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Frank William Miller

Washington University School of Law

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A PRIMER OF ABSOLUTE LIABILITY

FRANK W. MILLER†

Originally given as a lecture to practicing lawyers, this little essay has been revised for freshman law students to read near the end of their basic course in Torts. It is very simply written, but it does assume familiarity with basic doctrines of tort law. Its purpose is three-fold: (1) to provide a basis for judging the significance of fault in the law of torts; (2) to enable the lawyer better to evaluate proposals to expand, contract, or otherwise change the rules in tort cases; (3) to point out recent trends toward an expansion of liability without fault.

Whatever the underlying principle or principles of tort liability may have been in medieval times, and there is some doubt on the point, it is reasonably clear that since about 1850 most people—even most lawyers—in this country have thought that the single most important principle underlying our law of torts is that there is no liability in the absence of fault or wrongdoing. Although other important cases could be selected from the same era, the decision generally credited with firmly establishing that principle in American tort law is *Brown v. Kendall*,¹ decided by the Supreme Judicial Court of Massachusetts in 1850; the case owes some of its authority to the fact that the opinion was written by Chief Justice Lemuel Shaw, one of our greatest state court judges. Plaintiff and defendant each owned a dog and the dogs were engaged in a fight. Plaintiff and defendant were both present at the contest, and defendant, in order to separate the animals, picked up a stick and began to strike at them while the plaintiff watched. Defendant was not immediately successful, and the scene of action shifted about. Finally, and of course at just the wrong time, plaintiff was standing behind defendant, apparently without defendant's knowledge. Defendant raised the stick to strike at the dogs again, and on the back-swing, struck plaintiff in the eye with the end of the stick, severely injuring the eye.

† Professor of Law, Washington University School of Law.
1. 60 Mass. (6 Cush.) 292 (1850).

Plaintiff brought an action for assault and battery, and the jury returned a verdict for the plaintiff. The case was reversed and remanded for a new trial for error in the instructions. But we are not primarily interested at this time in the details of those instructions. Our concern is with the broad principles announced in the opinion. The major points are two; (1) "If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care adapted to the exigency of the case"² and (2) the burden of proving lack of due care rested on the plaintiff so long as the activity was lawful, though not strictly necessary.

Now, that sounds pretty much like a theory of fault and it would certainly suggest to most people that in order to be liable in a tort action, one must do something bad. Nor is it insignificant for our purposes that the burden of proving defendant's fault rests on the plaintiff. But, let's examine the case in order to determine just what the three key terms, "unlawful," "intentional," and "negligent" mean. We may dispose of the idea of "unlawfulness" rather summarily. Although the notion that one was liable for all the consequences of an unlawful act was once a very virulent separate basis for tort liability, it has fallen into disrepute in more recent times except that part of it which has been absorbed into the negligence concept. What is left today is only the idea that the violation of a criminal statute may, in certain situations, be either evidence of negligence or negligence as a matter of law. Consequently we may safely conclude, I believe, that we have only two kinds of faulty conduct, so-called, to worry about, *i.e.*, intentional conduct and negligent conduct.

First, let's consider intentional conduct. Offhand I suspect that we would all agree that absent some meritorious defense, if A deliberately stabs B with a knife, A's conduct is faulty—morally, ethically, legally. But that is far more than the law requires for proof of intent. In most so-called intentional torts, the defendant need not be aware, even objectively, that his conduct will interfere with the legal rights of another in order to be found liable. A few examples:

Example No. 1:

Let us suppose that A and B were identical twin brothers, and that defendant, C, was an intimate acquaintance of A, but did not even know that A had a brother. Twin A and his friend C had long engaged in a species of horseplay which took this form. Each tried to surprise the other by sneaking up on him and slapping him on the back vigorously before the unsuspecting one became aware of the

2. *Id.* at 297.

stalker's presence. One day C spotted a person whom he naturally assumed to be his friend, twin A, when the person was in fact twin B. C crept up on B stealthily and slapped him on the back, his standard conduct toward A. Unfortunately B in his surprise bit off the end of his tongue.

Now the law is perfectly clear that since C intended to touch the person whom he did in fact touch, in a way which is normally socially unacceptable, both the state of mind and overt act requirements for a battery are present, and battery is an intentional tort. Of course C is liable to B, although it is clear that had it in fact been A, C would not have been liable even for the unusual consequence, since A had consented to that type of conduct. Unless we are willing to take the position that it is somehow morally wrong for close friends to greet each other boisterously, it seems clear that we have by hypothesis ruled out fault when we say that there was no carelessness in making the mistake. Yet we impose liability in tort.

Example No. 2:

A steals plaintiff's chattel and sells it to B, a bona fide purchaser for value who has no reason to suspect that A is not the owner of the chattel. It is certainly the law in most jurisdictions that B is a converter, and that he must pay for the chattel again, this time to plaintiff. That is because the only state of mind requirement for a conversion is that the defendant intends to assert over the chattel a dominion which is in fact adverse to the rights of the true owner. Of course, B had that state of mind; he certainly regarded himself as having a general property interest in the chattel. Liability will be imposed although it is not arguable that B engaged in morally reprehensible conduct.

Example No. 3:

A walks on B's land thinking it is his own, and under such circumstances that any reasonably prudent person in A's position would think so. Since A intended to walk on the land, he is guilty of trespass to land and liable for at least nominal damages. Surely he did not transgress any moral laws.

It can be argued, of course, that the rationale I use is not the correct one, at least in the battery case; that we can and should regard this conduct as somehow generally wrongful, only to be countenanced when a consensual privilege exists; that without the excuse of the privilege this is really a case of moral wrongdoing. But surely that is merely a rationalization in terms of familiar, expedient, and perhaps even necessary, rules governing the burdens of pleading and persuasion. Such rules cannot determine whether there was in fact

any morally reprehensible conduct. Yet these examples are representative cases, not freaks.

Most tort cases today are negligence cases, and by definition negligence is conduct which is unreasonable in the light of the foreseeable risk. Surely that sounds like fault, like conduct which does not meet the requirements of morality. But before this conclusion is drawn, a few facts about this concept should be noted. Over ten years before *Brown v. Kendall* was decided, the English case of *Vaughn v. Menlove*³ arose. In that case the defendant was apparently honest but stupid and stubborn. In dealing with a damp hay-stack, he decided, against advice, to arrange it with a vertical vent in the middle, to permit it to dry out. The vent, in fact, presented a serious risk of spontaneous combustion, and the hay was finally consumed by fire which spread to his neighbor's land and did damage. In the ensuing action for negligence, the defendant claimed he ought to be found innocent because he did what he honestly believed to be for the best. The court, however, adopted a different theory. Good faith was not enough. In order to be free from negligence, one must act in at least as satisfactory a manner as the reasonably prudent man. That idea was implicit also in the decision in *Brown v. Kendall*. This means, I believe, that negligence and morally reprehensible conduct are far from identical things. If one does the best he can, within the limits of his intelligence, he does nothing wrong morally or ethically in the commonly accepted sense; yet he may be found negligent and, so, liable as a tortfeasor. Surely there may be, and I submit there often is, liability without fault, even in the very heart of the fault concept, negligence. Except in some relatively unimportant cases, those involving children for example, negligence is tested by an objective standard which does not take into account the inherent intellectual limitations of the defendant,—limitations which of necessity weaken his basis for choosing and narrow his range of choice.

One might argue that I have chosen the odd examples, freak situations. I do not agree that I have; but assume for the moment that the examples I give form a relatively small percentage of the whole. Still fault is not a requirement of liability if it need not be there. Requirements are minimum things. To illustrate the point rather dramatically, assume that a statute provides that all men with black hair, and all men with hair other than black, and all bald men, who knowingly and wilfully steal money shall be guilty of a felony. No one would argue that a defendant had to have black hair to be convicted or even that the facts about his hair had any legal significance. Fault is as much a *requirement* in negligence cases as black hair would be

3. 3 Bing. N.C. 468, 132 Eng. Rep. 490 (C.P. 1837).

under such a statute. At least we may say that if negligence thus defined is *faulty* conduct, we need a different definition of "fault," one which would bear no resemblance to any commonly-held notions of what the word means in terms of morals and ethics.

But so far we have made the attack only on the enemy's strongholds. There has always been a tough residuum of situations in which most courts have admitted that there can be tort liability without even the watered-down concept of legal fault which I have been discussing. Passing by such things as blasting and wild animals, let's examine instead the really huge group of liability-without-fault cases which often are overlooked in a discussion of this sort. I refer, of course, to the master-servant cases, where the doctrine of *respondet superior* fixes liability on the master though he is entirely free of the thing the law calls fault, *i.e.*, negligence. Surely, at this period in our legal history, it is beyond dispute that whatever may be the basis of the master's liability for his servant's torts, the result is non-fault liability.

With this much introduction I now propose to point out some but not all of the present trends toward increasing non-fault liability. I believe that the most significant of these trends lies in the area of master-servant law. There are several aspects. First of all, the employer's privilege of shifting responsibility to an "independent contractor" has undergone great change. This has occurred in three principal ways. It is the rule when the degree of danger to third persons is great, that the duty to use due care is non-delegable, *i.e.*, the employer *is* responsible for the negligent acts of an independent contractor. The change has been simply this. More and more duties are now regarded as non-delegable, so the area of exemption has been cut down. Second, the courts have gone far toward finding that a particular contractor is a servant rather than an independent contractor. This they have accomplished by putting primary emphasis on the benefits accruing to the employer rather than on the amount of control and direction he is entitled to exercise.

Third, the courts have chosen to say, in more and more cases, that while the employee, as between himself and his employer, is an independent contractor, he is, as to third persons, a servant. All this has led some persons to conclude that an employer is liable for the acts of independent contractors in most cases, and that the cases of non-liability are the exceptional ones. How the rule is phrased is not important, but the re-phrasing represents implicit recognition of the trend toward increased liability.⁴

4. For a discussion of the problem, see Steffen, *The Independent-Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935).

The second major expansion of *respondet superior* is in the "scope of the employment" concept. Here the rules are not stated differently, but it is nevertheless true that juries today are permitted to find that a servant acted within the scope of his employment on facts that thirty years ago would have led to a directed verdict for the defendant. The two most striking examples are, (1) the growing liability of the master for the servant's intentional torts, particularly when the servant has assaulted a third person, and, (2) the contraction of the "frolic and detour" limitation of vicarious liability. In these cases the courts increasingly tend to find the servant within the scope of his employment in spite of wide deviations in space and time from his normal duties. The formation of an intention to return to duty is apparently enough to justify the imposition of vicarious liability. Frequently, the only evidence is that the truck driven by the servant has been turned and headed back in the right direction.

Next are two well-recognized exceptions to the *respondet superior* doctrine, the exemptions traditionally enjoyed by municipal corporations and charities. The immunities of municipal corporations have been narrowed by treating as proprietary many functions which were formerly regarded as governmental, and by expanding the nuisance concept. Even more significant, however, are the changes in the liability of charities for the negligence of their servants. Traditionally, of course, it was thought that the public benefit from keeping the funds of charities intact outweighed the desirability of compensating persons injured by the negligence of the institution's servants. This idea crystallized in the form of the so-called "trust-fund" doctrine,—that the funds of a charity were trust funds and so should not be dissipated for purposes outside the trust. Very early, however, exceptions arose in various jurisdictions:

(1) when there was negligence in selecting the particular servant as an employee the charity was held liable;

(2) when the injured person was not a recipient of the charity but was rather a stranger to it, there was liability.

Those exceptions are, of course, anomalies, and fly in the face of the trust-fund doctrine.

But more important are some recent decisions which go much farther than these. Here are three of them. The first was a Vermont case.⁵ In discussing the problem the court discovered that the issue had never been presented to it for decision in its long history. The court then, treating the case as one of first impression, chose to reject the doctrine in its entirety as out of line with modern conditions. The

5. *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A.2d 230 (1950)..

court's approach is refreshing and the following quotation from the opinion is instructive:

From our study of the law and after reading many decisions from other jurisdictions pertaining to the subject-matter involved in this case, we are convinced that we should decide this case upon the broad question, namely: Is or is not a privately conducted charitable institution liable for injury caused by negligence? We are satisfied *if we should not do so*, we would start this Court along a highway that would soon be shrouded in a fog of doubt from which it would be difficult to emerge into the sunlight of legal certainty.⁶ (Emphasis added.)

Even more significant is an Arizona⁷ case which likewise completely repudiated the doctrine of non-liability, for to do so it had to overrule its own precedents. The court found no justification for the continued existence of the immunity under modern conditions.

Although the Supreme Court of Illinois⁸ was unwilling to go quite that far, it very significantly drew a distinction which points up the whole problem in which we are interested. Convinced that it was bound by its precedents to adhere to the immunity, the court indicated a dislike for the doctrine and a desire to limit it. The limitation imposed was this: If there are non-trust funds in fact available, then, and to that extent, the reason for the doctrine fails, and liability insurance is a satisfactory non-trust fund for this purpose. As we shall see, this is not the only case in which courts have openly recognized as significant the increased availability of liability insurance.

The next important trend deals with the decline of the contributory negligence defense.⁹ The idea that plaintiff must be free from fault in order to recover is part and parcel of the fault concept in negligence cases. That concept does not merely demand that losses can and should be shifted to so-called guilty parties. Rather, it permits the loss to be shifted to a guilty party only *by an innocent one*.

Perhaps the most significant development is the expansion of the last clear chance doctrine to cover more and more situations. One point about this doctrine is of great importance: even though it operates within the traditional fault framework and is presumably based on some notion of comparative wrongdoing, it in fact does not rest on comparative fault. It depends entirely on a time-sequence of events, and sometimes permits a very careless plaintiff to recover from a defendant who has made a trivial error of judgment. Conversely, if the time-sequence is not technically satisfied, a relatively

6. *Id.* at 125-26, 70 A.2d at 231.

7. *Ray v. Tuscon Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951).

8. *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81 (1950). For a full citation of other recent cases showing similar tendencies, see Annot., 25 A.L.R.2d 29 (1952).

9. See Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1947).

innocent plaintiff may be barred against a rather obviously faulty defendant. The doctrine has been described by one of this country's most progressive tort scholars as a transitional one¹⁰—one which will serve the purpose of bridging the gap between the old contributory negligence rule and a developing rule that plaintiff's faulty conduct should not bar recovery. Other examples are the dropping of court-set standards of conduct, such as the "stop look and listen" rule, and the "drive within the radius of your lights" rule.

On the legislative side, the enactment of comparative negligence statutes as in Wisconsin, Mississippi, and some other states, stands out. While those statutes operate within the fault framework, their effect, of course, is to increase the number of recoveries.

Next are some developments within the automobile accident field. Two of them are of considerable significance. The first is the judicial expansion of the family-car doctrine which makes the head of a family responsible for the negligence of members of the family driving the car with his permission. The most significant step there is the frank statement of the Minnesota court that the doctrine rests on ability to bear loss and not on agency principles.¹¹

The second development is a legislative one, the enactment of statutes which make the owner of a car liable for the damage caused by the negligent act of anyone driving the car with his permission. In addition, some states make the so-called "omnibus coverage" clause a statutory part of all automobile liability policies, which has the same effect as the statutes if the owner is insured.

Next, consider the problem of tort immunity within the family. Several reasons, none of them very good, have been advanced for holding that a child cannot sue his parent in tort. Exceptions developed, the first being liability for intentional torts of a particularly vicious kind. More recently, however, the impact of insurance has been considered, and at least one court found that an employer-father's liability insurance was the most important reason for deciding that he intended to waive his immunity from suit and emancipate his employee-son.¹²

Next, are the well-known extensions of manufacturers' liability. Great strides have been made since Judge Cardozo decided the *MacPherson* case.¹³ There a manufacturer of a chattel, dangerous if de-

10. See James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

11. *Felcyn v. Gamble*, 185 Minn. 357, 241 N.W. 37 (1932). The court refused to apply the doctrine to a family-used motorboat.

12. *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930). *But see*, *Levesque v. Levesque*, 99 N.H. 147, 106 A.2d 563 (1954).

13. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

fectively made, was held liable for negligence to one not in privity of contract with him.

The first really significant development was the use of the doctrine of *res ipsa loquitur* against a manufacturer in a products liability case. The most dramatic use, perhaps, is in the bursting bottle cases. By way of introducing the subject, it should be noted that there are different views on this matter.¹⁴ Some courts have taken the position that the exclusive control requirement of *res ipsa* is satisfied only if defendant had such control at the time of the accident itself. They refuse to apply *res ipsa* in bursting bottle cases, then, because intermediate persons have usually handled the bottle. Most courts, however, say that defendant need have exclusive control only at the time when the negligence occurred; in these states if plaintiff can prove that there was no negligent mishandling either by himself or others between the time the bottle left defendant and the time of the accident, he may avail himself of the doctrine. Usually, the evidence needed to meet such a burden is not great. But, let us examine the opinions of the courts which say *res ipsa* is not available. They, far from denying recovery, frequently permit the case to go to the jury on precisely the same evidence under a general negligence instruction: the result is the same as under the other rule.

The next important step is the development of the rule that in a certain limited area, usually food sold in sealed containers, the plaintiff may sue the manufacturer for breach of warranty even without privity of contract. In a warranty action, of course, fault has no place at all. The development has been based on such fictions as third-party beneficiary contracts, or warranties running with title; but it is there and is significant.

Of tremendous importance is the growing judicial recognition that oftentimes in *res ipsa* cases there simply is no real evidence of fault. This quotation from a concurring opinion in a California Supreme Court case is enlightening:

I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *MacPherson v. Buick Motor Co.* . . . established the principle . . . that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. . . . In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of com-

14. See Note, 1951 WASH. U.L.Q. 216.

ponent parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to give such protection.¹⁵

Another significant development is the increasing use of the *res ipsa* doctrine against multiple defendants.¹⁶ This particular expansion does substantial violence both to the exclusive control requirement of *res ipsa*, and to the more general principle that the burden of proving fault rests on the plaintiff. In the leading case of *Ybarra v. Spangard*,¹⁷ the court applied the doctrine against a group of some seven defendants, who were not joint tortfeasors. It was very likely in the case that some one or more of the defendants were negligent, but it is almost beyond belief that all of them were. The court held that on a trial the jury might find some or all of the defendants negligent, depending on the evidence; the plaintiff in fact recovered a judgment against all the defendants, at a subsequent trial.¹⁸ The case certainly shows an increased willingness to recognize the importance of giving plaintiff every sort of procedural aid to prove his case, but more—it throws doubt on the applicability of the fault concept in complicated multiple-party cases. The same court, in *Summers v. Tice*,¹⁹ permitted a plaintiff injured by only one of two negligent tortfeasors to recover a joint judgment against both in the absence of proof by one of them exculpating himself and placing responsibility

15. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

16. Note, 1954 WASH. U.L.Q. 215.

17. 25 Cal. 2d 436, 154 P.2d 637 (1944).

18. *Ybarra v. Spangard*, 93 Cal. App. 2d 43, 208 P.2d 445 (1949).

19. 33 Cal. 2d 80, 199 P.2d 1 (1948).

on the other. The decision unfortunately is obscured by the court's flirtation with the joint-tort concept.

Originally in some jurisdictions absolute liability in blasting cases was confined to trespassory invasions. More recently this limitation, based on entirely archaic procedural distinctions, has been abandoned by some courts, and absolute liability has been imposed whether the damage resulted from rocks thrown on the land, or from vibrations.

Two quite different types of modern statutes, operating with substantially different degrees of directness, tend toward expansion of liability. The first places a duty of lookout on trains operating in open country, and the second makes the defendant's liability insurer a proper named defendant.

These heterogeneous things have one common element. They all, directly or indirectly, as specific rules or as jury persuaders, make the imposition of liability easier, and so in fact make liability without fault more common.

The object of this discussion has been to show that lack of any necessary relationship between legal liability and immorality is an important fact. It must be kept in mind constantly whenever one tries to evaluate intelligently the myriad of current proposals to extend or restrict liability in this field, in that:

- (1) It makes it clear that any change which would increase the areas of admitted non-fault liability is not necessarily a "radical idea,"—not "out of line with our existing economic and political institutions" or our "ideas of morality or ethics";
- (2) It will enable us to consider the problem and make our decision on the merits rather than on the basis of emotion, and I urge that none of us as lawyers can or should dodge the job of playing a responsible part in policy formulation in this area;
- (3) Finally, it will help to end the practice of disguising our value judgments behind a facade of outmoded, inaccurate doctrine—doctrine which in fact does not meet the test of practical realistic application in our courts.