TRESPASS TO THE PERSON IN CANADA: A DEFENCE OF THE TRADITIONAL APPROACH

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I. INTRODUCTION

Some ten years ago, Frederick L. Sharp wrote an article in which he called the law of trespass to the person as it currently exists in Canada an "historical anomaly" and "a persistent source of embarrassment".[1] This was Sharp's contribution to the store of abusive epithets that is generally relied on to describe the Canadian law of trespass to the person.[2] The chief purpose of this article is to examine the extent to which such abuse is deserved. It is my view that the criticisms urged by Sharp and others are misconceived; that the traditional view of trespass as a direct (though not necessarily intentional) interference with the plaintiff or his property can be justified in the modern world; and that, far from being an embarrassment, the Canadian law of trespass to the person has much to recommend it.

Criticism of the Canadian approach takes various forms. Sharp, for example, complains that it confers an unfair advantage on the plaintiff, first, by making his burden of proof lighter than it would be in a negligence action[3] and, second, by preventing the defendant from relying on the

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[1] F.L. Sharp, *Negligent Trespass in Canada: A Persistent Source of Embarrassment* (1978) 1 ADVOCATES' Q. 311.

[2] *See, e.g.*, C.A. Wright, *The English Law of Torts: A Criticism* (1955) 11 U.T.L.J. 84 at 102-03 ("strange", "foreign to our present thinking on torts"); C.A.Wright, *Res Ipsa Loquitur* in A.M. Linden, ed., STUDIES IN CANADIAN TORT LAW (Toronto: Butterworths, 1968) 41 at 44 ("irrational and unnecessary"); F.A. Trindade, *Some Curiosities of Negligent Trespass to the Person — A Comparative Study* (1971) 20 INT'L & COMP. L.Q. 706 at 707 ("curious and anomalous"); B.C. Crocker, *Apportionment of Liability and the Intentional Torts: The Time is Right for Change* (1982) 7 DALHOUSIE L.J. 172 at 180 ("anachronistic"). *See also* P. Burns, *Trespass to the Person and the Burden of Proof: A Canadian Common Law Remnant* (1970) 48 CAN. B. REV. 728; G. Dworkin, *The Case of the Misguided Missile* (1959) 22 MOD. L. REV. 538. *But see* G.H.L. Fridman, *Trespass or Negligence?* (1971) 9 ALTA. L. REV. 250; A.M. Linden, CANADIAN TORT LAW, 3d ed. (Toronto: Butterworths, 1982) at 284-90.

[3] *See* Sharp, *supra*, note 1 at 316-18, 326. *See also* R.J. Bailey, *Trespass, Negligence and Venning v. Chin* (1976) 5 ADEL. L. REV. 402.

defence of contributory negligence.[4] He also concurs in the view, almost universally shared by judges and scholars in this century, that modern tort law should be divided into three broad categories, based on the type of fault which the plaintiff must prove in order to make out his case. If the plaintiff must prove an intention to harm on the part of the defendant, the wrong is intentional. If the plaintiff must prove that the defendant failed to take reasonable care, the wrong is negligent. If the plaintiff is not required to prove either an intention to harm or negligence, the defendant's liability is strict. The traditional law of trespass is said to be "anomalous" or "irrational" or "anachronistic"[5] because it does not fit into this modern tripartite classification.

For some, the chief virtue of the modern classification is its "scientific" character. It distills the untidy array of nominate torts inherited from mediaeval England into three broad categories on the basis of a single principle, namely type of fault. The elegance and simplicity of this classification appeals to the modern sensibility, which has come to accept these virtues as the indicia of truth. For these critics, the Canadian law of trespass offends because it preserves an approach to liability that pre-dates the modern approach. In so doing, it not only perpetuates the complexity and technicality of the past but allows the ghosts of the old forms of action to rule us from their graves.[6] In the view of Dean Wright, one of the earliest and most highly respected critics of the Canadian approach, to continue speaking of "trespass of the person" today is to use the language of mediaevalism to obscure the search for clarity and rational priniciple.[7]

For others, the chief attraction of the modern tripartite classification lies in the fault principle itself and the notion that, generally speaking, a plaintiff cannot succeed in a tort action unless he proves that the damage for which he seeks recovery was caused by the defendant's fault, consisting of either an intention to harm or negligence.[8] Those who champion the fault principle believe that it is unjust or unduly repressive to ask those who are faultless to pay for the damage they have caused.[9] For such critics, the Canadian law of trespass offends because it makes proof of direct interference, rather than proof of fault, the prerequisite for recovery. Although the question of fault is relevant in trespass to the

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[4] *See* Sharp, *ibid.* at 318-21, 326.

[5] Trindade, *supra*, note 2 at 707; Wright, *Res Ipsa Loquitur*, *supra*, note 2 at 44; Crocker, *supra*, note 2 at 180.

[6] *See*, *e.g.*, Burns, *supra*, note 2 at 730.

[7] C.A. Wright, *The Province and Function of the Law of Torts* in A.M. Linden, ed., STUDIES IN CANADIAN TORT LAW, *supra*, note 2, at 7. Similar language is used in *Letang* v. *Cooper* (1964), [1965] 1 Q.B. 232 at 238- 39, [1964] 2 All E.R. 929 at 931-32 (C.A.), Lord Denning M.R.

[8] *See* G. Williams and B.A. Hepple, FOUNDATIONS OF THE LAW OF TORT, 2d ed. (London: Butterworths, 1984) at 90ff. for an account of the fault principle.

[9] *Ibid.* at 135-42. *See also* G.T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability* (1981) 15 GA. L. REV. 963.

person, it is not the basis on which liability is imposed. For such critics, this departure from the fault principle is unacceptable.[10]

In the course of this article I shall attempt to answer these criticisms, in part by exposing the misconceptions on which they are based, in my view, and in part by exposing what I believe are the merits of the traditional approach. Its chief merit, I shall argue, is that it embodies a rights-based theory of civil liability that constitutes a viable and worthwhile alternative to the fault principle. With the recent introduction of the *Canadian Charter of Rights and Freedoms*,[11] the time is ripe for the development of a rights-based theory. Although the traditional law of trespass to the person may not produce results that differ dramatically from those achieved using the modern approach, it does confer advantages on the plaintiff which he would not otherwise enjoy; and, more importantly, its way of explaining liability gives appropriate recognition to some of the values which we as a society claim to prize most highly. The right to personal autonomy enshrined in the *Charter* and, more particularly, the right to life, liberty and security of the person enshrined in section 7 of the *Charter* both presuppose and build on the very basic right of the individual to control his person and access to his person. It is precisely this right of the individual to be in charge of his physical person that the traditional law of trespass ensures by throwing the burden of justification or excuse on he who would interfere with that right. In taking this approach, traditional trespass law not only provides an appropriate degree of protection to what must now be recognized as a fundamental right, but also offers a useful model for judicial development of other causes of action, including the action for damages under section 24 of the *Charter*.[12]

A secondary purpose of this article is to examine some of the questions that must be resolved if the traditional view of trespass is to be retained and developed. One such question concerns the meaning of the words "fault" and "negligence" and whether these terms refer to the same thing in a trespass action as they do in a negligence action. Another concerns the availability of mechanisms to apportion damages in trespass. Is the defence of contributory negligence or contributory fault available in trespass? What is the effect of provocation? What is the relationship between contributory negligence and provocation?

In order to give principled answers to these questions and more generally to understand why the law of trespass has evolved as it has, it will be necessary to examine the contrasting theories of liability on which the torts of trespass and negligence are based. As indicated above,

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[10] The most explicit statement of this position in Anglo-Canadian law is found in F. Pollock, THE LAW OF TORTS (London: Stevens & Sons, 1887), discussed *infra* at text accompanying notes 74-77.

[11] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[12] *See* M.L. Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms* (1984) 62 CAN. B. REV. 517.

much of the hostility expressed by critics of the traditional view of trespass comes from the modern impulse to explain everything in tort law in terms of a single principle. I shall argue that there is virtue in variety and that the courts should be slow to abandon distinctions for the sake of simplicity. The assumption that recovery in tort law should be grounded in a single theory of liability and serve a single goal is, in my view, mistaken.

To accomplish these purposes, Part II of this article very briefly sets out the law of trespass to the person as it has developed in Canada and elsewhere in the Commonwealth. Part III examines the alternative theories of liability which have been used by the courts to justify recovery in personal injury cases. Part IV looks at the meaning of fault in trespass and negligence. Part V examines and attempts to respond to particular criticisms of the Canadian position. Part VI looks at the apportionment of loss in trespass under the rubric of both provocation and contributory negligence. Part VII, by way of conclusion, offers a short summary of the law of trespass to the person in Canada.

II. Overview of Canadian and Commonwealth Law of Trespass

As every first year law student knows, "trespass to the person" is the generic name for the nominate torts of assault, battery and false imprisonment, each of which evolved from the old writ of trespass *vi et armis*.[13] In the torts of assault and battery, A harms B by interfering with his person, through unwanted contact in the case of a battery (A touches B without B's permission), or through the apprehension of unwanted contact in the case of an assault (A gives B reason to believe that he is about to touch him without his permission). In the tort of false imprisonment, A harms B by interfering with his liberty (A prevents B from leaving a particular place). The common thread that runs through these three torts is commitment to the personal autonomy of the individual. Trespass to the person presupposes that each individual has exclusive control over his own physical person so that any attempt by another to usurp that control is a wrong. As Goff L.J. explains in *Collins* v. *Wilcock*, "[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate. . . . [E]verybody is protected not only against physical injury but against any form of physical molestation."[14]

It has become customary in Canada as elsewhere to think of the several forms of trespass to the person as "intentional torts", that is, torts in which the plaintiff must allege and prove that the defendant intended

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[13] The account of trespass to the person offered here may be found in any standard text on torts. *See, e.g.*, W.V.H. Rogers, ed., Winfield and Jolowicz on Tort, 12th ed. (London: Sweet & Maxwell, 1984) at 53-68.

[14] (1984), [1984] 1 W.L.R. 1172 at 1177, [1984] 3 All E.R. 374 at 378 (Q.B.).

the harm.[15] In the United States and England it is perfectly appropriate to think in this way; in Canada, however, it is not. In Canada, to succeed in an action for trespass to the person, the plaintiff must allege and prove that the defendant directly interfered with his person in one of the recognized ways. It is then up to the defendant to allege and prove whatever defences may lie, including the defence of inevitable accident or, in more modern parlance, absence of fault. Thus, trespass to the person in Canada does not require proof that the interference was intentional; negligent or careless interference will equally serve.

The leading authority on trespass to the person in Canada is the judgment of Cartwright J. in *Cook* v. *Lewis*.[16] In that case, the plaintiff sought to recover for injuries suffered when he was struck in the face by pellets shot from the gun of one or both of the defendants who were hunting at the time. At trial, in charging the jury, the Judge explained that the plaintiff's claim was in negligence (that is, the tort of negligence) and the burden was therefore on him to prove negligence (that is, absence of due care) on the part of each defendant who shot him.[17] The jury answered that although one of the defendants shot the plaintiff, it could not say which one; it therefore could not find that the plaintiff's injuries were caused by the negligence of either defendant.[18] In the Supreme Court of Canada, Cartwright J. ordered a new trial on the ground that the trial Judge had misinstructed the jury in regard to the burden of proof. The key passage is the following:

> While it is true that the plaintiff expressly pleaded negligence on the part of the defendants he also pleaded that he was shot by them and in my opinion the action under the old form of pleading would properly have been one of trespass and not of case. In my view, the cases collected and discussed by Denman J. in *Stanley* v. *Powell* [(1890), [1891] 1 Q.B. 86], establish the rule (which is subject to an exception in the case of highway accidents with which we are not concerned in the case at bar) that where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without his fault". In my opinion *Stanley* v. *Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.[19]

This was sufficient to dispose of the appeal. However, Cartwright J. went on to suggest a solution to the plaintiff's causation problem that might

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[15] *See, e.g.*, C.A. Wright & A.M. Linden, CANADIAN TORT LAW: CASES, NOTES AND MATERIALS, 7th ed. (Toronto: Butterworths, 1980) and R.M. Solomon, B.P. Feldthusen & S.J. Mills, CASES AND MATERIALS ON THE LAW OF TORTS, 2d ed. (Toronto: Carswell, 1986), both of which introduce the torts of battery, assault and false imprisonment under the heading "intentional interference with the person".

[16] (1951), [1951] S.C.R. 830, [1952] 1 D.L.R. 1.

[17] *Ibid.* at 848, [1952] 1 D.L.R. at 10.

[18] *Ibid.*

[19] *Ibid.* at 839, [1952] 1 D.L.R. at 14-15.

have assisted the plaintiff in the new trial. He suggested that if the plaintiff could prove that he was shot by one of the two defendants, but could not say which one "because . . . both shot negligently in his direction", then the burden should shift to the defendants to prove, each of them, that the pellets which struck the plaintiff did not come from his gun.[20] To justify this departure from the ordinary rules respecting onus, the learned Judge invoked a principle of fairness: where two or more defendants have been proven negligent and their negligence has placed the plaintiff in a position of being unable to say which defendant caused his harm, it is fair to put the burden of disproving causation on the defendants. They are better placed than the plaintiff to offer instructive evidence on the point and should it ultimately prove impossible to determine the point, it is fair that the negligent defendants rather than the innocent plaintiff should pay.[21]

There is a world of difference, of course, between requiring a defendant to prove absence of fault in a trespass action and requiring a defendant to prove absence of causation in negligence. The burden of proving causation in trespass is always on the plaintiff. He has no cause of action unless he can demonstrate a direct causal connection between some act of the defendant and the harm of which he complains. The defendant is then called upon to prove absence of fault, not because the normal burden of proof has shifted, but because absence of fault is a defence. The significance of *Cook* v. *Lewis* for the Canadian law of trespass is that it affirms, first, that the plaintiff succeeds in trespass simply by proving direct interference and, second, that the defendant makes out a defence by proving his interference was neither intended nor the consequence of negligence on his part.

Mr. Justice Cartwright's suggestion to shift to the defendant the burden of proving causation relates solely to actions framed in negligence. In such actions the plaintiff must ordinarily prove both negligence on the part of the defendant and a causal relation between this fault and the damage for which he seeks recovery. Mr. Justice Cartwright suggests that the burden of proving causation should shift to the defendant, by way of exception to the ordinary rule, in cases where there are two or more defendants and the plaintiff successfully proves fault on the part of the defendants and a causal relation between their fault and his own inability to prove causation. This aspect of *Cook* v. *Lewis* is well explained by Rand J. who wrote a concurring judgment. In his view, where two persons simultaneously commit culpable acts, such as negligently firing a gun in the direction of another, the onus is on them to exonerate themselves if they can. "The onus attaches to culpability", he explains, so that "if both acts bear that taint, the onus or *prima facie* transmission

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[20] *Ibid.* at 842, [1952] 1 D.L.R. at 18.

[21] *Ibid.*

of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them".[22]

There has been an unfortunate tendency on the part of some courts[23] and some commentators,[24] notably Sharp himself,[25] to blur the distinction between (1) treating absence of fault as a defence in trespass and (2) shifting the burden of proving causation to the defendant in negligence. These two possibilities are unrelated to one another and there is nothing in the judgment of Cartwright J. to suggest that they might be combined so as to require defendants to prove both absence of fault and absence of causation upon proof that the plaintiff was injured by one of two or more defendants. However, this is just what was done by the High Court of Ontario in *Woodward* v. *Begbie*.[26] In that case, the plaintiff was shot at while being chased by two police officers. Both fired, but only one of them hit the plaintiff. He sued and recovered in trespass against both defendants on the following ground:

> [I]t was either Yearwood's shot or Begbie's second shot which wounded the plaintiff and the plaintiff is entitled to succeed unless the defendants can establish that they did not intend to injure the plaintiff and that they were not negligent: *Cook v. Lewis*. . . .
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> . . .
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> As there is no evidence to show whether it was Yearwood's or Begbie's second shot that caused the wound, both are liable: *Cook v. Lewis*. . . .[27]

The success of the plaintiff in *Woodward* v. *Begbie* may be just, but it is not warranted by anything said in *Cook* v. *Lewis*. Possibility (1) — treating absence of fault as a defence — does not apply because the plaintiff did not prove a direct connection between the act of a particular defendant and the harm of which he complained. Possibility (2) — shifting the burden of proving causation to the defendants — does not apply because he did not prove that both defendants were negligent.

At least some of the criticism aimed at the Canadian law of trespass may thus be dismissed at the outset. Contrary to Sharp's suggestion, the effect of that law is not to "shift the onus of proof on to defendants where there is no available evidence of causation".[28] Such a shift is possible, of course, but only in the context of a negligence action as explained

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[22] *Ibid.* at 833, [1952] 1 D.L.R. at 4.

[23] *See Woodward* v. *Begbie* (1961), [1962] O.R. 60, 31 D.L.R. (2d) 22 (H.C.); *Brown* v. *Ratto* (1986), 75 N.S.R. (2d) 300, 186 A.P.R. 300 (S.C.T.D.). *But see Lange* v. *Bennett* (1963), [1964] 1 O.R. 233, 41 D.L.R. (2d) 691 (H.C.).

[24] *See* Trindade, *supra*, note 2 at 715-16; Fridman, *supra*, note 2 at 262.

[25] *See* Sharp, *supra*, note 1 at 315-18.

[26] *Supra*, note 23.

[27] *Ibid.* at 63-64, 31 D.L.R. (2d) at 25-26.

[28] Sharp, *supra*, note 1 at 318.

above — possibility (2).[29] Sharp also suggests, following the lead in *Woodward* v. *Begbie*, that under the Canadian law of trespass, liability is imposed on innocent as well as guilty defendants wherever there are two or more defendants, only one of whom caused the harm.[30] As explained above, this suggestion inappropriately merges possibilities (1) and (2). In trespass, liability may be imposed without proof of fault, but never without proof of a direct relation between the defendant's act and the harm.

When *Cook* v. *Lewis* was decided in 1952, the account of trespass to the person offered by Cartwright J. accurately reflected the law as it existed in England and elsewhere in the Commonwealth at the time. In 1959, however, with the judgment of Diplock J. in *Fowler* v. *Lanning*,[31] a new approach was initiated. *Fowler* v. *Lanning* was an accidental shooting case; the issue was whether it was sufficient for the plaintiff in a trespass action to allege and prove that he had been shot by the defendant. Mr. Justice Diplock said no. While acknowledging that an action in trespass would lie whether the harm was negligently or intentionally inflicted, the learned Judge took the view that the burden of alleging and proving fault in trespass, no less than in negligence, should lie with the plaintiff.[32] The next step was taken by Lord Denning in *Letang* v. *Cooper*.[33] The issue in that case was a narrow point of construction involving a section of the *Law Reform (Limitation of Actions, &c.) Act, 1954*.[34] However, the following passage from the judgment of Lord Denning M.R., concurred in by Danckwerts L.J., announced a new starting point. Lord Denning's account has since been accepted both officially[35] and unofficially[36] as stating the law of trespass to the person as it now exists in England:

> The truth is that the distinction between trespass and case is obsolete. We have a different sub-division altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. . . . If he does not inflict injury intentionally but only unintentionally, the plaintiff

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[29] For criticism of this possibility, *see* T.B. Hogan, *Cook v. Lewis Re-examined* (1961) 24 MOD. L. REV. 331. *See generally* E.J. Weinrib, *A Step Forward in Factual Causation* (1975) 38 MOD. L. REV. 518.

[30] Sharp, *supra*, note 1 at 316-17.

[31] (1959), [1959] 1 Q.B. 426, [1959] 1 All E.R. 290.

[32] *Ibid.* at 440, [1959] 1 All E.R. at 298.

[33] *Supra*, note 7.

[34] *Law Reform (Limitation of Actions, &c.) Act, 1954* (U.K.), 2 & 3 Eliz. 2, c. 36, s. 2(1).

[35] *See Wilson* v. *Pringle* (1986), [1986] 3 W.L.R. 1, [1986] 2 All E.R. 440 (C.A.).

[36] *See* J.G. Fleming, THE LAW OF TORTS, 7th ed. (Sydney: Law Book, 1987) at 20 n. 41.

> has no cause of action today in trespass. His only cause of action is in negligence. . . .[37]

The effect of these two cases was to "modernize" the law governing personal injury actions by placing the burden of proving fault in all such actions on the plaintiff and confining trespass to intentionally inflicted injury. This brought English law into line with American law[38] which had already adopted the modern approach more than a century before the decision in *Letang* v. *Cooper*. One further effect of these English cases was to force a choice on courts in other Commonwealth jurisdictions: old style trespass or new wave?

New Zealand was quick to opt for the modern approach. In fact, in *Beals* v. *Hayward*,[39] McGregor J. anticipated Lord Denning by several years in holding that trespass to the person should be regarded as an intentional tort. This meant that the burden was on the plaintiff to allege and prove intent and, by implication, negligently inflicted injury could be compensated in negligence alone.[40] In 1974, New Zealand introduced a government run compensation scheme that replaced the traditional tort action with a no fault claim against the state in all cases where a person "suffers personal injury by accident in New Zealand".[41] On the basis of this wording, one might have thought that the new scheme preserved the distinction established in *Beals* v. *Hayward* between intentionally and negligently inflicted harms. However, as construed by New Zealand courts, the term "accident" includes any event resulting in misfortune that was not intended by the victim of the misfortune even though it may have been deliberately caused.[42] In New Zealand, then, both intentionally

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[37] *Supra*, note 7 at 239, [1964] 2 All E.R. at 932.

[38] The seminal American case was *Brown* v. *Kendall*, 6 Cush. 292 (Mass. 1850). For further discussion of these developments, *see* E.F. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein* (1965) 50 CORNELL L.Q. 191.

[39] (1959), [1960] N.Z.L.R. 131 (S.C.).

[40] *Ibid.* at 141-43. In reaching the conclusion that the plaintiff in a trespass action must allege and prove intention, McGregor J. systematically confused the requirement that the harm be intended with the requirement that the defendant's act be voluntary. That is, in answer to the question, "must the plaintiff allege and prove that the defendant intended the harm?", McGregor J. in effect answers "yes, the authorities show that the plaintiff must allege and prove that the defendant's act was voluntary". McGregor J. is not the first to fall into this confusion.

[41] *See* the *Accident Compensation Act 1972*, [1972] 1 N.Z.S. 521, s. 5(1). The 1972 Act and subsequent amendments have been consolidated and re- enacted as the *Accident Compensation Act 1982*, [1982] 3 N.Z.S. 1552, s. 27(1). The section in full provides: "Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment." Although "personal injury by accident" is defined in the Act, "accident" is not.

[42] *See G.* v. *Auckland Hosp. Bd.* (1975), [1976] 1 N.Z.L.R. 638 at 641 (S.C.).

and negligently inflicted injuries are compensated under the no fault scheme.

Australia has been content with a more traditional approach to personal injury actions. The leading Australian case is *Williams* v. *Milotin*,[43] decided by the High Court of Australia in 1957. In its judgment the Court observes that the essence of trespass is "direct violation of the protection which the law throws round the person".[44] While negligence involves both the infliction of damage and want of due care, trespass involves neither.[45] The language used by the Court in the *Williams* case suggests that liability in trespass is strict and cannot be avoided even if the defendant proves that he neither intended the violation nor was negligent. If this is what the Court meant, its views are eccentric and unlikely to prevail even if the old fashioned law of trespass is ultimately preserved in Australia. In *McHale* v. *Watson*,[46] decided in 1964, Windeyer J. rejected this approach; he held that although fault is not an essential element of trespass, a defendant may avoid liability by proving absence of fault. This, of course, is the approach taken in *Cook* v. *Lewis*[47] and it has since been approved and adopted by several state courts.[48] Thus the real issue in Australia, it appears, is not whether the High Court will abandon the position it took in *Williams* v. *Milotin*,[49] but what it will put in its place. The Court may opt for modernism, following the English lead in *Fowler* v. *Lanning*[50] and *Letang* v. *Cooper*,[51] or it may opt for the more traditional analysis of the Australian state courts.

The situation is much the same in Canada. The courts of the provinces have followed *Cook* v. *Lewis* without exception, and for the most part without comment.[52] In fact, the view of trespass as expressed in

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[43] (1957), 97 C.L.R. 465 (H.C.) [hereinafter *Williams*]. This was a joint judgment of the Court.

[44] *Ibid.* at 474.

[45] *Ibid.*

[46] (1964), 111 C.L.R. 384, 38 A.L.J.R. 267 (H.C.). This was a judgment of Windeyer J. sitting in first instance. An appeal to the full court on a point not discussed in the text is reported at (1966), 115 C.L.R. 199, 39 A.L.J.R. 459 (H.C.).

[47] *Supra*, note 16.

[48] *See, e.g., Venning* v. *Chin* (1974), 10 S.A.S.R. 299 at 306-08, 310-16, *aff'd* (1975), 49 A.L.J.R. 378 (H.C.); *Horkin* v. *North Melbourne Football Club Social Club* (1982), [1983] 1 V.R. 153 at 157-58 (S.C.); *Shaw* v. *Hackshaw* (1982), [1983] 2 V.R. 65 at 96-99, 112-13 (S.C.), *rev'd* (1984), 155 C.L.R. 614, 56 A.L.R. 417 (H.C.).

[49] *Supra*, note 43.

[50] *Supra*, note 31.

[51] *Supra*, note 7. For further comment on the Australian position, *see* R.J. Bailey, *supra*, note 3.

[52] *See, e.g., Tillander* v. *Gosselin* (1966), [1967] 1 O.R. 203, 60 D.L.R. (2d) 18 (H.C.), *aff'd* (1967), 61 D.L.R. (2d) 192n (C.A.); *Ellison* v. *Rogers* (1967), [1968] 1 O.R. 501, 67 D.L.R. (2d) 21 (H.C.); *Verbrugge* v. *Bush* (1975), [1976] W.W.D. 79 (B.C.S.C.); *Hatton* v. *Webb* (1977), 7 Alta. R. 303, 81 D.L.R. (3d) 377 (Dist. Ct.); *Doyle* v. *Garden of the Gulf Security and Investigation Inc.* (1979), 24 Nfld. & P.E.I.R. 123 (P.E.I.S.C.); *Beale* v. *Beale* (1982), 52 N.S.R. (2d) 550, 24 C.C.L.T. 101 (S.C.T.D.); *Brown* v. *Ratto*, *supra*, note 23.

Cook v. *Lewis* has become so ingrained in Canadian thinking that it has been applied as a matter of course in cases of trespass to property[53] and even in cases of conversion.[54] However, on the rare occasions when Canadian courts have been invited by counsel to adopt the English approach, the response has been sympathetic. In *Goshen* v. *Larin*, for example, McDonald J.A. wrote that "[t]he English judicial view . . . appeals to me as being a fair and just one".[55] In *Dahlberg* v. *Naydiuk*, Dickson J.A. (as he then was) appeared equally to favour the English view.[56] Despite their preference, both judges felt they were bound by *Cook* v. *Lewis*. As Dickson J.A. remarks, the issue must ultimately be decided by the Supreme Court of Canada.[57] Even if that Court chooses to reject the English approach and to affirm the Canadian law of trespass as it currently exists, the objections of critics such as Sharp must be answered. Something more than historical accident must be offered to explain and justify the law. In short, the challenge of the English cases must be met.

III. Alternative Theories on Which to Base Liability in Tort

It has always been the case that plaintiffs are compensated in tort for some but not all types of injury, in some situations but not others. The fundamental problem for tort law is identifying the circumstances in which it is just to require a defendant to compensate the plaintiff for harm he has suffered. This involves answering two distinct questions: first, whether what happened to the plaintiff is something for which compensation should be awarded and, second, whether it is appropriate in the circumstances to make the defendant pay. In order to give principled and consistent answers to these questions, a theory of justice is required.

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[53] *See Bell Canada* v. *Bannermount Ltd.* (1973), [1973] 2 O.R. 811, 35 D.L.R. (3d) 367 (C.A.); *Bell Canada* v. *Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (Ont. H.C.), *aff'd* 31 O.R. (2d) 571, 119 D.L.R. (3d) 254 (C.A.).

[54] *See Steiman* v. *Steiman (No. 1)* (1979), 11 Man. R. (2d) 362 (Q.B.).

[55] (1974), 10 N.S.R. (2d) 66 at 70, 56 D.L.R. (3d) 719 at 722 (S.C.A.D.). *See also Teece* v. *Honeybourn* (1974), 54 D.L.R. (3d) 549 at 556-57, [1974] 5 W.W.R. 592 at 600-01 (B.C.S.C.).

[56] (1969), 10 D.L.R. (3d) 319 at 328-29, 72 W.W.R. 210 at 219-20 (Man. C.A.).

[57] *Ibid.* Strangely enough, just two months before the judgment in *Dahlberg* v. *Naydiuk* was rendered, the Supreme Court of Canada briefly addressed the issue of burden of proof in trespass. In *Mann* v. *Balaban* (1969), [1970] S.C.R. 74 at 87-88, 8 D.L.R. (3d) 548 at 558, Spence J., for the majority, noted that in an action for assault or battery, once the trespass itself has been proven, the burden is on the defendant to establish his defences. As authority for this proposition, he quoted in full the description of trespass in *Cook* v. *Lewis* given by Cartwright J. Subsequent courts have generally ignored this passage.

In Book V of the *Nicomachean Ethics*,[58] Aristotle describes two forms of justice: distributive and corrective. Distributive justice governs the allocation of benefits among members of society, a given allocation being just in so far as the benefit is distributed among potential recipients in proportion to their relative worth. Corrective justice, on the other hand, has to do with the relationship of persons *inter se*. It assumes as given a particular distribution of benefits in society and it focusses on the means by which individuals alter this distribution by engaging in transactions. These may be voluntary, as where A sells property to B, or involuntary, as where A wounds B or steals his property. Where the pre-existing distribution of benefits is altered by a transaction, one party enjoys a gain relative to his previous position, or the other party suffers a loss, or both. Corrective justice consists in the annulment of wrongful gains and losses and the restoration of the parties to their pre-transaction position.

As explained by Aristotle, these are formal rather than substantive theories of justice. While they describe the different forms that justice may take, they do not tell us what in fact is just. For that purpose some additional theory is needed. In the case of distributive justice, a substantive theory of worth is needed to indicate how much of a particular benefit different persons in society may justly claim. In the case of corrective justice, a substantive theory of wrong is needed to indicate which gains and losses are wrongful and therefore candidates for corrective justice.[59]

Tort law has evolved over the centuries primarily as a system of corrective justice in the formal sense explained above. That is, when the judges whose decisions constitute the common law of tort rendered those decisions, they generally took themselves to be administering corrective justice to the parties before them rather than effecting a more just distribution of benefits in society at large. This, of course, does not tell the whole story. In the first place, it is obvious that common law rules and principles have a significant impact on the distribution of wealth in society. Moreover, some common law rules or principles may be better explained as attempts to achieve distributive rather than corrective justice. The vicarious liability of employers for the torts of their employees is perhaps an example.[60] Finally, in recent years a number of scholars have emphasized the extent to which the common law of torts serves, and should serve, distributive goals.[61] As desirable as such goals may be, however, they are more readily achieved, in my view, through the enactment of legislation. The chief purpose for which the common law of torts is suited is the administration of corrective justice. If this is so, that is, if the

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[58] Aristotle, *Nicomachean Ethics, Book V*, in R. McKeon, ed., THE BASIC WORKS OF ARISTOTLE (New York: Random House, 1941) 927 at 1004-10.

[59] For further discussion, *see* J.L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II* (1983) 2 LAW & PHIL. 5; E.J. Weinrib, *Toward a Moral Theory of Negligence Law* (1983) 2 LAW & PHIL. 37.

[60] *See* P.S. Atiyah, ACCIDENTS, COMPENSATION AND THE LAW, 3d ed. (London: Weidenfeld & Nicolson, 1980) at 258.

[61] *See, e.g., ibid.*

primary judicial task in tort law is the administration of corrective justice, then it is essential that the courts adopt or develop a theory of wrongful transactions.

What makes this proposition interesting is the fact that there are several theories of wrongful transactions from which to choose. This wealth of possibility is almost never acknowledged by the courts and it is exploited only imperfectly. Yet it is there, and in tracing the development of English tort law over the years one sees that the different theories have variously appealed to the courts, depending on the era and the problem to be solved, as well as the cast of mind of the individual judge. These theories are briefly outlined below.

A. Fault

The fault-based theory of liability has dominated Anglo-Canadian law for more than a century. It provides that a plaintiff is entitled to be compensated by the defendant if he can show that the injury for which he seeks compensation was caused by the defendant's fault. A defendant is at fault in the relevant sense if he either intended to cause the plaintiff's injury or failed to take reasonable care. Notice that on this approach the infliction of injury on another is not intrinsically wrongful. The character of the transaction between the parties, whether it is wrongful or not, depends on judicial assessment of the defendant's conduct rather than the effect of that conduct on the plaintiff. This is the key feature of the fault-based approach.

B. Fairness

Under the fairness-based theory of liability, the defendant must compensate the plaintiff if he has unfairly transferred to the latter some of the costs of his own activity. Not every transfer of cost is wrongful, only those that are unfair. The leading proponents of this approach are the American scholars Richard Epstein and George Fletcher, both of whom define unfairness as the absence of symmetry or reciprocity between persons who are entitled to equal treatment.[62] As Professor Epstein explains, the statement "A harmed B" describes a situation in which the parties are causally linked to each other, but their roles are non-reciprocal; the proposition "A harmed B" is not equivalent to "B harmed A" because one of the parties is an agent who carries on an activity while the other is a passive and involuntary recipient of the effects of that activity.[63] Since *prima facie* B is entitled to be treated as well as A, this lack of symmetry is unfair. Thus, for Epstein, anytime B can prove that A is

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[62] *See* R.A. Epstein, *A Theory of Strict Liability* (1973) 2 J. LEGAL STUD. 151; R.A. Epstein, *Defences and Subsequent Pleas in a System of Strict Liability* (1974) 3 J. LEGAL STUD. 165; G.P. Fletcher, *Fairness and Utility in Tort Theory* (1972) 85 HARV. L. REV. 537.

[63] *A Theory of Strict Liability*, *ibid.* at 167, 172, 175.

the non-reciprocal cause of his harm, other things being equal, he is entitled to compensation.[64]

Fletcher explains the idea of fairness in somewhat different terms. His basic principle is that all individuals in society are entitled to roughly the same degree of physical security. In the case of risks to which A and B expose one another in the course of a shared activity or more generally in the course of every day life, the principle of fairness is not violated and therefore any loss that occurs must lie where it falls. However, where A exposes B to some additional, non-reciprocal risk, B is entitled to compensation.[65] A victim should "recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant. . . . Cases of liability are those in which the defendant generates a disproportionate, excessive risk of harm, relative to the victim's risk-creating activity."[66]

C. Rights

On the rights-based theory of liability, a plaintiff is entitled to compensation from a defendant upon proof that the defendant violated one or more of his rights. The basic idea here is expressed in a constitutional context by subsection 24(1) of the *Charter*: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[67] In the context of ordinary tort law the reasoning is much the same: anyone whose property rights or right to personal autonomy, as guaranteed by the common law, has been infringed or denied is entitled to compensation.

It is instructive to notice the difference between the rights-based and the fault-based theories. Under both, the plaintiff enjoys a right to security of the person and interference with this right sounds in damages. However, under the fault theory, the existence and scope of the plaintiff's right to security is controlled by the existence and scope of the defendant's freedom to act. This is so because the plaintiff's right begins where the defendant's freedom ends and *the latter is defined first*. If the defendant's conduct is found to be faultless, having regard to his state of mind and the character of the activity in which he was engaged, the infliction of harm on the plaintiff is not wrongful and the plaintiff's right to security of the person is accordingly narrowed. Under the rights-based theory, however, the existence and scope of the plaintiff's right to security of the person is determined prior to and independently of the defendant's freedom to act. On this approach, both the state of mind of the defendant and the moral character or utility of his actions are immaterial. The wrongfulness of the transaction depends on the effect of the defendant's

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[64] *Ibid.* at 168-69.
[65] Fletcher, *supra*, note 62 at 550.
[66] *Ibid.* at 542.
[67] *Charter* (U.K.), 1982, c. 11, s. 24(1).

conduct, however innocent, on the plaintiff's right. In RIGHTS, Theodore M. Benditt distinguishes three categories of rights: (1) absolute rights, which cannot be overridden by other rights or other considerations regardless of circumstance; (2) *prima facie* rights, which have the same content as absolute rights but can be overridden by competing rights or other considerations in some circumstances; and (3) relative rights, the content of which is narrowed by competing rights and other considerations.[68] Using this analysis, one would say that under a rights theory the plaintiff's right to personal autonomy or property is a *prima facie* right whereas under the fault theory it is relative.

Both the rights and fairness-based theories of liability require defendants to compensate plaintiffs in the absence of fault as that term is normally understood. In this sense, they are theories of strict liability. It should be noted, however, that neither one of them requires defendants to compensate plaintiffs in the absence of wrongdoing. In each case, liability is imposed only upon proof of a wrongful transaction between the parties, the purpose being to annul its wrongful effects. Properly understood then, these are theories of corrective justice and, along with fault, provide principled and coherent ways of responding to the fundamental problem of tort law: identifying the circumstances under which it is just to make one person compensate another.

As noted above, the fault-based theory of liability has dominated Anglo-American law for more than a hundred years. It is instructive to see how this theory came about. In his study of the intellectual history of tort law in America, G. Edward White has shown that a strong tendency toward conceptualization arose with the demise of the writ system, first in the United States and later in the United Kingdom.[69] "Conceptualization" is the term used by American scholars of the Victorian era to describe the scientific ordering of data into a unified and comprehensive system on the basis of some universally applicable principle.[70] One of the most influential advocates of conceptualization in law was Oliver Wendell Holmes whose treatise on the common law first appeared in 1870.[71] The unifying principle identified by Holmes as underlying the law of tort was liability based on fault. The general principle of our law, he wrote, is that loss from mere accident must lie where it falls.[72] In the absence of fault, it is no more justifiable to make me indemnify my neighbour for the consequences of my actions than it is to compel me to insure him against lightning.[73]

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[68] T.M. Benditt, RIGHTS (Totowa, N.J.: Rowman & Littlefield, 1982) at 11.

[69] *See* G.E. White, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (New York: Oxford University Press, 1980) at 3-19.

[70] *Ibid.* at 6-7.

[71] *See* O.W. Holmes Jr., THE COMMON LAW (Boston: Little, Brown & Co., 1881) at 77ff.

[72] *Ibid.* at 94.

[73] *Ibid.* at 96.

The effort of Holmes and other American jurists to develop a general theory of tort, based on liability for fault, was followed by an analogous development in the United Kingdom. The first English treatise on tort, written by Sir Frederick Pollock, appeared in 1887.[74] Pollock begins with a confession of his desire to produce for English law what Holmes had produced for American law, namely a "complete theory of Torts" based on the "scientific treatment of principles".[75] Pollock's thesis was that English tort law should be analyzed in terms of the character of the fault which informs the tortious act or omission. In some torts, the wrong is the intention to harm; in others, it is negligence.[76] The torts of trespass and conversion which do not fall within this classification represent an anomalous exception. As Pollock explains, in language that has a familiar ring, "[t]he truth is that we have here one of the historical anomalies that abound in English law".[77]

There can be no doubt that for some purposes the fault-based theory of liability works very well. However, it does not follow that it is the only suitable basis on which to ground liability in tort. Given the way in which tort law has evolved and continues to evolve over time, given the wide range of activities and relationships that come within its purview, it is hard to see why a single principle or theory must be adopted to serve all purposes, once and for all. It is my view that the several theories of liability set out above may operate, and historically have in fact operated, as complementary rather than mutually exclusive alternatives. This claim can be demonstrated quite readily by looking at the range of actions that lie to protect a person's interest in real property. It is also true of actions designed to protect a person's interest in his autonomy and security.

1. *Interference with Real Property*

Where a plaintiff's interest in real property is interfered with in some way, depending on the character of the interference, an action may be brought (1) in trespass to land, illustrating the rights-based theory of liability; (2) in nuisance or negligence, illustrating the fault-based theory; or (3) pursuant to the rule in *Rylands* v. *Fletcher*,[78] illustrating the fairness-based theory.

(a) *Trespass to Land*

Where a defendant sets foot or object on the plaintiff's land, he violates the plaintiff's right to exclusive possession of the land and is

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[74] F. Pollock, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW (London: Stevens & Sons, 1887).

[75] *See* Pollock, *supra*, note 10 at vii.

[76] *Ibid.* at 8-12.

[77] *Ibid.* at 13.

[78] (1868), L.R. 3 H.L. 330, [1861-73] All E.R. Rep. 1, *aff'g* (1866), L.R. 1 Ex. 265, [1861-73] All E.R. Rep. 1.

therefore guilty of trespass. It is evident that the claim in trespass is founded on a rights-based theory of recovery, for the plaintiff's right to exclude the defendant is pre-existing and independently defined; it is not relative to the moral character or utility of the defendant's conduct. This point is illustrated quite vividly by a recent case in which Goodridge J. granted an injunction prohibiting the defendant from passing its crane over the plaintiff's land during construction of a building, even though the temporary trespass cost the plaintiff nothing and might have saved the defendant close to half a million dollars. As the Judge explained, "[t]he balance of convenience . . . may have to take second place to the sacrosanctity of property rights in matters of trespass".[79]

(b) *Nuisance and Negligence*

Where the defendant interferes unreasonably with the plaintiff's use and enjoyment of his land, whether or not he effects a physical entry onto the land, he commits a nuisance. Where the defendant's unreasonable conduct causes the property to be damaged in a foreseeable way, he is guilty of negligence. Although nuisance is often thought of as a strict liability tort,[80] this classification is misleading. In nuisance, the defendant's interference with the plaintiff's use and enjoyment of his land is found to be wrongful only if it is judged excessive, unreasonable or contrary to accepted community standards. In both nuisance and negligence, then, the plaintiff's property right is balanced against and in effect is qualified by the defendant's freedom to act. This, we have seen, is the hallmark of the fault-based theory of liability.

(c) *The Rule in Rylands v. Fletcher*

Where the plaintiff's land is damaged by some force or substance escaping from the land of the defendant, an action under the rule in *Rylands* v. *Fletcher*[81] may lie. As the judgments in the case indicate, this rule is grounded in the fairness-based theory of liability. In the words of Lord Cranworth, writing in the House of Lords, "when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*", that is, bound in using his own property not to injure that of another.[82] Mr. Justice Blackburn makes the same point on behalf of the Exchequer Chamber noting the evident justice of holding a person responsible for the consequences when, for his own

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[79] *Lewvest Ltd.* v. *Scotia Towers Ltd.* (1981), 19 R.P.R. 192, 126 D.L.R. (3d) 239 at 240 (Nfld. S.C.T.D.).

[80] *See* authorities cited in CANADIAN TORT LAW, *supra*, note 2 at 547 n. 112.

[81] *Supra*, note 78.

[82] *Ibid.* at 341, [1861-73] All E.R. Rep. at 14.

purposes, he brings something onto his land that is likely to do mischief if it escapes.[83]

An escape is an unfair transaction, however, only if it represents a non-reciprocal transfer of costs from the defendant to his neighbour. This realization, it would appear, underlies the puzzling distinction drawn by Lord Cairns between the natural and non-natural use of land. It also explains the famous passage from the judgment of Blackburn J. in which he explains why accidents on the highway or in industrial settings require fault for liability, while escapes do not.

In Lord Cairns' view, where damage is caused as a result of some "natural" or "ordinary" use of land, the defendant is not liable in the absence of fault. However, where damage is caused as a result of its use for a "non-natural" purpose, that is, one outside the ordinary course of enjoyment for the land in question, the defendant's liability is strict.[84] This is so presumably because the risks associated with the "natural" use of land are reciprocal as between land owners in a given area; that is, the risks to which each is exposed are the sort of risks that each is apt to create. The risks associated with the "non-natural" use of land, on the other hand, are not reciprocal and, therefore, are unfair.

The same reasoning informs the well-known passage from the judgment of Blackburn J. in which cases where liability should be based on fairness are contrasted with those where it should be based on fault. His Lordship writes as follows:

> Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger, and persons who, by the licence of the owners, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident. . . . But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land.[85]

Where the risk is a normal and inevitable by-product of socially useful activity, plaintiffs must be taken to have accepted it by participating in the activity. In these circumstances, the risk is a consequence of an activity that benefits a group to which both parties belong. Hence, there is no unfair or non-reciprocal transfer of costs. In these circumstances, the plaintiff has no basis for compensation unless he can show that the harm he suffered resulted from an abnormal and excessive risk, one that could have been avoided through the exercise of due care. Where the exposure to risk is non-reciprocal, however, in the sense that the plaintiff is not

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[83] *Ibid.*, L.R. 1 Ex. at 279-80, [1861-73] All E.R. Rep. at 7.
[84] *Ibid.* at 338-40, [1861-73] All E.R. Rep. at 12-13.
[85] *Ibid.*, L.R. 1 Ex. at 286-87, [1861-73] All E.R. Rep. at 11.

part of the class of persons who benefits from the activity, the transfer of costs is unfair and should be compensated, even if there has been no want of due care.

2. *Interference with the Person*

Where the interest interfered with is the personal autonomy of the plaintiff, rather than his interest in property, in principle the same range of possibilities should be available. In practice, this is not so. A plaintiff may bring an action in trespass to the person, illustrating the rights-based theory of liability, or in negligence, illustrating the fault-based theory. However, as the law currently stands, a plaintiff may appeal to fairness as a basis for recovering his loss in only a limited and uncertain range of circumstances.

(a) *Trespass to the Person*

Where the interference with the plaintiff is direct, the defendant is guilty of trespass to the person. Like trespass to land, this tort is best understood in terms of the rights-based theory of recovery. The wrong for which the defendant must pay compensation is violation of the plaintiff's right to exclusive control of his person. Conduct which has this effect is wrongful whether or not it is judged a fault. This understanding of trespass to the person explains a number of its special characteristics, for example, the availability of special types of damage awards. Even though the violation of the plaintiff's right causes no material damage, the plaintiff in trespass may nonetheless recover nominal damages.[86] Moreover, if the violation is particularly high- handed or offensive, the plaintiff is entitled to punitive damages.[87] These forms of damages might aptly be termed vindication damages, for both are designed to acknowledge the intrinsic wrongfulness of any interference with the plaintiff's right.

The attitude underlying trespass is nicely captured by Dickson J.A. (as he then was) in the final paragraph of the judgment in *Dahlberg* v. *Naydiuk*:

> Hunters must recognize that firing over land without permission of the owner constitutes a trespass to land and if injury to person results, trespass to

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[86] *See, e.g., Stewart* v. *Stonehouse* (1926), [1926] 2 D.L.R. 683, [1926] 1 W.W.R. 929 (Sask. C.A.); *Mulloy* v. *Hop Sang* (1935), [1935] 1 W.W.R. 714 (Alta. S.C.A.D.); *Ketchum* v. *Hislop* (1984), 54 B.C.L.R. 327 (S.C.). *See also* H. Street, THE LAW OF TORTS, 7th ed. (London: Butterworths, 1983) at 433: "The function of nominal damages . . . is to mark the vindication, where no real damage has been suffered, of a right which is held to be so important that infringement of it is a tort actionable *per se*. . . ."

[87] *See, e.g., S.* v. *Mundy* (1969), [1970] 1 O.R. 764, 9 D.L.R. (3d) 446 (Co. Ct.); *Dandurand* v. *Pier I Imports (Canada) Inc.* (1986), 55 O.R. (2d) 329 (C.A.).

> person. . . . If a hunter chooses to hunt in a farming area he must do so in full awareness of the paramount right of the farmer to carry on his lawful occupation without risk or injury from stray bullets.[88]

The farmer's right to security is not narrowed to make room for reasonable risk-taking on the part of the hunter.

(b) *Negligence*

Where a defendant interferes with the plaintiff by causing him physical injury, an action in negligence will lie if the plaintiff can establish that the conduct which caused the injury was negligent. The gist of a negligence action is the culpable infliction of injury; thus, fault and injury are both essential elements of the wrong. In keeping with this conception, damages in negligence are compensatory rather than vindictive. The concern is not with the plaintiff's rights, but with his physical well-being. However, if this well- being is jeopardized by the defendant's reasonable conduct, so much the worse for the plaintiff. The loss must lie where it falls.

(c) *The Rule in Rylands v. Fletcher*

Where the plaintiff is injured through the materialization of a non-reciprocal risk, there is no obvious reason why the rule in *Rylands* v. *Fletcher*[89] should not apply to render the creator of the risk liable, whether or not he was guilty of fault. This would represent a natural and appropriate evolution of the principle of fairness asserted in that case. That such an evolution has not occurred appears to be due to judicial hostility towards strict liability. In *Read* v. *J. Lyons & Co.*, the leading modern case, the attitude of the House of Lords is well captured in Lord Macmillan's response to the suggestion that *Rylands* v. *Fletcher* ought to apply to personal injury cases whether or not there has been an escape of something dangerous from the defendant's land:

> Whatever may have been the law of England in early times I am of opinion that as the law now stands an allegation of negligence is in general essential to the relevancy of an action of reparation for personal injuries. . . . The emphasis formerly was on the injury sustained . . . the emphasis now is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent.[90]

Although other courts have been less explicit, the widespread distrust of strict liability is evident in the way the broad principle asserted in *Rylands* v. *Fletcher* has been persistently ignored in favour of technical analysis

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[88] *Supra*, note 56 at 330, 72 W.W.R. at 221.
[89] *Supra*, note 78.
[90] (1946), [1947] A.C. 156 at 170-71, [1946] 2 All E.R. 471 at 476 (H.L.).

of such questions as what is a "non-natural user" of land and what counts as an "escape". More than a hundred years after the case was decided, it is still unclear whether the rule is merely a branch of nuisance law and under what circumstances, if any, it applies to actions for personal injuries.[91]This is in striking contrast to judicial treatment of the fault principle asserted in *Donoghue* v. *Stevenson*.[92]

One hopes that the Supreme Court of Canada would be prepared to lead the way in exposing and rejecting the automatic and uncritical commitment to the fault principle that has become habitual with modern courts. The possibilities of grounding liability on a principle of fairness or of imposing liability for violation of the plaintiff's rights are both coherent and morally palatable forms of corrective justice which warrant serious consideration by the Court. By reducing all to the fault principle, modern scholars have achieved simplicity and elegance in the law but they have done so at the expense of fully exploring the ways of achieving justice through law.

IV. The Meaning of Fault in Trespass and Negligence

It is sometimes suggested that the advantages a plaintiff receives by bringing his action in trespass are largely academic, that in the real world of civil litigation the plaintiff's success is not likely to turn on whether his action is framed in trespass rather than negligence.[93] This view is based on the belief that what trespass achieves by treating absence of fault as a defence is achieved in negligence through the doctrine of *res ipsa loquitur*. There are two things wrong with this reasoning in my view. First, it attaches too much weight to the doctrine of *res ipsa loquitur*. In Canada at least, these words do not have the power to shift the legal burden of proof; the better view is that they do not even shift the evidentiary burden.[94] They are simply a short way of saying that sometimes it is possible to infer negligence on the part of the defendant from the facts of the accident alone. This inference will be more or less compelling, and more or less easily rebutted, depending on the facts of each case. The other defect in this reasoning is its supposition that the fault which a defendant must negative in a trespass action is the same as the fault which the plaintiff must prove in a negligence action. It thus begs one of the more interesting and important questions raised by the retention

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[91] *See, e.g.*, Fleming, *supra*, note 36 at 311-16; Street, *supra*, note 86 at 259-68, 271-73.

[92] (1932), [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

[93] *See, e.g.*, *Notes* (1959) 75 L.Q. Rev. 161 at 163; G. Dworkin, *Tresspass and Negligence — A Further Attempt to Bury the Forms of Action* (1965) 28 Mod. L. Rev. 93 at 94-95. *See also* Trindade, *supra*, note 2 at 716.

[94] *See* Wright, *Res Ipsa Loquitur*, *supra*, note 2; S.A. Schiff, *A Res Ipsa Loquitur Nutshell* (1976) 26 U.T.L.J. 451; Linden, Canadian Tort Law, *supra*, note 2 at 266.

of traditional trespass, namely what is the meaning of fault in a trespass action?

In *Cook* v. *Lewis*, Cartwright J. held that once the plaintiff proves direct interference his case is complete and "the onus falls upon the defendant to prove 'that such trespass was utterly without his fault' ".[95] This language comes from the old case of *Weaver* v. *Ward*,[96] first reported in 1616. Cartwright J. goes on to note that the onus the defendant must discharge consists of "establishing the absence of both intention and negligence on his part".[97] This gloss on *Weaver* v. *Ward* comes from *Stanley* v. *Powell*,[98] which at the time *Cook* v. *Lewis* was decided was the leading modern case on trespass to the person. The question raised by the language used in these cases is how the terms "fault" and "negligence" should be defined and more particularly whether these terms have the same meaning in the context of trespass that they have come to have in modern negligence actions.

Weaver v. *Ward* arose out of a shooting incident. The defendant shot the plaintiff, who sued in trespass. The defendant answered that although he had shot the plaintiff he had done so inadvertently and against his will. This was no defence, however, for as the Court explains, a plaintiff may recover in trespass notwithstanding the defendant's lack of intention to injure him,

> and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, prout ei bene licuit) except it may be judged utterly without his fault.
>
> 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.[99]

This passage is generally taken to be the source of the absence of fault defence in trespass. It is interesting for several reasons. First, the defence is said to be an excuse rather than a justification. Under the old pleading system, prior to 1834, justifications had to be specially pleaded while excuses did not; excuses were embraced within the general plea of "not guilty".[100] Although this procedural distinction is now obsolete, there remains an important conceptual difference between the two types of

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[95] *Supra*, note 16 at 839, [1952] 1 D.L.R. at 15.

[96] (1616), Hob. 134 at 134, 80 E.R. 284 at 284 (K.B.).

[97] *Supra*, note 16 at 839, [1952] 1 D.L.R. at 15.

[98] (1890), [1891] 1 Q.B. 86, [1886-90] All E.R. Rep. 314 (Q.B.).

[99] *Supra*, note 96 at 134, 80 E.R. at 284.

[100] *See* J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 2d ed. (London: Butterworths, 1979) at 340-42. As Baker explains at 77-78, in 1834 the New Pleading Rules of Hilary Term restricted the availability of the general plea so that, henceforth, both excuses and justifications required a special plea.

defence. A justification seeks to demonstrate that the transaction between the parties was not actually wrongful and that the plaintiff has accordingly failed to establish a basis for compensation. An excuse, while admitting there are just grounds for compensating the plaintiff, denies that the defendant should pay in the special circumstances of the case. In other words, justifications undermine the plaintiff's claim that the defendant's conduct has been wrongful while excuses invite the judgment that he should not be held accountable for his wrong.[101]

It is not surprising that absence of fault in trespass is not a justification. The wrong in trespass consists of violating the plaintiff's right and, as explained above, this is no less a wrong for being the result of faultless conduct. The puzzling thing is that absence of fault figures as a defence at all. This question is addressed by Professor Fletcher who in his own discussion of *Weaver* v. *Ward* suggests that excusing is best understood as "a perception of moral equivalence".[102] More specifically, it is a judgment that the defendant's contribution to the wrong admittedly suffered by the plaintiff is equivalent to his having done nothing at all.[103] The illustrations of the no fault defence set out in *Weaver* v. *Ward* support this understanding. Each is an instance of circumstances in which the defendant is technically guilty of trespass in that some act of his was immediately followed by contact with the plaintiff, but morally he is innocent because he is not the effective agent of the wrong. In the first example ("if a man by force take my hand and strike you"), the true agent is a third party, namely the man who guides the defendant's hand. In the second example ("the plaintiff ran across his piece when it was discharging"), the true agent is the plaintiff himself. In the third and crucial illustration, the true agent appears to be external circumstance, that is, something outside the defendant's control, for the harm suffered by the plaintiff must have been "inevitable" and the defendant must have "committed no negligence to give occasion to the hurt".

If absence of fault is the moral equivalent of having done nothing at all, then negligence in this context must refer broadly to any avoidable failure by a defendant to use care or skill. Although this interpretation is speculative, it is consistent with what is known of negligence in the context where it was most often pleaded in the sixteenth and seventeenth centuries, namely *assumpsit*. The plaintiff in *assumpsit* alleged that the defendant undertook to perform a service for the plaintiff but did so negligently so that some specific harm resulted. The defendant was liable if in the view of the jury any carelessness or want of skill on his part was responsible for the damage.[104] This is a very simple conception of

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[101] *See* Fletcher, *supra*, note 62 at 556; J.L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I* (1982) 1 LAW & PHIL. 371 at 377.

[102] Fletcher, *ibid.* at 552.

[103] *Ibid. See also* W.S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts* (1970) 31 LA. L. REV. 1 at 10-15.

[104] Baker, *supra*, note 100 at 337-38.

negligence involving neither standards of reasonable care nor sophisticated cost-benefit analyses. The jury is asked to answer what is largely a question of fact: in acting as he did, did the defendant commit an avoidable mistake? If he had been more careful, would the accident not have occurred?

Toward the end of the seventeenth century a new and more sophisticated conception of negligence emerged. The seminal case was *Mitchil* v. *Alestree*.[105] This was an action on the case in which the plaintiff complained that the defendant rode his horse into Lincoln's Inn Fields for the purpose of taming it, but while there the horse broke away and trampled the plaintiff. Counsel argued before the Court *in banco* that there was no cause of action here, but the Court replied that "[i]t was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concourse of people".[106] The wrong committed by the defendant here, it will be noted, consisted not in inflicting harm on the plaintiff but in exposing him to the risk of harm. This was a new way of defining fault and it was to have a profound effect on the development of English law.

The conception of fault, or more precisely of negligence, introduced by the Court in *Mitchil* v. *Alestree* is a good deal more complex than the one referred to in *Weaver* v. *Ward*. Before concluding that the risk created by a defendant is unacceptable and therefore wrong, the court or trier of fact must answer two questions. The first is whether the risk of harm in question was perceptible or foreseeable by the defendant. The second is how the defendant ought to have responded to the risk. While it is obvious that persons should always seek to avoid damage-causing mistakes, it is not obvious that the mere *risk* of damage should always be avoided. Given the ubiquitous character of risk, life would come to a standstill if our judgments about risk creation did not take into account such matters as the benefits to be derived from risk-creating conduct as well as the character of the risk. Severe risk, for example, should probably be taken seriously even if remote, but a remote risk of modest damage might well be ignored. The moment attention is focussed on the creation of risk, as opposed to the infliction of harm itself, negligence becomes a question of identifying competing costs and benefits and weighing the odds.

This new way of defining negligence introduced a new basis on which plaintiffs could seek compensation and greatly extended their range of recovery. In the past, on facts such as those in *Mitchil* v. *Alestree*, the plaintiff would have gone uncompensated. An action in trespass would have failed because the immediate cause of the interference with the plaintiff, the movement of the horse after bolting from the defendant, was not something the defendant had voluntarily directed or controlled. An action in *assumpsit* would have failed because the defendant had not been negligent in performing an undertaking. The plaintiff succeeded in

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[105] (1776), 1 Vent. 295, 86 E.R. 190 (K.B.).
[106] *Ibid.* at 295, 86 E.R. at 190.

Mitchil v. *Alestree* only because the Court for the first time recognized that, in some circumstances at least, it is wrongful to expose a stranger to a risk of harm.[107]

Once this point is appreciated, it is easy to understand the distinction between the direct and indirect infliction of harm that developed in the eighteenth century. In the classic trespass action the immediate effect of the defendant's risk-creating action is the harm itself. The defendant presses the trigger and the plaintiff is instantly struck by a pellet from his gun. Because the harm follows immediately on the act, there is no reason to think in terms of risk. In the new action in negligence, on the other hand, the immediate effect of the defendant's risk-creating action is not harm but the mere risk of harm. Some damage may occur in the future but whether any in fact occurs depends on a number of variables. In directing a spirited horse into a crowded field the rider perceives (or should perceive) that someone may be harmed, but there is also the chance that the horse will be exercised and no harm will occur. The outcome depends partly on the rider himself, his skill and care, but partly on such factors as the condition of the ground, how many others are using the field, the amount of noise they are making and so on. These contingent and uncertain factors accompanying the defendant's risk-creating act make the harm, if it occurs, indirect.

The defendant in the new style of action in negligence is essentially a gambler. Because he does not in fact control all the effects that may result from a given course of conduct, his choices are essentially wagers: he bets that the benefits he is seeking will be realized but that the costs will not occur. It is this element of chance, of playing the odds, that underlies and explains both the new definition of negligence and the concept of indirect connection. Under the theory of liability introduced in *Mitchil* v. *Alestree*, a defendant must compensate the plaintiff only if he makes and, in the event loses, a bad bet.

At the time the forms of action were abolished in common law jurisdictions, it thus appears that there were two distinct conceptions of negligence operating in law. The one, associated with trespass and the defence of no fault or inevitable accident, was a simple conception of negligence as any avoidable failure to use care or skill in performing an act. The other, associated with the emerging tort of negligence, was a more complex conception of negligence as the creation of excessive or unreasonable risk. In my view, these competing conceptions of negligence represent a key difference between old style trespass and the modern tort of negligence.

It is evident that adopting the older and simpler conception of negligence confers an advantage on the plaintiff in trespass in that it tends to make the defendant's burden of proving absence of fault quite difficult.

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[107] *See* Baker, *supra*, note 100 at 336; M.J. Prichard, *Trespass, Case and the Rule in Williams v. Holland* [1964] CAMBRIDGE L.J. 234.

To establish absence of fault as an excuse, the defendant must show that he lived up to the highest standard of care. While admittedly onerous, there is nothing arbitrary or unjust in this requirement, for it does not arise unless the plaintiff first proves that the defendant has wronged him by interfering with his right. Such interference is a wrongful transaction and in justice warrants compensation unless the defendant can justify what he did or excuse it. Since absence of fault is not a justification for violation of a right, it can figure only as an excuse.

For the most part the issue of what is meant by negligence in a trespass action has been ignored by Canadian courts.[108] In *Stanley* v. *Powell*, Denman J. held that a defendant who proves both absence of intention to interfere and negligence has a good defence to trespass.[109] This holding, we have seen, was affirmed and followed by Cartwright J. in *Cook* v. *Lewis*.[110] However, neither Judge gave any indication of what he meant by negligence. The issue is thus ripe for settlement by the Supreme Court of Canada.

The issue is complicated, however, by a debate concerning the defence of inevitable accident which has been carried on by the courts ever since the abolition of the forms of action in the mid-nineteenth century. One side of the debate is represented by Lord Esher M.R. who writes that to make out the defence of inevitable accident, a defendant must prove that the plaintiff's damage was caused by something over which he "had no control" and which could not have been avoided "by the greatest care and skill".[111] This view of inevitable accident obviously embodies the simpler conception of negligence associated with old style trespass. However, most modern courts have rejected this view. In recent cases the courts have held that the defence of inevitable accident is made out if the defendant proves that the damage could not have been avoided by "due diligence"[112] or the exercise of "reasonable care".[113] This corresponds to the modern conception of negligence as the creation of unreasonable risk. Although the latter definition of inevitable accident has prevailed in Canada as well as in England,[114] it does not follow that proof of due diligence or reasonable care on the part of the defendant is a good defence to *trespass* in Canada. The key feature of this debate is

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[108] The one judicial reference to this issue was made by Dickson J.A. (as he then was) in *Dahlberg* v. *Naydiuk*, *supra*, note 56 at 328-29, 72 W.W.R. at 219-20.

[109] *Supra*, note 98 at 93-94, [1886-90] All E.R. Rep. at 318-19.

[110] *Supra*, note 16.

[111] *The Schwan* (1892), [1892] P. 419 at 429 (C.A.).

[112] *Southport Corp.* v. *Esso Petroleum Co.* (1953), [1953] 3 W.L.R. 773 at 778, [1953] 2 All E.R. 1204 at 1209 (Q.B.), *rev'd* (1954), [1954] 2 Q.B. 182, [1954] 2 All E.R. 561 (C.A.), *aff'd* (1955), [1956] A.C. 218, [1955] 3 All E.R. 864 (H.L.).

[113] *Rintoul* v. *X-Ray and Radium Indus. Ltd.* (1956), [1956] S.C.R. 674 at 678.

[114] *Ibid. See also Goveia* v. *Lalonde* (1977), 1 C.C.L.T. 273 (Ont. C.A.); *Telfer* v. *Wright* (1978), 23 O.R. (2d) 117, 95 D.L.R. (3d) 188 (C.A.).

the fact that it has taken place exclusively in the context of actions framed in negligence.[115]

To speak of the defence of inevitable accident in the context of a negligence action is peculiar, of course, for in negligence it is up to the plaintiff to prove fault, not the defendant to prove absence of fault. The explanation is simple enough, however. In the cases referred to above, the doctrine of *res ipsa loquitur* has been expressly or implicitly relied on to shift the burden of proof in respect of fault to the defendant, who is then obliged to show absence of fault or "inevitable accident" to avoid liability. Since fault in a modern negligence action is properly defined as the creation of unreasonable risk, proof that the defendant took reasonable care is obviously adequate to negate fault in this context. However, this tells nothing of what will suffice where the action may be framed in trespass.

V. Criticisms of The Canadian Version of Trespass

Although criticism of the Canadian law of trespass is spirited, it is seldom accompanied by anything like a detailed analysis of its shortcomings. One may nonetheless detect a number of recurring themes. One frequently heard objection is that the Canadian version of trespass permits an unseemly overlap or concurrence of actions. Another complaint concerns its failure to be modern and more particularly its failure to conform to the modern conceptualist approach. Finally, the distinction between direct and indirect interference retained by Canadian law is thought to be pointless and unworkable.

A. Concurrence

Where trespass is confined to the intentional infliction of harm, reserving negligence for non-intentional injury, the problem of concurrence does not arise, for so defined trespass and negligence are mutually exclusive categories. However, where trespass is defined as direct interference with the person and negligence as the infliction of damage by fault, there is a significant area of overlap. This includes all cases where the damage suffered by the plaintiff may be characterized as resulting both from the defendant's fault and from his direct interference. If con-

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[115] In fact, nearly all the cases were concerned with collisions that occurred on the highway or at sea. Under the modern rule such actions *must* be brought in negligence; they cannot succeed in trespass even if the damage was direct. The source of this rule is generally taken to be the passage from the judgment of Blackburn J. in *Rylands* v. *Fletcher*, quoted *supra*, at text accompanying note 85, as applied by Baron Bramwell in *Holmes* v. *Mather* (1875), L.R. 10 Ex. 261 at 267, [1874-80] All E.R. Rep. 345 at 350-51.

currence is allowed in this area, as it has been in the past,[116] then the plaintiff enjoys a considerable advantage. If he cannot make out his case in negligence, he may yet succeed in trespass with its less onerous burden of proof.

A number of critics have found this prospect unacceptable. The most detailed criticism is offered by R.J. Bailey who suggests that insofar as the torts of trespass and negligence overlap they protect a single interest, the physical security of the plaintiff:

> Why should this single interest require two torts to protect it? Serious objections arise if the two causes of action offer the single interest different degrees of protection, as will be the case if the torts of trespass and negligence differ in their substantive details even in the area of injuries directly caused by negligence. We know that a single fact-situation can give rise to the two causes of action. How justifiable is this, if the two causes of action differ in their substance and so may produce different results as to liability on the same facts?[117]

Professor Bailey never identifies the serious objections which arise if a plaintiff is able to succeed in trespass in circumstances where his action in negligence would have failed. It is difficult to imagine what these objections could be. Concurrence has been a feature of English law almost from the beginning and the tendency in recent years has been to expand rather than narrow the areas in which it is permitted.[118] In cases of pure economic loss, for example, modern plaintiffs regularly claim remedies for breach of contract, breach of fiduciary duty and negligence on a given set of facts.[119] The cumulation of alternative grounds for interference with property interests is perfectly commonplace.[120] Where the plaintiff relies on overlapping grounds of recovery, the courts have generally allowed the plaintiff to succeed on the basis that is most advantageous to him. No doubt there are contexts in which this approach creates problems. Security of contracts comes readily to mind. Absent such considerations, however, the following justification for concurrence is to my mind unanswerable. Where any of the overlapping grounds for recovery relied on by a plaintiff is found to apply to the facts he has proven, then he has made out a cause of action and is entitled to the associated remedy. That the facts on which he relies would not warrant recovery under some alternative theory or would entitle him to a different and less

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[116] The possibility of concurrence in trespass and negligence was established in *Williams* v. *Holland* (1833), 10 Bing 112, 131 E.R. 848 (C.P.).

[117] Bailey, *supra*, note 3 at 415.

[118] *See Central Trust Co.* v. *Rafuse* (1986), [1986] 2 S.C.R. 147, 31 D.L.R. (4d) 481.

[119] *See, e.g., Carl B. Potter Ltd.* v. *Mercantile Bank of Canada* (1980), [1980] 2 S.C.R. 343, 112 D.L.R. (3d) 88; *Luckiw Holdings (1980) Ltd.* v. *Murphy* (1984), 60 Alta. R. 1, 35 Alta. L.R. (2d) 352 (Q.B.).

[120] *See, e.g., Miller* v. *Jackson* (1977), [1977] Q.B. 966 at 972, [1977] 3 All E.R. 338 (C.A.).

beneficial remedy should be irrelevant. The only relevant issue is whether the cause of action he has in fact made out and on which he seeks to rely is a just one. If so, the plaintiff should have his remedy without further ado.

B. The Failure to be Modern

The Canadian law of trespass disappoints modern expectations in a number of ways, but the essence of the criticism here is that it imposes liability on a basis other than fault. It thus permits strict or near strict liability and undermines the modern classification of torts according to type of fault. This criticism of the Candian approach is damning only if one accepts one or more of the assumptions on which it is based: first, that the traditional law of trespass is the product of historical accident and cannot be explained or justified in a principled way; second, that tort law should strive to be simple and elegant and in order to accomplish this goal should avoid overlapping or alternative principles; third, that fault is the preferred (if not the only) basis on which to ground liability in tort.

I have tried to show that these assumptions are not tenable. Far from being anomalous, the traditional law of trespass is based on the principle that each person is by right an autonomous individual, that interference with the person of another is a violation of this right and that violations of the rights of others, if not justified or excused, must be compensated. Although recognition of this principle as a source of liability admittedly complicates the law of tort, it also enriches it. After all, the range of ways in which persons relate to one another in modern life is neither simple nor elegant. The law which purports to bring justice to this range of relationships must be sufficiently subtle and flexible to achieve its goal. The idea that non-intentional, non- negligent interference with the rights of others may be a wrong that warrants compensation has explanatory power in so far as it accounts for and justifies the characteristic features of traditional trespass, including the availability of "vindication damages" and treating absence of fault as an excuse. Apart from this, the idea also serves as a basis on which the courts may develop new causes of action in their effort to respond to novel claims for justice, both at common law[121] and under the *Charter*. In a sense, by anticipating the rights-based theory of recovery embodied in subsection 24(1) of the *Charter*, the Canadian law of trespass was not obsolete but ahead of its time.

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[121] The emerging tort of privacy is a good example. *See Saccone* v. *Orr* (1981), 34 O.R. (2d) 317, 19 C.C.L.T. 37 (Co. Ct.).

C. *Direct Versus Indirect Interference*

Yet another criticism of the Canadian law of trespass is directed at the way in which trespass is distinguished from negligence. This was the focus of Lord Denning's judgment in *Letang* v. *Cooper*, where His Lordship, after poking fun at the foolish contortions of the old law, announced that nowadays we distinguish between intentionally and negligently inflicted damage.[122] The distinction between direct and indirect interference, Lord Denning implies, is both irrational and unduly technical.[123]

Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant.[124] In the paradigm case the defendant hits the plaintiff with his hand. In such a case the connection between the defendant's act and the interference is felt to be immediate because of the proximity in time and space and the absence of competing causal factors. To the extent interference with the plaintiff approximates this paradigm, it is direct. The burden of proving directness, of course, rests with the plaintiff. If this burden is not discharged, the action cannot succeed in trespass even though it may succeed in negligence or possibly under the rule in *Rylands* v. *Fletcher*.[125] Under this approach, it will be noted, the court is not obliged to classify every interference with the person as direct or indirect; its only task is to judge whether the plaintiff has demonstrated a sufficiently direct connection between the defendant's act and the injury to warrant treatment as a trespass. Where the court is not convinced, the plaintiff will have to make out his case on some other basis. From a technical point of view, then, the directness rule is neither unintelligible nor unduly difficult to apply. The more difficult question is whether there is any reason to give special treatment to directly inflicted harms.

In my view, where the injury complained of is an immediate consequence of the defendant's act, it is intuitively sound to require compensation from the defendant unless he offers a defence. In cases of direct interference, the relationship between the defendant's will, his decision to act, and the injury to the plaintiff is both simple and clear; there are no competing causal factors to obscure the defendant's role or dilute his factual responsibility. The question of his moral and legal responsibility is thus posed with unusual sharpness: as between the defendant who caused the injury and the plaintiff who received it, other things being equal, who shall pay? If we as a society are serious about the right to life, liberty and security of the person that we have enshrined in our Constitution, this question should not be difficult to answer. Once the plaintiff has shown that his right to personal autonomy has been violated by the defendant, *prima facie* the defendant should pay.

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[122] *See supra*, note 7.

[123] *See also* Burns, *supra*, note 2 at 732.

[124] *See Scott* v. *Shepherd* (1773), 2 Black. W. 892, 96 E.R. 525, [1558-1774] All E.R. Rep. 295 (C.P); *Leame* v. *Bray* (1803) 3 East 573, 102 E.R. 724 (K.B.).

[125] *Supra*, note 78.

Another reason to give special treatment to directly inflicted injury is mentioned by Mr. Justice Linden in *Bell Canada* v. *Cope (Sarnia) Ltd.*[126] After noting the many attacks on the Canadian law of trespass by judges and scholars, he writes:

> The trespass action still performs several functions, one of its most important being a mechanism for shifting the onus of proof of whether there has been intentional or negligent wrongdoing to the defendant, rather than requiring the plaintiff to prove fault. The trespass action, though perhaps somewhat anomalous, may thus help to smoke out evidence possessed by defendants, who cause direct injuries to plaintiffs, which should assist Courts to obtain a fuller picture of the facts, a most worthwhile objective.[127]

In cases of direct interference, the defendant is likely to know how and why the interference occurred. This contrasts with cases where the interference is the ultimate result of a complex sequence of events. As Mr. Justice Linden suggests, if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him.

Finally, it is appropriate to treat direct interference differently, and more strictly, because cases of direct inteference tend to produce high "demoralization costs". This term refers to the psychological costs of wrongful transactions — the resentment and insecurity that victims, and those who identify with the victims, feel if the wrong is not compensated.[128] These costs increase in direct proportion to the victim's sense that he deserves compensation and that it would be unjust not to make the defendant pay. Demoralization costs are thus a rough measure of the public's sense of corrective justice. A.I. Ogus notes a number of factors which tend to increase these costs: a close causal relationship between the defendant's conduct and the victim's injury, a close identification of the loss with the victim's personality and freedom, the infliction of loss in isolated or arbitrary circumstances (as opposed to systematic or widely spread loss), a perception that the defendant's conduct was anti-social, and finally, a perception that the defendant derived a financial benefit from which compensation might be paid.[129] With the exception of the last, these factors tend to be present in cases of direct interference.

VI. Apportionment in Trespass

In his attack on the Canadian law of trespass, Mr. Sharp alleges that Canadian law is unfair to defendants because it precludes raising the

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[126] *Supra*, note 53.

[127] *Ibid.* at 180.

[128] *See* F.I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv. L. Rev. 1165 at 1214.

[129] *See* A.I. Ogus, *Do We Have a General Theory of Compensation?* (1984) 37 Curr. Legal Probs. 29 at 39ff.

defence of contributory negligence.[130] If true, this criticism would be difficult to answer. In recent years, however, the courts have been moving in the opposite direction, toward permitting the apportionment of damages in an ever wider range of circumstances. In the context of trespass, where the interference for which the plaintiff seeks compensation is due in part to the plaintiff's own fault, an apportionment of damages may be effected by the courts in one of two ways — under the common law doctrine of provocation or pursuant to provincial apportionment legislation.

The impulse to apportion damages is probably best understood in terms of fairness among the parties. If the harm for which compensation is sought is the result of wrongful conduct on the part of two or more persons, it would be unfair to single out just one of them to bear the entire loss. If like cases are to be treated alike, as the principle of fairness requires, then damages must be apportioned among everyone whose wrongful conduct contributed to the loss. This principle, I would suggest, underlies and justifies not only the apportionment legislation that has been introduced in most common law jurisdictions, but also the common law doctrine of provocation. Where the principle applies, the effect is to create a partial defence in the nature of an excuse.

At first glance this analysis appears to be inconsistent with well established authority. One frequently reads, for example, that provocation is not a defence although contributory negligence is. Provocation does not reduce compensatory damages but contributory negligence does. These shibboleths have tended to obscure the essential similarity between the two forms of apportionment; in both, the court is invited to examine the conduct of the plaintiff and to conclude, not that the defendant's conduct was justified by what the plaintiff did, but rather that there is a moral equivalence between the plaintiff's conduct and the defendant's. It is this equivalence which renders unequal treatment of the two unfair. Since both have contributed to the loss in comparable ways, both should pay.

A. Provocation

Provocation consists of conduct on the part of a plaintiff which would tend to make a reasonable person in the position of the defendant lose control and act as the defendant has done.[131] Until quite recently, Canadian courts treated provocation as a mitigating factor which entitled the defendant to have the size of the plaintiff's damages reduced. Upon proof of provocation, a court would not only decline to award punitive damages, but would also refuse to compensate the plaintiff for a portion

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[130] *See* Sharp, *supra*, note 1 at 318-21, 326.

[131] *See Miska* v. *Sivec* (1959), [1959] O.R. 144 at 149, 18 D.L.R. (2d) 363 at 368 (C.A.).

of the damage he actually suffered.[132] Clearly, on this approach, there is no conceptual or practical difference between provocation on the one hand and contributory negligence on the other. Conceptually the plaintiff who behaves provocatively foresees, or should foresee, that his conduct invites some form of aggressive response from the defendant. By indulging in the conduct anyway, he fails to take reasonable care for his own safety and so contributes to the harm of which he subsequently complains. The law responds by reducing his damages, which in practice is the same as apportioning the loss.

In 1962 the High Court of Australia challenged the traditional Canadian view of provocation by holding, in *Fontin* v. *Katapodis*,[133] that provocation may be relied on to reduce punitive or exemplary damages, but not compensatory damages. As often noted, the Court in *Fontin* v. *Katapodis* was a particularly strong one. The judgment itself, however, is not impressive. Owen J., with whom Dixon C.J. concurred, relied entirely on precedent and offered no reasons for his view.[134] McTiernan J. pointed out that if compensatory damages were reduced on account of provocation, this would place damages for trespass on the same footing as damages for injury caused by negligence.[135] He did not say why this would be undesirable. *Prima facie* the principle of fair distribution applies, and should apply, whenever damage is caused by equivalent conduct on the part of two or more persons. In *Fontin* v. *Katapodis* the damage was intentionally inflicted and it may be the Court assumed that apportionment in such a case could never be just because the defendant's fault would always dwarf the plaintiff's. If so, its assumption was inappropriate. Whether the plaintiff's own contribution to his injury was sufficiently important to justify apportionment depends on the facts of the case. The plaintiff's conduct must be compared to the defendant's in order to judge the degree of equivalence. This is a task for the trier of fact; it should not be decided in advance by a rule.

Fontin v. *Katapodis* has been followed by the Courts of Appeal of England, Manitoba and Ontario.[136] However, in both countries, initial approval of the Australian approach has given way to doubt and re-

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[132] *See, e.g., Griggs* v. *Southside Hotel Ltd.* (1946), [1946] 4 D.L.R. 73, [1946] O.W.N. 576 (H.C.), *aff'd* (1946), [1947] O.R. 674, [1947] 4 D.L.R. 49 (C.A.); *Hartlen* v. *Chaddock* (1957), 11 D.L.R. (2d) 705 (N.S.S.C.); *Agar* v. *Canning* (1965), 54 W.W.R. 302 (Man. Q.B.), *aff'd* (1966), 55 W.W.R. 384 (Man. C.A.); *Fillipowich* v. *Nahachewsky* (1969), 3 D.L.R. (3d) 544 (Sask. Q.B.).

[133] (1962), 108 C.L.R. 177, 36 A.L.J.R. 283 (H.C.).

[134] *Ibid.* at 187, 36 A.L.J.R. at 286.

[135] *Ibid.* at 184, 36 A.L.J.R. at 285.

[136] *See Lane* v. *Holloway* (1967), [1968] 1 Q.B. 379, [1967] 3 All E.R. 129 (C.A.); *Check* v. *Andrews Hotel Co.* (1974), 56 D.L.R. (3d) 364, [1975] 4 W.W.R. 370 (Man. C.A.); *Shaw* v. *Gorter* (1977), 16 O.R. (2d) 19, 77 D.L.R. (3d) 50 (C.A.); *Landry* v. *Patterson* (1978), 22 O.R. (2d) 335, 93 D.L.R. (3d) 345 (C.A.). *See also Reeves* v. *Pollard* (1977), 10 Alta. R. 349 (S.C.T.D.).

assessment.[137] In *Murphy* v. *Culhane*, for example, the English Court of Appeal recently ruled that any conduct by a plaintiff which "can fairly be regarded as partly responsible for the damage" should be taken into account to reduce damages, including compensatory damages.[138] This is totally inconsistent with the Australian position. In Canada, the courts of the common law provinces remain divided. As the Ontario Court of Appeal observed in its last judgment on provocation, this is yet another issue for the Supreme Court of Canada. It is hoped that in addressing this issue the Court will draw attention to the underlying principle of fairness on which the doctrine of provocation is based, and will encourage its development as a tool for ensuring the fair apportionment of loss in a fashion that parallels the modern law of contributory negligence.

B. Contributory Negligence

At common law, proof of the plaintiff's failure to use ordinary care to avoid the harm for which he seeks compensation affords the defendant a complete defence.[139] In the common law provinces, this rule has been displaced by legislation designed to apportion damages in cases where the plaintiff has been contributorily negligent. It is thus a question of statutory construction whether contributory negligence is available to defendants in a trespass action.[140]

In Canada, seven provinces have enacted legislation in the following terms:

> Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is [or shall be] in proportion to the degree in which each person was at fault. . . .[141]

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[137] *See Mason* v. *Sears* (1979), 31 N.S.R. (2d) 521, 52 A.P.R. 521 (Co. Ct.); *Rouleau* v. *Rex Drive-In Theatre (1972) Ltd.* (1981), 16 C.C.L.T. 218 (B.C. Co. Ct.); *Holt* v. *Verbruggen* (1981), 20 C.C.L.T. 29 (B.C.S.C.); *Long* v. *Gardner* (1983), 144 D.L.R. (3d) 73 (Ont. H.C.); *Gillen* v. *Noel* (1984), 50 N.B.R. (2d) 379, 131 A.P.R. 379 (Q.B.T.D.); *Coote* v. *Antonenko* (1986), 46 Sask. R. 165 (Q.B.). For academic comment, *see* P.H. Osborne, *Annotation* (1981), 20 C.C.L.T. 29 at 34-35; L.N. Klar, *Recent Developments in Canadian Law: Tort Law* (1985) 17 OTTAWA L. REV. 325 at 336-38; *compare* Crocker, *supra*, note 2 at 184-85.

[138] *Murphy* v. *Culhane* (1976), [1976] 3 All E.R. 533 at 535 (C.A.).

[139] *Butterfield* v. *Forrester* (1809), 11 East 60, 103 E.R. 926, 10 R.R. 433 (K.B.).

[140] Since the apportionment legislation in England, Australia and New Zealand is significantly different in its terms from that enacted in Canada, the law in those jurisdictions will not be considered here.

[141] *See Contributory Negligence Act*, R.S.A. 1980, c. C-23, s. 1(1); *Negligence Act*, R.S.B.C. 1979, c. 298, s. 1; *Contributory Negligence Act*, R.S.N.B. 1973, c. C-19, s. 1(1); *Contributory Negligence Act*, R.S.N.S. 1967, c. 54, s. 1(1); *The Contributory Negligence Act*, R.S.N. 1970, c. 61, s. 2; *Contributory Negligence Act*, S.P.E.I. 1978, c. 3, s. 1(1); *The Contributory Negligence Act*, R.S.S. 1978, c. C-31, s. 2(1).

Ontario's legislation provides:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.[142]

Manitoba's is the only provincial statute that refers to negligence alone. It provides:

> Contributory negligence by a plaintiff is not a bar to the recovery of damages by him and in any action for damages that is founded upon the negligence of the defendant, if negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of negligence found against the plaintiff and defendant respectively.[143]

Given the wording of these provincial enactments, the key question here is the meaning of the word "fault". Does "fault" refer to any conduct which the law regards as a fault for the purpose of recovery in a tort action? Or does it refer only to conduct which the law regards as negligent?

Until recently, the leading case on the construction of provincial apportionment legislation was *Hollebone* v. *Barnard*,[144] a judgment of Wells J. on the effect of the Ontario statute. Wells J. points out that shortly after the Ontario statute was enacted, the question of its true construction came before Mr. Justice Riddell who adopted a somewhat peculiar reading. Riddell J. held that the sole purpose of the legislation was to remedy the defective common law rule which gave defendants a complete defence upon proof that the plaintiff's negligence contributed to his injury.[145] He therefore ruled that the legislation did not apply unless at common law the plaintiff would have lost on account of his contributory negligence:

> I think . . . that the statute was intended to apply only when the finding of contributory negligence was of importance, and not to apply to cases in which the real cause of the accident was the ultimate negligence of the defendant; or, to put it in still other words, I think the statute was intended in ease of the plaintiff who was found guilty of contributory negligence, and not of the defendant.[146]

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[142] *Negligence Act*, R.S.O. 1980, c. 315, s. 4.

[143] *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1970, c. T90, s. 4(1), C.C.S.M. T90, s. 4(1).

[144] (1954), [1954] O.R. 236, [1954] 2 D.L.R. 278 (H.C.).

[145] *See Walker* v. *Forbes* (1925), [1925] 2 D.L.R. 725, 56 O.L.R. 532 (S.C.); *Farber* v. *Toronto Transp. Comm'n* (1925), [1925] 2 D.L.R. 729, 56 O.L.R. 537 (S.C.); *Mondor* v. *Luchini* (1925), [1925] 2 D.L.R. 746, 56 O.L.R. 576 (S.C.).

[146] *Mondor* v. *Luchini*, *ibid.* at 747, 56 O.L.R. at 577. His other judgments make the same point: *see Walker* v. *Forbes*, *ibid.* at 727, 56 O.L.R. at 535; *Farber* v. *Toronto Transp. Comm'n*, *ibid.* at 731-32, 56 O.L.R. at 540.

It will be noted that Riddell J. (as he then was) says nothing of the meaning of "fault" or "negligence" in this passage. His point is not that the Act is limited to actions framed in negligence, but rather that the Act is limited to factual situations in which the contributory negligence of the plaintiff would have been regarded at common law as a supervening cause. On the basis of this reasoning, Wells J. concludes that Ontario's Act applies only if the action is one to which contributory negligence was formerly a defence. Since contributory negligence was formerly not a defence to trespass, the Ontario Act cannot apply to actions framed in trespass. It follows that the words "fault or negligence", despite appearances, refer to negligence alone.[147]

There are two things wrong with this conclusion. First, it assumes that contributory negligence was not a defence to trespass at common law. This assumption, though widely held, appears to be false. According to Lord Ellenborough in *Knapp* v. *Salsbury*, in an action in trespass, "if what happened arose from inevitable accident, or from the negligence of the plaintiff, . . . the defendant is not liable. . . ."[148] Lord Ellenborough took it for granted that the defence was available in trespass. The point is acknowledged by Glanville Williams, who attempts to avoid it, however, by suggesting that the defence was limited to cases of negligent, as opposed to intentional, trespass.[149] This suggestion is not plausible for prior to the mid-nineteenth century the distinction between negligent and intentional interference was not legally significant.[150] At common law, then, as stated in *Knapp* v. *Salsbury*, contributory negligence is a complete defence to trespass whether the interference complained of is intentional or inadvertent. Thus, even if one were to accept Mr. Justice Riddell's reading of Ontario's *Negligence Act*, this would not exclude its application to actions framed in trespass.

In fact, Mr. Justice Riddell's reading of the Ontario Act appears to have been quietly abandoned. Modern courts take it for granted that the purpose of apportionment legislation is not simply to shield plaintiffs from an unfortunate common law rule, but to provide a fair apportionment of the damages in factual situations where both parties through their fault have contributed to the damage. Its application is no longer limited to cases where the plaintiff's negligence would have given the defendant a defence at common law. Given this understanding of the legislature's purpose, the courts should experience no difficulty in construing "fault" in its broadest sense to refer to any conduct which the law treats as a

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[147] *Hollebone* v. *Barnard*, *supra*, note 144 at 245, [1954] 2 D.L.R. at 286.

[148] (1810), 2 Camp. 500 at 501, 170 E.R. 1231 at 1231 (K.B.). Lord Ellenborough might have cited *Weaver* v. *Ward*, *supra*, note 96, as authority for this proposition, for one of the illustrations of excuse offered by the Court in that case featured a plaintiff who ran across the path of the bullet fired from the defendant's gun. This appears to be an example of contributory fault.

[149] *See* G.L. Williams, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE (London: Stevens & Sons, 1951) at 318 n.3.

[150] *See Holmes*, *supra*, note 71 at 107 n.1 (*Holmes* v. *Mather*).

fault for the purpose of recovery in tort. This construction has already been approved by some courts.[151] In *Bell Canada* v. *Cope (Sarnia) Ltd.*, Linden J. offered the following interpretation of Ontario's Act:

> Fault and negligence, as these words are used in the statute, are not the same thing. Fault certainly includes negligence, but it is much broader than that. Fault incorporates all intentional wrongdoing, as well as other types of substandard conduct.[152]

This judgment was affirmed by the Ontario Court of Appeal.[153]

If this definition of fault is correct, the statutory defence of contributory negligence is clearly available to defendants in a trespass action in all common law provinces except Ontario and Manitoba. In those provinces, the wording of the Act is problematic. Ontario's Act, we have seen, applies to actions "founded upon" the fault or negligence of the defendant, while Manitoba's is limited to actions "founded upon" negligence. While the damage in a successful trespass action may be said to be caused by the defendant's fault, arguably, the action itself is not "founded upon" that fault, but upon the defendant's direct interference with the plaintiff.[154] This problem is readily resolved, however, through sensible construction of the relevant terms. "Founded upon" is not a legal term of art and the words "action founded upon the defendant's fault" can be taken to refer to any action in which the fault of the defendant is relevant in determining his liability, either as an element of the plaintiff's cause of action or as a defence. In Manitoba, this construction would help only in cases of negligent trespass. However, where the trespass is intentional, the same result may be achieved by applying the common law doctrine of provocation. In one fashion or another, then, it appears that in trespass, no less than in negligence, the defendant who shows that the plaintiff's own fault contributed to the damage is entitled to apportionment.

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[151] *See, e.g., Teece* v. *Honeybourn*, *supra*, note 55 at 560, [1974] 5 W.W.R. at 604; *Verbrugge* v. *Bush*, *supra*, note 52. For discussion, *see* L.N. Klar, *Annotation* (1978), 4 C.C.L.T. 155; Crocker, *supra*, note 2 at 178ff.

[152] *Supra*, note 53 at 180. Although Linden J. takes care to distinguish *Hollebone* v. *Barnard*, *supra*, note 144, by pointing out that the plaintiff's claim in that case was based exclusively on trespass, whereas in *Bell Canada* v. *Cope (Sarnia) Ltd.* it was based on both negligence and trespass, this nod to precedent belies the iconoclastic character of the judgment. Linden J. also points out that he is not bound by the earlier case and in any event it was wrongly decided.

[153] *Ibid.*

[154] Linden J. avoids this problem in *Bell Canada* v. *Cope (Sarnia) Ltd.*, *ibid.* at 180, by asserting that "the gist of the trespass action today is fault; if it can be established by the defendant that there was no negligence and no intentional interference then the action will fail because no fault exists. Consequently, trespass is based on fault . . . ". With respect, this analysis incorrectly treats fault as an element of trespass rather than a defence.

VII. CONCLUSION

As the law currently stands in Canada, a plaintiff who proves that he was directly interfered with by the defendant in one of the recognized ways makes out a case in trespass.[155] The burden is then on the defendant to allege and prove his defence, which may take the form of a justification, an excuse or a defence under the statute of limitations. Justifications for trespass to the person include consent,[156] self-defence,[157] defence of others,[158] discipline[159] and legal authority.[160] Excuses include absence of fault,[161] necessity,[162] *ex turpi causa*[163] and lack of capacity due to mental illness[164] or infancy.[165] Although the matter is controversial, one may also list contributory negligence and provocation as forms of excuse.[166] Finally, there is the statute of limitations defence. In England and Australia, historically, the limitation period for trespass has been longer than for actions framed in negligence.[167] In Canada, however, the reverse is true.

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[155] There are two exceptions to this rule. If the interference occurs while the plaintiff is using a highway or receiving medical care pursuant to a consent that was obtained through inadequate disclosure of risks, an action in trespass will not lie and the plaintiff must sue in negligence. With respect to the highway exception, *see* Holmes, *supra*, note 71. With respect to failure to make adequate disclosure of the risks of an invasive medical procedure, *see Reibl* v. *Hughes* (1980), [1980] 2 S.C.R. 880, 14 C.C.L.T. 1.

[156] *See Collins* v. *Wilcock*, *supra*, note 14 at 1177-78, [1984] 3 All E.R. at 378; *Wilson* v. *Pringle*, *supra*, note 35 at 8-11, [1986] 2 All E.R. at 446- 48. For discussion, *see* M. Hertz, *Volenti Non Fit Injuria: A Guide* in L. Klar, ed., STUDIES IN CANADIAN TORT LAW (Toronto: Butterworths, 1977) 101.

[157] *See, e.g.*, *Wackett* v. *Calder* (1965), 51 D.L.R. (2d) 598 (B.C.C.A.); *Bruce* v. *Dyer* (1966), [1966] 2 O.R. 705, 58 D.L.R. (2d) 211 (H.C.), *aff'd* (1969), [1970] 1 O.R. 482, 8 D.L.R. (3d) 592 (C.A.).

[158] *See Roundall* v. *Brodie* (1972), 7 N.B.R. (2d) 486 (S.C.); *Gambriell* v. *Caparelli* (1974), 7 O.R. (2d) 205, 54 D.L.R. (3d) 661 (Co. Ct.).

[159] *See Murdock* v. *Richards* (1953), [1954] 1 D.L.R. 766 (N.S.S.C.).

[160] *See Moore* v. *Slater* (1979), 101 D.L.R. (3d) 176 (B.C.S.C.); *Banyasz* v. *K-Mart Canada Ltd.* (1986), 57 O.R. (2d) 445, 33 D.L.R. (4th) 474 (H.C.). It is arguable that self-defence, defence of others and discipline are simply illustrations of the defence of legal authority.

[161] *See supra*, Part IV.

[162] *See Rigby* v. *Chief Constable of Northamptonshire* (1985), [1985] 1 W.L.R. 1242, [1985] 2 All E.R. 985 (Q.B.).

[163] *See Dolson* v. *Hughes* (1979), 17 B.C.L.R. 350, 107 D.L.R. (3d) 343 (S.C.).

[164] *See Squittieri* v. *deSantis* (1976), 15 O.R. (2d) 416, 75 D.L.R. (3d) 629 (H.C.).

[165] *See Tillander* v. *Gosselin*, *supra*, note 52.

[166] *See supra*, Part VI.

[167] *See, e.g.*, the *Law Reform (Limitation of Actions, &c.) Act, 1954* (U.K.), 2 & 3 Eliz. 2, c. 36, s. 2(1), at issue in *Letang* v. *Cooper*, *supra*, note 7 and the *Limitation of Actions Act, 1936-1975*, S.A.S. 1837-1975, ss. 35- 36 at issue in *Williams* v. *Milotin*, *supra*, note 43.

In the four provinces where the period differs depending on whether the plaintiff's action is in trespass or in negligence, the period is shorter for trespass.[168]

Apart from this exception, trespass is generally a better action for plaintiffs than an action in negligence. The chief advantage for the plaintiff, of course, is that the burden of disproving fault lies with the defendant. This burden will prove more or less onerous depending on how fault, or more particularly how negligence, is defined. Although Canadian courts have generally assumed that negligence always means a failure to take reasonable care, it is at least arguable that negligence in the context of a trespass action means a failure to take the greatest care possible in the circumstances.

A further advantage of trespass, from the point of view of the plaintiff, lies in its greater liberality in the assessment of damages. The courts have often said that the defendant who commits a trespass becomes an insurer for all the damage that ensues, whether foreseeable or not.[169] In addition, certain types of general damage, such as loss of time, inconvenience or emotional distress are more readily recoverable in trespass than in negligence.[170] Finally, in trespass the courts are prepared to award substantial damages for the purpose of vindication, even if the plaintiff has suffered no material loss.[171]The chief virtue of the Canadian law of trespass is the recognition it gives to the individual's right to be in control of his person and access to his person. Negligence is inadequate for this purpose for it is concerned with only one aspect of autonomy, namely physical security, and in negligence the plaintiff's right to physical security is sacrificed to the goals of the defendant where these have been reasonably pursued. Trespass, on the other hand, acknowledges the person inside the physical shell. It does this by making interference with the plaintiff a question of right, and further, by insisting that the plaintiff's right is paramount. In this way it complements the *Charter* and offers a suitable model for developing a remedy in damages for *Charter* violations, particularly violations of section 7. It also provides a model for developing new common law protections for aspects of autonomy that are imperfectly

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[168] *See Limitations Act*, R.S.O. 1980, c. 240, ss. 45(1)(g), (j); *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, ss. 4, 9; *The Statute of Limitations*, R.S.N.S. 1967, c. 168, ss. 2(1)(a), (e); *The Limitation of Actions (Personal) and Guarantees Act*, R.S.N. 1970, c. 206, s. 2.

[169] *See, e.g., Bettel* v. *Yim* (1978), 20 O.R. (2d) 617, 88 D.L.R. (3d) 543 (Co. Ct.); *Mahal* v. *Young* (1986), 36 C.C.L.T. 143 (B.C.S.C.).

[170] This is particularly true for actions brought in false imprisonment. *See, e.g., Campbell* v. *S.S. Kresge Co.* (1976), 21 N.S.R. (2d) 236, 74 D.L.R. (3d) 717 (S.C.T.D.), where Hart J. awarded damages of $500 for "upset" and "personal inconvenience". It is doubtful that the plaintiff would have recovered had the action been framed in negligence. For discussion, *see* A.J. Harding & T.K. Feng, *Negligent False Imprisonment - A Problem in the Law of Trespass* (1980) 22 MAYALA L. REV. 29.

[171] *Supra*, notes 86-87.

protected under current law. In short, trespass offers the individual an inviolable area within which he alone may act as agent. In a crowded world this area may be small, but within it the individual's claim to autonomy receives the recognition that it deserves.