
Are the Torts of Trespass to the Person Obsolete?

Part 1: Historical Development

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This article re-examines the liability currently imposed by the courts for trespass to the person. It demonstrates that the process for imposing such liability has evolved so that the courts now both carefully scrutinise how the defendant engaged in the conduct which interfered with the plaintiff's personal security and finely balance a range of competing interests. To the extent that the process for imposing liability for trespass to the person is not dissimilar to the process for imposing liability in the tort of negligence, this article questions whether the torts of trespass to the person might now be viewed as obsolete. The article is in two parts. Part one examines the historical development of trespass to the person. Part two (to be published separately) explores whether it is possible to identify anything distinctive about the process for determining liability in trespass to the person (as it has continued to evolve) when compared with the process for determining liability in negligence.

INTRODUCTION

The individual torts comprising trespass to the person – battery, assault and false imprisonment – can be traced to the medieval writ system. Significant questions persist, however, as to the nature of the liability imposed in respect of the torts and the circumstances in which such liability is imposed. Is the liability imposed by reason of the defendant's wrongdoing¹ or regardless of the defendant's wrongdoing and therefore strict?² Referred to as "intentional" torts, must the defendant have intended to engage in the conduct which caused the interference with the plaintiff's³ personal security (intended conduct), intended to interfere with the plaintiff's personal security (intended interference) or intended to harm the plaintiff by interfering with the plaintiff's personal security (intended harm)?⁴ Does negligent, as well as intentional and reckless conduct, attract liability in respect of the torts?⁵

The fundamental nature of these questions and the lack of ready answers suggest that the current understanding of the torts of trespass to the person is flawed. The object of this article is to clarify that understanding. The first part of this article examines the historical development of the torts of trespass to the person. It shows that the nature of the liability and the circumstances in which the liability is imposed have changed over time. Specifically, it demonstrates that the courts have become both more able and more willing to balance competing interests when imposing liability for trespass to the person, slowly shifting the focus from *what* the defendant did (engage in conduct which interfered with the plaintiff's personal security), to an analysis of *how* the defendant did it and the circumstances in which

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¹ Despite usually being defined by reference to moral standards, wrongdoing is defined for these purposes as conduct personally engaged in or not engaged in by the defendant that attracts legal responsibility.

² Peter Cane, "Responsibility and Fault: A Relational and Functional Approach to Responsibility" in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His 80th Birthday* (Hart Publishing, 2001) 81, 99.

³ The term "plaintiff" rather than "claimant" is used throughout this article as it is published in an Australian journal where "plaintiff" remains the standard term of reference for a party commencing a civil action.

⁴ This being the interest primarily protected by the torts of trespass to the person; William Blackstone, *Blackstone's Commentaries* (1803) 129. In the matter of intention, see FA Trindade, "Intentional Torts: Some Thoughts on Assault and Battery" (1982) 2 *Oxford Journal of Legal Studies* 211.

⁵ See discussion of following cases below: *Williams v Milotin* (1957) 97 CLR 465; *Letang v Cooper* [1965] 1 QB 232.

the interference occurred. This process for determining liability is not dissimilar to that utilised by the courts when imposing liability in the tort of negligence.

The second part of this article (to be published separately) examines the continuing evolution of the torts of trespass to the person and questions whether the approach to determining liability in respect of such torts remains distinct. It suggests that it is very difficult to isolate any form of liability imposed in trespass to the person which does not involve the courts carefully scrutinising how the defendant engaged in the conduct which interfered with the plaintiff's personal security and finely balancing a range of competing interests. The principal difference between the processes for determining liability in trespass to the person and negligence is the sophistication of the techniques employed by the courts to undertake that balancing. For this reason, it might be argued that the balancing techniques employed by the courts when determining liability in trespass to the person are now obsolete.

HISTORICAL DEVELOPMENT

The historical development of the torts of trespass to the person can be divided into three broad periods: the period in which the writ system operated; the period between the abolition of the writ system and the development of a single tort of negligence; and the period after the development of a single tort of negligence. In each of those periods, significant changes can be discerned in the approach taken by the courts to determining liability for the torts of trespass to the person.

To date, the existence of such changes has been somewhat obscured by the broad range of factual circumstances in which liability for the torts of trespass to the person has been imposed. For this reason, the historical development of the torts of trespass to the person will be traced using cases concerning two particular fact patterns, namely: shootings and highway collisions. These fact patterns have been selected for two reasons. First, they are relatively common so that cases exhibiting those fact patterns can be found in each of the relevant periods. Second, in at least some of the cases the courts have found it necessary to impose liability for trespass to the person. The cases in which the courts have decided not to impose such liability are therefore particularly instructive. A similar exercise could be conducted using cases involving other fact patterns.

The Writ System

The paucity of cases from the medieval period means that the origins of the writ of trespass are not entirely clear. The potential for damages to be awarded suggests that the writ may have originated in the practices of local courts.⁶ Alternatively, the prescriptive forms of the writ, *contra pacem domini Regis* (against the peace of our Lord the King) and *vi et armis* (by force of arms),⁷ suggest that the writ originated in the King's Court as part of the criminal system.⁸

Whatever the origins of the writ of trespass,⁹ it was in general use by the end of the 13th century¹⁰ and was available in respect of interferences with a broad range of interests including, but not limited to, interferences with personal security.¹¹ For a plaintiff to successfully plead trespass, it had to be shown that "the injurious act [was] the immediate result of the force originally applied by the defendant" (hence

⁶ For example, TFT Plucknett, *Concise History of the Common Law* (Liberty Fund, 1956) 366–367. See also George E Woodbine, "Origins of the Action of Trespass" (1924) 33 *Yale Law Journal* 799, 811–812.

⁷ SFC Milsom, "Trespass from Henry III to Edward III, Part 1: General Writs" (1958) 74 *Law Quarterly Review* 195, 207–209. For translations see JW Jones, *A Translation of All the Greek, Latin, Italian and French Quotations Which Occur in Blackstone's Commentaries on the Law of England* (T&J W Johnson & Co, 1823) 23.

⁸ For example, OW Holmes, *The Common Law* (Little Brown, 1881) 100–101. See also FW Maitland, *Forms of Action at Common Law* (CUP, 1965) 48–50.

⁹ A debate fully canvassed in CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (Greenwood Press, 1949) Ch 3.

¹⁰ Fifoot, n 9.

¹¹ Other protected interests include land and goods. See generally Blackstone, n 4.

the prescriptions above).¹² The availability of trespass therefore hinged on the immediacy of the causal connection between the defendant's conduct and the interference with the plaintiff's interests.¹³ Where the causal connection was "direct and immediate",¹⁴ it was appropriate for the plaintiff to plead trespass; where the causal connection was "mediate and consequential",¹⁵ the action was liable to be struck out.¹⁶

The requirement to establish a direct causal connection between the defendant's conduct and the interference with the plaintiff's interests when pleading meant that, at least initially, the courts were not particularly concerned with the intention of the defendant when engaging in that conduct. For instance, Lord Ellenborough CJ stated in the 1803 case *Leame v Bray*:¹⁷ "It is immaterial whether the injury be wilful or not." It is unclear from this statement whether Lord Ellenborough CJ (with whom all other members of the court agreed) used the term "wilful" in the sense of intended harm, intended interference or intended conduct by the defendant. At the very least, it appears from the cases that the courts were not concerned with whether the defendant intended to interfere with the plaintiff's personal security or harm the plaintiff when initially imposing liability in trespass to the person. There is also some evidence to suggest that whether the defendant intended to engage in the conduct which interfered with the plaintiff's personal security was similarly not a relevant consideration for the courts when initially imposing liability in trespass to the person. That the intention of the defendant was not generally a relevant consideration for the courts when initially imposing liability in trespass is best demonstrated by the shooting cases.

Consider the following example cited in a 1506 case reported in the Year Books:

Where one shoots (arrows) at the targets and wounds someone even though it was against his will he will be called a trespasser against his intent.¹⁸

The example was used by the court to suggest that even where a shooting is accidental (in the sense that although the defendant might have intended to fire the arrow, the defendant neither intended to interfere with the plaintiff's personal security nor harm the plaintiff), a defendant could still be liable in trespass as the plaintiff's injuries were a direct consequence of the defendant's conduct. In this respect, the court expressly contrasted felony with trespass for which evidence that the defendant intended to "slay" the plaintiff was required.¹⁹ The decision reached in the 1616 case of *Weaver v Ward*²⁰ is to similar effect. The case concerned an accidental shooting during a military training exercise.²¹ The plaintiff brought an action in trespass for assault and battery in respect of his injuries and succeeded in holding the defendant liable even though it was found that the defendant had not intended to shoot the plaintiff (either in the sense of intended harm or intended interference). Consider finally the 1723 case of *Underwood v*

¹² *Leame v Bray* (1803) 3 East 593; 102 ER 724 (Lord Ellenborough CJ).

¹³ The focus was therefore on the activity engaged in by the defendant as opposed to how the defendant undertook that particular activity.

¹⁴ *Leame v Bray* (1803) 3 East 593; 102 ER 724 (Lawrence J).

¹⁵ *Leame v Bray* (1803) 3 East 593; 102 ER 724 (Lawrence J).

¹⁶ Hereinafter, this distinction will be drawn using the words "direct" and "indirect".

¹⁷ *Leame v Bray* (1803) 3 East 593; 102 ER 724.

¹⁸ *Trespass on the Statute (of Forcible Entry)* (1505) 21 Hen 7, 28A (See: David J Seipp (ed), *Medieval English Legal History: An Index and Paraphrase of Printed Year Book Reports, 1268–1535* (Boston University, 2013) <<https://www.bu.edu/phpbin/lawyearbooks/display.php?id=22002>> (referred to in *Leame v Bray* (1803) 3 East 593; 102 ER 724 (Gross J); *Stanley v Powell* [1890] 1 QB 86, 89 (Denman J)).

¹⁹ *Trespass on the Statute (of Forcible Entry)* (1505) 21 Hen 7, 28A (See: David J Seipp (ed), *Medieval English Legal History: An Index and Paraphrase of Printed Year Book Reports, 1268–1535* (Boston University, 2013) <<https://www.bu.edu/phpbin/lawyearbooks/display.php?id=22002>> (referred to in *Leame v Bray* (1803) 3 East 593; 102 ER 724 (Gross J); *Stanley v Powell* [1890] 1 QB 86, 89 (Denman J)).

²⁰ *Weaver v Ward* (1616) Hob 134; 80 ER 284.

²¹ *Weaver v Ward* (1616) Hob 134; 80 ER 284: "they were skirmishing with their musquets charged with powder for their exercise in re militari, against another captain and his band."

Hewson.²² In that case, the plaintiff was shot when a gun held by the defendant accidentally discharged while the gun was being uncocked. Although there was no evidence that the defendant intended to shoot that plaintiff (either in the sense of intended harm or intended interference), the defendant was once again held liable in trespass. Significantly, the defendant in *Underwood v Hewson* did not appear to intentionally discharge the gun. It may be, therefore, that it was not even necessary for the defendant to have intended to engage in the conduct that caused the interference with the plaintiff's interests for liability in trespass to be imposed. As the courts did not generally consider the intention of the defendant when initially imposing liability in trespass, it is difficult to be certain in this regard.

As can be seen, when the writ of trespass was first devised, the courts were more concerned with *what* a defendant did (engage in conduct that interfered with the plaintiff's personal security), as opposed to *how* the defendant did it. Provided that a plaintiff could show that the defendant voluntarily engaged in the conduct which interfered with the plaintiff's personal security,²³ the courts generally made no inquiry into how the defendant engaged in that conduct. It was sufficient for the plaintiff to prove that the defendant, by their conduct, directly caused the interference with the plaintiff's personal security. This generally limited the inquiry before the court to the immediacy of the causal connection between the defendant's conduct and the interference with the plaintiff's interests.²⁴ Although the nature of the inquiry was limited, pleading trespass to the person was not without its difficulties.

First, the distinction between direct and indirect interferences with a plaintiff's personal security was not at all clear. The courts commonly explained the distinction by reference to an example attributed to Fortescue J in the 1724 case of *Reynolds v Clarke*:²⁵

If a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action on the case; because it is only prejudicial in consequence, for which originally I could have no action at all.

The example was used by the courts to suggest that an interference with a plaintiff's interests was likely to be direct when the plaintiff was physically close to the defendant²⁶ and the period of time between the defendant's conduct and the interference was relatively short so that the plaintiff was unlikely to have been in a position to avoid the interference. By contrast, an interference with a plaintiff's interests was likely to be indirect when the plaintiff was not in physical proximity to the defendant and there was a longer period of time between the defendant's conduct and the interference so that the interference may possibly have been avoided; in terms of the example for instance, the plaintiff may have walked around the log rather than tumbling over it.

As is often the case, applying the distinction proved more difficult than explaining it. The 1773 case of *Scott v Shepherd*²⁷ is a good example, the facts of which are well-known. The defendant threw a firework out of a window into a crowded market. The firework was picked up and thrown by two consecutive stall holders before it exploded near the plaintiff, damaging his eye. Blackstone J, in dissent, held that the plaintiff's damage was an indirect consequence of the defendant's initial act of throwing the firework into the marketplace as the firework had obtained "two new directions" after it was thrown by the defendant. In contrast, the majority held that the plaintiff's damage was a direct consequence of the defendant's act of throwing the firework out of the window. In reaching this decision, the majority disregarded the subsequent actions of the stall holders on the basis that the defendant's initial conduct

²² *Underwood v Hewson* (1723) 1 Str 596; 93 ER 722.

²³ Conduct might not be intended, but can still be voluntarily. For instance, although the defendant might not have intended to fire the gun in *Underwood v Hewson* (1723) 1 Str 596; 93 ER 722, there was no evidence to suggest that the firing was the result of an involuntary movement.

²⁴ Though note the early reference to the possibility of a defendant pleading the plaintiff's injury was the result of an "inevitable accident" in *Weaver v Ward* (1616) Hob 134; 80 ER 284. Discussed by Diplock J in *Fowler v Lanning* [1959] 1 QB 426, 433.

²⁵ *Reynolds v Clarke* (1724) 1 Str 634; 93 ER 747.

²⁶ Fifoot, n 9, 184–185.

²⁷ *Scott v Shepherd* (1773) 3 Wils KB 403; 95 ER 1124.

was of a “mischievous nature”.²⁸ An analogy was made in this regard with the release of a dangerous animal, such as a “mad bull”, into the marketplace.²⁹ Such reasoning is difficult to reconcile with the log example above given the lack of physical proximity between the parties and the period of time which passed between the defendant’s conduct and the plaintiff’s damage. The reasoning is, however, consistent with the more general approach to determining liability for trespass to the person at the time, which, as explained above, focused more on what the defendant did (engage in conduct that interfered with the plaintiff’s personal security) than on how the defendant did it.

A further difficulty for plaintiffs when pleading trespass was the time at which a decision as to the immediacy of the causal connection between the defendant’s conduct and the interference with the plaintiff’s interests had to be made. Due to a rule which prevented the joinder of actions,³⁰ a plaintiff quite often had to assess whether the defendant’s conduct had directly or indirectly interfered with the plaintiff’s personal security at the time of pleading and hence before full evidence of the facts was available. If a plaintiff incorrectly assessed the nature of the interference, and pleaded trespass when the interference was subsequently found to be indirect, the plaintiff’s action was liable to be struck out. The appropriate action in such circumstances was case rather than trespass. Referred to in the log example above, the action on the case was the predecessor of the modern tort of negligence and was available when a defendant indirectly interfered with a plaintiff’s interests. It was an alternative form of action developed by the courts in the 14th century which enabled plaintiffs to plead the particular facts of their case, rather than being restricted to the prescriptive forms of other writs.³¹

The highway collision cases demonstrate the practical difficulties faced by plaintiffs in assessing the immediacy of the causal connection between the defendant’s conduct and the interference with the plaintiff’s interests at the time of pleading. Consider the 1800 case of *McManus v Crickett*.³² The plaintiff commenced an action in trespass after a carriage owned by the defendant collided with the carriage in which the plaintiff was travelling, causing the plaintiff personal injury. It transpired at trial that the carriage owned by the defendant had been driven not by the defendant, but by a servant of the defendant. Furthermore, the defendant was not in the carriage at the time of the collision. At trial, the plaintiff’s action was nonsuited. The court held that the defendant was an indirect cause of the plaintiff’s injuries given that all the defendant had done that was causally connected with the accident was to engage the servant in driving the carriage.³³ In such circumstances, the appropriate form of action was case rather than trespass.

Plaintiffs fared no better pleading an action on the case.³⁴ Consider the 1794 case of *Day v Edwards*.³⁵ The plaintiff brought an action on the case against the owner of a carriage which had collided with the plaintiff’s carriage, causing the carriage damage.³⁶ The defendant successfully demurred³⁷ once evidence was led that the defendant had been driving the carriage at the time of the accident. As the defendant was the direct cause of the plaintiff’s injuries, the court held that the appropriate form of action

²⁸ *Scott v Shepherd* (1773) 3 Wils KB 403, 407 (Nares J); 95 ER 1124.

²⁹ *Scott v Shepherd* (1773) 3 Wils KB 403, 408 (Nares J); 95 ER 1124.

³⁰ DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 1999) 163. See generally, MJ Prichard, “Trespass, Case and the Rule in *Williams v Holland*” (1964) 22 *Cambridge Law Journal* 234.

³¹ Fifoot, n 9, 66.

³² *McManus v Crickett* (1800) 1 East 106; 102 ER 43.

³³ The plaintiff was also unable to succeed on the basis of vicarious liability as it transpired that the servant had intentionally driven against the plaintiff’s carriage and so was acting outside the “scope of employment” at the time of the collision.

³⁴ Although after the introduction of statutory restrictions on recovering costs in trespass, there were cost advantages in so doing; Ibbetson, n 30, 156–157.

³⁵ *Day v Edwards* (1794) 5 Term Rep 648; 101 ER 361.

³⁶ It is not relevant, for this purpose, that the case involved trespass to goods rather than trespass to the person.

³⁷ A demurrer is “a pleading by which one of the parties alleged that the preceding pleadings of the other party showed no good cause of action or defence”; Roger Bird, *Osborn’s Concise Law Dictionary* (Sweet & Maxwell, 7th ed, 1983).

was trespass and not case. Similar difficulties were encountered by the plaintiff in *Savignac v Roome*,³⁸ a case heard in the same year. Once again, the plaintiff brought an action on the case against the owner of a carriage after it collided with the plaintiff's carriage, causing it damage. On this occasion, the evidence showed that the carriage had been driven by the servant of the defendant. Unlike in *McManus v Crickett*, however, the defendant was present in the carriage at the time of the accident. On this basis, the court held that the defendant's conduct was a direct cause of the plaintiff's injuries and the action was again nonsuited.

The law reports are filled with cases from the end of the 18th century and the beginning of the 19th century in which plaintiffs failed to recover compensation for damage sustained in a highway collision because the wrong form of action had been commenced. Despite the evident difficulties experienced by plaintiffs in commencing the right form of action, courts were initially unsympathetic to their plight. Instead, the courts emphasised the need for consistency and certainty in the law. As Lord de Grey CJ explained in *Scott v Shepherd*:³⁹

The distinction between actions of trespass on the case and trespass vi et armis should be most carefully and precisely observed, otherwise we shall introduce much confusion and uncertainty.

Such views were repeated by successive Chief Justices of the Court of King's Bench, including Lord Kenyon CJ and Lord Ellenborough CJ.⁴⁰

Over time, however, the attitude of the courts began to soften. The first indication that the courts were prepared to modify their strict approach to striking out claims incorrectly brought in either trespass or case came in the 1825 case of *Moreton v Hardern*.⁴¹ The plaintiff commenced an action on the case after a carriage owned by the three defendants collided with the carriage in which the plaintiff was travelling, injuring the plaintiff. The defendants tried to nonsuit the action on the basis that the carriage was being driven by one of the defendants at the time of the accident. As the defendants had directly caused the plaintiff's damage, it was argued that the appropriate form of action was trespass rather than case. The court held that although trespass could have been brought against the driver, it could not have been brought against the other two defendants. In such circumstances, the plaintiff was entitled to bring only one cause of action against the defendants and could consequently "waive" the trespass against the defendant who was driving the carriage and proceed in case. As Bayley J noted:⁴²

The objection made to the count was, that as one of the defendants was driving, the injury was immediate, and that, consequently, the action should have been trespass and not case. It is a sufficient answer to say, that the plaintiff had a right to sue all the defendants, and that trespass clearly would not lie against them all.

The concept of "waiving" the trespass was a fiction, but had the desired effect of preserving the action.

With the appointment of a new Chief Justice to the Court of the King's Bench, the fiction was ultimately replaced with a rule which allowed plaintiffs to commence an action on the case regardless of whether the interference was directly or indirectly caused by the defendant's conduct, provided that the defendant had acted negligently, rather than intentionally. The rule was introduced by Tindal CJ in the 1833 case of *Williams v Holland*.⁴³ The plaintiff brought an action on the case against the owner of a carriage which had collided with the plaintiff's carriage, causing the carriage damage and injuring the plaintiff's children. The defendant had been driving the carriage at the time of the accident. The defendant's efforts to nonsuit the action on the basis that the defendant has directly caused the damage

³⁸ *Savignac v Roome* (1794) 6 Term Rep 125; 101 ER 470.

³⁹ *Scott v Shepherd* (1773) 3 Wils KB 403, 411; 95 ER 1124.

⁴⁰ Prichard, n 30, 249.

⁴¹ *Moreton v Hardern* (1825) 4 B & C 223; 107 ER 1042.

⁴² *Moreton v Hardern* (1825) 4 B & C 223, 226; 107 ER 1042.

⁴³ *Williams v Holland* (1833) 10 Bing 112; 131 ER 848.

to the plaintiff failed. Relying on the decision in *Moreton v Harden*, Tindal CJ (who gave the judgment for the court) held:⁴⁴

[W]here the injury is occasioned by the carelessness and negligence of the Defendant, the Plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act.

It followed that the plaintiff's action was well founded and that damages could be awarded.

The decision in *Williams v Holland* was significant because it enabled plaintiffs to overcome the difficulty of having to determine the immediacy of the causal connection between the defendant's conduct and the interference with the plaintiff's interests at the time of pleading by bringing an action on the case. Provided the defendant had not "acted wilfully", the plaintiff could commence an action on the case regardless of whether the plaintiff's injuries had been caused directly or indirectly by the defendant. Tindal CJ did not clarify the meaning of the term "wilful" in this regard. As the defendant's intentional act in driving the carriage did not disqualify the plaintiff pleading an action on the case, the term appears to have been used either in the sense of intended interference and/or intended harm. It follows that a plaintiff could not bring an action on the case where the defendant intended to interfere with the plaintiff's personal security and/ or intended to harm the plaintiff. It is important to note that the decision in *Williams v Holland* did not directly affect the writ of trespass. The writ was still limited to circumstances in which a defendant directly caused the interference with the plaintiff's interests. The effect of the decision was simply to make pleading an action on the case a much more attractive option.

This examination of the writ of trespass has shown that the availability of the torts of trespass to the person originally hinged on the immediacy of the causal connection between the defendant's conduct and the interference with the plaintiff's personal security. Subject to a limited range of defences,⁴⁵ a defendant could be held liable in trespass for any direct interference with a plaintiff's personal security.

It can also be seen that, at the very least, whether the defendant intended to interfere with the plaintiff's personal security or intended to harm the plaintiff was not initially a relevant consideration for the courts when imposing liability for trespass to the person. The courts only started making inquiries as to the intention of the defendant towards the end of the period in which the writ system operated in order to overcome practical difficulties experienced by plaintiffs in having to determine the immediacy of the causal connection between the defendant's conduct and the interference with the plaintiff's interests at the time of pleading.

As proof that a defendant had directly interfered with a plaintiff's interests was sufficient to attract liability under the writ of trespass,⁴⁶ the interests protected by the writ of trespass (including personal security) were considered "inviolable".⁴⁷ It does not necessarily follow, however, that the liability imposed for trespass to the person was strict. The imposition of such liability depended upon a plaintiff being able to show that the defendant engaged in conduct which caused a direct interference with the plaintiff's personal security. It is possible, therefore, that the defendant's conduct was seen, of itself, as a form of wrongdoing, since the consequence of the conduct was a direct interference with the plaintiff's personal security. As McLachlin J more recently noted in the Supreme Court of Canada decision in *Non-Marine Underwriters, Lloyds London v Scalera*:⁴⁸

[T]he traditional approach [to battery] will not impose liability without fault because the violation of another person's right can be considered a form of fault.

⁴⁴ *Williams v Holland* (1833) 10 Bing 112, 117–118; 131 ER 848.

⁴⁵ Including possibly the defence of "inevitable accident" which was turned in the next period to an element of the action. See below ff n 62.

⁴⁶ Provided the conduct was also voluntary.

⁴⁷ Blackstone, n 4, 129.

⁴⁸ *Non-Marine Underwriters, Lloyds London v Scalera* (2000) 185 DLR (4th) 1, [10].

John Gardner has made a similar point:⁴⁹ “The moral wrong one does is essentially just to injure P.”

Although a rather crude indicator of wrongdoing by modern standards, the courts had yet to develop an effective legal method by which judges could more finely balance the interests of a defendant in undertaking the particular conduct with the interests of a plaintiff in maintaining personal security when determining whether wrongdoing had occurred. Without such methods, there was little else for the courts to do other than attach liability to the undertaking of the conduct itself.

Difficulties in balancing the competing interests of plaintiffs and defendants did not mean that courts were not mindful of the importance of doing so when determining liability in trespass to the person during the operation of the writ system. Consider the following statement made in obiter by Holt CJ in the 1704 case of *Cole v Turner*:⁵⁰

If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery.

The statement suggests that the interest in having a functioning society, which necessarily involves people being in close physical proximity with one another, may outweigh a minor interference with personal security so that the defendant may not be seen in such circumstances to have engaged in wrongdoing. It does not appear, however, that such reasoning underpinned any actual decisions made during the period in which the writ system operated.⁵¹

Post Judicature Acts

The first steps to abolish the writ system were taken in 1852 with the passing of the *Common Law Procedure Act 1852* (UK).⁵² The Act removed the requirement for a writ to specify a particular form of action so that writs became little more than a form of originating process. With the passing of the *Supreme Court of Judicature Acts* in 1873 and 1875, the abolition of the writ system was complete. The forms of action were abolished, joinder of claims was permitted⁵³ and plaintiffs were free to plead the specific facts of their case.⁵⁴

Relieved from the shackles of form, the courts were also now free to focus on the substantive law. There was consequently an opportunity for the courts to reconsider rules which had previously been developed to overcome the vagaries of the writ system; such as the rule in *Williams v Holland* that a plaintiff could plead an action on the case regardless of whether the defendant had directly or indirectly interfered with the plaintiff’s personal security, provided the defendant had not “acted wilfully”. At this time, the courts might have opted to restore the immediacy of the causal connection between the defendant’s conduct and the interference with the plaintiff’s interests as the primary inquiry for determining liability in tort (abandoning more recent inquiries into the defendant’s intention). Instead, the courts confirmed that, in at least some circumstances, it was appropriate to consider how a defendant had acted when determining liability for trespass to the person.

The move towards the courts accepting that it was appropriate in some circumstances to consider how a defendant had acted when determining liability for trespass to the person started with the decision of the Court of Appeal in *Rylands v Fletcher*.⁵⁵ The judgment of the court was handed down by Blackburn J in 1866, after the enactment of the *Common Law Procedure Act 1852* (UK), but before the

⁴⁹ John Gardner, “Obligations and Outcomes in the Law of Torts” in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His 80th Birthday* (Hart Publishing, 2001) 1, 21.

⁵⁰ *Cole v Turner* (1704) Holt KB 108; 90 ER 958.

⁵¹ *Cole v Turner* itself was an “action of battery by husband and wife, for a battery upon the husband and wife”.

⁵² *Common Law Procedure Act 1852* (UK) c 76.

⁵³ *Supreme Court Rules 2009* (UK) O 18 enacted under the *Supreme Court of Judicature Acts*. See generally: Willis B Perkins, “The English Judicature Act of 1873” (1913–1914) 12 *Michigan Law Review* 277, 290.

⁵⁴ Maitland, n 8, 81.

⁵⁵ *Rylands v Fletcher* (1866) LR 1 Ex 265, 286–287.

writ system had been fully abolished by the *Judicature Acts*. The case itself did not concern trespass to the person; it is best known for creating a new tort that imposed liability on an occupier who made an unnatural use of land by keeping on that land a mischief which was likely to do damage if it escaped, and subsequently did escape.⁵⁶ In the course of the judgment, however, Blackburn J commented on liability in tort more generally. From those obiter comments emerged two associated rules which directly impacted the imposition of liability for trespass to the person.

The first rule to emerge from the obiter comments of Blackburn J in *Rylands v Fletcher* came to be known as the “highway exception”. The rule stated that a plaintiff could not succeed in trespass to the person in respect of damage suffered as a result of a collision on a highway caused by a defendant unless the plaintiff could prove that the defendant had either intentionally or negligently interfered with the plaintiff’s personal security.⁵⁷ The term “intentional” was used in this context to include intended harm, as well as intended interference, although the term was not always used consistently. The requirement for the plaintiff to show that the defendant had either intended to harm the plaintiff or intentionally or negligently interfered with the plaintiff’s personal security was a significant departure from the previous rule under which a plaintiff was generally only required to demonstrate that the defendant had directly interfered with the plaintiff’s personal security to be able to succeed in trespass to the person. The need to treat highway collisions differently from other cases of trespass to the person was referred to by Blackburn J in *Rylands v Fletcher*:⁵⁸

Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger. ... In neither case therefore, can they recover without proof of want of care or skill occasioning the accident.

In making this statement, Blackburn J was suggesting that a person who went on a highway “assumed” or “accepted” the risks of being injured while on the highway. What was not clear was why a person who went on a highway should be viewed as accepting such risks.

The reasons why highway users should be viewed as accepting the risks of being on a highway were subsequently expounded in the 1875 case of *Holmes v Mather*.⁵⁹ The plaintiff in the case was a young girl who had been run over by a carriage while walking on the footpath. The horses pulling the carriage had bolted after being startled by the barking of a dog. The court found that there was no negligence on the part of the defendant owner, who was in the carriage at the time of the accident. Nor had the defendant intended to either harm the plaintiff or interfere with the plaintiff’s personal security. Although the defendant had directly caused the plaintiff’s injuries, the plaintiff’s claim failed. In recognising the highway exception, Bramwell B held:⁶⁰

For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

He also commented:⁶¹

Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye and so injured it.

⁵⁶ Confirmed by House of Lords in *Rylands v Fletcher* (1868) LR 3 HL 330.

⁵⁷ The highway exception was also applied in respect of other protected interests, such as land; *Gayler and Pope Ltd v B Davies and Son Ltd* [1924] 2 KB 75.

⁵⁸ *Rylands v Fletcher* (1866) LR 1 Ex 265, 286–287.

⁵⁹ *Holmes v Mather* (1875) LR 10 Ex 261.

⁶⁰ *Holmes v Mather* (1875) LR 10 Ex 261, 267

⁶¹ *Holmes v Mather* (1875) LR 10 Ex 261, 267.

Such reasoning reflects concerns initially expressed by Holt CJ in *Cole v Turner*. In making such statements, Bramwell B was suggesting that there was a need to balance the interest in protecting personal security, with the broader interest in having a functioning society, which necessarily involved having traffic on highways so that people could move from one location to another. An appropriate balance between those competing interests could only be reached, in Bramwell B's view, by limiting the circumstances in which a plaintiff could successfully recover damages in trespass to the person in respect of injuries suffered as a result of a highway collision to those in which the plaintiff could show that the defendant had either intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff's personal security. Similar reasoning underpinned the extension of the highway exception to collisions involving motorcars.⁶²

The second and related rule to emerge from the obiter comments of Blackburn J in *Rylands v Fletcher* concerned accidents off the highway. Once it was accepted that a defendant could only be held liable in trespass to the person for an accident on the highway if the plaintiff could show that the defendant either intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff's personal security, questions arose as to whether similar considerations affected the imposition of liability for trespass to the person in respect of accidents "off" the highway. In *Rylands v Fletcher*, Blackburn J had made reference to a possible defence of "inevitable accident" in which a defendant could escape liability for trespass to the person if they could show that the interference with the plaintiff's interests was "inevitable", in the sense that it was beyond the control of the defendant. Blackburn J did not himself think that such a defence existed, preferring to explain the exclusion of liability in such circumstances in terms of an "assumption of risk" by a plaintiff,⁶³ as alluded to in the earlier quote. Despite this, the idea that liability for trespass to the person might be excluded in cases of "inevitable accident" took hold once the highway exception was formally recognised.

In the 1890 case of *Stanley v Powell*,⁶⁴ the Court of the Queen's Bench controversially⁶⁵ held that a defendant could escape liability for trespass to the person if the defendant could prove that the defendant had not either intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff's personal security. *Stanley v Powell* concerned the accidental shooting of a beater⁶⁶ by a member of a shooting party. A jury had found that the defendant did not intend to shoot the plaintiff (either in the sense of intended harm or intended interference). The jury also found that the defendant was not negligent in shooting the plaintiff, the most likely explanation being that the plaintiff had been shot after the bullet had glanced off a near-by tree.⁶⁷ Contrary to earlier decisions which suggested that a defendant could be held liable for accidentally shooting a plaintiff,⁶⁸ the defendant in *Stanley v Powell* escaped liability. Denman J held:

I am of opinion that if the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant.

⁶² *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539, 553 (McCardie J): "In my view it is reasonably clear on principle that just as no absolute duty at common law exists as against owners of horses, so no absolute duty at common law exists with respect to motor cars. ... I think that the general existing practice at Nisi Prius, of requiring some prima facie evidence of misconduct or negligence against a defendant, is correct, is sound in principle, and consistent with the main body of authority."

⁶³ *Holmes v Mather* (1875) LR 10 Ex 261, 287.

⁶⁴ *Stanley v Powell* [1891] 1 QB 86.

⁶⁵ PH Winfield and AL Goodhart, "Trespass and Negligence" (1933) 49 *Law Quarterly Review* 359.

⁶⁶ "A man employed in rousing and driving game" *Oxford English Dictionary*, <www.oed.com>.

⁶⁷ *Stanley v Powell* [1891] 1 QB 86, 87.

⁶⁸ See earlier discussion of *Weaver v Ward* and *Underwood v Hewson*.

Throughout his judgment Denman J referred to the concept of “inevitable accident” which Blackburn J had earlier discussed in *Rylands v Fletcher*. He then quoted the earlier statement of Bramwell B in *Holmes v Mather* to demonstrate that the law of trespass to the person had continued to develop after the abolition of the writ system, with a shift in focus away from the immediacy of the causal connection between the defendant’s conduct and the interference with the plaintiff’s interests towards an examination of whether the defendant had either intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff’s interests. Having recognised the change in the law, Denman J was able to dismiss the earlier shooting cases and find the defendant not liable for the plaintiff’s injuries.

The decision in *Stanley v Powell* was soon after approved by courts in other common law jurisdictions, including the Supreme Court of the Northwest Territories (Canada) in the 1898 case of *McLeod v Meek*.⁶⁹ The defendant in that case had accidentally shot the plaintiff while trying to remove a bullet from the gun while standing in a railway station on Christmas Eve. Wetmore J held:

The correct rule laid down by recent decisions is that a trespass to the person is not actionable if it be neither intentional nor the result of negligence. If, however, it is intentional or the result of negligence it is actionable. The whole question is discussed in a very excellent judgment by Denman J in *Stanley v Powell*.

The decision of the New South Wales District Court of Appeal (Australia) in the 1928 case of *Blacker v Waters*⁷⁰ was to similar effect. The plaintiff in that case had been shot while watching the defendant fire a gun at a shooting gallery located on a busy street. The shooting was found to be accidental in the sense that the defendant did not intend to harm the plaintiff or intend to interfere with the plaintiff’s personal security. The defendant was, however, found to have acted negligently. In holding the defendant liable, Street CJ stated:

In my opinion the appeal fails. ... The trespass to the plaintiff’s person was complete, on proof that the lead which entered his eye came from the bullet fired by the defendant at the target, and the defence was that it was not actionable as it was neither intentional nor the result of negligence; see *Stanley v Powell*. The burden of establishing that it was neither intentional nor the result of negligence lay, in my opinion, upon the defendant ... I do not think that we can say that the learned Judge was wrong in thinking that ... he was guilty of negligence.

As can be seen, the rules governing the imposition of liability in trespass to the person significantly changed after the abolition of the writ system. The result of the decisions in *Holmes v Mather* and *Stanley v Powell* was that it was no longer sufficient for a plaintiff to show that a defendant had directly interfered with the plaintiff’s interests for liability in trespass to the person to be imposed. It also had to be shown that the defendant had intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff’s interests. The only real difference between the cases was who bore the onus of proof. With respect to claims resulting from highway collisions, *Holmes v Mather* established that the plaintiff bore the onus of proving that the defendant had intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff’s interests. When a claim arose off the highway (as in the shooting cases), the defendant bore the onus of proving that the defendant had not intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff’s interests in accordance with *Stanley v Powell*.

The decisions in *Holmes v Mather* and *Stanley v Powell* have subsequently been interpreted as signalling a shift to “fault” based liability in the torts of trespass to the person.⁷¹ It is true that at the time the cases were decided, there were a number of prominent jurists advocating that there should not be liability in tort without proof of fault, the most notable being Oliver Wendell Holmes JR in his book *The Common Law* published in 1881. This is not, however, the only interpretation of the cases.

⁶⁹ *McLeod v Meek* (1898) 6 Terr LR 431.

⁷⁰ *Blacker v Waters* (1928) 28 SR (NSW) 406.

⁷¹ GHL Fridman, “Trespass or Negligence?” (1971) 9 *Alberta Law Review* 250.

First, such an interpretation rests on a view that the liability imposed in trespass to the person during the period in which the writ system operated was not itself a form of fault-based liability. As explained in the previous section, this is not entirely clear.

Second, to the extent that reasons were given in the cases, those reasons focused on the need to balance competing interests rather than change the nature of the liability imposed in trespass to the person from strict liability to fault-based liability. In *Holmes v Mather*, the court said that the “highway exception” was introduced in order to balance the interest in protecting personal security, with the broader interest in having a functioning society, which necessarily involved having traffic on highways so that people could move from one location to another. The reasoning of Denman J in *Stanley v Powell* was not so transparent. After distinguishing the earlier shooting cases, Denman J did little other than approve the reasoning in *Holmes v Mather*. In approving such reasoning, it is possible that Denman J formed the view that just as there was a need to balance the interest in protecting personal security with the broader societal interest of using highways, there was also a need to balance the interest in protecting personal security with the broader societal interest of being able to hunt. If this is correct, it would appear that Denman J also formed the view that the interest in being able to hunt was not as important as the interest in being able to use the highway, given that he placed the burden in hunting cases on the defendant to prove that they did not intentionally harm the plaintiff or intentionally or negligently interfere with the plaintiff’s interests rather than on the plaintiff, as the court did in *Holmes v Mather*.

The difficulty for Denman J in *Stanley v Powell* was that there was no ready method by which he might balance the competing interests of personal security and being able to hunt or indeed explain that balance. The idea that a plaintiff might have “assumed” or “accepted” the risk of undertaking certain activities, as used by Blackburn J to develop the highway exception, was both too blunt and hollow sounding when applied to activities such as shooting. Today, courts regularly balance competing interests when imposing liability in negligence. At the time *Stanley v Powell* was decided, however, a single tort of negligence did not exist. The tort of negligence was nothing more than a series of discrete duty categories with no unifying principle. This may explain why Denman J proffered little more in terms of reasoning in *Stanley v Powell* other than an approval of the reasoning in *Holmes v Mather*.

Post *Donoghue v Stevenson*

The decision of the House of Lords in *Donoghue v Stevenson*⁷² was one of the most significant decisions of the 20th century. It recognised that liability for negligence might be imposed in circumstances outside a contractual relationship. It lay down a test for determining the circumstances in which liability for this new tort of negligence might be imposed; Lord Atkin’s famed “neighbourhood principle”.⁷³ It also recognised that manufacturers of goods owed consumers of those goods a duty of care and could be held liable when a consumer was injured as a result of a breach of that duty.

For present purposes, however, it was the reasons given by the Lords for the specific formulation of the fault element in the new tort of negligence which are most important. Those reasons were most clearly enunciated by Lord Macmillan:⁷⁴

In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life.

⁷² *Donoghue v Stevenson* [1932] AC 562.

⁷³ *Donoghue v Stevenson* [1932] AC 562, 580–581.

⁷⁴ *Donoghue v Stevenson* [1932] AC 562, 619.

It was this concern with the complexity of everyday human life which led the Lords to adapt and make generally available a method which enabled the courts to effectively balance the interests of defendants in undertaking particular activities with the interests of plaintiffs in being free from harm when determining liability in the law of torts. That method involved determining the “standard of a reasonable person” and assessing whether the defendant had acted in accordance with standard.⁷⁵ As the historical development of the torts of trespass to the property demonstrates, the need for such a generally available method had long been flagged by the courts.

The development of the tort of negligence signalled a whole new approach to determining liability in the law of torts, but did not directly affect the torts of trespass to the person. The tort of negligence was a stand-alone tort. There was, however, the potential for the torts of trespass to the person and the tort of negligence to overlap. As noted in the previous section, negligence could form the basis of a claim in trespass. This meant that the method for balancing competing interests in the tort of negligence might be available, in at least some circumstances, to assist in determining liability in the torts of trespass to the person. It also meant that more than one cause of action (complete with different tests for determining liability) might arise in the same factual circumstances.

At least initially, the potential for overlap between the torts of trespass to the person and the tort of negligence did not appear to be cause for concern. In the notorious hunting case of *Cook v Lewis*,⁷⁶ the Supreme Court of Canada did not question that the torts of trespass to the person and the tort of negligence might arise on the same facts. The court was more concerned with a lack of evidence which affected both claims equally. There was, however, a concern to balance competing interests when determining liability in shooting cases, whether the claim was brought in the trespass or negligence. This concern is evident in the judgment of Rand J, as is his disapproval of Blackburn J’s earlier attempts to balance competing interests in the torts of trespass to the person in terms of an “assumption of responsibility” by a plaintiff.⁷⁷

The risks arising from these sporting activities by increased numbers of participants and diminishing opportunity for their safe exercise, as the facts here indicate, require appropriate refinements in foresight. Against the private and public interests at stake, is the privilege of the individual to engage in a sport not inherently objectionable. As yet, certainly, the community is not ready to assume the burden of such a mishap. The question is whether a victim is to be told that such a risk, not only in substantive right but in remedy, is one he must assume.

In *Williams v Milotin*⁷⁸ the High Court of Australia was expressly required to examine the relationship between the torts of trespass to the person and the tort of negligence. The plaintiff in the case was a young boy who had been hit by a truck while riding his bicycle on a public road. The defendant claimed that the action was out of time as actions for trespass had to be commenced within four years of the cause of action accruing.⁷⁹ The plaintiff argued in response that his claim was in negligence, which had a longer limitation period of up to six years of the date on which the cause of action accrued.⁸⁰ Although there was the opportunity for the court to consider the substantive relationship between the torts of trespass to the person and the tort of negligence, the High Court limited itself to interpreting the relevant limitation statute. The High Court unanimously held that the torts of trespass to the person and the tort of negligence were two discrete causes of action which had developed independently of one another,⁸¹ and that express words were required by the legislature to remove the possibility of the plaintiff choosing

⁷⁵ The method had previously been restricted to claims for breach of a contractual term to use reasonable care.

⁷⁶ *Cook v Lewis* [1951] SCR 830.

⁷⁷ *Cook v Lewis* [1951] SCR 830, [13].

⁷⁸ *Williams v Milotin* (1957) 97 CLR 465.

⁷⁹ *Limitation of Actions Act 1936* (SA) s 36.

⁸⁰ *Limitation of Actions Act 1936* (SA) s 35.

⁸¹ *Williams v Milotin* (1957) 97 CLR 465, 474: “The two causes of action are not the same now and they never were.”

between two available causes of action to take advantage of different limitation periods. No such intention was evident on the face of the legislation.⁸²

The first case to seriously question the relationship between the torts of trespass to the person and the tort of negligence was the 1959 decision of the Court of the Queen's Bench in *Fowler v Lanning*.⁸³ The plaintiff in the case had been shot while participating in a shooting party with the defendant. There was no suggestion that the defendant had intentionally shot the plaintiff (either in the sense of intended harm or intended interference). Nor was there any evidence as to the circumstances surrounding the shooting more generally. As the plaintiff had failed to establish that the defendant had either intentionally harmed the plaintiff or intentionally or negligently interfered with the plaintiff's personal security, Diplock J dismissed the claim. After an extensive review of the authorities, Diplock J questioned whether the tests for establishing either the torts of trespass to the person or the tort of negligence differed in circumstances in which it was alleged that the defendant had acted negligently. He went on to specifically find that the onus of proving negligence lay upon the plaintiff, whether the claim was brought in trespass or negligence (disregarding the existing distinction between trespasses "on" and "off" the highway). His reasons for attempting to unify the approaches to determining liability for negligence in both the torts of trespass to the person and the tort of negligence lay in ensuring that there was an appropriate method to balance the competing interests of the parties notwithstanding the cause of action selected by the plaintiff:⁸⁴

If it were right to say with Blackburn J in 1866 that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury (ie injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking upon himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful – of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples. For Blackburn J in the passage I have quoted in *Fletcher v Rylands*, was in truth doing no more than stating the converse of the principle referred to by Lord Macmillan in *Read v J Lyons & Co Ltd*, that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others.

Evidently, Diplock J was as critical of Blackburn J's earlier attempts to develop a method to balance competing interests as Rand J had been in *Cook v Lewis*.

The English Court of Appeal in *Letang v Cooper*⁸⁵ went one step further and held that the torts of trespass to the person were not available where the defendant had negligently interfered with the plaintiff's personal security, as opposed to intentionally harming the plaintiff or intentionally interfering with the plaintiff's personal security. The plaintiff in the case had been sunbaking in a carpark when her legs were run over by the defendant in his Jaguar motorcar. As in *Williams v Milotin*, the English Court of Appeal was required to determine whether the limitation period for the torts of trespass to the person or the tort of negligence should be applied. Unlike the High Court of Australia in *Williams v Milotin*, however, the English Court of Appeal chose to examine the substantive relationship between the different torts. Lord Denning MR emphatically held:⁸⁶

The truth is that the distinction between trespass and case is obsolete. We have a different sub-division altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. ... If

⁸² *Williams v Milotin* (1957) 97 CLR 465, 473.

⁸³ *Fowler v Lanning* [1959] QB 426.

⁸⁴ *Fowler v Lanning* [1959] QB 426, 439.

⁸⁵ *Letang v Cooper* [1965] 1 QB 232.

⁸⁶ *Letang v Cooper* [1965] 1 QB 232, 239 (with whom Danckwerts LJ agreed).

he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care.

This new division reflected more modern developments in the torts of trespass to the person, specifically the shift in focus from the immediacy of the causal connection between the defendant's conduct and the interference with the plaintiff's interests to how the defendant engaged in that conduct. The division also acknowledged the greater capacity of the courts to balance the competing interests of the parties under the tort of negligence. In redrawing the division between trespass and negligence, Lord Denning MR's principal concern was with consistency and certainty in the law of torts and the need not to repeat earlier mistakes.⁸⁷

I must say that if we are, at this distance of time, to revive the distinction between trespass and case, we should get into the most utter confusion. The old common lawyers tied themselves in knots over it, and we should do the same.

As the defendant had not intended to run over the plaintiff's legs (either in the sense of intended harm or intended interference – note that Lord Denning MR appeared to use these two concepts interchangeably), it was held that the shorter limitation period for the tort of negligence was to be applied, with the result that the plaintiff was out of time.

Diplock J, who handed down judgment in *Fowler v Lanning*, was also on the Bench in *Letang v Cooper*. He was not persuaded by Lord Denning MR's arguments and maintained his original position that a plaintiff was entitled to choose either the torts of trespass to the person or the tort of negligence in cases in which the defendant intended to harm the plaintiff or intentionally or negligently interfered with the plaintiff's personal security. In Diplock J's view, however, the tests for establishing liability under the different torts were the same, removing any issue of consistency and certainty in the law.

The availability of the torts of trespass to the person in respect of negligent conduct by a defendant (negligent trespass) remains a source of continuing controversy. Lord Denning MR's judgment in *Letang v Cooper* represents the state of the law in England and Wales, following the decision of the House of Lords to refuse leave to appeal. The High Court of Australia has not yet had the opportunity to reconsider its decision in *Williams v Milotin* so that there is currently still the potential for the two torts to arise on the same facts.⁸⁸ Furthermore, the High Court has maintained that different tests, particularly in terms of onus of proof, exist for the two torts.⁸⁹ A similar position exists in Canada, where the opportunity to reconsider *Cook v Lewis* is also yet to arise.⁹⁰

The controversy with respect to negligent trespass has proved difficult to resolve. The debate is quickly reduced to arguments emphasising the historical development of the law⁹¹ as against concerns with consistency and certainty.⁹² It is unclear, however, whether the debate has much of an effect on the actual resolution of disputes. The principal differences between proceeding in the torts of trespass to the person or the tort of negligence in cases of negligent conduct lie in the onus of proof and the need to prove damage. With respect to onus of proof, Windeyer J of the High Court of Australia noted in *McHale v Watson* (a case in which a young boy threw a dart while playing with friends, accidentally hitting a young girl):⁹³

⁸⁷ *Letang v Cooper* [1965] 1 QB 232, 238.

⁸⁸ Compare *Hackshaw v Shaw* (1984) 155 CLR 614 (Gibbs CJ); *Platt v Nutt* (1988) 12 NSWLR 231 (Kirby J); *Veming v Chin* (1974) 10 SASR 299 (Jacobs J).

⁸⁹ *McHale v Watson* (1964) 111 CLR 384.

⁹⁰ Although who bore the burden of proof in trespass claims was considered by the Supreme Court of Canada in *Non-Marine Underwriters, Lloyds London v Scalera* (2000) 185 DLR (4th) 1.

⁹¹ What John Fleming called the "misplaced cult of historicism" in John Fleming, *The Law of Torts* (Law Book Co, 9th ed, 1998), cited in *Platt v Nutt* (1988) 12 NSWLR 231, 237 (Kirby J).

⁹² *Platt v Nutt* (1988) 12 NSWLR 231 (Kirby J).

⁹³ *McHale v Watson* (1964) 111 CLR 384, 389.

But, where the elements on which liability depends are not in dispute and evidence relating to them is given on both sides, it seems to me that adjudication is not likely often to depend upon which side has the onus of proof.

The statement is particularly apt in cases of negligence, where fault is determined objectively by reference to how a reasonable person would have acted.⁹⁴ Practicalities such as the cost of bringing legal proceedings also means that there are relatively few instances where courts are asked to determine liability where there is no proof of damage. This is not to suggest that such cases do not occur; the avid reader being accidentally locked in the library for a short period of time is an example often used.⁹⁵ It is just that there is often not much incentive to bring such claims to court.

As with every other period in the historical development of the torts of trespass to the person, the period following the development of a single tort of negligence in *Donoghue v Stevenson* was a time of significant change. The courts finally had a more effective method for balancing competing interests which was available for general use; the method of determining the “standard of a reasonable person” and assessing whether the defendant had acted in accordance with that standard. This method has since been fully utilised in respect of negligent conduct irrespective of whether a claim has been brought in the torts of trespass to the person or the tort of negligence. The development has raised serious questions about the relationship between the torts of trespass to the person and the tort of negligence. Only one jurisdiction, however, has taken the development to its logical conclusion and abolished claims for negligent trespass.

CONCLUSION

The controversy surrounding the availability of claims for negligent trespass has garnered considerable academic attention.⁹⁶ The controversy, however, should not be viewed in isolation. It is just one step in a process of continual change and development undertaken by the courts when imposing liability in trespass to the person. As the examination of the historical development of trespass to the person in part one of this article has shown, the courts have slowly been shifting the focus when imposing such liability from *what* a defendant did (engage in conduct which interfered with a plaintiff’s personal security), to *how* the defendant did it. At the same time, courts have been developing increasingly sophisticated techniques to more carefully balance competing interests when imposing liability in trespass to the person.

In light of that historical development, it might now be asked whether the English Court of Appeal went far enough in *Letang v Cooper*. Part two of this article (to be published separately) examines the current process for determining liability in trespass to the person. Continuing evolutions in the balancing techniques employed in determining liability in trespass to the person have brought the process for determining that liability much closer to the process for determining liability in negligence. So close, that it might be argued that the balancing techniques employed by the courts when determining liability in trespass to the person are now out of date. As with all forms of outdated technology, there comes a time to consider whether it has reached the point of being obsolete. In the second part of this article it is suggested that time has come for the torts of trespass to the person, so that liability for all interferences with personal security should now be determined in accordance with the tort of negligence.

⁹⁴ There is greater potential for the onus of proof to play a more significant role in cases of alleged intentional interference with the plaintiff’s personal security where evidence of intention is harder to establish. Discussed further in part 2 of this article.

⁹⁵ Peter G Heffey, “Negligent Infliction of Imprisonment: Actionable ‘Per Se’ or ‘Cum Damno’?” (1983) 14 *Melbourne University Law Review* 53, 64.

⁹⁶ Gerald Dworkin, “Trespass and Negligence – A Further Attempt to Bury the Forms of Action” (1965) 28 *Modern Law Review* 92. Fridman, n 71. Lewis Klar, “Intentional and Negligent Trespass: It Is Time to Clarify the Law” (2004) 28 *Advocates Quarterly* 410.