TORTS

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The Common Law may well be thought of as the last citadel of Holmes' greatness. Without being a systematic collector of such items, one can readily tick off a series of other Holmes' works the achievement of which appears tarnished to the critical eye of today. The clear and present danger formula has had both critics and a reduction in legal status;[1] the dictum in *Commonwealth v. Davis*[2] as to the proprietary control of a municipality over the use of public parks has happily failed to survive; the dictum in *McAuliffe*[3] about having a right to talk politics but no right to be a policeman has looked increasingly like an oversimplification;[4] it now appears that the three generations of imbeciles of *Buck v. Bell*[5] will neither be forthcoming nor be enough;[6] again the rule in *Dempsey v. Chambers*[7] finding ratification of an agent's tort so as to create respondeat superior liability has been viewed as generating anomalous doctrine;[8] and it is difficult to find anyone to put in a good word for the detour limitation on attractive nuisances of the *Britt* case;[9] and to top things off, the extraordinary brevity of the opinion in *Eisner v. Macomber*[10] has bespoken more a disinterest in the problem of taxation and the corporation than a mastery of the intricacies of stock dividends. It was, therefore, daring of Professor Howe not to let sleeping classics lie, but by his handsome new edition of *The Common Law* to put it to the test of contemporary critical appraisal.

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1 MEIKLEJOHN, POLITICAL FREEDOM (1960); Dennis v. United States, 341 U.S. 494 (1951); Beauharnais v. Illinois, 343 U.S. 250 (1952); Roth v. United States, 354 U.S. 476 (1957); *cf.* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 9 *et seq.* See also Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3 (1962).

2 162 Mass. 510, 39 N.E. 113 (1895); *cf.* Niemotko v. Maryland, 340 U.S. 268, 273-89 (1951) (Frankfurter, J., concurring); Hague v. CIO, 307 U.S. 496 (1939).

3 McAuliff v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

4 *Cf.* EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 552 (1952).

5 274 U.S. 200 (1927).

6 Kalven, *A Special Corner of Civil Liberties: A Legal View I*, N.Y.U.L. REV. 1223, 1234 (1956).

7 154 Mass. 330, 28 N.E. 279 (1891).

8 MECHEM, OUTLINES OF THE LAW OF AGENCY § 212 (4th ed. 1952).

9 United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1922).

10 252 U.S. 189 (1920).

I have been asked to discuss the essays dealing with tort.[11] In an important sense my vote has already been decisively cast in favor of *The Common Law*. In our casebook Professor Gregory and I rated lecture III of such importance for today that we quoted from it at length on three different occasions.[12] Greater praise than that hath no law teacher. I should like in this comment to outline why lecture III remains so relevant to contemporary negligence theory, and then to report and explore a feeling of puzzlement about the way lecture III looks to me when it is placed back into the full context of Holmes' theorizing about tort.

But first a word about the style. The point is not that, as we all recognize, Holmes was a great prose stylist; it is rather that there is such daring reach and grandeur in the casual epigram: "Ignorance is the best of law reformers."[13] "[E]ven a dog distinguishes between being stumbled over and being kicked."[14] "It is something to show that the consistency of a system requires a particular result, but it is not all."[15] "It [the law] does not attempt to see men as God sees them, for more than one sufficient reason."[16] Thus, the writing is refreshingly different from modern legal commentary; the philosophic idiom places us on high ground indeed. And undoubtedly part of the appeal *The Common Law* has had for law men over the years lies in the fact that it succeeds in lending intellectual status to technical discussions of law.

Lecture III, the essay on Trespass and Negligence, has some splendid virtues for tort teaching and study today. It expresses a generous interest in underlying liability theory and endorses the quest for coherence in legal subject matter. As its main business, the essay places into able and explicit debate[17] the competing principles of negligence and strict liability and thus makes possible discussion of *Brown v. Kendall*[18] as policy. And although Holmes has a notable paragraph about the possibilities of insurance,[19] the special virtue of the essay is that it discusses liability principles in pre–insurance and pre–risk shifting terms. It provides,

11 The relevant essays are: Lecture I—Early Forms of Liability; Lecture III—Torts. —Trespass and Negligence; and Lecture IV—Fraud, Malice and Intent. They constitute roughly 20 per cent of the entire text.

12 GREGORY & KALVEN, CASES AND MATERIALS ON TORTS, 57-63, 89-91, 116-118 (1959).

13 COMMON LAW 64 (Howe ed. 1963) (hereinafter cited as COMMON LAW).

14 *Id.* at 7.

15 *Id.* at 5.

16 *Id.* at 86.

17 *Id.* at 63-85.

18 60 Mass. (6 Cush.) 292 (1850).

19 COMMON LAW 77-78.

therefore, a needed baseline for measuring the impact of insurance on liability thinking.

Moreover, there is a superb handling of the issue of discounting the standard of care for personal shortcomings of the actor.[20] Holmes spells out a subtle "third opinion" between liability for moral fault and strict liability. Only those who cannot act at the reasonable man level—only the Menloves of the world—act at their peril.

Further there is remarkable realism and sophistication about the role of the jury in a negligence system.[21] Whatever the idiom about mixed questions of law and fact, Holmes is utterly clear about how remarkable it is that a normative issue, the standard of care, is given to the jury to legislate. He delineates carefully the *de facto* control the jury gets over the law in the ordinary case because there are disputed questions of fact and because a general verdict procedure is used. Whatever control the jury gets over the law in such cases is different from the delegating to it in the negligence case of the job of setting the standard of care, of deciding how the parties *ought* to have acted. What is distinctive about the negligence issue, as Holmes so clearly sees, is that it will go to the jury legitimately even when there is no dispute of fact. As Holmes explains:

> When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.[22]

This concern with the jury's role in negligence leads Holmes to the famous "wrong" prophecy.[23] He argued that over time the courts would slowly take the negligence issue away from the jury and would after "a temporary surrender"[24] regain control over a domain of law.[25] "The featureless generality"[26] of the due care formula would, Holmes pre-

20 *Id.* at 85-88.
21 *Id.* at 88-103.
22 *Id.* at 98.
23 *Id.* at 89, 91.
24 *Id.* at 100.
25 Holmes regarded it "a great part of the law." *Id.* at 101.
26 *Id.* at 89.

dicted, be replaced by the evolution of specific common-law rules as to the standard of care under given circumstances. In brief, judicial precedent would slowly codify the law of negligence. It matters little that Holmes was a spectacularly poor prophet in this instance or that; as the familiar story of the *Goodman*[27]-*Pokora*[28] sequence shows, he was to be unsuccessful even as a judge in making his prophecy come true. The point is that his prediction goes to the heart of any negligence theory and poses the properly philosophical query of why negligence remains so uniquely resistant to capture and domestication by legal rule.

Thus lecture III is a very great success.[29] Perhaps the final accolade to its stature is the debt that the writings of Terry, Edgerton, Seavey and James owe to it.[30] It has truly been the seminal essay on the law of negligence.

Yet when one goes back to the full *Common Law* one gets the uneasy impression that lecture III reads better out of context as a separate essay than when it is placed in the mainstream of Holmes' theorizing about tort liability. Holmes' major preoccupations with underlying theory and with the shift from moral to external standards yield sophisticated and arresting results when applied to negligence. When, in lecture IV on Fraud, Malice and Intent, he pursues the same points in other areas of law, fraud, defamation, malicious prosecution and conspiracy, the treatment seems to me doctrinaire, unilluminating and even a little[31] foolish.

The difficulty, I suspect, is with his desire to unify law by showing "that the tendency of law everywhere is to transcend moral and reach external standards."[32] As we have seen this yields a very subtle sense in which the negligence system is based on blameworthy conduct; it makes a first-rate point about the basis of liability. When applied to fraud, however, the analysis becomes mechanical and strained. It is not true, we are told, that fraud depends on any moral notions about the intent to deceive; rather it depends on such external behavior as making a

27 Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927).

28 Pokora v. Wabash Ry. 292 U.S. 98 (1934).

29 Lecture I on Early Forms of Liability is, it should be noted, also a great success. The material is charming and the hypothesis about vengeance and deodands is fascinating.

30 Edgerton, *Negligence, Inadvertence and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926); James, *The Nature of Negligence*, 3 UTAH L. REV. 275 (1953); James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951); Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927); Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

31 I recognize the disturbing aptness here of the anecdote about Emerson and Holmes' essay on Plato.

32 COMMON LAW 107-08; see also *id.* at 109.

statement known to be false to someone known to rely on it. If a man so acts, Holmes tells us, the law does not care what his private reasons may have been; it will hold him liable for fraud.[33] This is undoubtedly a correct analysis; the puzzle is why Holmes thought the point was worth making. We feel that time has obscured things and we are missing a sense of whom and what he was fighting against. Whatever the power of such analyses in their day to clear the air of ghosts of morality, today the extreme behaviorism seems either trivial or misleading.

Moreover, as a result we do not get the grand essay on tort liability across the entire field which lecture III would lead us to expect. Holmes does not confront seriously the pockets of strict liability found in the system. He is helpful neither as to *Rylands v. Fletcher*[34] nor as to the basis of liability in defamation.[35]

The essays do not therefore strike the modern ear with uniform charm and persuasiveness. Holmes appears to have been too much involved with intellectual issues we can no longer appreciate. We suspect that the special unifying theme which was for Holmes the great achievement of the work is its least congenial feature for us today. But the sheer range of law material covered in its pages, the depth of its historical inquiry, the flashes of grandeur in its style and the seriousness of its purpose will continue to make *The Common Law* welcome and required reading for those generations of law men who care for the intellectual heritage of their profession.

[33] *Id.* at 106-09.

[34] *Id.* at 93, 123-26.

[35] *Id.* at 110-12.