

2008

Victorian Tort Liability for Workplace Injuries

Michael Ashley Stein

Repository Citation

Stein, Michael Ashley, "Victorian Tort Liability for Workplace Injuries" (2008). *Faculty Publications*. 106.
<https://scholarship.law.wm.edu/facpubs/106>

Copyright c 2008 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

VICTORIAN TORT LIABILITY FOR WORKPLACE INJURIES

Michael Ashley Stein*

The first decision of an injured worker suing his master for a workplace accident was reported in 1837, the year of Queen Victoria's ascension. The second Workman's Compensation Act, a comprehensive social insurance scheme, was passed in 1900, a few months before her death. The Article provides an initial account of the development of employers' liability to their servants for work-related injuries during the Victorian era. It demonstrates that English judges, and especially the Barons of the Exchequer, interpreted the law to resist employers' liability. The means these judges used included creating the defence of common employment, widely applying the doctrines of assumption of the risk and contributory negligence, quashing nearly every innovative attempt to create law favourable to labourers, and avoiding House of Lords precedent that supported a limited form of liability. The Article argues that the dominant influence of political economy as an intellectual schema provides the most complete account of why Victorian judges acted in this manner. It also demonstrates that the three leading rationales for the parallel development of American tort law (judicial restraint, the invisible hand hypothesis, and the subsidy theory) fall short as explanations. By setting forth the first comprehensive treatment of the evolution of English employer/employee liability, the Article provides a comparative perspective into the debate over the development of American tort law, and challenges its reinterpretation. The considerable weaknesses of the traditional historical explanations for the development of tort law when applied to the English context suggest that they may not be as

* Professor, William & Mary School of Law; Executive Director, Harvard Project on Disability. Many thanks to Charles Donohue, Mary Dudziak, Richard Epstein, George Fisher, Lawrence Friedman, T.P. Gallanis, Alex Geisinger, John Goldberg, Robert Gordon, Christopher Guzelian, Morton Horwitz, Helen Irving, David Lieberman, Kenneth Mack, William Nelson, David Seipp, Daniel Sharfstein, Jed Shugerman, and Brian Simpson for their comments. I benefited from presenting this Article at Boston University, Harvard, and New York University workshops, as well as the 18th British Legal History Conference. Rare book collections staff at the British Library and Cambridge University Library provided valuable assistance. My initial research was funded by a W.M. Tapp Studentship from Gonville & Caius College, Cambridge University; a Harvard Law School Mark DeWolfe Howe grant enabled me to complete remaining archival work. I am grateful to both institutions for their generous support.

strong for the American context. The Article demonstrates that historical inquiries are important for understanding novel applications of traditional legal doctrines to rapidly changing technological circumstances. Many of the same dilemmas faced by English judges in the aftermath of the Industrial Revolution are being reprised for contemporary American jurists. Understanding how a previous generation of judges approached similar jurisprudential quandaries, as well as what motivated their decisions, lends insight to modern-day struggles with these dilemmas.

"And was Jerusalem builded here, among these dark Satanic Mills?"¹

INTRODUCTION†

Seeking support for passage of the 1847 Ten Hours Bill, a measure to reduce the workday of women and children factory workers, trade union leaders arrived unannounced at the home of the foreign secretary, Lord Palmerston. Nonplussed, Palmerston remonstrated that such legislation surely was unnecessary. The lot of factory workers, he was certain, had improved immeasurably since the advent of machinery "which does all the work." In response, the labourers pushed together a pair of large lounge chairs and invited his Lordship to push them around the drawing room. Thoroughly winded after managing only a few circumlocutions, and then only with the aid of his footman, Palmerston was informed that children in factories were expected to handle much the same load daily for thirty miles. Taken aback, the foreign secretary ardently championed the legislation.²

The change in Lord Palmerston's outlook was unusual. With rare exception, privileged British gentlemen, including those sitting the judicial bench, had even less practical insight or empathy into the condition of the working classes and saw the world through their own social lenses.³ They adhered rigorously to notions of political economy, the intellectual milieu that dominated the Victorian elite's worldview. Central to this schema, as inspired by Adam Smith's classical economic theories, was a fervent belief in the absolute ability of individuals to determine their own employment terms in the benevolent conditions of a thriving *laissez-faire*

1. WILLIAM BLAKE, *Milton: A Poem in Two Books* (1804), reprinted in *THE COMPLETE POETRY AND PROSE OF WILLIAM BLAKE* 95 (David V. Erdman ed., Univ. of Cal. Press 1982).

† Victorian-era cases throughout this Article are cited to their original reporters. Although all quotes are taken from the original reporters, where cases appear in substantially similar form in English Reports, a parallel cite to English Reports is provided. Finally, English spelling conventions are followed throughout.—Ed.

2. JASPER GODWIN RIDLEY, *LORD PALMERSTON* 293–94 (1970). Palmerston also favoured less progressive ideas; for instance, he was strongly nostalgic for the days when Naval discipline included flogging. *Id.* at 49–52.

3. I do not wish to overstate the point. Labour had its sympathisers, among who numbered social reformers like the philanthropist Lord Ashley and the progressive mill owner Robert Owen. However, these individuals were few, far between, and rarely blue-blooded. Two judicial exceptions are set forth, *infra* Part II.B.2.

market where contract was sacrosanct. By logical extension, political economy also condoned replacing home-based charitable relief with degrading workhouses as an incentive to cure poverty, and embracing Thomas Malthus's dour determination that starvation was the inevitable and appropriate consequence of overpopulation. That practical application of these beliefs adversely affected the most socially and economically vulnerable members of society was either unknown or beside the point: individuals were solely responsible for their own fate.

Victorian notions of political economy in relation to workers were nicely summed up in a letter published by the redoubtable Baron Bramwell. Having held steadfastly to *laissez-faire* principles for more than half a century, Lord Bramwell railed openly against what he held to be the abominable creation of limited workers' rights through promulgation of the 1880 *Employer's Liability Act*: "No one could doubt that the dangers of an employment are taken into account in its wages," he wrote with complete assurance; moreover, creating liability for workplace injuries engendered by fellow servants was so "contrary to principle, unjust, unreasonable," that he "cannot suppose anything so outrageous."⁴ Rather, it would be far better "to make servants liable to their masters for the damage caused" through their negligence.⁵

It was against this tide of intellectual, social, and judicial belief that injured workmen or their survivors sought to establish employer/employee liability over the course of Victoria's reign.⁶ The first reported decision of an injured servant suing his master for a workplace accident was announced in 1837, the year of the Queen's ascension; the second *Workman's Compensation Act*, which provided comprehensive social insurance for occupational harm, was passed in 1900, a few months before her death. Between those two events, and inspired by their deep belief in political economy, English judges doggedly resisted the enlargement of employers' liability.

This Article sets forth an initial analysis of the development of master/servant tort duty for work-related injuries during Queen Victoria's reign.⁷ It demonstrates how English judges, and especially the Barons of the Exchequer, interpreted the law to prevent employers' liability from emerging. The means used to preclude the growth of accountability included creating the defence of common employment, widely applying the doctrine *volenti non fit injuria* (also called assumption of the risk), eschew-

4. GEORGE WILLIAM WILSHER (BARON) BRAMWELL, EMPLOYERS' LIABILITY: LETTER FROM LORD JUSTICE BRAMWELL TO SIR HENRY JACKSON 11, 16, 13 (1880).

5. *Id.*

6. With rare exception, actions were brought by, or on behalf of, injured or deceased male employees. Accordingly, the pervasive use of the male gender pronoun in this Article is intended to point out that sexist aspect of Victorian society, and especially the legal convention that only men had standing to assert claims.

7. An earlier examination of legislative responses is P.W.J. BARTRIP & S.B. BURMAN, THE WOUNDED SOLDIERS OF INDUSTRY: INDUSTRIAL COMPENSATION POLICY 1833-1897 (1983).

ing innovative attempts to extend existing duties to workers, and avoiding House of Lords precedent that supported limited liability.

The Article argues that Victorian judges acted this way because of the dominant influence of political economy as an intellectual schema. It also demonstrates that the three leading rationales for the parallel development of American tort law supplement our knowledge, but have significant shortcomings. Judicial restraint, the notion that judges only apply existing precedent, cannot explain why jurists proactively created defences to bar workers claims. The invisible hand hypothesis, which asserts that the common law evolves towards economically efficient rules, lacks empirical support and is contrary to existing evidence. The subsidy theory, which claims that the judiciary transformed compensation rules to nurture nascent industries, arrives too late in the English industrial cycle and flies in the face of extensive liability judges fostered against railways. By setting forth the first comprehensive treatment of the evolution of English employer/employee liability, the Article provides a comparative perspective into the debate over the development of American tort law and challenges its reinterpretation. The considerable weaknesses of the traditional historical explanations for the development of tort law when applied to the English context suggest that they may not be as strong for the American context.

The account presented in this Article also has implications beyond the immediate subject of Victorian tort law. Historical inquiries are essential for fully understanding novel applications of traditional legal doctrines to changing circumstances. Their necessity is evidenced by the revolution in negligence doctrine brought about by the California Supreme Court from 1950 to 1980⁸ on the ground that the ancient common-law rules were “contrary to our modern social mores and humanitarian values.”⁹ More trenchantly, many of the same dilemmas faced by English judges in the aftermath of the Industrial Revolution are being reprised for contemporary American jurists. The question of how or whether to apply long-standing doctrines developed in an earlier age to rapidly emerging technological innovations challenges our legal system on an almost daily basis. For example, recurring issues drawn from only the Anglo-American common law of property include: what intellectual or real prop-

8. See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975) (disposing of contributory negligence in favour of comparative negligence); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (jettisoning the three traditional categories of occupiers' liability and adopting a general duty of reasonable care). For opposing views on whether such an overt shift in jurisprudence was warranted, compare Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 (2006), with John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329 (2006).

9. *Rowland*, 443 P.2d. at 568; *id.* at 567 (“Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society.”).

erty rights, if any, ought to extend to technological innovations,¹⁰ information,¹¹ creative works,¹² and genetic materials?;¹³ is trespass in cyberspace actionable as a trespass to chattel?;¹⁴ and is the worldwide web even a place?¹⁵ Understanding how a previous generation of judges approached similar jurisprudential quandaries, as well as what motivated their decisions, lends insight to modern-day struggles with these dilemmas. Finally, as a collective intellectual biography of a homogeneous judiciary, the Article raises questions about the diversity of contemporary judges and legal institutions.¹⁶

The Article proceeds as follows. By way of background, Part I describes pre-Victorian duties owed by employers to strangers and to their own servants. Part II sets forth the doctrinal defences that precluded employers' liability and demonstrates that each was a judicial creation that negated the claims of injured workmen. Expanding on this assertion, Part III shows how English judges annulled resourceful attempts by plaintiffs, and even a pair of sympathetic judges, to establish limited workplace liability. Finally, Part IV argues that the influence of political economy selectively applied through a class-based perspective is the most plausible explanation for why nineteenth-century judges acted in the manner described in Parts II–III. It reveals that the three leading rationales for the parallel development of American tort law (judicial restraint, the invisible hand hypothesis, and the subsidy theory) provide insight into the course of the events depicted, but are flawed.

I. PRE-VICTORIAN EMPLOYERS' LIABILITY

As a prelude to discussing judicial hostility to the development of employers' liability in Parts II and III, this Part examines the extent of masters' pre-Victorian duties. Section A provides a brief exegesis of the independent tort of negligence, which by and large was restricted to status-based categories until a notable pair of cases were handed down in 1837. Next,

10. See John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439 (2004).

11. See Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783 (2007).

12. See Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257 (2006).

13. See Donna M. Gitter, *International Conflicts Over Patenting Human DNA Sequences in the United States and the European Union: An Argument for Compulsory Licensing and a Fair-Use Exception*, 76 N.Y.U. L. REV. 1623 (2001).

14. For a powerful (but rejected) affirmative view of this question, see Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73 (2003).

15. The question arises in several contexts, one of which is whether the Internet is a place of public accommodation under the Americans with Disabilities Act. See PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* §§ 31–32 (2004).

16. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005); see also DAVID B. WILKINS, *THE BLACK BAR: THE LEGACY OF BROWN V. BOARD OF EDUCATION AND THE FUTURE OF RACE AND THE AMERICAN LEGAL PROFESSION* (2007); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2004) (responding to Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004)).

Section B sets forth the scope of masters' vicarious liability to third parties for injuries caused by their servants, a duty which was limited to acts committed by servants in the ordinary course of employment. Finally, Section C briefly summarises the customary terms of employment governing master/servant relations, and demonstrates that employers were not generally required to furnish medical attendance to their incapacitated workers.

A. *General Duties of Negligence*

Although liability for inadvertence can be traced back to the Year Books, negligence as an independent tort is an essentially Victorian phenomenon. Traditionally, inadvertent injury gave rise to civil liability for the violation of five distinct types of duty, each of which involved an undertaking that equated the individual's status with attendant care obligations.¹⁷ Consequently, whether a farrier was imprudent or sadistic when improperly shoeing a horse was irrelevant; the point was that the plaintiff had taken his horse to the blacksmith and that it had not been shod properly.¹⁸

Pre-Victorian actions clearly grounded in negligence are sparse, a fact that is largely attributable to the governing procedural forms of action. Since these prescribed the means for asserting tort claims, the number of cases expressly asserting negligence as the underlying cause of action was reduced to a small handful.¹⁹ In addition, if defendants did manage to raise the issue of fault, they did so before a jury, after having first pleaded the "general issue" by averring simply that they were "not guilty."²⁰ Moreover, whatever explanations these defendants might have offered at trial were not recorded.²¹ The result is that legal historians largely concluded that prior to the nineteenth century negligence was not actionable *per se*.²² A more accurate statement is that negligence was not actionable *per se* as a

17. These duties emanated from: (1) a public calling such as an innkeeper or common carrier, (2) a public office (e.g., a sheriff), (3) a bailment, (4) a prescription or custom, and (5) the control of dangerous things, such as unruly animals. See Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 44-48 (1934).

18. The most comprehensive historical treatment of doctrinal negligence is by Professor Sir John Baker who notes that traces of negligence as an independent tort can be seen as far back as the fourteenth century. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 403 n.10 (4th ed. 2002) (citing fourteenth-century Plea Roll cases).

19. Specifically, if a plaintiff was injured by an intentional harm he would sue in trespass. If the harm was unintentional, then assumpsit was available when the injury was caused by a prior relationship between the parties, for example if the defendant was a common carrier. Barring such a relationship, the plaintiff could sue only because of the indirect nature of the injury. See BAKER, *supra* note 18, at 406-09.

20. *Id.* at 403.

21. The procedural explanation for the scarcity of "true" negligence actions can be attributed to the venerable S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 283-313 (2d ed. 1981).

22. A classic example is Winfield's understated description of pre-nineteenth-century negligence as a "skein of threads" yielding "little more than a bundle of frayed ends." Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 LAW Q. REV. 184, 185 (1926).

matter of formulaic pleading, but that the remedy nonetheless existed, albeit in an unknown quantity, both by inference and in practice.²³

Then, because modern transportation harmed increasingly large numbers of legally unrelated individuals, negligence evolved from having been almost exclusively a method for committing recognised torts into its own independent tort.²⁴ In this evolution, "the year 1837 marked a turning point,"²⁵ with the cases of *Vaughan v. Menlove*²⁶ and *Langridge v. Levy*.²⁷ These judgments extended the scope of cognisable liability arising from either the five pre-industrial type duties or through contractual agreement by espousing a more general negligence-based duty of care.²⁸ Nonetheless, Baron Parke explicitly rejected the broad type of duty sought by the latter plaintiff on the ground that it could lead to an "indefinite extent of liability."²⁹

Parke's apprehension that clever counsel would seize upon *Langridge* as a precedent for attempting to expand tort liability was soon proven prophetic. So, too, his call for the refutation of these ventures. When duty-based claims were asserted on behalf of injured or deceased workmen, resistance by English judges, and in particular by his fellow Barons of the Exchequer, would prove staunch.

B. From Masters to Third Parties

The principle that masters could be held vicariously liable for the acts of their servants owes a large debt to Chief Justice Holt. In a trio of cases handed down at the end of the seventeenth century, Lord Holt ruled masters responsible for the negligence of their employees in spoiling goods in transit, failing to convey goods safely, and spreading fire.³⁰ Precedent existed for employers' liability in the first two instances as arising from the established duties of carriers, but the last situation was novel.³¹ This expan-

23. See BAKER, *supra* note 18, at 410-11.

24. See generally M.J. Prichard, *Trespass, Case and the Rule in Williams v. Holland*, 1964 CAMBRIDGE L.J. 234 (explaining that negligence actions become prominent due to running down cases, rather than industrial accidents).

25. See Winfield, *supra* note 17, at 51.

26. (1873) 3 Bing. 468, 173 Eng. Rep. 232.

27. (1873) 2 M. & W. 519, 150 Eng. Rep. 863.

28. In *Vaughan* the plaintiff was awarded damages against his neighbor who he alleged had "wrongfully, negligently, and improperly" kept a haystack that spontaneously combusted in contravention of his "duty." *Vaughan*, 3 Bing. at 468, 173 Eng. Rep. at 232. Acknowledging that this was a case of first impression, the Court of Common Pleas upheld the trial court upon the sweeping principle that everyone has a duty to use their land so as not to injure others. *Id.* *Langridge* involved injuries arising from the sale of a defective firearm under a false pretence. *Langridge*, 2 M. & W. at 519, 150 Eng. Rep. at 863. Affirming the jury award, the Court of Exchequer ruled that an implied duty was created where none had previously existed because the defendant had falsely misrepresented the gun's safety. *Id.* at 530, 150 Eng. Rep. at 868-69.

29. *Langridge* 2 M. & W. at 530, 150 Eng. Rep. at 868.

30. Respectively, *Boson v. Sandford*, (1691) 2 Salk. 440, 91 Eng. Rep. 382; *Middleton v. Fowler*, (1699) 1 Salk. 82, 91 Eng. Rep. 247; *Tuberville v. Stamp*, (1698) 1 Raym. Ld. 264, 92 Eng. Rep. 671.

31. See generally G.F. JONES, A TREATISE OF THE LAW CONCERNING THE LIABILITIES AND RIGHTS OF COMMON CARRIERS 1-27 (London, Joseph Butterworth & Son 1827).

sion of masters' vicarious liability to strangers for their servants' harms was recapitulated in a trio of *nisi prius* cases (meaning, trials held before juries at local Assizes) in which Holt presided.³²

Lord Holt's innovative notion of employers' vicarious liability became sufficiently entrenched in mainstream legal thought by the time of William Blackstone for the great commentator to state with confidence that if a servant "by his negligence does any damage to a stranger, the master shall answer for his neglect."³³ What remained to be clarified, and often at the hands of Baron Parke, was defining the limits of this doctrine. Specifically, to hold employers responsible for their workers' actions, courts had first to determine if the person employed stood in the legal relationship of a servant to the defendant. These cases frequently involved construction conducted under the growing use of subcontracting relationships.³⁴ Once it was determined that the negligent actors stood in the position of servants to the named defendants, most reported decisions upheld liability by stating without further elaboration the proposition that masters were responsible for injuries to strangers caused by their servants' negligence.³⁵ Conversely, if negligent workmen were shown to exercise an independent calling, plaintiffs were barred from recovering vicariously against employers because these workmen, as nonservants, were not considered to have acted under a master's control.³⁶ Nevertheless, in 1840, Baron Parke lessened the significance of these latter rulings by holding that the violation of duty therein arose not from a master/servant relationship but instead from a property holder's duty to "take care that his property is used or managed, that other persons are not injured."³⁷

Establishing culpability was more difficult when intricate fact situations compelled courts to parse out whether the unskilled actions of servants arose within the "ordinary course of employment," thus casting responsibility upon those servants' masters. The majority of these actions involved driving-related incidents alleging specific acts of carelessness, including servants not traversing the safest route, incorrectly letting off pas-

32. See *Hern v. Nichols*, (1708) 1 Salk. 289, Eng. Rep. 256 (holding a merchant civilly answerable for the deceit of his overseas factor in the sale of silk); *Jones v. Hart*, (1697) 1 Raym. Ld. 738, 91 Eng. Rep. 382 (declaring a pawnbroker accountable for his servant's loss of an entrusted item); *Anon.*, (1701) 1 Raym. Ld. 739, 91 Eng. Rep. 1394 (finding a master culpable for both personal and material injuries caused by the reckless driving of his servant).

33. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 431 (Dublin, John Exshaw et al. eds., 1769).

34. Perhaps the best-known case of the time is *Bush v. Steinman*, (1799) 1 Bos. & Pul. 404, 126 Eng. Rep. 978, wherein Chief Justice Eyre extended liability up a distant chain of command on the ground that the defendant was the person "from whom the authority flows, and for whose benefit the work is carried on." *Id.* at 404, 126 Eng. Rep. at 981.

35. See, e.g., *Hern*, 1 Salk. at 289, 91 Eng. Rep. at 256; *Jones*, 1 Raym. Ld. at 738, 91 Eng. Rep. at 382; *Anon.*, 1 Raym. Ld. at 739, 91 Eng. Rep. at 1394.

36. See generally ROWLAND JAY BROWNE, A PRACTICAL TREATISE ON ACTIONS AT LAW 178-79 (London, H. Bitterworth 1843).

37. *Quarman v. Burnett*, (1840) 6 M. & W. 499, 151 Eng. Rep. 509, 514.

sengers, and improperly utilising their masters' horses.³⁸ As with the determination of the chain of command between masters and servants, Baron Parke once more played a crucial role by introducing the criterion of a servant being "on a frolic of his own" as a counterbalance to the by-then common standard for liability, in the "course of employment."³⁹

Paralleling and influencing the development of substantive vicarious liability law was the sorting out of procedural niceties involved in bringing suit against masters for their workers' careless actions. At issue was whether running-down actions against a master should be initiated through a writ of trespass or by way of an action on the case. Traditionally, courts held that direct injuries required the former and indirect harm the latter.⁴⁰ This dichotomy thrust the escalating number of running-down accident victims into a procedural quandary that was not resolved until 1833, when *Williams v. Holland* restricted trespass actions to the narrow field of wilful conduct resulting in immediate harm.⁴¹ In 1849, Baron Parke applied this procedural rule in a pair of trespass suits brought against employers for inadvertent harms caused by their servants in the course of employment.⁴² Employers were not liable for intentional or unlawful acts conducted by employees on their own initiative, but were responsible when either instigating or ratifying such conduct, or when the actions were performed for their benefit, however injudiciously.⁴³

By the beginning of the Victorian era, it was clear that employers could be held vicariously liable for the inattentive acts their servants committed against third parties in the ordinary course of employment. An issue

38. In *Dudley v. Smith*, (1808) 1 Camp. 107, 107 Eng. Rep. 915, 916, for instance, a stagecoach driver instructed his passenger to hold onto the outside of the vehicle while he pulled up closer to an inn. Passing under a low archway, the plaintiff struck her head and was injured. *Id.*

39. *Joel v. Morrison*, (1834) 6 Car. & P. 502, 172 Eng. Rep. 1338, 1339.

40. See generally MILSOM, *supra* note 21, at 283-313.

41. See *Williams v. Holland* (1833) 10 Bing. 112, 131 Eng. Rep. 848. Briefly, because plaintiffs were unable to join trespass and case actions due to their conceptual differences, they bore a significant risk that recovery would be precluded through an unprecipitous choice of writ. Injuries resulting from the defendant's driving were considered direct, necessitating a trespass action. Accidents arising from the servant's driving were not viewed as immediate, and thus had to be framed in case. Once one or the other form of action had been chosen by the plaintiff, crafty defence counsel could move for dismissal, averring after demurrer that it was really the unnamed master or servant who had been driving. Prichard, *supra* note 24, at 241.

42. See, e.g., *Sharrod v. London & Nw. Ry. Co.*, (1849) 4 Ex. 580, 154 Eng. Rep. 1345 (involving a railway company servant who ran over cattle in spite of direction to drive slowly); *Gordon v. Rolt*, (1849) 4 Ex. 365, 154 Eng. Rep. 1253 (allowing a claim against a master on account of his workers' accidental breaking of the plaintiff's crane).

43. Compare *Bowcher v. Noidstrom*, (1809) 1 Taunt. 568, 127 Eng. Rep. 954 (exculpating a master/owner for his servants' wilful injury to another ship in the absence of an overt direction to cause harm), with *Lewis v. Read*, (1845) 13 M. & W. 834, 153 Eng. Rep. 350 (ruling a master responsible for his bailee's illegal distraint), and *Huzzey v. Field*, (1836) 1 M. & W. 506, 150 Eng. Rep. 186, 186 (holding a boat's master responsible for his servant's wrongly receiving a ferry charge because, even absent an express command, he was "acting at the time in the course of his master's service and for his master's benefit"). Meagre judicial treatment of this topic may be explained by a combination of two factors. First, the relatively straightforward nature of the *vi et armis* procedure for alleging direct harm caused by the servant made it clear that vicarious liability would not ensue. Second, barring exceptional circumstances courts thought it unseemly to hold masters responsible for deliberate injuries inflicted by their workers.

that had not yet been broached, but which would both occupy judicial attention and engage considerable resistance for the remainder of the nineteenth century, was whether a master's vicarious liability extended to servants injuring other servants.

C. *From Masters to Their Servants*

Historically, the scope of masters' obligations to their servants was contractual. Whether oral, written, or implied, the terms of agreement were established by custom and enforced through the common law. Employment was typically for a year, commanded all available working hours, and was unaffected when illness or accident prevented a labourer from rendering her services.⁴⁴

The law was equally settled that masters were not responsible for furnishing medical treatment to their ailing servants unless they themselves solicited or acquiesced in the care provided.⁴⁵ Responsibility for medical care traditionally fell upon parishes through the aegis of the Old (meaning, pre-1834) Poor Law, which "was the principal legal provision for the victims of serious accidents at work" until the advent of reforming legislation near the end of the nineteenth century.⁴⁶ A servant who became ill during the course of her yearly service remained in her master's parish and was provided with medical attention if she was otherwise eligible for settlement (i.e., legal residence) in that parish. When a servant fell ill or was injured outside her settlement, the parish where the worker had become "casually" indisposed was under an obligation to provide medical care until she was "removed" to her own parish.⁴⁷

In theory, the New Poor Law did not change the provision of medical relief to the destitute.⁴⁸ In reality, the amended legislation brought in its wake newly economical methods for relieving the impoverished.⁴⁹ These included pooling parish medical providers, a corresponding reduction in

44. M. DALTON, *THE COUNTRY JUSTICE* 85 (London, John Mori 5th ed. 1635), a popular practical manual for justices of the peace, stated that in the event a yearly servant "be hurt or lamed, or otherwise" incapable of work, "the master must not therefore put such servant away, nor abate any part of his wages for such time."

45. A trio of cases formally developed these propositions: *Cooper v. Phillips*, (1831) 4 Car. & P. 581, 172 Eng. Rep. 834; *Sellen v. Norman*, (1829) 4 Car. & P. 80, 172 Eng. Rep. 616; and *Wennall v. Adney*, (1802) 3 Bos. & Pul. 248, 127 Eng. Rep. 137.

46. A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 117 (1995).

47. This was because simply falling ill in a parish did not confer settlement in that parish. *R. v. Inhabitants of Titchfield*, (1757) 2 Burr. S.C. 511, 512. Once burdened with casual patients, parishes immediately sought out orders of removal which permitted the overseers to return the healed paupers—frequently accompanied by bloated bills for their medical care—to their original parishes. The extent to which overseers went in removing paupers from their parishes was limited only by their ingenuity or ethics. In *R. v. Seward*, (1834) 1 Ad. & E. 706, 110 Eng. Rep. 1377, for instance, Isle of Ely overseers conspired to remove a casual indigent by marrying her off to a pauper from another parish.

48. Poor Law Amendment Act, 1834, 4 & 5 Will. IV, c. 76.

49. P.W.J. BARTRIP, *MIRROR OF MEDICINE: A HISTORY OF THE BRITISH MEDICAL JOURNAL* 51–55 (1990) ("Poor Law medicine was relatively generous and effective before the 1834 amendment." Afterwards, it was not.).

the total annual expenses allocated by parishes on medical assistance, offering paupers loans in lieu of medical assistance, and decreases in individual physicians' salaries.⁵⁰ Perhaps most parsimonious was the requirement that local Board of Guardians approve ministrations to casual accident victims in advance.⁵¹ Because this latter constraint precluded what was in essence an injured labourer's only legally recognised remedy for occupational harm, the absence of Poor Law relief in ensuing years would give rise to incapacitated labourers seeking redress in Her Majesty's courts.⁵²

The manner in which counsel framed the declarations of injured workers, and the concerted resistance that these assertions encountered at the hands of English judges, is discussed next, in Parts II–III.

II. THE EVOLUTION OF THE DOCTRINE OF COMMON EMPLOYMENT, 1837–1880

In a trio of decisions, the Court of Exchequer foreshadowed and then created the doctrine of common employment. At the same time, the Exchequer acknowledged that masters might be held liable for accidents that they themselves brought about. Overlapping with these rulings was a series of House of Lords appeals from Scottish courts, which affirmed employers' accountability for personally bringing about harm and then firmly cemented the defence of common employment onto the British legal landscape. Following the last of these decisions, English courts increasingly widened the scope of workers considered fellow servants and barred from recovering vicariously against common masters. Two short-lived juridical attempts to carve out a limited exception from common employment were similarly defeated.

A. *The Origins of the Doctrine of Common Employment, 1837–1858*

The Court of Exchequer invented the doctrine of common employment. Although the Barons offered a narrow and circumscribed exception to a complete disavowal of employer's liability, one that was echoed by the House of Lords when reviewing cases appealed from the Scottish courts, both the Exchequer and the Law Peers staunchly and broadly supported the common-law defence.

50. It was the latter that was most bitterly resented by members of the medical profession. See, e.g., *Report of the Select Committee of the House of Commons on the Poor Law Amendment Act*, 30 LANCET 760–63 (1838) (reporting that the President of the British Medical Association had “lost his situation at Dulwich because he would not belong to a medical club”); *Report of the Council of the British Medical Association on the Present State of the Poor-Law Question*, 30 LANCET 750–51 (1838) (objecting that “the salaries offered to medical officers were miserably insufficient to enable them to do justice to themselves”).

51. See SIMPSON, *supra* note 46, at 124.

52. Credit for noting this connection is due entirely to SIMPSON, *supra* note 46, at 127.

1. *The Court of Exchequer*

In the year of Victoria's ascension, *Priestley v. Fowler* became the first recorded decision of a servant suing his employer for work-related injuries.⁵³ Although the case is best understood as an unsuccessful attempt to fashion a general duty of care on behalf of masters towards their servants,⁵⁴ the *ratio* of the decision laid the groundwork for the doctrine of common employment that was later produced in the companion cases *Hutchinson v. York, Newcastle & Berwick Railway Co.* and *Wigmore v. Jay*.⁵⁵

Priestley involved the claims of Charles Priestley against his master Thomas Fowler for injuries sustained in a wagon accident conducting mutton to market.⁵⁶ The van was driven by fellow employee William Beeton and apparently was overladen, because Beeton protested to Fowler "he ought to be ashamed of himself for sending such a dangerous load."⁵⁷ The butcher responded by calling Beeton "a damned fool for saying anything of the sort."⁵⁸ Priestley observed the exchange, but held his peace.⁵⁹ Some hours after this ominous start, Beeton and Priestley heard a cracking noise. An inspection of the wagon revealed nothing amiss and so they continued onward. About a mile later the van's front axle broke and the vehicle overturned. Beeton escaped harm, but Priestley was buried under a mountain of mutton, suffering serious injuries. Lying "in a very precarious state," Priestley was taken to an inn where he remained for nearly five months, attended by two surgeons. His care cost a considerable £50.⁶⁰

Priestley sued Fowler at the next Lincoln Summer Assizes for compensation relating to his accident.⁶¹ Serjeant Edward Goulburn and Mr. Nathaniel Clarke represented Priestley; Serjeant John Adams and Mr. An-

53. (1837) M. & H. 305, 150 Eng. Rep. 1030; cf. EDWIN HODDER, 1 THE LIFE AND WORK OF THE SEVENTH EARL OF SHAFTSBURY, K.G. 301, 347 (1889) (detailing the results of two previous but unreported actions sponsored by the philanthropic Earl of Shaftsbury).

54. Michael Ashley Stein, *Priestley v. Fowler (1837) and the Emerging Tort of Negligence*, 44 B.C. L. REV. 689 (2003).

55. (1850) 5 Ex. 343, 155 Eng. Rep. 150; (1850) 5 Ex. 354, 155 Eng. Rep. 155.

56. The most insightful (and humorous) account is by the irrepressible SIMPSON, *supra* note 46, at 100-34.

57. LINCOLNSHIRE CHRON. & GEN. ADVERTISER, Jan. 24, 1837.

58. *Id.*

59. *Id.*

60. SIMPSON, *supra* note 46, at 101; Stein, *supra* note 54, at 693.

61. As a minor, the younger Priestley sued via his father, Brown Priestley. The only viable claim available to Charles Priestley was a suit in negligence, whether against Fowler directly or vicariously through a fellow employee. As a pauper casually injured in Peterborough, Priestley had no recourse against his presumed parish of settlement, Market Deeping. At the same time, having undertaken payment of his son's medical bills "voluntarily" (meaning, without either a promise of repayment from an overseer or prior approval of such expenses by the medical union's Board of Governors), Brown Priestley lacked grounds for legal redress against the Peterborough overseers. The same could be said for Charles Priestley, even if he paid the bill with funds borrowed from his father. Nor was redress available from Fowler through the established master/servant relationship, for this did not encompass a right to medical attendance in the absence of an express agreement. Consequently, suing Fowler in negligence was the Priestleys' only hope for recompense.

drew Amos acted on behalf of Fowler.⁶² Goulburn declared that Fowler had breached his duty "to use due and proper care" to ensure Priestley's safe conveyance by overloading the van.⁶³ No allegation was made as to any act, omission, or duty by anyone in Fowler's employ.⁶⁴ Serjeant Adams maintained that Fowler could not be held liable as a master because there was "no such case in the books,"⁶⁵ and emphasised Priestley's complicity in continuing to travel after witnessing Beeton's protest and also hearing the axle crack.⁶⁶ Justice Park opined "the defendant is liable" and instructed the jury to concur if "the accident was occasioned by the 'pigheadedness' of the defendant" in making "the van shamelessly overladen."⁶⁷ Charles Priestley was awarded a sizeable £100, but Serjeant Adams obtained a rule to arrest judgment (i.e., vitiate the award) on the ground "that there was nothing in the declaration to throw any liability on the master."⁶⁸

Arguing before the Court of Exchequer, Serjeant Goulburn acknowledged that the suit was "a case of the first impression" but nevertheless viable because the master/servant relationship was similar to established pre-industrial undertakings in which duty bound the parties' actions.⁶⁹ Because Priestley was hurt while riding on a van, Serjeant Goulburn likened his position to that of "an ordinary coach passenger."⁷⁰ Lord Abinger deflected this analogy by noting that a servant could inspect the vehicle in which he was to be conveyed, whereas a passenger could not.⁷¹ Goulburn cleverly spun the Chief Baron's rebuke by asserting that the master/servant contractual relationship was equivalent to that of a coach and passenger: the servant paid consideration with his labour, and the master was in turn duty bound "not to expose him to risk in performing these services."⁷² Because the jury had found for the plaintiff, Goulburn insisted that two inferences had to be drawn: that "it was the master's duty to provide a proper vehicle," and that "the master knew the van was overloaded."⁷³ At no point during the repartee did either Serjeant Goulburn or the Exchequer Barons touch on the likelihood of Priestley's injury originating from the oversight of a fel-

62. No evidence exists of how such expensive legal talent was retained, although Simpson surmises that a contingency fee may have been arranged. See SIMPSON, *supra* note 46, at 102. This begs the question of how Fowler, as a defendant unable to proceed under a contingency fee, could have afforded his counsel and raises the conjecture that those costs contributed to his subsequent bankruptcy. See *Priestley*, (1837) M. & H. 305, 3 Eng. Rep. 1030.

63. *Priestley*, (1837) M. & H. at 305, 3 Eng. Rep. at 1031.

64. See *id.* Goulburn also played to the jury's sympathy, remonstrating the unprincipled behaviour of the "very opulent tradesman" who had "driven this poor lad into court." LINCOLNSHIRE CHRON. AND GEN. ADVERTISER, *supra* note 59.

65. LINCOLNSHIRE CHRON. & GEN. ADVERTISER, July 22, 1836.

66. *Id.*

67. *Id.*

68. Fowler also moved for a new trial, but this part of the rule was abandoned with his bankruptcy. *Priestley*, (1837) M. & H. at 305, 3 Eng. Rep. at 1033.

69. *Id.* at 305, 3 Eng. Rep. at 1031.

70. *Id.* at 305-06, 3 Eng. Rep. at 1031.

71. See *id.*

72. *Id.* at 306, 3 Eng. Rep. at 1031.

73. *Id.*

low servant.⁷⁴ In response, Serjeant Adams proclaimed that “there is nothing in the declaration which shews that this was anything more than a mere accident; and for a mere accident which happens in a master’s service, the master is not responsible.”⁷⁵ As with the arguments presented by Goulburn, defence counsel never raised the prospect of avoiding liability due to the intervening act of a fellow servant.

The Court of Exchequer reserved judgment, with the Chief Baron presenting a rambling opinion some ten months later. The only issue to be decided was narrow and clear: whether “the mere relation of master and servant” implied a general common-law duty “on the part of the master, to cause the servant to be safely and securely carried.”⁷⁶ Lacking “precedent for the present action,” Lord Abinger agreed that they were at “liberty to look at the consequences of a decision the one way or the other.”⁷⁷ But “general principles” dictated that there not be legal culpability in this circumstance, for then “liability will be found to carry us to an alarming extent.”⁷⁸

Even more distressing was the prospect that the case’s rationale could be extended further, for instance, holding a master “liable to the servant, for the negligence of the chambermaid, in putting him into a damp bed.”⁷⁹ Because the consequences of such an extension would engender both “inconvenience” and “absurdity,” general principles of political economy provided “a sufficient argument” against liability.⁸⁰ While the master/servant relationship properly bound the master to directly “provide for the safety of his servant . . . to the best of his judgment, information, and belief,” it could “never” imply a general duty “to take more care of the servant than he may reasonably be expected to do of himself.”⁸¹

Moreover, the servant was an independent actor who was “not bound to risk his safety in the service of his master.”⁸² In the face of danger, he was free to “decline any service in which he reasonably apprehend[ed] injury to himself.”⁸³ Servants, the Chief Baron emphasised, were in as good, if not better positions, than their masters to appreciate possible hazards.⁸⁴ He concluded with a policy argument against liability, reasoning that it “would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master.”⁸⁵ In

74. See T. BEVEN, *PRINCIPLES OF THE LAW OF NEGLIGENCE* 372 (1889) (“In any view, the legal relationship of fellow-servants as affecting their employer is not raised, since the case does not even suggest that the defendant had another servant than the plaintiff.”).

75. *Priestley*, (1837) M. & H. at 306, 3 Eng. Rep. at 1031.

76. *Id.* at 307, 3 Eng. Rep. at 1032.

77. *Id.*

78. *Id.* at 308, 3 Eng. Rep. at 1032.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*, 3 Eng. Rep. at 1033.

84. See *id.*

85. *Id.*

other words, the Exchequer Barons clearly foresaw that permitting Priestley to recover against Fowler in this novel action would open the floodgates to vicarious liability, entitling servants injured by their peers to recover against their common masters.

Thirteen years passed between the Court of Exchequer's rulings in *Priestley* and those in *Hutchinson* and *Wigmore* where the defence of common employment was born "naked and unashamed."⁸⁶ *Hutchinson* was an action brought by a railway labourer's widow.⁸⁷ Her counsel asserted that *Priestley* was "[t]he only reported case being on point," and stood solely for the proposition that employers were not responsible for injuries that servants could prevent by using "common prudence and caution."⁸⁸ When, as here, a labourer had been killed when the carriage in which he was conveyed collided with another of the defendant's railroad cars, "why should a servant be without remedy in cases where a stranger may sue?"⁸⁹ Defence counsel responded that, unlike a passenger, a servant "virtually undertakes all ordinary risks" incident to his service.⁹⁰ Without citing any legal basis, he also proffered that "it is difficult to see why a master should be responsible for the acts of his servants."⁹¹ Following Baron Parke's suggestion, the Exchequer delayed announcing their decision so that the related appeal in *Wigmore* could be determined at the same time.⁹² *Wigmore* involved the death of a bricklayer in a scaffolding collapse.⁹³ It was determined at trial that defendant's foreman knowingly erected the structure with an unsound ledger pole.⁹⁴ However, Chief Baron Pollock agreed with defence counsel that an action could not be maintained on the ground that the defendant had not personally supervised construction.⁹⁵

86. A. BIRRELL, *FOUR LECTURES ON THE LAW OF EMPLOYERS' LIABILITY AT HOME AND ABROAD* 27 (1897); see also A.H. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950*, at 288 (1980) (noting that it was *Hutchinson* that "really established the rule"). Two events require parenthetical notation. First, the Assize case, *Armsworth v. South Eastern Railway* (1848) 11 Jur. 758, involved commonly employed servants but was nonetheless permitted by Baron Parke to proceed. This adds to the evidence that *Priestley* did not originate the defence of common employment. See Stein, *supra* note 54, *passim*. Second, that a year before *Priestley* American state courts developed a doctrine called the "fellow servant rule." For the clearest expression of this principle, see *Farwell v. Boston & Worcester Railroad Corp.*, 45 Mass. (4 Met.) 49 (1842).

87. The case was brought under the Fatal Accidents Act (Lord Campbell's Act), which is discussed in greater detail *infra* Part III.B. *Hutchinson* was brought on a special demurrer, meaning that the case was not tried at the Assize level, but brought directly to the Court of Exchequer.

88. *Hutchinson v. York, Newcastle & Berwick Ry. Co.*, (1850) 5 Ex. 343, 346-47, 155 Eng. Rep. 150, 152.

89. *Id.*

90. *Id.* at 348, 155 Eng. Rep. at 153.

91. *Id.*

92. Baron Parke's suggestion appears only in the Law Journal report. See (1850) 19 L.J.Ex 296. Regrettably, the *Wigmore* Assize decision went unreported.

93. *Wigmore v. Jay*, (1850) 5 Ex. 354, 155 Eng. Rep. 155. *Wigmore* was likewise a Fatal Accidents Act claim.

94. *Id.* at 354-56, 155 Eng. Rep. at 156.

95. See *id.*

After a six-month recess, Baron Alderson delivered opinion in *Hutchinson* that, although the actual ruling in *Priestley* was narrow, the cases were “undistinguishable in principle.”⁹⁶ Without supporting evidence or case law, Baron Alderson declared that workers naturally assumed the risks of their employment as part of their service contracts. Accordingly, Lord Abinger’s dictum that “a master is not in general liable to one servant for the damage resulting from the negligence of another” was laid down as a controlling rule of law.⁹⁷ The only possible exception was when a master personally hired an incompetent fellow worker.⁹⁸ Since that instance had not been proven at trial, widow Hutchinson’s claim was denied.⁹⁹ The Court of Exchequer therefore converted *Priestley*’s dictum into the doctrine of common employment—a legal defence that had not previously existed.

Widow Wigmore’s claim, in spite of the cleverness of her counsel, met with much the same result as did that of Mrs. Hutchinson. Arguing for a new trial before the Court of Exchequer, Mr. Watson attempted to avoid any obstruction created by *Priestley* by asserting that the duty alleged in *Priestley* “was similar to that of a common carrier,” and thus inapplicable to a case involving a bricklayer and his supervising foreman.¹⁰⁰ He further maintained that his client’s claim was grounded in “a duty that arises out of the contract of service” not to use faulty equipment, rather than in a master’s general duty.¹⁰¹ Chief Baron Pollock was unswayed that his own reasoning when presiding at trial was incorrect, and equated Mrs. Wigmore’s claim with those principles “laid down” in *Priestley* and just affirmed in *Hutchinson*; namely, that although never raised (or even in existence), the defence of common employment limited a master’s liability to his servant to instances involving his personal, rather than vicarious actions.¹⁰² Since the plaintiff had not proven the defendant’s foreman either deficient in skill or improperly employed, her motion was denied.¹⁰³

Priestley thus stood at a crossroads of liability that the Barons of the Exchequer took pains to block. Although the decision itself went only to the possibility of a master’s direct liability for creating harms that servants could not anticipate (and thus avoid) as a routine part of their service, the Court of Exchequer expanded upon Lord Abinger’s far-reaching dictum to erect common employment as a defence to vicarious employers liability in *Hutchinson* and *Wigmore*.

96. *Hutchinson*, 5 Ex. at 349, 155 Eng. Rep. at 153.

97. *Id.* at 350, 155 Eng. Rep. at 153.

98. *Id.*

99. *See id.* at 349–53, 155 Eng. Rep. at 153–55.

100. *Wigmore*, 5 Ex. 357, 155 Eng. Rep. at 156.

101. *See id.*

102. *Id.* at 357–58, 155 Eng. Rep. at 156–57.

103. *See id.* at 358, 155 Eng. Rep. at 157.

2. *The House of Lords*

Following on the Exchequer decisions in *Hutchinson* and *Wigmore*, three cases were appealed from the Scottish Court of Session to the House of Lords. In *Paterson v. Wallace & Co.*, and in *Brydon v. Stewart*, the Law Peers held masters responsible for harms they personally caused.¹⁰⁴ The consolidated cases of *Bartonshill Coal v. Reid and McGuire* exculpated masters for the neglectful actions of fellow servants by reinforcing the defence of common employment¹⁰⁵ and in so doing extended the doctrine's reach north of the Tweed. The agreement among these judges is hardly coincidental. The author of the *Paterson*, *Brydon*, and *Bartonshill Coal* (v. *Reid*) opinions was Lord Chancellor Cranworth who, as Baron Rolfe, had participated in *Hutchinson*.¹⁰⁶ Conferring in both *Bartonshill Coal* decisions was Lord Wensleydale, formerly Baron Parke, who had contributed to *Priestley*, *Hutchinson*, and *Wigmore*.¹⁰⁷

What is illuminating about *Paterson* and *Brydon* are the very brief statements of controlling law as to master/servant liability. In *Paterson*, Lord Cranworth held that a master "is bound to take all reasonable precautions for the safety" of his workers and is under a "duty" not to induce a servant into thinking that the conditions are safe if he "knows, or ought to know" otherwise.¹⁰⁸ Injuries caused by the negligence of a fellow servant (under English law) or by the rashness of the deceased plaintiff (under both English and Scottish law) were not, however, actionable.¹⁰⁹ The Lord Chancellor similarly, but briefly, held in *Brydon* that masters were responsible for injuries that they themselves brought about.¹¹⁰

If the small window of liability for harms personally caused by masters in *Paterson* and *Brydon* left any doubt that the House of Lords supported the doctrine of common employment, *Bartonshill Coal* irrefutably confirmed the defence. On appeal from the Scottish Court of Session, *Reid* was argued over the course of three days before Lord Chancellor Cranworth sitting as the sole Law Peer.¹¹¹ Seeking to overturn defendant's liability, Solicitor-General Bethell averred that *Priestley*, *Hutchinson*, and *Wigmore* precluded general liability for fellow servants and dramatically

104. Respectively, *Paterson v. Wallace*, (1854) 1 Macq. 748; *Brydon v. Stewart*, (1855) 2 Macq. 30.

105. (1858) 3 Macq. 266, 300.

106. Cranworth did not sit on the companion case of *Wigmore* since he was raised up about a month after *Hutchinson* was heard. 17 *DICTIONARY OF NATIONAL BIOGRAPHY* 159-60 (Sidney Lee ed., MacMillan Co. 1909).

107. Lord Wensleydale of Walton was elevated to a peerage a month after oral argument in *Reid*. 15 *DICTIONARY OF NATIONAL BIOGRAPHY*, *supra* note 106, at 226.

108. *Paterson*, 1 Macq. at 751.

109. *Id.* at 751, 754.

110. *Brydon v. Stewart*, (1855) 2 Macq. 30, 35, 38.

111. *Bartonshill Coal Co. v. Reid*, (1858) 3 Macq. 266. The importance of the case is underscored by the expense of retained counsel. Funded by a mining trade union, Mrs. Reid was represented by Lord Advocate Moncreiff and by Serjeant Byles. The Appellant-defenders were represented by Solicitor-General Bethell, a Queen's Counsel, and a Junior.

misrepresented that Scots law was “the same as that of England.”¹¹² Lord Advocate Moncreiff maintained on behalf of the plaintiffs (called pursuers) that Scottish law sustained the principle of a master’s general duty of care towards his servants; an obligation that was recognised by the House of Lords in *Paterson and Brydon*.¹¹³ Lord Chancellor Cranworth announced on completion of oral argument his certainty that English law would preclude liability,¹¹⁴ but postponed decision for two years while the related case of *McGuire* was appealed to the House of Lords on a bill of exception.¹¹⁵ During this time Lord Cranworth conferred on both cases with Lord Wensleydale (formally, Baron Parke).¹¹⁶

Delivering opinion, Lord Cranworth recapitulated the general maxim of *respondeat superior*, through which masters were held responsible for injuries caused by their workers to strangers, and also acknowledged that *Paterson and Brydon* held masters liable for directly causing injuries to their servants.¹¹⁷ Nevertheless, Court of Exchequer decisions made it clear that when a workman contracts for his services “he knows, or ought to know, to what risks he is exposing himself.”¹¹⁸ These include the possibility “that want of care on the part of a fellow workman may be injurious or fatal to him.”¹¹⁹ When injuries result, “the blame was wholly that of the servant.”¹²⁰ Next, Lord Cranworth resolved that since the law of England was “founded on principles of universal application,” the law of Scotland should be the same.¹²¹ Reid and his feckless colleague were therefore in common employment, and their widows barred from recovery.¹²² The companion case of *McGuire* was heard and decided later that day before now-Lord Chancellor Chelmsford and Lords Brougham and Wensleydale, with similar results.¹²³

In sum, the prospect of precluding employers’ liability for injuries to fellow servants germinated in *Priestley*, the formal doctrine of common employment was raised *sua sponte* in *Hutchinson*, and, despite narrow poten-

112. *Id.* at 271–72.

113. *See id.* at 274–76.

114. *Id.* at 276–78.

115. *Batonshill Coal Co. v. McQuire*, (1858) 3 Macq. 300. Arising from the same incident as *Reid*, McGuire’s claim reached a £100 verdict through an agreement to abide the disposition in *Reid*. *Id.*

116. Cranworth was now the former Lord Chancellor, following the demise of Derby’s brief ministry. 17 *DICTIONARY OF NATIONAL BIOGRAPHY*, *supra* note 106, at 160.

117. *See Reid*, 3 Macq. at 282–84.

118. *Id.*

119. *Id.* at 284.

120. *Id.*

121. *Id.* at 285, 289–94. Due to its clarity in applying “universal” principles of political economy, Lord Cranworth also took the unusual step of appending a copy of *Farwell*, *supra* note 86, to his opinion. *Id.* at 316.

122. *Id.*

123. *Bartonshill Coal Co. v. McGuire*, (1858) 3 Macq. 300, 307. Parenthetically, after concurring with the result, the Lord Chancellor raised in *dictum* the prospect of servants recovering for injuries inflicted by fellow servants of unequal status. Ironically, this statement in *McGuire* was ignored by subsequent plaintiffs’ barristers, who attempted to establish an exception to common employment through *Paterson and Brydon*. *See infra* Part II.B.2.

tial avenues for liability when masters themselves brought about injuries, the defence was reaffirmed and expanded in *Bartonshill Coal*. As one commentator archly described the course of the doctrine: "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase."¹²⁴ It is to the defence's cultivation that we now turn.

B. Expanding the Doctrine of Common Employment, 1858–1880

Following on the *Bartonshill Coal* decisions, English courts progressively enlarged the types of workers considered within the same service. In consequence, a greater variety of suits by injured co-workers were barred against their common masters. Three judges (one Scottish and two English) unsuccessfully attempted to uphold a narrow exception from the defence of common employment for servants of unequal status.

1. Widening the Scope of Fellow Service

Subsequent to the *Bartonshill Coal* decisions, the extent of employers' liability for workplace injuries was contingent upon whether a negligent workman was deemed a fellow servant of the plaintiff. In consequence, the English judiciary extended the application of the defence of common employment over an increasingly broad range of workers.¹²⁵ They achieved this augmentation by grouping together nearly all the servants of a given mutual employer, even those in dissimilar occupations.¹²⁶ Chief Justice Erle's reasoning on this matter is worth noting. Despite conceding that "many cases" exist wherein "the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed," the risk of harm "is so much a natural consequence of the employment . . . that it must be included in the risks that are to be considered in his wages."¹²⁷

The corollary of so encompassing a definition incorporated an astonishing range of activities within the scope of common employment. These included: a carpenter repairing the roof of a railway station and labourers shifting engines on a turntable,¹²⁸ a miner and a mine under-

124. COURTNEY STANHOPE KENNY, A SELECTION OF CASES ILLUSTRATIVE OF THE ENGLISH LAW OF TORT 90 (5th ed. 1928).

125. See THOMAS BEVEN, THE LAW OF THE EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION 378 (London, Waterlow Bros. & Layton 1898) (noting that *Bartonshill Coal* "was the starting point of a large number of decisions, the general effect of which was indefinitely to extend" the scope of common employment).

126. Thus, common employment was described by Chief Baron Kelly as work "incidental to the carrying on of the general business" of a common master. See *Warburton v. Great W. Ry. Co.*, (1866) 2 L.R. Ex. 30. Similarly, Justice Brett considered two labourers to be commonly engaged when "the service of each will bring them so far to work in the same place and at the same time . . . as part of the work which he is bound to do . . ." *Charles v. Taylor, Walker & Co.*, (1878) 3 C.P.D. 496. Justice Brett had advocated the railway's position as a Q.C. before Chief Baron Kelly in *Warburton*.

127. *Morgan v. Vale of Neath Ry. Co.*, (1865) 5 B. & S. 736, 122 Eng. Rep. 1004.

128. See *id.*

looker,¹²⁹ a licensed waterman employed to moor and unmoor barges and labourers at a nearby warehouse,¹³⁰ a scaffolder and the building manager,¹³¹ a ship's chief and third engineers,¹³² a clerk of works and a construction worker,¹³³ and railway guards with both a gang of platelayers¹³⁴ and a labourer who loaded ballast onto wagons,¹³⁵ to name only a few. Moreover, appellate courts frequently negated jury awards to workmen injured by fellow servants, further extending judicial control over the development of the doctrine of common employment. In one appellate decision, Justice Willes sternly cautioned against allowing juries to determine who were commonly employed: "There is always a strong inclination to find some mode of giving the plaintiff redress," he admonished, but "one man's misfortune must not be compensated for at another man's expense."¹³⁶

Central to these cases is the deeply held belief that, as part of their service contracts, labourers voluntarily assumed all the risks incident to their employment, including hazards brought about by fellow workers. This conviction, expressed as a certainty without empirical inquiry or factual support, rationalised denials of workers' claims on the ground that any additional compensation in the guise of damages constituted an unbar-gained-for windfall. As articulated by Chief Baron Kelly, "it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant," for the assumption of that "risk is part of the consideration for the wages which he is entitled to receive."¹³⁷ Similar explanations were offered on different occasions by other prominent members of the judiciary, including Chief Baron Pollock;¹³⁸ Chief Justices Erle,¹³⁹ Grove,¹⁴⁰ and Cockburn;¹⁴¹ and Justice Blackburn.¹⁴² The re-

129. *Hall v. Johnson*, (1865) 3 H. & C. 589, 590, 159 Eng. Rep. 662, 662-63.

130. *See Lovell v. Howell*, (1876) 1 C.P.D. 161.

131. *See Gallagher v. Piper*, (1864) 16 C.B. (N.S.) 677, 143 Eng. Rep. 1293.

132. *See Searle v. Lindsay*, (1861) 11 C.B.(N.S.) 429, 142 Eng. Rep. 863.

133. *See Brown v. Accrington Cotton Spinning & Mfg. Co.*, (1865) 3 H. & C. 511, 159 Eng. Rep. 631.

134. *See Waller v. SE Ry. Co.*, (1863) 2 H. & C. 102, 159 Eng. Rep. 43; *see also Lovegrove v. London, Brighton & S. Coast Ry. Co.*, (1864) 33 L.J.C.P. 329, 143 Eng. Rep. 1289 (construing a railway platelayer and a truck-pusher to be commonly employed).

135. *See Tunney v. Midland Ry. Co.*, (1866) 1 L.R.C.P. 291.

136. *Id.* at 297.

137. *Warburton v. Great W. Ry. Co.*, (1866) 2 L.R.Ex. 30, 31, 143 Rev. Rep. 858, 861.

138. *See Swainson v. Ne. Ry. Co.*, (1878) 2 Exch. Div. 341, 343 ("The negligence of a fellow servant is taken to be one of the risks, which a servant as between himself and his masters undertakes, when he enters into the service.").

139. *See Tunney*, 1 L.R.C.P. at 296 (noting that it was well-settled that "a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service").

140. *See Turner v. Great E. Ry. Co.*, (1875) 33 L.T. 431, 433 ("He submits himself to the risks which in the service of his master the latter may reasonably impose upon him.").

141. *See Woodley v. Metropolitan Dist. Ry. Co.*, (1877) 3 Exch. Div. 384, 389 (rationalising that an employee had waived his right to redress, for when he accepted "the benefit of employment, he must take it subject to its disadvantages").

sult was that ever-increasing categories of employees were precluded from recovering against their employers for work-related mishaps.

Thus, England's judiciary seemed to have taken to heart Chief Baron Pollock's admonitions that the laudable defence of common employment not be "trenched upon" or "frittered away."¹⁴³

2. *Defeating Two Judicial Attempts at Limiting Common Employment*

Despite the clear trend toward common employment, not every Victorian jurist was convinced the doctrine was monolithic or unassailable. Brief attempts were made in Scotland, and to a lesser degree England, to follow *Paterson's* and *Brydon's* limited exception for injuries caused by fellow servants of unequal status.

Lord President M'Neill, who had presided over both the trial and appeal of Mrs. Reid's case, took particular umbrage to the Law Peers interpretation of Scots law in *Bartonshill Coal* and unstintingly voiced this position while upholding plaintiffs' awards. During the first appeal that raised the defence of common employment, he maintained that *Bartonshill Coal* "has not decided" that servants put into positions of "superintendence, and authority, and control over others" should in any way be regarded as collaborators of the injured servant and thus bar the servant being supervised from recovery.¹⁴⁴ Three years later, the Lord President once more seized the opportunity to vindicate his earlier rulings by declaring that *Bartonshill Coal* had been made completely "without any explanation or observation as to the grounds of the [Scots] judgment" wherein the servant causing injury to the pursuer had stood in a superior position to him, and was thus not a collaborator.¹⁴⁵ Moreover, because the House of Lords continued to disregard the *ratio* of Session Court rulings, he averred that the House of Lords in turn did not bind Scottish courts.¹⁴⁶ Consequently, for about a decade, labourers in Scotland recovered against their masters for the negligence of collaborators of superior position. In direct contravention of the English practice, this liability was largely determined by juries resolving "the old question, who is to be considered a fellow labourer?"¹⁴⁷

The possibility of a limited exception from the doctrine of common employment for labourers of unequal status was raised in England from 1862–1865, first in a pair of idiosyncratic *obiter dicta* by Justice Byles, then with greater caution by Chief Justice Erle. In *Clarke v. Holmes*, a factory

142. Reasoning that "[a] servant who engages for the performance of services for compensation," contractually agrees to "the natural risks and perils incident to the performance of such services; the presumption of law being that compensation was adjusted accordingly, or, in other words, that those risks are considered in the wages." *Morgan v. Vale of Neath Ry. Co.*, (1864) 5 B. & S. 736.

143. *Riley v. Baxendale*, (1861) 6 H. & N. 445, 448, 158 Eng. Rep. 183, 184 (Exch.); *Vose v. London & Yorkshire Ry. Co.*, (1858) 27 L.J. Ex. 249, 252, 157 Eng. Rep. 300, 303 (Exch.).

144. *M'Aulay v. Brownlie*, (1860) 22 D. 975, 977.

145. *Somerville v. Robert Gray & Co.*, (1863) 1 Macph. 769, 774.

146. *Id.*

147. *Darby v. John, Duncan & Co.*, (1861) 23 D. 529, 530.

worker engaged to oil dangerous machinery was injured after being falsely reassured by his manager that the apparatus would be repaired.¹⁴⁸ Both the Court of Exchequer and the Exchequer Chamber affirmed a victorious trial verdict.¹⁴⁹ Concurring in the latter's result, Justice Byles commented that common employment ought to be restricted to domestic settings, not those where machinery was used, musing further that workers of superior authority should be excluded from the rule of common employment.¹⁵⁰ Two years later, Justice Byles followed his temeritous suggestion in *Clarke* by strongly dissenting in *Gallagher v. Piper* against the Court of Common Pleas overturning a jury verdict in a case he had tried at the London Sittings.¹⁵¹ Instead, the labourer who was permanently injured by falling from a scaffolding knowingly built with insufficient materials under direction of the defendant's foreman should have been awarded a verdict. For the foreman's twenty-five years of experience running the operations of the business, he reasoned, caused him to stand "in the position of a general agent for the defendants."¹⁵² And that capacity, as the defendants' "acting-master," made the defendants vicariously liable.¹⁵³ Concurring in the adverse verdict because he could not distinguish the case from *Wigmore*, Chief Justice Erle admitted that "[t]he only matter upon which I pause is, whether or not [the supervisor] was such a general manager as to make himself stand in the place of [the master]."¹⁵⁴

Soon thereafter, Chief Justice Erle delivered two opinions in which he implicitly raised the prospect of excluding the negligence of vice-principals from common employment.¹⁵⁵ In *Murphy v. Smith*, the Court of Common Pleas reversed a Middlesex Sittings jury verdict compensating a lucifer-match factory worker injured in an explosion caused by a fellow servant who also managed the works.¹⁵⁶ Although the Court of Common Pleas' decision rested on its finding that the substitute foreman had been neither negligent nor acting as a representative of the defendants, the Chief Justice implied that a dissimilar set of facts would direct a different conclusion.¹⁵⁷ That same year, delivering an opinion for the Exchequer Chamber in *Hall v. Johnson*, Chief Justice Erle upheld a nonsuit of a miner wounded by a falling stone because the negligent underlooker was the plaintiff's fellow employee.¹⁵⁸ Nevertheless, the Chief Justice noted that there were times in

148. (1861) 6 H. & N. 349, 351-52, 158 Eng. Rep. 144, 145.

149. (1862) 7 H. & N. 937, 949, 158 Eng. Rep. 751, 756.

150. "Why may not the master be guilty of negligence by his manager, or agent, whose employment may be so distinct from that of the injured servant, that they cannot with propriety be deemed fellow-servants?" *Id.* at 947-49, 158 Eng. Rep. at 755.

151. (1864) 16 C.B.(N.S.) 677, 695-98, 143 Eng. Rep. 1293, 1300-01.

152. *Id.*

153. *Id.* at 696, 143 Eng. Rep. at 1300.

154. *Id.* at 689-90, 143 Eng. Rep. at 1297-98.

155. Justice Byles was empanelled on these cases, but concurred silently.

156. (1865) 19 C.B.(N.S.) 361, 368, 144 Eng. Rep. 827, 829.

157. *See id.* at 366, 144 Eng. Rep. at 829.

158. (1865) 34 L.J. Ex. 222.

which "a person called a fellow laborer should rather be considered to stand in the position of a deputy-master," and in those circumstances "it might be a question whether the real master was not responsible for his negligence."¹⁵⁹

Chief Justice Erle's insinuations must have irked the Barons of the Court of Exchequer. Later that Term, while affirming the nonsuit of a builder injured while falling from scaffolding warranted by the defendant's foreman, Baron Martin expressly responded to the plaintiff's assertion that he was not a fellow workman of the foreman.¹⁶⁰ "This is an important case," the Baron acknowledged, because if that assertion was upheld then "the liability of masters for accidents happening to persons in their service would be very much extended"; judges ought instead to take great "care that the rule of law which is already wide enough is not stretched further."¹⁶¹

Any possibility for instituting an exemption from common employment for servants of different grades, whether in Scotland or in England, was definitively ended by the House of Lords in *Wilson v. Merry & Cunningham*.¹⁶² Three Law Peers delivered an opinion on an appeal brought, appropriately enough, from the Scottish Court of Session. Each had held the post of Lord Chancellor, respectively, and each had personally bolstered the doctrine of common employment. After reiterating the now decade-old decision in *Bartonshill Coal*, Lord Cairns expressed his opinion that the doctrine of common employment absolutely barred recovery for injuries sustained by fellow servants and was not contingent upon the "technical sense" of the equality of the involved workers.¹⁶³ Lord Cranworth, who as Lord Chancellor had given the sole opinion in *Reid*, concurred and noted that "on this subject there is no difference between the laws of England and Scotland."¹⁶⁴ The third judgment was by Lord Chelmsford, the Lord Chancellor who had given judgment in *McGuire*. Despite Scottish decisions that seemed to uphold an exception to common employment, Lord Chelmsford stated affirmatively that subsequent English cases "clearly established" the absence of an exemption from common employment predicated on the workmen being "of different classes."¹⁶⁵ With this decision, any opportunity for English judges to follow the lead set by Justice Byles and Chief Justice Erle was foreclosed. Similarly, the Scottish Court of Session fell fully into place with the English courts on the matter of common employment.¹⁶⁶

159. *Id.* at 224. The Chief Justice wavered further: "We wish to reserve our opinion in respect of that question whenever the facts of the case shall give rise to it." *Id.*

160. *Lynch v. Marchmont*, (1865) 29 J.P.R. 375, 376.

161. *Id.*

162. (1868) 1 L.R. Sc. & D. 326.

163. *Id.* at 331-32.

164. *Id.* at 334-35.

165. *Id.* at 338.

166. See *Leddy v. Gibson*, (1873) 11 M. 304 (citing *Wilson* while dismissing a sailor's claim for personal injuries caused by his captain's negligence). The opinion was issued by Lord Justice-Clerk Moncreiff, who as the Lord Advocate had advanced Mrs. Reid's claim.

This Part describes how the Barons of the Exchequer established the doctrine of common employment, how the House of Lords wavered and then instantiated it, and how the scope of the defence was then expanded to bar additional claims from being adjudicated. Part III sets forth how English courts similarly chose to prevent recovery by injured workers or their decedents for claims that were predicated on theories of liability beyond the reach of the defence of common employment.

III. QUASHING OTHER AVENUES TO EMPLOYER/EMPLOYEE LIABILITY, 1830–1880

English judges precluded the development of employer/employee liability through techniques besides the defence of common employment. These included limiting noneconomic damages under the Fatal Accidents Act, resisting assertions of duty based on House of Lords precedent, and raising and applying the common-law defences of assumption of the risk and contributory negligence.

A. *Limiting Recovery Under the Fatal Accidents Act, 1846–1880*

The concerted effort of a handful of coroners to compensate workers' families through archaic deodand awards was sufficiently successful that in 1846 the deodand was abolished,¹⁶⁷ and the Fatal Accidents Act (also called Lord Campbell's Act) was put in its place.¹⁶⁸ The Fatal Accidents Act promulgated two novel remedies. When brought in the name of an executor or administrator of the deceased for the benefit of specified relations, it permitted personal actions to the same extent as if the late party had survived, as well as countenancing an action for wrongfully causing another's death.¹⁶⁹ The method of calculating damages was left vague: the "jury may give such damages as they may think proportioned to the injury resulting from such death."¹⁷⁰ In the first case brought under the statute, Baron Parke instructed the jury that, because it "cannot estimate the value of a person's life," it should "give what [it] consider[ed] a fair compensation."¹⁷¹ This exhortation to reasonableness became an oft-repeated formula.¹⁷² So, too, the notion of allocating pecuniary loss on the basis of annual wages, a

167. Deodand awards emanated from an arcane superstition compelling the forfeiture, at a coroner's inquest, of an object that "moved to the death" of a person. After 1834 (and the New Poor Law), deodands were aggressively used to compensate impoverished relations of industrial accident victims. See generally Harry Smith, *From Deodand to Dependency*, 11 AM. J. LEG. HIST. 389 (1967).

168. Deodands Act, 1846, 9 & 10 Vict., c. 62; Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.

169. Previously, common-law actions died with the injured person; moreover, it was thought crude to place a value on their lives. See, e.g., *Baker v. Bolton*, (1808) 1 Camp. 493, 493, 170 Eng. Rep. 1033, 1033 (allowing damages occasioned during the lifetime of the plaintiff's wife but not afterwards, for "[i]n a civil Court, the death of a human being could not be complained of as an injury").

170. 1846, 9 & 10 Vict., c. 93.

171. *Armstrong v. Se. Ry.*, (1847) 11 Jur. 758, 760.

172. See, e.g., *Rowley v. London & Nw. Ry. Co.*, (1873) 8 L.R. Ex. 221; *Blake v. Midland Ry. Co.*, (1852) 18 Q.B. 93, 118 Eng. Rep. 35.

calculation that favoured wealthier claimants who, by definition, had more to lose.¹⁷³ Procedurally, the statute also favoured wealthier plaintiffs since claimants had to take out letters of administration, and that was expensive.¹⁷⁴

Unresolved under Lord Campbell's Act was whether it provided for *solatium*, an award for pain and suffering. Such compensation was available in Scotland, was included in the original bill and acknowledged during Parliamentary debate by the Scottish Lord Campbell, yet was absent from the enacted statute (which itself did not apply to Scotland).¹⁷⁵ The absence of a clause regarding *solatium* was ambiguous and could therefore be construed either way.¹⁷⁶ As a practical matter, excluding *solatium* from a jury's otherwise broad discretion in calculating Fatal Accidents Act remedies could still result in considerable monetary damages for representatives of men of affairs killed by corporate negligence.¹⁷⁷ By contrast, workers' families might get £100 or less, which while equal to some years of earnings, was comparatively meagre. In consequence, contemporary mining inspectors (who had participated in deodand inquiries) wondered whether the Fatal Accidents Act was really an improvement over the previous system.¹⁷⁸

Hence, the question became whether coroner and Radical M.P. Thomas Wakley was correct in decrying the general wording of the final Bill as "crude" and "carelessly drawn," the work of "some legal gentleman who was practising as an amateur";¹⁷⁹ or was the absence of *solatium* the result of the statute having been "drawn with a degree of cunning?"¹⁸⁰ The Barons of the Court of Exchequer must have favoured the latter explanation, for they took pains to exclude *solatium* from claims brought under the Fatal Accidents Act.¹⁸¹ The Queen's Bench followed suit, emphasising that so-

173. Compare, e.g., *Birkett v. Whitehaven Junction Ry. Co.*, (1859) 4 H. & N. 731, 157 Eng. Rep. 1029 (upholding a £200 award to the widow of a draper/postman who had earned £260/year but was also insolvent and in poor health), with *Sykes v. Ne. Ry. Co.*, (1875) 44 L.J.C.P. 191 (denying recovery to a workman father for the contracts he could have taken had his bricklayer son survived, because recovery was based on their relationship rather than on a contract).

174. 1846, 9 & 10 Vict., c. 93.

175. G.J. BELL, *PRINCIPLES OF THE LAW OF SCOTLAND* 877-78 (6th ed., Edinburgh, T & T Clark 1872) (1829) (noting that standard reparation included monetary loss and *solatium* for injury).

176. Lord Campbell had recently published an unflattering portrait of the bill's co-sponsor, Lord Lyndhurst. See 5 J. CAMPBELL, *IX & X LIVES OF THE LORD CHANCELLORS* *passim* (5th ed., London, John Murray 1868). The result was an amusing repartee on the subject of valuing an action for death. Lord Campbell stated that "[t]he Bill will help if the learned Lord Chancellor were to meet with an accident on the railways." Lord Lyndhurst replied: "If my noble and learned friend should unfortunately fall a sacrifice, how would any jury be able to estimate the value of his hopes?" 86 PARL. DEB., H.L. (3d ser.) (1846) 174-75.

177. A seminal example is *Pym v. Great Northern Railway Co.*, in which the Exchequer Chamber upheld a £13,000 jury award based on the sum which the deceased would have expended on his children's education and "advancement" in life. (1863) 4 B. & S. 396, 406-07, 122 Eng. Rep. 508, 512-13.

178. See BARTTRIP & BURMAN, *supra* note 7, at 110-11.

179. 87 PARL. DEB., H.C. (3d ser.) (1846) 1372-73.

180. W.R. CORNISH & G. DE N. CLARK, *LAW & SOCIETY IN ENGLAND 1750-1950*, at 503-04 (1989).

181. Thus, in *Gillard v. Lancashire & Yorkshire Railway Co.*, (1848) 12 L.T. 356, Chief Baron Pollock held that "[i]t is a pure question of pecuniary compensation, and nothing more, which is contemplated by

latium was the law of Scotland and not of England.¹⁸² One suspects that Lord Campbell's Act had indeed been "drawn with a degree of cunning," for its author and namesake was also the son-in-law of Chief Baron Abinger, the judge who had denied compensation to an injured worker in the case of first impression, *Priestley*.¹⁸³

B. *Resisting Assertions of Duty*

The House of Lords decisions in *Paterson* and *Brydon* laid the groundwork for lawyers representing afflicted workers or their decedents to assert several novel forms of liability. These included allegations that masters were accountable for creating extraordinary risk, hiring negligent fellow servants, and engaging faulty systems. Nevertheless, the Lords decisions were either ignored or subverted by courts, and in particular the Court of Exchequer.

1. *Creating Extraordinary Risk*

In a pair of cases brought under the Fatal Accidents Act, respective widow-plaintiffs asserted that masters were under a duty of care to protect workmen from extraordinary risk. By doing so, their allegations sought to fall within a narrow exception from common employment set forth in *Paterson* and *Brydon*. The Court of Exchequer nonetheless summarily rejected their claims.

In *Dynen v. Leach*, the plaintiff alleged that her husband had been employed on condition "that the defendant would take due and ordinary care" that he "should be exposed to no extraordinary risk in the course of his said service."¹⁸⁴ In contravention of this duty, a clip was substituted for the usual net-bag when hoisting sugar moulds, resulting in Dynen's death.¹⁸⁵ The Passage Court of Liverpool nonsuited this claim.¹⁸⁶ Moving to set aside that motion, Dynen's counsel argued that contrary to the employment agreement, as well as the House of Lords's opinion in *Paterson*, the method engaged by the defendant was unsafe.¹⁸⁷ Chief Baron Pollock replied that "the deceased should not have used" the unsafe net-bag, and that in any case the duty of care enumerated in *Paterson* "was an *obiter dictum*."¹⁸⁸ Refusing the plaintiff's rule, the Chief Baron also stated, "there was no general

the Act." Pressed by plaintiff's counsel, Pollock hypothecated that if a rich man lost his only son, "[n]othing on earth could compensate" for that loss. *Id.* at 356-57.

182. *Blake v. Midland Ry. Co.*, (1852) 18 Q.B. 93, 96, 118 Eng. Rep. 35, 36.

183. CORNISH & CLARK, *supra* note 180.

184. (1857) 26 L.J. Ex. 221.

185. *Id.* at 221.

186. *Id.*

187. *Id.* at 222.

188. *Id.*

duty thrown by law upon the master to the effect stated in the declaration."¹⁸⁹

Four years later in *Riley v. Baxendale*, another widow alleged that her husband had been employed on terms that the "defendants should take due and ordinary care not to expose [him] to extraordinary danger and risk," but that he was nonetheless struck by a railway carriage and killed.¹⁹⁰ At the sittings after Michaelmas Term, Chief Baron Pollock nonsuited the plaintiff on the ground that the declared facts did not sustain liability.¹⁹¹ On appeal to the Court of Exchequer to set aside the nonsuit and order a new trial, Serjeant Chambers asserted that "there is an implied contract between master and servant as to the risks of the service," the breach of which created liability.¹⁹² Denying the plaintiff's motion, the Barons of the Exchequer responded forcefully to this contention. First, Baron Martin noted that although there had recently been other cases asserting masters' duty, "I am of opinion that on the hiring of a servant no such contract as this is to be implied," for "the liability of a master for injury to his servant in the course of his employment is one of a different character."¹⁹³ Baron Wilde was of the same view, reasoning in a circular manner that a contract could only be implied "which arises out of some duty so generally understood that it leads to the implication of a contract."¹⁹⁴ Finally, Chief Baron Pollock expressed his view that the doctrine of common employment "ought not to be trenched upon. Servants are often far better judges than their masters of the dangers incident to their employment. . . ."¹⁹⁵

2. *Hiring Negligent Fellow Servants*

If intrepid lawyers were inspired by the suggestions in *Patterson* and *Bryson* that masters might be held liable for personally hiring incompetent servants who harmed their peers, these hopes were soon crushed. In the year following *Bryson*, Chief Justice Jervis of the Court of Common Pleas emphasised the narrow scope of possible employer/employee liability by requiring that plaintiffs prove at trial both the ineptitude of fellow servants, as well as an employer's personal negligence in their hire.¹⁹⁶ Thus, as long as masters either maintained proper hiring practices or acted through an agent, they were effectively immune from vicarious liability claims, no matter how negligent the actions of fellow workers when injuring one another.¹⁹⁷ Applying this stringent standard, claims raised in England's courts

189. *Id.*

190. (1861) 6 H. & N. 445, 446, 158 Eng. Rep. 183, 183.

191. *Id.* at 446, 158 Eng. Rep. at 184.

192. *Id.* at 447, 158 Eng. Rep. at 184.

193. *Id.*

194. *Id.*

195. *Id.* at 448, 158 Eng. Rep. at 184.

196. *Tarrant v. Webb*, (1856) 18 C.B. 797, 802, 139 Eng. Rep. 1585, 1587.

197. *See id.* at 804, 139 Eng. Rep. at 1587-88.

that asserted the ineptitude of fellow workers met with nonsuits,¹⁹⁸ denials of liability,¹⁹⁹ and the overturning of jury awards on the grounds of insufficient evidence.²⁰⁰ In consequence, House of Lords intimation of potential employers' liability for negligent hiring became a nearly insurmountable goal for either wounded workers or their representatives to achieve.²⁰¹

3. *Engaging Faulty Systems*

Even less tenable than allegations of negligently hiring fellow servants were claims for harms arising from employers engaging faulty systems of operation. Both the Court of Exchequer and the Exchequer Chamber expressly rejected such declarations as exceeding the province of the jury.

The first reported case asserting a master's liability for operating an enterprise in an irresponsible fashion was *Skipp v. Eastern Counties Railway Co.*²⁰² There, a railway labourer severely injured while attaching a luggage carriage alleged that insufficient workers had been engaged to safely perform this task.²⁰³ At the London Sittings before Baron Martin, evidence was submitted both as to the adequacy of staffing and to the fact that Skipp had worked his job for several months without complaint.²⁰⁴ The plaintiff was nonsuited, and his case kept from the jury.²⁰⁵ On motion for a new trial to the Court of Exchequer, plaintiff's counsel asserted that the job was inherently dangerous due to insufficient staffing.²⁰⁶ Affirming the nonsuit, Baron Parke declared that the plaintiff's "attempt to cast upon the jury the duty of fixing the number of servants which a railway company ought to have" was inappropriate, for the defendant's foremen "are to be the judges of the number."²⁰⁷ Baron Alderson concurred, noting that "[t]he jury are not to be the judges of the sufficiency of any number of servants a man keeps."²⁰⁸ Finally, Baron Martin justified his removal of the case from the jury at the Assizes "upon the chance that their finding a verdict for the

198. See, e.g., *Searle v. Lindsay*, (1861) 11 C.B. (N.S.) 429, 431–32, 142 Eng. Rep. 863, 864 (nonsuiting the claim of an engineer injured when the handles came off of a steam vessel's winch, because the defendants had not been negligent in hiring the engineer who had maintained it).

199. See, e.g., *Smith v. Howard*, (1870) 22 L.T. (N.S.) 130, 130 (precluding recovery for a steam-saw worker who was injured after the defendant's foreman hired an inexperienced boy to assist him).

200. See, e.g., *Allen v. New Gas Co.*, (1876) 1 Exch. Div. 251 (setting aside a £150 jury verdict for an injury caused by falling gates that the plaintiff's manager had been apprised of and ordered to fix).

201. A narrow exception occurred when accidents involved especially young workers. For instance, in *Grizzle v. Frost*, a sixteen-year-old girl employed for two days in a rope-making factory lost her arm when ordered by a foreman to place discarded hemp into rollers while the machine was in motion. (1863) 3 F.&F. 622, 623–24, 176 Eng. Rep. 284, 285. A jury awarded her £150 on the ground that the foreman, himself an inexperienced boy, should not have been managing the machinery. See *id.* at 625, 176 Eng. Rep. at 286.

202. (1853) 9 Ex. 223, 156 Eng. Rep. 95.

203. *Id.* at 223–24, 156 Eng. Rep. at 95–96.

204. *Id.* at 224, 156 Eng. Rep. at 96.

205. *Id.* at 224–25, 156 Eng. Rep. at 96.

206. *Id.* at 225, 156 Eng. Rep. at 96.

207. *Id.* at 226, 156 Eng. Rep. at 96.

208. *Id.*

plaintiff from motives of commiseration.”²⁰⁹ Four years later, *Skipp*’s rationale was recapitulated by the Court of Exchequer, with Chief Baron Pollock holding that “a master is not bound to use the safest method” available to prevent harm.²¹⁰

Jury evaluations of corporate defendants’ responsibilities in conducting their operations was subjected to further reproach, first by the Court of Exchequer, and then the entire Exchequer Chamber, in *Saxton v. Hawksworth*.²¹¹ In *Saxton*, a sheetroller was employed in a steelworks factory where five steam engines were used, but attended only by a single worker.²¹² After three uneventful years the plaintiff was injured when an unsupervised engine revolved too quickly and flew to pieces.²¹³ Denying the plaintiff’s motion to the Court of Exchequer for a new trial, Chief Baron Kelly characterised the case as raising “the question of the number of workmen a manufacturer may be bound to employ.”²¹⁴ This was an inappropriate inquiry because it “may be one question as between the manufacturer and the public, and another between himself and his servants.”²¹⁵ Affirming the Chief Baron’s ruling on behalf of the Exchequer Chamber, Justice Willes expounded at length on the unsuitable nature of cases asserting employers’ liability for engaging a faulty system. This was “one of a great number of cases” where only after an accident occurs does the plaintiff discover the employer’s systemic failings.²¹⁶ For that reason, “cases of this kind ought not to be left to the jury.”²¹⁷

Accordingly, courts removed the question of the adequacy of a defendant’s system from the province of the jury as a means of controlling masters’ liability.

C. Additional Common-Law Defences

The common-law defences of *volenti non fit injuria* (also referred to as assumption of risk) and contributory negligence effectively barred the claims of injured workers seeking redress outside the boundaries already delineated by the fellow servant rule.²¹⁸ This was especially true of *volenti*, which judges advanced in a conscious effort to nullify recovery by injured workmen against their employers.

209. *Id.*

210. *Dynen v. Leach*, (1857) 26 L.J. Ex. 221, 222.

211. (1872) 26 L.T. 851.

212. *Id.* at 851.

213. *Id.* at 851–52.

214. *Id.* at 852 n.(a).

215. *Id.*

216. *Id.* at 853.

217. *Id.*

218. Together with the doctrine of common employment, these defences formed the troika “the ugly sisters of the common law.” MANCHESTER, *supra* note 86, at 286–87.

1. Volenti Non Fit Injuria

At the heart of the maxim *volenti non fit injuria* (loosely translated, “a willing person cannot be wrongfully harmed”) was the notion that in exchange for their wages, workers agreed to incur the hazards of their employment. Application of *volenti* was a legal matter decided by judges based on how foreseeable the dangers of employment were at the time of hiring, and the degree to which workers were heedless of those dangers.²¹⁹ The modern day question of whether they acted out of desperation rather than volition was not addressed.²²⁰ *Volenti* proved to be an effective bar to intrepid assertions of employers’ negligence. As was the case with the parallel context of common employment, it was also once more the Court of Exchequer and the Exchequer Chamber—rather than those defending suits—that inaugurated the doctrine to the field of master/servant relations.

Skipp, the initial case in which a worker declared an employer negligent for engaging a faulty system, was also the first instance in which *volenti* served as a defence against the claims of a servant.²²¹ While moving the Court of Exchequer for a new trial, plaintiff’s counsel was interrupted by Baron Platt’s comment that the suit came “within the maxim *volenti non fit injuria*.”²²² Baron Parke then interjected that if Skipp “felt that he was in danger, by reason of the want of a sufficient number of fellow servants, he should not have accepted the service,” and that by remaining he had willingly incurred any subsequent danger.²²³ Similar reasoning manifested in the opinion, with Baron Martin concurring that he had “acted upon that principle [of *volenti*] at the trial,” wherein he considered Skipp “a voluntary agent.”²²⁴ These proclamations must have come as an unpleasant surprise, since defence counsel had not raised the prospect of *volenti* either at trial or on appeal.

In *Dynen*, another faulty operations case, the Court of Exchequer once more raised and used the defence of assumption of the risk on its own initiative.²²⁵ During oral argument, Chief Baron Pollock remarked that “the deceased should not have used” inadequate kit, but rather “he should have left.”²²⁶ This perspective was echoed in the Chief Baron’s holding, which concluded that Dynen had assumed responsibility for causing his own death.²²⁷ Baron Bramwell explicated the brief opinion by reasoning that this was a situation where “the workmen has known all the facts and is

219. See generally Terence Ingman, *A History of the Defense of Volenti Non Fit Injuria*, 26 JURID. REV. 1 (1981).

220. See, e.g., Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987).

221. *Skipp v. E. Gunties Ry. Co.*, (1853) 9 Ex. 223, 156 Eng. Rep. 95.

222. *Id.* at 225, 156 Eng. Rep. at 96.

223. *Id.*

224. *Id.*

225. *Dynam v. Leach*, (1857) 26 L.J. Ex. 221.

226. *Id.* at 222.

227. *Id.* at 223.

as well acquainted as the master with the nature of the machinery and voluntarily use[d] it.”²²⁸ Once more, although not raised by defence counsel, *volenti* was used by the Barons to prevent recovery against an employer.

The Court of Exchequer’s belief that servants assumed all known risks of their employment was confirmed by the Exchequer Chamber in a third defective system case, *Saxton*.²²⁹ Denying the plaintiff’s motion for a new trial on other grounds at the Court of Exchequer, Chief Baron Kelly expressed his incredulity: “[C]an we believe a Sheffield man to be ignorant of the risks he ran” in steel manufacture?²³⁰ Affirming the Court of Exchequer on behalf of the Exchequer Chamber, Justice Willes sarcastically characterised the case as one “where a servant chooses to enter into an employment of which the system is well known,” and only after meeting with an injury “suddenly finds out that the master was exceedingly wrong” in organising the workplace.²³¹ Once more, *volenti* had been raised and applied by an appellate court without being asserted by defendants’ lawyers at trial or on appeal.

2. *Contributory Negligence*

Contributory negligence was a factual question that was determined by juries.²³² When raised as a defence, the issue of a plaintiff’s contributory negligence generally hinged on his actions after a newly dangerous condition came to light.²³³ Timing was fundamental; if a plaintiff acted either in a negligent manner or had a “last clear chance” to avoid harm, his suit would usually fail.²³⁴ When both employer and employee knew of a hazard, and the latter continued to work, contributory negligence summarily barred recovery on the theory that the servant had brought about his own plight.²³⁵ Consequently, the defence proved an additional barrier for workers to surmount in pressing accident claims against their employers. Contributory negligence was much less used than *volenti* because judges could

228. *Id.*

229. *Saxton v. Hawksworth*, (1872) 26 L.T. 851.

230. *Id.* at 853.

231. *Id.*

232. See *Butterfield v. Forrester*, (1809) 11 East. 60, 60, 103 Eng. Rep. 926, 927 (directing the jury to determine whether plaintiff acted without ordinary care).

233. See, e.g., *id.* at 61, 103 Eng. Rep. at 927 (“Two things must concur to support [a claim for contributory negligence], an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it in the part of the plaintiff.”).

234. The modern rule of contributory negligence was established in *Butterfield v. Forrester*, wherein Chief Justice Ellenborough held that to support a negligence action a “party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it.” *Id.*

235. Typical denials of liability include *Dakin v. Brown*, (1849) 8 C.B. 92, 137 Eng. Rep. 443 (engineer killed by an exploding coffee roaster); *Assop v. Yates*, (1858) 2 H. & N. 768, 176 Eng. Rep. 317 (labourer on whom building equipment collapsed); *Smith v. Dowell*, (1862) 3 F. & F. 238, 157 Eng. Rep. 107 (shipwright buried under two coal bulkheads); *Senior v. Ward*, (1859) 1 El. & El. 385, 120 Eng. Rep. 954 (coal miner who plunged to his death after refusing to examine a pit rope); *Doel v. Sheppard*, (1856) 5 El. & Bl. 856, 119 Eng. Rep. 700; *Caswell v. Worth*, (1856) 5 El. & Bl. 849, 119 Eng. Rep. 697 (factory workers who ignored warnings not to approach unfenced machinery).

summarily dispose of the latter on legal grounds rather than wait on jury consideration. Nevertheless, application of the defence allowed judges to vent their animosity towards generous, and hence irresponsible, juries.

Perhaps most notable is the severe language directed against juries in a pair of 1889 decisions. While reversing a verdict on behalf of a rag merchant's helper who had tumbled down a ladder on the ground that the damage had been caused by her wearing high heeled boots, Baron Huddleston declaimed that "[t]he verdict was obviously one of sympathy rather than justice."²³⁶ Justice Wiles added that juries needed to be firmer, else their verdicts would create mischief by encouraging "persons to bring actions against their employers."²³⁷ Comparable concerns were raised while reversing a £167 verdict for the widow of a dockworker who died on the first day on the job by plunging from planks set across a caisson chamber. Giving opinion for the court, Chief Justice Coleridge reasoned "if the workman chose to take a certain way when another was open to him, he took it at his own risk."²³⁸ Moreover, "if such verdicts as this were to stand," then "[a]nything happening to the workman would be sufficient to support a verdict against the employer. It was extremely important that the Courts should hold a strong hand over juries in this class of cases."²³⁹

IV. UNDERSTANDING JUDICIAL RESISTANCE TO EMPLOYERS' LIABILITY

Parts I–III demonstrated that nineteenth-century English common law rarely held employers accountable to their servants for harm caused by other workers. When faced with employer/employee tort claims these judges, and in particular the Barons of the Exchequer, almost uniformly refused to augment employers' established vicarious liability to strangers to include claims by injured servants. The preceding Parts also showed that the judiciary precluded master/servant liability by raising and applying the doctrine of common employment, denying intrepid claims of duty, subverting jury awards, avoiding House of Lords precedent, and *sua sponte* applying the traditional (but unraised) defences of *volenti non fit injuria* and contributory negligence.

Part IV argues that the most comprehensive reason for understanding why nineteenth-century judges thwarted the growth of employers' liability was their selective application of political economy. It also analyses judicial restraint, the invisible hand hypothesis, and the subsidy theory as alternative explanations for why the claims of injured workmen and their repre-

236. *Ayres v. Bull*, (1889) 5 T.L.R. 202, 202.

237. *Id.*

238. *Pritchard v. Lang*, (1889) 5 T.L.R. 639, 640.

239. *Id.*; see also *Kay v. Briggs*, (1889) 5 T.L.R. 233, 234 (Chief Justice Coleridge stating that "he regretted that the evidence of contributory negligence had not been submitted to the jury, as there was ample evidence of it").

sentatives were turned aside. Each traditional explanation lends insight to the phenomenon described, but none adequately explains the course of events. The revealed history provides a comparative perspective that informs our thinking about the development of negligence doctrine in America and challenges a reinterpretation of existing theories, for the considerable weaknesses of the received historical explanations for the development of tort law when applied to the English context suggest that they may not be as strong for the American context.

A. *Political Economy, Selectively Applied*

Victorian judges resisted the development of employer/employee tort liability due to the influence of selectively applied notions of political economy. Section A.1 describes the intellectual schema of political economy and its pervasive influence on the nineteenth-century worldview, while section A.2 demonstrates its selective application.

1. *Political Economy*

The term political economy references the classic economic theories set out by Adam Smith in *The Wealth of Nations* and subsequently developed by his intellectual progeny.²⁴⁰ Central to this schema is the premise that, when left alone (*laissez-faire*), natural principles ensure that markets for goods and services, including labour, operate efficiently. Markets capably determine prices, free bargaining is the norm, and knowledge is completely and symmetrically disseminated, resulting in prices that correlate to production value.²⁴¹ In the specific context of agreements governing labour arrangements, it was believed that the parties to a contract of service knew best the value of the benefits over which they bargained.²⁴² Hence, reflected in the wages agreed upon between masters and servants was both an appreciation and an assumption of the risks incident to employment.²⁴³ To be fair, there is some traction to this assumption. One can argue that a key qualification for factory

240. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Dublin, 1776). See generally G.R. SEARLE, *MORALITY AND THE MARKET IN VICTORIAN BRITAIN* (1998); DONALD WINCH, *RICHES AND POVERTY: AN INTELLECTUAL HISTORY OF POLITICAL ECONOMY IN BRITAIN, 1750–1834* (Quentin Skinner ed., 1996).

241. For contemporaneous assertions, see WILLIAM ATKINSON, *PRINCIPLES OF POLITICAL ECONOMY* (New York, Greely & McElrath 1843); GEORGE HENRY SMITH, *OUTLINES OF POLITICAL ECONOMY* 34 (London, Longmans, Green, Reader & Dyer 1866) (labourers receive maximum wages based on their skill and ability in relation to supply).

242. “The produce of labour constitutes the natural recompense or wages of labour.” SMITH, *supra*, note 240, at 94. See generally ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLAND AND AMERICA IN LAW AND CULTURE, 1350–1870* (Thomas A. Green ed., 1991).

243. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 526 (4th ed. 1971) summarises the assumptions as being those of “complete mobility of labor, that the supply of work was unlimited, and that the workman was an entirely free agent, under no compulsion to enter into the employment.”

workers was knowing how to avoid industrial hazards and remain in one piece. Yet no evidence supports the widespread supposition that occupational perils were proportionately accounted for in wages, even if the assumption was treated as self-evident by judges.

The seminal work of P.S. Atiyah documents the extent to which nineteenth-century lawyers and judges were raised and educated on notions of classic economics. In his view, the influence was so great “it is scarcely possible that any educated man growing to maturity” during the Victorian era “would not have read a good deal of the new political economy” and been strongly influenced by its precepts.²⁴⁴ This is equally true for notables such as Henry Brougham, judge and later Chancellor, who founded the *Edinburgh Review* (a journal on political economy) and ushered into Parliament David Ricardo (Adam Smith’s protégé), as it was for individuals with less publicly shared views sitting the judicial bench.²⁴⁵

According to a public lecture delivered by the inaugural Whately Professor of Political Economy at Queen’s College, Galway, “there are few persons of decent education and ordinary mental activities who do not form and express opinions” based on its premises.²⁴⁶ A review of contemporary publicly circulated writing bears out this conclusion. For example, in analysing optimal wage levels, one treatise on political economy concluded that “the lowest wage that will be accepted is determined solely by the worker’s power to endure; he who can work with the least food and rest and the poorest lodging will obtain the employment.”²⁴⁷ As to the remaining population, the author believed them most suited to the “workhouses and refuges and charity organisations” operated for their “especial benefit.”²⁴⁸ The prevalence of these views is not surprising

244. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 293 (1979). The thrust of Atiyah’s book is that between the years 1770 and 1870, political economy pervaded judicial views of contract law.

245. See *id.* at 370–72; see also MARK CURTHOYS, *GOVERNMENTS, LABOUR, AND THE LAW IN MID-VICTORIAN BRITAIN: THE TRADE UNION LEGISLATION OF THE 1870s* 7 (2004) (“[T]he outlook of mid-Victorian judges tended to be coloured by the individualist, utilitarian assumptions” as well as “dogmatic individualism.”).

246. JOHN E. CAIRNES, *POLITICAL ECONOMY AS A BRANCH OF GENERAL EDUCATION* 6 (London, J.W. Parker & Son 1860). Galway was not unique in accrediting political economy as a discipline. For instance, Oxford had a Drummond Chair in Political Economy. One might also consider its popularity among not-as-well educated people who read SAMUEL SMILES, *THRIFT* (1875) and SAMUEL SMILES, *SELF-HELP* (1875), as well as the journal *Illustrations of Political Economy* with its moral stories for children by Harriet Martineau. See generally Scott Gordon, *The London Economist and the High Tide of Laissez Faire*, 63 J. POL. ECON. 461 (1955).

247. ALEXANDER W. JOHNSTON, *STRIKES, LABOUR QUESTIONS, AND OTHER ECONOMIC DIFFICULTIES: A SHORT TREATISE OF POLITICAL ECONOMY* 98 (London, Bliss, Sands & Foster 1895).

248. *Id.* at 99; see also JOHN LANCELOT SHADWELL, *POLITICAL ECONOMY FOR THE PEOPLE* 56–57 (London, Trubner Co. 1880) (Iron puddlers *must* earn high wages as “a compensation for the suffering and fatigue which is involved in constant exposure to the intense heat of the furnace,” for otherwise no one would do the work.); G. POULETT SCROPE, *PRINCIPLES OF POLITICAL ECONOMY* 52 (London, Longman, Rees, Orme, Brown, Green, Longman, Paternaster-Row 1833) (Labour is “voluntary and free in the choice of its direction” such that wages are based on principles of free exchange in which the more skilled are paid more.).

given that John Stuart Mill's *Principles of Political Economy* had become "the standard text for students."²⁴⁹

Lord Abinger's opinions and public statements provide a clear example of how political economy influenced the views of the judiciary. One of the most obvious exemplars is the discussion in *Priestley* on the relative rights of masters and servants. The master, the Chief Baron opined, had no obligation "to take more care of the servant than he may reasonably be expected to do of himself."²⁵⁰ To rule otherwise was to invite "absurdity."²⁵¹ Avoidance of the "absurd" as justification for corraling responsibility was revived five years later in Lord Abinger's *Winterbottom v. Wright* opinion limiting liability for faulty goods.²⁵² Lack of privity precluded recovery by an injured coachman against the supplier of a defective mail coach because if the plaintiff were allowed to recover "the most absurd and outrageous consequences, to which I can see no limit, would ensue."²⁵³

The strong influence of political economy upon Lord Abinger may also be seen in House of Commons speeches delivered by him as M.P. Sir James Scarlett. Although his career was brief and far from stellar, it was notable for his rigorous efforts to amend the Old Poor Law.²⁵⁴ In 1821, Sir James put forward a bill that proposed caps on relief awards, restrictions on assistance to the able-bodied, and complete abolishment of the law of settlement.²⁵⁵ The rationales offered in support of this proposed legislation smack of classic Liberal thought. Sir James argued that the "great evil in connexion with the present poor laws" was "that by law an unlimited provision was made for the poor."²⁵⁶ It therefore "must operate as a premium for poverty, indolence, licentiousness, and immorality. . . . and nothing could be more injurious to a country" than a system that disincented industriousness.²⁵⁷

Perhaps the most stalwart judicial proponent of political economy, at least as measured by publicly stated positions on the operation of labour markets, was Baron Bramwell.²⁵⁸ His views, although relatively

249. GORDON BIGELOW, *FICTION, FAMINE, AND THE RISE OF ECONOMICS IN VICTORIAN BRITAIN AND IRELAND* 65 (2003).

250. *Priestley v. Fowler*, (1837) M. & H. 305, 307, 150 Eng. Rep. 1030, 1050.

251. *Id.*; see also R.W. KOSTAL, *LAW AND ENGLISH RAILWAY CAPITALISM 1825-1875*, at 264 (1994) ("The outcome of this reasoning was determined by Lord Abinger's philosophical convictions about the nature of personal responsibility in early nineteenth-century England.").

252. (1842) 10 M. & W. 109, 152 Eng. Rep. 402.

253. *Id.* at 110, 152 Eng. Rep. at 402; see also ATIYAH *supra* note 244, at 368 (Lord Abinger's Court of Exchequer was "most favourably inclined to the stern severity of *caveat emptor*" as an example of its Liberal views.).

254. See EDWARD FOSS, *A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND 1066-1870*, at 591 (London, Spottiswoode 1870).

255. See 5 PARL. DEB., H.C. (N.S.) (1821) 573-82, 587-88, 987-99, 1228-30, 1479-83; 7 PARL. DEB., H.C. (N.S.) (1822) 761.

256. 5 PARL. DEB., H.C. (N.S.) (1821) 574.

257. *Id.*

258. Richard A. Epstein, *For a Bramwell Revival*, 38 AM. J. LEGAL HIST. 246, 246-47 (1994), lauds the Baron's career-long constancy to notions of political economy. So does his biographer, not-

stronger than those of his colleagues towards the end of the century as political economy began to lose influence,²⁵⁹ were nonetheless emblematic of the perspective commonly held by the judiciary.²⁶⁰ In a lecture given to and published by the Liberty and Property Defence League (of which he was a founding member and life-long supporter) Lord Bramwell exegesised the beliefs underlying political economy: people ought to take care of themselves “not from any arrogant notion,” but rather because it is “a special knowledge” that each of us possess.²⁶¹ Accordingly, when a worker contracted out his service it was an act of free will, with eyes wide open to the dangers he had agreed to encounter.²⁶² A contract, the Baron averred, could never be “forced” upon anyone: “[The] advantages the workman is to have in wages” come about through an open market wherein the master “*must*” pay wages commensurate to the risks encountered.²⁶³

This atomistic, existential view of the marketplace for services, and in particular the role played by individual labourers in mediating their positions, was maintained throughout the Victorian period by judges and jurists alike. To provide just one example, in 1887 Frederick Pollock (namesake grandson of the Chief Baron and the author of the first torts treatise),²⁶⁴ stated as axiomatic that servants “contracted with the risk before his eyes, and that the dangers of the service, taken all around, were considered in fixing the rate of payment.”²⁶⁵

2. *Selective Application*

Application of the postulates of political economy to new circumstances was selective. When faced with the equal possibility of extending or restricting liability, English judges favoured individuals whose social

ing how the Baron adhered to his values with “the superior bull-terrier expression of the true English schoolboy.” CHARLES FAIRFIELD, *SOME ACCOUNT OF GEORGE WILLIAM WILSHERE, BARON BRAMWELL OF HEVER AND HIS OPINIONS* 7 (London, MacMillan 1898).

259. On being told during a debate that political economy was falling out of favour, the Baron sarcastically expostulated: “Oh dear! Oh dear! The gods I have worshipped from my youth are all false gods.” GEORGE WILLIAM WILSHER (BARON) BRAMWELL, *LAISSEZ FAIRE* 5 (London, Liberty & Property Defence League 1884).

260. See generally David Abraham, *Liberty and Property: Lord Bramwell and the Political Economy of Liberal Jurisprudence, Individualism, Freedom and Utility*, 38 AM. J. LEGAL HIST. 288, 309–10 (1994) (“[P]erhaps singular about the hegemonic impulse of nineteenth century British liberalism was its insistence on the universality of contract and laws of political economy.”). Perhaps the most prominent exception was Justice Byles, who early in his career anonymously repudiated some tenants of political economy. JOHN BARNARD BYLES, *SOPHISMS OF FREE TRADE AND POPULAR POLITICAL ECONOMY EXAMINED* (London, Seeleys 1849). As a judge he twice attempted to carve out a limited superior servant exception to common employment. See *supra*, Part II.B.2. Even so, it cannot be said that as a judge his rulings varied much from that of his peers.

261. BRAMWELL, *supra* note 259, at 3.

262. *Id.* at 13.

263. *Id.* at 19–20. For similar assertions, see BRAMWELL, *supra* note 4.

264. See generally NEIL DUXBURY, *FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION* (2004).

265. FREDERICK POLLOCK, *THE LAW OF TORTS* 85 (London, Stevens & Sons 1887).

condition was akin to theirs, such as railway passengers, and precluded liability for others, most notably, labourers. The point here is not that of Marxist or Socialist historians who portray courts as exploiting the working classes in favour of capitalist interests, all the while justifying their actions through classical economic precepts.²⁶⁶ Nor is this assertion of a piece with outraged commentators who view the burden cast upon labourers as "cruel and wicked," although on many levels it was indeed harsh.²⁶⁷ Rather, the argument is that judges did not empathise with workmen and were unable or unwilling to place themselves mentally or juridically in similar straights. They saw the world through their own social lenses, believing that everyone logically would conduct themselves in the same way, and did not want to alter the status quo of this admirable situation.²⁶⁸

Accordingly, those very few successful assertions of culpability based on master/servant duty of care arose from injuries caused by employers who acted in an irrational or indecent manner with which the judges simply could not identify. These included masters who personally provided equipment known to be defective,²⁶⁹ induced labourers to return to work with false assurances that known defects would be repaired,²⁷⁰ or failed to protect especially young workers.²⁷¹

The notion that applying objectively correct propositions of political economy would have a disparate negative impact on individuals less fortunately placed than themselves either did not occur to judges or was repressed.²⁷² Take, as example, Lord Abinger's confident statement in

266. See, e.g., E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1965); ARNOLD TOYNBEE, *LECTURES ON THE INDUSTRIAL REVOLUTION* (London, Rivingtons 1884); SIDNEY & BEATRICE WEBB, *THE HISTORY OF TRADE UNIONISM* (London, Longmans, Green & Co. 1884).

267. See, e.g., 1 THOMAS G. SHERMAN & AMASA A. REDFIELD, *A TREATISE ON THE LAW OF NEGLIGENCE* vi-vii (5th ed. 1903) ("A small number of able judges, devoted, from varying motives, to the supposed interests of the wealthy classes, and caring little for any others" invented common employment.); Seymour D. Thompson, *Under What Circumstances A Servant Accepts the Risk of His Employment*, 31 AM. L. REV. 82, 85 (1897) ("[T]he rule of judge-made law which holds the servant at all times and under all circumstances" responsible for injuries incurred on the job "is destitute of any semblance of justice or humanity.").

268. A similar assertion is raised in the context of labour union development by Michael J. Klarman, *The Judge Versus the Unions: The Development of British Labor Law, 1867-1913*, 75 VA. L. REV. 1487, 1559-91 (1989).

269. See, e.g., *Davies v. England*, (1864) 33 L.J.Q.B. 321 (labourer hired to cut cattle carcasses who became ill after coming into contact with diseased meat knowingly supplied by his employers); *Webb v. Rennie*, (1865) 4 F. & F. 608, 176 Eng. Rep. 713 (holding a master liable for a rotted scaffolding's collapse because he cavalierly neglected his duty to use reasonable care to inspect tackle).

270. For example, in *Clarke v. Holmes*, (1861) 6 H. & N. 349, (1862) 7 H. & N. 937, a labourer's £200 jury verdict for grievous injuries occurring after his master promised to refence dangerous machinery was upheld by both the Court of Exchequer and the Exchequer Chamber.

271. In *Grizzle v. Frost*, (1863) 3 F. & F. 622, a sixteen year old girl employed for two days in a rope-making factory lost her arm when ordered by a foreman to place discarded hemp into rollers while the machine was in motion. (1863) 3 F.&F. 622, 623-24, 176 Eng. Rep. 284, 285. A jury awarded her £150 on the ground that the foreman, himself an inexperienced boy, should not have been managing the machinery. See *id.* at 625, 176 Eng. Rep. at 286.

272. As noted by Abraham, *supra* note 260, at 309, "it is characteristic of ruling classes that they identify their own interests as the general interest."

Priestley that a servant was “not bound to risk his safety in the service of his master,” and so was free to “decline any service in which he reasonably apprehends injury to himself.”²⁷³ This proposition was utilised throughout the period by judges to justify denial of master/servant liability.²⁷⁴

Baron Bramwell also presented this position extrajudicially to a Parliamentary committee investigating employers’ liability. On the subject of workers who continued to work in the face of hazardous conditions, Lord Bramwell challenged the notion that servants could not simply leave their jobs. “To my mind,” he averred, “it is a sad thing to hear men come into court” and explain their continued employment “on the ground that their bread depended upon it, or something of that sort.”²⁷⁵ Putting to the side the fact that the majority of industrial labourers lived at subsistence levels and might indeed be placed in dire straits by walking off the job, or that a servant who left his post without tendering adequate notice was unlikely to receive the positive character reference needed for further employment, Baron Bramwell’s representation is questionable. Technically, a servant had to exhibit moral misconduct, willful disobedience, or habitual neglect to warrant losing his position or pay.²⁷⁶ However, as noted by legal commentators of the period, in practice there was no difference between refusing to work and willfully neglecting to do a job.²⁷⁷ Thus, servants who refused to obey their masters’ orders could be summarily dismissed, with their remaining wages left unpaid.²⁷⁸ Further, Justices of the Peace with some frequency imprisoned less fortunate servants at local Quarter Sessions for breach of their labour contracts under the Master and Servants Acts.²⁷⁹

It is similarly telling that, although the majority of English workers by the beginning of Victoria’s reign were engaged in industrial pursuits,²⁸⁰ all the labourers mentioned in Lord Abinger’s parade of horrors in *Priestley* were domestic servants. As a wealthy individual who employed many of the archetypes listed, the Chief Baron was understandably taken

273. *Priestley v. Fowler*, (1837) M. & H., 305, 308, 150 Eng. Rep. 1030, 1032, 1034.

274. See *supra* Parts II.B.1, III.C–D, *passim*.

275. 285 PARL. PAPERS 63 (1877) (Report from the Select Committee on Employers’ Liability for Injuries to their Servants).

276. See, e.g., *Callo v. Brounker*, (1831) 4 Car. & P. 518.

277. See, e.g., EDWARD SPIKE, *THE LAW OF MASTER AND SERVANT, IN REGARD TO DOMESTIC SERVANTS AND CLERKS*, 14 (1839); HENRY FREDERICK GIBBONS, *A HANDY BOOK OF THE LAW OF MASTERS AND SERVANTS* 16 (1867).

278. See, e.g., *Spain v. Arnott*, (1817) 2 Stark 256, 257–58, 171 Eng. Rep. 638, 639.

279. See Douglas Hay, *England, 1562–1875: The Law and Its Uses*, in *MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562–1955*, at 59 (Douglas Hay & Paul Craven eds., 2004) (empirical analysis indicating that “the law as it was applied became more identified with the interests of employers,” including the increased incidence and severity of imprisonment for breach of employment contracts); Douglas Hay, *Master and Servant in England*, in *PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE* 97 (Willibald Steinmetz ed., 2000) (criminal penalties contained in the Master and Servant Acts made it implausible that servants could simply walk off the job).

280. See BRIAN INGLIS, *POVERTY AND THE INDUSTRIAL REVOLUTION* 33–37 (1971).

aback at the prospect of a flood of employer's liability from people who lived under his patronage, even under his own roof.²⁸¹ As explained by Richard Epstein—an ardent, contemporary believer in political economy—at a time when society was rife with illness, disease, and early mortality, “[w]hy should the legal system intervene on behalf of those fortunate enough to gain employment when there were countless others, far worse off, who would gladly trade places with them?”²⁸²

When Lord Abinger encountered industrial labourers in 1839, they had the misfortune of being Chartists demonstrating for a universal franchise; worse, he was to judge their criminal prosecution for illegal organising.²⁸³ Charging the jury, the Chief Baron remonstrated against collective action as the bane of individual freedom and responsibility. A publication the defendants had distributed in favour of Parliamentary representation, he further averred, was likely “to excite the poor against the rich,” lead to “violence and bloodshed,” and ultimately encourage the destitute to “do nothing less than to pull down the monarchy, to destroy the aristocracy.”²⁸⁴ The arraignment was considered sufficiently provocative that Sir Frederick Pollock, hardly a champion of labourers,²⁸⁵ moved the Commons to charge Lord Abinger with judicial misconduct.²⁸⁶

Nonetheless, other judges repeated both the antipathy that Lord Abinger displayed towards labourers seeking social progress, and the justifications of political economy that bolstered that feeling. When sentencing sixteen defendants in a tailors' strike, Baron Bramwell stated that “reason and justice” were against the cause of unionism, for “everybody knows that the total aggregate happiness of mankind is increased by every man being left to the unbiased, unfettered determination of his

281. Most nonindustrial servants were referred to as “menial” from the Latin description of those workers “being *intra moenia*,” i.e., living “within the house or walls of their master.” JAMES BARRY BIRD, *LAWS RESPECTING MASTERS AND SERVANTS, ARTICLED CLERKS, APPRENTICES, AND JOURNEYMEN AND MANUFACTURERS* 1 (London, W. Clark & Son 1795).

282. Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 777–78 (1982); see also DAVID GEORGE GOYDER, *THE DUTIES OF MASTERS AND SERVANTS* 5 (1854) (servants owe “submission, integrity, faithfulness, and obedience”).

283. As to the fate of the Chartists and their endeavour, see EDWARD ROYLE, *CHARTISM* 27 (3d ed. 1996).

284. JAMES SCARLETT, *LORD ABINGER, ADDRESS TO THE GRAND JURY AT THE LATE LEICESTERSHIRE ASSIZES 5–6* (London, John Murray 1839). He was in any event consistent, having previously avowed that if the franchise was expanded the Commons would overwhelm the Peers in the same manner that they had in France. SIX SPEECHES DELIVERED IN THE HOUSE OF COMMONS AT THE CLOSE OF THE DEBATE UPON THE REFORM BILL 25 (1831) (speech of Right Hon. John Wilson Croker).

285. During his tenure as Chief Baron, the Court of Exchequer would continue to resist labour rights; further, he characterized the Chartists as a dangerous and disconcerting social element. See ERNEST MURRAY POLLOCK, *LORD HANWORTH, LORD CHIEF BARON POLLOCK. A MEMOIR* 102 (1929).

286. Lord Abinger was vindicated by a wide vote of 228 to 73. 66 PARL. DEB., H.C. (3d ser.) 1037–1143. Nevertheless, according to the hagiographical biography written by his son, the accusations of impropriety hounded the remainder of his judicial career. PETER CAMPBELL SCARLETT, *A MEMOIR OF THE RIGHT HONOURABLE JAMES, FIRST LORD ABINGER, CHIEF BARON OF HER MAJESTY'S COURT OF EXCHEQUER 175–92* (1877).

own [free] will and judgment as to how he will employ his industry.”²⁸⁷ Following the 1831 Luddite riots against mechanisation, Baron Martin charged the jury that the Poor Law led “to early and improvident marriages and the consequent forced increase of the population.”²⁸⁸ This perspective—that people both knew and received what they had bargained for—also encouraged habitual neglect of occupational illness, the existence of which (when recognised at all) was viewed as part and parcel of individual employment contracts.²⁸⁹

An absolute notion of Victorian class boundaries is elusive. Individuals often straddled more than one category, as in the case of highly remunerated craftsmen or clerical workers; the ambitious and the fortunate could be upwardly mobile.²⁹⁰ Divisions, moreover, occurred within defined classes, such as the separation between the landed aristocracy whose wealth was of long standing, and those propelled into the upper echelons by newly garnered capital.²⁹¹ Nonetheless, a comprehensive survey on the topic found that the economic background of nineteenth-century judges arose from the professions, business interests, and land holdings.²⁹² Moreover, the judiciary was uniformly “socially exclusive”; the median estate value of all English judges indicating that, no matter their precise social origin, those who sat the bench were clearly much wealthier than plaintiff servants and had very different concerns.²⁹³ One must also bear in mind that when judges encountered working class people in the Queen’s courts it was “usually either as criminals, or as witnesses—only very rarely as litigants” asserting civil law claims against social superiors.²⁹⁴ Thus, despite the rarity of successful lawsuits by injured workmen, the judiciary held to the belief that liability was expansive and, if anything, ought to be reined in.²⁹⁵

The absence of empathetic connection to the labourers was characteristic of the upper class that the judiciary inhabited.²⁹⁶ This point is well

287. *R. v. Bailey*, (1867) 16 L.T. 859. More restrained than Lord Abinger, Baron Bramwell’s handling of the matter was lauded by Chief Justice Erle as head of a commission investigating the strike. CURTHOYS, *supra* note 245, at 83–84.

288. CHARLES ALDERSON, SELECTIONS FROM THE CHARGES AND OTHER DETACHED PAPERS OF BARON ALDERSON 172 (1858).

289. P.W.J. BARTRIP, THE HOME OFFICE AND THE DANGEROUS TRADES 30–33 (2003).

290. See NEIL MCCORD, BRITISH HISTORY 1815–1906 (1995).

291. See generally *id.* at 99–107.

292. DANIEL DUMAN, THE JUDICIAL BENCH IN ENGLAND 1727–1875: THE RESHAPING OF A PROFESSIONAL ELITE 140 (1982).

293. *Id.* at 178–79.

294. A.W.B. SIMPSON, VICTORIAN LAW AND THE INDUSTRIAL SPIRIT 5 (1995) (reprinting Selden Society Annual Lecture).

295. See, e.g., *Lynch v. Marchmont*, (1865) 29 J.P.R. 375, 376 (Judges ought to take great “care that the rule of law which is already wide enough is not stretched further.”); *Riley v. Baxendale*, (1861) 6 H. & N. 445, 448, 158 Eng. Rep. 183, 184 (stating that the laudable defence of common employment should not be “trenched upon”); *Vose v. London & Yorkshire Ry. Co.*, (1858) 27 L.J. Ex. 249, 252, 157 Eng. Rep. 300, 303 (same, cautioning that the doctrine not be “frittered away”).

296. Judicial lack of empathy to the lower classes was exacerbated by fear that a chaotic circumstance similar to that of the French Revolution would inexorably follow any meaningful empowerment of the un-

illustrated in the publications of the period addressing the problem of poverty. The source of impoverishment was seen as a variety of negative social causes, including an overly generous Poor Law,²⁹⁷ ignorance of the value of thrift,²⁹⁸ lack of moral restraint (especially in regard to enthusiastic procreation),²⁹⁹ "profligate and libidinous saloons,"³⁰⁰ and inherent inequality.³⁰¹ A hardhearted view of the "plight" of labourers was also shared. As stated with great authority (wholly unencumbered by factual distraction) by one pamphleteer, "the discomforts and privations which are said to oppress the working man, dismally set forth in catalogues woeful and lugubrious . . . really are not so great or general as is believed."³⁰² A similarly dismissive attitude extended to the British hunger riots of the 1830s and to the more than one million Irish deaths caused by the midcentury famine: their collective predicament was attributed to imprudent farming (and family) planning.³⁰³ The social divide was accurately summarised by a character in future Prime Minister Benjamin Disraeli's fiction, that "an impassable gulf divided the Rich from the Poor . . . with no thoughts or sympathies in common."³⁰⁴

In consequence, it hardly comes as a surprise that master/servant decisions are decidedly contrary in relation to culpability by employers for injuries to nonlabourers. In 1839, two years after the decision in *Priestley*, Lord Brougham explicated the rationale for the general principle of employers' vicarious liability to strangers. Masters are culpable because they could sever their servants' employment at will. By contrast, in "employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the conse-

educated masses, whether by universal enfranchisement, or through common-law rights. For a detailed account of social reaction to the French Revolution, see GEORGIOS VAROUXAKIS, *VICTORIAN POLITICAL THOUGHT ON FRANCE AND THE FRENCH* (2002).

297. See, e.g., ROBERT A. SLANEY, *AN ESSAY ON THE EMPLOYMENT OF THE POOR, TO WHICH IS PREFIXED A LETTER BY THE AUTHOR TO JAMES SCARLETT* 11 (1822) (characterising the support system as a great incentive for the poor to throw themselves upon the parish).

298. See, e.g., S. BROOKES, *THOUGHTS ON THE POOR LAWS; WITH A PLAN FOR REDUCING THE POORS' RATES, PREPARATORY TO THEIR ABOLITION* (1822) (urging that the poor be put to work and monetarily rewarded so that they could understand the benefits of prosperity).

299. See, e.g., ANON., *JUSTICE TO THE POOR; AND JUSTICE TO EVERY OTHER CLASS OF THE PEOPLE, AS RESPECTS THE SITUATION OF THE POOR, AND THE STATE OF AGRICULTURE AND COMMERCE* 54 (1820); WM. LISLE BOWLES, *THOUGHTS ON THE INCREASE OF CRIMES, THE EDUCATION OF THE POOR, AND THE NATIONAL SCHOOLS; IN A LETTER TO SIR JAMES MACKINTOSH* 7-10 (2d ed. 1819).

300. WILLIAM CLARK, *THOUGHTS ON THE MANAGEMENT AND RELIEF OF THE POOR; ON THE CAUSES OF THEIR INCREASE; AND ON THE MEASURES THAT MAY BE BEST CALCULATED TO AMEND THE FORMER AND CHECK THE LATTER* 57-58 (1815) ("Let all public spectacles be restrained within the boundaries of chastity and decorum.").

301. "The inequality which we observe in social life, result from corresponding inequality in the natural . . . constitution of the human being." THOMAS LEWIN, *THE RELATIVE DUTIES OF MASTERS AND SERVANTS: A BRIEF DISCOURSE. BY A MASTER OF A FAMILY AND J.P. FOR KENT* 1 (1849).

302. CHARLES WHITEHEAD, *WHAT MAY BE DONE FOR THE POOR BY THE RICH* 4 (1858).

303. RAYMOND G. COWHERD, *POLITICAL ECONOMISTS AND THE ENGLISH POOR LAWS: A HISTORICAL STUDY OF THE INFLUENCE OF CLASSICAL ECONOMICS ON THE FORMATION OF SOCIAL WELFARE POLICY* 182-201 (1977); BIGELOW, *supra* note 249, *passim*.

304. BENJAMIN DISRAELI, *SYBIL, OR THE TWO NATIONS* 265 (London, MacMillan & Co. 1895).

quences.”³⁰⁵ Logically, the same rationale should have controlled when servants acted improvidently on behalf of their employers but the resulting injuries were to fellow servants. In both cases, labourers acted for their masters’ advantage and under their provenances.³⁰⁶

More trenchantly, purely applied notions of political economy militated against liability for injuries to railway passengers because it was common knowledge that travel was dangerous. Both large-scale and lesser accidents were frequent, the more dramatic ones receiving extensive newspaper coverage and calls for public collections in aid of victims.³⁰⁷ Nevertheless, English judges consistently upheld these damage claims, and passengers were not viewed as having bargained for their fares in proportion to undertaking a widely recognized perilous activity.³⁰⁸ Nor was it thought unjust that railways incurred different risk levels and awarded disparate compensation in return for identically priced tickets (as in the case of passengers of different economic means traveling in the same class of service), or that railways were also compelled to dole out identical awards in exchange for variant premiums (e.g., when passengers of the same economic means traveled in different classes of service). All three propositions flew straight in the face of the basic market principles of free bargaining and correct pricing upon which political economy was founded.

This imbalance is particularly acute in light of the hundreds of thousands of pounds that railways annually compensated the estates of wealthier victims under the Fatal Accidents Act;³⁰⁹ amounts that could, in the view of railway attorneys, have been offset by the expedient of passengers taking out readily available accident insurance.³¹⁰ As stated in a letter to Lord Campbell published by the attorney for the London & North West Railway Company, “[l]et a fair premium or consideration be paid, it matters not whether to the railway company or to a public insurance office, and the pecuniary risk is provided for, on the only sound and equitable basis.”³¹¹

305. *Duncan v. Findlater*, (1839) 6 Cl. & Fin. 910, 7 Eng. Rep. 940.

306. Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1154–56 (1990), offers a parallel explanation for the expansion of preexisting common carrier liability to include railway passengers occurring at the same time that potential master/servant liability was quelled.

307. For an overview, see KOSTAL, *supra* note 251, at 279–316.

308. See generally HENRY PARRIS, *GOVERNMENT AND THE RAILWAYS IN NINETEENTH-CENTURY BRITAIN* (1965).

309. EDWARD SMIRKE, *A LETTER TO LORD CAMPBELL ON THE RATING OF RAILWAYS* 7 (1851), pointed out that in the previous year actions under the namesake act had cost one railway alone £10,000. For tabulated annual compensation costs, see KOSTAL, *supra* note 251, at 294–95, 305.

310. Insurance was offered for a wide variety of matters, ranging from theft to venereal disease, and became more prevalent for railway passengers from 1840 onwards. See H.A.L. COCKERELL & EDWIN GREEN, *THE BRITISH INSURANCE BUSINESS 1547–1970*, at 47–50 (1976); HAROLD E. RAYNES, *A HISTORY OF BRITISH INSURANCE* 118–20 (1948).

311. See, e.g., H. BOOTH, *A LETTER TO THE RIGHT HON. LORD CAMPBELL ON THE 9 AND 10 VICTORIA*, CHAPTER 93, at 18 (1854).

Thus, in contrast to the judgments routinely handed down against workmen, English courts with equal constancy upheld passenger litigation versus railways, a situation from which judges could personally benefit.³¹² The Exchequer Barons, moreover, created a presumption of negligence in favour of injured railway passengers two years before *Hutchinson* and *Wigmore*.³¹³ In the same year that they created the doctrine of common employment, the Court of Exchequer elaborated on that ruling by declaring that “the fact of an accident having occurred was of itself *prima facie* evidence of negligence,”³¹⁴ with Baron Alderson adding that it was “not necessary for the plaintiff to trace specifically in what the negligence consists.”³¹⁵ It also bears noting that the first lawsuit on behalf of a passenger against a railway was heard in the Court of Exchequer one year after the decision in *Priestley*, yet parallel concerns about opening the courts to a floodgate of claims were not raised.³¹⁶

Finally, the influence of class perspective in channelling political economy may also be seen in the corresponding allocation of occupiers’ liability which upheld a duty in negligence towards invited strangers or “invitees” but not to servants or other “agents” engaged on the premises.³¹⁷ Not coincidentally, it was the Barons of the Exchequer who laid the groundwork for this parallel, two-tracked formulation.³¹⁸

B. *Alternative Explanations*

Three alternative explanations drawn from the continuing debate over the evolution of American tort law lend insight into the course of the non-development of employer/employee liability in nineteenth-century England, but do not sufficiently explain the phenomenon. In turn, these are judicial restraint, the invisible hand hypothesis, and the subsidy theory.

312. See generally KOSTAL, *supra* note 251, at 273–319. Indeed, writing to then-Prime Minister Gladstone, Queen Victoria described “the very alarming and increasing insecurity of the Railroads” as an imperative matter, for “the Queen’s own family, not to mention her servants and visitors are in perpetual danger.” Jonathan Simon, *Edgework and Insurance in Risk Societies: Some Notes on Victorian Lawyers and Mountaineers*, in *EDGEWORK: THE SOCIOLOGY OF RISK-TAKING* 203, 214 (Stephen Lyng ed., 2005).

313. *Grote v. Chester & Holyhead Ry.*, (1848) 2 Ex. 251, 255.

314. *Skinner v. London, Brighton & South Coast Ry.*, (1850) 5 Ex. 787, 789.

315. *Id.*; see also *Ayles v. Se. Ry. Co.*, (1868) 3 L.R. Ex. 146 (Chief Baron Kelly holding at both trial and on appeal to the Court of Exchequer, that the fact of one train running into another presented a *prima facie* evidence of negligence).

316. See *Bridge v. Grand Junction Ry.*, (1838) 3 M. & W. 244, 150 Eng. Rep. 1134.

317. *Indermaur v. Dames*, (1867) 2 L.R.C.P. 311, 318.

318. In *Southcote v. Stanley*, Chief Baron Pollock referred to the rationale of *Priestley* to deny a hotel’s liability to a guest injured by a falling pane of glass. (1856) 1 H.&N. 247, 249–50, 156 Eng. Rep. 1195, 1197; see also *Wilkinson v. Fairrie*, (1862) 4 B. & S. 396, 158 Eng. Rep. 1038 (ruling by the Court of Exchequer that a servant sent on his master’s business to a certain premises was not entitled to the same protection as a regular business customer).

1. *Judicial Restraint*

One explanation that might be offered as to why workers found it more difficult to obtain compensation at common law than similarly harmed strangers lies in judicial restraint, a brand of jurisprudence in which judges apply existing precedent and do not create new law. Vicarious tort liability for injuries caused by servants to third parties was well established by the beginning of the nineteenth century under the legal maxim "*qui facit per alium facit per se*," that is "whoever does an act by the hands of another, shall be deemed to have done it himself."³¹⁹ By contrast, the possibility of compensating an employee for a work-related accident was not raised until *Priestley* in 1837. Beforehand, with the narrow exception of servants being able to claim the remainder of annual wages for periods spent recuperating from illness or injury, the only legal redress available to incapacitated workers was that provided by their local parishes through the Poor Law system.³²⁰ It can therefore be argued that, in denying Charles Priestley's novel assertion of a master/servant duty of care, the Barons of the Exchequer were juridically conservative, remaining constant to an existing compensation system that did not recognise claims by injured employees. At the same time, and upholding the *status quo*, employers remained vicariously liable for the claims of third parties wounded by their servants.³²¹

A number of factors demonstrate that the decisions of nineteenth-century English courts, rather than manifesting restraint, were precipitated by conscious choices to thwart employers' liability. First, judicial self-possession cannot explain the decision in *Priestley*. Notably, Lord Abinger unambiguously stated that lacking "precedent for the present action," the Court of Exchequer was at "liberty to look at the consequences of a decision the one way or the other."³²² This authority, to either extend or constrict liability, was acknowledged by Baron Martin to a parliamentary committee. Common employment, he explained, was a "new rule of law" that did not exist as they deliberated in *Priestley*.³²³ When the "consequences" of augmenting liability for workplace injuries were envisaged as a litigation deluge that could, shockingly, rise to vicarious liability, the Barons of the Exchequer chose under the guise of "general principles" to avoid the ramifications of this new form of liability as too "inconvenient" and "absurd."³²⁴ Thus, the basis of the denial of liability in

319. Harold Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 108 (1916).

320. See *supra* Part I.C.

321. See generally Harry Smith, *Judges and the Lagging Law of Compensation for Personal Injuries in the Nineteenth Century*, 2 J. LEGAL HIST. 258, 259 (1981) (claiming that the approach taken by judges since *Priestley* may be "associated with conservatism").

322. *Priestley v. Fowler*, (1837) M. & H. 305, 307, 150 Eng. Rep. 1030, 1032.

323. In later testimony, Lord Esher stated "that the law as to the non-liability of masters with regard to fellow servants arose principally from the ingenuity of Lord Abinger in suggesting analogies" that could then be applied to other circumstances. W.C. SPENS & R.T. YOUNGER, *THE LAW OF EMPLOYERS AND EMPLOYED AS REGARDS REPARATION FOR PHYSICAL INJURY* 66 (1887).

324. *Priestley*, M. & H. at 307, 150 Eng. Rep. at 1032.

Priestley was not fidelity to either doctrinal precedent or to the Poor Law as the socially sanctioned system of assistance, but to "general principles" of policy regarding the common law. Notably, Lords Abinger and Cranworth and Baron Alderson's assertions to the contrary, these principles were hardly universal. Although many American state courts adopted the doctrine of common employment (which they called the fellow servant rule), France, Italy, Germany—and Scotland—did not.³²⁵

Second, judges often declined to apply or distinguish precedent to avoid extending employers' liability. When injured employees predicated claims for harm on the House of Lords's decisions in *Paterson* and *Brydon*, judges created exceptions to this duty, with Chief Baron Pollock characterising the ruling in *Paterson* as "*obiter dicta*."³²⁶ In addition, when Justice Byles and Chief Justice Erle sought to follow those decisions by exempting servants of unequal status from the doctrine of common employment, the suggestion was quickly reprovved.³²⁷ This side-stepping of precedent, at a time when all courts were acknowledged as being bound by House of Lords decisions, demonstrates that employer/employee accountability was avoided because of consciously interpretive decision making, not as the result of conservative judicial reticence.³²⁸

Third, and perhaps most telling, is that instead of extrapolating from established rules governing the allocation of employers' vicarious liability to third parties, England's judges proactively invented and reinstituted common-law defences to preclude servants' recovery against their masters. Specifically, it was the Court of Exchequer, and not defence counsel, that originated and then expanded the use of the doctrine of common employment.³²⁹ As well, it was the Barons of the Exchequer who invoked the defence of *volenti non fit injuria*.³³⁰ Together, these common-law doctrines barred the majority of injured workers' claims. Given the quality of counsel for defendants in *Priestley*, *Hutchinson*, and *Bartonshill Coal v. Reid*, it cannot be plausibly asserted that the lawyers' reserve was due to a failure of skill.³³¹ There simply were no common-law defences for these prestigious barristers to raise until the Court of Exchequer invented and applied them.

325. See BIRRELL, *supra* note 86, at 56–60; T. BEVEN, *THE LAW OF THE EMPLOYERS' LIABILITY FOR THE NEGLIGENCE OF SERVANTS CAUSING INJURY TO FELLOW SERVANTS* 4–6 (1880); see also SIR FREDERICK POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 114–15 (1882) (noting that common employment did not exist in Europe and was novel to Britain).

326. *Dynen v. Leach*, (1857) 26 L.J. Ex. 221, 222.

327. *Wilson v. Merry & Cunningham*, (1868) 1 L.R.S. & D. App. 326, 332; see also *supra* Part II.B.2.

328. In *Attorney-General v. Dean & Canons of Windsor*, (1860) 8 H.L.C. 369, 369, 11 Eng. Rep. 472, 472, Lord Chancellor Campbell categorically established that the Lords were constrained by their own precedent much in the same way as all lower courts were already known to be bound. The ruling was reiterated one year later in *Beamish v. Beamish*, (1861) 9 H.L.C. 274, 274, 11 Eng. Rep. 735, 735.

329. See *supra* Part II.A.

330. See *supra* Part III.C.1.

331. See *supra* Part I.A.

Consequently, judicial restraint does not explain the range of decisions made by the nineteenth-century judiciary when allocating master/servant liability for personal injuries.

2. *The Invisible Hand Hypothesis*

A second explanation that can be drawn from the debate over the origins of American tort doctrine to explain why nineteenth-century English judges resisted employer's liability is the efficiency of legal doctrine.³³² Law and economics scholars, most notably Richard Posner, have argued that Anglo-American common law evolves towards economically efficient rules.³³³ This historical interpretation of how tort doctrine developed, also called the "invisible hand" hypothesis, posits that market driven efficiency guides judges in their decision making.³³⁴ Ironically, this is a notion with which the Victorians would have been comfortable, for it resembles a commonly held belief that organic substances, of which Law was one, evolve towards the best possible state.³³⁵ In the specific context of common employment and *volenti non fit injuria*, Judge Posner has argued that these defences precipitated a regime in which wages were commensurate with risk.³³⁶ Labourers could elect between vocations receiving greater pay to encounter more hazard, and those remunerated at a lower level in return for safer conditions.³³⁷ He concluded that nineteenth-century workers were by-and-large "risk preferring" and had therefore decided for the former option.³³⁸ In consequence of the greater peril that was undertaken, incentives were created for workers to mind themselves and their peers lest they be injured and uncompensated.³³⁹ This modern, retrospective rationale dovetails well with the rhetoric offered by English judges throughout the period, namely that it was the injured workers themselves who were best placed to know of and avoid hazards, and that they were paid wages commensurate with the running of these risks. Nevertheless, three flaws undercut the persuasiveness of an efficiency rationale.³⁴⁰

332. Or, as Lord Mansfield stated (while still the advocate William Murray) in *Omichund v. Barker*, (1744) 1 Atk. 21, 33, the law "works itself pure" over time.

333. "Judge made rules tend to be efficiency promoting." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 404-05 (2d ed. 1977).

334. For further assertions of this theory, see John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 651 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

335. See generally CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* (1859).

336. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 70 (1972).

337. *Id.*

338. *Id.* at 71.

339. *Id.* at 69-71.

340. See also ALLAN C. HUTCHINSON, *EVOLUTION AND THE COMMON LAW* (2005) (arguing that instead of being viewed as an organic, linear process, law should be understood as developing from a mixture of different processes, including serendipity).

The first shortcoming with the notion of efficiency determining the development of nineteenth-century English employer liability law is purely factual. The legal opinions are devoid of an indication that workers knew of specific dangers arising from their employment or that they responded to these hazards by bargaining for higher wages. Instead, the rulings are predicated upon empirically unfounded, however deeply held, principles of political economy that were presumed as true.³⁴¹ One could also point out that economic and social science data consistently reaches an opposite conclusion, namely, that employees (as well as other persons) are generally risk averse.³⁴²

The second and more trenchant shortcoming of a common-law efficiency theory is the absence of evidence supporting the determination that a no-liability rule was (or is) more efficient than a regime holding employers strictly liable for injuries to their servants.³⁴³ The basic economic principle of economy of scale makes it less expensive for large industries than for smaller ones to invest in safety and internalise accident costs. Moreover, the type of industry in question affects how frequently accidents occur, the level of risk, and the costs of prevention. Therefore, from an economic efficiency perspective "there is insufficient information to identify the rule that properly allocates the risk of loss, and there is no reason *a priori* to assume that the same rule will work equally well in widely dissimilar contexts."³⁴⁴ In the same vein, no convincing rationale has been put forward to establish why a higher wage/lower liability rule is ultimately more economically efficient than a lower wage/higher liability regime. There is also reason to believe that a system of greater compensation in lieu of reduced tort culpability may have less utility because it does not prevent human injury and its attendant social costs.³⁴⁵

Further, what enquiries were made into the efficiency of competing legal regimes pointed in the opposite direction, towards employer liability. The Benthamite reformer Sir Edwin Chadwick, for instance, en-

341. For a parallel contemporary assertion, see Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES IN LAW 145, 145 (2003) (characterising Posner's arguments about an economic efficiency formula "based on speculative and implausible assumptions, overbroad generalisations, selective quotations, and superficial" case descriptions).

342. Epstein, *supra* note 282, at 781, was the first to identify this flaw in the invisible hand theory. He has nevertheless very strongly and consistently advocated the position that workers are in fact knowledgeable about the risks incumbent in their employment, are guided by this knowledge in their occupational decisions, and should have autonomy to make those choices. For a contrary, empirical view that contemporary workers are largely unaware of their employment rights, see Pauline Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

343. The debate may have begun in the nineteenth century, but continues through to the present day. Compare Jennifer Arlen & Bentley MacLeod, *Beyond Master Servant: A Critique of Vicarious Liability*, in EXPLORING TORT LAW 111 (Stuart Madden ed., 2005) (arguing that the common law was inefficient because it focuses on the principle's actual ability to control the agent, rather than its financial ability to do so), with Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984) (asserting that the rule created efficient effects).

344. Epstein, *supra* note 282, at 781–85.

345. *Id.*

gaged in a series of relatively sophisticated cost-benefit analyses that included externalities. He determined that to reduce accidents and increase utility, railways ought to be held strictly liable for injuries to their labourers.³⁴⁶ Chadwick clearly was not motivated to this conclusion by a pained social conscience that wished to redirect funds to injured workmen—he *was*, after all, the driving force behind the New Poor Law and its economising measures. Nevertheless, Sir Edwin concluded that most accidents arose because of recklessness on the part of labourers rather than their “cupidity.” In consequence, if railway owners and shareholders had to bear the cost, instead of labourers, the result would be greater care taken by subcontractors in their hiring practices and fewer injuries.³⁴⁷ Moreover, such a rule would be economically more efficient because “the relief of the orphanage and widowhood consequent on the casualties in the construction of railways, has fallen upon the ratepayers of the parishes (frequently distant) in which the labourers who fall had settlements.”³⁴⁸ When the total cost of labour was accounted for, including working days lost to illness and premature mortality, Chadwick concluded that the best course would be to not overwork labourers and to educate them to make intelligent choices, especially in relation to operating machinery.³⁴⁹

3. *The Subsidy Theory*

Finally, the divergence in treatment of injured employees and third parties in nineteenth-century England cannot be adequately explained by applying the American tort law “subsidy” theory to Victorian circumstances. Set forth initially by several commentators,³⁵⁰ the subsidy (or, legal instrumentality) principle’s most powerful advocate has been Morton Horwitz,³⁵¹ whose version has become predominant and is known to genera-

346. Similarly, one of his earliest cost-benefit forays, Chadwick recounted the unsanitary living conditions of the labouring classes, and argued for their improvement on the ground that healthier people lost less work time, live longer, and were less dependant on workhouses. POOR LAW COMMISSION, REPORT ON THE SANITARY CONDITION OF THE LABOURING POPULATION 254–76 (1842).

347. PAPERS READ BEFORE THE STATISTICAL SOCIETY OF MANCHESTER ON THE DEMORALISATION AND INJURIES OCCASIONED BY THE WANT OF PROPER REGULATIONS OF LABORERS ENGAGED IN THE CONSTRUCTION AND WORKING OF RAILWAYS 19–21 (Edwin Chadwick ed. 1846).

348. 13 PARL. PAPERS 1846, at 434 (Select Committee on Railway Labourers).

349. SIR EDWIN CHADWICK, MEETING OF THE BRITISH ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, CAMBRIDGE OCTOBER 1862, ADDRESS ON THE MANUAL LABORER AS AN INVESTMENT OF CAPITAL 516 (1862).

350. E.g., Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 27 (1970); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 65–66 (1967); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382 (1951).

351. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 67–108 (1977).

tions of law students.³⁵² In 1981, even its foremost critic acknowledged the subsidy theory as the "prevailing view of American tort history."³⁵³ Within the context of the development of the independent tort of negligence in nineteenth-century America, Horwitz maintains that judges "transformed" an existing common-law compensation rule that had remedied harms into one which "functionally or purposively" acted as "an instrument of policy" advancing the interests of industry by "forced subsidies to growth coerced from the victims of the process."³⁵⁴ Chief among the types of civil suits excluded in order to nurture emerging industry were those sustained by injured workman.³⁵⁵

In light of the manner in which English judges avoided the creation of employer/employee liability by refusing both general and specific master/servant duties of care, and by originating the defences of common employment and *volenti non fit injuria*, the transatlantic application of the subsidy theory may seem plausible. More so because in some cases English jurists overtly justified denying workmen's claims due to concern for the economic viability of business concerns if they were inundated by a deluge of litigation.³⁵⁶ Nonetheless, the subsidy theory has been strongly challenged on several grounds, three of which are pertinent in discrediting an instrumentality principle's application to nineteenth-century England.³⁵⁷

To begin with, the subsidy theory assumes the existence of a common law of strict liability compensating accident victims that was imported to colonial America, and later averted by state court judges. There are serious doubts about the presence of such a system in the United States.³⁵⁸ Nor has it ever been demonstrated to exist in England, where strict-like liability for injury was predicated on prescribed types of status relationships.³⁵⁹ Even more damaging is the issue of timing. Key to the subsidy theory is the proposition that American judges shifted the standard of liability at the height of economic development in the United States.³⁶⁰ By comparison, the rise of negligence as an independent tort in

352. Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663, 667-68 (1982) (lauding this method of historiography).

353. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1717 (1981).

354. HORWITZ, *supra* note 351, at xvi, 1, 3, 30.

355. *See id.* at 1, 30, 67-108, 155.

356. For instance, Chief Baron Pollock in *Morgan v. Vale of Neath Railway Co.*, stating that "I will only add to the judgment which has been just delivered, that by a decision in favour of the plaintiff we should open a flood of litigation, the end of which no one could foresee." (1864) 5 B. & S. 736, 742, 122 Eng. Rep. 1004, 1006.

357. *See, e.g.,* John P.S. McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History*, 3 OXFORD J. LEGAL STUD. 155 (1983); A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 534 (1979).

358. *See, e.g.,* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 927 (1981) ("regard[ing] the view that the industrial era was dominated by a comprehensive theory of fault liability for unintended harm as largely a myth" based on "limited historical evidence").

359. *See supra* Part I.A.

360. HORWITZ, *supra* note 351, *passim*.

English common law did not occur until 1837, just after the end of the Industrial Revolution (1750–1830).³⁶¹ One could counter this argument by asserting that English judges may not have been aware that the industrial cycle had slowed, in particular because of intermittent railway booms. Although there is merit to contending that the judiciary may not have been precisely cognisant regarding the economic cycle, it still does not affect the core argument that incipient economic development, and especially railway growth, was not fostered. Hence the timeframe of the subsidy theory is unsuitable for England.³⁶²

Also fatal to an English version of the subsidy theory is the fact that had judges wished to preserve the development of nascent industry they would have prevented both the extensive liability created by passenger litigation detailed above, as well as heavy parish ratings against railways.³⁶³ These latter were land-based tax assessments that funded a parish's Poor Law obligations. Clever (and greedy) parishes continued to apply the Parochial Assessment Act, and in doing so were able to rate a railway's total income rather than the profits generated by the particular strip of railway running through the individual tariff-assessing parish.³⁶⁴ The consequences were inequities in taxation of immense proportions, resulting in substantial tax relief for wealthier parish residents, including judges. In one instance complained of by Samuel Laing, chair of the London, Brighton & South Coast Railway Company, land that had previously been levied at less than one-half of one percent of the parish total now belonged to a railway paying one-third of the total Poor law assessment for that parish.³⁶⁵ Lord Campbell admitted that this situation was "absurd"—a phrase that was evoked several times throughout the period to preclude master/servant liability—but courts nonetheless uniformly upheld rating assessments against railways.³⁶⁶

Because corporate defendants were not protected during their period of growth, while railways were viewed as milch cows for parish tax assessments, American subsidy theory cannot explicate the preclusion of employees' suits for recompense against their masters in nineteenth-century England.

361. See DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* 1 (1969).

362. Sybil Jack & Adrian Jack, in *Nineteenth-Century Lawyers and Railway Capitalism: Historians and the Use of Legal Cases*, 24 J. LEGAL HIST. 59 (2003), argue that railways and other industries were, if anything, disadvantaged during this period.

363. See generally KOSTAL, *supra* note 251, at 273–319.

364. SAMUEL LAING, *RAILWAY TAXATION* 5–6 (1849).

365. *Id.* at 5; see also SMIRKE, *supra* note 309, at 6 (asserting that until 1836 ratable assessments were always below value, but after the advent of the new Poor Law, railway assessments were always above value).

366. WILLIAM EAGLE BOTT, *LETTER TO LORD CAMPBELL, SUGGESTING ALTERATIONS IN THE LAW OF RATING RAILWAYS* 3–6 (1856).

V. CONCLUSION

During the last two decades of Victoria's reign, Parliament promulgated employers' liability through the Employers' Liability Act and two versions of the Workmen's Compensation Act.³⁶⁷ The effect of these measures on master/servant liability was not immediately positive. Courts interpreted statutory terms to the disadvantage of workmen and, more trenchantly, continued to apply common-law defences to preclude their demands.³⁶⁸

Despite judicial encumbrance, the legislation was beneficial for it increased the variety, number, and successful likelihood of claims that injured labourers (and frequently their widows) could press against employers, and created leverage for out-of-court settlements.³⁶⁹ More importantly, the acts played a significant role in the evolution of twentieth-century British social policy. Largely as the result of early Parliamentary findings that the statutory scheme had achieved its purpose without being ruinous to industry,³⁷⁰ the legislation underwent fine tuning until after the Second World War, and was then subsumed into a national accident insurance plan.³⁷¹ Thus, the statutes helped inaugurate the British system of state insurance as a public solution to widespread social problems.

This Article presented the first analysis of the development of Victorian era master/servant tort liability. While tracing that evolving jurisprudence, it demonstrated that English judges interpreted the law to prevent the emergence of employer accountability. In doing so, these judges created the defence of common employment, widely applied the doctrines of assumption of the risk and contributory negligence, quashed nearly every innovative attempt to create law favourable to labourers, subverted jury awards, and avoided House of Lords precedent that supported a limited form of liability.

The Article demonstrated that the most complete account of why Victorian judges acted in this manner was the dominant influence of the intellectual schema of political economy. Further, it demonstrated that the established rationales for the parallel development of American tort law (judicial restraint, the invisible hand hypothesis, and the subsidy theory) supplement our knowledge but do not adequately explain the events depicted. By offering a comparative perspective into the debate over the development of American tort law, and illustrating the shortcomings of

367. 1880, 43 & 44 Vict., c. 42; 1897, 60 & 61 Vict., c. 37; 1900, 63 & 64 Vict., c. 22.

368. Foremost among the disparagers of this system was legal commentator, later County Court Judge, A.H. Ruegg who characterised the legislation as "the best abused statute ever passed." ALFRED HENRY RUEGG, *THE LAWS REGULATING THE RELATION OF EMPLOYER AND WORKMAN IN ENGLAND* 147 (1905).

369. See generally DAVID G. HANES, *THE FIRST BRITISH WORKMEN'S COMPENSATION ACT, 1897*, 104-05 (1968).

370. See, e.g., 88 PARL. PAPERS 2208 (1904) (reporting the findings presented by Sir Kenelm Digby's committee on Workmen's Compensation).

371. National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. VI, c. 62.

traditional interpretations when applied to the parallel English context, the Article challenged for a reinterpretation of this received wisdom.

The account in this Article also has implications beyond its immediate subject. These types of historical inquiries are necessary to better appreciate modern dilemmas over the salience of entrenched legal doctrines for unanticipated circumstances.³⁷² Much like their predecessors in post-Industrial Revolution England, contemporary American judges are asked daily to decide whether and how long-standing doctrines developed in an earlier age should be applied to rapidly emerging technological innovations.³⁷³ Analysing how earlier judges approached similar challenges, as well as what motivated their decisions, lends insight to our modern-day struggles with similar quandaries. Finally, in presenting an intellectual biography of a homogeneous judiciary, the Article raises questions about the diversity of contemporary judges and legal institutions.

372. See *supra* text accompanying notes 8–9.

373. See *supra* text accompanying notes 10–15.