable occurrence, the English court allowed plaintiff's recovery for his ship.

Under an old maxim of Francis Bacon,
One encounters "Proximate Causation,"

In the law, as Bacon proudly wrote:
Harm must be "proximate," not "remote."

Since those times of Bacon's epistle,
Many courts have cursed that thistle.

Whether a consequence proximately follows,
Can well choke a judge before he swallows.

In re Polemis, a case for the ages,
Now the subject of countless pages.

Defendant's servant, a board let slip,
It entered the hold of Plaintiff's ship.

Contact! Spark! Complete detonation!
Panic! Fire! Nay, conflagration!

Plaintiff's vessel: totally destroyed,
The Plaintiff: somewhat annoyed.

His first step: a claim for arbitration,
There found: fault and causation.

But the fire: not reasonably anticipated,
Defendant thus argued: liability abated.

Thence to the court, a solution sought,
If unforeseeable, did Plaintiff get naught?

The court asserted "with negligence detected,
There is accountability for harm unexpected."

"The plank and the fire: a direct connection,
Liability therefore: a result of perfection."

"Direct consequences" drew great applause:
As the English rule for "proximate cause,"

Foreseeability, as it was now dispensed,
Counted for fault, but not consequence.

Plaintiff recovered, to his great pleasure,
Receiving his coins, measure for measure.

Defendant paid it over, pound for pound,
Still perplexed with what the court found:

"The plank and the spark, they were redundant,
The problem was that the petrol was pungent!"

"There was no way I could have known,
I would burn the ship and lose my home!"

"This 'proximate cause' is a terrible thing,
To law, I predict, much trouble it will bring!"

B. *PALSGRAF V. LONG ISLAND R.R.*, 162 N.E. 99 (N.Y. 1928)

Palsgraf, the grandparent of all "proximate cause" cases, has appeared in virtually every Torts casebook published since 1928. The facts, the setting, and the disagreements among the courts all combined for a memorable legal event, in which Judge Cardozo is popularly acclaimed as having adopted the "risk rule" approach to determining the extent of liability for negligent conduct. In assisting a passenger aboard the train, a railroad employee knocked a package from the passenger's hands; the package fell to the rails and exploded; and the explosion caused scales on the loading platform to fall upon an intending passenger, Mrs. Palsgraf. Focusing upon the employee's conduct as the relevant negligent act, could the railroad's liability be extended to cover both an unforeseeable result and an unforeseeable plaintiff? The New York Court of Appeals divided four-to-three, with Cardozo's majority opinion denying recovery and thereby reversing both the trial court and the intermediate appellate court.

The Long Island Railroad, legend unto itself,
A legend, that is, of proficiency bereft.

A subject of preposterous proportions,
An "institution" of fabled contortions.

"If the Long Island Railroad runs on time,
The world's clocks must be out of chime."

The zenith year of consternation great:
Nineteen-hundred and twenty-eight.

A mother and children, picnic in reach,
Waiting for passage to Rockaway Beach.

There was some commotion, a large clatter,
Mrs. Palsgraf, of course, knew not the matter.

Instantly, however, the earth shook,
Scales fell, from an encroaching nook.

Upon the mother, the scales descended,
She, of course, contemptuously up-ended.

Her two little girls: both frightened and scared,
A feeling of foreboding: each said they shared.

Attendants arrived, and requested her name,
"Helen," she stammered, from a cloud of pain.

Recuperation came, but maddingly slow,
As daily, "Helen's" stutter did grow.

Eventually, the inconvenience grew big:
"Helen" sounded much like Porky Pig.

This was not right, it just couldn't be,
So "Helen" determined, a lawyer to see.

Her luck to this point: not exceedingly good,
It proved unchanging: she found Matthew Wood.

"At Yale," Matthew expounded, somewhat obtuse,
"I learned to sue trains, from engine to caboose."

The trial was on, the jury came in:
"$6,000, the Plaintiff does win."

$6,000 in nineteen-and-twenty-seven!
"Helen" divined, she must be in heaven.

Now up the ladder, the appeals must go,
It is the law's way, but painfully slow.

At the first level, it went very well,
Of the verdict, that court said "Swell!"

Then to the high court, the final forum,
Chief Judge Cardozo marshaled a quorum.

The issue, he focused, "a duty of care,"
"There is no such thing, as fault in the air."

Rather, negligence is a term of relation,
Not an obligation owed to all the nation.

Here, he said, "Helen" was unforeseen,
To punish the railroad, was simply mean.

The employee, knew not her existence,
The employer owed her no subsistence.

To "Helen," no negligence had been done,
An anticipated victim? She was not one.

The risk foreseen was a risk elsewhere,
Within its ambit, "Helen" was not there.

Judgments reversed, of all courts below,
The costs of appeal, "Helen" did owe.

It now appeared, said Matthew Wood:
"My Yale education was not very good."

On a Sunday in August, the Palsgrafs still gather,
They talk of the past and work up quite a lather.

They recall their ancestor: she of great fame,
The law, they protest, never knew her name.

Though she responded "Helen" that fateful day,
Her birth name was Jacobina, so they now say.

And when, at this point, they speak of the low,
A hemlock toast: "To Chief Judge Cardozo!"

C. *MARSHALL V. NUGENT*, 222 F.2D 604 (1ST CIR. 1955)

Marshall subsists as a beneficial judicial effort at explaining and applying the so-called "risk rule" of "proximate causation." Defendant's truck driver cut the corner on an icy highway, forcing the car in which plaintiff was riding off the road. As preparations were underway to pull the car back onto the road, plaintiff sought to warn an on-coming motorist of the highway blockage, only to be struck by the motorist. In plaintiff's action against the defendant for his injuries, the court rejected defendant's argument of no "proximate cause." The court reasoned that whether plaintiff's injury fell within the foreseeable ambit of the risk created by defendant's driver was a question properly left to the jury.

Driving on ice is a daring adventure,
An act, indeed, inviting fate's censure.

As rubber meets road, and spins asunder,
Where one is going, he can only wonder.

In and out, like bumper cars at a fair,
First, he is here; then, he is there.

Northerners treat it as the utmost in fun:
Put the car on the road and give it the gun.

Southerners, in contrast, not nearly so bold:
At the sight of a snow flake, put life on hold.

Northerners scoff, at the south's timidity:
"Do you fear a little frozen humidity?"

Such the sentiment, evidenced in this case,
Arising in New Hampshire, a northern place.

Defendant's truck cut the corner just a tad,
Forcing off the road, a son-in-law and dad.

This was neglect, as the driver understood,
Perhaps this is why, he tried to act good:

"I'll get my chain, and pull you out,
Go up that hill, and warn all about."

This Plaintiff did, just as he was told,
But it was miserable, and he was cold.

Then a car he spied, barreling his way,
"Wait, stop!" he cried, "without delay!"

The driver saw him and attempted to stop,
His car skidded, and gave Plaintiff a pop.

Now to the law, for his injuries pendant,
He sued the truck owner, as Defendant.

When the driver cut the corner just so,
Of Plaintiff, could he foreseeably know?

The harm, recovery for which plaintiff sought:
Did that harm's risk render Defendant at fault?

"Well," mused the court, as courts often say,
"From traffic mishaps, there is heck to pay."

"Such mishaps," we know, "create bundles of risks,"
"They may be bizarre, but they're still on the list."

"Fainting, falling, even soiling one's clothes,
All do occur, as the track record shows."

"A jury could find, we say without pause,
Defendant's fault was the 'proximate cause.' "

So, to all Northerners, who drive on ice:
Some Southern caution is especially nice.

Otherwise, the road hazards are many,
Strange, wild, and bizarre aplenty.

However outrageous, you may have to pay,
If the "risk rule" of causation has its way.

The ambit yawns wide, it does not skimp,
As you will find, when fate next you tempt.

The burden is heavy, the law does impose:
Pay the money, and/or soil your clothes!

D. *WAGNER V. INTERNATIONAL RY.*, 133 N.E. 437 (N.Y. 1921)

Seemingly among the most unforeseeable plaintiffs in Tort law would be actors who voluntarily come to the rescue of others placed in danger by the negligence of third parties. Given the common law's historic refusal to impose a "duty to rescue," how could a defendant, negligent toward "A," possibly foresee "B" coming to "A's" rescue and himself being injured in doing so? Logically, "B" would seem to fall outside the "foreseeable ambit of risk" created by defendant's negligence, and thus unable to recover. In the famous *Wagner* case, however, Judge Cardozo (of all people) surprised many and found a duty owed by defendant to the rescuer. There, the plaintiff and his cousin boarded a train which negligently lurched in such manner as to throw the cousin from the open car. When the train stopped, plaintiff walked back in the dark to search for his cousin and fell from a bridge. Plaintiff then sued the railroad for his injuries from the fall.

Where, in the entire Torts universe,
Is there an actor more perverse?

Than the Plaintiff who does dare,
To rescue a person in despair?

And when, in the effort, Plaintiff is hurt,
Is there a claim he can legally assert?

Defendant, who placed the party in danger:
Could he foresee such aid from a stranger?

While liable to the party he cast into grief,
Is he also indebted to one attempting relief?

Defendant, naturally, exclaims "no way!"
"Such a cowboy, never need I pay!"

"Liability for fault at some point must end,
To the world at large, it does not extend."

This, the railroad's retort in Willie Wagner's case,
Whose cousin, Herbert, it had launched into space:

"For Herbert's harm, we shall attempt settling,
We owe no duty to Willie, he was only meddling."

"When discovering the chapeau, there on the track,
Willie to the train, should have scampered back."

"For injuries in rescue, we stoutly disclaim,
Any liability, responsibility, or even blame."

The Judge was Cardozo, Defendant felt good,
Cardozo's fault theory was well understood:

Defendant's fault created an ambit of risk,
An unforeseen Plaintiff, it did not enlist.

But with great minds, it is hard to know,
In which direction, they eventually will go.

So with Cardozo, in this famous case:
What precept might emerge from his face?

"Danger invites rescue," is what he said,
And Plaintiff nodded his injured head.

"If Defendant foresaw no savior, that is sad,
He is accountable, as though he had."

Into the ambit of anticipated harm,
Rescuers, Cardozo ushered, on his arm.

From that day forward, they could rejoice:
The law dared not follow it's "Master's Voice."

"Unforeseeability" is neat, for a theory in need,
But the "rescue doctrine," it cannot impede.

If they seem inconsistent, ask the Master,
He reconciles all, by analytical disaster.

Should one ask: "How can this be?"
He belies his ability, the light to see.

When at your backside, great peril looms due:
You best hope it a danger that invites rescue!

E. *OVERSEAS TANKSHIP (U.K.), LTD. V. MORT'S DOCK & ENGINEERING CO. (WAGON MOUND NO. 1),* [1961] A.C. 388

The Wagon Mound is typically credited with shifting English Tort law from the "direct consequences" test (of *In re Polemis*) to the "risk rule" test of "proximate cause." Defendant carelessly discharged oil from its ships in the harbor, the oil then drifting to plaintiff's wharf where it was inadvertently ignited by plaintiff's workers and the resulting fire destroyed plaintiff's dock. It was found that defendant was negligent in allowing the oil to escape because it might reasonably have foreseen that the oil would muck up the plaintiff's slip ways. The fire, however, was not foreseeable, and this was the point employed by the appellate court to decide no "proximate cause" and thus no liability for the devastated dock.

Oil is slick: that's sure and certain,
Spread over water, like a filmy curtain.

Oil is money: that's also true,
Those who buy it think so too.

Oil is the cause of good things and bad,
It turns the world, but runs people mad.

Oil is the subject, of the case at hand,
An issue transcending, a single man.

Defendant had the oil, but let it go,
It covered the water, like fallen snow.

It was washed about, far and wide,
Around Plaintiff's dock, front and side.

Plaintiff's foreman checked about:
"Who," he inquired, "let the oil out?"

About its flashpoint, would it burn?
For the dock's safety, he was concerned.

The flashpoint, he found, all did know:
Unlikely, on water, to be set aglow.

His welders, then he told to proceed,
One of whom, was not up to speed.

He dropped molten metal into the oil,
The substance promptly began to boil.

Then a fire, roared out of control,
A conflagration, inordinately bold.

"What? My dock, it's all burned up!"
Cried the Plaintiff, most abrupt.

He was mad: "Someone must pay,
For the clear negligence of this day!"

In the lower court: "direct causation,"
Plaintiff received due compensation.

On appeal, however, the law did change:
A brand new doctrine, quaint and strange.

Was the fire a risk, of the harm created?
Or only a result, not much anticipated?

"Defendant," said the court, "could not know,
That fire from the oil, would lay the dock low."

"It is high time; indeed, this the very day:
To forsake ugly scholars who lead astray."

"Their jargons unsightly, tattered and torn:
We now reject them, in analytical scorn."

"And as for *Polemis*, that flagrant flaw:
We regard it no longer, as being good law."

"Direct consequences—a defective tool:
Only the hindsight of a devious fool."

"We're not philosophers, never shall be,
Their metaphysical muses, we now set free."

"For resolving causation, that is a must,
And from now on: It's foresight or bust."

X. TRADITIONAL STRICT LIABILITY

A. *RYLANDS V. FLETCHER*, L.R. 3 H.L. 330 (1868)

In addition to intent and negligence as grounds for liability, Tort history also features a tradition of "strict or absolute liability," or "liability without fault." The fountainhead for that tradition is the English case of *Rylands v. Fletcher*, a case in which the judges imposed liability upon the owner of a reservoir for water which escaped through underlying and unknown mine shafts into adjoining shafts and then into the plaintiff's mine. At various appellate levels, the judges offered assorted reasons for holding defendant liable without evidence of negligence on his part. Tort casebooks typically offer *Rylands* at all its appellate appearances.

Defendant, in surveying his manorial estate:
"My sources of water—they all dissipate."

He needed, he thought, in several places:
"A reservoir, a pond, or a veritable oasis."

Thus he sought engineers, of renowned skill,
They selected the spot, and commenced to drill.

They dug and they crafted, a basin of beauty:
"It's the least we can do, execute our duty."

The day came: a reservoir was produced,
All that remained: water to be introduced.

And when that was done, they stood in awe,
Admiring perfection, no blemish they saw.

At that moment, a wail of indignation:
The hills were alive, sounds of litigation.

The source: the owner of a near-by mine,
Whose shafts, Defendant's water did find:

A petition, the Plaintiff then drafted,
His complaint: he had been shafted!

But alas, Defendant did expound:
"No fault on my part was found!"

"And without fault, you miserable man,
You hold no ground, upon which to stand."

The case went straight to law, as many cases do,
At least those cases, containing no bottles of brew.

Starting up the chain, through all appellate courts:
Was Defendant liable, without negligence of sorts?

"Yes!" said Judge Bramwell, a dolt in fact,
He thought there a trespass: "Direct contact!"

To the Exchequer, the case then did go,
There Judge Blackburn, delivered the blow:

"No trespass necessary," he casually reflected,
"For substances brought, kept, and/or collected."

And to make certain, all lawyers he'd fool,
He dubbed his precept: The law's "true rule."

From the Exchequer, to the House of Lords:
The highest forum, English justice affords.

The Honorable Lord Cairns, sat in review,
But Blackburn's "true rule," he did eschew:

"The principle at play," he said quite profuse,
"Defendant put his land, to a non-natural use."

"The water exceeded its natural condition,
Liability without fault—the correct position."

Rylands thus proclaims, liability absolute,
But its precise principle, refuses to compute.

"Trespass," "collecting," or "non-natural use,"
A historical dilemma, of analytical abuse.

American law, in its incomparable fashion:
What rationale for its no-fault compassion?

A formulation, it offered, of studied proclivity:
"Abnormal," it posited, "and dangerous activity."

From *Rylands*, therefore, a multitude of roads,
Of confusion, delusion, and problems it bodes.

Pivotal, however, is not so much direction,
Rather, destination reached, after reflection.

That destination, as extracted from a vault:
A fabled Tort history of liability minus fault.

B. *BROWN V. COLLINS*, 53 N.H. 442 (1873)

Shortly after the English decision of *Rylands v. Fletcher*, several American cases purported to reject its announced principle of absolute liability. One such case, an 1873 decision by the New Hampshire Supreme Court in *Brown v. Collins*, featured a defendant whose horses ran away with him, without his fault, and broke a post on plaintiff's land. Plaintiff sued for damages to his property, relying upon the principle of *Rylands*, and the court offered a disquisition on the flaws of the *Rylands* precept, declaring it unsuited for a society of "modern, progressive, industrial pursuits." *Brown* is often included in Tort casebooks to illustrate America's early lack of receptiveness to strict liability.

When his horses ran away in the traffic,
The harm to Defendant bode very graphic.

Between the horses' heads, he did plunge,
As his unruly steeds, continued to lunge.

The Plaintiff also become most irate:
The horses demolished a post by his gate.

"This post!" Plaintiff sobbed, "I loved it you see,
It was by my Sweetheart, once given to me!"

Defendant replied: "You appear somewhat quaint,
I shall, however, reject your complaint."

"My horses, you see, bolted without fault,
A moment before, your post they did assault."

But Plaintiff in his cause, still persisted,
A principle of strict liability, he insisted:

"Your equines came right onto my close,
No negligence by you, need I disclose."

This was the argument, he carried to court,
As recovery for damage, he sought to exhort.

But those judges reacted, sure and fast,
As English law, they took straight to task.

Rylands, they said, no longer did hold,
For barbarians no longer were in control.

The days of Exodus—vineyards and beasts,
In an industrial society, those had all ceased.

In today's world, with all its complexions,
No sympathy for posts, even one of affection:

"Tell your Sweetheart, when next you woo,
About her last gift—well, it just wasn't you."

"If another present, she offers in remorse:
You might request a gun, to shoot a horse."

C. *BOLTON V. STONE*, [1951] A.C. 850

Bolton v. Stone is a highly celebrated modern case in English law, both for its facts and for its focus upon the concept of negligence. The plaintiff, Bessie Stone, lived on Beckenham Road and was struck on the head in front of her house by a cricket ball that had been hit from an adjacent cricket park. According to witnesses, the hit was the longest in the past forty years, although balls had landed in the garden of one Mr. Brownson, whose house was located nearer the park. Plaintiff sued the cricket club and its members for her injury, alleging negligence in locating the cricket pitch too near the road. Although she won in the Court of Appeal, the English House of Lords unanimously reversed. *Bolton* is a popular entry for Tort casebooks.

Bessie Stone, she of aristocratic mode,
An impressive address: Beckenham Road!

Off on an errand, and running late,
No time to tarry, fast out the gate.

Her mind focused, on purpose and function,
No thought of danger, or missile conjunction.

Her stride measured, her lips sealed,
No way to fathom, a fate unrevealed.

No single notion, that just over the hoarding:
An event then in motion, of great foreboding.

As mighty Thor, stepped to the wicket,
A giant of a player, a warrior of cricket.

The pitch, the swing, the resounding crack,
Every eye skyward, at the ball on track.

Climbing, ever climbing, bit by bit,
Exclaimed an old-timer: "It's a forty-year hit!"

The crowd's jubilation, at the disappearing ball,
And then . . . the thud, just over the wall.

Now the alarm, the ominous lull,
The piercing cry, as sphere finds skull.

The whispered word: "It's Bessie Stone!
Why oh why, didn't she just stay home?"

The medics arrive, Bessie they attend:
"It doesn't look good, the skull was thin."

"In Brownson's garden, once such a blow:
Cancelled his cabbage and asparagus laid low."

To the courts: Bessie's plea for assistance,
The law's response: steadfast resistance.

"There was no way, the club could foresee,
An event so unlikely, it hardly could be."

The cricket club—still very sad:
"Why, at us, is everyone mad?"

They tendered damages, although not liable:
"We should not smite—it's in the Bible."

The money, however, made no matter,
A useless gesture, full of blather.

Today, Bessie Stone: a virtual recluse,
She owns only a pet: an albino moose.

She is obsessed with the law: "a stingy meanie,"
That, and Mr. Brownson's elongated zucchini!

D. *SPANO V. PERINI CORP.*, 250 N.E.2D 31 (N.Y. 1969)

The activity of blasting with explosives possess a lengthy common-law history of strict liability. A remarkable American exception to that history, the New York courts had turned their determination upon whether the blasting caused direct harm to plaintiff (stones, debris, etc.) or indirect harm (vibrations, etc.). Those courts imposed strict liability for the former, but required a showing of negligence for the latter, thereby maintaining the historic "trespass–case" distinction of the old "forms of action." *Spano v. Perini Corp.* was the case in which the New York Court of Appeals finally confessed error, abandoned the "direct–indirect" test, and adopted the general rule of strict liability for blasting.

One day around Thanksgiving, in a garage,
Plaintiff felt a jolt, as from a barrage.

Looking around, he detected tell-tale signs:
No windows, no roof, and no Venetian blinds.

Then peering more closely, there was no doubt:
Although he was "inside," all the walls were out.

"By darn!" he exclaimed, a forceful expression,
Excused, perhaps, by his sudden depression.

"What manner of beast has destroyed my premises?
It appears I was visited by a prehistoric nemeses!"

"In terms of Thanksgiving, I'm as grateful as can be,
I do wish, however, that my garage still I could see."

"Without it and my tools, I'll never get ahead,
They were the sole source, of my daily bread."

"My wife, my mistress, and dear little Ned,
If I cannot work, they'll soon be dead."

"Although one I would miss, more than another,
I would mourn most severely my significant other."

"So who did this?" I ask, "Where does he stay?
And why oh why, did fate send him my way?"

At about this time, a developer appeared,
Clipboard in hand, and nose hairs seared:

"I am quite surprised to witness your plight,
A great deal of damage from mere dynamite."

"I am most sorry, is about all I can say,
But progress, of course, must have its way."

"To develop is divine, to stop is delay,
And for what I develop, you must pay."

"When harm occurs, from mere vibration,
Then you cannot recover in litigation."

"We forfeit the future, if we ignore the past,
Hence, the distinction: Case and Trespass!"

"The forms of action: from the grave they rule,
Also in New York, as you were taught in school."

But when to the law, Plaintiff still did appeal,
He found a court anxious, and ready to yield:

"No one else, follows a rule so old,
From it no good, could ever unfold."

"One has the right, to develop his land,
But not at the expense of another man."

"Blasting is danger, as everyone knows,
Whether or not, much debris it throws."

"No matter how careful, the blaster may be,
From the harm done, he can never be free."

"Our little town blues, are melting away,
For now in New York, Defendant must pay."

E. *SIEGLER V. KUHLMAN*, 502 P.2D 1181 (WASH. 1972)

The American refinement of *Ryland*'s strict liability concept into the principles of "ultrahazardous activities" and "abnormally dangerous activities" is a familiar development in Tort law. The search is on for modern cases applying those principles, and *Siegler v. Kuhlman*, a Washington case, is one of the most popular examples. There, the driver of defendant's gasoline tanker was attempting to exit an interstate highway when the trailer came loose from the cab and crashed down onto the road below, incinerating the plaintiff motorist. Although rejecting the "non-natural use" concept of *Rylands*, the court adopted the Restatement principle of "abnormally dangerous activities" and imposed liability on the defendant.

The Plaintiff on holiday, driving her car,
The road stretched ahead, wide and far.

The mirror revealed, nothing to the rear,
Her route ahead, all perfectly clear.

She relaxed momentarily, no danger impended,
Unless, from above, something descended.

That, however, an unlikely concantation,
For car and trucks, don't do levitation.

But at that moment, while she dreamed of love,
A gasoline tanker, crashed down from above.

Its coupler had uncoupled the proof did show,
Propelling it downward, to the road below.

A spark, an explosion, a holocaust in succession,
As Plaintiff and car, joined the celestial procession.

On Defendant's part, no negligence appeared,
Indeed, no evidence at all, everything seared.

From viewing the site, all one could know,
Something happened, above and below.

If such was the case, the court perused,
An alternative approach might be used.

Whenever no evidence of fault can exist,
Upon such evidence, we should not insist.

The freight of gasoline, with hazard is fraught,
Extreme, extraordinary, beyond mere default.

Inordinate, beseeching, without emulation,
A peril so inherent, it defies calculation.

Abnormally dangerous, the activity beyond all,
In the space of an instant, a searing red ball.

When tragedy occurs, the worst comes to pass,
Award compensation—it will be Plaintiff's last.

A Defendant, who leaves no clue of neglect,
To being held liable, can hardly object.

Like Hansel and Grettle, scatter some crumbs,
Or don't complain when accountability comes.

For damages from danger, in the last degree:
Impose strict liability—how bad can it be?

F. *MADSEN V. EAST JORDAN IRRIGATION CO.*, 125 P.2D 794 (UTAH 1942)

Even though blasting is necessary and conducted with due care, the law regards it as so dangerous as to justify the imposition of strict liability for causal damage. There may remain, however, the question of "proximate cause"; *i.e.*, whether plaintiff's harm is within the scope of the abnormal risk that is the basis of the strict liability. The *Madsen* case is a popular example of a court's answering that inquiry in the negative. There, defendant blasted with explosive some 100 yards from plaintiff's mink farm, the noise frightening the mother mink into eating 230 of their offspring. Although conceding the rule of strict or absolute liability for blasting, the court held plaintiff's damage too remote for recovery.

"Bad vibes!" They shook the cage,
The mink inside: a frightened rage.

The mother mink: peculiar inflections,
Eating everything, in all directions.

Defendant was apologetic: expressing regret,
Plaintiff was apoplectic: entirely upset.

"Hey!" said Defendant, "the mothers gained weight!"
"Yes," said Plaintiff, "do you know what they ate?"

Defendant persisted: "I hope they don't get alexia."
Plaintiff insisted: "You'd better hope for anorexia."

At the end of the day, it all went to law,
There, the whole thing considered a draw.

On one hand: Strict liability indicated,
But on the other: No damage anticipated.

Physical harm, or self-preservation,
Those were the results of expectation.

Mental effects, or peculiar disposition,
Not within the realm of supposition.

Shock, vibrations, or missiles in flight,
Not intervening mothers with appetite.

In strict liability law, as well, it turns out:
The risk-rule analysis still holds its clout.

And little Murray Mink, wherever he roams,
Might think twice, about dinner at home.

When he comes in from play, starved and dirty:
"If it's Pizza night, I believe I can eat thirty!"

His mother only smiles, seemingly amused,
She instructs Murray: "Take off your shoes."

"Here, Murray," she directs, "get in the pot,
Your father is hungry, and you're all we've got."

For the moment, Murray thinks she is teasing,
He climbs into the pot, simply to be pleasing.

As the water heats, and while he is still able,
Murray observes, only two plates on the table.

"Hey, Mom!" he pleads, "I'm as tough as a board."
"I know," she responds, "but you're all we can afford."

After dinner that night, the father intones:
"Murray would dearly have loved those bones."

XI. PRODUCTS LIABILITY

A. *WINTERBOTTOM V. WRIGHT*, 152 ENG. REP. 402 (EX. 1842)

"Lack of privity" long constituted a bar to recovery for plaintiffs injured by defective products, and *Winterbottom* stands as the classic example. There, a stagecoach provided by defendant under contract with the Postmaster-General contained a defect which injured the plaintiff, a driver employed by the Postmaster-General. The English court, relying upon a lack of privity of contract between the defendant provider and the plaintiff driver, denied plaintiff's recovery for his injuries. Few Tort casebooks omit the *Winterbottom* case.

Across the plains, the whip cracked,
Driver and coach, of legend smacked.

The mail was important, it must go through,
The Postmaster-General employed the crew.

The delivery coach, Defendant supplied,
Services and inspections, he satisfied.

Plaintiff, for his part, designated to drive,
His primary desire: To arrive alive.

These two parties, both part of the pact,
But with neither, did either contract.

Through rain, snow, and hostile grounds,
The coach must make, its appointed rounds.

The postal department, committed to excel,
Via legendary efficiency, all worked well.

Until one day, when the coach went down,
The driver, hurled violently to the ground.

After the tragedy, inspection did detect:
There in the coach—a latent defect.

Plaintiff, for damages, sought out Defendant:
"Upon your services, I was dependent."

Defendant feigned surprise, no recognition:
"Who are you?" was his inquisition.

"With the Postmaster-General, I contracted,
And to him only was my duty exacted."

Plaintiff pleaded for the right to sue:
"For only the supplier can I pursue."

Reasoned the court: "We regret your fall,
But you may possess no remedy at all."

"The problem" you see, "is privity of contract,
And that, with Defendant, you sorely lack."

"To define duty, beyond that relation,
Would be absurd! An abomination!"

"For liability in Tort, a limit there must be,
If confined to contract, the line we can see."

From scholars, condemnation the case did draw:
"Nothing but a fishbone, in the throat of law!"

For Torts, however, the limitation loomed great,
As through the centuries, reform did wait.

"Privity of contract," a litigation bar supreme:
Separating in Torts, the whey from the cream.

Liability, all agree, must end somewhere,
It might be here, or it might be there.

The postal system proved a perfect place:
Accountability slowed to a grinding pace.

So, when a letter arrives, late by a decade:
It is a tradition, by which legends are made.

B. *MACPHERSON V. BUICK MOTOR CO.*, 111 N.E. 1050 (N.Y. 1916)

MacPherson, a landmark Cardozo decision, is commonly given the credit for breaking the shackles of "privity" in the law of Torts. Defendant manufacturer sold a car to a retail dealer who resold to plaintiff. Plaintiff, while driving the car, was injured when one of the wheels "crumbled into fragments." Although no privity of contract existed between plaintiff and defendant, Cardozo approved plaintiff's recovery for injuries. It would be hard to imagine a Tort casebook omitting coverage of the famous case.

Plaintiff treated himself to a Buick car:
"With that thing," he said, "I should go far."

He purchased the vehicle, from a retail dealer:
"That guy should have been a good-faith healer."

The car was exquisite, a pleasure to drive:
"It gives you the feeling of being alive!"

But also dynamic—actually quite nifty,
Designed for daring—it would hit fifty!

Driving one day, Plaintiff exhibited his nerve,
When, at eight miles an hour, he took a curve.

While careening in that fashion, without a care,
He noticed a wheel, that was no longer there.

"That wheel," he exclaimed, "where could it be?
I don't think this car will travel on three!"

Alas, he was right, the car did falter:
Plaintiff was ejected, like a pole vaulter.

"Someone negligently made that automobile,
Perhaps it was the guy who attached the wheel."

"Just a moment," said the maker, "not so fast,
No car from my hands to your hands did pass."

"You dealt only with the retailer, you see,
There was no privity between thee and me."

What Defendant stated had long been the rule,
The principle was basic, even taught in law school.

But on this occasion, the judge was Cardozo,
Who made more law, than most lawyers know:

"If ever the rule was what you say,
"No longer will it be, after today."

"All the old cases, that seem so confined,
A more liberal spirit, I think I divine."

"Is a car dangerous, if carelessly constructed?
Are bears in the woods to be deducted?"

"Will it be used by only the buyer?
Or, does the number likely go higher?"

"To these questions, the answer is yes,
Thus, foreseeability becomes the test."

"We put aside the notion of contracts,
The maker must prepare for Tort attacks."

If more practical advice, you also crave,
Here's a neat tip, the case likewise gave:

When you buy a car, from a dealer so humble,
Best kick the wheels, to see if they crumble!

C. *CHYSKY V. DRAKE BROTHERS CO.*, 139 N.E. 576 (N.Y. 1923)

Even following *MacPherson*, where Judge Cardozo eliminated the requirement of privity in a negligence case, that requirement still obtained to bar actions founded in "breach of warranty." *Chysky* is often employed to illustrate the early law's view of implied warranty as sounding in contract and thus defeated when no privity existed between plaintiff and defendant. There, the plaintiff, a waitress in a diner, was given a piece of cake supplied to plaintiff's employer by defendant wholesaler. While eating the cake, plaintiff's mouth was injured due to a nail baked therein. Plaintiff sued the wholesaler for her injures, alleging breach of an implied warranty of fitness, but her action was rejected because no privity existed between the parties.

"Cake, for me?" squealed Alice in delight,
As Mel, her employer, handed her the bite.

"Don't stroke!" sneered Mel, in obvious distaste,
"Nobody will buy it—it's going to waste."

"Still," gushed Alice, in galvanized glee,
"It shows, Mel, that you care for me!"

Mel grimaced, his eyes to the sky:
"Why," he wondered, "do I even try?"

Alice to a booth, did happily proceed,
Opening her lunch, for her daily feed.

"And to top it off," she did assert,
"I now have cake, for my dessert!"

She proceeded then to stuff in the cake:
Opening wide, for each savored intake.

Forgetting altogether, her harbored desire:
To become neither fat, nor to expire.

Then, in an instant, joy turned to disdain,
Misery wracked her face, with searing pain.

"Oh, my goodness," she cried in despair,
"My tooth, my tooth, it's no longer there!"

In place of her tooth, and far from numb,
A veritable spike, penetrated her gum.

Following recuperation, from painful repair,
Alice looked for help, it seemed only fair.

Where could she go? Not to Mel,
He would fire her, she knew very well.

Perhaps the wholesaler? He supplied the cake,
Into which delicacy, a nail he did bake.

Any food so loaded, Alice then contended,
Not reasonably fit, for the purpose intended.

When upon appearance, she then relied:
A breach, she said, of warranty implied.

With the action filed, she could only wait,
And for her compensation, salivate.

False hope, however, and sorely misplaced,
"Stop!" said the court, right in her face.

"No implied warranty, could ever there be,
Without privity, between you and he."

"He knew you not, don't you understand?
He is not liable for your warranty demand."

This thing called "privity," a concept neat,
Claims of this sort, it will always defeat.

Now Alice had occasion, sadly to reflect,
Childhood memories, she could not neglect:

"Four and twenty black birds, baked into a pie,
You may as well eat them, for no action will lie."

And Mel, her employer, a man of care,
Docked her pay, for bleeding on a chair.

"Honestly, Alice, how came it to be,
That always and ever, you frustrate me?"

D. *ESCOLA V. COCA COLA BOTTLING CO.*, 150 P.2D 436 (CAL. 1944)

Justice Roger Traynor's concurring opinion in the *Escola* case is commonly acknowledged as the most pivotal judicial opinion in the embryonic development of products liability law. There, Traynor rationalized a theory for freeing product responsibility from the ancient restrictions of contract law by viewing the manufacturer's implied warranty of fitness as sounding in Tort. The warranty must be "severed from the contract of sale between the dealer and the consumer and based on the law of torts as a strict liability." Although Traynor spoke only for himself in *Escola*, his theory later became the law in many states, including California. The episode thus teaches not only the substantive principles, but also the potential importance of concurring and dissenting opinions in the common law process.

"The Common Law," an enigmatic elocution,
Savoring both the past, and judicial evolution.

In the latter sense, a thing truly to behold,
Watching new law, judicially unfold.

Some judges applaud, others less bold:
They view judging, in a less active role.

An illustration, many would designate:
A concurring opinion, tending to legislate.

The context familiar: a bottle mis-constructed,
Injuries severe: when the bottle self-destructed.

Plaintiff's hand—so functional and slender,
Shredded—like cabbage through a blender.

"My hand!" cried Plaintiff, "I cannot spare.
Defendant's bottle was made without care."

"Since no proof of fault, have I to deploy:
Res ipsa loquitur, I herewith employ."

The court agreed, its sympathy at a peak:
"Of negligence itself, the accident did speak."

But one lone judge, took a path less traveled,
As eons of common law, he then unraveled.

Plaintiff's recovery, he said, was not in doubt,
But proof of negligence, he could do without.

When Defendant proceeds to float a product,
Liability depends not upon negligent conduct.

From maker to consumer, a warranty extends,
For an injury from a defect, liability attends.

Though warranty appears a contract of sorts,
It was, in its origin, a pure action of Torts.

And if in Torts, a warranty indeed sounds,
Then liability without privity legally abounds.

Strict liability, the jurist thus expanded,
A result, he said, public policy demanded.

That policy, though he proclaimed all alone:
Soon, it would claim each state as its home.

It would register gross on the seismic scale,
Progressive or not, it would handily prevail.

The theory of warranty, yesterday a contract:
Today a Tort, as if ordained by compact.

So if in the future, you read a case,
Resist, resolutely, a reading in haste.

Else you may miss, the revolution occurring,
Because it appears, in an opinion concurring.

And when they speak of "the Common Law,"
Remember the Plaintiff, and her shredded paw.

E. *VOLKSWAGEN OF AMERICA, INC. V. YOUNG*, 321 A.2D 737 (MD. 1974)

An early, and highly controversial, epic of products liability focused on the "crash worthiness doctrine" or the case of the so-called "second collision." Should a manufacturer be liable for injury occurring inside the car, although it was not caused by a construction defect and was not responsible for the initial impact? Was there a duty to design a car so as to lessen injuries arising from the passenger's contact with the interior of the car in a collision caused by a third party? The *Young* case presented a judicial opinion favoring such duty, and is often included in Torts casebooks on the point. There, plaintiff's Volkswagen Beetle was struck from behind by a Ford, causing the front seat to break away and hurl plaintiff into the rear of the car where he was killed.

Plaintiff was stopped at a traffic light,
When, by propulsion, he was given flight.

Struck from behind, in his Beetle so neat,
The force of the blow, ripped off the seat.

Into the rear, Plaintiff was catapulted,
As a consequence, his death resulted.

Clearing the seat like a soaring bird,
Only shortly thereafter, to be interred.

In his behalf: perplexing litigation,
The Beetle's defect: seat separation.

Because of that flawed division,
Plaintiff suffered a second collision.

To be struck once: bad enough,
To be struck again: doubly tough.

But for the Beetle's faulty design,
Its front seat would never untwine.

The car maker protested the charge,
It owed no duty, so wide, so large.

Its fault, if any, lay only in plans,
It did no act, by careless hands.

It did not cause the initial impact,
It owed no duty of a safe contact.

Although the car may enter a moat,
Was there a duty to make it float?

True, its cars were sold for cash,
But minus knowledge that they might crash.

With countering positions articulated,
A rule from the court elaborated:

No insurer's duty did it intend,
Only that of reasonable men.

No one suggested a crash-proof car,
That, an obligation much too far.

But all know that for cars in traffic,
The risk of collision is very graphic.

With the chance of crashes thus in sight,
Design must envision the passenger's plight.

That plight, of course, the second collision,
Well within the range of design pre-vision.

Beetles need not swim, nor bounce off trucks,
But neither crumble, like fine china in flux.

If upon contact, the front seat implodes,
Hurling its passengers, like tepid toads,

The designer must know, well in advance:
He is at risk, for creating that chance.

And the driver, who winds up in the rear:
"I simply can't be killed from here!"

F. *BARKER V. LULL ENGINEERING CO.*, 573 P.2D 443 (CAL. 1978)

Barker was the well-known case in which the California court attempted to clear up some of the confusion it had previously wrought concerning the "defect" requirement of strict products liability law. The case involved a plaintiff worker injured while operating a high-lift loader leased to his employer by the defendant. The loader tilted on uneven ground, causing plaintiff to leap from it only to be hurt by falling lumber. Plaintiff sued for his injuries, charging the loader's defective design, and the court proceeded to elaborate its requirements for sufficiently proving a "defect."

It is not uncommon, in the land of gold,
To wake up feeling extremely old.

Lifestyles are simply designed that way,
Some people work, but many play.

From either substance or physical activity,
One may awaken to a painful proclivity.

"Oh my head!" an oft-recurring exclamation,
When seeking to maneuver after "relaxation."

A land of fast cars, extravagance galore,
Where each indulgence invites even more.

Where dreams unfold, and tragedies descend,
As Hollywood's allurements to all extend.

Fame today, and failure tomorrow,
Untold riches, then forced to borrow.

Crooks, cowboys, and movie stars,
Palaces, mansions, and seedy bars.

It was here, Ray Barker found his fame,
Although not of a kind he hoped to claim.

Rather, Ray, no "girly-man" at all,
Injured by lumber, caused to fall.

That cause, he charged, holding his head,
A loader, not level, defective instead.

"There's the rub," Defendant shot back,
"Proving the defect, a tedious fact."

At trial, each party made its case,
Which, then, would the court embrace?

The judges, with considerable temerity,
Straddled the law, with dubious dexterity.

Definition of "defect," they did proclaim,
Cannot, in all contexts, be the same:

"At different times, and in some situations,
It is governed by 'consumer expectations.' "

"On other days, and different occasions,
'Risk-benefits' will be the equation."

This latter test, of particular potential:
A jury's hindsight, the sole essential.

Plaintiff need prove only design causation,
Burden of proof? Defendant's obligation.

Carrying that burden, Defendant must show:
Design benefits high, and the risks low.

"Hereby," said the court, "we clarify confusion,"
"And Plaintiff should recover, for his contusion."

They can come true, in this land of dreams,
Where things are often, not what they seem.

Ray Barker, rendered hurt and lame:
Now a star, on Tort's walk of fame.

G. *DALY V. GENERAL MOTORS CORP.*, 575 P.2D 1162 (CAL. 1978)

Once strict products liability became a reality, courts then confronted arguments of limitation or defense. For example, could plaintiff's contributory negligence in using the product serve to bar or limit his recovery in strict liability? Or, contrarily, were the two concepts (negligence and strict liability) so inherently at odds as to exclude their appearance in the same case? The *Daly* case from California was the leading authority for allowing the contributory negligence defense in a strict liability context. It featured a plaintiff who crashed his Opel on the freeway, a plaintiff who failed to use available seat belts and door locks, ignored warnings in the owner's manual, and was intoxicated. Although defendant manufacturer was strictly liable for the car's defects, it was permitted to introduce evidence of the plaintiff's contributory negligence.

"This is unreal, in complete disbelief!"
So cried Plaintiff, who had come to grief.

"You propose reduction of compensation,
Merely because of my intoxication?"

"The car was defective, that is enough,
You did not make it, with the right stuff."

"And now you quibble, seek to deflect,
Charging me with safety neglect?"

"Compare strict liability and fault, you wish?
They're completely at odds: like foul and fish!"

"Apples and oranges, oil and water,
All of creation: You put out of order!"

"Enough already!" opined the court,
"Forget semantics, and think Torts."

"We combine the concepts, to reach just ends,
For actually, to us, they seem more like twins.

"Apples and oranges we do not compare,
Rather, ambrosia is the delight we share."

"Defenseless victims, problems of proof,
Neither concept, to those goals aloof."

"What we want here, a larger synthesis:
'Justice' need never appear in parenthesis."

"Fairness is the jurisprudence we seek,
With semantic symmetry we do not compete."

"A manufacturer's incentive, we don't remove,
Indeed, we predict, it will only improve."

"To compare fault and strict liability:
Never underestimate a jury's agility,"

"Rather, logic, fairness, and fundamental good:
For those qualities, we have always stood."

Though strict liability, Defendant may bear,
Damages reduced, by Plaintiff's lack of care.

Strict liability and fault: though a diverse pair,
Consanguinity and affinity: they'll always share.

So if, Defendant, you produce a clunk,
Sell it promptly, to an outright drunk.

When, on the freeway, he comes to grief,
For his damages, you'll get relief.

When he wonders how this can be:
"The law is for you, but also for me!"

XII. EMOTIONAL AND DIGNITARY HARMS

A. *ALCORN V. MITCHELL*, 63 ILL. 553 (1872)

At an early juncture in American law, the courts were employing intentional tort actions to impose liability for conduct resulting primarily in emotional harm. *Alcorn*, an action in battery, is typically presented as an example of the exercise. At the conclusion of a trespass action between them, defendant spat upon plaintiff while still in the courtroom, and plaintiff subsequently sought damages. Suffering a judgment of $1,000, defendant appealed on the ground that "the damages are excessive." The appellate court affirmed the award, emphasizing the vileness of defendant's conduct and tort law's concern for keeping the public peace. The court reasoned that "vindictive damages" were appropriate for the purpose and that, because "defendant appears to be a man of wealth[,] we cannot say that he has been made to pay too dearly for the indulgence."

The parties were in court, on another case,
When Defendant spat into Plaintiff's face.

Again from the law, Plaintiff sought satisfaction,
Demanding succor for such despicable action.

The jury responded: "Although we're no scholars,
We award Plaintiff one-thousand dollars."

On appeal, Defendant waxed apoplectic:
"Excessive award! He can't collect it!"

But the appellate court, found reason ample:
It affirmed the award, by way of example.

Although a civil case, the court did reason,
A substantial penalty was yet in season.

To punish, to teach, to preserve tranquility:
All more reasons, to impress responsibility.

An act so disgraceful, so utterly vile,
The temple of justice, it did defile.

Vindictive damages, the court exhorted,
Most appropriate for the interest torted.

To soothe the sting of gross indignity,
Plaintiff deserved assuaging liquidity.

If in payment, Defendant was caused to smart,
Perhaps this message, he would take to heart:

When in court, one finds his fate,
Perhaps he'd best not salivate.

Inadvisable to show one's fangs,
And saliva tends to boomerang.

So, if soaked, one desires not to be:
Spitting is conduct not fiscally free.

B. *I. DE S. & WIFE V. W. DE S.*, AT THE ASSIZES, CORAM THORPE, C.J., 1348 YEAR BOOK

Another instance of the technical Tort violation which early resulted in liability for the infliction of emotional harm, *I. de S. & Wife* presented the case of a defendant who struck at plaintiff with a hatchet but did not touch her. Reversing the lower decision that there had been no trespass, the court held that defendant "made an assault upon the woman." The case has long been a favorite for Torts casebooks.

The night was dark, the need was great:
"Chablis, Chablis, I can not wait!"

A Defendant of thirst, appeared on scene,
To Plaintiff's tavern, seeking relief supreme.

But the tavern door was locked up tight,
"Was ever," he screamed, "there such a night?"

In rage, and considerable consternation,
Defendant hit the door in irate frustration.

Plaintiff wife, put her head out a window,
"Stop!" she cried, without innuendo.

But Defendant now, thirst unabated,
Would not abide, being so berated.

So at the woman, he next did swipe,
His hatchet almost taking flight.

Missing completely, and in deep disgust,
Defendant now stood, stomping the dust.

Plaintiff, however, was not amused,
Her very essence had been abused.

The parties debated, giving no quarter,
Neither desisting, and each in order:

"Oh please! I never touched a hair,
Where I swung, you were not there."

"Although my body, your hatchet missed,
You touched my mind, I do insist."

Does law protect, for interests so fragile?
Or must its actors, simply be more agile?

The court remained coy, it did not default:
"Defendant with his hatchet, made an assault."

Was this because the Plaintiff he upset?
Or, only to prevent his battery, yet?

The former would evidence sophistication,
The latter might confirm simplification.

Was early law this keen and sensitive,
Or only basic, and much less pensive?

One settles, for what the court reveals,
Here it exudes far less than it conceals.

Some things are clear, and these are the facts:
You don't order Chablis, by wielding an axe.

C. *BIRD V. JONES*, 115 ENG. REP. 668 (K.B. 1845)

The essential case on the nature of confinement necessary for the tort of False Imprisonment, *Bird v. Jones* featured a defendant who blocked a public way for his personal use, preventing the plaintiff from continuing his travel in that direction. Although defendant's agents forced plaintiff to desist in his efforts at passing the blockade, he was at liberty to go in any other direction. The English judges debated whether the facts amounted to "imprisonment," the majority concluding in the negative.

The Plaintiff, a jogger of wide renown,
Jogged in all directions, all over town.

With exercise and low carbs, he did aspire,
Good health, long life, and never to tire.

His obsession legendary, in name and deed,
Ever in motion, like a rabbit on speed.

He ran up the roads, he ran down,
He ran some more, round and round.

When it stormed outside, he ran in place,
When he could not run, he hid his face.

All in the universe, it seemed to him:
An eternal race, of vigor and vim.

On his rounds, he made no stops,
On each pass, citizens set their clocks.

And children, playing out in the street:
Promptly scattered, when they heard his feet.

Plaintiff so prevailed, until one spring day:
He rounded a curve, on a public way.

What, to his wondering eyes did appear,
Defendant's blockade, ever so near.

Plaintiff blinked his eyes, he shook his head,
An apparition, an image, or a mirage instead?

On one point, he was perfectly clear:
That blockade, had no place here.

Defendant, and his agents were there,
To the Plaintiff, they offered a chair.

Plaintiff was insulted, bent on proceeding,
But the agents refused, no signs of receding.

"You can't do this!" Plaintiff maintained,
"Just watch me!" Defendant exclaimed.

In desperation, and unbridled awe,
The Plaintiff appealed, to the law:

"By barring my path, he made a jail,
Imprisonment—a ship without sail."

The judges debated, one way and another,
Each disputing, the view of the other.

Obstruction, detention, or justification?
Each an issue, or only obfuscation?

A prison its walls, a boundary in fact?
Or restraint of motion, a turning back?

Final decision: no action could abide,
Only an obstruction, no locking inside.

Plaintiff now dejected, faltering in gait:
Visions of sugar plumbs, lying in wait.

To joggers of the world, a lesson is due,
The path not taken: it may be for you.

D. *WILKINSON V. DOWNTON*, [1897] 2 Q.B. 57

In breaking the shackles so as to allow recovery for the intentional infliction of emotional harm, *Wilkinson* receives much credit for an enlightened first step. There, defendant falsely told plaintiff that her husband had been injured in an accident, causing plaintiff "violent shock to her nervous system" and "permanent physical consequences." Rejecting defendant's argument that no recovery could be awarded for the nervous shock, the English court advanced Tort law's concern for nonphysical harms.

The Joker—a character of historic plunder,
Long before Batman, and the Boy Wonder.

His taste knew no bounds, extremely tacky,
Regarded by many, as somewhat wacky.

On numerous occasions, he received his kicks,
From the execution of quite thoughtless tricks.

An individual, known far and wide,
To be avoided, turned aside.

His reputation: just short of evil,
A purveyor: of gross upheaval.

Even so, his cunning deception,
Still fooled victims, of all complexion.

A loving wife, he approached one day,
His face distorted, bad news to say:

"Your husband, I fear, his auto has crashed,
He now lies disabled, abandoned, and mashed!"

"This message from him, I deliver to you:
'Please come with haste, and effect my rescue.' "

The poor wife in shock, emotionally undone,
Except for her husband, she loved no one.

Her mind became addled, her reason destroyed,
On the brink of a breakdown, insanity toyed.

She was unable to go to her husband's aid,
Others she hired, that is, she paid.

Of course, they found no injured spouse,
"It was all a trick: that lying louse!"

As the Jokester convulsed, in raucous enjoyment,
The wife suffered meltdown, not fit for employment.

When begged for assistance, juristic relief,
The English judges all shared Plaintiff's grief:

"What a dastardly act," they opined in despair,
"For her well-being, you clearly did not care."

"An intent to produce her condition distraught,
We impute to you for what you have wrought."

"What ordinary person, upon being so instructed,
Would not, at such news, have self-destructed?"

"One should not fool others in such a way,
For harm inflicted, he can laughingly pay."

"We declare, therefore, let all jokers know:
He laughs last, who gets the dough."

E. *NICKERSON V. HODGES*, 84 SO. 37 (LA. 1920)

Cited as a leading case for the "New Tort" (the Tort of "insult and outrage"), *Nickerson v. Hodges* is remembered by most Tort students both for its "law" and its facts. Knowing of plaintiff's obsession with buried treasure, certain of her neighbors intended a practical joke by arranging for her to find a sealed pot of supposed treasures. Having previously filled the pot with earth and stones, defendants also arranged for a public opening of the pot, at which occasion the plaintiff suffered rage and humiliation, dying some two years later. Her legal heirs brought the action against the instigators of the practical joke.

"I know," said one, "let's do something funny,
Let's make Nina think she's found some money!"

"Oh no," said another, "poor Nina is a jewel,
"As Elvis once advised: 'Don't be cruel.' "

But others differed, and embraced the notion,
The scheme, they hastened, to put in motion.

A large pot they lifted, from some place at night,
They stuffed it with rocks, and sealed it up tight.

They lugged it out, to a remote location,
And buried it, with feigned ostentation.

Back then to town, leaving clues to the kettle,
That could only be missed, by Hansel and Grettle.

When Nickerson awakened, she discovered in fun,
A Note: "Greetings. You may already have won!"

A map, she clutched, running to and fro:
"A pot of gold—the end of the rainbow!"

No mistaking the clues, she found the pot:
"Come to the opening—see what I've got!"

At the ceremony, alas, deception revealed:
The mocking stones, from the pot unsealed.

Nickerson screamed, she raged, she vented,
Against the schemers, she never relented.

"Oh, come on," said Defendants, "it was all in jest.
How could we know—our intent was the best."

"Your intent," said the law, "we'll judge by your acts,
What did you do? Give us the facts."

With evidence before it, the court did peruse,
Liability or not? Which way to choose?

"Perhaps," mused the judges, "no wilful intention.
But Plaintiff's sanity, has suffered abstention."

"Tricks, jokes, and guffaws, all have their place,
We think, however, it's not in this case."

"Disappointment, humiliation, carried to her grave,
Perhaps you should receive, as good as you gave."

"The end of the rainbow, her desired destination,
We think you should send her heirs and relations."

In conclusion, therefore, Defendants now understood:
To disregard Elvis—is not very good.

F. *MITCHELL V. ROCHESTER RY.*, 45 N.E. 354 (N.Y. 1896)

The common-law rule long denied liability for the negligent infliction of emotional harm absent some physical contact or "impact" upon the plaintiff. Both English and American jurisdictions persistently followed the rule, although at times structuring "impact" from the most minimal of circumstances. Nevertheless, the "impact rule" remained in strong vogue until recent times in America, the leading case acknowledged to be *Mitchell v. Rochester Railway*. There, defendant's servant drove a team of horses so near the plaintiff that she stood between the horses' heads when they came to a stop. Plaintiff sued for emotional harm resulting in a miscarriage, but the New York court denied recovery because there had been no physical impact.

The right of transit: a guarantee,
From Point "A": to Point "B".

Upon that right, Plaintiff sought to enter,
Awaiting a horse car, front and center.

April 1, the weather was warm,
Soon the bees would start to swarm.

Perhaps, too, good fortune awaited,
Plaintiff, pleasantly, anticipated.

Little Maggie was almost due,
It seemed to good to be true.

Soon the Mets would start to play,
A winning season, there was no way.

All seemed right, in Plaintiff's world,
If only Maggie turned out a girl.

Where was that car? Plaintiff implored,
She'd feel better, once aboard.

At that instant, a terrible sound,
Plaintiff jumped, and looked around.

Headed her way, a ferocious pace,
A team of horses, face to face.

The driver helpless, it did appear,
As the horse car, charged ever near.

Oh, to be safe, she did aspire,
This was no streetcar, named desire.

At the last second, she closed her eyes,
Not to witness, her own demise.

Nothing happened! She was not dead!
But on either side, a horse's head.

Though body safe, her mind in fright,
She then blacked out, as if at night.

Somewhere she heard, as though at school,
Defendant's cry: "April Fool!"

Later, much later, she came around,
In a courtroom, now uptown.

"I don't think," the judge was saying,
"For this, Defendant need be paying."

"Plaintiff's only injury occurred from fear,
Without contact, no damages here."

"Otherwise," the jurist did postulate,
"We'd open wide, a large floodgate."

"And the claims, how could we know,
What was false, and what was so?"

"Anyone may feign a fraudulent fear,
Here the Plaintiff seems most sincere."

"We draw that line, as best we can,
Without impact, there is no plan."

"Wow!" said Plaintiff, "the law is tough,
Two miscarriages are quite enough!"

G. *CHRISTY BROTHERS CIRCUS V. TURNAGE*, 144 S.E. 680 (GA. APP. 1928)

Christy Bros. Circus is one of the most famous cases in the law of negligent infliction of emotional harm—both for its facts and its willingness to torture virtually any contact into the requisite element of "impact." There, plaintiff attended a performance at defendant's circus where one of the defendant's horses "evacuated his bowels" in plaintiff's lap, resulting in much laughter by onlookers. The Georgia Court of Appeals found sufficient "impact" to permit plaintiff's recovery for her embarrassment.

To attend the circus: What a delight!
Whether afternoon, or later at night.

The shows, the performers, the crowd:
Glitzy, outrageous, and extremely loud.

The colors, the sawdust, and benches hard,
Unless one is padded with the comfort of lard.

The sights, the smells, the raucous clowns,
Hot dogs, candy, and peanuts in mounds.

Frenzied activities, in all three rings,
It won't conclude, 'till the corpulent sings.

A night of a lifetime: the tent is packed,
Joyful screams, and popcorn in sacks.

Tara Turnage, in a front row seat,
Keeping time, with the music's beat.

Her seat is so near, the ring in the center,
She must lean forward, as performers enter.

Tara has known, her share of bad times:
When she was ten, she lost three dimes.

She recalls that day, with a shudder slight,
She was the object, of gossip and spite.

But tonight, she smiles, that is all past tense,
Here in this temple, of mirth and suspense.

She can imagine only a future of fun,
The time is now, and it has begun.

Excitement builds, as the lights dim low:
What happens now? Who can know?

First, the clowns, running and jumping,
Poor Tara's heart is literally thumping.

Then come the horses, as black as night,
Bearing their riders, all clad in white.

Proud steed, stalking and prancing,
Rounding the ring, a sight enhancing.

Led by the ringmaster, trumpet blowing,
As the horses obey, stopping and going.

As the procession nears Tara's location,
She holds her breath, in anticipation.

Suddenly they all stop, right at her side,
The equine nearest Tara, looking snide.

The horse prances on, a haughty composite,
But in Tara's lap, he has left a deposit.

She is astounded, can't believe her eyes,
Then those around her, they all realize.

They point, they guffaw, they giggle in glee,
One man laughs so hard, he breaks his knee.

Mortified, horrified, and otherwise incensed,
Tara leaps up, and spills her lap's contents.

Dashing up the aisle, blinded by tears,
Depression descends, from her early years.

She cannot think, desiring only to disappear,
As the peals of laughter sound from her rear.

"Where is the justice?" she later demands,
Changing her skirt, and washing her hands.

And the answer came, low but clear:
"Fear not Tara—redemption day is near."

"For negligently inflicted mental harm,
There must be impact, not simply alarm."

"But in this case, a problem there is not,
From horse to Plaintiff: connect the dots."

"The deposit landed, a convincing thud,
Betrayed by its fragrance, it wasn't mud."

"Impact a plenty, toasts all around,
We find for Tara: let justice abound!"

What lesson, you ask, can be derived,
From a tale so sordid, and contrived?

If the stuff hits the fan, on your career map,
Recoup and rejoice, that it's not in your lap!

H. *HAMBROOK V. STOKES BROS.*, [1925] 1 K.B. 141 (C.A.)

Although the English courts early abolished the "impact" rule in cases of negligent infliction of emotional harm, they retained the requirement that plaintiff's shock must arise from a reasonable fear for her own safety and not a fear for the safety of someone else (e.g., plaintiff's children). This latter requirement persisted until the *Hambrook* case where the King's Bench allowed plaintiff's recovery for the death of his wife resulting from shock produced by a reasonable fear for the safety of her young children whom she knew to be where a driverless motor lorry might strike them. *Hambrook* is a famous and favorite case for study in Tort law.

"Loose Lorry!" A sound of fright,
Much like a firebell in the night.

From side to side, down narrow street,
The lorry plunged, none too discrete.

Finally it stopped, striking a house,
The faulty driver, what a louse!

The Plaintiff's wife, did not know:
"What? Which way did it go?"

Indeed, she feared, it might have struck,
Her young children: Betty and Buck.

Those dear charges, she had dispensed,
Off to school, to gain some sense.

But now fearful, and filled with dread,
For all she knew, they might be dead.

Horrified, her pulse increased,
She went from living to deceased.

Plaintiff bereaved, now all alone,
But for children, none of them grown

How to manage, what to do?
"Perhaps," he said, "I'd better sue."

Defendant regretted, or so he professed:
"Indeed," he said, "in peace may she rest."

"But your suit will gather dust on the shelf,
She feared for the kids, and not for herself."

"On those facts, the law is well laid:
No duty owed, no remunerative aid."

The Court of Kings Bench, well knew the law,
But cared not at all, for the line it would draw.

"Assume two mothers: one timid and shy,
There is help for her, should she fear and die."

"But for the other: maternal and true,
No aid for her, when she turns blue."

"That is not right, it simply cannot be,
King Solomon wouldn't do it, and neither will we."

So to the drivers of lorrys, everywhere:
You must do more than pretend to care.

When in the future, you endanger Y,
Don't scare X, and make her die.

I. *DILLON V. LEGG*, 441 P.2D 912 (CAL. 1968)

In 1968, California became the first American jurisdiction to go from the "zone of danger" rule to the "bystander" approach. There, the defendant negligently drove his car so as to strike and kill plaintiff's child as the child was crossing the street. As a result, the on-looking mother allegedly suffered "nervous shock and serious mental and physical pain." Reversing the lower court's dismissal of the mother's claim for her injuries (because she was not herself in "the zone of danger"), the California Supreme Court adopted the English rule permitting recovery in such circumstances. *Dillon* is thus a famous Torts case dealing with what, even today, remains a controversial issue.

A horrified mother, hand over mouth,
As Defendant struck child, going south.

As the child lay, banged up and dying,
The mother collapsed, shaking and crying.

Defendant's wrong to child? Probably so,
But a duty to the mother? The law said no.

She was, said the law, in no zone of danger,
Rather, to Defendant, a complete stranger.

"Unforeseeable," the law's catchy phrase:
A concept long producing a mental haze.

When Defendant hit child, he did not know,
The on-looking mother would be laid low.

If a duty to her, did extend,
Then liability, might never end.

What court would trifle, with a rule so old?
What court indeed, were there any so bold?

Still, the mother felt hopeful, not torn asunder,
After all, California was the land of wonder.

And the court there, it was well known,
On past occasions, had gone it alone.

The mother thus filed suit, and all lay in wait:
Could the case law hurdle, a chasm so great?

Up to the plate, stepped the judges supreme,
It was a day for justice, nothing in between.

At this late date, the time was at hand,
To loosen the shackles, of an ancient band.

"Duty," the court termed, only a conclusion,
A fuzzy product, of analytical collusion.

The timid hesitations, of ancient civilizations,
They had no place, in modern machinations.

There were guidelines, they could suffice,
To separate results, both bad and nice.

A negligent driver, who hurt a child,
Must expect more than a reprimand mild.

Rather, the driver, should reasonably foresee:
"A mother here someplace, there may well be."

Knowing that much, it was no great drama,
To anticipate her injury, shock, and trauma.

Once again, therefore, on this fine day,
Where will is present, there is also way.

XIII. PRIVACY

A. *WARREN & BRANDEIS*, THE RIGHT TO PRIVACY, 4 HARV. L. REV. 193 (1890)

Still widely regarded as perhaps the most famous law review article ever published, *The Right to Privacy* successfully advocated the creation of a new Tort, the invasion of privacy. Its authors, Samuel Warren and Louis Brandeis, were formerly law school classmates, allegedly motivated by a personal irritation with the techniques of the press in prying into the individual's personal affairs. Both the judicial creation of the Tort, and its modern collision with First Amendment freedoms remain matters of high controversy. Indeed, some question whether various branches of the Tort still exist. The article, its origins, and its history are delightful matters for study.

The story well known, and often told,
A daring endeavor, and also bold.

Warren & Brandeis, a likely pair,
Law school classmates, extraordinare,

While passing the time, hoisting a brew,
Warren was sad, tear drops like dew.

He told his friend, of his discontent:
Newspaper reporters, everywhere he went.

"I cannot," he said, "even fall asleep,
Without a scoop, on counting sheep."

"They're everywhere, all over town,
At every party, they're all around."

"My wife is upset, hanging by a thread,
She found a reporter, under her bed."

"Can we do nothing?" Warren did implore,
Brandeis thought, and thought some more.

"I have an idea," he finally persisted,
"We'll discover a right, that never existed."

What to call it, how would it be known?
"The right," they decided, "to be let alone."

So, they wrote up the right, in a law review,
A good place for announcing, what no one knew.

A right of privacy, of quiet solitude,
Free from another's right to intrude.

They searched for analogy, ever so slight,
Finally, they hit it—the law of copyright.

Warren in particular, ecstatic in glee:
"Just wait until next, they try spying on me!"

"For now," said Brandeis, "the deed is done.
Another round—why don't you buy one?"

"Nothing is more powerful, than a good idea,
We can only hope, it will start from here."

"We pray somewhere, in this land of ill breeding,
That a judge on a court, will do some reading."

"That our 'right' he'll find, all enunciated,
A claim to fame, to be appropriated."

"That he'll seize the notion, declare in awe:
'The right of privacy, I pronounce the law.' "

The years elapsed, and it came to be,
A court somewhere, the idea did see.

As the common law, then worked its spell,
How it all happened, it was hard to tell.

A little judicial sleight of hand:
A new "right" throughout the land.

What is crucial, it at least became clear:
It came not from the brain, but rather the beer.

B. *ROBERSON V. ROCHESTER FOLDING BOX CO.*, 64 N.E. 442 (N.Y. 1902)

Roberson is a famous case, not for what the court did, but for what it refused to do. There, the plaintiff complained that the defendant had reproduced as a part of its flour advertisement a portrait of the plaintiff without her knowledge or consent, and that the resulting publicity had caused her distress, suffering, and illness. In rejecting the plaintiff's claim, the New York Court of Appeals also rejected the Warren & Brandeis Tort of "the right to privacy." The court said no precedent existed for such a Tort, and that recognition would open the floodgates of litigation.

She emitted a gasp, and then a shudder,
A mere glance, caused her heart to flutter.

A brochure, a placard, a sign of some sort:
An advertisement of flour, it did exhort.

And there in the center, it did appear:
Plaintiff's portrait, plain and clear.

"What is this? From whence did it come?
It makes me feel cheap, much like a bum!"

She had not consented, and had no knowledge,
Her worst experience, since attending college.

Use of one's picture, in commercial context:
Hardly the treatment, a person expects.

"Flour of the Family," the brochure asserted,
A dastardly insult, and in her view, perverted.

"In my life," Plaintiff sobbed, "there is no cheer,
Each place I now go, they scoff and jeer."

"Humiliation, embarrassment, no fun to be had,
To be used in such fashion, a feeling so sad."

"I'll not be so degraded, it just isn't funny,
At the least, I should receive some money."

And so, she sued in the New York court,
Staking her claim, on the privacy Tort.

"Because this happened, without my consent,
I demand compensation, to the full extent."

But the court reacted, with obvious disdain:
"We know nothing, of a privacy claim."

"If for such a Tort, there is a plan,
That is a job, for statute man!"

"A statute can limit, modify, and withdraw,
Its principles flexible, unlike case law."

"Such a right, recognized in this case,
Would ricochet forcefully, into our face."

"Floodgates, complaints, everyone disturbed,
Litigation unbounded—vast and absurd."

"Flour of the family, Queen of the mean,
A Tort to call one Barron, of the butterbean?"

"Everyone whining, their feelings frayed,
We're not joining, that sensitive parade."

"We cannot write, upon such a slate,
To do so would be, to legislate."

"As for the article, by Warren and Brandeis:
It is somewhat clever, but not sound advice."

Courts don't "make" law, that is taboo,
"Finding" it, however, that they can do.

The difference, though often hard to intuit:
Does the court really, really want to do it?

C. *PAVESICH V. NEW ENGLAND LIFE INSURANCE CO.*, 50 S.E. 68 (GA. 1905)

Commonly acclaimed as the first state appellate court to recognize the Warren & Brandeis "right to privacy" Tort, the Georgia Supreme Court sustained plaintiff's action for the defendant's including his picture in a newspaper advertisement. In *Pavesich*, the court emphasized the absence of plaintiff's consent to the advertisement and expressly rejected the view of the New York court in the *Roberson* case. Conceding that no court had previously recognized "the right to privacy," the Georgia court announced its derivation from "the law of nature." *Pavesich* was thus the first of many American cases legitimating the Warren & Brandeis proposal.

A Sunday in November, records would reflect,
Plaintiff awakened early—he felt like heck.

Coffee cup in hand, he stumbled to the door,
To retrieve his pants, from the night before.

What a night it was, he did recall,
A true joint venture—a charity ball!

Stepping over socks, and other stuff,
He could not remember, feeling so rough.

Asking himself: "Was it her idea or mine?"
Swearing off forever, Georgia moonshine.

Reaching the door, he felt retribution:
Lying there: "The Atlanta Constitution."

Picking it up, one thing he knew:
It covered Dixie, like the dew.

What it published, went everywhere,
But at that moment, he did not care.

His attitude soon changed, rapidly in fact,
When, in the paper: Himself looking back

"Life insurance," it said, "Plaintiff did buy,"
"Why I never," he cried, "that's a lie!"

"Some policy, they say I bought:
Why, that possibility, I gave no thought."

The lower court, dismissed Plaintiff's case:
"There is no action, for seeing your face."

The next step: The state Supreme Court,
Plaintiff's dismissal, it did soundly abort.

"To use one's picture," the court opined,
"Violates one's rights, historically defined."

"We care little, about nomenclature,
We'll just call it, 'the law of nature.' "

"However defined, it affords protection:
A theory of damages, and not rejection."

"If Defendant's business has to pay,
Well, nature just intended it that way."

Plaintiff, the winner, smacking his mouth:
All his good intentions, headed due south.

He picked up his pants, but then thought better,
He instead dialed the phone, letter by letter.

A voice finally answered, husky and low:
"Yes?" she breathed, like silk on snow.

"Where?" Plaintiff inquired, his voice benign:
"Did we last stash, that Georgia moonshine?"

D. *WHITE V. SAMSUNG ELECTRONICS AMERICA, INC.*, 971 F.2D 1395 (9TH CIR. 1992)

Vanna White's case is well known, both because it involved Vanna White and because it provided striking judicial protection to a public performer's "right of publicity," depending upon nothing more than defendant's having invoked plaintiff's identity (no name, picture, portrait, or likeness) in advertising its products. Defendant's advertisement "depicted a robot, dressed in a wig, gown, and jewelry . . . consciously selected to resemble White's hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous."

"Give me a 'T,' and I'll buy an 'A!' "
That is what the contestants all say.

Either "Bankrupt," or "Lose a turn,"
That is what the contestants may earn.

As they all play, and play to win,
Their fate at rest, upon each spin.

Risking bets, and pursuing chances:
Savoring the flavor of high finances.

A few minutes of fame, wide exposure,
All seeking wealth, with full disclosure.

A flick of the wheel, the arrow's location:
Will the result be happiness, or constipation?

Contestants may laugh, or they may cry,
As the wheel turns, they either live or die.

What is this madness, this vivid fixation,
That rivets attention, across the nation?

As forty million viewers know each day,
It's the "Wheel of Fortune," U.S.A.

There are the staples, these are well known:
The wheel, the board, and new cars to own.

But the constant, the true star of the show,
That does not change, as all viewers know.

This is by no means to detract from Pat,
Personable and witty: he knows where it's at.

He cracks his jokes, and exhibits great glee,
But he's not the one, they tune in to see.

Rather, that distinction, that vision of delight:
The hostess of "Wheel," Ms. Vanna White!

Vanna with her outfits, even her shoes,
Each variation makes national news.

And her hair styles—you never know:
Will it be braided, or hanging low?

She smiles a lot, not much to say,
But hey, who's listening anyway?

Eye candy divine—an American treasure,
Affording to many, the ultimate pleasure.

The Defendant knew that, it well understood:
A plug from Vanna could do nothing but good.

Thus, it fashioned an ad, for its VCR,
And inserted a robot, to serve as the star.

It attired the robot in wig, jewels, and dress,
Who could it be? Can anyone guess?

It positioned the robot, in that precise stance,
Next to a game board, as if purely by chance.

Viewing the prop, there could be little doubt:
It's all Vanna White, this ad is about!

Vanna agreed; indeed, she was miffed:
"They paid me nothing—I've been stiffed!"

But could she, at law, a verdict fetch?
To do so, all knew, required a stretch.

At bottom, of course, the case would turn,
Not upon any "law" that one might learn.

Rather, the issue, at the end of the day:
Woman or machine, who must pay?

A woman, moreover, a famed figure apart:
It was Vanna White—America's sweetheart!

The court thus invented a new legal entity:
A right of publicity and the theft of identity.

Defendant did the theft, Vanna had the right,
Don't fool around, with the Queen of the Night!

Courts, we are told, follow the election returns,
They also follow Vanna—As the Wheel turns!

E. *ZACCHINI V. SCRIPPS-HOWARD BROADCASTING CO.*, 433 U.S. 562 (1977)

Zacchini presented the familiar standoff between state law's "right of publicity" and the First Amendment. However, it affords a fairly unusual instance of the United States Supreme Court's siding with the publicity claim. Defendant's television reporter videotaped plaintiff's entire act as "The Human Cannonball" at the local fair and showed it on television news. The plaintiff sought compensation for unlawful appropriation of his property, and the state court rejected his claim, relying upon the television station's First Amendment right to show matters of public interest. The Supreme Court reversed.

"What's that hurdling across the sky?
Can Hugo Zacchini really fly?"

"Perhaps a bird, or maybe a plane,
For, we rather doubt Hugo's claim."

But for those who know, the legend is real,
A tale of tradition, with universal appeal.

A family skill, Hugo's father perfected:
Being shot from a cannon, thus projected.

To slide down the barrel of a very large gun:
What is the reason? Where is the fun?

To wait in the dark, as preparations proceed,
The explosion and launch, at blinding speed.

Like a vapor trail, into yawning space,
An arc of awe, a projection of grace.

No wonder they come, from miles around,
To witness the sight, to absorb the sound.

A spectacular feat, a modern Houdini:
A "Cannon Ball," the great Zacchini!

The aim was to fly and then descend,
Into a net, at the swift journey's end.

To soar majestically, into the night,
Like the fabled falcon, taking flight.

Flying was fun, Hugo always said,
Hitting the net, there lay the dread.

If the cannon's aim was a trifle low,
His abrupt landing may close the show.

If the trajectory was a bit too high,
Perhaps a wave, as he went streaking by.

As Hugo performed, one evening at the fair,
A television reporter, with camera, was there.

Later that night on the eleven o'clock news:
"This just in, from our camera crews!"

"Why pay at the fair, to see this production?
See it free here, no commercial interruption!"

Hugo cried foul: "They have stolen what I do!
Why they might as well have pilfered my shoe!"

Defendant brandished the amendment, first:
"If of public interest, we must quench the thirst."

The Supreme Court disagreed, occasioning some surprise:
"This is not the protection, the first amendment supplies."

"For Plaintiff's efforts at creative exploration,
He deserves rewards, not misappropriation."

"Plaintiff seeks not to suppress public view,
He wants only the compensation he is due."

"Nothing about the freedom of expression,
Entitles Defendant to robbery at discretion."

Right of publicity trumped first amendment,
A rare result, and unfavorable for Defendant.

So, when Hugo next takes to the air,
You can see it, only if you're there.

If he misses the net, and comes to grief,
Your admission fee will provide his relief.

The news announcer: what now can he say?
"There goes Hugo, and . . . good day!"

F. *SIDIS V. F-R PUBLISHING CORP.*, 113 F.2D 806 (2D CIR. 1940)

Legions of first year Torts students have marveled at the mental prowess of William James Sidis, a famous child prodigy in the early 1900s. He had composed a treatise on anatomy at age five, and a new table of logarithms at eight. He entered Harvard at age eleven where he lectured the professors there on four-dimensional bodies. He was graduated from Harvard at age sixteen. Subsequently, however, he retreated from the public eye and sought to live as unobtrusively as possible. Several years later, defendant magazine published an article about Sidis, recounting his general breakdown and intimate details of his personal life. Sidis sued defendant for violation of his right to privacy, and the federal court, stressing Sidis' newsworthiness, rejected the action.

William Sidis: A prodigy child,
With a silly giggle, a manner mild.

But this kid, was world renowned,
His fame and feats, known all around.

They told the story, of when at three,
He learned to type, on his father's knee.

At five, he wrote an anatomy book,
They gave him a pen, that's all it took.

It was logarithms, at the age of eight,
Before most tykes, could clean their plate.

At eleven, he enrolled at Harvard U.,
Where he proved to all, how much he knew.

Soon thereafter, the news was sad,
A nervous breakdown: William felt bad.

He recovered somewhat, but was never the same,
Rather, retiring, and shy, with a revulsion to fame.

William drifted around, with profile low,
He desired no part, of publicity's glow.

"A perfect life," was his delusion,
Lived alone, in remote seclusion.

Reporters still tried, for interviews,
But William ran, he gave no news.

Finally, "The New Yorker Magazine":
Ran an article, William thought obscene.

He sued, he demanded his solitude,
Not notoriety, or vapid platitudes.

He complained not, of any falsehood,
Only public scrutiny, he thought not good.

He deemed a man, entitled to privacy,
Not the prey, of journalistic piracy.

But all the courts, to which he appealed,
Found limitation, on the right he did wield.

Rather, they fashioned, a privacy exception,
For those in the glare, of public affection.

It was newsworthy, they did proclaim:
William's fate, and subsequent shame.

The public, they said, had a right to know,
A right, they opined, that laid privacy low.

The good, the bad, the in-between,
All the province of the media machine.

Whether authenticated, or verified,
Maybe an error, perhaps they lied.

So, if ever you become a figure of news,
It's much like having a hole in your shoes.

You may complain, and some may care,
But, in the end, it just isn't there.

XIV. DEFAMATION

A. *YOUSSOUPOFF V. METRO-GOLDWYN-MAYER PICTURES*, 50 T.L.R. 581 (C.A. 1934)

In formulating the law of defamation, much attention was afforded the standard by which the alleged publication was to be judged defamatory. An ever-popular English case on the issue, *Youssoupoff* featured a complaint by a Russian princess to a movie presentation of the influence allegedly exerted by the "mad monk" Rasputin upon the Russian royalty. That influence, it was alleged, brought about the destruction of the country. The plaintiff charged that the film portrayed her as having had sexual relations with Rasputin, thereby defaming her. Defendants contended that the movie contained nothing defamatory of the plaintiff, a contention rejected by the English court. Both its drama and its historical setting (Rasputin was eventually murdered by a group including plaintiff's husband, the prince) keep the *Youssoupoff* case popular in defamation law.

History is deep, around the story.
The Russian empire, in all its glory.

In those days, the plots were thick,
To keep one's head, one must be quick.

Loyalties were mixed, one never knew,
What was false, and what was true.

Unscrupulous factions, actors in league,
Threats, conspiracies, and excess intrigue.

One day in power, the next day out,
Little of stability, much in doubt.

In this setting, charged with malice,
A purported monk, entered the palace.

A man of mystery, of mystic power,
He visited the Czarina, in a sad hour.

Her child lay dying, all did fear,
Until Rasputin, did draw near.

He cured the child, to all acclaim,
The Czarina most grateful, did remain.

Rasputin's control of palace transactions,
Encountered the wrath of other factions.

They hatched a plot, and then did deliver,
The mad monk's body to the Neva River.

After the murder, a rumor took hold,
How, of Rasputin, they gained control:

The Princess was used, as seductive bait,
To lure the mad monk, inside the gate.

This was the account, many years later,
Portrayed by a movie, in every theater.

The Prince and Princess, were not amused,
The facts, they charged, Defendant abused.

They brought an action, claiming defamation,
Viewing the film, the jury gave compensation.

On appeal, Defendants disclaimed violation,
They argued no harm to Plaintiff's reputation.

Portraying her unchaste, Defendants maintained,
Would cause no viewers, to regard her as shamed.

This position, the court forcefully rejected,
It could not be allowed, to go uncorrected.

"I only wish we knew," said the court in fury,
"The view taken of this argument, by the jury."

By what standard, could this not be libel,
When what it imputed, violated the Bible?

To depict Plaintiff raped, by a man so pathetic,
Worked falsely and fatally, to her total discredit.

No court would hold Defendants exempt,
For exposing Plaintiff to such contempt.

But the court's opinion, left open to debate:
If, by a *good* man, Plaintiff had been raped?

B. BURTON V. CROWELL PUBLISHING CO., 82 F.2D 154 (2D CIR. 1936)

The *Burton* opinion is one of Judge Learned Hand's most famous. A magazine advertisement of Camel cigarets contained pictures of the plaintiff, "a widely known gentleman steeplechaser," with legends recommending the product. One picture showed plaintiff holding a saddle and "over the seat at his middle a white girth falls loosely in such a way that it seems to be attached to the plaintiff and not to the saddle," causing the picture to become "grotesque, monstrous, and obscene." Although maintaining that the picture "asserts nothing whatever about the plaintiff, even by the remotest implications," Judge Hand nevertheless held it to be libelous. The colorful facts of the case, and the debatable nature of Judge Hand's decision, render it a favorite for Torts casebooks.

Plaintiff posed, with saddle in hand,
A picture taken, where he did stand.

It then appeared, in advertisement style,
One look at result, caused all to smile.

A girth on the saddle, fell loosely and free,
It seemed of the Plaintiff, a part to be.

Viewed by Judge Hand, as grotesque and obscene,
Although not published, with an intent to be mean.

Obviously, said the Judge, the camera misfired,
Against Plaintiff, he said, no one had conspired.

Could it be a libel?, the issue in litigation,
If, about Plaintiff, it gave no implication?

Although, of Plaintiff, no falsehood asserted,
He became a spectacle, by the image perverted.

In the minds of others, he may forever remain:
A victim, the object of preposterous disdain.

Indeed, said the judge, the gist of defamation,
Was not so much injury, to one's reputation.

Rather, he opined, with distinction in extreme:
Plaintiff's feelings of repulsion, and light esteem,

In this fashion, and by this analysis,
Plaintiff's case escaped, legal dialysis.

Now off the lifeline, resurrected in stance,
A trial, to recover for this absurd mischance.

Libel can thus exist, it now comes through,
Though nothing is asserted, either false or true.

If the law has been changed, in manner so grand,
It's all permissible: It was done by Judge Hand.

So, if it appears, your girth hangs low,
There is one comfort, one truth to know:

If your pendulum swings, fro and to,
Well, so what? The law does too!

C. *E. HULTON & CO. V. JONES*, [1910] A.C. 20

The "Artemus Jones case" has long served as a classic illustration of the common law's "strict liability" in defamation. There, defendant newspaper ran a gossip item, using what they believed to be a fictitious name: "Artemus Jones, a church warden at Peckham." Plaintiff lawyer, named Artemus Jones, though not a church warden nor a resident of Peckham, produced witnesses who had believed the published item referred to the plaintiff. The English House of Lords imposed liability on defendant, reasoning that reasonable belief was irrelevant. If in fact it used a name which others may reasonably believe referred to plaintiff, defendant's good intentions were no defense. One of the judges said the issue was not who was meant, but who was hit.

"Artemus Jones" was Plaintiff's name,
"It has been," he said, "always the same."

He was a lawyer, a profession sound,
Clients he served, all over town.

"My reputation is good, my word is too,
Everyone knows, what I say is true."

"If it was thought, I was a bum,
Clients rarely, to me would come."

"My name, therefore, beyond reproach,
Let no man, henceforth, upon it encroach."

Defendant newspaper, widely read,
People believed, everything it said.

One day, its star columnist reported:
"Artemus Jones, with women consorted."

"Who would believe?" it looked askance:
"He acts this way, when he comes to France?"

Suddenly, Plaintiff's friends and clients,
All treated him, with marked defiance.

They wanted no part, understandably so,
Of any lawyer, who stooped so low.

Plaintiff sued: "What you did was vicious!"
Defendant responded: "It was all fictitious!"

"We had no intent, we knew you not,
Who would believe, the name you've got?"

"Well," said Plaintiff, "we'll just have to see,
How the law views, what you did to me."

The law deemed the matter, clear beyond doubt:
No intent need be shown, no fault to point out.

"Your intent may be pure, you acted with care,
Still, Plaintiff's reputation, you must now repair."

"His friends had no clue, no way they could know,
You spoke not of him, and your report was not so."

"Fiction is fine, if kept in its place,
It cannot be used, others to disgrace."

The moral seems clear, well understood:
What Defendant did, was not very good.

When next you write: of sex, blood, and bones,
Don't dare use the name, of Artemus Jones!

D. *TERWILLIGER V. WANDS*, 17 N.Y. 54 (1858)

The harm protected by the law of defamation was historically said to be damage to plaintiff's reputation and not injury to his feelings. Early cases went to pains to make that point, insisting that plaintiff allege and prove injurious reactions by third parties because of the defendant's publication. *Terwilliger* is a famous old case in which defendant published that plaintiff was keeping Mr. Fuller in jail so that he, the plaintiff, could "continue to enjoy Mrs. Fuller's favors." The court rejected plaintiff's proof that defendant's publication made him ill, unable to work, and required that he hire workers. None of that, the court reasoned, evidenced injury resulting from damage to reputation.

Vile the report, and gossipy too,
Something Plaintiff would never do.

Malicious, atrocious, of unseemly flavors:
That Plaintiff enjoyed Mrs. Fuller's favors.

Defendant spread the rumor all over town,
Others told Plaintiff it was going around.

To be accused of such outrageous conduct,
Caused Plaintiff promptly to self destruct.

"Why I hardly know her!" he alleged,
"We have only talked over the hedge."

The reports, however, continued their course,
Others asked Plaintiff: "Did you get a divorce?"

"Stop! Stop!" cried Plaintiff in utter disgust,
As in the eyes of others, he saw their distrust.

Finally, Plaintiff started to break,
He had had more than he could take.

He began to sing in the middle of the night,
And then his dog, he attempted to bite.

He ran screaming through his house,
Claiming a visit from Mickey Mouse.

He tore his clothes and platted his beard,
To say the least, he was acting weird.

He became disabled, completely undone:
He could neither work, nor have any fun.

His crops suffered, his house fell down,
He had to hire workers to plow the ground.

"If the law will not help me, in my despair,
Then the law is an ass!" he did declare.

But the law turned away, it offered no aid,
To Plaintiff, it said: "No case have you made."

"No actions by others have you demonstrated,
Caused by the tales that were circulated."

"It may well be that no one thought them true:
Mrs. Fuller would never have trifled with you."

"As for your grief, depression, and labor hired,
Perhaps it is high time that you retired."

So spoke the law, and the law did then snort:
"Defamation, you see, is a relational Tort!"

Perhaps, thereafter, Plaintiff well understood:
To call the law "an ass" will do you no good.

E. *WATT V. LONGSDON*, [1930] 1 K.B. 130

Defamation's nonconstitutional defense of "privileged communications" possesses a lengthy history in the common law. All agree that the law excuses the defendant on some occasions for publishing a false defamatory communication about the plaintiff. In determining the appropriate occasions, a delicate balance operates between reputation and freedom of communication. That balance focuses upon the communication interests of the sender and receiver, as well as situations of mutual interests between them. *Watt v. Longsdon* is a famous English case in which the court decided, inter alia, that defendant's communication of the plaintiff's "matrimonial delinquencies" to plaintiff's wife did not enjoy the privilege.

Plaintiff and wife had been, of course, wed.
They enjoyed the relation and the life they led.

Not to say there were not, and on occasion:
Instances of strife, and tension invasion.

He said, she said, and so it went,
Until all anger was thoroughly spent.

Then a compromise, and each would purr:
In the future, he would always obey her.

Like most married couples, downs and ups,
Some dishes thrown, but not many cups.

As the years ticked by, minute by minute,
They treasured their union, glad to be in it.

Defendant, however, received a report:
Plaintiff had a mistress, and such import.

A few days later, and without authentication,
Defendant to Plaintiff's wife sent the information.

She was hurt, angry, and distraught, of course,
Indeed, in fairly short order, she filed for divorce.

Plaintiff was puzzled—what could it be?
He disclaimed in passion—no mistress had he!

This scurrilous dispatch—whence did it arise?
It was the Defendant—he spread these lies!

Evil, Plaintiff charged, to transmit the matter,
Repeating without care, such malicious chatter.

Defendant, however, a privilege he claimed:
A duty, he argued, to defame the defamed.

Additionally, he asserted, and to no small degree:
The report, Plaintiff's wife had an interest to see.

"Duty" and "interest"—the crucial elements:
Serving to justify, all future developments.

Considered by the law, Court of King's Bench:
The Defendant's report, of the Plaintiff's wench.

On "duty" and "interest," the court agreed:
Those were the elements of privilege, indeed.

Thereby concurring, with Defendant thus far,
The court proceeded, however, to raise the bar:

Showing such charges, to Plaintiff's wife,
Fulfilled no duty, in Defendant's life.

No duty to communicate: to spread lies,
Not moral, not social, and not otherwise.

To disclose the report, to continue to tattle:
Placed Defendant up creek, minus a paddle.

When in the future, about your best friend:
you receive reports, that cause you to grin,

However envious, you may secretly be:
Don't prompt his spouse to set him free.

Otherwise, the law may well hold him due:
Favors of his mistress and a tribute from you!

F. *CARR V. HOOD*, 170 ENG. REP. 983 (K.B. 1808)

Carr is the classic case on whether criticism published under the "fair comment" privilege in defamation law must in any sense be "fair." There, defendant published scathing criticism of a book written by Sir John Carr, allegedly causing special damages to Carr who argued that the ridicule and criticism were unfair. The English court (Lord Ellenborough) held that criticism on merits of the book, not reflecting on the plaintiff's personal character, was privileged as fair comment on literary works. Ellenborough rested on the rationale that the public should be told of works of poor quality. That rationale drew criticism, in turn, by others who argued that "fair comment" is privileged because it is "comment" on works in the public domain, whether those works be good or bad.

Sir John Carr published many books,
About his travels, to assorted nooks.

Those travels described, in comments extended,
As though upon them, the free world depended.

All details included, in page after page,
So lengthy to read, that readers did age.

Any facet omitted, he seemed to fear,
Would cause deprivation, most severe.

His knowledge, he thought; nay, he insisted:
Surpassed all others, whom had ever existed.

All in all, some asserted, a pontifical bore,
Yet sales of his books, continued to soar.

Finally, the Defendant, acting all alone,
Took Plaintiff to task, in a book of his own.

Sir John, said Defendant, was not very cool,
His writings, he exposed, to great ridicule.

He made much fun, of what Plaintiff had written,
Delusions of grandeur, with which he was smitten.

His books, Defendant charged, were heavy tomes,
Their weight might damage, the purchasers' homes.

The Plaintiff cried "foul!" to Defendant's attack:
"He has no such right—he must take it back!"

"My books," Plaintiff complained, "no longer sell,
For Defendant's dire criticisms, I can not dispel."

"Although he may comment, in public domain,
From basic unfairness, he must ever abstain."

"My damages are great, justice I demand,
Or else all authors, might as well disband."

The English court, was singularly unimpressed,
And Plaintiff's argument, it deemed second best:

"If your books are bad, and your work inane,
Anyone who wishes, may of them complain."

"The public, we think, is entitled to know:
Which quality is high, and which is low."

"If damages you suffered, from such comment,
We hope it was money, you had not yet spent."

"When books are published, for others to read,
All others may comment, with deliberate speed."

"There is liberty of the press, for all to enjoy,
Not just such liberty, as you may employ."

The lesson from the case, all may share:
Law's "fair comment" need never be "fair."

G. *NEW YORK TIMES CO. V. SULLIVAN*, 376 U.S. 254 (1964)

New York Times Co. v. Sullivan receives credit for revolutionizing the common law tort of defamation. There, the newspaper carried an ad based upon a statement of facts, some of which were conceded to be false. On the libel suit of a city police commissioner in Alabama, the United States Supreme Court held that public officials could sue in defamation only upon proof that defendant made the statement about their official conduct with "actual malice," *i.e.*, "knowledge that it was false or with reckless disregard of whether it was false or not." The decision considerably diluted the common-law distinction between "fact" and "opinion." Now there could be no recovery even for a false statement of fact unless made with actual malice.

The law of defamation, as long held intact:
A distinction between, "opinion" and "fact."

The former permitted, in many contexts,
Simply as comment, upon sundry effects.

If the facts on a public official were true,
For an opinion on them, little could he do.

But if the opinion stated false facts,
Then Defendant invited legal attacks.

This the "law," in broad panorama,
It was equally the "law," in Alabama.

Until the era, a civil rights revolution,
Placed its imprint, on legal evolution.

A newspaper stated facts that were fiction,
A police official charged tortuous infliction.

He sought damages against the *Times*,
The jury awarded a good many dimes.

This the rule, when facts were deficient:
Privilege of comment was insufficient.

Something, however, did not set quite right,
The newspaper appealed, with all its might:

"We deserve some leeway," it perfected,
"Even on facts, not completely corrected."

But Plaintiff held fast, no quarter he gave:
The facts were false, the charge was grave.

The Supreme Court, then took the case,
It changed the rule, but not post haste.

Rather, an opinion, of inordinate length,
In history and policy, it found great strength.

The majority rule, the Court disposed:
A burden on expression, the rule imposed.

The risk to society, loomed far too intense,
A more lenient approach, made better sense.

The Court harkened back: the Act of Sedition,
Our country's heritage: its most sacred tradition.

Jefferson and Madison: our forefathers all,
Free expression: a precious right stood tall.

The public official, his conduct performed,
The risk he must take, of being scorned.

Robust debate: Constitutional guarantees,
Though the officer is smitten, to his knees.

Even of false facts, he cannot complain,
Although negligently applied, to his name.

To squelch such matter, the Court did fear,
Might dampen the debate, it held so dear.

"A federal rule," it thus announced,
For the official, he who felt trounced.

"Actual malice," the official must show,
On the part of the critic, who laid him low.

Knowledge of falsehood, reckless disregard:
Such were the standards, no matter how hard.

As for Defendant *Times*, here in this case:
Those standards, its conduct did not embrace.

Even false facts, perhaps causing harm,
Still failed to trigger, the Court's alarm.

For all public officials, a message bewitching:
"Act like Jefferson, or get out of the kitchen."