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Richard Epstein, Strict Liability, and the History of Torts

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Abstract

Epstein's strict liability model of tort law, first stated in 1973, relied on arguments derived from the history of the common law, starting with the late medieval period and extending into the nineteenth century. Since that seminal article was published, legal historical scholarship has deepened our understanding of earlier tort law and brought many new sources to bear, and it has also uncovered a pervasive if quiet Romanistic influence on doctrinal development. None of this new work overturns Epstein's historical intuitions, and his strict liability theory can continue to claim support in the practices of the older common law.

KEYWORDS: torts, strict liability, legal history, fault liability, causation

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I. EPSTEIN'S HISTORICISM

The historical elements supporting Richard Epstein's distinct model of the common law of torts are outlined in his initial essay *A Theory of Strict Liability* in 1973.[1] Epstein greatly elaborated the historical underpinnings of the model in his later work, notably in the *Cases and Materials on Torts*[2] and the 1999 treatise on *Torts.*[3] His engagement with the history as well as the theory of tort law has been sustained across many decades. So I begin this review of the historical dimensions of Epstein's tort theory with a meta-question. Did the strict liability theory evolve from an interpretation of the legal history? Or did the model arise from philosophical or ideological commitments, with the historical evidence integrated as an 'essential ornament', the additional trope that expresses and supports the essence of the main argument? The answer is probably yes to both. In Epstein's words: "Common law judges have examined these issues through a long historical dialogue."[4] History is important to Epstein because he is acutely aware that historical learning can give a fresh perspective, through displacement in time and space, detaching us from our own enveloping legal culture, and helping us to see deeper truths. Amongst modern American jurists, perhaps only Epstein could seek lessons for common-law interpretation by looking at the Lex Aquilia of the 3rd Century BCE:

> To see how the common law works, I will examine…not the common law or our own system, but the common law as it developed casuistically in Rome, where the rules of tort law were remarkably similar to our own. The historical remoteness of the Roman law system is, for these purposes, a point in favour of making the comparison. If the approach of Roman lawyers can survive the enormous transitions of space, time, and circumstance, as the Roman rules of tort have done, then there might be less than meets the eye to the frequent assertion that our common law rules are short term matters of convenience…[5]

It is abundantly clear that Epstein acquired many of the tools to construct the strict liability theory from his legal studies at Oxford in the mid-1960s, where he

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[1] Richard A. Epstein, *A Theory of Strict Liability*, 2 JOURNAL OF LEGAL STUDIES 151 (1973).

[2] RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (9th ed, 2008). Epstein was lead author of this work from the 3rd edition of 1977, with the book titled under his sole name from the fifth edition of 1990.

[3] RICHARD A. EPSTEIN, TORTS (1999).

[4] CASES, *supra* note 2 at 102.

[5] Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 BOSTON U. L. REV. 699, 704 (1992).

studied the traditional Roman-law and common-law syllabus with its strong historical consciousness, alongside the new analytical jurisprudence then being formulated by Herbert Hart, Tony Honoré, and their peers and students.[6] So Epstein's *Theory of Strict Liability* straddles traditions: it is a classic of American legal analysis and at the same time a typically Oxonian contribution to jurisprudence. In his tort writings as in the rest of his lucid, learned and inventive work Epstein bridges the divide between the American and English common law worlds.[7]

II. A THEORY OF STRICT LIABILITY (1973)

The justificatory arguments for strict liability set out in Epstein's 1973 article and developed in his later writings fall into two main parts. The first part, privileging factual causation in fixing liability, has attracted the most attention; but there is also much to consider in a second raft of arguments dealing with aspects of legal justice: settlements, corrective and distributive justice, the primacy of property and contract rights, and finally the natural law underpinnings of our legal system. We must hold in mind all these dimensions of the strict liability theory before turning to examine Epstein's deployment of legal history.[8]

A. Causation and Strict Liability

At its core *A Theory of Strict Liability* is an argument about the role of causation in establishing responsibility in tort. Epstein notes that the basic 'but-for' factual test for causation creates absurd results and needs to be reined back; but finds the traditional policy-driven filters for 'legal causation' applied by modern courts (proximity, remoteness, and so on) to be unacceptable arrogations of discretionary power hiding behind vague causal language that no-one really believes has any justificatory bite. The 1973 article sought to rescue causation-based liability from those empty and cynically deployed legal formulations. Against causation skeptics like Calabresi and Coase, Epstein argued sardonically:

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[6] Richard A. Epstein, *The Modern Uses of Ancient Law*, 48 S. CAROLINA L. REV. 243 (1997); Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OXF. J. OF LEG. STUD. 219 (2005). Epstein also traces his interest in constitutional protection of property to his time studying private law in Oxford; see his book SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL RESPECT FOR PRIVATE PROPERTY xv-xvi (2008).

[7] The links between American and British common lawyers were much stronger a century ago, as shown by David M. Rabban, *From Maine to Maitland via America*, 68 CAMB. L.J. 410 (2009). Today jurists like Jeremy Waldron, Ronald Dworkin and Richard Epstein who work effortlessly in both traditions are rare, and of this group Epstein is unique in his engagement with the case-law details of both legal cultures.

[8] The following summary of *A Theory of Strict Liability*, *supra* note 1, is augmented by material from TORTS, *supra* note 3, at 85-107 and CASES, *supra* note 2, at 101-214.

> …the question of proximate cause has been said to reduce itself to the question of whether the conduct of the defendant is a "substantial factor" contributing to the loss of the plaintiff, or whether the harm was "reasonably foreseeable"…. One might think that this would be treated as a defect in an account of a concept like causation, but in large measure it has been thought to be its strength. Once it is decided that there is no hard content to the term causation, the courts are free to decide particular lawsuits in accordance with the principles of "social policy" under the guise of the proximate-cause doctrine.[9]

What to put in place of 'social policy'? Epstein here follows Herbert Hart and Tony Honoré's treatment of the problem in *Causation and the Law* (1959) to argue that there can be determinate concepts of causation, allying commonsense views with discriminating juristic categorizations derived from case law. Causation is not a rival theory competing with 'policy' in attaching tort liability to harmful conduct; causation is in and by itself the core policy explaining why we attach liability, and we discover how causation works through the casuistic experiments of the law. Epstein details the four main causal categories operating in common law as 1. application of force (*A* hit *B*), 2. fright or shock (*A* frightened *B*), 3. compulsion (*A* forced *B* to hit *C*), and finally, 4. dangerous conditions (*A* created a dangerous condition that resulted in harm to *B*).[10] In all of these cases Epstein claims that the causal relationships are transitive and not reciprocal; *A* acts upon *B* and trenches upon *A*'s rights in a manner different than how *B* is affecting *A*. In other words the relationship is not symmetrical and reflexive. Coase *et al.* are wrong to claim that the farmer who sues to stop the manufacturer from polluting is imposing a burden on the manufacturer in a relevantly similar fashion to the manufacturer whose pollution burdens the farmer; the manufacturer who is stopped from polluting is only being enjoined by law from pursuing his interests as he pleases. By contrast, the manufacturer who does pollute is actively causing harm; his intervention in the world is changing the world for the worst.[11] Stating that your nose got in the way of my freely swinging fist sounds funny to the lay ear because it is intuitively wrong; but it also has a seductive appeal to the antinomian tendencies of intellectuals, especially economists. Epstein stands against that appeal, but he does not entirely reject economic or utilitarian calculation in assessing the allocation and enforcement of rights. He suggests that a strict liability system as a simple and comprehensible

[9] *A Theory of Strict Liability*, *supra* note 1, at 162-3.

[10] *A Theory of Strict Liability*, *supra* note 1, at 165-85.

[11] *A Theory of Strict Liability*, *supra* note 1, at 164-5. Compare the formulation: 'to cause something is to *intervene* in the existing or expected state of the world': TONY HONORÉ, RESPONSIBILITY AND FAULT 2 (1999) (emphasis added).

measure of justice turns out to be cheaper to run because rights to redress are delineated far more clearly.[12] It is a constant theme in his work that utilitarianism has its place as a supporting argument, but cannot be allowed to overwhelm or displace questions of rights and causality at law; rather, common-law technique can empirically yield patterns of rights of high efficiency without directly aiming at maximization.[13] Epstein acknowledges that in many transitive causal relationships the response of the affected party does require a judgment call that may curb liability. In that type of case such judgments should be remitted as questions of fact for juries or triers of evidence, and do not form part of the *prima facie* test of legal cause. So the law can rightly enquire into why *B* was in a position to be hit, to be frightened, to be compelled, to succumb to a dangerous condition etc.; and if *B*'s conduct was groundless or inexcusable or unjustified, this can be treated as a question of fact, and at *that level only* the transitivity of the *prima facie* causal finding is disrupted.[14] This approach inscribes the practice of

[12] *A Theory of Strict Liability*, *supra* note 1, at 188-9; TORTS, *supra* note 3, at 91-107; Richard A. Epstein, *The Economics of Tort Law: A Hurried and Partial Overview*, 10 KANSAS J. OF L.& PUB. POLICY 59 (2000). Epstein's intuitions concerning efficient processing of claims under a strict liability regime are assailed by Richard A. Posner in *Strict Liability; A Comment*, 2 J. LEG. STUD. 205, 217-20 (1973) and *Epstein's Tort Theory: A Critique*, 8 J. LEG. STUD. 457 (1979). Posner also doubts Epstein's claims that strict liability can be based on voluntarism and respect for rights, or that it can restrict judicial discretion through common-sense causal tests.

[13] Epstein's evolving thought on the tension between utilitarianism and rights can be followed in *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. OF LEG. STUD. 49 (1979); *Are Values Incommensurable, or Is Utility the Ruler of the World?* UTAH L. REV. 683 (1995); *One Step Beyond Nozick's Minimal State: The Role of Forced Exchanges in Political Theory*, 22 SOC. PHIL. & POLICY 286 (2005).

[14] I will not here broach the relationship of Epstein's theory to later refinements of the Hart and Honoré causation model, notably the idea of testing legal cause as a 'necessary element of a sufficient set' as propounded by Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988); cf. Tony Honoré, *Necessary and Sufficient Conditions in Tort Law*, in RESPONSIBILITY AND FAULT 94 (1999); Jane Stapleton, *Cause-in-Fact and the Scope of Liability for Consequences*, 119 L. Q. REV. 388 (2003). The latest wave of tort theory suggests that liability to compensate, whether strict or fault-based or some combination, depends critically on the existence of a prior legal duty not to injure or harm, so that rights analysis comes before causal analysis: see Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72 (Gerald J. Postema ed., 2001) 72; John Gardner, *Obligations and Outcomes in the Law of Torts*, in RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY 111 (Peter Cane and John Gardner eds., 2001); ROBERT STEVENS, TORT AND RIGHTS 92-172 (2007). The question then arises where the prior legal duty supporting the correlative right comes from, if not in some moral impulse of the law to require a real-world harm to one person to be compensated by some other person identified as responsible in the causal chain: see Tony Honoré, *Responsibility and Luck. The Moral Basis of Strict Liability*, in RESPONSIBILITY AND FAULT 14 (1999); Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXF. J. LEG. STUD. 1 (2010).

English (and American) common-law courts interacting with jury fact discretions up until the end of the nineteenth century, before the Holmes-Pollock theory of tort law as objective moral duties specified by the court took hold.[15]

Epstein's key assumption, then, is that that articulate categories of legal causation can be identified from the empirical data of the case law by judges and jurists; this can be seen as an echo of the ordinary language school of legal philosophy prevalent in the 1950s and early 1960s in Oxford and elsewhere.[16] Hart and Honoré, however, went on to argue that the scope of the ordinary factual inquiry into cause is conditioned by reference to the social function that the causal inquiry pursues in each legal context. Epstein does not foreground such social conditioning; for him a simple workable distinction may be drawn between legal and factual causal inquiries, where policy is wrapped up in the traditional doctrines of the law and is not subjected to curial discretion. It then becomes possible to see tort law as founded on *prima facie* strict liability, subject to relevant defences pleaded by the defendant (D), such as inevitable accident, or supersession of D's causation by P's own causal responsibility for the harm, or that of some other person or factor. Early law hid the defences (or excuses or justifications) in the pleading rules shifting the onus to the defendant, and also in the hidden deliberations of the jury; modern law brings the defences to the surface as doctrine controlled by the court. But it is best to see departures from *prima facie* liability based on factual causation as true defences rather than *ex ante* restrictions on initial liability. This, Epstein argues, is the best possible system of rights maintenance, notwithstanding the surface language of fault liability that has dominated the past century of tort law. The superadded requirement of *prima facie* fault in the conduct of the defendant, whether an intention to harm or negligence in harming, which is so obviously the centerpiece of modern tort law, is rendered superfluous or vacuous above all by the *objectivity* of the fault standard. There might once have been ideological comfort in claiming that fault liability added a moral dimension to tort law, and has 'replaced the unmoral standard of acting at one's peril';[17] but for Epstein this moralizing language can and should be replaced by clear-eyed causal language. Epstein also doubts attempts by unsentimental jurists from Holmes to Posner to argue that a system of tort law cannot be a rational deterrent and guide to action if it does not announce clear *ex ante* fault rules to guide the populace. For Epstein formulating tort

[15] CASES, *supra* note 2 at 146-153, quoting OLIVER W. HOLMES, JR, THE COMMON LAW 77-84, 88-96 (1881).

[16] Compare Tony Honoré, reflecting on the line of thought leading to CAUSATION AND THE LAW (1st ed. 1959): 'Hart and I were concerned with the analysis of how ordinary people and lawyers used causal language in assessing liability for conduct and events that caused harm': RESPONSIBILITY AND FAULT, *supra* note 14, at 1.

[17] James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908), cited in *A Theory of Strict Liability*, *supra* note 1, at 153.

liability in strict causal terms can create rational guides to action at least as powerful as fault standards. In practice fault liability, based on *ex post* analysis of complex counter-factual antecedent precautions, delivers a system dedicated above all to the enrichment of lawyers, and delivering along the way too much political power to judges.

B. Strict Liability and Justice

1. Settlements

Epstein acknowledges that his model of *prima facie* strict liability subject to defences has clear overlap with fault liability, in that a defendant who causes a harm and is shown to be at fault in doing so will often equate to a person who causes a harm and can show no justification or excuse for what has been done. The great difference, which is present within Epstein's analysis but should be brought to the fore, is that strict liability is procedurally a sharper protection of plaintiff's rights, precisely because only factual cause need first be established by the plaintiff; the onus then shifts to the defendant to escape the liability. The shading of fault liability into strict liability in certain stereotypical cases of harm is made quite clear through formal shifting of the probative onus to defend through the maxim *res ipsa loquitur.*[18] Placing the onus onto the defendant to disprove a *prima facie* liability will make settlement of claims on more favourable terms for the plaintiff more likely. That is because predicting a curial result where the defendant bears the considerable onus of having to establish a defence to escape liability based on cause ('I was justified in my action notwithstanding my causal contribution to loss'; 'I ought to be excused despite my causal contribution'; 'the victim or a third party was more causally responsible than I was', and so on) will attract a lower discount rate of the plaintiff's chances than under a fault regime, where the plaintiff bears the onus of establishing fault as well as causation, which could amount to the onerous task of pre-emptive elimination of all possible defences. Hence a higher discount rate will apply to the plaintiff's chances in a fault regime. The added litigation costs for the defendant in establishing defences (under strict liability) or for the plaintiff in establishing absence of reasonable precautions (under fault liability) will only reinforce the relevant discount rate applying in each case. Moreover the English rule which allows the winner recovery of costs following the event further buttresses the plaintiff's litigation position under strict liability; defendants who cannot produce reasonable pleadings face automatic payment of plaintiff costs as well as the likelihood of losing the case itself, and this ramps up the pressure to settle. Hence despite the normative overlap between strict and fault liability models, in practice

[18] Cf Samuel J. Stoljar, *Concerning Strict Liability*, in ESSAYS ON TORTS 267 (Paul D. Finn ed., 1989).

the two regimes will play out differently: strict liability will likely have a marked pro-plaintiff resonance, and negligence a pro-defendant tilt.

2. Corrective justice

Epstein fits the pro-plaintiff quality of strict liability into a wider moral theory. He notes that both strict liability and fault can be supported in a corrective justice analysis. Strict liability fastens liability where rationally it would lie *post facto* if a single actor encompassing both plaintiff and defendant had committed an act causing harm to own interests. Fault liability will only attach to a defendant where he took less than the reasonable care he would use to defend his own interests *ex ante*, if he were a single actor encompassing plaintiff and defendant interests. By dividing plaintiff from defendant, we can see strict liability as enterprise liability – pay for the losses you inflict in pursuit of gains through your activities; or to use a different vocabulary, internalize your externalities. Strict liability thus makes a corrective claim based on a definite moral argument about responsibility; it is not an 'amoral' argument as the fault liability theorists sometimes claim, just a different moral perspective than the principle that liability can only be attached to blameworthy conduct.

Since Epstein's early essay, corrective justice theorizing has become a major focus of academic effort. Arguably much of this theorizing has been too fixated on defining the conditions for responsibility for losses or harms disturbing pre-existing states, and too little interested in identifying the underlying normative duties that render breach of such duties a civil wrong, independently of loss or disturbance of interests. In other words corrective justice as a monotonic principle is too thin; it needs to be joined to theories of how benefits and burdens can justly be distributed by social institutions such as law.[19] But this inquiry outstrips Epstein's narrow claim for the minimal justice of strict liability regimes, which merely argues that strict liability regimes are at least compatible with a corrective justice approach, if not mandated by such an approach.

3. Distributive justice and the subsidy thesis

Given his pro-plaintiff tilt, Epstein might be thought to have some affinity with 'subsidy' theorists such as Morton J. Horwitz who argued that historically the shift in the nineteenth century from strict to fault liability was developed by

[19] The exuberant growth of corrective justice theories of tort is sceptically appraised in John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, U. OF OXF. LEG. RES. PAPER SER., 1/2010 at http://ssrn.com/abstract=1538342 (2010). John Goldberg & Benjamin Zipursky in *Torts as Wrongs*, 88 TEXAS L. REV. 917 (2010) take the corrective justice theorists including Epstein, Coleman, Ripstein and Perry to task for neglect of the key concepts of duty and wrongdoing; they exempt Ernest Weinrib from the charge sheet. See also references in note 14, *supra*.

judges in order to weaken plaintiff interests, and so help active industrialists impose uncompensated externalities on those under their power, notably neighbours, customers and employees.[20] By weakening corrective justice, fault liability is thus seen to promote a more inegalitarian distribution of risks and resources. Epstein will have none of this. First of all everyone in society is by turn an active and a passive agent, and can by turn benefit or be detrimented by either liability regime. Secondly it is not clear that strict or fault liability makes a huge difference to deterrence or to costs of insurance for any active agent. And finally, careful historical work has uncovered ambivalent evidence of at least any *conscious* policy to use the tort system as an engine of political economy favouring one class over others.[21] Epstein holds that strict liability's greatest practical benefits are the clarity and likely lower cost of administration of such a system, that is efficiency within the legal system, rather than promotion of efficient rules without (though it is fair to say that the administrative simplicity claimed for strict liability is asserted rather than demonstrated).

4. Libertarian property and contract

Epstein's strict liability theory must be viewed alongside his commitment as a libertarian to stout defence of vested property rights, by which he includes rights to personal integrity and reputation as attributes of self-ownership. The plausibility of the strict liability tort theory might therefore depend on how attractive one find's Epstein's Lockean self-ownership theory, which he claims is a foundation of all modern legal systems.[22] Epstein has written extensively on the theory of property and self-ownership, for which he ultimately offers a twinned conventionalist and utilitarian argument.[23] Linked to the self-ownership thesis is

[20] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977).

[21] See further Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982), drawing on Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L. J. 1717 (1981). This is not to say that the common law of torts in America did not have political effect: by denying liability and so allowing the imposition of externalities on workers and landowners injured by industry it had powerful implications for class power, as shown in Gary T. Schwartz, *The Character of Early American Tort Law*, 376 UCLA L. REV. 641 (1989) as well as *Tort Law and the Economy, supra;* see also Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GEORGIA L. REV. 925 (1981); John F. Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents* 1:2 J. OF TORT LAW §1 (2007). Evidence of an overt or ideologically express class tilt in English tort law during industrialization is found in RANDE W. KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM 1825-1875 (1998).

[22] TORTS, *supra* note 3, at page xxx.

[23] Richard A. Epstein, *Possession as the Root of Title*, 13 GEO. L. REV. 1221 (1979); TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L. J. 2091 (1997); *Weak and Strong Conceptions of Property: An Essay in Memory of Jim Harris*, in PROPERTIES OF LAW: ESSAYS IN

the very strong defence of freedom of contract as a hallmark of autonomy in a liberal society, linked to a rejection of any social balancing of rights by legal or governmental agencies in order to promote social welfare. Courts should not presume to balance contending social and economic interests in deciding how far to allow damage to individual's property, persons and reputations; these are vested holdings that deserved automatic and non-discretionary legal protection through strict liability rules, unless the individual has consented to weaken that protection through contract (or sometimes quasi-contract involving receipt of benefits in exchange for implicit acceptance of correlative obligation or liability). The contractarian side to Epstein's theory of obligations neatly balances (maybe over-balances) the strict liability tort theory; if strict liability favours plaintiffs, contractarianism favours defendants. Inspiration is drawn from the career of Baron Bramwell, the nineteenth-century English judge who applied the logic of *laissez-faire* individualism across the spectrum of private rights and brought the doctrine of *volenti non fit injuria* to its apogee.[24] Alongside *volenti*, the nineteenth-century judges invented the fellow servant rule and the doctrine of contributory negligence, again serving to block liability based on defendant's voluntary assumption of risk. Historians of nineteenth-century American law have pursued the role of *volenti* to show that much of the time neither strict nor fault liability pertained but rather a no liability regime based on putative acceptance of risk.[25] Epstein acknowledged that strongly protected individual rights balanced by ready contractual or voluntary reformation of liability might yield an unwieldy or politically unacceptable system of compensation, for example in the realm of industrial accidents. In such cases the state can then use its collective authority to reshape rights – though always subject to the constitutional takings requirements of full compensation for those whose rights were involuntarily degraded.

It would be an injustice, however, to reduce Epstein's strict liability theory to a subset of libertarian political theory. There have been many varieties of English

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HONOUR OF JIM HARRIS 97 (Timothy Endicott, Joshua Getzler, and Edwin Peel eds., 2006); *Introduction* to ECONOMICS OF PROPERTY LAW ix-xxxvi (2007).

[24] Richard A. Epstein, *For a Bramwell Revival*, 38 AMER. J. OF LEG. HIST. 246 (1994); cf Anita Ramasastry, *The Parameters, Progressions, and Paradoxes of Baron Bramwell*, 38 AMER. J. OF LEG. HIST. 322 (1994). In a revealing quote Lord Bramwell opposed tort compensation at common law for workplace injuries: 'it is a rule of good sense that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation which he did not stipulate': *Smith v. Charles Baker & Sons* [1891] A.C. 325, 344 (House of Lords, appeal taken from Eng.). Lord Bramwell's approach was extreme even for his time; see Michael Lobban, *Workplace Injuries*, in THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOL. XII 1820-1914: PRIVATE LAW, 1001-32 (William R. Cornish *et al.* eds., 2010).

[25] Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GEORGIA L. REV. 925 (1981); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Gary T. Schwartz, *The Character of Early American Tort Law*, 376 UCLA L. REV. 641 (1989).

and American rights theories that recoil from the policy-riddled discretions of modern law and seek to recast torts as a system for redressing pre-existing rights.[26] There is no necessary political valence to be attached here – communitarians and social liberals can be highly rights-conscious and hostile to judicial balancing of interests, whilst free-market liberals or illiberal authoritarians can be pragmatic and policy-driven and be skeptical about protection of vested rights. Striking ideological alliances were recently forged in the *Kelo* case, for example, between libertarian and social lobbies concerned to defend vested rights against the pragmatism and *étatism* of so-called liberal judges.[27] The highly contingent politics of the "rules versus standards" debate can be expanded onto a wider canvas: for example in both Britain and Germany in the early to mid twentieth century the liberal left was often far more wedded to rule-of-law virtues than those on the right of politics; the same could be said for early twentieth-first century America.

5. Strict liability and natural law

At a deeper level still, Epstein's strict liability theory fits into his wider Humean theory of natural law, announced in greatest detail in his Hart lecture delivered at Oxford in 2003.[28] There Epstein argued that both Roman law and

[26] The dispute between 'fault' and 'rights' theorists is set out historically in Michael Lobban, *The Development of Tort Law*, in THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOL. XII 1820-1914: PRIVATE LAW, *supra* note 24, at 879-902 and ff.; for modern law see James Edelman and John Davies, *Torts and Equitable Wrongs*, in ENGLISH PRIVATE LAW 1188 ff (Andrew S. Burrows ed., 2d ed., 2007). Debate over the basis of modern English tort law continues. At polar opposites, PETER CANE, THE ANATOMY OF TORT LAW (1997) stresses the sanctioning of conduct on moral and policy grounds; STEVENS, TORT AND RIGHTS, *supra* note 14, reformulates a rights-based approach keeping policy at arms' length. Unlike Epstein, both classic and modern theorists of English tort law have tended to accept the desirability of some fault ingredient in evoking liability. To take a leading example from a century ago, John Salmond, who opposed a general negligence standard, also regretted the existence of pockets of strict liability in the law: '[i]f I am not in fault, there is no more reason why I should insure other persons against the harmful issues of my own activity, than why I should insure them against lightning or earthquakes': JOHN W. SALMOND, FIRST PRINCIPLES OF JURISPRUDENCE 373 (2d ed., 1907), quoted in Lobban, *Development of Tort Law*, *supra* note 26, at 943.

[27] Epstein analyses the politics and economics of the *Kelo* case, in which he was involved as an adviser, in RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL RESPECT FOR PRIVATE PROPERTY (2008) and again in *Public Use in a Post-Kelo World*, 17 SUP. CT. ECON. REV. 151 (2009).

[28] *The Not So Minimum Content of Natural Law*, *supra* note 6; also *The Utilitarian Foundations of Natural Law*, 12 HARV. J. OF L. & PUB. POLICY 713 (1989) (exploring overlap between utilitarian and natural law thought across an array of legal issues); *The Classical Legal Tradition*, 73 CORNELL L. REV. 292 (1988) (focussing on the classical Roman contribution to basic taxonomies of law). For critique see James Allan, *Is You Is or Is You Ain't Hart's Baby? Epstein's Minimum Content of Natural Law*, 20 RATIO JURIS 213 (2007).

English common law each independently discovered over time the substance of property, contract and tort as basic building blocks of social cooperation. This evolution was achieved through systems of contingent factual and legal pleading to isolate the pertinent legal issues and permit the orderly enforcement of claims within a framework of guiding precedent. Epstein is here particularly influenced by his Roman and common-law training,[29] but I would like to pick out the special influence of S.F.C. Milsom, the greatest English legal historian of the 1960s and 1970s. Milsom famously argued that the common law evolved through winnowing of disputes in courts using a professionalized adversarial procedure, relatively immune from political or economic considerations.[30] My reading of Epstein is that, like Milsom, he perceives a 'natural history' of the common law as the source of our rights.[31] The people make the law either by living out shared customs and conventions, or else by bringing litigations before pragmatic, casuistic lawyers who devise workable solutions. Those solutions provide precedents for future disputes and settlements, and ultimately, focal points for cooperation. Key to Epstein's vision is the emergence of pleading rules whereby the parties are allowed to alternate their pleas and explore the other side's claims and defences until a polished issue of fact is joined for jury decision. The pleading of necessary fact raising rebuttable presumption, where each rebuttal in turn is subjected to counter-rebuttal, lies at the basis of legal order, whether in classical Roman law or in English common law. It places the parties in control of the articulation of their cases, addressing their claims to the fact-determining jury or judge through the medium of alternative pleading.[32] Legal intellectuals periodically intervene to give a jurisprudential summary and refinement of what was invented or discovered in practice by the people, interacting with their attorneys, judges, fact-finders, jurists and legislators. The elite jurisprudential work of the intellectuals, the jurists and writers of treatises and commentaries, feeds back into the system to influence the conduct and mentalities of those elsewhere in the legal chain. The same theory of legal evolution has been given variant expression by jurists across historical time: by Gaius and Ulpian in ancient Rome, by Henry de Bracton, Edward Coke and William Blackstone in medieval

[29] See works cited in notes 5-6, *supra*.

[30] S.F.C. Milsom, *Law and Fact in Legal Development*, and *Reason in the Development of the Common Law*, both in S.F.C. Milsom, *Studies in the History of the Common Law* 149 & 171 (1985); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed., 1981).

[31] Expressed most clearly in *The Not So Minimum Content of Natural Law*, *supra* note 6; cf S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW (2003).

[32] For common law alternative pleadings as a mode of legal discovery, see Richard A. Epstein, *Pleadings and Presumptions*, 40 U. OF CHIC. L. REV. 556 (1973); *Defenses and Subsequent Pleading in a System of Strict Liability*, 3 J. OF LEG. STUD. 165 (1974); *Intentional Harms,* 4 J. OF LEG. STUD. 391 (1975). Analogous Roman tort litigation procedures are explored in Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, *supra* note 5, at 704-12.

and early modern England, and by Savigny in Germany and Holmes in America in the nineteenth century. Perhaps more than libertarian rights theory, it is this pleading theory that lies at the foundation of Epstein's vision of tort law.

It is a beautiful theory; but it is possible to raise counter-examples to this model of the smooth evolutionary nature of law. One objection is that legal systems have often been subjected to sharp doses of political reform. For example the Roman law of property delict enshrined in the Lex Aquilia in the third century BCE may have been passed by the Plebeians to defend their small holdings during a period of class warfare, or to maintain the value of curial awards during a period of monetary inflation;[33] Henry II's assertion of royal power in the wake of the Anarchy of Stephen was the source of interdictal protection of possession outside feudal structures in the thirteenth century, marking the genesis of the common law.[34] Again the origins of the medieval English action on the case in the fourteenth century, encompassing tort and contract forms, lay in the extension of political control over the workforce in the wake of the Black Death, applying more stringent enforcement of proprietary and contractual interests.[35] And finally there is good evidence that the rise of negligence liability in the nineteenth century, in England at least, is indeed connected to the rise of industry, notably railways, as well as the development of more sophisticated insurance markets.[36] But even granted that law is periodically jolted into new directions by social change, it is still plausible to argue that the detailed architecture of legal reasoning is not crudely responsive to function, but works according to the longer rhythms of internal legal culture.[37]

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[33] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 953-1049 (1990, 1996); Alan Rodger, *What did* Damnum Iniuria *Actually Mean?*, *in* MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS 421 (Andrew S. Burrows and Alan Rodger eds., 2006); Alan Rodger, *The Palingensia of the Commentaries Relating to the Lex Aquilia*, 124 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 145 (2007).

[34] Paul Brand, *The Origins of English Land Law: Milsom and After*, in PAUL BRAND, THE MAKING OF THE COMMON LAW 203 (1993).

[35] ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381: A TRANSFORMATION OF GOVERNANCE AND LAW (1993).

[36] KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM, *supra* note 21; DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS, 169-87 (1999).

[37] For a case-study making this argument in the realm of property rights and nuisance see JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW (2004).

III. THE HISTORY OF STRICT LIABILITY

A. 'History is on Our Side'[38]

In analyzing the nature of common-law torts, legal history is especially valuable for Epstein because it shows how for centuries the common law system used a strict liability machinery, remitting questions of excuse and justification to the realm of defences subject to jury decision. Epstein claims, moreover, that this system was not primitive and inarticulate but functioned exceedingly well in protecting certain rights and interests. The early common-law history is used by Epstein to disrupt the modern conceit that fault in causing harm is the correct and obvious metric for ascribing liability. The clarity of the older strict liability common law rules was, however, compromised by insufferable procedural formalism. Litigants had a one-way choice between exclusive writs of action. On the one hand there was trespass for immediate damage caused by force or physical invasion, based on the Crown's jurisdiction to repress crime and breaches of the peace. On the other hand there was the newer action on the case for non-immediate or purely consequential damage, or misfeasance in performance of a duty, a gap-filling remedy to cover harms where trespass could not be pleaded, even fictitiously. The learning surrounding these procedural tactics was erudite and opaque, and failure to divine the correct writ would be fatal to one's litigation chances. Until the Common Law Procedure Act 1852 most of the practical learning of torts indeed concerned such procedural tactics. However by the later nineteenth century the types of tortious harms flowing into the courts changed in character as the industrial and transport revolutions created risks on a new scale, often with many interacting parties contributing to a disaster. Fault liability then arose as a unifying theory, in part reflecting new social ideologies of moral responsibility and deterrence, and in part simply to overcome the murkiness of the old forms of action. A unifying fault standard was built around massive extensions of the action on the case, so as to encompass all types of harm whether immediate or not. With the triumph of the new tort of negligence, based on assessment of the defendant's conduct in divining actionable harm, the law had developed a simpler method of bringing the new mass torts to court. But the prevailing modern fault standard was riven with contradictions, and in its complex operation proved expensive to run. History, for Epstein, might teach us that the best system of all would be a strict liability model of responsibility for invasion of rights, cleansed of the procedural tangles of earlier common law.

[38] Nikita Kruschev's apocryphal comment to Wladyslaw Gomulka at the Polish Embassy, Moscow, November 18, 1956.

Here is the key passage from Epstein's 1973 article which contains the essence of his historical argument:[39]

> The distinction between the kinds of causation [eg between direct force and dangerous conditions] is thus crucial to the development of the law. Moreover, its importance was recognized in imperfect form at common law. During the years that the forms of action controlled, English lawyers drew the distinction between trespass and trespass on the case. Each of these actions was governed by its own writ, and in the early stages at least case could lie only if trespass did not. The mistake of the common lawyers lay not in their recognition of the distinction between the forms of action, but in their insistence that trespass actions (where the causal link is clear) were actions of strict liability, while actions on the case for "indirect" harm required proof of negligence or intent.[40] That distinction makes no more sense than the modern rules which hold that automobile accidents (usually collision cases) are governed by negligence principles while products liability cases (which are never trespass cases) are governed by the principles of strict liability. Both kinds of cases are governed by strict liability principles, once the causation rules are well developed. The line between trespass and case, stated at common law and implicitly followed today, is crucial only on the question whether the causal paradigm of force or that of dangerous conditions is applicable to the case. "The forms of action we have buried, but they still rule us from their graves."[41]

Epstein later expanded this analysis of the early history in his *Cases and Materials on Torts*, and again restated the historical material with great clarity in the 1999 treatise on *Torts.* He makes the acute observation that much of the work of the king's courts in keeping the peace involved repression of intentional torts, and tortious liability therefore was not strongly differentiated from crime, and often contained a *mens rea* element. Epstein expresses surprise that once a civil tort system is up and running from the fourteenth century, the split between strict and fault liability is rarely debated but can only be inferred from procedural forms, which usually bury the reality in fictions or in the inscrutable discretions of juries, with only the occasional scrap of reported legal argument.[42] But perhaps

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[39] *A Theory of Strict Liability*, *supra* note 1, at 187.

[40] Original note: See generally C[ECIL] H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 66-73 (1949); O[LIVER] W. HOLMES, JR, THE COMMON LAW 90 (1881).

[41] Original note: F[REDERIC]W[ILLIAM] MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1936 ed.).

[42] TORTS, *supra* note 3, at 70-1.

this surprise is misplaced, since medieval tort law divided the decision-making process between pleaders, judge and jury, and would have left issues of causal and fault liability as a mixed question, partly law in the hands of the judges and fact in the hands of the jury.

B. Trespass

Epstein observes that 'trespass' in the fourteenth century had a double meaning: the non-technical idea of transgression or wrongdoing, and the specific writs covering invasive interference with another's interests. To trespass at law was to act with force and arms (*vi et armis*) against the king's peace (*contra pacem regis*), and in order to engage the royal jurisdiction parties would fictitiously plead the most fantastic violence accompanying relatively small infractions. Trespass came in three main categories, being forceful invasion including battery, false imprisonment and wrongful maiming (*vi et armis*); breaking into land (*quare clausum fregit*); and interference with goods. As a generic law of wrongs it stood as the great remedial writ for *in personam* protection of rights to property and personal integrity. It is true at some level that liability for trespass was strict – a culpable state of mind was no part of the action, but liability ensued if you invaded someone's person or property and caused harm. But this simple statement covers many ambiguities in how trespass operated, and a fault element was in fact present.

Epstein rightly highlights the *Case of Thorns* reported in the Year Book of 1466 as one of the formative cases in early trespass.[43] There a man who was lawfully cutting a hedge on his land allowed thorns to fall onto his neighbour's land, and entered that land without permission to remove them. The neighbour alleged that the trespass caused damage and was actionable. The trespasser argued that the cutting was lawful, and the consequence of the thorns falling had occurred without his intention, and hence his intentional entry into the neighbour's land was justified by the necessity to recover these as his personal property. His defence was that the falling of the thorns was not tortious since he had not purposed the thorns to fall, and hence his entry to recover his property was privileged and he was not liable for any necessary damage he inflicted. Epstein notes that D's counsel argued that actionable trespass requires that the damage ensuing from an act, as well as the initial act, be willed or intentional, modelling tort on the *mens rea* requirements of felony. P's counsel responded that even a lawful act without intention to harm can be actionable if harm ensues: when someone does something 'he is bound to do it in such a way that no prejudice or damage is done to others by his action' (per Serjeant Bryan). Need fault be proved

[43] *The Thorns Case (Hull v. Orange)* Y.B. MICH. 6 EDW. 4, f. 7, pl. 18 (1466), in CASES, *supra* note 2 at 102-4.

in addition? Littleton J seemed to agree with Bryan, stating: 'If a man suffers damage, it is right that he be recompensed', drawing on the analogy of cattle trespass where you have a duty to constrain animals to avert the risk, and perhaps implying no-fault liability. Choke J however held that D 'should have said that he could not do it in any other manner or that he did all that was in his power to keep them out; otherwise he shall pay damages'; this implied a possible defence of acting either by necessity or without fault.

Epstein relies heavily here on the classic 1949 presentations by Cecil Fifoot of the Year Books and nominate reports as the source for his primary materials.[44] Great and essential though Fifoot's work is, for legal historians working six decades later Fifoot cannot give us a complete picture of the crucial sources. I will evidence this claim shortly. Epstein also draws from Morris Arnold's pioneering work on early tort.[45] Arnold argued that the early cases including *Thorns* speak for a strict liability approach based not on an abstract theory but on the pleading rules: a defendant could either deny the general issue, for example lead evidence that he had not in fact hit the plaintiff or taken his goods or entered his land, that he had *done no wrong*; or else give a justificatory defence that he had done the act but had *done so rightly*, for example that he was lawfully self-defending, or arresting the plaintiff, or had a claim to take the goods, or a right to enter the land. An accidental harm inflicted without fault could not be pleaded as a denial of the action or as a justified act, implying that a no-fault accident brought strict legal liability. Fault still entered the picture, however, in analysis of causation, which was a factual issue left to the jury, sometimes with direction from the judge. Arnold suggests, perhaps anachronistically, that contributory negligence was a good defence at the causal level. It would be more accurate to state that a plaintiff's contribution to his or her own loss would have been seen by medieval lawyers as a dominant cause of the loss; defendant could therefore deny the general issue and plead 'not guilty' – 'I did not cause the harm'. Milsom argues against the assumption that juries would *sub silento* always decide causation by reference to fault; he associates the plain causal tests of the medieval court room with a strict liability approach. Ibbetson,[46] by contrast, endorses the view that despite a strict liability shell, liability in the medieval period was 'suffused by some idea of fault' since juries based findings of causation on fault, whether described as blame, guilt or responsibility: 'ultimately it was for the jury to determine where liability for an allegedly wrongful injury should lie'. This

[44] CECIL H. S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 44-92, 154-213 (1949).

[45] Morris S. Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth Century Law of Torts*, 128 U. OF PENN. L. REV. 361 (1979).

[46] IBBETSON, HISTORICAL INTRODUCTION, *supra* note 36, at 57-70. See also David J. Ibbetson, *How the Romans Did for Us: Ancient Roots of the Tort of Negligence*, U.N.S.W.L.J. 37 (2003).

aligned with the Canon Law principle that 'If loss is caused by your fault…it is necessary that you make amends for it'. It also aligns with the entrenched classical Roman approach which was to use fault and cause nearly as synonyms.[47] Ibbetson also criticizes Arnold for using the anachronistic language of *negligence* – most particularly contributory negligence – rather than *fault* with its causal overtones in describing how justification and excuse might have worked, since no external standard such as negligence was ever used to define fault; it was not until much later that the Romanistic standards or intensities of care were introjected into the common law, notably in the 1703 case of *Coggs v Barnard*[48] (as to which more later). However, Arnold's basic picture of medieval trespass seems to be sound: a defence that the harm was an accident occurring without fault could be made by pleading alternative cause, whether plaintiff's action, act of God or some inevitable occurrence that displaces any causal potency of the defendant. It was a factual plea that the judge generally allowed the jury to decide.

All scholars build on Arnold's work, and revisions to his findings leave his major insights intact. Epstein in following Arnold is sensitive to the ambiguities in the sparse medieval case law. Perhaps the ambiguities are slightly lessened now that we have much fuller pleadings of the great *Case of Thorns*, revealed in a Latin manuscript discovered in the Bodleian Library by Sir John Baker, Milsom's redoubtable student and successor at Cambridge.[49] Those pleadings reveal that the *Case of Thorns* was likely a boundary dispute, where the trespasser was nibbling into his neighbour's territory, acting as if the land was his to use; the neighbour then used the law of trespass to hit back and assert title to repel the intrusions. The pleadings also reveal that on winning against D's demurrer P accepted a settlement and released all damages; the title point had been won simply by showing an invasive harm that D had been unable to justify or explain away. The strict liability flavour of the case is perhaps influenced by the context that this was a defence of title to property dressed up in trespassory guise. The pleadings add some quite useful information to the Year Book report, suggesting that the fault theory of causation was not in fact entertained in the court. Jenney, counsel for D, argues the thorns 'fell…against the defendant's will *and without his fault*'. Fairfax for P counters: 'That is no plea, for there is a distinction between felony and trespass. In felony the intent and will of a man shall be construed [that is inferred, or taken into account]… In trespass, however, one should not have regard to the

[47] JUSTINIAN'S INSTITUTES, 4.3.3 to 4.3.8, at 125 (Peter Birks and Grant McLeod eds. and transls., 1987).

[48] (1703) 2 Lord Raymond 909, 2 Salk. 735. But cf. *Anon.* (1374) Y.B. Mich. 48 Edw. III, fo. 25, pl. 8, in JOHN H. BAKER AND S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY. PRIVATE LAW TO 1750 (2d ed., 2010), at 345-6.

[49] BOD. LIB. MS Lat. Misc. C. 55, fo. 6, a manuscript belonging to Robert Constable (died 1500), who was admitted to Lincoln's Inn in 1477, in BAKER AND MILSOM, SOURCES OF ENGLISH LEGAL HISTORY, *supra* note 48, at 369-73.

intent or will but only to the matter in fact'. Lack of intent would excuse a felonious killing, for example a misfired arrow, but not a trespassory wounding. Cattle trespass was conceded as a third case, where it might not be an unlawful entry to remove trespassing cattle, since '*there is no fault* in my entering at once to take them back'. Littleton J rejects the cattle trespass analogy 'for a man is bound to keep his cattle and also his fire [from doing harm], and if he does not he shall be punished'. Choke J and Danby CJ concur, but each puts the law differently. Choke J states: 'If [D] wants to make a good plea out of this, he should show what he did to prevent the thorns from falling, *so that we can judge whether or not he did enough to excuse himself*'. Danby CJ (who does not appear in the Year Book report at all) observes that even if the cutting of the thorns was lawful, allowing them to fall into another's land was not lawful, even if the act was unintentional: 'he was to cut them *in such a way that they did not damage others*'. This seemed to be a proprietary analysis, as Danby gave many supporting examples of lawful actions that turn out to be harmful to neighbours, such as trees that grow or fall so as to disturb watercourses, where the consequential damage is actionable under the assize of nuisance independently of fault.

The aftermath of the *Case of Thorns* is expertly charted by Epstein. He notes how in the 1506 *Case of Tithes*[50] a defence of necessity fails as a justification where the necessity (to move goods for their own protection) responds to a threat from a third party; only acts of God or natural threats qualify since the plaintiff could have recovered directly from the third party had that party wreaked damage. Likewise the fault analysis of Choke J in *Thorns* is seemingly upheld in a 1626 case involving a lawful chase of animals out of the defendant's land where the dogs keep going and harm the animals on the plaintiff's own land.[51] The defendant, according to the court, used his 'best endeavour' to call his dogs back having started the chase lawfully, and was therefore not liable. Epstein notes that since the plaintiff kicked off the train of incidents by allowing animal trespass in the first place, this can still be seen as a strict liability case where the defendant by disproving fault is really showing that the plaintiff's initial causation remained dominant. In *Thorns* the plaintiff had nothing to do with the initial dropping of material over the hedge, and so the putative lack of intent by the defendant had no impact on the ascription of causal responsibility.

[50] Y.B. TRIN. 21 HEN. 7, f. 26-28, pl. 5; CASES, *supra* note 2 at 106-8.

[51] *Millen v. Faudyre* (1626) Popham 161; 79 E.R. 1259 (K.B.) (Fifoot's citation reproduced at CASES, *supra* note 2, at 105 is eccentric). This was clearly a significant case judging by the variant reports: *Millen v. Fawtrey* (1626) W. Jones 131; 82 E.R. 70; *Millen v. Hawerey* (1624?) Latch 13; 82 E.R. 250; *Millen v. Fawen* (1626) Benloe 171; 73 E.R. 1033; *Millen v. Fawdry* (1626) Latch 119; 82 E.R. 304.

The other formative case in Epstein's analysis is the 1616 case of *Weaver v Ward*.[52] This is another cryptic report full of ambivalences. D was wielding a musket on a training exercise with the local militia when his weapon accidentally discharged and wounded P. D's plea was that the shot was accidental, by misfortune and against his own will. P brought a demurrer against this plea and won, because D's lack of intention and misfortune did not show he (D) was 'utterly without fault'. The court gave examples of plausible defences: where 'a man by force take my hand and strike you'; if 'the plaintiff ran across his piece when it was discharging'; or if further facts and circumstances of the case showed that 'it had been inevitable' then it could have been found that 'the defendant committed no negligence to give occasion to the hurt'. Commentators have struggled to divine if the result connoted a strict liability approach yet with a tail-end piece of reasoning giving an opening to fault analysis, with the concept of a standard of negligence making an early appearance.[53] On one view the case simply is restating the medieval theory that pleadings of justification and excuse by the defendant, including narratives of lack of fault due to compulsion, act of plaintiff, act of God etc., merely register in order to show absence of causation. 'Negligence' is here a synonym for 'fault' which is a route to analysis of effective cause. I cannot resolve this puzzle except by adducing two further pieces of evidence. Firstly the court's three examples of defence seem to be lifted from well-known discussions in Roman law – the case of the hand being used as an instrument by another person to land a blow, or the slave straying into the path of a javelin on a training ground, or the case of a puff of wind diverting a well-thrown javelin so as to skewer another unfortunate passing slave.[54] We know that even dyed-in-the-wool common lawyers like Sir Edward Coke were steeped in Justinian at this juncture in English legal history, and indeed the common lawyers feared that their entire system of reasoning could be supplanted by civilian jurisprudence.[55] It seems to me that *Weaver v Ward*, like other English cases of the time, is a *sotto voce* experiment in trying out some Roman doctrine for size.

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[52] Hobart 134; 80 E.R. 284 (K.B.); CASES, *supra* note 2 at 108 ff. Compare the cryptic reports of *Angel v Satterton* (1663) KB 27/1850 m. 623; *Burford v Dadwel* (1669) 1 Sid. 433, pl. 26; and *Dickinson v Watson* (1682) KB/27/2018, m. 576 and T. Jones 204. in BAKER AND MILSOM, SOURCES OF ENGLISH LEGAL HISTORY, *supra* note 48, at 3768

[53] IBBETSON, HISTORICAL INTRODUCTION, *supra* note 36, at 58, 62; JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 405 (4th ed., 2002).

[54] JUSTINIAN'S INSTITUTES, *supra* note 47, 4.3.2 to 4.3.8, at 125; JUSTINIAN'S DIGEST, 9.2.9-11 (Alan Watson ed., 1998); WILLIAM W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 585-9 (3d ed., Peter G. Stein ed., 1963); ZIMMERMANN, THE LAW OF OBLIGATIONS, *supra* note 33, at 953-1049.

[55] GETZLER, A HISTORY OF WATER RIGHTS, *supra* note 37, at 46-52 and ff; 153-4.

The second point about the case is that, again thanks to the labours of Milsom and Baker,[56] we now have a more detailed manuscript report of *Weaver*. We also have the pleadings, which state that D was acting not only under the command of his local militia captain, one Henry Andrews, but that the militia was training under the direction of the Privy Council. D's counsel further implied that the harmful act had been justified by the 'public good' and 'upon a lawful command' and thus attracted a governmental immunity. In other words it was a justified act, being a non-intentional accident done whilst training for the king. The problem was that D could not enter a special plea of accident in the sense of lack of intention, without going further and arguing that the shot had been an 'inevitable' accident entirely without his 'fault'; lack of intentionality only negated the felony. Still, the judges reserved their decision, and after taking time finally allowed demurrer against the defence by two to one, but refused to enter a judgment and forced the parties to mediation, and the case finally was settled. Gary Schwartz in a splendid note on the case observed that the plaintiff Weaver did not think to sue the militia or the maker of the faulty musket, but he correctly intuits that such claims would have been fruitless in 1616; the legal system of Jacobean England did not operate like that of late twentieth-century America and no alternative or concurrent vicarious or product liability claim would have been feasible.[57] Whatever the micro-history of the case, the well-known Hobart report that Epstein uses in the *Casebook* was constantly cited as a leading case and was a stimulus to much debate over causation and fault in later law.

Building on the rather cryptic Hobart report, Epstein sees *Weaver v Ward* as an example of general denial of liability by the defendant, but this is probably a mischaracterization. Epstein gives the case an extended speculative treatment in his treatise, extracting nuance from the spare words of the report. He notes that 'excuse' not 'justification' is clearly at issue since an accident cannot be justified. Yet compulsion is really a claim that no act was done at all, whilst P's fault is likewise a claim that P caused the harm himself. As for inevitable accident, it is not clear if this means a sudden act of God or simply an accident without antecedent negligence. Epstein sees the words 'no negligence to give occasion to the hurt' as connoting a demanding fault standard in cases of antecedent negligence. This may also have been a reference not to trespass but to harms covered by the action on the case. He correctly cites the 1647 compulsion case of *Smith v Stone*[58] as a 'speciall plea in justification' since D did not deny that he walked on P's land, but added the explanation that he had been forced to do so by a third party. Roll J held it that in light of these facts it was the third party who had committed a trespass, not the compelled defendant. The same judge held in

[56] BAKER AND MILSOM, SOURCES OF ENGLISH LEGAL HISTORY, *supra* note 48, at 375-76.
[57] Gary T. Schwartz, *Weaver v. Ward*, 74 TEXAS L. REV. 1271 (1995-1996).
[58] (1647) Style 65; 82 E.R. 533 (K.B.).

Gilbert v Stone[59] (also in 1647, but not necessarily with the same defendant) that committing a trespass under duress caused by the threats of a third party was not justified conduct; to allow duress to clear the trespasser of liability would have left the injured plaintiff without redress since the third party had committed no direct act touching the plaintiff's interest. Epstein closes his trespass discussion with two later seventeenth century cases. *Dickenson v Watson* in 1682[60] concerned a tax collector who was worried at how his clientele might receive him, and so went out on the street armed to the hilt. He then seems to have let off a weapon for no particular reason, perhaps as a practice shot, not realizing that someone was in the way, who lost his left eye as a result. The collector claimed he had not willed the harm and that it was 'inevitable' due to the coincidental presence of the victim; the court threw this out as 'unavoidable necessity' had to be shown. *Gibbons v Pepper* of 1695[61] concerned a man who was carried away down Drury Lane by a frightened horse. He ran down the plaintiff, and then defended himself on the basis that he had not intended the horse to run wild and had called out a warning, so doing everything in his power to avoid harm, but that the accident that ensued was inevitable. Epstein cites but does not quite bring out the flavour of a revolutionary statement by counsel: 'Serjt. Darnall for the defendant argued that if the defendant in his justification shews that the accident was inevitable and that the negligence of the defendant did not cause it, judgment shall be given for him'.[62] The plaintiff nonetheless won on demurrer. Epstein speculates from the short Lord Raymond report[63] that the court saw the rider as acting through the passive instrument of the horse or else had vicarious liability as owner for the horse with a sideways claim against any jointly responsible third party, and adds that insolvency risk might point to the latter theory. But the two alternative reports we have of the case suggest that the defendant was liable simply because he maladroitly pleaded specially to justify the accident and had failed to lead enough evidence to dispel any possibility that he had by his own actions or fault caused the crash; 'He should have pleaded the general issue'; 'if the defendant had pleaded Not guilty the matter might have acquitted him on evidence'.[64] In other words he should have told the court – I didn't do it, I did not whip or spur the beast, I contributed no cause to the accident; the horse did it. Stating, as Serjt. Darnall had done, that the defendant had ridden the horse into the plaintiff but had not done so negligently was no defence; it was a negative

[59] (1647) Style 72; 82 E.R. 539 (K.B.).

[60] (1682) Jones T. 205; 84 E.R. 1218 (K.B.).

[61] (1695) 1 Lord Raymond 38; 91 E.R. 922; also 4 Modern 404; 87 E.R. 469; 2 Salk. 637, 91 E.R. 538 (K.B.).

[62] See the fuller version, adding the pleadings, in BAKER AND MILSOM, SOURCES OF ENGLISH LEGAL HISTORY, *supra* note 48, at 378-80.

[63] 1 Lord Raymond 38, 91 E.R. 922 (K.B.).

[64] See 4 Modern 404, 87 E.R. 469; 2 Salk. 637, 91 E.R. 538 (K.B.).

statement of absence of fault, rather than a positive justification or excuse. Faced by such procedural and probative dangers, defendants were as likely to plead to the general issue and leave fault questions to the jury in causal terms.[65] Read thus, the reasoning in the case in fact supports Epstein's model of *prima facie* strict liability based on pleadings and presumptions rather more directly than he perhaps realizes.

C. Trespass on the Case

Epstein, as we have seen, adopts Milsom's evolutionary, a-political theory of common law evolution, and nowhere more so than in the convoluted story of the emergence of the action of trespass on the case. He departs from Fifoot's picture of royal innovation in expanding remedies for wrongs beyond forcible and direct harms to non-immediate damage, preferring the Milsomian view that case was simply new packaging of well-known general trespass actions known since the Conquest. Robert Palmer's brilliant challenge[66] to the Milsomian gradualist view may at least be noted – that action on the case in the fourteenth century was a stark innovation designed to increase the power and reach of royal governance to all levels of society through the central courts, with particular attention paid to tort regulation of contractual performances in the labour market which had been disrupted by the Black Death.

The development of the action on the case as a residual remedy for wrongful damage alongside the force or invasion writs emanates from three sources within the general trespassory jurisdiction.[67] Again opposing Milsom, it is important to see that the action on the case procedure was a convenient substitute for the popular assize of nuisance, the sister writ to the novel disseisin jurisdiction which policed possession of land and thereby extended direct royal jurisdiction deep into feudal tenurial relationships. Maitland's view that the rise of such centralized title enforcement does represent a revolutionary rise in state power is perhaps back in fashion now after some decades of Milsomian revisionism. Epstein, like me a devotee of the intricate law of riparian rights,[68] sees very clearly how riparian conflicts, especially over access to water power for mills, was a fertile source of

[65] Ample evidence is given in BAKER AND MILSOM, SOURCES OF ENGLISH LEGAL HISTORY, *supra* note 48, at 351-80; see also BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 53, at 405; IBBETSON, HISTORICAL INTRODUCTION, *supra* note 36, at 158. Again the shadow of Roman law may be detected: *Justinian's Digest*, 9.2.8.

[66] PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, *supra* note 35.

[67] See BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 53, at 406 ff; IBBETSON, HISTORICAL INTRODUCTION, *supra* note 36, 97 ff.

[68] Richard A. Epstein, *The Historical Variation in Water Rights* in THE EVOLUTION OF MARKETS FOR WATER: THEORY AND PRACTICE IN AUSTRALIA ch. 3 (Jeff Bennett ed., 2005); Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, 11 SOC. PHIL. & POLICY 17 (1994); GETZLER, A HISTORY OF WATER RIGHTS, *supra* note 37.

case actions where direct trespass could not readily be pleaded. Secondly, case developed into an alternative path to plead trespass or harm to interests where it was doubtful if there had been any direct force or invasion allowing invocation of the standard writs. Typical cases involved damage caused by an inanimate force such as fire or water, or by an intermediary animate force such as an animal or perhaps a servant. Thirdly, the action on the case provided a means of giving private redress for special damage caused by common nuisances injurious to the public, where such nuisances were subject to administrative or criminal remedies through presentment and indictment before the royal courts.[69] We can identify a fourth pressure making for adoption of actions on the case, being a mechanism for remedying misfeasance of both customary and specially adopted duties, hence allowing enforcement of common callings and contracts through jury trial rather than archaic wager of law. This branch of trespass on the case later turned into an action to remedy non-performance or unpaid debt, and thus the action on the case is the ancestor not only of the modern tort of negligence but also of the modern contract and unjust enrichment actions. Epstein picks up on the importance of the action on the case not only as a rival writ to direct trespass, but also as a secondary enforcement mechanism for lousy positive performances, noting the streak of claims against blacksmiths who seem to be attacking horses with bows and arrows all the time in the fourteenth century; Milsom observes these could as well be fictitious pleadings for road accident cases or misperformed bailments.

Epstein shows us how trespass and case were long kept from fusing due to procedural distinctions, notably the superior *capias* attachment process for trespass that lasted until 1504, and then the more ready allowance of full costs to the plaintiff in case actions, since after 1677 the plaintiff failed to recover his costs if his damages fell below the jurisdictional limit of forty shillings in the king's courts. At a substantive level he explains how direct trespass could more easily be seen as unlawful conduct breaching the peace, whereas harms caused indirectly by an act that might have been lawful in isolation but caused consequential loss required something more to be shown than simple causation.[70] One can itemize the sources of liability for action on the case, but where precisely does strict versus fault liability come into it? This is a question that I did not quite find answered in Epstein's treatment. Perhaps there is no clear answer, but one possibility is this: since an action on the case did not involve a simple plea of unlawful act causing injury, but was rather a narrative of a case to a court telling how harm had been caused in a manner that demanded redress, the notion of responsibility based on fault was closer to the surface. Harm caused by faulty conduct in the absence of an unlawful act or directly invasive interference was implicitly the whole point of getting one's story before the jury. There was no

[69] Epstein notices this in TORTS, *supra* note 3, at 76; CASES, *supra* note 2 at 114.
[70] CASES, *supra* note 2 at 112-15.

prima facie wrong involving a breach of right; rather the plaintiff had to explain how the defendant had caused harm through wrongful conduct.

To further distinguish the writs, one might add that trespass could be used for simple right-maintenance through nominal damages (subject to the costs rule) whilst material damage was the gist of any action on the case. At the same time there was clearly overlap between the writs, as where there was indirect harm caused by a *prima facie* unlawful act, such as a breach of statute or a public nuisance causing special damage. This ultimately explains the famous *Squib Case*,[71] where D threw a firecracker in a public market; the explosive was then picked up and thrown away successively by two persons in the market, to land before P and take out his eye. D was liable in trespass for a direct harm, as the two intermediate squib-throwers were really transmitting the force of D's original wrongful act (*per* De Grey J), or else because D's squib-throwing was so clearly unlawful (*per* Nares J). The dissenting judge, one Blackstone J, instead applied the rule in *Reynolds v Clerke*,[72] itself likely formulated by reference to Roman doctrine,[73] that trespass lay for direct harm and case for indirect, and this was an indirect harm. Epstein deals with the confusing line between trespass and case, and implicitly between direct/indirect and strict/fault liability, with a sure touch, and then expertly analyses the run-up to the great case of *Williams v Holland* in 1833.[74] The problem lay in running down cases, where a victim might not know in a pre-discovery world whether the driver was an owner (involving direct trespass) or a servant (indirect action on the case for vicarious liability). Joinder of actions was impossible, and so in these very common actions the choice of writ and manner of pleading was a blind lottery. *Williams v Holland* cut the Gordian knot by allowing action on the case for either direct or immediate harm to be brought where the damage was non-intentional. By extending the case action with its intrinsic fault standard to direct harms, this was to associate the strict liability core of simple direct trespass with a fault standard. By the late nineteenth century judges were stating that plaintiffs must prove both causation and *negligence* to succeed in case, and the requirement to show negligence in direct harm/unintentional trespass cases was superadded in 1959 as a final tidying-up operation.[75]

Epstein treats *Rylands v Fletcher* or liability for escapes as a restoration of the old methods of *prima facie* strict liability to land torts through reversal of onus of proof requiring the defendant to disprove responsibility. It is only seen as a

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[71] *Scott v. Shepherd* (1773) 2 Blackstone W. 892; 96 E.R. 525 (K.B.).

[72] (1726) 2 Lord Raymond 1399; 92 E.R. 410 (K.B.).

[73] IBBETSON, HISTORICAL INTRODUCTION, *supra* note 36, 159.

[74] (1833) 10 Bingham 112; 131 E.R. 848 (C.P.), analysed in Michael J. Prichard, *Trespass, Case, and the Rule in Williams v. Holland,* 22 CAMB. L. J. 234 (1964).

[75] CASES, *supra* note 2 at 119-22, citing *Fowler* v *Lanning* [1959] 1 QB 426.

strange throwback to medieval ideas because, like the allied doctrine of *res ipsa loquitur*, it is decided against the backdrop of a victorious general negligence principle. Epstein notes Brian Simpson's historical insight that the decision may have been driven by a series of dam disasters; the law responded pragmatically to a sense of prevalent danger, as in modern strict product liability, and was not reconsidering doctrinal foundations. Epstein also rejects as unproven and illogical various attempts to find economic and class politics in *Rylands v Fletcher* itself; this pocket of strict liability was not a political exception to the generally a-political rules of tort law in the nineteenth century. Rather the boot was on the other foot: if social engineering is to be looked for, then at the elite intellectual plane Epstein sees Holmes as the architect of a modern negligence standard based on reasonable foresight, designed consciously to serve as a social policy tool chopping back liability for remote causes.[76]

Certainly by the time of *Donoghue v Stevenson* in England, the victory of negligence doctrine, directly creating duties based on reasonable foresight of harm, is complete.[77] Even if fault liability is merely a surface language, the prevalence of this newly dominant discourse needs to be explained. One explanation might link this to shifts in power within the judicial process: for example judges had supplanted civil juries as fact finders in English trials by the 1930s, and perhaps need a generalized negligence test of liability to justify their strong factual and moral discretions. The rise of the negligence standard in the jury-based and federalized American law demands a tweak to the thesis, for example it could be argued that court identification of duties of care permitted at least some constraint on the dispositive powers of the jury in civil trials. Alternative explanations would be to look to shifts in judicial reasoning or ideology; after all we need to explain the rise not only of fault liability, but of fault expressed in terms of a legally defined negligence standard based on neighbourly or reasonable care. This could be a matter of intellectual lineage, being the powerful injection of Roman ideas of *culpa* or fault as a touchstone of liability and natural law ideas of immanent social duty not to harm others that perennially influenced English legal discourse, notably from the later seventeenth century. Or it could involve ideological commitments concerning distributive justice, for example judicial setting of standards of care might differ widely in areas as diverse as industrial accidents, product liability or medical malpractice.

It is no surprise to learn that Epstein today has revised the stark, monist strict liability thesis of his famous 1973 article and has made room for different modes of liability in the tort system. He accepts that we have a law of *torts* and not tort in the singular, and there is a spread of appropriate strict and fault liability standards

[76] HOLMES, THE COMMON LAW, *supra* note 15, at 77-84, 88-96, extracted in CASES, *supra* note 2 at 146-53.

[77] [1932] AC 562 (H.L.) (Eng.).

across the terrain. The major shift concerns assumed obligations of positive care, to be contrasted with imposed obligations to avoid harm or injury. Historically there is thick evidence of the idea that negligence as an articulate standard of *culpa* or fault emerges as a *contractual* reasonableness standard, used to measure the performance of a pre-existing duty. English lawyers before the mid-nineteenth century conceptualized negligence not as one standard but as an integrated set of differential standards, again borrowing from Roman law with its grid of heavy/light and abstract/concrete levels of care correlating to variant status relationships.[78] The entry point for the Roman negligence standards into common law was duty undertaken under some recognized relationship, examples being the customary duties of the common callings such as carriers and innkeepers;[79] or contractual or bailment duties. The Roman vocabulary is seen most plainly in the famous bailment case of *Coggs v Barnard*, which exerts a vast influence on modern law[80] Epstein turned to this precise issue in a fine 2009 piece that should be read alongside his 1973 classic.[81] Epstein picks up on the great importance of *Coggs* with its variant fault standards derived from Roman contract law, and finds an economic logic in its categorizations based on the capacity of persons to choose counterparties with good information as to the risk of performance shortfalls. He can therefore quarantine the complex fault standards of *Coggs* as dealing with voluntaristic or paid undertakings of duty aligned with contract, which present a different, though complementary, set of issues to stranger liabilities for harm regulated by tort law. This allows Epstein to claim that the negligence standard that flooded into nineteenth-century tort law, and which all but overwhelmed the classical strict liability approach, had a fundamental contractual signature. It is not that parties agree, implicitly or hypothetically, to live under rules of reasonableness, as Enlightenment-era natural lawyers might argue. Rather, when the law has to regulate any pre-existing relationships, whether imposed by statute or custom or voluntarily undertaken, then the law reaches for a fault standard in explaining when and how the performance of such

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[78] IBBETSON, HISTORICAL INTRODUCTION, *supra* note 36, 155-187; Ibbetson, *How the Romans Did for Us*, *supra* note 46; David J. Ibbetson, '*'The Law of Business Rome': Foundations of the Anglo-American Tort of Negligence*' CURRENT LEGAL PROBLEMS 74 (1999); David J. Ibbetson, *Coggs v. Barnard,* in LANDMARK CASES IN THE LAW OF CONTRACT (Charles Mitchell and Paul Mitchell eds., 2008); Joshua Getzler, *Duty of Care,* in BREACH OF TRUST (Peter Birks and Arianna Pretto eds., 2002) at 41-74.

[79] Cf Richard A. Epstein, *Common Carriers* and *Customary Practices and the Law of Torts* in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 301, 579 (Peter Newman ed., 1998); Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEG. STUD. 1 (1992). .

[80] (1703) 2 Lord Raymond 909, 2 Salk 735.

[81] Richard A. Epstein, *The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying*, 107 MICH. L. REV. 1461 (2009).

relationships has gone wrong and requires remedy.[82] This suggests that the strict-fault liability distinction ultimately gives way to a distinction between a tort system based on rights (personal and proprietary) and one based on relational duties. Further adjustments to fault liability can be made when the voluntaristic contact between the parties does not involve a continuing relationship, as in products liability or occupier's liability; here Epstein reaches for standards that track the relevant access to risk information available to the two sides, and their respective ability to then avoid harm through their own decisions – Learned Hand meets Coase, if you like. Medical malpractice involving high-risk high-return activity in a continuing relationship, or liability for failing to control third parties, might also depend on a blend of enforcement of customary standards with cost-benefit analyses, using local praxis to judge when risks are justified by payoffs. Epstein also suggests that a mid-way standard of gross negligence or recklessness may offer a superior metric outside the core trespass class, or cases of "push-pull causation" causing harm as where *A* hits *B*.[83]

So what is left? Epstein's theory of strict liability now registers as a rather narrowly focused theory of rights protection in the trespassory core; it is no longer an all-encompassing theory. Yet even within that narrow core of strict-liability protection of rights from trespass there is a lurking circularity, for common-law history teaches us that rights do not come first but rather emerge from regularized remedial procedures; the discovery of liabilities through curial remedy establishes rights, as much as rights generate liabilities and ensuing remedies.

IV. THE VALUE OF LEGAL HISTORY

As teachers and writers of law we live in a time when historical analysis is out of fashion, and model-building and hypothesis-making about current legal issues dominates the academy. But legal historians like to think that by engaging with the past we reach more deeply into the law and can create ideas that will outlast

[82] The most detailed historical explication of the process in the early modern period is found in IBBETSON, HISTORICAL INTRODUCTION, *supra* note 36, and Peter Birks, *Negligence in the Eighteenth Century Common Law*, in NEGLIGENCE: THE COMPARATIVE LEGAL HISTORY OF THE LAW OF TORTS 173 (Eltjo Schrage ed., 2001), and for the nineteenth century in Michael Lobban, *Tort*, in THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOL. XII 1820-1914: PRIVATE LAW, *supra* note 24 at 877-1150.

[83] See TORTS, *supra* note 3 *passim, eg* at chs 5, 6, 8, 12, 15, 16; and for a summary of late thoughts**,** see Richard A**.** Epstein, Multiple Standards of Liability in Tort Law: Of Context and Categories, (1 February 2010) at http://lawprofessors.typepad.com/tortsprof/, which concludes:

> "A short column cannot explore all the complex variations. But it can point them out, as a stubborn reminder that context matters in tort, especially in those cases with strong contractual overtones. Keeping all the balls in the air at the same time is a real challenge to any tort theorist, both within and outside of the law and economics tradition. My sense of the field has surely evolved since I first wrote back in 1973."

the short cycles of academic fashion. Epstein's very earliest work on tort and the structure of rights still commands our attention. The vitality and insight of his work derives in large measure from his ability to use historical imagination. Since his initial strict liability essay in 1973, he has illuminated the terrain of tort and its relationship to private and public law, in a great arc of scholarship that shows no signs of abating. I have suggested some revisions to Epstein's historical picture of the development of tort – there are always new things to say about the past, and we have not been entirely idle in the English academy since the young Richard Epstein studied Roman and common law with us all those years ago. But these revisions on the whole tend to reinforce rather than weaken Epstein's claims for the role of strict liability in the law of torts. I end with a speculation. The American system of civil trial with entrenchment of the jury arguably brings that system closer in practice and spirit to the ancient common law than the jury-less English system of today. This only reinforces Epstein's methodological claim that one cannot understand the American present without knowledge of 'the enormous transitions of space, time, and circumstance'.