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THE NEGLIGENCE DUALISM

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TABLE OF CONTENTS

INTRODUCTION	2
I. WHAT IS THE NEGLIGENCE DUALISM?.....	11
II. COURTS OCCASIONALLY ALLOW JURIES TO FORGIVE COMPLIANCE ERRORS.....	35
A. <i>The General Landscape of Modern Absolution Doctrine</i>	35
B. <i>Modern Judicial Controls on Jury Absolutions</i>	38
III. THE DUALISM IN CLASSICAL ACCIDENT LAW	53
A. <i>Procedural Preliminaries</i>	53
B. <i>How the Modern Negligence Rule Maps onto the Old Writs</i>	65
C. <i>Three Central Accident Cases from the Holmes Canon</i>	69
D. <i>Accidental Harms to Property</i>	82
E. <i>Accidental Shootings</i>	85
F. <i>Accidental Collisions</i>	89
G. <i>The Thorns Case</i>	93
H. <i>Modern Accident Law Could Be More Strict Than Classical Law</i>	99
IV. THE DUALISM IN MODERN ACCIDENT LAW	100
CONCLUSION.....	110

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THE NEGLIGENCE DUALISM

INTRODUCTION

The purpose of this article is to reexamine and to provide a better description of the core features of the negligence rule. Because the rule is so basic, it has attracted countless analyses. Nevertheless, our fundamental understanding still comes from Oliver Wendell Holmes's third lecture of *The Common Law*.¹ Holmes published his lectures in 1881, and it is a tribute to his brilliance that his third lecture still guides our thinking about the most basic aspects of negligence doctrine.

In that year the English and American authorities had only recently abolished the "forms of action," which had framed legal thought up to that point. Only a little before Holmes wrote, lawyers had thought not of the "rule of negligence" but of the requirements of "trespass *vi et armis*" and "trespass on the case," the two forms of action that together covered the domain of modern negligence law, as well as what we now call intentional torts. Holmes obviously saw this legal revolution as an opportunity for his analytical gifts.² In his lecture III, he set out

¹ O.W. HOLMES, JR., *THE COMMON LAW* (1881) [hereinafter *HOLMES, COMMON LAW*]. For an outstanding description of how our modern concepts of accident law developed, including Holmes's influence on these concepts, see Thomas C. Grey, *Accidental Torts*, 54 *VAND. L. REV.* 1225 (2001) [hereinafter *Grey, Accidental Torts*].

² Holmes prefaced his analysis as follows:

Since the forms of action have disappeared, a broader treatment of the subject ought to be possible. Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning.

Id. at 78.

to describe the modern law of negligence and of “trespass,” which is how Holmes has made us see the two modern categories of tort.

Holmes also observed that the modern rule of negligence came from both of the old trespassory writs. Because his new gloss would synthesize the substantive law of both, his lecture III was filled with historical cases. The rule of negligence, according to Holmes, was essentially a fault-based rule that created liability when people failed to comply with “standards of general application”³ that corresponded to the conduct of a “prudent man.”⁴ The second part of Holmes’s gloss was that the negligence rule nevertheless contained a modest pocket of strict liability because persons facing special challenges and disabilities could not always meet its requirements, which were set to “a certain average of conduct.”⁵ Thus, the “man born hasty and awkward” might find absolution in heaven, but not in common law courts.⁶ Both parts had famous sources in English court decisions. The first part of Holmes’s gloss—that negligence is conduct that falls

³ *Id.* at 108.

⁴ *Id.* at 107.

⁵ Holmes summarized this point as follows:

The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. *If we fall below the level in those gifts, it is our misfortune; so much as that must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law.*

Id. at 108 (emphasis supplied). Just a little later, Holmes discussed “distinct defects,” which were not the same as a lack of “intelligence and prudence” and which, in his view, did not generally lead to strict liability. *Id.* at 109-10.

⁶ *Id.* at 108. Actually, as we will see, the person born “hasty or awkward” can sometimes find absolution in earthly courts when a common-law court allows a jury to forgive a compliance error. See, e.g., *A.C. ex rel. Cooper v. Bellingham School District*, 105 P.3d 400 (Wash. App. 2005) (teacher absolved for losing grip on piñata bat that struck plaintiff, her student), discussed *infra* pp. 36-37, and also the explanatory text *infra* pp. 38-39.

below an objective standard—had been stated twenty-five years earlier by Baron Edward Hall Alderson in the English Court of Exchequer.⁷ The second part—that the negligence rule creates strict liability for those unable to meet its objective standards—was the principal theme of the great English case of *Vaughan v. Menlove*, decided in 1837.⁸ It is a tribute to Holmes that he was so early able to see the significance of these cases and to generalize the rule they stated.

The latter-nineteenth- and then twentieth-century negligence scholarship basically picked up where Holmes left off. Over this very long period several major issues and themes can be discerned. First, if accident law is fault-based, was it always this way, or was there an earlier period of development in which strict liability was not just a pocket for people of below-average ability, but the basic rule for everyone? Late-nineteenth- and early twentieth-century scholars

⁷ Baron Alderson wrote in the case of *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 156 Eng. Rep. 1047 (Exch. 1856):

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.

Id. at 1049. Holmes cited the case for one of his key assertions (that negligence is conduct, not a state of mind). See HOLMES, COMMON LAW, *supra* note 1, at 107, n.2. The *Blyth* case is discussed *infra* pp. 99-100.

⁸ 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837). In that case, the defendant lacked normal intelligence and argued that the jury should have been instructed to take his actual intelligence into account when determining whether he had been negligent. In deciding that he was liable whether or not he could have achieved the law's objective standard of conduct, the court said:

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

Id. at 493.

took different views⁹ based on historical sources that were then much less developed than in our own day.¹⁰ Even now, however, based on many more

⁹ See John Henry Wigmore, *Responsibility for Tortious Acts: Its History, Part III*, 7 HARV. L. REV. 441, 442-43 (1894), who concluded that liability for accidents was strict in the 1300s, but became more fault-based starting with the early seventeenth-century case of *Weaver v. Ward*, discussed *infra* pp. 69-73. The great Harvard torts scholar James Barr Ames agreed with Wigmore. See James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908). In a key passage, Ames wrote:

The early law asked simply, “Did the defendant do the physical act which damaged the plaintiff? The law of today, except in certain cases based upon public policy, asks the further question, “Was the act blameworthy?” The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one’s peril.

Id. at 99.

The English historian William Holdsworth, originally writing 1908, asserted that the rule applied by medieval English courts to cases of accidental injury to persons was strict. 3 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 375-80 (5th ed. 1942). Here is Holdsworth’s statement of his position:

The general rule is that a man is liable for the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of actions provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. In adjudicating upon questions of civil liability the law makes no attempt to try the intent of a man, and the conception of negligence has as yet hardly arisen. A man acts at his peril.

Id. at 375.

With regard to accidental personal injuries, Holdsworth based his conclusion of strict liability on lawyers’ arguments in *The Thorns Case*, discussed *infra* pp. 91-97, which itself involved a trespass to land. See *id.* at 375-77.

Finally, the English torts scholar Percy H. Winfield, writing in 1926, argued that even ancient liability rules, dating from the Anglo-Saxon period, were not rules of “absolute liability” in that they were always subject to important limitations that could be related in one way or another to the actor’s fault. See Percy H. Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37, 44-51 (1926).

¹⁰ The later English legal historian C.H.S. Fifoot has complained that

The literature on the subject offers as a whole a striking and not entertaining warning against the temptation of historians to assume the presence of some recurrent theme—of evolution or of progress or of action and reaction—to “find the facts” necessary to disclose or to support it. To adventure far into this fascinating realm of wish-fulfillment would be irrelevant to the purpose of the present book.

C.H.S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* 187 (1949) [hereinafter FIFOOT, *HISTORY AND SOURCES*]. Fifoot himself seemed genuinely unable to decide whether the old English rule of accidents was strict liability or fault-based. He concluded his analysis of the old cases as follows:

It is not unfair to conclude that the evidence, fragmentary as it is, confirms Holmes in denying any initial premise of strict liability, and perhaps suggests a doubt as to his “period of dry precedent” [in which strict liability may have prevailed] between two more enlightened eras. The prevailing tenor of judicial opinion in the first half of the nineteenth

sources,¹¹ modern historians still contest whether the old accident law was strict or fault-based.¹² A related scholarly theme from the mid-to-late-twentieth century was that American courts, sometime in the nineteenth century, shifted from strict

century, as far as so palpable a phenomenon may be analysed, would seem to favour rather than to reject the presence of fault as a necessary element of liability both in Trespass and in Case.

Id. at 194.

¹¹ Torts scholars owe a great debt to Morris S. Arnold, J.H. Baker, C.H.S. Fifoot, and S.F.C. Milsom, for collecting and translating a large number of classical tort cases that were almost surely unavailable to scholars of Holmes's generation. In this article I've especially benefited from YEAR BOOKS OF 2 RICHARD II, 1378-1379 (Vols. I & II) (Ames Foundation, Morris S. Arnold ed. 1975) [hereinafter ARNOLD, YEAR BOOKS OF 2 RICHARD II]; SELECT CASES IN THE COURT OF KING'S BENCH, VOL. I, (Selden Society, vol. 55); 1 SELECT CASES OF TRESPASS FROM THE KING'S COURTS, 1307-1399 (Morris S. Arnold ed., 1985) [hereinafter 1 ARNOLD, SELECT CASES OF TRESPASS]; 2 SELECT CASES OF TRESPASS FROM THE KING'S COURTS, 1307-1399 (Morris S. Arnold ed., 1987) [hereinafter 2 ARNOLD, SELECT CASES OF TRESPASS], JOHN H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750 (1986) [hereinafter BAKER & MILSOM, SOURCES]; and FIFOOT, HISTORY AND SOURCES, *supra* note 10.

¹² The English historian J.H. Baker has concluded that the old law of accidents was fault-based. He has written:

[A]lthough negligence played no formal part in the action of trespass *vi et armis*, it seems likely that a man was only considered guilty of a trespass if he was to blame for it, first in the sense that he had caused it, and secondly in the sense that with reasonable care he could have avoided it. There is no reason to suppose that the standard was any different for trespass and case, since in either case it was left to the jury to decide according to current notions of culpability.

J.H. BAKER, AN INTRODUCTION TO LEGAL HISTORY 459 (3d ed. 1990) [hereinafter BAKER, INTRODUCTION].

S.F.C. Milsom thought that the old civil rule for accidents was probably stricter than the modern rule, but he says that the evidence is very sparse because issues of fault were addressed to the jury after a plea of the general issue. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 299 (2d ed. 1981) [hereinafter MILSOM, HISTORICAL FOUNDATIONS].

Finally, the American legal historian (and judge) Morris S. Arnold has in turn disputed his English colleagues, as well as their reasoning, and has argued that unless trespass *vi et armis*, as applied to accidents, was a tort of strict liability during the fourteenth century, some evidence of attempts to plead the absence of fault should be apparent. See Morris S. Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361, 375-78 (1979) [hereinafter Arnold, *Accident, Mistake, and Rules*].

liability for accidents to a fault-based negligence rule, and their purpose was to subsidize industrial development.¹³

A third theme, still based on Holmes's pioneering work, has been the precise content of the negligence rule. Holmes had said that it was "objective" and based on what a "prudent" person would do under the circumstances, but he offered no other way to think about the standard of care except to suggest that courts would evolve as legal precedents detailed standards for different accidents. This idea, famously, did not work out.¹⁴ Early in the twentieth century, Henry T. Terry argued that cost-benefit analysis could be helpful in thinking about the standard of care.¹⁵ A little later, Judge Learned Hand developed this theme in the celebrated

¹³ Morton Horwitz has argued that as a practical matter liability for accidental harm in the eighteenth century was strict whatever the heading of liability. Here is a representative quotation from his work:

At the end of the eighteenth century, when the conception of negligence revolved around nonfeasance, liability in trespass and case was equally strict and there was little inducement to distinguish between them. Nuisance, which dominated tort actions for injuries, was itself a strict liability doctrine and was, in fact, pleaded in case. When in the course of the first half of the century the idea of misfeasance begins to prevail, it transforms not only the action on the case but that of trespass as well. The result was that some judges came to require that negligence be proven even in trespass, while others distinguished between the actions on the basis of whether the injury was intentional or negligent. But whatever the period studied, there is no indication that American judges ever regarded the substantive law governing the two writs as turning on a distinction between strict liability and negligence.

MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 90 (1977) (footnotes omitted) [hereinafter HORWITZ, *TRANSFORMATION*].

¹⁴ Compare *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927) (per Holmes, J.) (it is negligence as a matter of law to fail to get out of car to look down obstructed tracks) with *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934) (per Cardozo, J.) (failure to get out of car and look is not negligence as a matter of law). See also *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (per Easterbrook, J.) (theory that courts would evolve detailed standards of care was not one of Justice Holmes's "more astute predictions").

¹⁵ See Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42-44 (1915) [hereinafter cited as Terry, *Negligence*].

case of *United States v. Carroll Towing Co.*,¹⁶ and his work has in turn been explained and extended in a revolutionary way by modern economic theorists, including Richard Posner,¹⁷ William Landes,¹⁸ Steven Shavell,¹⁹ and many others. Indeed, the modern economic theory of accident law is probably the greatest tribute to Holmes's scholarship. This theory posits that negligence consists of a defendant's use of care (x) below the objective standard established by courts (x^*),²⁰ and that persons with substandard abilities can face a "strict liability element" within the negligence rule.²¹ The theory is a highly literal interpretation of Holmes's work—both his insights and his errors.

A final theme, developed mainly by late-twentieth-century economists, involves an extension of Holmes's thinking on the pocket of strict liability in the negligence rule. Holmes, it will be recalled, believed that strict liability would be faced only by those who were unlucky enough to be born "hasty or awkward" or who possessed less-than-standard intelligence or prudence. All others would encounter a fault-based rule. Holmes himself wrote, "[H]e who is in intelligent

¹⁶ 159 F.2d 169 (2d Cir. 1947). See the discussion *infra* pp. 25-31.

¹⁷ Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) [hereinafter Posner, *Theory of Negligence*].

¹⁸ See, e.g., William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851 (1981); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) [hereinafter LANDES & POSNER, *ECONOMIC STRUCTURE*].

¹⁹ See, e.g., Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 32-46 (1987) [hereinafter SHAVELL, *ACCIDENT LAW*].

²⁰ See LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 18, at 73-77; SHAVELL, *ACCIDENT LAW*, *supra* note 19, at 32-46.

²¹ See LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 18, at 73.

and prudent does not act at his peril, in theory of law.”²² To the economists, Holmes’s idea has meant that strict liability will be faced by people with higher-than-normal costs of taking care. To this notion, however, the economists have added a further idea of their own. They say that an additional pocket of strict liability is faced by those who are physically or mentally unable to control their movements or care levels.²³ Strict liability does indeed exist as a part of the negligence rule—indeed it is the largest part on the ground—but the strict liability does not arise in the way that these economists have said, a major point that will be developed below.

Holmes’s theory of accident law has been influential in every sense. It has guided academic conceptions of the negligence rule as well as the language of judicial opinions, and it has spawned scholarly conversations that continue down to our own day. If we put to one side the technical debates among legal historians, probably most lawyers and legal scholars today believe that the modern negligence rule was born sometime in the nineteenth century and that it was and is more profoundly fault-based than earlier legal rules governing accidents.²⁴ I will maintain that this popular history leads to a misunderstanding

²² HOLMES, COMMON LAW, *supra* note 1, at 108.

²³ See LANDES & POSNER, ECONOMIC STRUCTURE, *supra* note 18, at 72. *But see* Williams v. Hays, 52 N.E. 589 (N.Y. 1899) (defendant sea captain not liable for loss of ship if he was reasonably insane from overwork at time of bad decision).

²⁴ Good statements of this popular view are contained in Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951), and in HORWITZ, TRANSFORMATION, *supra* note 13, at 85-89. *See also* Michael Ashley Stein, *Priestley v. Fowler (1837) and the Emerging Tort of Negligence*, 44 B.C. L. Rev. 689 (2003); M.J. PRICHARD, SCOTT V. SHEPHERD (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE (1976) [hereinafter PRICHARD, SCOTT

of the real negligence rule, then and now. If we look at the results that courts have achieved over the centuries, they have been remarkably consistent, even though the courts' terminology has changed. The most striking difference between fourteenth-century and twenty-first-century accident jurisprudence is not how particular cases have been decided, but instead the composition of cases that have led to appeals.

To be sure, the negligence rule has been significantly elaborated and extended from the fourteenth century to our era, but its major empirical core has remained basically unchanged. That core was and is, not a principle of "negligence," at least according to our modern use of that term, but of absolute or strict liability. Ironically, this engulfing swath of strict liability within the negligence rule has become largely invisible in modern appellate decisions largely because it has become so uncontroversial. In a vast range of cases it does not pay a defendant who has been found absolutely liable at the trial level to appeal the legal principle. It is entirely too predictable that the appellate court in question will affirm the decision below. Indeed, most of the negligence cases to which absolute liability applies are settled because the principle so clearly ordains the defendant's liability. To compound the irony, what we today call the rule of negligence was created by the cases that at least some legal historians have instanced as evidence of a prior rule. Instead, these apparently puzzling old cases actually established the strict-liability core of the modern negligence rule.

v. SHEPHERD]; M.J. Prichard, *Trespass, Case and the Rule in Williams v. Holland*, 1964 CAMBRIDGE L.J. 234 [hereinafter Prichard, *Trespass*].

Here is my plan for developing these points. In the next section I'll explain what the negligence dualism is and illustrate the concept with some modern cases, including the famous *United States v. Carroll Towing Co.*²⁵ The following section explores classical accident cases and examines whether these too can be explained by the dualism gloss. This analysis also sheds light on the claim made by some legal historians that the classical accident rule was stricter than the modern rule. The last section undertakes the same analysis for a set of modern accident cases. The rule enforced in the modern cases seems highly similar to that enforced in the classical accident cases. I'll then conclude with a few words about where I think this analysis might take us in the future.

I. WHAT IS THE NEGLIGENCE DUALISM?

Without intending to do so, Holmes left out of his negligence gloss a type of strict liability that traditionally existed in the old writs, especially in trespass *vi et armis*. (This same strict liability also existed in trespass on the case,²⁶ but it was more salient in *vi et armis*.) Modern courts could have been so influenced by Holmes they might have eliminated the classical strict liability, but they haven't. Strict liability still exists within the negligence rule, and it is not the small pocket that Holmes defined. It is instead the biggest part of the negligence rule applied to the everyday accidents of the twenty-first century.

²⁵ 159 F.2d 169 (2d Cir. 1947).

²⁶ See *Beaulieu v. Finglam*, Y.B. 2 Hen. IV, fol. 18, Pasch, pl. 6, (1401) (strict liability for apparent compliance error in setting fire that burned plaintiff's property), reprinted and translated in C.H.S. FIFOOT, HISTORY AND SOURCES, *supra* note 10, at 166-67 (1949).

Let me say briefly what I mean by “strict liability” and add an important qualification about how the courts apply this principle in the context of negligence. Generally speaking, someone is strictly liable if it would be prohibitively difficult or costly for that person to avoid all liability under the rule in question. Thus, the people who owned and operated the *Rylands v. Fletcher*²⁷ reservoir could not at reasonable cost avoid all liability for bursts, so they would be strictly liable in the most conventional sense. Under Holmes’s own conception, the person born “hasty or awkward” might not be able at reasonable cost to avoid negligence liability and so would also be strictly liable, at least some of the time.²⁸

The main strict-liability component within the negligence rule, which I’ll develop in detail below, can be somewhat different from the rule of *Rylands v. Fletcher*. This part of the negligence rule says that someone guilty of a lapse in an iterative precaution obligation—such as counting sponges before closing the patient or looking for pedestrians when driving an auto—is strictly liable in varying degrees. In many cases, the legal opponent of such an individual will be entitled to judgment as a matter of law and will get it. Nevertheless, in some of these “compliance-error” cases the judge will send the case to the jury, and, in a

²⁷ 1 L.R. Exch. 265 (1866), *aff’d*, 3 L.R.E. & I. App. 330 (H.L. 1868). The defendants were owners of a reservoir who were held liable when it burst downward through subjacent abandoned mine shafts. The defendants’ building contractors, who were not defendants, knew of the abandoned mine shafts, but failed to tell the defendants or to do anything about risk. The Court of Exchequer Chamber and later the House of Lords held that the defendants were liable even though they seemed to have possessed no reasonable way of preventing the burst.

²⁸ Actually, contrary to Holmes, courts sometimes allow juries to forgive the lapses of the “hasty and awkward.” See the discussion in the text *infra* pp. 38-39.

subset of these, if the jury returns a verdict for the erring party, the trial court may *not* order either a new trial or judgment n.o.v., but will instead allow the jury to “absolve” the party for its compliance error. Although absolutions do not appear common, the practice of allowing them—very occasionally—has existed for centuries.

It may be objected that this rule for compliance errors—what I am calling strict liability—is no different from the common understanding of negligence. For two reasons, however, I think the rule for compliance errors (sponges left in patients, *etc.*) is much more like strict liability than at least the common conception of negligence. First of all, someone who has committed a compliance error (which has caused harm), will always have an expectation of liability because he will know that his opponent can always get to a jury²⁹ and that a jury verdict for the opponent will always be affirmed.³⁰ Indeed, the victim of the compliance error can usually get summary judgment or a directed verdict on the

²⁹ *See, e.g.*, *Mudd v. Dorr*, 574 P.2d 97 (Colo. App. 1977) (plaintiffs entitled to jury trial when defendant surgeon closed plaintiff wife without removing surgical sponge); *Pete v. Youngblood*, 141 P.3d 629 (Utah App. 2006) (trial court erred in entering summary judgment in favor of surgeon who had left surgical sponge in plaintiff).

³⁰ *See, e.g.*, *Shehtanian v. Kenny*, 319 P.2d 699 (Cal. App. 1958) (jury properly instructed that changing lanes without looking is negligence as a matter of law and sufficient evidence existed to support plaintiff’s verdict); *Mondot v. Vallejo General Hospital*, 313 P.2d 78 (Cal. App. 1957) (trial court erred in directing a verdict for defendant surgeon who may have left foreign object in plaintiff’s body); *Cochran v. Gritman*, 203 P. 289 (Idaho 1921) (plaintiff’s verdict affirmed when defendant surgeon left sponge in plaintiff); *Hanson v. Cresco Lines, Inc.*, 372 N.E.2d 936 (Ill. App. 1978) (plaintiff’s verdict affirmed when defendant changed lanes without adequately checking that path was clear); *Marigny v. DeJoie*, 172 So. 808 (La. App. 1937) (plaintiff’s verdict affirmed when defendant pharmacist dispensed wrong drug to plaintiff); *Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961 (Me. 2000) (plaintiff’s verdict affirmed when defendant’s pharmacist dispensed wrong drug to plaintiff); *Wynn v. Harvey*, 165 P. 67 (Wash. 1917) (plaintiff’s verdict affirmed when defendant surgeon left sponge in plaintiff).

issue of liability.³¹ In the unlikely event that the jury gives verdict to the person guilty of a compliance error, the usual result is for the trial court or the appeals court to order a new trial or judgment n.o.v. for the victim.³² Thus, in settlement

³¹ See, e.g., *Boyd v. Shaw*, No. Civ.A. 85C-JL-72, 1987 WL 764058 (Del. Super. Ct.) (court directed verdict against trucker who changed lanes without checking blind spot and crashed into plaintiff); *Plaut v. Allright Parking Management, Inc.*, 795 N.Y.S.2d 576 (App. Div. 2005) (pedestrian plaintiff given partial summary judgment on defendant motorist's negligence when motorist backed into pedestrian without adequately checking that path was clear); *Arabatzis v. Rha Trans Corp.*, 735 N.Y.S.2d 767 (App. Div. 2002) (summary judgment for plaintiff proper when taxi in which he was riding and that was owned by defendants rear-ended another vehicle); *Kaswan v. Mallory*, No. 79AP-449, 1980 WL 353218 (Ohio App.) (trial court properly directed verdict against defendant motorist who, when changing lanes, crashed into plaintiff's vehicle in adjacent lane).

For cases where courts have entered summary judgment against defendants who rear-ended plaintiffs' automobiles without excuse or justification see, for example, *Colby v. Parrillo*, No. CV 980412978, 2000 WL 371208 (Conn. Super. Ct.); *Caseria v. Klass*, No. CV92 03 94 68, 1992 WL 315919 (Conn. Super. Ct.); *Googe v. Hellandbrand*, No. CV96 0560974, 1996 WL 601987 (Conn. Super. Ct.); *Burgess v. CNY Star Construction*, 851 N.Y.S.2d 56 (N.Y. Sup. Ct. 2007); *Hakakian v. McCabe*, 833 N.Y.S.2d 106 (N.Y. Sup. Ct. 2007); *De La Cruz v. Ock Wee Leong*, 791 N.Y.S.2d 102 (App. Div. 2005); *Florez v. Diaz*, 663 N.Y.S.2d 620 (N.Y. Sup. Ct. 1997).

³² See, e.g., *Gray v. Brinkerhoff*, 258 P.2d 834 (Cal. 1953) (jury tried to absolve trucker who failed to notice plaintiff in crosswalk and struck her, but California Supreme Court found trucker liable as matter of law); *Ales v. Ryan*, 64 P.2d 409 (Cal. 1937) (jury tried to absolve surgeon who left sponge in plaintiff's deceased, but appeals court ordered new trial); *Lazzarotto v. Atchison, Topeka & Santa Fe Ry. Co.*, 321 P.2d 29 (Cal. App. 1958) (jury tried to absolve motorist who failed to notice that defendant's train was crossing his path, but trial court properly ordered judgment n.o.v. for railroad); *Gibson v. Southern Pacific Co.*, 290 P.2d 347 (Cal. App. 1955) (jury tried to absolve plaintiff who failed to notice that defendant's train was approaching while he was walking too close to tracks, but trial court properly entered judgment n.o.v. for railroad); *Previs v. Dailey*, 180 S.W.3d 435 (Ky. 2005) (jury tried to absolve truck driver who failed to ensure that he had fully passed bicyclist before swinging back into her space, but court reversed and found driver negligent as matter of law); *Rodriguez v. Budget Rent-A-Car Systems, Inc.*, 841 N.Y.S.2d 486 (App. Div. 2007) (when jury returned verdict for defendant who had rear-ended plaintiff's automobile, trial court should have entered judgment n.o.v. for the plaintiff on the issue of the defendant's liability); *Hyder v. Weilbaecher*, 283 S.E.2d 426 (N.C. App. 1981) (when jury returned verdict for surgeon who had left a wire in plaintiff, appeals court ordered new trial because of errors in jury instructions); *Franklin v. Toal*, 19 P.3d 834 (Okla. 2000) (when jury returned verdict for surgeon who had left nerve pad in plaintiff, trial court should have entered judgment n.o.v. for plaintiff on issue of surgeon's liability); *Jenkins v. Wolf*, 911 A.2d 568 (Pa. Super. 2006) (new trial proper when trial court failed to instruct that it was negligence per se for defendant motorist to fail to yield to plaintiff in crosswalk after jury apportioned a small amount of fault to driver); *Guckian v. Fowler*, 453 S.W.2d 323 (Tex. Civ. App. 1970) (jury tried to absolve motorist who without excuse or justification rear-ended plaintiffs' stopped vehicle, but trial court properly entered judgment n.o.v., for plaintiffs); *Hoey v. Solt*, 236 S.W.2d 244 (Tex. Civ. App. 1951) (jury tried to absolve driver who without excuse or justification rear-ended plaintiffs' vehicle while stopped at red light, but court ordered judgment n.o.v. for plaintiffs); *Crye v. Mueller*, 96 N.W.2d

negotiations, which are far more common than actual trials, the erring individual will almost always be liable for some portion of the damages. Second, the rule for compliance errors is clearly different from the standard conception of “negligence,” which only requires “reasonable” behavior. “Reasonable persons” routinely commit compliance errors, and the reasonableness of an error will not be a legal defense—although a jury may occasionally be allowed to forgive it. This new conception of the negligence rule leads to better predictions of judicial behavior and also opens up a new area where our academic understanding of the law is still deficient. When do judges commonly allow juries to absolve compliance errors? I’ll provide a general framework here, but I expect that others will wish to develop it further. I will also argue that this relatively unexplored area of compliance errors is the true core of the negligence rule in actual practice. Court-sanctioned absolutions of compliance errors seem very rare events.

The key to understanding negligence doctrine is to distinguish between “unreasonable precaution plans” and “compliance errors”—an important distinction because courts treat these two kinds of negligence differently. Precaution plans, to which Holmes’s fault-based notion of negligence properly applies, are typically precaution programs. So, a commitment by a motorist to look for pedestrians would be a “precaution plan,” as would be a commitment to drive within the speed limit. A typical precaution plan, like both of these examples, comprises a number of more or less indistinguishable iterations of the

520 (Wis. 1959) (jury tried to absolve motorist who failed to keep proper lookout for opposing traffic, but trial court properly found him negligent as matter of law).

same precaution, for instance, actually looking iteratively for pedestrians as one travels down the road and actually working the gas and brake pedals, again iteratively, so that one's auto stays within the speed limit. A "compliance error," to which strict liability applies, is a lapse in a precaution plan.³³ So, if a driver once fails to look for pedestrians, that is a "compliance error," and if this compliance error causes harm, as when the auto hits a pedestrian, the driver will be liable (except in the rare event when a court allows a jury to forgive the erring driver).

Here is the dualism that constitutes the negligence rule: courts require only *reasonable* precaution plans, but they make actors strictly liable for their compliance errors (again, subject to rare jury absolutions).³⁴ An actor can be liable by implementing an unreasonable precaution plan or by erring in the implementation of a reasonable plan. If one's precaution plan was—foolishly—never to look for pedestrians, that would be one way to be negligent. Another way would be to have a plan to look regularly for pedestrians, but to fail to do so on one occasion. As this example suggests, implementing an unreasonable precaution plan is often a more deliberate violation of the negligence rule than a

³³ Although Holmes captured the reasonable plan part of the negligence rule and failed to include the compliance error part, another writer from the same era made the opposite mistake. Francis Wharton defined negligence as "such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another." FRANCIS WHARTON, *A TREATISE ON THE LAW OF NEGLIGENCE* 3 (1874). See the discussion in Grey, *Accidental Torts*, *supra* note 1, at 1258-66.

³⁴ The exceptions to this harsh rule are familiar to torts students, even when the basic rule is not. Juries are told they can forgive the compliance errors of children in juvenile activities and of some other challenged people.

compliance error. Table 1 classifies the different types of negligence that this view generates.

Table 1: Types of negligence cases

	No compliance error	Compliance error
Reasonable plan	Type I case NL No breach of duty	Type II case L Breach of duty was lapse of an iterated precaution
Unreasonable plan	Type III case L Entails utilitarian balance (risk-utility approach)	Type III case L Overdetermined type of case

Courts use these concepts, without of course using these names, to decide cases and expose the concepts to various twists and turns in the opinion-writing process. Many examples will be given below. Basically, however, courts evaluate the reasonableness of precaution plans by examining the costs and benefits of an adopted plan relative to better plans. Thus, if the defendant's plan was *not* to have a bargee aboard its barge, the court will look at the costs and benefits of actually having a bargee. If, however, the defendant committed a compliance error, costs and benefits won't enter the calculus; the defendant will be strictly liable, unless the defendant falls under some special rule such as exists for children involved in juvenile activities and others with "distinct defects" as described by Holmes.

The same legal case can incorporate two different "cases" from table 1. One defendant may have committed a compliance error and was thus strictly liable, and another defendant (or even the same defendant) may have implemented a precaution plan that the court was able to see as unreasonable using the Learned

Hand formula or some similar risk-utility construct. The *Carroll Towing* case—the origin of the Learned Hand formula—itself incorporated both sides of the dualism, as the following discussion will show. The primary negligence issue in that case was a type II (compliance error) case, and the more famous comparative negligence issue—stemming from the bargee’s absence—was a type III (unreasonable plan) case.

Here is an even more accurate description of the key difference courts recognize between precaution plans and compliance errors. A precaution plan is typically a set of iterated precautions, but courts behave as if a precaution plan is any precaution *except* an individual iteration in a series of similar precautions. Thus, it is a precaution plan to commit to driving within the speed limit because this precaution is comprised of iterated similar precautions (doing what is necessary, iteratively, to stay within the speed limit). It is also a precaution plan to have a contest that encourages teenagers to speed over the freeways thus endangering other drivers because designing such a contest is *not* an individual iteration of a series of similar precautions.³⁵ The second example is more general. Most technically, a “precaution plan” is any precaution, or set of precautions, that is *not* a single iteration of a series of similar precautions. Although these concepts are admittedly a bit refined, they are also enormously useful in predicting how courts will look at different negligence cases and even how courts choose what

³⁵ See *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975) (radio station liable for auto collision caused by its dangerous contest).

reasoning to use in their opinions, whether risk-utility analysis or the more summary and simple reasoning that courts reserve for compliance errors.

Before we examine the classical cases, I want to think briefly about how these two different principles could have developed within the same rule—the modern rule of negligence. Imagine two hypothetical precautions, one “durable” in the sense that an actor does not have to use it very often and the other “nondurable,” which an actor must use frequently and iteratively. For the first, think of a fire escape. Once a building owner installs a fire escape, the owner won’t have to install another for a long time. Precisely because of its durability, a fire escape is not a single iteration in a series of similar and repeated precautions; it is a precaution plan. Any problems with the design or placement of the fire escape, or even its absence or presence, will be examined under the Learned Hand formula or something similar. For instance, if a building never has any people inside, it will be a reasonable plan not to have any fire escape.

When an actor uses a durable precaution—which may be required by the negligence rule—the same actor must usually also commit to a series of nondurable precautions. Once installed, the fire escape must be inspected, maintained, and repaired. Someone must check every month, or possibly every week, whether the spring-loaded steps can still extend down to the street or whether they have rusted tight so that evacuees would have to jump from the second floor. The fire escape itself is one precaution plan, and its maintenance program is a companion precaution plan. Suppose that the defendant’s actual plan was to check the fire escapes every month, but that one month the defendant

failed to check and, through bad luck, a fire occurred and the evacuees had to jump because the spring-loaded steps had rusted tight between inspections. The Learned Hand formula won't figure into the court's decision of this negligence case. The defendant will be strictly liable for the failure to use an iterated precaution.

Why is the absence of a fire escape judged under the Learned Hand formula but the failure to inspect a fire escape judged under a rule of strict liability? To see the answer, we need to make one more distinction: between "precaution cost" and "compliance cost." "Precaution cost" is what is foregone (either in expense or in increased risk to persons other than the victim) to use the precaution once (during some period of time). "Compliance cost" is the additional cost to ensure that the precaution is used at every reasonable interval (again, during some period of time). In fact, we get an excellent model of how courts actually decide negligence cases if we imagine that they pay full attention to precaution costs but pay little or no attention to compliance costs. The likely reason is that courts cannot see or measure compliance costs nearly as well as precaution costs. Compliance costs almost certainly increase at higher rates of compliance—as when compliance rates approach a perfect 100%—but courts cannot easily measure what the defendant's actual compliance rate was and hence what the compliance cost was for the missed iteration. Remember that the hallmark of a compliance error is that one looks pretty much the same as another. How is the court to know whether the missed fire-escape inspection was the defendant's first-ever miss or the last miss in a long series of misses? Theoretically, courts could

investigate defendants' habits of care and that way measure whether the defendant was probably at a reasonable compliance rate on the day in question. Nevertheless, this evidence would mainly come from the defendant or the defendant's friends and would often be self-serving. In fact, courts sometimes do look at an injurer's or victim's habits of using nondurable precaution when one of them was killed in the accident.³⁶ I don't know of a case, however, in which a party's good caretaking habits in the past have been held to exonerate his or her actual compliance error.³⁷ Courts also disregard compliance costs when they analyze durable precautions, but because of the very durability of such precautions compliance cost need only be incurred infrequently and is therefore small relative to precaution cost, which courts do examine.

This technical account of courts' difficulty in measuring compliance costs leads to a practical distinction between an unreasonable precaution plan (judged by some risk-utility construct) and a compliance error. In order for a lapse to be a compliance error, it should be indistinguishable from other lapses or potential lapses of the same type and which occur in the same sequence of iterations. As already noted, the only legal issue with respect to a compliance error is whether the judge should allow the jury to forgive it. Courts themselves do not normally

³⁶ See George H. Genzel, *Admissibility of Evidence of Habit, Customary Behavior, or Reputation as to Care of Motor Vehicle Driver or Occupant, on Question of His Care at Time of Occurrence Giving Rise to His Injury or Death*, 29 A.L.R.3d 791 (1970); G. H. Genzel, *Admissibility of Evidence of Habit, Customary Behavior, or Reputation as to Care of Pedestrian on Question of His Care at Time of Collision with Motor Vehicle Giving Rise to His Injury or Death*, 28 A.L.R.3d 1293 (1969).

³⁷ See *McGonigal v. Gearhart Industries*, 788 F.2d 321 (5th Cir. 1986), reconsidered and aff'd on subsequent appeal, 851 F.2d 774 (5th Cir. 1988) (defendant tried to defend on ground that a reasonable number of compliance errors was permissible, but failed).

forgive compliance errors, but, as we'll see in the next section, courts occasionally allow juries to do so.³⁸ Thus, if a surgeon miscounted the sponges before she closed her patient and left one inside, that would be a compliance error for two reasons. First, it seems to be a reasonable plan to count sponges every time you close patient (based on risk-utility grounds) and, second, this failure to tally the sponges was indistinguishable from any other.

Suppose, however, that just as the surgeon was about to count the sponges before closing the patient, fifteen disaster survivors are wheeled into the hospital. Some of them are in critical condition, and one of them urgently needs to be resuscitated, and our surgeon is the only one who can do it. The surgeon thinks that she has all of the sponges out of the patient on whom she has just operated, but if she stops to count, that will be less time for trying to save the disaster victims. In this unusual case, failing to count the sponges would be either a reasonable or unreasonable plan (almost surely a *reasonable* plan), because it is different on risk-utility grounds from other failures to count. Namely, there would be a much higher opportunity cost from counting in this case as compared to the normal case.

Each precaution plan is unique on risk-utility grounds, but a compliance error must be some indistinguishable pea in a (precaution plan) pod. Again, it is surprising that courts make this refined distinction, but it follows logically from

³⁸ A jury won't be able to forgive a compliance error if the trial court upon receiving the defense verdict either orders a new trial or judgment n.o.v. for the plaintiff. Jury forgiveness of compliance errors also cannot happen if the trial court has already awarded summary judgment to the plaintiff on the issue of liability or directed a verdict for the plaintiff. For examples of compliance errors that courts have allowed juries to absolve, see the discussion *infra* pp. 37-52.

their inability to judge what a defendant's cost would have been to avoid some random compliance error when the court can't easily measure how hard a particular defendant was trying to comply with a precaution plan and what success the defendant had actually achieved. For this reason, courts require 100% compliance even when they must know that perfection is usually impossible to achieve. The rule is easy to apply, however; courts impose liability, or at least send the case to a jury, every time they see that the plaintiff's harm was caused by the defendant's compliance error.

It is courts' insistence on perfect compliance that creates strict liability within the negligence rule, and the more onerous compliance obligations become, the more the negligence rule begins to resemble the rule in *Rylands v. Fletcher*,³⁹ which itself was not absolutely strict⁴⁰—but close enough to be the epitome of strict liability.

Some scholars have noticed that the Learned Hand formula is absent from many negligence cases.⁴¹ Besides other reasons offered, here are two more, both

³⁹ 1 L.R. Exch. 265 (1866), *aff'd*, 3 L.R.E. & I. App. 330 (H.L. 1868).

⁴⁰ See, e.g., *Nichols v. Marsland*, [L.R.] 10 Exch. 255 (1875), *aff'd*, 2 Ex. D. 1 (C.A. 1876) (no strict liability for reservoir that overflowed in severe storm); *Albig v. Municipal Authority*, 502 A.2d 658 (Pa. 1985) (no strict liability for leaking *public* reservoir used for firefighting and other *public* activities); *Cambridge Water Co. v. Eastern Counties Leather p.l.c.*, [1994] 2 A.C. 264 (H.L. 1993) (no strict liability for long-distance escape of a liquid); *Transco p.l.c. v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L. 2003) (no strict liability for giant leaking pipe).

⁴¹ See Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 148 (1995) (disputing importance of cost-benefit analysis in English negligence law); *but see* Stephen G. Gilles, *The Emergence of Cost-Benefit Analysis in English Negligence Law*, 77 CHI.-KENT L. REV. 489 (2002) (identifying cost-benefit analysis in English cases).

largely neglected by modern scholars. First and most important, most accidents involve compliance errors that don't implicate the formula or risk-utility analysis of any kind. Second and less important, defendants who have committed to a precaution plan can sometimes be held liable even when the plaintiff has failed to show that the Learned Hand formula required the plan.⁴² A good example of the latter point is *Lucy Webb Hayes National Training School v. Perotti*,⁴³ where the defendant had a precaution plan of checking the credentials of everyone moving from a guarded hospital ward to an unguarded ward. Thus, when the plaintiff's deceased, who was a suicidal psychiatric patient, was able to get past the defendant's guards without them making the "planned-for" check of his credentials, the defendant was liable for his suicide. Moreover, the court did not

⁴² The most common reason for the defendant's precaution plan to be neglected in litigation is either because it was obviously reasonable or because it was obviously unreasonable.

When a party has committed to a precaution plan, sometimes courts will not examine whether that plan was reasonable or not. In addition to the cases discussed in the text, see *Valentin v. Six Flags Over Georgia, L.P.*, 649 S.E.2d 809, 812 (Ga. App. 2007) (defendant had obligation to show that it performed its "customary inspection procedures" on the day of accident); *Smithson v. Chicago G.W. Ry. Co.*, 73 N.W. 853 (Minn. 1898) (defendant's violation of its own private safety rule was evidence of its negligence); *Wimbish v. New York City Transit Authority*, 759 N.Y.S.2d 879 (App. Div. 2003) (defendant's own assessment of the accident in terms of compliance with its own policies was relevant evidence for plaintiff).

See generally M. C. Dransfield, *Admissibility of Evidence of Precautions Taken, or Safety Measures Used, on Earlier Occasions at Place of Accident or Injury*, 59 A.L.R.2d 1379 (1958); C. R. McCorkle, *Admissibility in Evidence of Rules of Defendant in Action for Negligence*, 50 A.L.R.2d 16 (1956).

But see *Branham v. Loews Orpheum Cinemas, Inc.*, 819 N.Y.S.2d 250 (App. Div. 2006) (defendant's own private rule requiring it to check aisles every 15-20 minutes established standard greater than common law required and could not serve as basis for imposing liability); *Gilson v. Metropolitan Opera*, 841 N.E.2d 747 (N.Y. 2005) (defendant's private rules for escorting patrons to their seats went beyond the standard of ordinary care and could not serve as a basis for imposing liability).

⁴³ 419 F.2d 704 (D.C. Cir. 1969).

analyze whether this plan was reasonable in terms of its precaution costs and safety benefits.

A similar case was *Stewart v. Erie R.R.*,⁴⁴ where the plaintiff was injured when the defendant's train struck the truck in which he was a passenger. The defendant maintained a guard station at the grade crossing where the plaintiff's truck was struck, but the guard was momentarily absent from his post and did not signal that a train was coming. In finding the defendant liable, the court stressed the defendant's own plan of providing a guard and also that the plaintiff knew of this plan and relied on it. The case was therefore less extreme than *Lucy Webb Hayes*, where there was no allegation that the plaintiff's deceased or anyone acting for him relied on that defendant's plan to check the credentials of psychiatric patients. This analysis resolved the duty issue. On the issue of breach of duty—what I'm calling the “core” of the negligence rule—the court provided practically no analysis. The very lack of risk-utility analysis frequently flags the court's judgment that the lapse in question was a compliance error.

Although modern torts casebooks and scholarship stress industry custom and its relationship to the standard of care—in *The T.J. Hooper*⁴⁵ and similar cases—a neglected theme is how a plaintiff's proof that the defendant committed to a particular precaution plan sometimes ends analysis if the plaintiff also shows that

⁴⁴ 40 F.2d 855 (6th Cir. 1930).

⁴⁵ 60 F.2d 737 (2d Cir. 1932).

a single compliance error was a cause in fact of the harm.⁴⁶ Indeed, liability will often follow this bare proof without any further evidence that the defendant's plan was customary in the industry. Again, in *Lucy Webb Hayes*, liability followed simply from the plaintiff's showing that the defendant had committed to a private precaution plan, reasonable or not, and that a compliance error occurred in the implementation of that plan. Nevertheless, it is also clear that courts sometimes *do* analyze the reasonableness of precaution plans to which defendants have committed. The outstanding example here is the most famous negligence case—*United States v. Carroll Towing Co.*⁴⁷

Let's take a moment to look closely at *Carroll Towing* because the case turns out to be better evidence for the dualism gloss than for the Holmes gloss. In fairness to Judge Hand, others have asserted that the Hand formula is a comprehensive theory of the negligence rule.⁴⁸ Judge Hand did not himself make this claim.

Carroll Towing was a complicated admiralty case, though most casebooks radically redact it for the sake of focusing attention on the Learned Hand formula. It was World War II in New York harbor, and the Grace Line, which was one respondent, wanted to get a barge called the *Anna C* out of the Public Pier and move it to Pier 58. The Grace Line sent the tug *Carroll*, which the Grace Line

⁴⁶ See, e.g., *Flowers v. Torrance Mem'l Hosp. Med. Ctr.*, 884 P.2d 142 (Cal. 1994) (defendants failed to put up rail on gurney and plaintiff fell off).

⁴⁷ 159 F.2d 169 (2d Cir. 1947).

⁴⁸ See, e.g., Posner, *Theory of Negligence*, *supra* note 17.

had chartered with its crew (captain and deckhand) from its co-respondent, the Carroll Towing Co. When the *Carroll* got to the Public Pier, the *Carroll's* crew found that the *Anna C* was tied to other barges docked at the adjacent Pier 52. The *Carroll's* captain sent his deckhand (a fellow Carroll Towing Co. employee) and a Grace Line “harbormaster” to reset the lines. Although the harbormaster had a fancy title, Judge Hand’s opinion always called him “harbormaster” in ironic quotation marks to stress that he was just a Grace Line employee. In any event, the harbormaster and the deckhand, both under the supervision of the tug *Carroll's* captain, reset the lines and then pulled out the *Anna C*. They had got about 75 feet away when the whole tier of barges at Pier 52, including the *Anna C*, broke away. The Grace Line’s harbormaster and deckhand had failed properly to reset and to inspect the lines that they had changed. The tug *Carroll* and the Grace Line employees then tried to save the day as the barges floated out into the harbor, but they didn’t notice that the *Anna C* was leaking fast from having bumped into the propeller of a tanker ship. The *Anna C's* bargee (the district court called him a “captain”) had been AWOL since the prior day. He was an employee of the Connors Co., the libellant, which had chartered the barge bundled with the services of its own bargee, to the Pennsylvania R.R. If the Connors Co. bargee had been at his station, he would have noticed that his barge, the *Anna C*, was seriously leaking. Because he wasn’t there to tell the *Carroll* crew to come immediately with their pumps, the *Anna C* sank and had to be returned to its owner, the libellant Connors Co., in a damaged condition. Again, the missing

bargee was an employee of this same Conners Co., which was the effective plaintiff.

There ensued a number of actions and cross-actions for the damage to the barge *Anna C* and to its cargo of flour, which was owned by the U.S. government. The part of Judge Hand's opinion that is normally printed in casebooks concerns the comparative negligence of the Conners Co. in the sinking of its own barge because of the absence of its bargee. On this point, the district court had held that the Conners Company wasn't negligent because it didn't need to have a bargee in the first place, and the district court had cited five precedent cases in support of this finding.⁴⁹ Here is an example, then, albeit an ultimately reversed example, in which a court did analyze the reasonableness of a precaution plan to which a party had privately committed; the Conners Co. had indeed committed to its charterer, the Pennsylvania R.R., to have a bargee on board the chartered barge during working hours. From this perspective, the case was quite similar to *Stewart v. Erie R.R.*, the case discussed above where the railroad committed to motorists that its guard would be at a grade crossing who then wasn't there when the time came to protect the plaintiff.

When the case got to the Second Circuit, it must have been tempting for the judges to suppose that the bargee's unexcused absence was just a compliance error in the Conners Co.'s plan to have a bargee on duty during working hours, just as the railroad guard's absence was a compliance error. Then, liability would

⁴⁹ See *Conners Marine Co. v. Pennsylvania R.R.*, 66 F. Supp. 396, 398 (E.D.N.Y. 1946).

follow as automatically as in *Stewart v. Erie R.R.*⁵⁰ In the end, the Second Circuit did not take that view because Judge Hand's use of risk-utility analysis signified that he thought the bargee's absence should be analyzed as an unreasonable precaution plan. Hand's choice is understandable for two reasons. Most importantly, the bargee wasn't gone just momentarily (he didn't miss a single, short iteration as in *Stewart v. Erie R.R.*). Judge Hand even stressed that the bargee had been absent just about the entire working day, indeed for "twenty-one hours."⁵¹ Second, it is a little ambiguous under modern doctrine when a court may or should evaluate a precaution plan to which a defendant has privately committed in order to excuse that defendant. In some cases like *Lucy Webb Hayes* or *Stewart v. Erie R.R.*, the courts took the respective defendants' commitments to their plans as prima facie evidence of the plans' validity. In *Carroll Towing*, the district court had already held that five precedent cases proved that the Connors Co. didn't need a bargee in the first place, so his absence shouldn't count against the plaintiff. In any event, Hand's first windup was to describe the five cases that the district court cited, to add some precedent cases of his own about missing boat attendants, and then to assert that his famous formula reconciled all of them—against the libellant.⁵² Next, in a second windup, Hand

⁵⁰ The Pennsylvania R.R., which was the charterer of the barge, would seem to have relied on the bargee's presence as much as the *Stewart* plaintiff relied on crossing guard's presence.

⁵¹ 159 F.2d 169, 173 (2d Cir. 1947).

⁵² Here is Judge Hand's famous language on his formula:

It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would

analyzed the reasons for the bargee's absence and found them woefully nonexistent.⁵³ In this second analysis, Hand suggested that if the bargee had possessed some good reason to be gone, his absence could have been a reasonable plan and the Connors Co. might not have been comparatively negligent.⁵⁴ In any

be so liable for injuries to others obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about.

Id. at 173.

⁵³ The district court had held that the Connors Co. didn't need to have a bargee on board because that was the holding in the Kathryn B. Guinan, 176 F. 301 (2d Cir. 1910). Judge Hand thus distinguished that case. Here is Judge Hand's second piece of analysis, which goes into the bargee's lack of a good excuse for being away from his station:

On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in 'The Kathryn B. Guinan,' supra; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo—especially during the short January days and in the full tide of war activity—barges were being constantly 'drilled' in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Connors Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

Id. at 173-74.

⁵⁴ In *Lucy Webb Hayes* and *Stewart* the courts did not evaluate the respective defendants' precaution plans, and both were cases in which the respective defendants committed compliance errors under those same plans. *Carroll Towing* was a little different. The *Carroll Towing* courts did evaluate the plaintiff's (libellant's) precaution plan, but the plaintiff (libellant) did not commit a compliance error under that plan. Instead, as Judge Hand found, the *Carroll Towing* plaintiff (libellant) possessed an unreasonable plan.

event, one way or another, this part of the case is well explained by the Holmes gloss. Indeed, based on Richard Posner's work, this famous paragraph of Judge Hand's opinion has become the principal example of the "economic Learned Hand formula."

A little-noticed aspect of *Carroll Towing* is that no one provided any risk-utility analysis of the primary negligence, which was the deckhand and the harbormaster's joint failure properly to reset and to inspect the *Anna C*'s lines, the original cause of the whole debacle. In the decision below, when the district court came to consider whether these two employees had been negligent, the only question was whether the harbormaster, who was an employee of the Grace Line, was acting in that capacity or as an agent of the Carroll Co., the owner of the tug.⁵⁵ On the precise question of whether these two employees had indeed committed a breach of duty, the district court provided no analysis at all.⁵⁶

On the appeal, Judge Hand also failed to analyze the negligence of the harbormaster and the deckhand, though he likewise held—again without

⁵⁵ That question determined whether the Grace Line would share liability for the sunken *Anna C* with the Carroll Towing Co. or whether the latter would be the solely liable respondent. The district court decided that the harbormaster was indeed acting as a Grace Line employee, so the two companies shared liability. See *Connors Marine Co. v. Pennsylvania R.R.*, 66 F. Supp. 396, 400 (E.D.N.Y. 1946).

⁵⁶ Here is the core of the district court's analysis, which was conclusory on the issue of breach of duty:

Prior to the time that the harbor master and the deckhand of the tug adjusted the lines, the *Anna C* was safely made fast and lying properly. Had they left the *Anna C* as she was, there would have been no accident. Had they adjusted her lines properly and also had another line been placed between the two tiers or another tug been used to assist the Carroll, there would have been no accident.

Id. at 397-98.

elaboration or even discussion—that both had been negligent.⁵⁷ Judge Hand never explained, for instance, why their one slip could not be forgiven if these were normally careful employees. In fact, he expressed no interest in whether the harbormaster and deckhand were normally careful or not. You get from his opinion the impression that if these employees had been shown to be obsessed with loose lines, it wouldn't have made any difference to Judge Hand so long as they made one error on this occasion. Judge Hand's analysis of the two employees' primary negligence, moreover, comes before the part of his opinion where he lays out his formula, so he didn't appear to think any *legal* reader needed his formula in order to agree with him that the two employees had indeed been negligent.

From an economic or moral perspective—indeed from any perspective except *legal*—the possibly innocent lapse of the deckhand and the harbormaster, on a single occasion among perhaps hundreds or even thousands of iterations, properly to set and to inspect a line is harder to see as “negligence” than the barge's being AWOL for many hours. Yet, the latter got the most famous negligence analysis

⁵⁷ Like the district court judge before him, Judge Hand analyzed, in even more detail, whether the harbormaster was acting for the Carroll Co. or for the Grace Line and affirmed the district court's finding that the harbormaster was acting for the Grace Line.

Here is the passage of Judge Hand's opinion that comes closest to saying why he thought the deckhand and harbormaster were negligent:

The “harbormaster” and the deckhand went aboard the barges and readjusted all the fasts to their satisfaction, including those from the “Anna C.” to the pier.

After doing so, they threw off the line between the two tiers and again boarded the “Carroll,” which backed away from the outside barge, preparatory to “drilling” out the barge she was after in the tier off the Public Pier. She had only got about seventy-five feet away when the tier off Pier 52 broke adrift because the fasts from the “Anna C,” either rendered, or carried away.

Id. at 171.

of all, whereas the former received none, even when the famous legal analysis was readily available. This, then, is a good example of strict liability for compliance errors, which is the giant core of the negligence rule. In terms of table 1 the primary negligence of the Carroll Co. and the Grace line was a type II case (compliance error), whereas the comparative negligence of the Connors Co. was a type III case (unreasonable plan).

The negligence rule is unusual because it incorporates two opposing legal concepts: a “rule of reason” for precaution plans and a “per se” rule for compliance errors. An analog does exist, however, namely, the judicially evolved rule against price fixing under section 1 of the Sherman Act. To summarize another complicated body of law, the rule against price fixing contains both a “per se rule” and a “rule of reason.” The modern rule of reason, exemplified by such cases as *Broadcast Music, Inc. v. CBS, Inc.*,⁵⁸ asks whether, based on boxcars of evidence, a particular arrangement actually restricts or increases output (defined in the legally relevant way). The modern per se rule of price fixing asks whether a practice is of a type that would almost always restrict output. This aspect of the same rule need not require much evidence at all. So, if an industrial arrangement can be characterized as a per se violation (e.g., the actual setting of a common price by competitors), it falls under the per se rule of strict liability. Other arrangements—vertical mergers, for instance—don’t fall within a per se category because they are not the type of arrangement that always or almost always

⁵⁸ 441 U.S. 1 (1979).

restricts output. Such arrangements must be analyzed under the rule of reason to see whether, based on a more extensive evidentiary record, it is probable that they actually do restrict output. The same concept animates both sides of the dualism—namely, whether the practice restricts output.

The reason antitrust courts say that they enforce per se rules is that it costs them and parties too much to measure whether certain suspect arrangements violate the rule of reason. The game of extensive analysis is not worth the candle because per se violations always or almost always restrict output; that is supposedly why they are per se violations in the first place. The negligence rule is similar in that compliance errors can't be analyzed under a risk-utility standard such as the Learned Hand formula because it would usually be too costly for courts to measure actual compliance costs. Plans are analyzed under a rule of reason, and compliance errors yield per se liability. The negligence rule could be even more extreme, as compared to the antitrust rule, in that most observed compliance errors—in many accident settings—might be truly uneconomic to avoid. Perhaps a good example would be the failure of the *Carroll Towing* respondents to make sure that the reset lines were fast. Faced with strict liability, and huge liability, corporations whose employees set nautical lines must do practically everything possible to reduce errors. (For instance, even at the height of World War II, the Carroll Towing Co. and the Grace Line together had at least three employees on the job who were supposed to cross-check and supervise each other.) Yet, liability for these compliance errors still exists, apparently because it

is too difficult for courts to measure whether these errors were efficient or not.⁵⁹ Courts must think that if they tried to assess each compliance error the negligence system would become swamped with measurement cost, which would reduce its effectiveness. In this way, too, the compliance-error rule is aggravatingly similar to the per se rule against price fixing because in each type of case a court usually won't even listen to evidence about detailed circumstances that might show that the practice was efficient.

II. COURTS OCCASIONALLY ALLOW JURIES TO FORGIVE COMPLIANCE ERRORS

A. *The General Landscape of Modern Absolution Doctrine*

As we have just seen, the negligence rule can be harsh and strict. It often attaches enormous liability to lapses that no one can perfectly avoid. Still, there is a potential escape hatch for defendants daring enough to avail themselves of it. Courts occasionally allow juries to forgive compliance errors. The juries are certainly under no obligation to absolve a compliance error, and sometimes they will try to do so only to find that the trial judge then foils them by ordering judgment n.o.v. or a new trial for the party whom the jury members wanted to forgive. This doctrine is one of the most underexplored aspects of negligence law. Indeed, it is so central that I'll describe it here before we examine the classical cases. Another reason for doing so is that seeing the modern doctrine on

⁵⁹ If courts ever assumed that compliance errors were efficient, the system would become swamped with *inefficient* compliance errors in all situations in which transaction costs between injurers and victims are prohibitive, *e.g.*, on the highway.

this point helps us better to understand classical accident doctrine, which was actually highly similar to the modern negligence rule in this respect.

Let's examine three relatively modern cases in order to get the general contours of the absolute doctrine. The first is from 1954, a year in which contributory negligence was an absolute bar to recovery. In *Markwell v. Swift & Co.*,⁶⁰ the plaintiff was a carhop working at a drive-in restaurant. The defendants, who were ice-cream suppliers to the restaurant, removed a large plate glass window in order to replace the storage freezer. In doing so, they negligently failed to barricade or guard the opening left by their removal of the glass thereby negligently creating an unsafe condition, both for employees and customers of the restaurant. While the plaintiff was standing with her back to the open space, a customer approached and the plaintiff stepped back to get out of the way. Although she knew about the dangerous condition, she simply forgot about it. The plaintiff tripped backward over the unguarded sill and fell on her back, sustaining injuries. She was guilty of a compliance error, because her duties on that day required her to remember, iteratively, to stay away from the danger.⁶¹ Moreover, the trial court refused to allow the jury to absolve this compliance error and ordered a nonsuit before trial, which was affirmed.⁶² The plaintiff was

⁶⁰ 272 P.2d 47 (Cal. App. 1954), disapproved on other grounds, *Stewart v. Cox*, 362 P.2d 345 (Cal. 1961). The *Markwell* case was subsequently limited or overruled by *Austin v. Riverside Portland Cement Co.*, 282 P.2d 69 (Cal. 1955). See the explanation provided *infra* pp. 40-42.

⁶¹ The plaintiff was guilty of a lapse of "corrective precaution"—failing to use more precaution because of the defendants' prior negligence—of the type I've previously described in Mark F. Grady, *Multiple Tortfeasors and the Economy of Prevention*, 19 J. Legal Stud. 653 (1990) [hereinafter Grady, *Economy of Prevention*].

⁶² The appeals court stressed that the plaintiff had been negligent as a matter of law:

strictly liable for her compliance error in the most literal sense because even the jury was barred from absolving her.

Consider this second case, which is the same except it concerns a defendant's compliance error. In *Chi Yun Ho v. Frye*,⁶³ the defendant, a surgeon, sewed up the defendant with a surgical sponge still inside her. Based on the evidence of the sponge, the plaintiff moved for partial summary judgment on the issue of liability. The trial court denied the motion, and the jury absolved the defendant. The trial court then ordered a new trial for the plaintiff from which both parties appealed. The Indiana appeals court held that the trial court should have entered summary judgment for the patient in the first place because the defendant was guilty of negligence as a matter of law; he had a duty to count himself and never make any mistakes. This was a similar case of strict liability for a compliance error. Some other courts would have allowed the jury to forgive the defendant for this error,⁶⁴ but it is of course by no means certain that the relevant jury would do so.

[T]o excuse one's failure to avoid a known peril because of momentary forgetfulness, such forgetfulness must be induced by some sudden and adequate disturbing cause. A lapse of memory in the presence of known danger, in order to relieve a plaintiff from contributory negligence, must be occasioned by a reasonable cause and not from mere inattention. In other words, it must be induced by some sudden and adequate disturbing cause, and where, as here, there was a transitory or short-lived period of oblivion to a known danger, not induced by some sudden and inadvertent disturbing cause, such oblivion and forgetfulness is negligence as a matter of law

Markwell v. Swift & Co., 272 P.2d at 51.

⁶³ 865 N.E.2d 632 (Ind. App. 2007).

⁶⁴ See *infra* p. 48 and the cases cited in note 92.

Finally, in *A.C. ex rel. Cooper v. Bellingham School District*,⁶⁵ the plaintiff, A.C., was a student in Josephine Estrada's first grade class. The students were having a summer birthday piñata party at a local park when Estrada, while attempting to strike the piñata, lost her grip on the piñata bat. The bat flew through the air and struck A.C. in the face. She brought suit for her injuries against Estrada's employer, the school district, on a respondeat superior theory. This would seem to be a fairly obvious compliance error because it is a reasonable plan to maintain your grip on a piñata bat when you are swinging it, and losing your grip is an obvious lapse in an iterative precaution (continually holding onto the bat). The jury nevertheless returned a verdict for the school district—which enjoyed no immunity in this type of case—and the trial court denied the plaintiff's motion for a new trial and instead entered judgment on the defense verdict. On appeal, A.C. contended that because there was no evidence that the bat was defective, that its handle was slippery, or that Estrada had a physical or mental defect that made gripping the bat difficult, the only possible conclusion that the jury could have reached was that Estrada was negligent in losing her grip. The appellate court nevertheless affirmed the verdict below. Both courts allowed the jury to forgive the teacher's compliance error. This case seems at odds with the prior two. The next subsection seeks to make some sense of this pattern.

B. Modern Judicial Controls on Jury Absolutions

No one has yet been able to adduce from the cases a general account of when judges allow juries to forgive compliance errors. Of course the main reason is

⁶⁵ 105 P.3d 400 (Wash. App. 2005).

that this organization of negligence doctrine is new. Nevertheless, it is possible to see some important themes in the case law, and this section will briefly explore them.

1. *Core vs. marginal compliance errors.* A “core” compliance error is a *forgotten* iteration in a series of identical iterations of the same precaution. This type of error is rarely forgiven. Within the set of core compliance errors, those least likely to be absolved entail little skill or effort beyond remembering to perform the iteration.⁶⁶ An excellent example would be a surgeon’s or surgical nurse’s forgetting to count the sponges before closing the patient. Such errors are rarely forgiven, though even here absolutions exist.⁶⁷ A “marginal” compliance error—a bit more likely to be forgiven—is again an iteration in a series of precautions, but one that requires skill or judgment to perform. The case of the teacher’s failure to keep her grip the piñata bat, just described, could be an example. Interestingly, clumsiness or lack of skill seems more likely to yield the possibility of jury absolution as compared to a simple failure to remember.⁶⁸ It would probably be a mistake to assume that many juries forgive even these marginal compliance errors. Records of actual absolutions are exceedingly rare in the appellate reports and probably overrepresented because they are controversial

⁶⁶ See, e.g., *Bergin v. Grace*, 833 N.Y.S.2d 729 (App. Div. 2007) (client entitled to judgment as a matter of law against lawyer who forgot to file her complaint within the statute of limitations).

⁶⁷ See the cases discussed in the text *infra* pp. 47-48 and especially those cited in footnote 92.

⁶⁸ Holmes thus overspoke a bit when he said that the person “born hasty or awkward” could find absolution only in the courts of heaven. It is possible, albeit unlikely, for such a person to find absolution in common-law courts.

cases that have been selected for appeal. In the event that a jury does forgive clumsiness or a lack of skill, that verdict seems somewhat more likely to stick as compared to a jury's absolution of a surgeon who has failed to tally the sponges and has left one inside the plaintiff's body.

All core compliance errors are alike (indeed they are practically identical, as with forgotten inspections of one's blind spot before changing lanes), whereas marginal compliance errors are each somewhat different. It is therefore more damaging to care incentives when a court allows a jury to forgive a core compliance error because of the many other identical lapses—in that activity and others—which could not be distinguished from it. We could, however, wait a hundred years for another teacher to lose her grip on a piñata bat and hurt one of her students. Although the teacher's losing her grip was technically a compliance error, for a court to tolerate jury absolution of this marginal example creates a narrow precedent simply because in later cases the defendant's clumsiness could be distinguished from other clumsy acts.

To complete this somewhat ungainly picture, a very few compliance errors, both core and marginal, are forgiven as a matter of law. For instance, courts typically interpret guest statutes to absolve drivers of their compliance errors (both core and marginal) that harm their social passengers. Similar cases involve compliance errors committed by sports participants resulting in injury to co-participants, *e.g.*, misfired golf shots that strike other golfers⁶⁹ and rough hits in

⁶⁹ A golfer is not liable merely for mis-hitting a golf ball, which could be considered a kind of compliance error, though a highly marginal one because it takes so much skill—more than that

touch football games.⁷⁰ These sports errors will typically yield judgment as a matter of law for the defendant. The piñata bat case,⁷¹ though not exactly involving a “sports” injury, perhaps verges into that type of case because it did after all entail a game. The piñata bat jury certainly had the legal *power* to make the school district liable for the teacher’s compliance error because it seems almost impossible that any court should think that the child had assumed the risk of her teacher’s clumsiness. It is striking, however, that this jury *was allowed* to absolve the defendant whose employee had committed a compliance error, albeit marginal (clumsiness as opposed to forgetfulness), even when many equal acts of clumsiness draw liability. Moreover, the school district surely would have been negligent as a matter of law if the teacher had instead forgotten to look for approaching cars as she guided her young pupil across the street, which would have entailed a core compliance error of forgetfulness in a non-sports activity.

Let me just emphasize that (leaving aside sports, guest statutes, and the like) practically all compliance errors do in fact yield negligence liability of some type (whether through trial or settlement), so it is indeed reasonable to speak of strict liability for them. It is nevertheless also true that juries *do* have the legal power to

possessed by the greatest golfers—to hit them consistently straight. See *Nussbaum v. Lacapo*, 265 N.E.2d 762 (N.Y. 1970) (no liability as a matter of law for mere poor shot that struck plaintiff); *Carrigan v. Rousell*, 426 A.2d 517 (N.J. Super. Ct. 1971) (similar). If a golfer mis-hits a ball and sees it flying in the plaintiff’s direction, the golfer can be liable for failing to shout “fore.” See generally David M. Holliday, *Liability to One Struck by Golf Ball*, 53 A.L.R.4th 282 (1987).

⁷⁰ See, e.g., *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992) (no liability as a matter of law for rough hit and stepped-on finger in touch football game).

⁷¹ A.C. ex rel. *Cooper v. Bellingham School District*, 105 P.3d 400 (Wash. App. 2005) (teacher absolved for losing grip on piñata bat that struck plaintiff), discussed *supra* pp. 36-37.

forgive at least some compliance errors. This aspect of the modern negligence rule is important simply because it exists and also because its pedigree is ancient, as we are about to see in the next major section. First, however, let's examine a little bit more of the modern jurisprudence of jury absolution.

2. *Momentary forgetfulness doctrine.* For a plaintiff to forget an iteration of a simple self-protective precaution—such as to look where she is stepping—is a core (as opposed to marginal) compliance error. Nevertheless, even such a core compliance error can be eligible for jury forgiveness under the “momentary forgetfulness” (sometimes called “momentary distraction”) doctrine. The doctrine does not mandate jury absolution but only permits it through a special jury instruction.⁷² In terms of our general theme of strict liability for compliance errors, the doctrine is a double-edged sword. In the cases to which it applies, the doctrine makes clear that juries *are* entitled to forgive a forgetful or distracted plaintiff's compliance error. Nevertheless, in the cases to which the doctrine does *not* apply, its very existence often makes clear that a jury *lacks* the ability to forgive a compliance error (and that the defendant should be granted judgment as a matter of law). In the carhop case, described above, the court held that in order for the excusing doctrine to apply the plaintiff had to show first that her forgetfulness was induced by “some sudden and adequate disturbing cause.”⁷³ Because the carhop was unable to show the precondition, the court held that the

⁷² See generally W. E. Shipley, *Momentary Forgetfulness of Danger as Contributory Negligence*, 74 A.L.R.2d 950 (1960) [hereinafter cited as Shipley, *Momentary Forgetfulness*].

⁷³ *Markwell v. Swift & Co.*, 272 P.2d 47, 50-51 (Cal. App. 1954).

jury lacked the power to forgive her. Other courts fail to impose this precondition;⁷⁴ indeed, California—the jurisdiction of the carhop case⁷⁵—subsequently loosened its precondition,⁷⁶ thus giving juries the right to forgive plaintiffs' compliance errors in a broader range of cases.⁷⁷ In some jurisdictions,⁷⁸ but not all,⁷⁹ the doctrine has been folded into comparative negligence. For the momentary forgetfulness doctrine to become an undifferentiated part of comparative negligence probably *increases* the strict character of a plaintiff's liability for her own compliance errors. Comparative negligence without a special instruction on available excuses seems to invite jury apportionment of *some* fault to an erring plaintiff, even as it reduces the plaintiff's expected liability for any given error.

⁷⁴ See generally Shipley, *Momentary Forgetfulness*, *supra* note 72.

⁷⁵ Markwell v. Swift & Co., 272 P.2d 47 (Cal. App. 1954).

⁷⁶ See Austin v. Riverside Portland Cement Co., 282 P.2d 69, 76-77 (Cal. 1955).

⁷⁷ The momentary forgetfulness doctrine seems to create generally benign incentives. In the cases to which it applies, the defendant typically will have possessed some earlier opportunity to install a durable precaution, such as a barricade in the carhop case. If a defendant would never expect to be liable, even when a knowledgeable plaintiff was distracted and thus forgot to use precaution that would have corrected for the defendant's earlier negligence, the defendant might never acquire the incentive to use its own effective precaution (install the barricade) in the first place. The doctrine thus seems to be one example of many that seek to induce both parties to do what is reasonable and efficient, given the possibility of compliance errors by both. See generally Grady, *Economy of Prevention*, *supra* note 61.

⁷⁸ See, e.g., Flynn v. City of New York, 478 N.Y.S.2d 666 (App. Div. 1984) (eliminating momentary forgetfulness instruction and including former doctrine within comparative negligence); Rodriguez v. Morgan County R.E.A., Inc., 878 P.2d 77 (Colo. App. 1994) (same).

⁷⁹ California, despite having adopted comparative negligence, has apparently retained the momentary forgetfulness doctrine. See Williams v. Carl Karcher Enterprises, Inc., 227 Cal. Rptr. 465 (Cal. App. 1986); Turner v. Southern California Edison Co., No. B119083, 2000 WL 1507368 (Cal. App. 2000). See also Keller v. Vermeer Mfg. Co., 360 N.W.2d 502 (N.D. 1984) (retaining momentary forgetfulness instruction in comparative negligence system).

3. *Violation of statutes.* Many compliance errors are regulated by statutory provisions that create ostensibly absolute obligations for drivers to “maintain a vigilant lookout forward” or something similar. In such a case a court is likely, though not certain, to order judgment as a matter of law against the party who has violated the statute, even when no one could perfectly comply.⁸⁰

Nevertheless, even in this strict area of “negligence per se” some courts have allowed juries to forgive defendants who inadvertently violated statutes—that is, violated them by way of a compliance error. A good example is *Ortiz v. Martinez*,⁸¹ a case in which the defendant, without any apparent excuse or justification, rear-ended the plaintiff’s stopped vehicle. The plaintiff was driving his own car in the far right lane of the Interstate 45. He noticed an accident ahead in his lane, so he stopped for it. Meanwhile, the defendant was entering the highway on what he testified was an extremely short on-ramp. The traffic was heavy and, as the defendant was looking back to see where he could merge, he failed to notice that the plaintiff’s car was stopped in front of him and rear-ended

⁸⁰ See *Shehtanian v. Kenny*, 319 P.2d 699 (Cal. 1958) (court upheld plaintiff’s jury verdict finding defendant negligent for failing to see plaintiff before changing lanes and cited California Vehicle Code provisions ostensibly creating absolute obligations to comply); *Gray v. Brinkerhoff*, 258 P.2d 834 (Cal. 1953) (defendant negligent as a matter of law for violating statute and hitting plaintiff as she was walking in a crosswalk with the light in her favor and jury lacked power to absolve defendant); *Asmelash v. Braga*, No. H023824, 2003 WL 21437634 (Cal. App.) (speeding driver who struck one sister in school zone crosswalk was negligent as matter of law to other sister who was standing nearby and who suffered emotional distress from watching accident); *Philo v. Lancia*, 63 Cal. Rptr. 900 (Ct. App. 1967) (defendant negligent as matter of law for violating statute requiring him to keep proper lookout and trial court properly upheld verdict against him). See also *Plaut v. Allright Parking Management, Inc.*, 795 N.Y.S.2d 576 (App. Div. 2005) (driver negligent as a matter of law to pedestrian into whom driver backed his car when statute allowed backing up only when “such movement can be made with safety”). But see *Driver v. Norman*, 236 P.2d 6 (Cal. App. 1951) (jury allowed to forgive driver who, in an apparent violation of statute, struck plaintiff in crosswalk).

⁸¹ No. 01-05-00984-CV, 2007 WL 1441042 (Tex. App. 2007).

it. It was apparent that the defendant had violated several Texas statutes including one that imposed a duty on all Texas drivers to “control the speed of the[ir] vehicle[s] as necessary to avoid colliding with [a] vehicle that is on or entering the highway”⁸² The jury nevertheless found that the defendant had not been negligent, apparently concluding that he had made an error that they were willing to absolve. The trial court entered judgment on this defense verdict, and the Texas Court of Appeals affirmed. Other similar cases exist.⁸³

4. *Overreaching plaintiffs and sympathetic defendants.* In a distinct set of cases, the defendant has committed a core compliance error that harms the plaintiff, but the plaintiff asks for damages obviously exceeding the real harm done. The jury then will occasionally find for the defendant when it could instead

⁸² TEX. TRANSP. CODE ANN. § 545.351 (Vernon 1999).

⁸³ See *Brandes v. Burbank*, 613 F.2d 658 (7th Cir. 1980) (jury allowed to absolve defendant who parked his truck next to highway without setting out triangular warning reflectors as required by Federal Highway Administration regulation); *Figone v. Statter*, 248 Cal.App.2d 699 (Ct. App. 1967) (on two separate and apparently independent occasions, when he suddenly stopped with traffic, plaintiff was rear-ended by following drivers, the two defendants, each of whom received jury verdict in combined trial as well as final judgment on appeal); *Jordan v. Sava*, 222 S.W.3d 840 (Tex. App. 2007) (defendant truck driver not liable for striking plaintiff’s stopped vehicle thus apparently violating TEX. TRANSP. CODE ANN. § 545.062(a) (Vernon 1999), which required drivers to regulate their speeds and clearances so as not to collide with other vehicles, presumably including vehicles such as the plaintiff’s, which was stopped in normal rush-hour traffic). See also *Wims v. Chevron U.S.A. Inc.*, No. A097903, 2002 WL 31898303 (Cal. App.) (after styrofoam load flew out of defendant’s truck, in apparent violation of California Vehicle Code, and damaged plaintiff’s following Cadillac, summary judgment for defendant was still proper because no proper showing of breach of duty on record); *Peters v. Peterson*, 120 N.W.2d 846 (Minn. 1963) (jury allowed to absolve trucker who failed to light load properly [but cause in fact questionable]); *Youngs v. Potter*, 467 N.W.2d 49 (Neb. 1991) (jury allowed to absolve defendant who violated statute by failing to have proper lighting on farm-vehicle).

In *Risinger v. Shuemaker*, 160 S.W.3d 84 (Tex. App. 2004), discussed more fully in the next subsection, the jury also acquitted a defendant who collided with the plaintiff after being distracted for no justifiable reason. The court did not mention a particular statutory violation, but it appears that the defendant violated TEX. TRANSP. CODE ANN. § 545.062(a) (Vernon 1999) by failing to maintain a safe following distance that would have prevented collision with the plaintiff.

But see Guckian v. Fowler, 453 S.W.2d 323 (Tex. Civ. App. 1970) (jury had no power to absolve driver who without excuse or justification rear-ended another automobile).

have found for the plaintiff but reduced the damages to a realistic level. Many courts seem to respect this behavior, although they do not seem eager to publicize it, and a significant number of these appellate cases are unpublished.

A good example is *Farnsworth v. Tint*.⁸⁴ The defendant was a sixteen-year-old driver, David Tint, who was trying to meet up with his friends. He originally thought that he was supposed to meet them in what turned out to be dark parking lot. After five to ten minutes, it occurred to David that he was in the wrong location and that his friends were actually waiting for him at a different lot about a mile down the road. He started to back up out of his spot. David later testified that he first put on his lights, checked “everything,” put the car in reverse and slowly started backing out of the spot. He said that he was not in a hurry and did not accelerate out of the spot but instead let his foot off the brake. He estimated that he could not have been going more than two or three miles per hour. Then he felt a bump. David figured he hit another car, but later testified that he did not know whether the other car had been moving. He had backed into the plaintiff’s Lexus, which she said was stationary. Although the only physical damage to her car was a cracked taillight, the plaintiff later claimed a rotator cuff injury and \$36,003 in medical damages as well as \$2,500 for pain and suffering.

Although it seemed as though David Tint had committed a core compliance error (and California was a comparative negligence jurisdiction), the jury returned a defense verdict totally absolving David. The trial court entered judgment on the

⁸⁴No. A110435, 2006 WL 877438 (Cal. App. 2006).

defense verdict and the court of appeal affirmed it. Everyone seems to have concluded that the plaintiff's claim was radically excessive and that the jury was within its province by answering the excess with a total defense verdict. Other similar cases exist.⁸⁵

In a parallel set of cases a sympathetic defendant flaunts his virtue to the jury. One example is *Huetter v. Andrews*,⁸⁶ which involved an auto accident that happened right after World War II when the defendant, who was twenty-two years old, had just been discharged from the Marine Corps. Failing to notice over a long period of time that the plaintiff's car was crossing the highway ahead of

⁸⁵ A similar case was *Gore v. Smith*, 464 N.W.2d 865 (Iowa 1991), where the defendant pilot hit a runway boundary marker and crashed the plane in which he and the plaintiff were riding. The plaintiff apparently requested substantial damages, even though she could not prove that she was much affected by the crash. The defendant admitted negligence, but the jury found for him nevertheless. The Iowa Supreme Court affirmed the resulting judgment for the defendant.

Similarly in *Risinger v. Shuemaker*, 160 S.W.3d 84 (Tex. App. 2004), the defendant admitted and an independent witness confirmed that the defendant was distracted for no good reason just before the accident in question. When his eyes returned to the road, he could either strike bicyclists or rear end the plaintiff. He chose to rear end the plaintiff. Although not specifically mentioned by the court, the defendant was presumably violating TEX. TRANSP. CODE ANN. § 545.062(a) (Vernon 1999) by failing to maintain a safe following distance that would have prevented collision with the plaintiff. It was clear that the plaintiff and her car were harmed by the accident, and an ambulance came and took her immediately to the hospital. Nevertheless, at the trial she claimed an apparently substantial amount for a neck injury that she said she suffered as a result of the accident. The jury didn't seem to credit the plaintiff's medical evidence linking her injuries to the accident and accordingly returned a take-nothing verdict for the defendant, finding him not negligent. The trial court entered judgment on it, and the Texas Court of Appeals affirmed. Again, it seemed to be a case of an overreaching plaintiff, at least in the jury's view.

See also *Moore v. Horton*, 694 So.2d 21 (Ala. Civ. App. 1997) (jury allowed to forgive defendant who rear-ended vehicle lawfully stopped in traffic); *Hoffman v. Crawford*, 299 N.W.2d 179 (Neb. 1980) (jury allowed to absolve defendant who without excuse or justification rear-ended a vehicle lawfully stopped in traffic); *Zelbst v. Harkins*, No. 10-07-00293-CV, 2008 Tex. App. LEXIS 3705 (jury allowed to forgive mother who rear-ended plaintiff because she tended to her baby's cries while driving in stop-and-go traffic); *Torres v. Tessier*, 231 S.W.3d 60 (Tex. App. 2007) (jury's verdict for defendant affirmed even though defendant rear-ended plaintiff without apparent excuse or justification).

⁸⁶ 204 P.2d 655 (Cal. App. 1949).

him,⁸⁷ the recently discharged Marine did not slow or brake his vehicle but ran directly into her car, which undoubtedly resulted from his failure to maintain a vigilant forward lookout. At the trial both the defendant and his lawyer conspicuously wore their Marine Corps discharge buttons, and the trial court also allowed the defendant's war record to be admitted into evidence. The plaintiff was an elderly woman. The jury returned a verdict for the defendant, and the trial court entered judgment on it. The appeals court reversed, holding that the defendant had been negligent as a matter of law and stressed that the jury may have been improperly sympathetic to the defendant. This case seems conceptually parallel to *Farnsworth v. Tint*, just mentioned, though formally the opposite. The combined doctrine seems to be that juries are allowed to punish overreaching plaintiffs, but defendants are not allowed to seek forgiveness by playing too brazenly on juries' sympathies.

5. *Apparently random absolutions of core compliance errors.* A number of jury absolutions defy any simple categorization, though I will come back to a possible unifying theme after I describe a few of them. In *Peavy v. Hardin*⁸⁸ the plaintiffs gave the defendant pharmacist a prescription for coco quinine, but the pharmacist erroneously dispensed coco quinidine, which unfortunately killed the plaintiffs' small child. The trial court instructed the jury on negligence, but the jury acquitted the defendant, apparently forgiving his error. On the plaintiffs'

⁸⁷ The plaintiff's son, who was driving, began to cross the highway when it was safe to do so, but traveled very slowly. The road was straight, the weather good, and the defendant's forward view was unobstructed over the long period of time in which he was approaching the plaintiff's car.

⁸⁸ 288 S.W. 588 (Tex. Civ. App. 1926).

appeal the court stressed that negligence is ordinarily a question of provable fact, not law, and that here the jury had acted within its province in finding the pharmacist not liable.⁸⁹ This is obviously not the result that most juries or courts would have achieved, but this type of result is an occasional and noteworthy feature of the common law. Similar was *Akridge v. Noble*⁹⁰ where the defendant, a surgeon, donated his time to operate on charity patients at a local municipal hospital. He forgot a sponge in the plaintiff's body, and it stayed there for a year until she passed it through her bowels. Both when the sponge was present in her body and when she passed the sponge, the plaintiff suffered extreme pain. The trial court instructed the jury on negligence, and it returned a verdict for the defendant. The trial court refused the plaintiff's motion for a new trial, and the Georgia Supreme Court affirmed the defense verdict. In contrast to *Chi Yun Ho v. Frye*,⁹¹ the case of the forgotten sponge discussed above, at least some courts

⁸⁹ *Id.* at 589-90. The appeals court also stressed that the jury found that the plaintiffs had failed to incur any "pecuniary expense," which was an additional reason to bar their negligence action. It seems hard to credit this finding, however, because at minimum the plaintiffs must have incurred some sort of burial cost as a result of the defendant's negligence, and of course they also incurred a purely pecuniary expense from purchasing the drug that killed their child.

See also *Bean v. Dempsey*, 233 S.W.2d 417 (Ky. 1950) (on evidence strongly favoring plaintiff's claim that defendant pharmacist erroneously dispensed wrong substance, jury still would have been entitled to find for the defendant); *MacKay v. Crown Drug Co.*, 420 P.2d 883 (Okla. 1966) (when defendant pharmacist erroneously dispensed ten times prescribed dose, jury allowed to absolve pharmacist on ground that plaintiff was contributorily negligent in failing to notice unusual effects of misdispensed drug).

⁹⁰ 41 S.E. 78 (Ga. 1902).

⁹¹ 865 N.E.2d 632 (Ind. App. 2007).

have allowed juries to absolve surgeons who left foreign objects in their patients.⁹² Probably, however, most juries would not absolve in the first place.

Perhaps these court-permitted jury absolutions are not as random as they first appear. Negligence law contains a tension in that it produces deterrence of compliance errors but bundles with it a type of insurance that most victims would never purchase at its actuarial cost.⁹³ The economic function of insurance is to set those who buy it in equivalent financial conditions in two different states of the world: one in which the insured event occurs and the other in which it does not. For this reason people typically do not buy insurance against events that produce nonpecuniary losses. An excellent example is the death of a child. Because a money payment would not compensate parents for the pain caused by such a loss, people do not ordinarily purchase insurance for it.⁹⁴ Nevertheless, if a loss is uninsurable, those who may suffer it because of someone else's compliance error

⁹² See, e.g., *Houserman v. Garrett*, 902 So.2d 670 (Ala. 2004) (foreign object left in patient creates only prima facie showing of surgeon's negligence that will allow jury to forgive surgeon in a proper case), *overruling Ravi v. Williams*, 536 So. 2d 1374 (Ala. 1988) (proper to instruct jury that it only had to find that defendant surgeon left sponge inside plaintiff and that she suffered damage from it); *Walker v. Stewart*, No. F037392, 2002 Cal. App. Unpub. LEXIS 8079 (jury allowed to absolve surgeon who left retractor in patient); *Tams v. Kotz*, 530 A.2d 1217 (D.C. App. 1985) (jury allowed to forgive surgeon who left laparotomy pad in patient); *Willaby v. Bendersky*, No. 1-04-1311, 2008 WL 2550708 (Ill. App.) (jury allowed to absolve surgeon who left 12-inch-by-12-inch laparotomy sponge in patient); *Miller v. Tongen*, 161 N.W.2d 686 (Minn. 1968) (jury allowed to absolve surgeon who left sponge in patient); *Rayburn v. Day*, 268 P. 1002 (Or. 1928) (jury allowed to absolve surgeon who left surgical sponge in patient); *Kissinger v. Turner*, 727 S.W.2d 750 (Tex. App. 1987) (jury allowed to absolve surgeon who left surgical clamp in patient); *Hutchins v. Fletcher Allen Health Care, Inc.*, 776 A.2d 376 (Vt. 2001) (jury allowed to absolve defendant hospital whose doctor-employees left surgical sponge in patient).

⁹³ My prior analyses of this tension are contained in Mark F. Grady, *Accident Law Seeks to Limit Insurance Effects*, 1 Mich. L. & Policy Rev. 11 (1996); Mark F. Grady, *Efficient Negligence*, 87 Geo. L.J. 397 (1998).

⁹⁴ Parents of a child actor who were living off the child's income might purchase insurance, however, because they would suffer a financial loss if the child died.

will be for that reason *more*, not less, eager to have the legal system deter it. In contractual and similar situations, the tort system thus provides potential victims with a Hobson's choice. They will value the deterrence produced by the tort system, but probably not at the full price that they will be expected to pay to their contract (or other) partner in order to compensate that individual ex ante to become an insurer (through the tort system) of compliance errors.

We see that the law of negligence is sensitive to similar concerns in the context of other legal doctrines. For instance, when a social host commits a compliance error that hurts a social guest on the host's property, often the law of duty will create immunity.⁹⁵ If the immunity did not exist, social hosts might not be as eager to have guests over, and the guests themselves couldn't easily pay their hosts for the privilege (and still remain "guests") and might not want to, even if they knew the premises might contain some hazard due to the host's compliance error. Guest statutes created a similar doctrine for automobiles, often forgiving the compliance errors of a host driver to his or her passenger guest.⁹⁶ More broadly, the privity doctrine sometimes creates less negligence liability between parties who are linked to each other through contract.⁹⁷ Ironically, when no contractual or consensual relationship exists between potential litigants, less

⁹⁵ See, e.g., *Davies v. McDowell National Bank*, 180 A.2d 21 (Pa. 1962) (defendant's decedent not liable for deaths of plaintiffs' decedents caused by a rusted-shut vent that defendant's decedent neglected to inspect).

⁹⁶ See generally *J.T.W., Automobiles: Who Is Entitled to Benefit of "Guest" Statute*, 109 A.L.R. 667 (1937).

⁹⁷ See, e.g., *Winterbottom v. Wright*, 10 M. & W. 108, 152 Eng. Rep. 402 (Exch. 1842) (defendant immune for negligently providing and maintaining defective mail coach that hurt servant of fellow contractor to Postmaster General).

likelihood also exists that full liability for compliance errors will inefficiently destroy relationships. The paradoxical reason is that these relationships are *not* consensually created and therefore cannot easily be terminated. When money is not forthcoming from pedestrians whom a driver may negligently hit (through a compliance error), the driver may still drive even though he might not invite such a person to his home if he faced a similar liability. Thus, the test of whether a plaintiff was a social guest (or licensee) is often whether the host gained some advantage, ideally pecuniary, from the relationship.⁹⁸ If so, it becomes less likely that full liability for compliance errors will inefficiently destroy the relationship because at least in that type of case the defendant will have a fund from which to finance the prospective legal bill.

If we look back at our last category of jury absolutions in light of this reasoning, they may be less random than would first appear. Many of the cases just considered involved contractual or consensual relationships that might not have borne the weight of full liability for compliance errors. If a jury thought that a defendant made a relatively innocent or “reasonable” compliance error, it might implement its own limitation on liability analogous to a guest statute and a court might enter judgment on the jury’s absolution. Similarly, an absence of pecuniary damages might also send the jury in this direction because the jury might well realize that money damages would not compensate the plaintiff for the other

⁹⁸ See generally A.S. Klein, *Automobile Guest Statute: Status of Rider as Affected by Payment, Amount of Which Is Not Determined by Expenses Incurred*, 39 A.L.R.3d 1177 (1971); A.S. Klein, *Nonmonetary Benefits or Contributions by Rider as Affecting his Status under Automobile Guest Statute*, 39 A.L.R.3d 1083 (1971).

losses, for instance, the pain of losing a child.⁹⁹ Liability would just add an ex ante charge that would be felt most by the poor. Unfortunately, however, if all juries forgave all compliance errors, it would be easy for the system to cycle to the opposite extreme in which far too many of them occur. Thus, we may see an odd legal doctrine in which courts throw roadblocks in the way of juries that want to absolve compliance errors, but courts do not always prevent juries from doing so.

III. THE DUALISM IN CLASSICAL ACCIDENT LAW

A. *Procedural Preliminaries*

I now want to turn to samples of first classical and then modern accident cases and show how the dualism predicts and explains their results and also furnishes a convenient language for describing the twists and turns of judicial opinions. Before we start, let me say what we should perhaps expect to see. Most actual instances of negligence are likely to be compliance errors because it is easy to commit a compliance error—even when you are trying to avoid committing one. Moreover, the rule creating strict liability for compliance errors is simple and for that reason will generate less than its fair share of appealed cases. Especially using modern ideas about the selection of disputes for litigation,¹⁰⁰ we would not expect many modern lawyers to take a compliance-error case to a state's highest court, except in the rare cases in which the jury has forgiven the

⁹⁹ Many jury members probably understand that money damages do not really compensate people for pain and suffering. *See, e.g.*, *Jordan v. Sava, Inc.*, 222 S.W.3d 840, 845-46 (Tex. App. 2007) (stated reservations by “Venire No. 17” about awarding pain-and-suffering damages).

¹⁰⁰ *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

defendant for a lapse and the trial court has approved. As we've just seen, jury absolutions can be controversial, though actual absolutions of compliance errors are still rare in modern appellate reports. In almost all compliance error cases of liability—cases in which the jury has found *against* the person committing the compliance error—an appellate court's decision would be far too predictable to justify the expense of the appeal. Hence, in modern times precaution-plan cases should be a far larger proportion of appellate reports than they are of the underlying population of negligent injuries.

If the negligence rule is well glossed by the dualism, we would expect that leading *compliance-error* cases would be early, because that is when the simple rule of strict liability would still be legally controversial and would result in memorable opinions. Correspondingly, the later appellate reports should be more heavily populated by precaution-plan cases—cases that are inherently more disputable under the negligence “rule of reason” and for that very reason more likely to be appealed by rational actors. In short, because of the very simplicity of *per se* negligence liability, as well as its general acceptance, these simple cases must be much rarer in modern appellate reports than in the underlying population of negligent harms. Actually, so many reported negligence cases actually exist that it is still fairly easy to find compliance-error cases in modern appellate reports (though it is much harder to find absolved compliance errors).

Holmes developed his gloss of the negligence rule from classical cases, and I'd like to go back over those cases—the Holmes canon—and see whether his gloss truly explains them. My coordinate purpose is to see whether these cases

are better explained by the dualism gloss, which I believe they are. As already noted, at least the popular history of the negligence rule suggests that the negligence rule as we know it is modern. Certainly many aspects of the negligence rule *are* modern, but these aspects are less basic than the rule's central core. For instance, twentieth-century jurisprudence radically expanded tort liability for nonfeasances that yielded physical harm.¹⁰¹ As I intend to show, however, despite all of the claims to the contrary, the center of the negligence rule—the combination of breach of duty with cause in fact—is ancient, dating from at least the fourteenth century. When we attend to unreasonable plans and compliance errors, we not only see them in ancient cases but also acquire a new lens on what has previously seemed confusing. Trespass *vi et armis* was the writ of choice for most compliance errors, whereas trespass on the case was the more appropriate writ for unreasonable plans. When we combine the liabilities created by these two writs, we get the core of the modern rule of negligence.

Classical English cases were encumbered by two significant procedural complications that retarded the evolution of the substantive rule of accident law, the combination of negligence and strict liability that is the modern accident doctrine.¹⁰² The more significant was that that before mid-nineteenth-century

¹⁰¹ See, e.g., *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976) (psychiatrists liable for failing to warn their patient's intended victim).

¹⁰² Because a slower evolution is often a more refined evolution, these same procedural niceties may have also contributed to a decisional record of approximately 600 years in which (I claim) it is difficult to find a holding different from what a modern court would enforce in a modern negligence action. Although the antique procedural complications don't limit my claim that the negligence dualism is old and durable, they do form a backdrop for our examination of Holmes's classical cases and others from the same era.

legislative reforms¹⁰³—the same reforms that prompted Holmes’s modern study—a plaintiff who had suffered an accidental harm had to choose between two writs: trespass *vi et armis* and trespass on the case.¹⁰⁴ The commonly understood difference, then and now, was that trespass *vi et armis* lay for “direct” and “immediate” harms while trespass on the case lay for “indirect,” “mediate,” or “consequential” harms. A direct harm followed a simple causal chain from the defendant’s negligent act to the plaintiff’s injury, and a consequential harm was the opposite. Moreover, prior to the statutory reforms just mentioned, a plaintiff who selected the wrong writ would be nonsuited, even though he would have prevailed—as the deciding court often told him—if his lawyer had selected the other writ instead.¹⁰⁵ The evolved jurisprudence of the time was that these two types of accidental harms needed two different rules, even though no judge *in media res* could have predicted exactly what those two rules would become.¹⁰⁶ In

¹⁰³ In Great Britain, the Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76, and the Judicature Acts, 1873-75, 36 & 37 Vict., c. 66 (1873); 38 & 39 Vict., c. 77 (1875), and in the U.S. the Field codes and similar legislative reforms. See WILLIAM J. PALMER & PAUL P. SELVIN, *THE DEVELOPMENT OF LAW IN CALIFORNIA* (1983) (describing origin of California Civil Code and Code of Civil Procedure).

¹⁰⁴ See the discussion in FIFOOT, *HISTORY AND SOURCES*, *supra* note 10, at 187. A further reform took place with the Judicature Act of 1873, which effectively abolished the forms of action.

¹⁰⁵ Some early U.S. courts observed this same harsh doctrine. See *Taylor v. Rainbow*, 12 Va. 423 (1808) (plaintiff brought trespass on the case for gunshot wound when he should have brought trespass); *Case v. Mark*, 2 Ohio 169 (1825) (plaintiff brought trespass on the case for flatboat collision when he should have brought trespass).

¹⁰⁶ The old common-law courts’ judgment that “direct” harms and “consequential” harms needed different rules seems sensible to me. The defendant was the *prima facie* author of a “direct harm,” and the courts need not worry about diluting the incentives of other possible defendants. “Consequential harms” would be the opposite, and the judges of that era might have thought that the rule governing them would be trickier, as turned out to be true, because when you impose liability on the person responsible for one cause, you inevitably dilute the incentives of others responsible for different causes who might be more important to deter.

any event, as we are about to see, this strict requirement that plaintiffs select the proper writ certainly slowed down legal evolution, and presumably the judges of this era thought that to be a good thing.

The distinction between trespass *vi et armis* and trespass on the case was overdetermined because, from a relatively early time, plaintiffs tended to bring compliance-error accident cases as trespass *vi et armis* (along with the various trespasses to land and intentional torts that we now associate also with this writ) and unreasonable-plan cases as trespass on the case.¹⁰⁷ In other words, we might have before us two cases in which an equestrian defendant ran over the plaintiff, but the compliance error case will likely have been brought as trespass *vi et armis* and the unreasonable plan as trespass on the case, even though the harm in both cases was equally direct (or equally consequential).¹⁰⁸

Our modern law now creates a similar distinction between battery and negligence, except that the key difference is whether or not the defendant intended a trespassory touching or the equivalent. This modern reconstruction could have the same orientation, but with a better understanding of where the line needs to be drawn. If someone has acted with trespassory intent, that person most needs deterrence regardless of whether others may have possessed an opportunity to head off the loss. By contrast, if an original actor lacked trespassory intent—perhaps he committed a compliance error—it is a real concern whether others who could have headed off the loss need to be deterred more than he. They would, for instance, if they also owed the plaintiff a duty and if they could see the impending risk and deliberately failed to do something simple to nullify it.

¹⁰⁷ Defendants acting through their servants created an additional complication. *See* *McManus v. Crickett*, 1 East 106, 108, 102 Eng. Rep. 43, 44 (K.B. 1800); *See also* *Savignac v. Roome*, 6 T.R. 125, 101 Eng. Rep. 470 (K.B. 1794); *Morley v. Gaisford*, 2 H. Bl. 441, 126 Eng. Rep. 639 (K.B. 1795); *Brucker v. Fromont*, 6 T.R. 659, 101 Eng. Rep. 758 (K.B. 1796); *Turner v. Hawkins*, 1 Bos. & Pul. 472, 126 Eng. Rep. 1016 (K.B. 1796).

¹⁰⁸ Compare *Wakeman v. Robinson*, 1 Bing. 213, 130 Eng. Rep. 86 (C.P. 1823) (trespass *vi et armis* for pulling the wrong rein in an emergency) with *Gibbons v. Pepper*, 1 Ld. Raym. 38, 91 Eng. Rep. 922 (K.B. 1695) (trespass on the case for bringing an untamed horse into Lincoln's Inn Fields).

Indeed, when we recognize the concept of compliance error in the old cases, it does much to clarify an otherwise confusing history. Let me say right here what I'll defend later in more detail with case examples. The courts treated trespass *vi et armis* as appropriate for accidents that (1) arose from the defendant's own affirmative act (2) that entailed either (a) an intentional tort, (b) an apparent compliance error, or (c) a reckless plan; and (3) which led to the plaintiff's harm in an uncomplicated way that did not provide any significant opportunity for the plaintiff or a third party to head off the impending harm. Trespass on the case was the appropriate writ for the opposite type of harms. As just mentioned above, there was thus a strong tendency, clearly observable in the old reports, for plaintiffs to plead defendants' compliance errors as trespass *vi et armis* and defendants' merely unreasonable (not reckless!) plans as trespass on the case. As we'll soon see in more detail, this "rule of allocation" between the two writs was overdetermined and therefore confusing because it was possible, albeit unlikely, for a defendant to have implemented a reckless plan that produced harm only through a complicated causal sequence. (Most reckless plans produce immediate harm!) In such a case,¹⁰⁹ it was ambiguous which was the proper writ because two wings of the multipart test just mentioned pointed in opposite directions. The defendant's recklessness would have suggested trespass *vi et armis*, but the complication of the causal chain would have indicated trespass on the case. Let

¹⁰⁹ The most famous example of such a case is *Scott v. Shepherd*, 2 Black. W. 892, 96 Eng. Rep. 525 (K.B. 1773), discussed *infra* at pp. 85-87. The ultimate solution was to allow both writs for the ambiguous claims that arose when the various wings of the "rule of allocation" pointed in different directions. See the discussion of *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848, (C.P. 1833), *infra* p. 91.

me emphasize that the “rule of allocation” just described was merely a rule about when one writ or the other was appropriate. It was not a substantive rule of accident law. Nevertheless, given the technical way in which many classical tort cases arose, understanding the rule of allocation is a necessary preliminary to understanding the substantive rule itself.

A second procedural refinement very prominent in classical accident cases was that a litigant had to sort factual issues between two types of answers: a denial or a special plea. To make a long story short, if the defendant knew that he wasn't the one who hit the plaintiff or that it wasn't the defendant's fault that he did so, he had to decide whether to raise these issues either through a denial or a special plea.¹¹⁰ Again, the system ultimately became so strict that if he tried to claim that “Joe did it” through a special plea, the court might tell him that he should have raised this factual issue through a general denial and that was why the court was giving the plaintiff final judgment.¹¹¹ The system seemed more strict

¹¹⁰ When a plaintiff first declared the facts that entitled him to verdict and judgment, the defendant then acquired two alternative choices: he could plead in response or demur. If the defendant demurred, he would thereby challenge the legal sufficiency of the plaintiff's declaration, saying in effect that even if the plaintiff proved his alleged facts they would not entitle the plaintiff to judgment under the writ selected. If the defendant pleaded in response to the plaintiff's declaration, his responsive plea could be of two types: either a denial or a special plea. If he denied the plaintiff's entire declaration taken as a whole, that was called a “general denial,” and its name for the two trespass writs was “not guilty” or pleading the general issue. A plea of “not guilty” forced the plaintiff to prove his whole case to the jury. If he entered a special plea, the defendant would allege supposedly new facts that entitled him to judgment despite what was taken to be his admission that the plaintiff's declaration was true. It would now be the defendant's turn to plead to the special plea or to demur to it. See Arnold, *Accident, Mistake, and Rules*, *supra* note 12, at 7.

¹¹¹ Three of the cases mentioned by Holmes result in no holding of substantive law because the plaintiff pleaded the general issue (“not guilty”) instead of an appropriate special plea detailing the facts that the defendant claimed were exculpatory. Maybe courts thought that certain factual issues needed a detailed rule to define them and that this detailed rule would only develop if the issues were raised by special plea, subject to demurrer, as opposed to being decided by juries,

in the eighteenth century than in the fourteenth century. As we'll see from case examples, a fourteenth-century defendant would sometimes plead the general issue with respect to one part of the plaintiff's claim and then offer a justification, which would certainly have the appearance of a special plea, to a second part of the plaintiff's claim, thus carving it up as a butcher would cut a side of beef. In effect, the defendant would be hoping for a good affirmative defense, but hedging his bet for a possible jury absolution on the general issue also pleaded. In the eighteenth century, courts seemed to insist on a stricter election of either special plea (affirmative defense) or general denial (a plea of "not guilty").

Let's look at a case from an era that predates Holmes's analysis because I think we can glean from it many of the points just made about what he and many legal historians have missed. Before we do that, however, let's ask what turns out

where one jury's decision provides no precedent for any later case. In any event, it was an admittedly harsh system.

In *Hall v. Fearnley*, 3 Q.B. 919, 114 Eng. Rep. 761 (Q.B. 1842), the defendant struck the plaintiff, a pedestrian, with the defendant's cart. The defendant pleaded "not guilty" and then tried to introduce evidence that the only reason that he hit the plaintiff was because the plaintiff stepped from the curb just as the defendant was passing and was hurt in that way. The court held that this evidence could not be introduced under a plea of the general issue, but had to be pleaded specially.

In *Pearcy v. Walter*, 6 Car. & P. 232, 172 Eng. Rep. 1220 (1834), the plaintiff's van and the defendant's gig were going in opposite directions on the same road and somehow the shaft from the defendant's gig ended up wounding the plaintiff's horse. The defendant pleaded "not guilty" and then wanted to introduce evidence that the plaintiff was contributorily negligent. The court held and instructed the jury that the only issue for them under the pleadings and evidence was "how the shaft got into the horse's shoulder? Whether the defendant drove the shaft against the van horse, or the van horse was driven against the shaft?"

In *Milman v. Dolwell*, 2 Camp. 378, 170 Eng. Rep. 1190 (1810), the plaintiff pleaded that the defendant cut his barge free from its moorings on the Thames River whereby it was damaged. The defendant pleaded the general issue and then wanted to introduce evidence that the reason he moved the barge was because the plaintiff's barge was frozen to another barge that the defendant was authorized to move and that both of them were in danger from the ice on the Thames and that he moved the plaintiff's barge to a position of comparative safety. The court held that the defendant could not introduce this evidence under a plea of the general issue, but would have had to specially plead these facts (and thereby expose himself to a demurrer).

to be an enormously clarifying question. When in modern tort law would someone be automatically liable for his act unless the defendant proved some affirmative defense? A good answer is when someone has committed a compliance error or when she has committed one of the traditional intentional torts, such as trespass to land, battery, assault, or false imprisonment. Largely because of Holmes, we now see a big difference between a compliance error (which, thanks to his analysis, falls under “the rule of negligence”) and an intentional tort (which falls under his concept of “trespass”). Suppose you didn’t follow Holmes (maybe because you lived centuries before him) and just wanted to think about cases of automatic liability. Then you might combine compliance errors and intentional torts into the same category of automatic liability. This is an important key to understanding the old writ of trespass *vi et armis*. Medieval judges and lawyers saw an enormous similarity between compliance errors and intentional wrongs; then, as now, they were both cases of automatic liability. With respect to (what we now call) intentional torts *and* compliance errors, only two legal questions existed: whether the defendant had some good affirmative defense (which could be pleaded to the satisfaction of the court and proved to the satisfaction of the jury) and whether the jury would absolve the trespass (and would be permitted by the court to do so).

Let’s examine *Jankyn v. Anon.* (1378),¹¹² which illustrates many of the points just made. The plaintiff brought a writ of trespass *vi et armis* complaining that the

¹¹² ARNOLD, YEAR BOOKS OF 2 RICHARD II (VOL. I), *supra* note 11, at 69. Holmes did not discuss this case in his COMMON LAW, *supra* note 1, lectures.

defendant broke his house and took away his door posts and rafters. The defendant then denied that he did anything with force and arms and also denied that he carried away the rafters and the door posts (all of which seemed to be a plea of “not guilty”). Instead, the defendant offered this explanation (which seemed to be like a special plea). The defendant’s own house was right next door to the plaintiff’s house, and the defendant’s house needed repair; therefore, the defendant hired masons and carpenters to remodel it. As they were working, a “small piece” of building stone and timber fell from the defendant’s house onto the plaintiff’s house and all this happened “unintentionally and nonwilfully and without any malice.” In other words, the defendant said it was a mere compliance error by his servants. To this explanation, the plaintiff’s lawyer immediately answered, in so many words, “What’s the difference?”¹¹³ The court, moreover, immediately agreed with the plaintiff’s lawyer on this point.¹¹⁴ Surprising to us moderns, the judges (whose views were recorded) saw no difference between a compliance error and a forcible breaking of the plaintiff’s house. You could plead one and prove the other; it was trespass *vi et armis* all the same. Moreover, this was a pattern. In old *vi et armis* cases, it is common to see the parties jump back and forth between compliance-error conceptions of the defendant’s wrong and

¹¹³ The defendant’s lawyer actually said: “We are complaining about our house being broken, which fact he neither admitted, denied, nor justified for any reason; he has therefore given us no answer. So we demand judgment and pray our damages.”

¹¹⁴ One judge (Percy, J.) told the plaintiff that he should have paid for the damage before the case got to court, and another judge (Kirton, J.) said that the defendant would have to pay a fine if he was found liable on the writ.

intentional-tort conceptions.¹¹⁵ Holmes taught us to see this jumping back and forth as confusion or worse (maybe dishonesty), but the litigants of the day seem not to have observed the same refined distinctions that he advocated, and the judges accepted their view.¹¹⁶ Instead, everyone's main question about trespass *vi et armis* appeared to be, "Has the plaintiff alleged some act on the part of the defendant that would yield automatic liability¹¹⁷ in the absence of some special justification or excuse?"

Let me just drive home how similar this medieval system was to our modern tort system. Let's think about truly modern cases, again independently of Holmes's categories. When would you be automatically liable for damaging a plaintiff's car with your own car? One such case would be when you

¹¹⁵ See, e.g., *Roger and Christine atte Hall v. Stephen atte Hall*, reprinted in 1 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11, at 16-17 (plaintiff alleged that the defendant knocked the plaintiff Christine to the ground and "inhumanly" drove a plough and four horses over her prostrate body when it seemed from the further recitations that really the plaintiff's injuries were caused by the defendant's compliance error in tripping her up with his plough or else by the plaintiff's own contributory negligence). See also *Ellis v. Angwin* (1390), 2 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11, at 405 (parties shifted back and forth between compliance-error and intentional-tort conceptions of how fire started), discussed *infra* note 160.

¹¹⁶ This jumping back and forth between a compliance-error and intentional-tort conceptions of the defendant's wrong is even apparent in an early twentieth-century U.S. case. In *Hawksley v. Peace*, 96 A. 856 (R.I. 1916), the plaintiff's first count alleged an apparent compliance error with "force and arms" and the second count alleged an "assault and battery." Thus, both counts would have fallen within trespass *vi et armis*. The proven facts indicated that the defendant was showing his gun to the plaintiff, and while the gun was in the defendant's hands accidentally went off, striking the plaintiff. The two "causes of action" were an exact match with *Jankyn v. Anon.* in that one alleged, in effect, the defendant's compliance error, and the other "count" alleged an intentional tort. Interestingly, at the first trial the jury absolved the defendant, and the trial court entered judgment on the defense verdict. The Rhode Island Supreme Court held that the trial court should have ordered a new trial after the jury came in with its defense verdict; in other words, the Supreme Court thought that the verdict was improper and that the plaintiff should be allowed to try the case in front of another jury that might not absolve the defendant.

¹¹⁷ The qualification is that medieval juries, just like their modern counterparts, also possessed some scope for absolving the defendant's compliance error and possibly his intentional tort, as well.

intentionally drove your car into the plaintiff's car.¹¹⁸ Another case would be when you forgot to check your blind spot when changing lanes and through this compliance error struck the plaintiff's car with your own car.¹¹⁹ Both would be cases of automatic liability. Without intending to do, Holmes blinded us to the great similarity that exists between twenty-first-century and fourteenth-century tort law. It's true that his refined distinctions between negligence and intentional torts explain many niceties in our modern jurisprudence. Nevertheless, the great mass of torts on the ground—compliance errors and intentional torts—still fall under the same strict rule that we can see clearly in *Jankyn v. Anon.* from the year 1387.¹²⁰ One possible difference is that modern juries might have *more* ability to forgive compliance errors than their fourteenth-century predecessors. I'll come back to this point later in the article and argue the opposite, namely, that modern juries probably possess *less* legal ability to forgive compliance errors than their fourteenth-century antecedents. If I am right on this point, the modern accident rule is more like strict liability than the medieval rule was—a possibility that legal historians have failed to consider.

¹¹⁸ See *People v. Katiya*, No. A109006, 2005 WL 950182 (Cal. App.) (defendant criminally liable for intentionally colliding with another vehicle). Understandably, there do not seem to be too many appealed negligence cases in which the question was whether a defendant was civilly liable for intentionally ramming his car into another car.

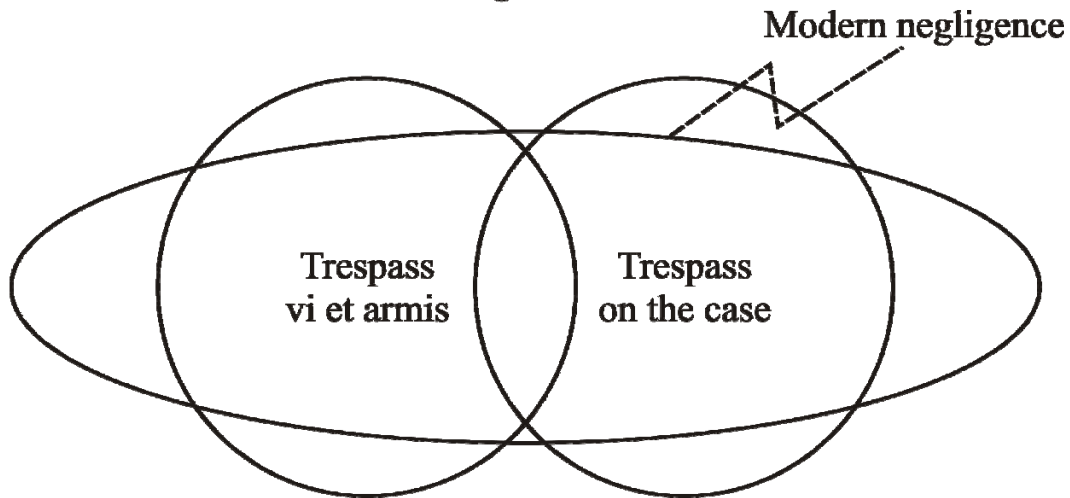
¹¹⁹ See, e.g., *Shehtanian v. Kenny*, 319 P.2d 699 (Cal. App. 1958) (jury properly instructed that changing lanes without looking is negligence as a matter of law and sufficient evidence existed to support plaintiff's verdict); *Boyd v. Shaw*, No. Civ.A. 85C-JL-72, 1987 WL 764058 (Del. Super.) (court directed verdict against trucker who changed lanes without checking blind spot and crashed into plaintiff); *Mire v. Birmingham Fire Ins. Co.*, 176 So.2d 624 (La. App. 1965) (driver who changed lanes suddenly and abruptly was sole negligent cause of ensuing accident); *Kaswan v. Mallory*, No. 79AP-449, 1980 WL 353218 (Ohio App.) (trial court properly directed verdict against defendant motorist who, when changing lanes, crashed into plaintiff's vehicle in adjacent lane).

¹²⁰ See the discussion *supra* pp. 60-62.

B. How the Modern Negligence Rule Maps onto the Old Writs

Before we get into the classical cases, let's examine briefly how the modern law of negligence maps onto the classical trespassory writs. The two classical writs of trespass (the two circles) ultimately overlapped as Figure 1 indicates. The basic domain of trespass *vi et armis* was (1) modern intentional torts (somewhat less evolved, of course, in the classical era); (2) compliance errors arising from the defendant's affirmative act and following a direct causal sequence to the plaintiff's harm; and (3) reckless plans by the defendant. The basic domain of trespass on the case was (1) merely negligent and not reckless plans; and (2) compliance errors either not arising from the defendant's affirmative act or following a complicated sequence from the defendant to the plaintiff's harm. The overlap between the two writs was always problematical, but it became clear over time that some overlap did indeed exist. For instance, *Williams v. Holland*¹²¹ held that harm flowing from the defendant's reckless plan could be litigated under either *vi et armis* or case, at the plaintiff's election.

¹²¹ 10 Bing. 112, 131 Eng. Rep. 848, 849 (C.P. 1833). The case is discussed *infra* pp. 91-91.

Figure 1

The long, skinny oval represents the domain of the modern negligence rule as applied to accidental harm. Thus, the modern negligence rule does not include all of the former trespass *vi et armis*; in particular, the modern negligence rule includes all the *vi et armis* compliance errors but not all of the *vi et armis* intentional torts (for instance, trespass to land and false imprisonment).¹²² Also, the modern negligence rule fails to include the entire domain of trespass on the case. For instance, modern negligence law does not include the obligations of a parker diligently to patrol for poachers in the service of his lord, who might once have sued his negligent parker for trespass on the case.¹²³ In addition, because of

¹²² See, e.g., *Milman v. Dolwell*, 2 Camp. 378, 170 Eng. Rep. 1190 (1810) (*vi et armis* was proper writ when defendant intentionally meddled with plaintiff's barge moored in the Thames River).

¹²³ See *The Parker's Case*, Y.B. 5 Edw. 4, Long Quinto, fo. 26 (1465), reprinted in A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 624 (1975). A park keeper sued his employer for unpaid wages. The defendant specially pleaded that strangers had killed many beasts in the park "through the negligence of the plaintiff." Justice Choke upheld the plea on the grounds that if the beasts were "wasted" as a result of "the plaintiff's negligence in park keeping" he should not receive his fee, "for the parker is bound to keep reasonably." Although an action "on the

continuing legal evolution, the modern negligence rule goes beyond both of the classical writs. A victim that a psychiatrist did not warn would have had no classical action for trespass on the case, even though a modern negligence action might exist.¹²⁴

Let's just think of a few common cases to get the intuition of the map. Suppose A accidentally shoots B. In the classical era, that was trespass *vi et armis*¹²⁵ because it was a compliance error originating in the defendant's affirmative act.¹²⁶ In modern times, it would also be a plain-vanilla compliance error for which the defendant would ordinarily be held liable under the negligence rule.

case," a similar modern action would not fall under accident law (or the modern rule of negligence) at all, but under contract law.

¹²⁴ See, e.g., *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976) (psychiatrists liable for failing to warn their patient's intended victim). Many of the modern extensions of the negligence rule have arisen in accidents not caused by the defendant's affirmative act. *Tarasoff* is a good example of extended modern liability for a nonfeasance.

¹²⁵ See *Weaver v. Ward*, Hobart 134, 80 Eng. Rep. 284 (K.B. 1616). *Weaver v. Ward* is about to be described in the text. In *Dickenson v. Watson*, 84 Eng. Rep. 1218 (K.B. 1682), the defendant shot randomly without being sure that no one was in the way. The plaintiff had a good action for trespass *vi et armis*. The same result was achieved in the relatively modern era in *Welch v. Durand*, 36 Conn. 182 (1869), a case that was virtually identical to *Dickenson*.

¹²⁶ A harm may result directly from an affirmative act and still not be an actionable compliance error, either under classical law or modern law. See *Jackson v. Metropolitan Ry. Co.*, 3 App. Cas. 193 (H.L. 1877), *rev'g*, 2 C.P.D. 125 (C.A. 1877) (no liability when defendant's guard slammed door to prevent overcrowding of railcar just as plaintiff slipped and to steady himself put his hand onto door jamb where door was being slammed). The case is mentioned in HOLMES, COMMON LAW, *supra* note 1, at 90, n.1. The *Jackson* case was similar to *Wade v. Spragg* (1376) reprinted in 1 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11, at 21, and discussed *infra* in note 184. The *Wade* case held that someone defending himself against an assailant was not liable to a plaintiff who jumped into the path of harm. That was basically the same case as *Jackson* (as well as *Brown v. Kendall*, discussed *infra* note 163.) When a direct contact by the defendant is *not* a compliance error by the defendant, as it was not in *Wade* and *Jackson*, often it is because the plaintiff has jumped into harm's way. That was one of the formulations used by the *Weaver v. Ward* court to explain when an accidental shooter would *not* be liable to the person hit, *i.e.*, when the plaintiff jumped into harm's way. See the discussion *supra* pp. 69-73.

Suppose that the plaintiff was a passenger on board the defendant's stagecoach and the coach wrecked due to a break in the axle, which should have been easy for the defendant to inspect. The cause of the accident would *not* be the defendant's compliance error of the affirmative act variety, but instead either a compliance error of the omission type (inadvertently missing a critical inspection) or a negligent plan (a plan not to inspect the axle very often). Either way the accident would fall under trespass on the case in the classical era¹²⁷ and also of course under the modern rule of negligence.¹²⁸

Suppose the defendant recklessly or "furiously" drove his cart and struck the plaintiff's carriage. Since the accident came from a reckless plan (not a compliance error or a merely negligent plan) and was manifested in the

¹²⁷ See *Christie v Griggs*, 2 Camp. 79, 170 Eng. Rep. 1088 (K.B. 1809). The *Christie* plaintiff actually brought "assumpsit on the case," but there was a close relationship between that writ and trespass on the case.

¹²⁸ In *Smith v. London & South Western Ry.*, L.R. 6 C.P. 14 (Exch. Ch. 1870), workers employed by the defendants, a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble-field beyond, and was thence carried by a high wind across the stubble-field and over a road, and burnt the plaintiff's cottage, which was situated about 200 yards from the place where the fire broke out. There was evidence that an engine belonging to the defendants had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them. The court stressed it was a bad plan. Holmes mentions this case at p. 93 of COMMON LAW, *supra* note 1. In the classical era because the accident arose from a negligent plan (and not from any kind of potentially iterated compliance error), it would have been trespass on the case. Obviously a modern negligence action would exist on these facts; indeed, *Smith* itself was a relatively modern case.

A similar consequential harm was involved in *Clark v. Chambers*, 3 Q.B.D 327 (1878) and mentioned by Holmes at p. 92, n.1 of COMMON LAW, *supra* note 1. The defendant had the unreasonable plan of using a sharp fence to block a public road that he had no right to block. A stranger moved the sharp fence, and the plaintiff injured his eye on it while struggling in the dark. The proper writ would have been trespass on the case, and like *Smith v. London & South Western Ry.*, it is a modern case of negligence.

defendant's affirmative act, the accident would be trespass *vi et armis* in the classical era¹²⁹ and of course an actionable injury under the modern rule of negligence.

My basic approach to analyzing whether the old rule was different from the modern rule will be to examine whether modern courts would achieve the same results as in the historical cases that Holmes exemplified and that others have brought to the debate about whether the classical accident rule was fault-based or strict. Fortunately, the facts of many of these cases have been replicated in modern times, so a comparison is often easy.

C. Three Central Accident Cases from the Holmes Canon

In his third lecture, Holmes dealt with a large and diverse set of tort cases.¹³⁰ Some modest amount of technology is usually needed to produce litigable accidents simply because it is difficult to hurt people seriously enough for them to want to sue unless something—mainly technology—has multiplied human force.¹³¹ It is hard just to trip onto someone and in that way create a lawsuit,

¹²⁹ See *Day v. Edwards*, 5 T.R. 648, 101 Eng. Rep. 361 (K.B. 1794).

¹³⁰ Even beyond his goal of glossing the modern negligence rule, he wanted to organize the whole field of tort along modern lines—those not necessarily determined by the old writ system. Many of the cases that Holmes discussed were therefore not accident cases of the type that would encounter the modern rule of negligence. I'll disregard those cases—trespass to land, battery, assault, false imprisonment, slander, and so forth—unless they are relevant in some way to Holmes's analysis of accident law, as one of them (*The Thorns Case*) clearly was. In addition, besides classical cases from the fifteenth century and before, Holmes also included relatively modern accident cases, including for instance *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 156 Eng. Rep. 1047 (Exch. 1856), which contains Baron Alderson's gloss of the negligence rule, highly similar to Holmes's own gloss. I'll deal with these more modern cases separately.

¹³¹ I have developed this theme more fully in Mark F. Grady, *Why Are People Negligent?: Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988).

though it is of course theoretically possible. Before industrial machines created massive amounts of accidental harm, horses, weapons, and fire created more modest amounts, and these bucolic accidents dominated the early records. Among Holmes's classical accident cases, three have figured most prominently in subsequent debates about the nature of the old rule of accidents. They are *Weaver v. Ward* (1616),¹³² which involved an accidentally discharged weapon, *Mitchil v Alestree* (1676),¹³³ which involved a bolting horse, and *Gibbons v. Pepper* (1695),¹³⁴ which involved a similar bolting horse.

The *Weaver v. Ward* (1616)¹³⁵ plaintiff brought a writ of trespass *vi et armis* against the defendant, who then specially pleaded that the accident happened when the two parties were engaged in a military field exercise with their muskets and that, accidentally and unfortunately and against the defendant's will, the defendant's own musket discharged a round into the plaintiff. (*Vi et armis* was the proper writ because the accident resulted from the defendant's compliance error in letting his finger accidentally pull the trigger.) The plaintiff demurred to this special plea, and the court held that the defendant's special plea was indeed bad (that these facts, if proved, would fail to exculpate the defendant). It said that

¹³² Hobart 134, 80 Eng. Rep. 284 (K.B. 1616).

¹³³ 1 Vent. 295, 86 Eng. Rep. 190 (K.B. 1676).

¹³⁴ 1 Ld. Raym. 38, 91 Eng. Rep. 922 (K.B. 1695).

¹³⁵ Hobart 134, 80 Eng. Rep. 284 (K.B. 1616). Gary T. Schwartz picked this case as his favorite in a symposium published by the University of Texas Law Review. See Gary T. Schwartz, *Weaver v. Ward*, 74 Tex. L. Rev. 1274 (1996). The case also figures prominently in Stephen G. Gilles's analysis of the classical law of accidental harm. See Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 Emory L.J. 575, 595-609 (1994) [hereinafter Gilles, *Inevitable Accident*].

“no man shall be excused of a trespass . . . except it may be judged utterly without his fault.”¹³⁶ In terms of table 1 presented at the beginning of this article, *Weaver* was a type II (compliance error) case. The defendant possessed a reasonable plan (skirmishing according to his military commander’s orders), but his trigger finger slipped when his gun was pointed at the plaintiff. The court’s emphasis that the defendant would not be excused “except it may be judged utterly without his fault” was an apt way of describing how harsh the compliance-error rule was—and still is.

Weaver v. Ward may have been even more similar to a modern case from yet another angle. The defendant pleaded *specialty* to the plaintiff’s declaration and therefore asked the court to recognize a defense, namely, the defense that the harm occurred “accidentally and against his will.” The court’s judgment decided that such a defense did not exist, and the opinion suggested that maybe a defense would exist if the defendant had pleaded that the accident was “utterly without the defendant’s fault,” as when the plaintiff suddenly jumped in front of the plaintiff’s

¹³⁶ *Id.* at 284. Despite the language quoted in the text, the English historian Fifoot thought *Weaver v. Ward* to be no evidence that the old English rule was strict liability. Here is his analysis:

The Court, after stating that “no man shall be excused of a trespass except it may be judged utterly without his fault,” proceeded,

As if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff rain against his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the Court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt.

“Fault,” “inevitable accident,” “negligence,” are words used indiscriminately without reflection and without meaning.

Such authority as this scarcely warrants the assumption of a doctrine of strict liability imbedded in the common law.

FIFOOT, HISTORY AND SOURCES, *supra* note 10, at 190-91. Fifoot believed that the judges of this era thought in entirely formalistic terms.

gun,¹³⁷ which of course would be similar to the defense of contributory negligence in the modern era. The court's judgment, however, did not prevent a future defendant from pleading not guilty (the general issue) and throwing himself on the jury for their possible absolution.

I think that another view of the case is possible, however. The strong language that court used to stress that the defendant could go before a jury on the general issue only if someone had grabbed his hand or if the plaintiff had run in front of his discharging weapon suggests that the court was entering a kind of summary judgment for the plaintiff.¹³⁸ Although theoretically anyone could plead "not guilty," the court may have been saying that the pleaded facts were inappropriate for even the possibility of jury absolution.

Weaver v. Ward seems very similar to *Hawksley v. Peace*,¹³⁹ decided by the Rhode Island Supreme Court in 1916. In that case the plaintiff pleaded that the defendant with "force and arms" shot him. The evidence indicated an accidental

¹³⁷ The court's words were as follows: "As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

See *Reynesbury v. Croyle*, KB 27/546, m. 21d (Coram Rege roll, Michaelmas 1397), reprinted and translated in 100 SELDEN SOCIETY 30, and described in more detail *infra* note 182, where the defendant pleaded that the plaintiff was hurt only because he jumped in front of the defendant's arrow, which was aimed at a target.

¹³⁸ It is true that the *Weaver v. Ward* defendant did specially plead, which bound the defendant to his fate if his special plea was demurrable, as it turned out to be. Nevertheless, the court's strongest language seemed to go to the fate of a hypothetical defendant who had pleaded "not guilty" when it was just an ordinary accident like *Weaver*. That language appears to block the path to a plea of "not guilty" in the purely accidental type of case—if this defendant or any defendant should have had it in mind.

¹³⁹ 96 A. 856 (R.I. 1916).

shooting, and the jury absolved the defendant. The Rhode Island Supreme Court held that the trial court, when it heard this defense verdict, should have ordered a new trial because the facts raised such a strong presumption that the defendant was liable. Other cases show that someone injured by a shooter's compliance error can always get to a jury and may even get judgment as a matter of law.¹⁴⁰ The only complication for a modern court would be whether a soldier in training would get some sort of official immunity.¹⁴¹ The *Weaver* court also noted that lunatics were liable for the trespasses even when they were not liable for their crimes. This is also an accurate description of modern law. Often in the older cases, in the same breath that judges described the harsh rule for compliance errors they describe the equally harsh rule applicable to children and persons with mental illness. Descriptions of how the negligence rule applies to children and

¹⁴⁰ See *Glueck v. Scheld*, 57 P. 1003 (Cal. 1899) (adult defendant liable when gun accidentally discharged); *Welch v. Durand*, 36 Conn. 182 (1869) (adult defendant liable for accidentally shooting plaintiff); *Conway v. Reed*, 66 Mo. 346 (1877) (12- or 13-year-old defendant liable for accidentally shooting his playmate); *Hawksley v. Peace*, 96 A. 856 (R.I. 1916) (new trial proper when jury attempted to absolve defendant for accidentally shooting the plaintiff) (citing many similar cases); *Tally v. Ayres*, 3 Sneed 681 (Tenn. 1856) (adult defendant liable for killing plaintiff's mare when his gun accidentally discharged); *Judd v. Ballard*, 30 A. 96 (Vt. 1894) (adult defendant liable when his pistol accidentally discharged round into plaintiff's knee).

¹⁴¹ See *Feres v. United States*, 340 U.S. 135, 142-43 (1950) (U.S. government immune for negligent injuries suffered by military personnel in the line of duty). The *Feres* Court could not find a case after *Weaver v. Ward* in which a soldier was liable for shooting another soldier. The Court failed to mention *Castle v. Duryea*, 32 Barb. 480 (N.Y. Sup. Ct.), *aff'd sub. nom.*, *Castle v. Duryea*, 1 Abb. Ct. App. Dec. 327 (N.Y. 1865), a case in which a soldier was liable for accidentally shooting civilians. The plaintiff and her child went to watch a military parade at a New York state militia base. The defendant, who commanded a group of parading soldiers, ordered them to shoot their muskets directly at a crowd of 2,000 spectators, which included the plaintiff and her child. Although the muskets were supposed to be loaded with blanks, the musket that hurt the plaintiff and her child was carrying live ammunition. The military commander was liable. This case was similar to *Weaver v. Ward*, but it was the defendant's reckless plan rather than his compliance error that created liability. In any event, the New York courts held that trespass *vi et armis* was the proper writ.

persons with mental illness are classical ways of signaling a strict-liability principle, which of course applies to compliance errors.

Some scholars have sought to discover the nature of the old accident rule by tracing the availability of the “inevitable accident” defense.¹⁴² That approach may really miss the mark because no “inevitable accident” defense exists in modern accident law—which modern scholars regard as fault-based. The reason that the defendant wanted an inevitable accident defense was, presumably, because he thought that the jury would find him guilty if he just pleaded the general issue. His failed attempt to introduce an inevitable accident defense probably indicates that seventeenth-century juries were unlikely to forgive this kind of compliance error.

In *Mitchil v Alestree* (1676),¹⁴³ the plaintiff brought an action for trespass on the case against the defendant who, the plaintiff alleged, “did ride an horse into a place called Lincoln’s Inn Fields, (a place much frequented by the King’s subjects, and unapt for such purposes) for the breaking and taming of him, and that the horse was so unruly, that he broke from the defendant, and ran over the plaintiff, and grievously hurt him.” The defendant pleaded “not guilty,” but the jury found for the plaintiff. The defendant moved to arrest the judgment, but the

¹⁴² See, e.g., Gilles, *Inevitable Accident*, *supra* note 135, at 595-609; Robert J. Kaczorowski, *The Common Law Background of Nineteenth Century Tort Law*, 51 Ohio St. L.J. 1127 (1990); Joseph Gold, *Inevitable Accident as a Defence in Trespass*, 21 Bell Yard 5 (1938).

¹⁴³ 1 Vent. 295, 86 Eng. Rep. 190 (K.B. 1676). The same case was alternatively reported as *Michael v. Alestree*, 2 Lev. 172, 83 Eng. Rep. 504 (K.B. 1676) and *Michell v. Allestry*, 3 Keble 650, 84 Eng. Rep. 932 (K.B. 1676). In *Michael v. Alestree*, the defendant sent his servant to Lincoln’s Inn Fields to tame two coach horses, but they were so unruly that they ran the plaintiff down. This other report also stresses that the defendant’s negligence was sending his servant to tame the horses in a public place.

court found sufficient evidence to support the verdict. Here the defendant possessed an unreasonable plan, as the jury found and the appeals court stressed, which is why the case was properly brought as trespass on the case.¹⁴⁴ *Mitchil v. Alestree* was a type III case of liability in which the defendant possessed an unreasonable plan (to tame his horse in a public place).¹⁴⁵ It, too, would be decided the same way today.¹⁴⁶

Note that the plaintiff did not plead trespass *vi et armis* because it was clear that the defendant had committed neither a compliance error nor what we would now call an intentional tort (like battery).¹⁴⁷ When a plaintiff successfully pleaded trespass on the case, the questions for the jury changed character from our modern point of view. The main issues in a *vi et armis* case were (as we've already noted) whether the defendant could escape liability through some

¹⁴⁴ The court said: "It was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concurrence of people." The risk for the plaintiff was that the court would view the defendant's plan as not merely "unreasonable" but as positively "reckless." At the time, if the court had seen the defendant's plan as reckless, trespass *vi et armis* would have been the proper writ instead of trespass on the case. See *Day v. Edwards*, 5 T.R. 648, 101 Eng. Rep. 361 (K.B. 1794). In the early nineteenth century the English courts abated the risk of the wrong trespassory writ in the case of *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (C.P. 1833), which held that even a reckless plan could yield a good action for trespass on the case or, alternatively, trespass *vi et armis*.

¹⁴⁵ A similar but earlier case was *Fogge v. Brigham*, CP 40/499, m. 278 (De Banco roll, Michaelmas 1385), reprinted in 103 SELDEN SOCIETY 406. The plaintiff declared that the defendant left unattended a horse which the defendant knew was accustomed to strike other animals if left unattended and that the defendant did in fact leave his horse unattended even "after a warning was made to him that he should duly take care of the horse." While unattended the defendant's horse "frequently struck" the plaintiff's mare and damaged her ability to produce offspring. The defendant pleaded not guilty.

¹⁴⁶ See *Mullich v. Brocker*, 97 S.W. 549 (Mo. App. 1905) (defendant liable for ordering his servant to break his horse in a public street); *Short v. Bohle*, 64 Mo. App. 242 (1895) (similar).

¹⁴⁷ It was also arguable that the defendant's plan was not totally reckless, which would have also made trespass *vi et armis* appropriate.

affirmative defense (special plea) or whether the jury would absolve (and be allowed to absolve) the defendant's compliance error. The issues in trespass on the case was, again, whether the defendant could escape through some affirmative defense, whether the jury would absolve any compliance error that might be involved in the case—maybe one arising not from the defendant's affirmative act but from someone's omission—and finally whether the defendant's executed plan was or was not negligent. This last issue must have been very common, and to many historians it has looked more modern than the issues raised by trespass *vi et armis*. The reality is, however, that trespass *vi et armis* can be understood in the same modern terms as trespass on the case. For a medieval jury to have attempted to absolve a defendant's compliance error (in trespass *vi et armis*) is just as modern as a jury's finding that a defendant's plan was not negligent.

In *Gibbons v. Pepper*,¹⁴⁸ decided in 1695, the defendant, riding on horseback on a public highway, accidentally ran down the plaintiff, a pedestrian. The plaintiff sued for trespass *vi et armis*, and the defendant entered a special plea (affirmative defense), to the effect that his horse became frightened for some unknown reason and ran out of control. The defendant demurred to this special plea. The court held that the defendant's lawyer should have pleaded "not guilty" and introduced the same facts as evidence, which would have entitled a jury to acquit him. The court's decision was logical. Given that the core of trespass *vi et armis* entailed a compliance error by the defendant (or some deliberate wrong), it

¹⁴⁸ 1 Ld. Raym. 38, 91 Eng. Rep. 922 (K.B. 1695).

makes sense that the defendant should deny that basic case in the most straightforward way, through a plea of “not guilty.” The holding was thus technical though important: the defendant’s evidence showing unavoidable accident should be entered upon a plea of the general issue (not guilty) and not as an affirmative defense. If we accept the facts of the defendant’s special plea as true, the defendant possessed a reasonable plan (to ride his horse on the highway) and committed no compliance error.¹⁴⁹ The facts were thus unlike those of *Weaver v. Ward* where the defendant committed a compliance error and of course also unlike *Mitchil v. Alestree*, where the defendant had an unreasonable plan (to tame his horse in a public place).

Just as *Weaver v. Ward* and *Mitchil v. Alestree* were decided consistently with modern accident law, so was *Gibbons v. Pepper*. Let’s take a truly modern negligence case and examine the similarities. In *Kohl v. Disneyland, Inc.*,¹⁵⁰ the plaintiff suffered injuries when the horses drawing the Surrey with the Fringe on

¹⁴⁹ An even earlier case, not mentioned by Holmes, came to the no-liability result that the court said would have occurred in *Gibbons v. Pepper* if that defendant had pleaded not guilty. In *Whitelock v. Wherwell*, CP 40/548, m. 221 (De Banco roll, Hilary 1398), reprinted in 103 SELDEN SOCIETY 412. Gilles discusses this case at Gilles, *Inevitable Accident*, *supra* note 135, at 609. The plaintiff declared that the defendant “so negligently and improvidently controlled [his] horse that the horse knocked [the plaintiff] down.” If the rule was strict liability, why in this case—just as in *Gibbons v. Pepper*—did the plaintiff allege the defendant’s negligence and not simply that he was harmed by the defendant’s act of riding into him with his horse? Also similar to *Gibbons*, the defendant pleaded that he possessed a reasonable plan and committed no compliance error. In particular, the defendant said that just before the accident he had hired the horse from one Alice Stok, a hackney woman, and that as soon as he mounted the horse it ran away with him, that he was powerless to control it, and that is how he collided with the plaintiff. The defendant also alleged that he had no notice of the bad habits of the horse before he got on it. Both parties prayed for judgment, which does not seem to be recorded.

Gibbons v. Pepper was like *Hammack v White*, [1861-1873] All ER Rep 702 (C.P. 1862), where the defendant was not guilty when his horse unforeseeably bolted and collided with the plaintiff.

¹⁵⁰ 20 Cal. Rptr. 367 (Ct. App. 1962).

Top ran away and toppled the surrey in which the plaintiff was riding. The plaintiff sued for negligence and relied on the doctrine of *res ipsa loquitur*, which was similar to the *Gibbons* plaintiff's reliance on trespass *vi et armis*. Neither plaintiff specifically alleged any unreasonable plan on the part of the defendant. Whereas the *Gibbons* defendant entered his special plea (affirmative defense) that his horse became frightened without any fault of his, Disneyland took the *Gibbons* court's advice to introduce evidence on its lack of fault after pleading the general issue. That evidence indicated that no Disney employee possessed an unreasonable plan or committed any compliance error. More specifically, Disney employees testified that the horses in question were specially selected; well trained; gentle in nature; had never shied or become unmanageable; had never run away; and had gone up and down Main Street for three years, covering about 15,000 miles, without mishap. Disney's horse-ride supervisor testified that horses sometimes become unaccountably spooked and that was what happened in this case.¹⁵¹ The jury returned a verdict for the defendant, the trial judge entered judgment on it; the court of appeal affirmed. The case turned out exactly the way the *Gibbons* court said it should if that defendant had pleaded the general issue.

The reason that legal historians have been mistaken about historical cases has nothing to do with their history, as such, and everything to do with Holmes's misconception of the *modern* negligence rule. Let's consider, as an example, the position of the great legal historian Morris Arnold (to whom we owe so much for

¹⁵¹ *Id.* at 370.

his careful translation of historical cases and his many important insights about them). Arnold has argued that if trespass *vi et armis* (the writ in *Weaver v. Ward* and *Gibbons*) was fault-based, pleas of inevitable accident, based on the defendant's own lack of fault, should be evident in one way or another in the historical record. According to Arnold, the absence of these pleas, or even attempted pleas, is evidence that the old rule for accidental trespass was strict liability.¹⁵² Yet, the modern rule of negligence as illustrated by *Kohl v. Disneyland* is certainly fault-based (according to the traditional Holmesian view), and yet fault is not specially pleaded (raised by affirmative defense) but through a rebuttal of the plaintiff's case in chief. A more fundamental answer, however, is that the classical rule for compliance errors was indeed close to strict liability, the same as the modern rule. When this is the doctrine, it is not useful to plead excuses as the *Weaver v. Ward* defendant found out. Nevertheless, on the other side of Arnold's point, some aspects of trespass *vi et armis* clearly *were* fault-based even in the Holmesian sense, because a battery or an assault, then and now, was typically based on fault.¹⁵³

¹⁵² More specifically, Arnold wrote in the introduction to the first volume of his selected cases of trespass published by the Selden Society:

[I]t seems odd, if accident (or lack of negligence) was regarded as good evidence, that we have not a solitary example of defendants trying to plead facts establishing it since they devoted so much energy to attempts to plead evidence in other instances.

1 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11, at xliii.

¹⁵³ See, e.g., *I. de S. v. W. de S.*, Y.B. Lib. Ass. f. 99, pl. 60 (1348) (defendant liable for assault when he struck with his hatchet against the plaintiffs' tavern door after the plaintiff wife stuck her head out the window in close proximity to the hatchet blows).

The great English legal historian S.F.C. Milsom has argued against Arnold's position by saying that the trespass *vi et armis* rule was indeed fault-based. He reasoned from *Gibbons v. Pepper* and similar cases and concluded that the absence of the defendant's fault was a part of the general issue, so the old rule of accidents could have been fault-based even if no successful inevitable accident pleas existed. Milsom wrote, "In an action based on the mere impact, a jury would not automatically find a defendant Guilty just because he was here; and there is no more to it than that."¹⁵⁴ Milsom's mistake consisted in his view that the trespass *vi et armis* was based on a (direct) "impact." Instead, the action was based on a compliance error (or an intentional tort or a reckless plan).¹⁵⁵ Moreover, contrary to Milsom's suggestion, it seems doubtful that many medieval juries would have forgiven compliance errors of the type represented by *Weaver v. Ward*. Of course, Milsom was correct that medieval juries might sometimes absolve a compliance error—just as modern jury might—but it seems unlikely that they would often do so. To us, a compliance error is the epitome of negligence, and the most likely source of our modern view is the historical common-law rule. Indeed, harsh judicial descriptions of compliance errors are more common in old cases than in modern cases. Consider *Weaver v. Ward* itself. If that defendant had thought that a jury would have absolved him, or if he

¹⁵⁴ MILSOM, HISTORICAL FOUNDATIONS, *supra* note 12, at 300.

¹⁵⁵ As noted above, the compliance error or intentional tort also had to be the defendant's own affirmative act, and not a mere omission or someone else's affirmative act.

thought that the court would let the jury do so, he had every incentive to plead the general issue instead of trying to specially plead “inevitable accident.”

In short, much of the debate among historians seems rooted in a misconception of the *modern* negligence rule—that it always requires only “reasonable care” and that the plaintiff must prove fault.¹⁵⁶ The surprising solution to the puzzle of classical accident law is to see that it was strikingly similar to modern accident law. The modern negligence rule possesses two wings: a generous, fault-based wing for “plans” and a harsh strict-liability wing for “compliance errors.” The medieval rule seems to have been the same, though packaged in more exotic clothes—the two trespassory writs. Legal historians have debated past each other because Holmes taught us all to believe that the entire modern negligence rule (with trivial exceptions) was fault-based. His conception, however, left out the biggest part of the modern negligence rule—strict liability for compliance errors. When we recognize that the biggest

¹⁵⁶ The great English legal historian J.H. Baker has written that the old rule of accidental trespass was probably fault-based and that a defendant would be considered guilty only if “he was to blame for it, first in the sense that he had caused it, and secondly in the sense that with reasonable care he could have avoided it.” BAKER, INTRODUCTION, *supra* note 12, at 459. Baker also added that there was no reason to believe that the trespass and trespass on the case entailed different standards of culpability. He wrote, “There is no reason to suppose that the standard was any different for trespass and case, since in either case it was left to the jury to decide according to current notions of culpability.” *Id.* Baker also argued that there were a number of successful “accident” pleas in the fourteenth century, but he conceded “they all could be described as cases where the chain of causation was broken by a force outside the defendant’s control: for instance, the forces of combustion and wind (in fire cases), the perversity of animals (in running-down cases), or the plaintiff’s own action (by moving in front of a horse, a moving dagger, or an arrow).” *Id.* at 457. Many of these same cases subsequently were published in translation in 1 & 2 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11.

Although Baker’s position was carefully considered, it is unclear whether it really is reasonable or possible for someone subject to trespass liability (either *vi et armis* or case) to avoid every compliance error. If not, medieval accident law contained the same pocket of strict liability possessed by modern law.

empirical part of the modern negligence rule is compliance error, it is easy to see that this strict-liability component was equally large and important in medieval England. Indeed, that is the time and place from which we moderns got it.

The Holmes canon of accident cases can be mostly divided into a few categories: damage to property; shooting cases; and collision cases. Let's examine each category and see how well it is explained by our reconceptualization of the negligence rule.

D. Accidental Harms to Property

Classical common-law judges thought it exceptionally important to maintain two distinct writs for accidental harms: trespass *vi et armis* and trespass on the case (though their commitment to this strict allocation waned over time, as we will soon see). In *Reynolds v. Clarke* (1724),¹⁵⁷ the defendant went into a yard, where he had a right to go, in order to fix his rain spout. The defendant fixed it in such a way that it cast water on the plaintiff's wooden structure and ultimately rotted it. The plaintiff brought trespass *vi et armis*, and the defendant maintained that he should have instead brought trespass on the case because the defendant's original entry into the yard was lawful and the damage followed not directly but consequentially. The King's Bench agreed. In a famous opinion, Chief Justice Raymond said that "We must keep up the boundaries of the actions, otherwise we shall introduce the utmost confusion."¹⁵⁸ I asserted before that the best

¹⁵⁷ 1 Str. 634, 93 Eng. Rep. 747 (K.B. 1724).

¹⁵⁸ *Id.* at 748. He continued:

conception of the differing requirements of the two writs is to see that *vi et armis* covered accidents that (1) arose from the defendant's own affirmative act (2) that was either an intentional tort, an apparent compliance error, or a reckless plan and (3) which led to the plaintiff's harm in an uncomplicated way that did not provide any opportunity for a third party to head off the impending harm. Trespass on the case was the appropriate writ for the opposite type of harms. Fixing your rain spout so that it ultimately rots your neighbor's house is not a compliance error, though it is an unreasonable plan. Compliance errors are iterations in a series; this act was a single iteration, so it would be a "plan." The court never reached the merits, but it seems reasonably clear that if the plaintiff had brought trespass on the case, he would have been entitled to succeed. It would be a type III "unreasonable plan" case under the taxonomy provided at the beginning. The same result would follow under modern negligence law.

Although trespass *vi et armis* was the proper writ for compliance errors arising from the defendant's own affirmative act, trespass on the case created

If the act in the first instance be unlawful, trespass will lie; but if the act is *prima facie* lawful (as it was in this case), and the prejudice to another is not immediate but consequential, it must be an action upon the case; and this is the distinction.

In a later passage, Chief Justice Raymond said:

This is only injurious in its consequence, for it is not pretended that the bare fixing of a spout was a cause of action without the falling of any water. The right of action did not accrue till the water actually descended, and therefore this should have been an action upon the case.

Id.

The *Reynolds v. Clark* defendant possessed a questionably unreasonable plan—and not a recklessly unreasonable plan—in that he adjusted the rain spout in a way that later events showed protected himself at the expense of his neighbor; moreover, the causal chain was somewhat complicated (it depended on the amount of rain, the flow of the water through the spout, etc.), so at the time trespass on the case was the proper form of action.

liability for other compliance errors for which the defendant was responsible, for instance, the independent compliance error of the defendant's servant or simply the defendant's own omission. An example is *Beaulieu v. Finglam* (1401),¹⁵⁹ a case in which the plaintiff brought a writ of trespass on the case for the defendant's having managed his fire so negligently that it spread and burned down the plaintiff's premises. Because of the lawyers' and judges' statements during argument, the case is commonly understood as one in which the defendant's servant mismanaged the fire, probably through a compliance error, and maybe through a nonfeasance (going to sleep without extinguishing a candle). Because the harm did not arise from the defendant's own affirmative act (as it would have, for instance, if the defendant had intentionally torched the plaintiff's premises¹⁶⁰), trespass *vi et armis* was unsuitable. The case is memorable because of the court's harsh statement of the liability rule. The defendant's lawyer had argued that if the action were good, "This defendant is undone and impoverished all his days if this action is maintained against him; for then twenty other such

¹⁵⁹ Y.B. 2 Hen. 4, fol. 18, Pasch., pl. 6, (1401), *reprinted and translated in* C.H.S. FIFOOT, HISTORY AND SOURCES, *supra* note 10, at 166-67.

¹⁶⁰ In *Ellis v. Angwin* (1390), 2 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11, at 405, the plaintiff sued the defendant, who was the plaintiff's neighbor, for burning down the defendant's house. The defendant pleaded that the fire started in his house "by mischance" and against the defendant's will and then that a great gust of wind spread it to the plaintiff's house. The defendant did not demur to this plea but denied it, alleging that the defendant burned down his house intentionally. The plaintiff evidently thought that the defendant's plea of "mischance" might be good or, possibly, that he, the plaintiff, stood a better chance on this question with a jury. It is of course possible for a house fire to start without the owner's or his servant's compliance error, and it is also possible that this plaintiff believed, in 1390, that the defendant might not be responsible for someone whose compliance error actually started the fire, for instance, a servant. The later case of *Beaulieu v. Finglam*, described in the text, apparently settled the question that the owner of a house would be liable for the compliance error of a servant or maybe a house guest, though that principle is not totally clear from the report of the *Beaulieu* court's decision.

suits will be brought against him for the same matter.” To this argument, Chief Justice Thirning replied, “What is that to us? It is better that he should be utterly undone than that the law should be changed for him.” This language is a good match with the *Weaver v. Ward* court’s statement (in the context of a *vi et armis* compliance error) that a defendant must show that the accident was “utterly without his fault” in order to avoid liability for it. Thirning’s fifteenth-century opinion further established a harsh strict-liability principle (for compliance errors) applicable in our own time to any small business owner whose employee has committed a minor lapse that yields a massive loss to others. *Beaulieu* was an early source of this rule, which is certainly not the forgiving negligence principle that Holmes taught us to see.

E. Accidental Shootings

In *Dickenson v. Watson* (1682),¹⁶¹ the defendant, a tax collector who carried a pistol to defend his tax receipts, accidentally discharged a round into the plaintiff, who sued for trespass *vi et armis*. The defendant specially pleaded that his gun went off by accident. Consistently with *Weaver v. Ward*, the court held this plea bad and also that “the defendant shall not be excused without unavoidable necessity, which is not shewn here.” Again, the accident came from the defendant’s own affirmative act that was also a compliance error. The defendant was strictly liable, just as a modern defendant would be (unless in an exceedingly rare case a jury would be allowed to absolve his compliance error).

¹⁶¹ Jones T. 205, 84 Eng. Rep. 1218 (K.B. 1682).

Similarly in *Underwood v. Hewson*,¹⁶² the plaintiff sued the defendant for accidentally shooting him while the defendant was showing the plaintiff how his gun uncocked. Although the report is very brief, the court found that the plaintiff could maintain trespass *vi et armis* for this obvious compliance error also arising from the defendant's own affirmative act.¹⁶³

Although *Scott v. Shepherd* (1773)¹⁶⁴ was not strictly speaking a shooting case, it came close, so this is as good a place as any to discuss it. The trouble started when the defendant, apparently as a practical joke, threw a firecracker—a

¹⁶² 1 Str. 596, 93 Eng. Rep. 722 (K.B. 1724).

¹⁶³ This is a good place to mention *Brown v. Kendall*, 60 Mass. 292 (1850), a case that Charles Gregory has said created a modern fault-based rule in Massachusetts, which had, he says, previously enforced classical strict liability for “direct harms.” See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951). The *Brown* accident arose in the midst of a bitter dog fight in which the animals, owned by the respective litigants, were hurting each other. As the defendant was striking the dogs, trying to separate them with a stick, the plaintiff approached from the defendant's rear, and the defendant accidentally struck the plaintiff in the eye. The trial court instructed the jury, among other things, that if it was not “a necessary act” for the defendant to attempt to separate the dogs, then the defendant would be liable unless it should also appear that the defendant was exercising “extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense.” *Id.* at 293. Because it was obvious that the defendant's act was not “necessary,” at least in a strict sense of that word, the instruction told the jury that it should find for the plaintiff unless the injury was “inevitable” in a popular sense—whatever that meant. So instructed, the jury found for the plaintiff.

The Massachusetts Supreme Court reversed, holding that the instruction was error. The court began by saying that the defendant's act of separating the dogs with a stick seemed to be a reasonable plan, partly because he might otherwise be liable if his dog had killed the plaintiff's dog. *Id.* at 293 The common sense of the case, then, was that while the defendant was following a reasonable plan with his stick, the plaintiff approached him from the rear as the defendant was actively swinging. This seems to have been an extraordinarily bad plan on the plaintiff's part and was contributory negligence. Either the plaintiff stepped into harm's way and barred himself from recovery under the dictum of *Weaver v. Ward* and the rule of *Wade v. Spragg* (1376) reprinted in 1 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11, at 21, or the defendant was not even guilty of a compliance error. (*Wade v. Spragg* is also discussed *infra* in note 184.) While in the heat of battle, was the defendant really supposed to be checking his rear iteratively to make sure that someone like the plaintiff was not sneaking into harm's way? In either event, the case seems well explained both by classical and by modern accident rules, which appear the same as they apply to this case.

¹⁶⁴ 2 Black. W. 892, 96 Eng. Rep. 525 (K.B. 1773).

“squib”—into a crowded marketplace. It originally landed next to Yates’s gingerbread stand. A man named Willis then picked it up and again threw it across the marketplace where it landed next to Ryal’s stand. The latter picked it up and again threw it across the market where it exploded and struck the plaintiff in the face, partially blinding him. As already noted, the plaintiff sued the original thrower—the practical joker. Still at this time the plaintiff had to choose one of the writs, and the plaintiff had chosen trespass *vi et armis*. The plaintiff got a jury verdict, and the defendant appealed to the Court of Common Pleas on the ground that the plaintiff should have brought trespass on the case instead of trespass *vi et armis*.

The case didn’t involve a compliance error, because the defendant quite deliberately threw the squib; this was not any kind of inadvertent lapse in iterated precaution. It was, however, a highly reckless plan and for that reason a facially unlawful act that would normally make *vi et armis* the writ of choice. The problem was that the causal chain was complicated in the worst way because it seemed possible that the two intermediate throwers each had an opportunity to head off the loss to the plaintiff. Nevertheless, most of the judges (Blackstone was the exception) thought that the intermediate throwers acted out of panic, so they didn’t really have a significant opportunity to head off the harm to the plaintiff. From this angle, the case was easy for trespass *vi et armis* because the harm arose from the defendant’s own affirmative act (his original throw) that was a reckless plan or even an intentional tort (an assault to all who were near the thrown squib). In short, the case entailed what we would call an “unreasonable

plan” (type III case) even though the classical judges thought trespass *vi et armis* the proper writ only for those unreasonable plans that appeared reckless on their face. From these cases, we can infer that the “unlawful act” that classical judges saw as the epitome of trespass *vi et armis*¹⁶⁵ entailed a defendant’s affirmative act that was either a reckless plan, an intentional tort (like an assault), or, most surprisingly, a compliance error, as in *Dickenson v. Watson* or *Weaver v. Ward*.

Today the squib case probably wouldn’t have to be decided on a negligence theory because, as Chief Justice De Grey actually said, the original throw was an assault to everyone who was close to its first landing and ended up as a battery to the plaintiff under the doctrine of transferred intent. In any event, the case is overall further support for the rule of allocation between trespass *vi et armis* and trespass on the case. The case could also be seen as an easy modern case of negligence, except for the possible problem of proximate cause.¹⁶⁶ The case

¹⁶⁵ See, e.g., *I. de S. v. W. de S.*, Y.B. Lib. Ass. f. 99, pl. 60 (1348) (defendant liable for assault when he struck with his hatchet against the plaintiffs’ tavern door after the plaintiff wife stuck her head out the window in close proximity to the hatchet blows). In the actual case of *Scott v. Shepherd*, Chief Justice De Grey actually said, the original throw was an assault to everyone who was close to its first landing and ended up as a battery to the plaintiff, under the doctrine of transferred intent.

Nares, J., wrote for the majority that, to him, it didn’t matter to him whether the harm was direct or consequential because the original act was highly “unlawful” (by which he must have meant that the defendant’s plan was recklessly unreasonable or an assault). He pointed out that in throwing the squib the defendant even violated a statute. From Nares’s point of view, the case ultimately became a good match with the subsequent case of *Day v. Edwards*, where the defendant should have brought trespass for the collision caused by the defendant’s furious driving of his horse and cart. *Day*, however, is easier to see as trespass *vi et armis* because the causal chain from the defendant’s unlawful act was more direct—the defendant bumped directly into the plaintiff’s carriage.

¹⁶⁶ You would think that the modern action would be for the intentional tort of battery, but *Scott v. Shepherd* has come back as *Bodkin v. 5401 S.P. Inc.*, 768 N.E.2d 194 (Ill. App. 2002), and the plaintiff brought that somewhat more extreme case on a negligence theory. The defendant, a bartender in a bar filled with hard-drinking, tobacco-smoking, and fun-loving railroad workers, handed the plaintiff a large firecracker, called an M-80. An unknown bar patron then lit it,

easily falls within the negligence dualism because throwing a lighted firecracker into a crowded market was a highly unreasonable plan.

F. Accidental Collisions

The rule of allocation between *vi et armis* and case became a minefield for plaintiffs seeking recovery in collision cases. In *Day v. Edwards* (1794),¹⁶⁷ the plaintiff brought trespass on the case against a defendant who, the plaintiff alleged, drove his horse and cart “so furiously, negligently and improperly” that he lost control of it and collided with the plaintiff’s own large carriage. The court went so far as to hold that the plaintiff’s allegations of the defendant’s reckless plan positively defeated his action of trespass on the case. The rule of allocation between the writs soon became problematical in the context of collisions because it is difficult for a plaintiff to know exactly when his opponent’s merely negligent driving plan (where case was the proper writ) became “reckless” (where *vi et armis* was the proper writ). Nevertheless, the substantive rule to be drawn from the case is completely consistent with modern law because the court made clear

and it blew up, injuring the plaintiff. The plaintiff had tried unsuccessfully to brush down the fuse and was hurt as he was attempting to throw the still-lighted bomb out the door where it would have exploded harmlessly. Handing a bar patron an unlighted bomb was a bad plan under the circumstances, especially if the bartender was in on the practical joke, as the jury could have found. *Scott v. Shepherd* was probably a clearer case of battery because the defendant actively threw a lighted firecracker toward one person (Willis), giving him an expectation of an immediate harmful contact. Under the doctrine of transferred intent, the defendant’s intent to assault Willis would transfer to the plaintiff to allow him to bring an action for battery. In modern times, negligence will lie in many of the same situation in which battery would also be available. *See, e.g., Jordan v. Adams*, 533 S.W.2d 210 (Ark. 1976) (defendant liable for negligence when he angrily threw another defendant’s purse at her and when the purse contained an unsecured pistol that then discharged a round into the plaintiff).

¹⁶⁷ 5 T.R. 648, 101 Eng. Rep. 361 (K.B. 1794).

that the plaintiff would have recovered if he had brought the writ appropriate for reckless plans, namely, trespass *vi et armis*.¹⁶⁸

In *Leame v. Bray* (1803),¹⁶⁹ the defendant, on a dark night, was driving his carriage on the wrong side of the road and for that reason collided with the plaintiff who was driving his own curricule in the opposite direction. The plaintiff had selected *vi et armis* and the trial judge (Ellenborough, C.J.) had nonsuited the plaintiff because it appeared that the accident occurred only through the “negligence” of the defendant. The full panel ultimately reversed Ellenborough and held that the plaintiff had properly pleaded trespass *vi et armis*. It is easy, however, to see the plaintiff’s dilemma. Driving on the wrong side of the road—or probably more accurately, toward the middle of the road—was not a classical compliance error because it appears that the defendant knew what he was doing and may have thought it was safer to stay toward the middle, at least along that stretch of road, and driving toward the middle of the road also would not have been an obviously reckless plan. Nevertheless, being on the wrong side of the road was an “apparent” compliance error, so we can understand the result in that way.

¹⁶⁸ Another case in which the plaintiff brought trespass on the case when he should have brought trespass *vi et armis* was *Savignac v. Roome*, 6 T.R. 125, 101 Eng. Rep. 470 (K.B. 1794), when the plaintiff alleged that the defendant, through his servant, “wilfully” drove the defendant’s carriage into the plaintiff’s horse and chaise. The case held that the harm was direct or immediate, even though the defendant acted through his servant. The problem seems to have been solved by *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848, 849 (C.P. 1833), which held that even a reckless plan could yield a good action for trespass on the case.

¹⁶⁹ 3 East 593, 102 Eng. Rep. 724 (K.B. 1803).

Leame v. Bray signaled a larger problem with the rule of allocation between *vi et armis* and case. Suppose it was apparent that the defendant had committed some compliance error but it was unclear to the plaintiff exactly what it was. How should the plaintiff plead? *Rogers v. Imbleton*¹⁷⁰ seems an attempt to solve this problem because that plaintiff pleaded generally that the defendant was guilty of “inattention” and “bad care” all of which the plaintiff characterized as “mere negligence.” The court held that trespass on the case, which the plaintiff had selected, was indeed a proper writ for the action. The case could have been a little easier to decide because the defendant’s compliance error, probably a failure to maintain a proper lookout, seems to have been the defendant’s *omission* rather than his affirmative act.

In *Wakeman v. Robinson* (1823),¹⁷¹ where the plaintiff brought an action of trespass *vi et armis* against a defendant who ran his horse-drawn gig into the plaintiff’s horse, which was drawing the plaintiff’s wagon. The defendant tried to maintain that he ran into the plaintiff’s horse only because his own horse got scared by the noisy and rapid approach of a butcher’s cart and became ungovernable, so that it was “unavoidable accident.” Nevertheless, the evidence also showed that the defendant, faced with this emergency, “pulled the wrong rein” and that everything would have been okay if he had just maintained a straight course. The jury found for the plaintiff, and the defendant appealed. Presumably because pulling the wrong rein was an obvious compliance error by

¹⁷⁰ 2 Bos. & Pul. (N.R.) 117, 127 Eng. Rep. 568 (C.P. 1806).

¹⁷¹ 1 Bing. 213, 130 Eng. Rep. 86 (C.P. 1823).

the defendant, as well as the defendant's own affirmative act, *vi et armis* was obviously the proper writ. Chief Justice Dallas went so far as to say that he regretted that the appeal had even come to his court and that if he had been the trial judge he would have directed a verdict for the plaintiff. Chief Justice Dallas's lament—that the defendant's rather innocent compliance error was so obviously a case of liability that he wished he'd never seen the appeal—is a good match with the courts' statements in *Weaver v. Ward* (must be utterly without his fault) and *Beaulieu v. Finglam* (better that the defendant should be totally undone than forgiven his or his servant's compliance error with fire).

In 1832 the English Court of Common Pleas solved many of the nice problems of “which writ?” by holding in *Williams v. Holland*¹⁷² that even when the defendant was alleged to have a reckless plan (he was racing his carriage on a public road when he collided with the plaintiff), the plaintiff could maintain either trespass on the case or trespass *vi et armis*. This holding solved a major pleading problem because now the plaintiff did not have to decide whether the defendant's plan was “merely negligent” or actually “reckless” (and nonsuited if he guessed wrongly).

¹⁷² 10 Bing. 112, 131 Eng. Rep. 848, (C.P. 1833). *See generally* Prichard, *Trespass*, *supra* note 23.

G. The Thorns Case

*The Thorns Case*¹⁷³ from 1466 has figured prominently in the historical debate over whether the classical accident rule was strict or fault-based,¹⁷⁴ though it is hard to see why. The “law” that supposedly came from it was merely argument by counsel, some of whom were supernumerary serjeants kibitzing in court. The case wouldn’t be decided today under the negligence rule because, as Holmes stressed in his own discussion,¹⁷⁵ the case didn’t involve an accident at all; it was a deliberate trespass to land. The defendant was trimming his thorn bushes, and the thorns fell over the property line onto the plaintiff’s land who sued him for trespass *quare clausum fregit* when he quite deliberately further invaded his neighbor’s property by stepping over the line in order to retrieve his fallen thorns. The defendant’s lawyer¹⁷⁶ inventively pleaded as a defense that

¹⁷³ Also known as *Hull v. Orynge*, Y.B. Mich. 6 Edw. 4, fo. 7, pl. 18 (1466), reprinted in translation in JOHN H. BAKER & S.F.C. MILSOM, *SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750*, at 327 (1986) [hereinafter BAKER & MILSOM, *SOURCES*] and in FIFOOT, *HISTORY AND SOURCES*, *supra* note 10, at 195. The case is also reprinted in abridged form in RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* 86-88 (Aspen 7th ed. 2000).

¹⁷⁴ *See, e.g.*, 3 William S. Holdsworth, *A History of English Law* 375-77 (5th ed. 1942). Stephen G. Gilles, who believes that the old rule approached strict liability, but did not quite get there, also relied heavily on the hypotheticals from *The Thorns Case* [*Hull v. Orynge*, Y.B. Mich. 6 Edw. 4, fo. 7, pl. 18 (1466), reprinted in translation in JOHN H. BAKER & S.F.C. MILSOM, *SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750*, at 322 (1986) [hereinafter BAKER & MILSOM, *SOURCES*]]. *See* Gilles, *Inevitable Accident*, *supra* note 135, at 595-609.

¹⁷⁵ Holmes basically offered his readers the hypotheticals from *The Thorns Case* on an “as is” basis. What he wrote as a preface to extensive quotations of the serjeants’ hypotheticals was as follows: “Next comes the argument from authority. I will begin with an early and important case [*The Thorns Case*]. It was trespass *quare clausum*.” HOLMES, *COMMON LAW*, *supra* note 1, at 85. Holmes himself drew no conclusions from *The Thorns Case*. His treatment of this case suggested he wanted to show his legal readers that the case contained arguments by counsel inconsistent with his own gloss of the negligence rule.

¹⁷⁶ Serjeant Jenney in Bod. Lib. MS. Lat. Misc. C 55, fo. 6, and Serjeant Catesby in Y.B. Mich. 6 Edw. IV, fo. 7, pl. 18. BAKER & MILSOM, *SOURCES*, *supra* note 11, at 327-331, translates and prints both versions of the case.

these thorns had fallen onto the plaintiff's land against the defendant's will. The defendant did *not* plead that he himself was on the plaintiff's land against the defendant's own will (that would have been a false and highly contestable plea), but the defendant's lawyer tried to argue that it was the same thing. In fact, five serjeants at law were in the court that day, and four of them¹⁷⁷ argued that the defendant's plea was bad. Much like tenors on stage together, they incited each other to more thrilling performances, which have since become part of the debate about whether the old accident rule was strict or fault-based. Although I believe that the case is weak evidence for any proposition about the common law of accidents, I'll discuss two of the hypotheticals raised by the serjeants.

The key to the serjeants' arguments, as well as to the judge's ultimate opinions, is to see that all the serjeants, except the defendant's counsel, assumed that cutting the thorns was a "lawful act," which in our terms would be a "reasonable plan" (though the concept really doesn't fit this trespass to land case). The court ultimately held that the defendant's cutting the thorns was an "unlawful act" (a reckless plan?) if they would inevitably fall onto his neighbor's land, and that is why the defendant was liable. Again, the case today would not be analyzed as an accident falling under the rule of negligence, but a trespass to land, as in the actual case.

¹⁷⁷ Fairfax, Pigot, Yonge, and Bryan, in the canonical Year Book report. Y.B. Mich 6 Edw. IV, fo. 7, pl. 18, translated and reprinted in BAKER & MILSOM, SOURCES, *supra* note 11, at 329-331.

The first hypothetical came from Serjeant Fairfax, who said, “But if a man is lopping his trees and the boughs fall on a man and injure him, in this case he shall have an action of trespass.” It would be rare for a modern tree lopper to avoid liability for this type of accident.¹⁷⁸ Cutting tree limbs when there are people below is either an unreasonable plan (as when the defendant knew or should have known that people were below) or a compliance error (as when the defendant forgot to check whether anyone was below). This hypothetical then poses no serious challenge to the view that the classical accident rule was different from the modern rule.

Serjeant Fairfax then argued, “Also, sir, if a man is shooting at the butts [a target] and his bow swerves in his hand and [the arrow] kills a man, against his will, this (as has been said) is not a felony. If, however, he injures a man by his archery, the man shall have a good cause of action of trespass against him: and yet the archery was lawful, and the injury which the other suffered was against his will. Likewise here.” That last proposition also is still generally true. If you shoot a bow and arrow where it might hit someone, that is an unreasonable plan, and you are liable.¹⁷⁹ If Serjeant Fairfax meant to say that if you are shooting at a

¹⁷⁸ See, e.g., *City of East St. Louis v. Klug*, 3 Ill. App. 90 (1878) (defendant’s employee cut tree that fell on plaintiff’s house causing her personal injuries). *Klug* was a type II (compliance error) case. See also *Lichtenthal v. St. Mary’s Church*, 561 N.Y.S.2d 134 (N.Y. App. Div. 1990); 561 N.Y.S.2d 151 (dissenting opinions), *aff’d*, 586 N.E.2d 54 (N.Y. 1991) (although church volunteers were immune “as volunteers” for individual acts of negligence in cutting tree that hit fellow volunteer, church itself could (and probably would) be negligent for having unreasonable plan).

¹⁷⁹ There are many cases holding young children liable for shooting playmates with bows-and-arrows. An older case in this set is *Bullock v. Babcock*, 3 Wend. 391 (N.Y. 1829) (12-year-old defendant liable for hitting classmate with arrow when defendant was shooting at classroom

target and your hand shakes and you hit a bystander, this case is more complicated. If you knew your hand was shaky and you shot anyway, that would be an unreasonable plan, and you ordinarily would be liable.¹⁸⁰ If you didn't know your hand was shaky, and you missed the target and hit a bystander, that case today might possibly yield no liability.¹⁸¹ Again, most accidents of this type would result in liability today, as when the defendant shoots either knowing or neglecting to notice that someone is standing behind the target or otherwise in the line of fire.¹⁸²

waste basket, which court stressed was an unlawful act). In *Evans v. Dozart*, 69 So.2d 591 (La. App. 1953), the court held that a minor defendant would be liable for shooting arrow in a populated area without knowing whether it would hit anyone. That was an unreasonable plan. If you shoot a gun without being absolutely sure that you won't hit someone, you are liable under a long line of precedents leading from the nineteenth century to the modern era. *See Jensen v. Minard*, 282 P.2d 7 (Cal. 1955) (trial court instructed too broadly on doctrine of unavoidable accident when defendant shot at sparrow and hit children even though children were out of view). If your gun accidentally discharges and hits someone, you've committed a compliance error and you are almost always liable. *See cases discussed supra note 140.*

¹⁸⁰ *See, e.g., Breunig v. American Family Insurance Co.*, 173 N.W.2d 619 (Wis. 1970) (defendant liable for driving when she knew or should have known she was suffering from schizophrenic hallucinations).

¹⁸¹ *Cf. Ratcliff v. San Diego Baseball Club*, 81 P.2d 625 (Cal. App. 1938) (professional baseball player not liable for injury caused to spectator by carelessly thrown bat).

¹⁸² *See Yancey v. Superior Court (Neal)*, 33 Cal. Rptr. 2d 777 (Ct. App. 1994) (defendant liable for throwing discus that accidentally hit and injured plaintiff, who was retrieving her own discus).

A plea roll from 1397 suggests that you were not liable for battery if someone jumped in front of your arrow when you were shooting at a target, so even at the time of *The Thorns Case* the broader language was unreliable. *See Reynesbury v. Croyle* (1397), *translated and reprinted in 1 ARNOLD, SELECT CASES OF TRESPASS, supra note 11, at 30.* The defendant in that case pleaded as follows to the plaintiff's action of trespass:

And he [the defendant] says that on the day and year on which he supposed that the aforesaid trespass was done him he and several others were shooting at targets in a contest in the castle bailey at Bridgwater and, as the aforesaid John Croyle was shooting at the aforesaid targets, af the arrow left his bow the aforesaid John Reynesbury came across in front of the aforesaid targets, so that the aforesaid arrow struck the aforesaid John Reynesbury.

Id. at 30.

A larger problem with all the serjeants' arguments is whether they were addressing the rule of allocation between *vi et armis* and case or whether they were making statements about when actual liability would exist (some kind of judgment as a matter of law). The language they used makes it seem more likely that they were addressing the rule of allocation. Consider again the "shooting at the butts" hypothetical, where Serjeant Fairfax said that the plaintiff who was hit by the stray arrow issued from the trembling hand would have "good cause of action." If the defendant committed no compliance error but simply trembled, it seems quite possible that a medieval jury could have forgiven his compliance error, just as the piñata bat jury forgave the teacher's compliance error in losing control over the bat.¹⁸³ The plaintiff in that case also had her "good cause of action," which is what Serjeant Fairfax would certainly claim. There were other hypotheticals addressed by the serjeants, which are set out in the margin.¹⁸⁴ As I

The plaintiff did not demur to this plea but instead denied it, which suggested it was a good plea.

¹⁸³ See the discussion *supra* pp. 36-37.

¹⁸⁴ The second two hypotheticals addressed by the serjeants were posed by Serjeant Bryan. His first "hypothetical" was none other than the apparent holding in *Jankyn v. Anon.* (1378), ARNOLD, YEAR BOOKS OF 2 RICHARD II, *supra* note 11, at 69. See the discussion *supra* at pp. 60-62 reconciling *Jankyn* with modern negligence law. This hypothetical also fails to establish that the old rule was different from the modern view. Bryan moreover prefaced his hypothetical with a statement at least similar to the modern compliance-error rule. He said, "To my mind, 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." That proposition is still generally true today, as when someone drives his automobile and (through a compliance error) hits a pedestrian. He then said, "For example, if I build a house, and when the timber is being hoisted a piece of it falls onto my neighbour's house and breaks it, he shall have a good cause of action: and yet the building of the house was lawful, and the timber fell against my will." Besides being a good description of the apparent holding in *Jankyn*, this statement is also a good description of the modern rule of *res ipsa loquitur* followed in *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863), and similar cases. Such a defendant would be presumptively liable because the nature of the accident makes it probable that the defendant committed a compliance error.

have said, given their context in a trespass to land case and given that the court itself adopted a premise different from that which drove the serjeants' hypotheticals,¹⁸⁵ it is hard to see why *The Thorns Case* has been so prominent in the debate about the nature of the classical common-law accident rule.

Serjeant Bryan's second hypothetical was far more troublesome and is frequently stressed by those who argue that the classical accident rule was stricter than modern negligence. He argued, "Also if a man assaults me, and I cannot get away from him without him beating me, and in my own defence I raise my staff to strike him, and there is someone behind me who is hurt when I raise my staff, he shall in this case have an action against me: and yet raising my staff to defend myself was lawful, and I hurt him against my will. Likewise here." It is possible, though highly improbable, that this scenario would today yield liability for the stick wielder. The attack threatened the defendant would have to be very innocuous, and he would have to use excessive force knowing or having good reason to know that the plaintiff was behind him. In fact, the hypothetical is similar to *Morris v. Platt*, 32 Conn. 75 (1864). The defendant was held immune when he accidentally shot the plaintiff, an innocent bystander, while defending his life against an attack from a mob armed with clubs.

Perhaps the most telling argument against Serjeant Bryan's resolution of his last hypothetical is a case from his own era that seems flatly inconsistent with it. In *Wade v. Spragg* (1376) reprinted in 1 ARNOLD, SELECT CASES OF TRESPASS, *supra* note 11, at 21, the plaintiff brought an action of trespass, and the defendant pleaded that the defendant was defending his life against a swordsman; that he pulled out his knife for this purpose when "the aforesaid Margaret [one of the plaintiffs] suddenly came in the shadows between them, the same Michael [the defendant] being wholly unaware of her coming; and thus if the same Margaret suffered any harm herein it was by her own negligence and foolishness and by her own act" *Id.* at 22. If the rule were as Serjeant Bryan said, the *Wade v. Spragg* plaintiff would have demurred to the defendant's special plea, but the defendant did not demur but instead joined issue on the facts and called for a jury.

¹⁸⁵ In the actual *Thorns Case*, all of the lawyers' hypotheticals missed the mark. Recall that they were trying to think of cases where a defendant's plan was reasonable (his act "lawful") but the defendant would still liable for some miscarriage (similar to a compliance error). All of the judges thought these hypotheticals were beside the point because either the defendant's cutting of his thorns so that they would inevitably fall on the plaintiff's land was "unlawful" or his going on the plaintiff's land to retrieve them was unlawful, or both were unlawful. In other words, they didn't need to get into the doctrine of compliance error (which was really inapposite in this trespass to land case) because the defendant's plan was unreasonable from the start.

Justice Littleton said:

Sir, if it were the law that he could enter and take the thorns, he might by the same argument cut large trees, and come in with horses and carts to take them out: and that would be unreasonable, because the plaintiff might perhaps have corn or other crops growing. Neither is it reasonable here, for the law is the same in great things as in small; and he shall have amends according to the magnitude of the trespass.

BAKER & MILSOM, SOURCES, *supra* note 11, at 331.

Justice Choke said:

When the defendant cut the thorns and they fell onto my land, this falling was unlawful, and consequently his coming to take them out was unlawful.

*H. Modern Accident Law Could Be More Strict Than
Classical Law*

As the prior discussion shows, the dualism gloss is an excellent description of the classical rule governing accidents. That rule consisted of two parts: strict liability for compliance errors and a fault-based standard for non-compliance errors or “plans.” The strict liability for compliance errors must have been tempered by the ability of classical juries to forgive compliance errors. How often they did so and often they were allowed to do so is not a question that can be easily answered from the largely appellate reports we possess. In modern times courts have many ways to limit juries’ absolutions. Largely these are post-verdict motions by the plaintiff whose defendant a jury has absolved. Examples are motions for new trial and for judgment notwithstanding the verdict. In addition, a court can also control jury absolution by ordering summary judgment for the plaintiff even without ordering a new trial. As J.H. Baker and others have recorded, these post-verdict controls became common in England starting in the 15th century.¹⁸⁶ To the extent that classical common-law courts possessed fewer and less developed ways to control jury absolutions, it is possible that the modern liability for compliance errors is actually more strict than the classical rule.

Id.

Chief Justice Danby said:

Even though it was lawful for him to cut his thorns, it was not lawful to allow them to fall into another person’s soil, for he was to cut them in such a way that they did not damage others.

Id. at 328.

¹⁸⁶ See BAKER, INTRODUCTION, *supra* note 12, at 97-101; Morris S. Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 Am. J. Legal Hist. 267 (1974); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 Colum. L. Rev. 35 (1983).

IV. THE DUALISM IN MODERN ACCIDENT LAW

An important claim I make in this article is that the core of the negligence rule has not changed much in at least 500 years. It is therefore hard for me to find a time that separates modern cases from classical cases because I see them all as expressions as the same dualistic accident rule. Therefore, for modern negligence cases, I'll use as my principal examples the cases from the "Calculus of Risk" section of the seventh edition of Richard Epstein's Torts casebook.¹⁸⁷ Epstein clearly regards these cases as modern because they come after a separate chapter on historical cases from the nineteenth century and before. Epstein's "Calculus of Risk" cases seem selected to illustrate the importance of the risk-utility calculus in modern negligence analysis—*Carroll Towing*¹⁸⁸ is one of the cases—so if anything they are biased against the dualism gloss, which says that many negligence cases (and almost all actual instances of negligent harm) do not require a court to perform a risk-utility calculus.

The first case in this section is *Blyth v. Birmingham Water Works*,¹⁸⁹ which involved a defendant's water system that burst during a record cold snap in the winter of 1855. The case was decided by the English Court of Exchequer in 1855, so it is barely a modern case, according to a traditional idea that a large reform in negligence law took place a little before this time. The untaken

¹⁸⁷ RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 194-220 (9th ed. 2008). The cases come from Section C ("The Calculus of Risk" in Chapter 3 entitled "The Negligence Issue." These cases could not be argued to be biased to support the theory as might the corresponding cases from WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS (2004).

¹⁸⁸ See the discussion *supra* pp. 25-31.

¹⁸⁹ 11 Ex. 781, 156 Eng. Rep. 1047 (Exch. 1856).

precaution in question was the defendant's failure to clear the ice from its fireplug stopper, which would have allowed the freezing and expanding water to expand upward harmlessly instead of breaking the pipe and flooding the plaintiff's property, as in the actual event. Subsequently, the defendant's turncock removed the ice from the fireplug and replaced it, which would have prevented the harm if it had been done earlier. Although it might first appear that the company's failure was a compliance error that would yield strict liability under the dualism, the court stressed that no one could have foreseen before the accident in question that fire plugs would behave in that way. England, after all, was and is a fairly temperate country. In short, this was a type I case (again on table 1) in which the defendant possessed a reasonable plan and did not commit any compliance error. Although the defendant did omit a nondurable precaution (it failed to clean the ice and snow off its stopper), this nondurable precaution was not part of a reasonable plan. The defendant of course had no actual plan to clean its stoppers during cold weather, and the absence of this plan was, according to the court, reasonable given the climate of England and the lack of foreseeability before the accident about how vulnerable Victorian fire plugs were to extreme cold.

In *Eckert v. Long Island R.R.*¹⁹⁰ the defendant on the day in question was running its train fast through a thickly populated residential neighborhood in Queens. Moreover, the locomotive was running with its cow catcher facing backward, and the crew failed to blow the whistle to signal the train's approach to

¹⁹⁰ 45 N.Y. 502 (1871).

the point where a three- or four-year-old child was standing or sitting on the tracks. The plaintiff, seeing the child's peril, attempted a rescue and almost succeeded. His survivor sued the railroad for his wrongful death, and got verdict and judgment at trial. The railroad argued on appeal that insufficient evidence of negligence existed, and the New York Court of Appeals affirmed the jury's plaintiff's verdict. That court took the main question to be whether the plaintiff had been contributorily negligent as a matter of law in going on the tracks. This was not a precaution that needed to be used iteratively, so the question was whether the plaintiff's deceased's rescue plan was reasonable. The court found that the plan was reasonable given that the plaintiff's deceased actually saved the child (so it couldn't have been foolhardy) and almost saved himself as well. In terms of the scholarly literature, *Eckert* was the early twentieth century version of *Carroll Towing* because Henry T. Terry used it as his principal example in developing his own vision of the risk-utility view of the negligence rule, which must have influenced Judge Learned Hand.¹⁹¹

The court and Henry T. Terry spent much less time analyzing the sufficiency of the evidence bearing on the defendant's primary negligence. The railroad's plan of running the locomotive backwards was of course poor because the cow-catcher on the front of the locomotive might have knocked the child off the track

¹⁹¹ The reason Henry Terry is not remembered as the author of an influential formula is probably because he used cost-benefit analysis to assess the reasonableness of a negligent act, namely, the deceased's going onto the tracks to save a child. It turns out that the negligent omission (failing to have a bargee) is the more general paradigm of breach of duty, which was unlucky for Terry because his analysis was at least as brilliant as Judge Hand's later analysis and certainly more original. See Terry, *Negligence*, *supra* note 15.

without killing him. It might have also saved the rescuer's life because if he had tried the rescue anyway, when it would have been somewhat less needed, he too might have been knocked off the tracks by the cow-catcher. Although the train crew's excessive speed seemed deliberate and was probably also an unreasonable plan, the crew's failure to keep a good lookout and to blow the whistle were compliance errors of the type to which strict liability attaches, assuming they were causes in fact of the rescuer's death. (It seems as though the crew could have stopped the train if they had been traveling at a reasonable speed and had been maintaining a good lookout forward.) In any event, probably because the court saw these mistakes as obvious, it spent little time analyzing whether they constituted negligence. A paucity or even absence of judicial analysis leading to a determination of liability is a hallmark of strict liability for compliance errors.

In *Osborne v. Montgomery*¹⁹² the defendant double parked his car to drop some clothing off at his cleaner's. The plaintiff, who was thirteen, was following on his bicycle and was, at the time of the accident, passing the defendant's double-parked vehicle on the left. Without looking, the defendant threw open his driver's side (left-hand) door, which struck the plaintiff's bicycle handle and threw him to the ground. The trial judge's instruction defined negligence as follows:

1. By ordinary care is meant that degree of care which the great mass of mankind, or the type of that mass, the ordinarily prudent man, exercises under like or similar circumstances.

¹⁹² 234 N.W. 372 (Wis. 1931).

2. Negligence is a want of ordinary care.

Seeing its way clearly to an unassailable verdict, the jury found that the defendant's double parking was not under the circumstances negligent but that it was negligent for the defendant to have opened his car door without looking for whom or what he might hit. On appeal, the defendant challenged this jury instruction, apparently arguing that the instruction virtually compelled a finding of negligence because a careful subset of the "great mass of mankind" would not throw open a car door in traffic without looking for who or what might be in the way. In this context, the dualism would say that the defendant might not be liable for double parking his car, if that was a reasonable plan under the circumstances, but would be strictly liable for failing to look before opening a car door into traffic. Apparently this is the way that the jury understood the instruction and found for the plaintiff based on the defendant's throwing his car door open without first looking. Also taking this view of the case, the appeals court affirmed the plaintiff's verdict.

The most interesting part of the opinion, perhaps, is the way that the Wisconsin Supreme Court camouflaged the strict liability principle by giving examples, not of compliance errors, but of reasonable precaution plans that the negligence part of the dualism would exculpate.¹⁹³ Perhaps the distinction that

¹⁹³ Here is what the court said:

The fundamental idea of liability for wrongful acts is that upon a balancing of the social interests involved in each case, the law determines that under the circumstances of a particular case an actor should or should not become liable for the natural consequences of his conduct. One driving a car in a thickly populated district, on a rainy day, slowly and in the most careful manner, may do injury to the person of another by throwing muddy or infected water upon that person. Society does not hold the actor responsible because the

the court invited was that if one had a plan to open car doors into busy traffic without looking, that would be a patently unreasonable plan and quite distinct from driving a fire truck fast but carefully to a fire, which was one of the court's counterpoised examples. The difficulty with the court's comparison is that the defendant probably *lacked* a reckless plan to always open his door without looking, but just forgot to look on this one occasion and could find nothing in the trial court's instruction that would allow the jury to exculpate him for what they might have been prone to see as an ordinary and excusable error. This was a type II case in that the defendant probably possessed a reasonable plan, but committed a compliance error (forgot to look before opening the door).

Cooley v. Public Service Co.,¹⁹⁴ the next case in Epstein's casebook, involved an accident in which during a severe winter storm the defendant's uninsulated power wire broke and fell onto the phone line over which the plaintiff was speaking and sent an extremely loud noise through her receiver, thus causing her injuries. The plaintiff alleged two untaken *durable* precautions: the defendant's failure to insulate its wires and the defendant's failure to install a wire-mesh basket underneath its power line that would catch it if it broke and prevent it from coming into contact with the telephone line. Since this was a

benefit of allowing people to travel under such circumstances so far outweighs the probable injury to bystanders that such conduct is not disapproved. Circumstances may require the driver of a fire truck to take his truck through a thickly populated district at a high rate of speed, but if he exercises that degree of care which such drivers ordinarily exercise under the same or similar circumstances, society weighing the benefits against the probabilities of damage, in spite of the fact that as a reasonably prudent and intelligent man he should foresee that harm may result, justifies the risk and holds him not liable.

Id. at 376.

¹⁹⁴ 10 A.2d 673 (N.H. 1940).

durable-precaution case, the court analyzed in detail whether either untaken precaution was reasonable. The court did not stress the actual expense of either untaken precaution but instead looked at the true economic cost: each precaution would have increased the risk to third parties, namely, pedestrians who might have been electrocuted by broken, insulated wires or by wires caught up in mesh baskets. The evidence indicated that insulated wires and caught-up wires do not ground as quickly as the uninsulated, unguarded wires that the defendant actually had installed. Hence, the plaintiff's safety would have been purchased at an excessive cost, namely, an expected cost of death to some pedestrians. Hence, the defendant was not guilty of negligence.

Although it is not in Epstein's casebook, a contrasting case is *Whitehead v. General Telephone Co.*,¹⁹⁵ where the defendant's employees forgot to ground the plaintiff's residential phone system when they installed it. While using the phone during a summer storm, the plaintiff was injured when a lightning bolt struck the system. Without any detailed analysis, the court found that the evidence of negligence was sufficient to support the plaintiff's verdict. For the defendant's employees to have omitted to ground this residential system, when that was their committed plan, was a compliance error to which strict liability attaches. The case was like *Lucy Webb Hayes National Training School* in that once the plaintiff established the defendant's actual precaution plan, the court assumed that the defendant would be liable for any compliance error in it, without actually

¹⁹⁵ 254 N.E.2d 10 (Ohio 1969).

analyzing whether the plan was more than due care required.¹⁹⁶ The rule seems reasonable because defendants possess little incentive to adopt excessive precaution plans—and even less incentive after cases like this and *Lucy Webb Hayes*. (If a defendant adopts an unreasonably inadequate plan, there can of course be liability for that, as already noted.)

Epstein's next case is *United States v. Carroll Towing Co.*,¹⁹⁷ which the previous discussion has already explained with the dualism gloss.¹⁹⁸

Lyons v. Midnight Sun Transportation Services, Inc.,¹⁹⁹ is the following case in Epstein's book. The plaintiff pulled suddenly out of a parking lot into traffic, and the defendant's truck driver, David Jette, struck the plaintiff's vehicle, killing her husband who was a passenger in the plaintiff's car. The plaintiff offered

¹⁹⁶ The case was somewhat extreme from two points of view. First, at the time the plaintiff was hurt, an independent contractor had left the surge protector at least partially disconnected so that it might not have done any good even if the defendant had properly installed it in the first place. The plaintiff had settled separately against that defendant. In effect, the decision discussed in the text holds that the case could be analogous to a rare breed of causation cases exemplified by the independently started converging fires, each of which would have been sufficient to destroy the plaintiff's property. See *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927) (persons responsible for independent concurrent sufficient causes are potentially jointly liable). Nevertheless, *Whitehead* was less extreme because the jury could have believed that the independent contractor left the device in operating order, if only the defendant had installed it properly in the first place. There was also the issue, not really discussed by the court, of whether the independent contractor's negligence in leaving the device exposed to the lightning storm was a supervening cause that would cut off the defendant's liability. In addition, the case involved a res judicata issue because the parents had earlier sued and lost for the minor plaintiff's medical expenses, and that case resulted in a judgment for the defendant. It is not clear whether the prior decision was grounded on a lack of breach of duty, cause in fact, or proximate cause, or maybe even that the parents did not have the right to sue for these damaged under the circumstances of this case. In any event, a subsequent case overruled *Whitehead* on this res judicata point of law. See *Grava v. Parkman Township*, 653 N.E.2d 226, 229 (Ohio 1995).

¹⁹⁷ 159 F.2d 169 (2d Cir. 1947).

¹⁹⁸ See the discussion *supra* pp. 25-31.

¹⁹⁹ 928 P.2d 1202 (Alaska 1996).

evidence that Jette was speeding. The jury returned a verdict for the defendant, finding that although Jette was negligent in speeding, his negligence was not a legal cause of the accident because the same thing would have happened if he had been driving a lawful speed. The plaintiff had pulled out directly in front of him. The trial court had given the “sudden emergency” instruction, which allowed the jury to take into account that Jette was reacting to an emergency that the plaintiff had created by pulling out into traffic without first seeing whether her path was clear. The court disapproved the instruction, but held that it was harmless error in this case. The case turned more on causation than on breach of duty. Nevertheless, the plaintiff’s pulling into traffic without checking was a compliance error, and she paid the price for it: she was barred from recovery. The defendant’s speeding seems to have been an unreasonable plan, but everyone agreed (the jury and the court) that it didn’t make a difference in this case because the plaintiff was so close to the defendant’s on-coming vehicle when she negligently blocked Jette’s path.²⁰⁰

Epstein’s last case in the section is *Andrews v. United Airlines*.²⁰¹ The plaintiff was injured while deplaning from the defendant’s aircraft when another passenger’s heavy briefcase fell from the overhead compartment onto her. The

²⁰⁰ On the causation issue, the case seems similar to the famous case of *Berry v. Borough of Sugar Notch*, 43 A. 240 (Pa. 1899), where the court held that the plaintiff’s excessive speed was not causal because it did not increase the probability of a direct hit by a tree. Here the defendant’s excessive speed did not increase the probability of a “direct hit” by the plaintiff’s vehicle. See also *Cunillera v. Randall*, 608 N.Y.S.2d 441 (App. Div. 1994) (speeding driver not liable for accident when another child pushed plaintiff into stream of fire-hydrant water, which propelled him directly into defendant’s speeding car).

²⁰¹ 24 F.3d 39 (9th Cir. 1994).

procedural issue was whether the trial court had properly entered summary judgment for the defendant. The appeals court held that there was a triable issue of fact. The case seems analogous to *Byrne v. Boadle*,²⁰² the famous res ipsa case of the barrel that fell onto the plaintiff from the defendant's warehouse as he was walking down a public sidewalk in front of the warehouse. Both plaintiffs were unable to say what specific untaken precaution by the defendant would have saved the day. The *United Airlines* case seems more extreme than *Byrne* because the defendant possessed less control over the other passenger's briefcase than the *Byrne* defendant possessed over the barrel that fell from its warehouse. The *United Airlines* court stressed that it was a close case for ordering a trial on the plaintiff's fairly unspecific claim. Whatever else the case may imply, it certainly does *not* suggest that the negligence rule requires only "reasonable" precaution. The actual liability standard that the court applied was quite strict. Perhaps the court thought might be able to show some unreasonable plan by the defendant for supervising deplanings or that a flight attendant committed a compliance error in this particular deplaning by somehow missing one of the steps in the airline's actual plan.²⁰³

In short, although Epstein's modern cases appear in a section designed to show how courts balance risks and benefits when they decide the negligence

²⁰² 2 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863).

²⁰³ A similar but more obvious case of liability was *Brosnahan v. Western Air Lines, Inc.*, 892 F.2d 730 (8th Cir. 1989) (defendant's flight attendant was not at her station when she could have stopped passenger from stowing heavy bag that instead dropped on plaintiff's head).

issue, the cases actually show that the modern negligence rule contains a significant core of strict liability, as the dualism gloss provides.

CONCLUSION

The preceding analysis has undertaken to show that Oliver Wendell Holmes inadvertently omitted a large part of traditional accident law from his gloss of the modern negligence rule. Holmes's analysis has been influential in practically every way, but his omission of this category of liability did not cause the actual rule to alter. A strict type of liability still exists for compliance errors. Nevertheless, his gloss denied this liability a conventional home in modern negligence discussions. Once we recognize what an important role strict liability still plays in modern accident law, it provides a new window on a whole set of legal doctrines. Moreover, recognition of the importance of strict liability within negligence law creates new scholarly research agendas. Some of the more important issues are as follows. To what extent do courts adopt the committed plans of defendants in assessing compliance errors? How often do juries wish to absolve parties of their compliance errors, and are there patterns to their behavior? What is the legal doctrine governing whether a jury absolution of a compliance error will or will not be accepted? Finally, how does strict liability within the negligence rule inform our understanding of other negligence doctrines, most notably the duty and proximate doctrines?

