The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination.

I reserve the relation between negligent and other torts for the next lecture.

→ LECTURE FOUR ←

FRAUD, MALICE, AND INTENT— THE THEORY OF TORTS

THE NEXT SUBJECTS TO BE CONSIDERED ARE FRAUD, MALICE, AND INTENT. In the discussion of unintentional wrongs, the greatest difficulty to be overcome was found to be the doctrine that a man acts always at his peril. In what follows, on the other hand, the difficulty will be to prove that actual wickedness of the kind described by the several words just mentioned is not an element in the civil wrongs to which those words are applied.

It has been shown, in dealing with the criminal law, that, when we call an act malicious in common speech, we mean that harm to another person was intended to come of it, and that such harm was desired for its own sake as an end in itself. For the purposes of the criminal law, however, intent alone was found to be important, and to have the same consequences as intent with malevolence superadded. Pursuing the analysis, intent was found to be made up of foresight of the harm as a consequence, coupled with a desire to bring it about, the latter being conceived as the motive for the act in question. Of these, again, foresight only seemed material. As a last step, foresight was reduced to its lowest term, and it was concluded that, subject to exceptions which were explained, the general basis of criminal liability was knowledge, at the time of action, of facts from which common experience showed that certain harmful results were likely to follow.

It remains to be seen whether a similar reduction is possible on the civil side of the law, and whether thus fraudulent, malicious, intentional, and negligent wrongs can be brought into a philosophically continuous series.

A word of preliminary explanation will be useful. It has been shown in the lecture just referred to that an act, although always importing intent, is per se indifferent to the law. It is a willed, and therefore an intended coordination of muscular contractions. But the intent necessarily imported by the act ends there. And all muscular motions or coordinations of them are harmless apart from concomitant circumstances, the presence of which is not necessarily implied by the act itself. To strike out with the fist is the same act, whether done in a desert or in a crowd.

The same considerations which have been urged to show that an act alone, by itself, does not and ought not to impose either civil or criminal liability, apply, at least frequently, to a series of acts, or to conduct, although the series shows a further coordination and a further intent. For instance, it is the same series of acts to utter a sentence falsely stating that a certain barrel contains No. 1 Mackerel, whether the sentence is uttered in the secrecy of the closet, or to another man in the course of a bargain. There is, to be sure, in either case, the further intent, beyond the coordination of muscles for a single sound, to allege that a certain barrel has certain contents, an intent necessarily shown by the ordering of the words. But both the series of acts and the intent are per se indifferent. They are innocent when spoken in solitude, and are only a ground of liability when certain concomitant circumstances are shown.

The intent which is meant when spoken of as an element of legal liability is an intent directed toward the harm complained of, or at least toward harm. It is not necessary in every case to carry the analysis back to the simple muscular contractions out of which a course of conduct is made up. On the same principle that requires something more than an act followed by damage to make a man liable, we constantly find ourselves at liberty to assume a coordinated series of acts as a proximately simple element, per se indifferent, in considering what further circumstances or facts must be present before the conduct in question is at the actor's peril. It will save confusion and the need of repetition if this is borne in mind in the following discussion.

The chief forms of liability in which fraud, malice, and intent are said to be necessary elements, are deceit, slander and libel, malicious prosecution, and conspiracy, to which, perhaps, may be added trover.

Deceit is a notion drawn from the moral world, and in its popular sense distinctly imports wickedness. The doctrine of the common law with

regard to it is generally stated in terms which are only consistent with actual guilt, and an actual guilty intent. It is said that a man is liable to an action for deceit if he makes a false representation to another, knowing it to be false, but intending that the other should believe and act upon it, if the person addressed believes it, and is thereby persuaded to act to his own harm. This is no doubt the typical case, and it is a case of intentional moral wrong. Now, what is the party's conduct here. It consists in uttering certain words, so ordered that the utterance of them imports a knowledge of the meaning which they would convey if heard. But that conduct with only that knowledge is neither moral nor immoral. Go one step further, and add the knowledge of another's presence within hearing, still the act has no determinate character. The elements which make it immoral are the knowledge that the statement is false, and the intent that it shall be acted on.

The principal question then is, whether this intent can be reduced to the same terms as it has been in other cases. There is no difficulty in the answer. It is perfectly clear that the intent that a false representation should be acted on would be conclusively established by proof that the defendant knew that the other party intended to act upon it. If the defendant foresaw the consequence of his acts, he is chargeable, whether his motive was a desire to induce the other party to act, or simply an unwillingness for private reasons to state the truth. If the defendant knew a present fact (the other party's intent), which, according to common experience, made it likely that his act would have the harmful consequence, he is chargeable, whether he in fact foresaw the consequence or not.

In this matter the general conclusion follows from a single instance. For the moment it is admitted that in one case knowledge of a present fact, such as the other party's intent to act on the false statement, dispenses with proof of an intent to induce him to act upon it, it is admitted that the lesser element is all that is necessary in the larger compound. For intent embraces knowledge sufficing for foresight, as has been shown. Hence, when you prove intent you prove knowledge, and intent may often be the easier to prove of the two. But when you prove knowledge you do not prove intent.

It may be said, however, that intent is implied or presumed in such a case as has been supposed. But this is only helping out a false theory by a fiction. It is very much like saying that a consideration is presumed for an instrument under seal; which is merely a way of reconciling the formal

theory that all contracts must have a consideration with the manifest fact that sealed instruments do not require one. Whenever it is said that a certain thing is essential to liability, but that it is conclusively presumed from something else, there is always ground for suspicion that the essential element is to be found in that something else, and not in what is said to be presumed from it.

With regard to the intent necessary to deceit, we need not stop with the single instance which has been given. The law goes no farther than to require proof either of the intent, or that the other party was justified in inferring such intention. So that the whole meaning of the requirement is, that the natural and manifest tendency of the representation, under the known circumstances, must have been to induce the opinion that it was made with a view to action, and so to induce action on the faith of it. The standard of what is called intent is thus really an external standard of conduct under the known circumstances, and the analysis of the criminal law holds good here.

Nor is this all. The law pursuing its course of specification, as explained in the last lecture, decides what is the tendency of representations in certain cases, as, for instance, that a horse is sound at the time of making a sale; or, in general, of any statement of fact which it is known the other party intends to rely on. Beyond these specific rules lies the vague realm of the jury.

The other moral element in deceit is knowledge that the statement was false. With this I am not strictly concerned, because all that is necessary is accomplished when the elements of risk are reduced to action and knowledge. But it will aid in the general object of showing that the tendency of the law everywhere is to transcend moral and reach external standards, if this knowledge of falsehood can be transmuted into a formula not necessarily importing guilt, although, of course, generally accompanied by it in fact. The moment we look critically at it, we find the moral side shade away.

The question is, what known circumstances are enough to throw the risk of a statement upon him who makes it, if it induces another man to act, and it turns out untrue. Now, it is evident that a man may take the risk of his statement by express agreement, or by an implied one which the law reads into his bargain. He may in legal language warrant the truth of it, and if it is not true, the law treats it as a fraud, just as much when he makes it fully believing it, as when he knows that it is untrue, and means to deceive. If, in selling a horse, the seller warranted him to

be only five years old, and in fact he was thirteen, the seller could be sued for a deceit at common law, although he thought the horse was only five.[1] The common-law liability for the truth of statements is, therefore, more extensive than the sphere of actual moral fraud.

But, again, it is enough in general if a representation is made recklessly, without knowing whether it is true or false. Now what does "recklessly" mean. It does not mean actual personal indifference to the truth of the statement. It means only that the data for the statement were so far insufficient that a prudent man could not have made it without leading to the inference that he was indifferent. That is to say, repeating an analysis which has been gone through with before, it means that the law, applying a general objective standard, determines that, if a man makes his statement on those data, he is liable, whatever was the state of his mind, and although he individually may have been perfectly free from wickedness in making it.

Hence similar reasoning to that which has been applied already to intent may be applied to knowledge of falsity. Actual knowledge may often be easier to prove than that the evidence was insufficient to warrant the statement, and when proved it contains the lesser element. But as soon as the lesser element is shown to be enough, it is shown that the law is ready to apply an external or objective standard here also.

Courts of equity have laid down the doctrine in terms which are so wholly irrespective of the actual moral condition of the defendant as to go to an opposite extreme. It is said that "when a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the representation is made knowing it to be untrue, or whether it is made believing it to be true, if, in fact, it was untrue."[2]

Perhaps the actual decisions could be reconciled on a narrower principle, but the rule just stated goes the length of saying that in business matters a man makes every statement (of a kind likely to be acted on) at his peril. This seems hardly justifiable in policy. The moral starting-point of liability in general should never be forgotten, and the law cannot without disregarding it hold a man answerable for statements based on facts which would have convinced a wise and prudent man of their truth. The public advantage and necessity of freedom in imparting information, which privileges even the slander of a third person, ought a fortiori, it seems to me, to privilege statements made at the request of the party who complains of them.

The common law, at any rate, preserves the reference to morality by making fraud the ground on which it goes. It does not hold that a man always speaks at his peril. But starting from the moral ground, it works out an external standard of what would be fraudulent in the average prudent member of the community, and requires every member at his peril to avoid that. As in other cases, it is gradually accumulating precedents which decide that certain statements under certain circumstances are at the peril of the party who makes them.

The elements of deceit which throw the risk of his conduct upon a party are these. First, making a statement of facts purporting to be serious. Second, the known presence of another within hearing. Third, known facts sufficient to warrant the expectation or suggest the probability that the other party will act on the statement. (What facts are sufficient has been specifically determined by the courts in some instances; in others, no doubt, the question would go to the jury on the principles heretofore explained). Fourth, the falsehood of the statement. This must be known, or else the known evidence concerning the matter of the statement must be such as would not warrant belief according to the ordinary course of human experience. (On this point also the court may be found to lay down specific rules in some cases).[3]

I next take up the law of slander. It has often been said that malice is one of the elements of liability, and the doctrine is commonly stated in this way: that malice must exist, but that it is presumed by law from the mere speaking of the words; that again you may rebut this presumption of malice by showing that the words were spoken under circumstances which made the communication privileged, as, for instance, by a lawyer in the necessary course of his argument, or by a person answering in good faith to inquiries as to the character of a former servant, and then, it is said, the plaintiff may meet this defense in some cases by showing that the words were spoken with actual malice.

All this sounds as if at least actual intent to cause the damage complained of, if not malevolence, were at the bottom of this class of wrongs. Yet it is not so. For although the use of the phrase "malice" points as usual to an original moral standard, the rule that it is presumed upon proof of speaking certain words is equivalent to saying that the overt conduct of speaking those words may be actionable whether the consequence of damage to the plaintiff was intended or not. And this falls in with the general theory, because the manifest tendency of slanderous words is to harm the person of whom they are

spoken. Again, the real substance of the defense is not that the damage was not intended, that would be no defense at all; but that, whether it was intended or not, that is, even if the defendant foresaw it and foresaw it with pleasure, the manifest facts and circumstances under which he said it were such that the law considered the damage to the plaintiff of less importance than the benefit of free speaking.

It is more difficult to apply the same analysis to the last stage of the process, but perhaps it is not impossible. It is said that the plaintiff may meet a case of privilege thus made out on the part of the defendant, by proving actual malice, that is, actual intent to cause the damage complained of. But how is this actual malice made out? It is by showing that the defendant knew the statement which he made was false, or that his untrue statements were grossly in excess of what the occasion required. Now is it not very evident that the law is looking to a wholly different matter from the defendant's intent? The fact that the defendant foresaw and foresaw with pleasure the damage to the plaintiff, is of no more importance in this case than it would be where the communication was privileged. The question again is wholly a question of knowledge, or other external standard. And what makes even knowledge important? It is that the reason for which a man is allowed in the other instances to make false charges against his neighbors is wanting. It is for the public interest that people should be free to give the best information they can under certain circumstances without fear, but there is no public benefit in having lies told at anytime; and when a charge is known to be false, or is in excess of what is required by the occasion, it is not necessary to make that charge in order to speak freely, and therefore it falls under the ordinary rule, that certain charges are made at the party's peril in case they turn out to be false, whether evil consequences were intended or not. The defendant is liable, not because his intent was evil, but because he made false charges without excuse.

It will be seen that the peril of conduct here begins farther back than with deceit, as the tendency of slander is more universally harmful. There must be some concomitant circumstances. There must at least be a human being in existence whom the statement designates. There must be another human being within hearing who understands the statement, and the statement must be false. But it is arguable that the latter of these facts need not be known, as certainly the falsity of the charge need not be, and that a man must take the risk of even an idle statement being heard, unless he made it under known circumstances of privilege. It

would be no great curtailment of freedom to deny a man immunity in attaching a charge of crime to the name of his neighbor, even when he supposes himself alone. But it does not seem clear that the law would go quite so far as that.

The next form of liability is comparatively insignificant. I mean the action for malicious prosecution. A man may recover damages against another for maliciously and without probable cause instituting a criminal, or, in some cases, a civil prosecution against him upon a false charge. The want of probable cause refers, of course, only to the state of the defendant's knowledge, not to his intent. It means the absence of probable cause in the facts known to the defendant when he instituted the suit. But the standard applied to the defendant's consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did.

Then as to malice. The conduct of the defendant consists in instituting proceedings on a charge which is in fact false, and which has not prevailed. That is the root of the whole matter. If the charge was true, or if the plaintiff has been convicted, even though he may be able now to prove that he was wrongly convicted, the defendant is safe, however great his malice, and however little ground he had for his charge.

Suppose, however, that the charge is false, and does not prevail. It may readily be admitted that malice did originally mean a malevolent motive, an actual intent to harm the plaintiff by making a false charge. The legal remedy here, again, started from the moral basis, the occasion for it, no doubt, being similar to that which gave rise to the old law of conspiracy, that a man's enemies would sometimes seek his destruction by setting the criminal law in motion against him. As it was punishable to combine for such a purpose, it was concluded, with some hesitation, that, when a single individual wickedly attempted the same thing, he should be liable on similar grounds.[4] I must fully admit that there is weighty authority to the effect that malice in its ordinary sense is to this day a distinct fact to be proved and to be found by the jury.

But this view cannot be accepted without hesitation. It is admitted that, on the one side, the existence of probable cause, believed in, is a justification notwithstanding malice;[5] that, on the other, "it is not enough to show that the case appeared sufficient to this particular party, but it must be sufficient to induce a sober, sensible and discreet person to act upon it, or it must fail as a justification for the proceeding upon general grounds."[6] On the one side, malice alone will not make a man liable for

instituting a groundless prosecution; on the other, his justification will depend, not on his opinion of the facts, but on that of the court. When his actual moral condition is disregarded to this extent, it is a little hard to believe that the existence of an improper motive should be material. Yet that is what malice must mean in this case, if it means anything.[7] For the evil effects of a successful indictment are of course intended by one who procures another to be indicted. I cannot but think that a jury would be told that knowledge or belief that the charge was false at the time of making it was conclusive evidence of malice. And if so, on grounds which need not be repeated, malice is not the important thing, but the facts known to the defendant.

Nevertheless, as it is obviously treading on delicate ground to make it actionable to set the regular processes of the law in motion, it is, of course, entirely possible to say that the action shall be limited to those cases where the charge was preferred from improper motives, at least if the defendant thought that there was probable cause. Such a limitation would stand almost alone in the law of civil liability. But the nature of the wrong is peculiar, and, moreover, it is quite consistent with the theory of liability here advanced that it should be confined in any given instance to actual wrongdoing in a moral sense.

The only other cause of action in which the moral condition of the defendant's consciousness might seem to be important is conspiracy. The old action going by that name was much like malicious prosecution, and no doubt was originally confined to cases where several persons had conspired to indict another from malevolent motives. But in the modern action on the case, where conspiracy is charged, the allegation as a rule only means that two or more persons were so far cooperating in their acts that the act of anyone was the act of all. Generally speaking, the liability depends not on the cooperation or conspiring, but on the character of the acts done, supposing them all to be done by one man, or irrespective of the question whether they were done by one or several. There may be cases, to be sure, in which the result could not be accomplished, or the offense could not ordinarily be proved, without a combination of several; as, for instance, the removal of a teacher by a school board. The conspiracy would not affect the case except in a practical way, but the question would be raised whether, notwithstanding the right of the board to remove, proof that they were actuated by malevolence would not make a removal actionable. Policy, it might be said, forbids going behind their judgment, but actual evil motives coupled with the

absence of grounds withdraw this protection, because policy, although it does not require them to take the risk of being right, does require that they should judge honestly on the merits.[8]

Other isolated instances like the last might, perhaps, be found in different parts of the law, in which actual malevolence would affect a man's liability for his conduct. Again, in trover for the conversion of another's chattel, where the dominion exercised over it was of a slight and ambiguous nature, it has been said that the taking must be "with the intent of exercising an ownership over the chattel inconsistent with the real owner's right of possession."[9] But this seems to be no more than a faint shadow of the doctrine explained with regard to larceny, and does not require any further or special discussion. Trover is commonly understood to go, like larceny, on the plaintiff's being deprived of his property, although in practice every possessor has the action, and, generally speaking, the shortest wrongful withholding of possession is a conversion.

Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.

But the law does not even seek to indemnify a man from all harms. An unrestricted enjoyment of all his possibilities would interfere with other equally important enjoyments on the part of his neighbors. There are certain things which the law allows a man to do, notwithstanding the fact that he foresees that harm to another will follow from them. He may charge a man with crime if the charge is true. He may establish himself in business where he foresees that the effect of his competition will be to diminish the custom of another shopkeeper, perhaps to ruin him. He may erect a building which cuts another off from a beautiful prospect, or he may drain subterranean waters and thereby drain another's well; and many other cases might be put.

As any of these things may be done with foresight of their evil consequences, it would seem that they might be done with intent, and even

with malevolent intent, to produce them. The whole argument of this lecture and the preceding tends to this conclusion. If the aim of liability is simply to prevent or indemnify from harm so far as is consistent with avoiding the extreme of making a man answer for accident, when the law permits the harm to be knowingly inflicted it would be a strong thing if the presence of malice made any difference in its decisions. That might happen, to be sure, without affecting the general views maintained here, but it is not to be expected, and the weight of authority is against it.

As the law, on the one hand, allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so, at the other extreme, it may on grounds of policy throw the absolute risk of certain transactions on the person engaging in them, irrespective of blameworthiness in any sense. Instances of this sort have been mentioned in the last lecture,[10] and will be referred to again.

Most liabilities in tort lie between these two extremes, and are founded on the infliction of harm which the defendant had a reasonable opportunity to avoid at the time of the acts or omissions which were its proximate cause. But as fast as specific rules are worked out in place of the vague reference to the conduct of the average man, they range themselves alongside of other specific rules based on public policy, and the grounds from which they spring cease to be manifest. So that, as will be seen directly, rules which seem to lie outside of culpability in any sense have sometimes been referred to remote fault, while others which started from the general notion of negligence may with equal ease be referred to some extrinsic ground of policy.

Apart from the extremes just mentioned, it is now easy to see how the point at which a man's conduct begins to be at his own peril is generally fixed. When the principle is understood on which that point is determined by the law of torts, we possess a common ground of classification, and a key to the whole subject, so far as tradition has not swerved the law from a consistent theory. It has been made pretty clear from what precedes, that I find that ground in knowledge of circumstances accompanying an act or conduct indifferent but for those circumstances.

But it is worth remarking, before that criterion is discussed, that a possible common ground is reached at the preceding step in the descent from malice through intent and foresight. Foresight is a possible common denominator of wrongs at the two extremes of malice and negligence. The purpose of the law is to prevent or secure a man indemnity from

harm at the hands of his neighbors, so far as consistent with other considerations which have been mentioned, and excepting, of course, such harm as it permits to be intentionally inflicted. When a man foresees that harm will result from his conduct, the principle which exonerates him from accident no longer applies, and he is liable. But, as has been shown, he is bound to foresee whatever a prudent and intelligent man would have foreseen, and therefore he is liable for conduct from which such a man would have foreseen that harm was liable to follow.

Accordingly, it would be possible to state all cases of negligence in terms of imputed or presumed foresight. It would be possible even to press the presumption further, applying the very inaccurate maxim, that every man is presumed to intend the natural consequences of his own acts; and this mode of expression will, in fact, be found to have been occasionally used,[11] more especially in the criminal law, where the notion of intent has a stronger foothold.[12] The latter fiction is more remote and less philosophical than the former; but, after all, both are equally fictions. Negligence is not foresight, but precisely the want of it; and if foresight were presumed, the ground of the presumption, and therefore the essential element, would be the knowledge of facts which made foresight possible.

Taking knowledge, then, as the true starting-point, the next question is how to determine the circumstances necessary to be known in any given case in order to make a man liable for the consequences of his act. They must be such as would have led a prudent man to perceive danger, although not necessarily to foresee the specific harm. But this is a vague test. How is it decided what those circumstances are? The answer must be, by experience.

But there is one point which has been left ambiguous in the preceding lecture and here, and which must be touched upon. It has been assumed that conduct which the man of ordinary intelligence would perceive to be dangerous under the circumstances, would be blameworthy if pursued by him. It might not be so, however. Suppose that, acting under the threats of twelve armed men, which put him in fear of his life, a man enters another's close and takes a horse. In such a case, he actually contemplates and chooses harm to another as the consequence of his act. Yet the act is neither blameworthy nor punishable. But it might be actionable, and Rolle, C. J. ruled that it was so in *Gilbert* v. *Stone*.[13] If this be law, it goes the full length of deciding that it is enough if the defendant has had a chance to avoid inflicting the harm complained of. And it may well

be argued that, although he does wisely to ransom his life as he best may, there is no reason why he should be allowed to intentionally and permanently transfer his misfortunes to the shoulders of his neighbors.

It cannot be inferred, from the mere circumstance that certain conduct is made actionable, that therefore the law regards it as wrong, or seeks to prevent it. Under our mill acts a man has to pay for flowing his neighbor's lands, in the same way that he has to pay in trover for converting his neighbor's goods. Yet the law approves and encourages the flowing of lands for the erection of mills.

Moral predilections must not be allowed to influence our minds in settling legal distinctions. If we accept the test of the liability alone, how do we distinguish between trover and the mill acts? Or between conduct which is prohibited, and that which is merely taxed? The only distinction which I can see is in the difference of the collateral consequences attached to the two classes of conduct. In the one, the maxim *in pari delicto potior est conditio defendentis*, and the invalidity of contracts contemplating it, show that the conduct is outside the protection of the law. In the other, it is otherwise.[14] This opinion is confirmed by the fact, that almost the only cases in which the distinction between prohibition and taxation comes up concern the application of these maxims.

But if this be true, liability to an action does not necessarily import wrongdoing. And this may be admitted without at all impairing the force of the argument in the foregoing lecture, which only requires that people should not be made to pay for accidents which they could not have avoided.

It is doubtful, however, whether the ruling of Chief Justice Rolle would now be followed. The squib case, *Scott* v. *Shepherd*, and the language of some textbooks, are more or less opposed to it.[15] If the latter view is law, then an act must in general not only be dangerous, but one which would be blameworthy on the part of the average man, in order to make the actor liable. But, aside from such exceptional cases as *Gilbert* v. *Stone*, the two tests agree, and the difference need not be considered in what follows.

I therefore repeat, that experience is the test by which it is decided whether the degree of danger attending given conduct under certain known circumstances is sufficient to throw the risk upon the party pursuing it.

For instance, experience shows that a good many guns supposed to be unloaded go off and hurt people. The ordinarily intelligent and prudent

member of the community would foresee the possibility of danger from pointing a gun which he had not inspected into a crowd, and pulling the trigger, although it was said to be unloaded. Hence, it may very properly be held that a man who does such a thing does it at his peril, and that, if damage ensues, he is answerable for it. The coordinated acts necessary to point a gun and pull a trigger, and the intent and knowledge shown by the coordination of those acts, are all consistent with entire blamelessness. They threaten harm to no one without further facts. But the one additional circumstance of a man in the line and within range of the piece makes the conduct manifestly dangerous to anyone who knows the fact. There is no longer any need to refer to the prudent man, or general experience. The facts have taught their lesson, and have generated a concrete and external rule of liability. He who snaps a cap upon a gun pointed in the direction of another person, known by him to be present, is answerable for the consequences.

The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances; and as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them. They are, however, facts of a special and peculiar function. Their only bearing is on the question, what ought to have been done or omitted under the circumstances of the case, not on what was done. Their function is to suggest a rule of conduct.

Sometimes courts are induced to lay down rules by facts of a more specific nature; as that the legislature passed a certain statute, and that the case at bar is within the fair meaning of its words; or that the practice of a specially interested class, or of the public at large, has generated a rule of conduct outside the law which it is desirable that the courts should recognize and enforce. These are matters of fact, and have sometimes been pleaded as such. But as their only importance is, that, if believed, they will induce the judges to lay down a rule of conduct, or in other words a rule of law, suggested by them, their tendency in most instances is to disappear as fast as the rules suggested by them become settled.[16] While the facts are uncertain, as they are still only motives for decision upon the law, grounds for legislation, so to speak, the judges may ascertain them in anyway which satisfies their conscience. Thus, courts recognize the statutes of the jurisdiction judicially, although the laws of other jurisdictions, with doubtful wisdom, are left to the jury.[17]

They may take judicial cognizance of a custom of merchants.[18] In former days, at least, they might inquire about it *in pais* after a demurrer.[19] They may act on the statement of a special jury, as in the time of Lord Mansfield and his successors, or upon the finding of a common jury based on the testimony of witnesses, as is the practice today in this country. But many instances will be found in the textbooks which show that, when the facts are ascertained, they soon cease to be referred to, and give place to a rule of law.

The same transition is noticeable with regard to the teachings of experience. There are many cases, no doubt, in which the court would lean for aid upon a jury; but there are also many in which the teaching has been formulated in specific rules. These rules will be found to vary considerably with regard to the number of concomitant circumstances necessary to throw the peril of conduct otherwise indifferent on the actor. As the circumstances become more numerous and complex, the tendency to cut the knot with the jury becomes greater. It will be useful to follow a line of cases up from the simple to the more complicated, by way of illustration. The difficulty of distinguishing rules based on other grounds of policy from those which have been worked out in the field of negligence, will be particularly noticed.

In all these cases it will be found that there has been a voluntary act on the part of the person to be charged. The reason for this requirement was shown in the foregoing lecture. Unnecessary though it is for the defendant to have intended or foreseen the evil which he has caused, it is necessary that he should have chosen the conduct which led to it. But it has also been shown that a voluntary act is not enough, and that even a coordinated series of acts or conduct is often not enough by itself. But the coordination of a series of acts shows a further intent than is necessarily manifested by any single act, and sometimes proves with almost equal certainty the knowledge of one or more concomitant circumstances. And there are cases where conduct with only the intent and knowledge thus necessarily implied is sufficient to throw the risk of it on the actor.

For instance, when a man does the series of acts called walking, it is assumed for all purposes of responsibility that he knows the earth is under his feet. The conduct per se is indifferent, to be sure. A man may go through the motions of walking without legal peril, if he chooses to practice on a private treadmill; but if he goes through the same motions on the surface of the earth, it cannot be doubted that he knows that

the earth is there. With that knowledge, he acts at his peril in certain respects. If he crosses his neighbor's boundary, he is a trespasser. The reasons for this strict rule have been partially discussed in the last lecture. Possibly there is more of history or of past or present notions of policy in its explanation than is there suggested, and at any rate I do not care to justify the rule. But it is intelligible. A man who walks knows that he is moving over the surface of the earth, he knows that he is surrounded by private estates which he has no right to enter, and he knows that his motion, unless properly guided, will carry him into those estates. He is thus warned, and the burden of his conduct is thrown upon himself.

But the act of walking does not throw the peril of all possible consequences upon him. He may run a man down in the street, but he is not liable for that unless he does it negligently. Confused as the law is with cross-lights of tradition, and hard as we may find it to arrive at any perfectly satisfactory general theory, it does distinguish in a pretty sensible way, according to the nature and degree of the different perils incident to a given situation.

From the simple case of walking we may proceed to the more complex cases of dealings with tangible objects of property. It may be said that, generally speaking, a man meddles with such things at his own risk. It does not matter how honestly he may believe that they belong to himself, or are free to the public, or that he has a license from the owner, or that the case is one in which the law has limited the rights of ownership; he takes the chance of how the fact may turn out, and if the fact is otherwise than as he supposes, he must answer for his conduct. As has been already suggested, he knows that he is exercising more or less dominion over property, or that he is injuring it; he must make good his right if it is challenged.

Whether this strict rule is based on the common grounds of liability, or upon some special consideration of past or present policy, policy has set some limits to it, as was mentioned in the foregoing lecture.

Another case of conduct which is at the risk of the party without further knowledge than it necessarily imports, is the keeping of a tiger or bear, or other animal of a species commonly known to be ferocious. If such an animal escapes and does damage, the owner is liable simply on proof that he kept it. In this instance the comparative remoteness of the moment of choice in the line of causation from the effect complained of, will be particularly noticed. Ordinary cases of liability arise out of a choice which was the proximate cause of the harm upon which the action

is founded. But here there is usually no question of negligence in guarding the beast. It is enough in most, if not in all cases, that the owner has chosen to keep it. Experience has shown that tigers and bears are alert to find means of escape, and that, if they escape, they are very certain to do harm of a serious nature. The possibility of a great danger has the same effect as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community.

This remoteness of the opportunity of choice goes far to show that this risk is thrown upon the owner for other reasons than the ordinary one of imprudent conduct. It has been suggested that the liability stood upon remote inadvertence.[20] But the law does not forbid a man to keep a menagerie, or deem it in anyway blameworthy. It has applied nearly as strict a rule to dealings which are even more clearly beneficial to the community than a show of wild beasts.

This seems to be one of those cases where the ground of liability is to be sought in policy coupled with tradition, rather than in any form of blameworthiness, or the existence of such a chance to avoid doing the harm as a man is usually allowed. But the fact that remote inadvertence has been suggested for an explanation illustrates what has been said about the difficulty of deciding whether a given rule is founded on special grounds, or has been worked out within the sphere of negligence, when once a special rule has been laid down.

It is further to be noticed that there is no question of the defendant's knowledge of the nature of tigers, although without that knowledge he cannot be said to have intelligently chosen to subject the community to danger. Here again even in the domain of knowledge the law applies its principle of averages. The fact that tigers and bears are dangerous is so generally known, that a man who keeps them is presumed to know their peculiarities. In other words, he does actually know that he has an animal with certain teeth, claws, and so forth, and he must find out the rest of what an average member of the community would know, at his peril.

What is true as to damages in general done by ferocious wild beasts is true as to a particular class of damages done by domestic cattle, namely, trespasses upon another's land. This has been dealt with in former lectures, and it is therefore needless to do more than to recall it here, and to call attention to the distinction based on experience and policy between damage which is and that which is not of a kind to be expected. Cattle generally stray and damage cultivated land when they get upon it. They only exceptionally hurt human beings.

I need not recur to the possible historical connection of either of these last forms of liability with the *noxæ deditio,* because, whether that origin is made out or not, the policy of the rule has been accepted as sound, and carried further in England within the last few years by the doctrine that a man who brings upon his land and keeps there anything likely to do mischief if it escapes, must keep it in at his peril.[21] The strictness of this principle will vary in different jurisdictions, as the balance varies between the advantages to the public and the dangers to individuals from the conduct in question. Danger of harm to others is not the only thing to be considered, as has been said already. The law allows some harms to be intentionally inflicted, and a fortiori some risks to be intentionally run. In some Western States a man is not required to keep his cattle fenced in. Some courts have refused to follow *Rylands* v. *Fletcher.*[22] On the other hand, the principle has been applied to artificial reservoirs of water, to cesspools, to accumulations of snow and ice upon a building by reason of the form of its roof, and to party walls.[23]

In these cases, as in that of ferocious animals, it is no excuse that the defendant did not know, and could not have found out, the weak point from which the dangerous object escaped. The period of choice was further back, and, although he was not to blame, he was bound at his peril to know that the object was a continual threat to his neighbors, and that is enough to throw the risk of the business on him.

I now pass to cases one degree more complex than those thus far considered. In these there must be another concomitant circumstance known to the party in addition to those of which the knowledge is necessarily or practically proved by his conduct. The cases which naturally suggest themselves again concern animals. Experience as interpreted by the English law has shown that dogs, rams, and bulls are in general of a tame and mild nature, and that, if anyone of them does by chance exhibit a tendency to bite, butt, or gore, it is an exceptional phenomenon. Hence it is not the law that a man keeps dogs, rams, bulls, and other like tame animals at his peril as to the personal damages which they may inflict, unless he knows or has notice that the particular animal kept by him has the abnormal tendency which they do sometimes show. The law has, however, been brought a little nearer to actual experience by statute in many jurisdictions.

Now let us go one step farther still. A man keeps an unbroken and unruly horse, knowing it to be so. That is not enough to throw the risk of its behavior on him. The tendency of the known wildness is not

dangerous generally, but only under particular circumstances. Add to keeping, the attempt to break the horse; still no danger to the public is disclosed. But if the place where the owner tries to break it is a crowded thoroughfare, the owner knows an additional circumstance which, according to common experience, makes this conduct dangerous, and therefore must take the risk of what harm may be done.[24] On the other hand, if a man who was a good rider bought a horse with no appearance of vice and mounted it to ride home, there would be no such apparent danger as to make him answerable if the horse became unruly and did damage.[25] Experience has measured the probabilities and draws the line between the two cases.

Whatever may be the true explanation of the rule applied to keeping tigers, or the principle of *Rylands* v. *Fletcher,* in the last cases we have entered the sphere of negligence, and, if we take a case lying somewhere between the two just stated, and add somewhat to the complexity of the circumstances, we shall find that both conduct and standard would probably be left without much discrimination to the jury, on the broad issue whether the defendant had acted as a prudent man would have done under the circumstances.

As to wrongs called malicious or intentional it is not necessary to mention the different classes a second time, and to find them a place in this series. As has been seen, they vary in the number of circumstances which must be known. Slander is conduct which is very generally at the risk of the speaker, because, as charges of the kind with which it deals are manifestly detrimental, the questions which practically arise for the most part concern the defense of truth or privilege. Deceit requires more, but still simple facts. Statements do not threaten the harm in question unless they are made under such circumstances as to naturally lead to action, and are made on insufficient grounds.

It is not, however, without significance, that certain wrongs are described in language importing intent. The harm in such cases is most frequently done intentionally, and, if intent to cause a certain harm is shown, there is no need to prove knowledge of facts which made it likely that harm would follow. Moreover, it is often much easier to prove intent directly, than to prove the knowledge which would make it unnecessary.

The cases in which a man is treated as the responsible cause of a given harm, on the one hand, extend beyond those in which his conduct was chosen in actual contemplation of that result, and in which, therefore, he may be said to have chosen to cause that harm; and, on

the other hand, they do not extend to all instances where the damages would not have happened but for some remote election on his part. Generally speaking, the choice will be found to have extended further than a simple act, and to have coordinated acts into conduct. Very commonly it will have extended further still, to some external consequence. But generally, also, it will be found to have stopped short of the consequence complained of.

The question in each case is whether the actual choice, or, in other words, the actually contemplated result, was near enough to the remoter result complained of to throw the peril of it upon the actor.

Many of the cases which have been put thus far are cases where the proximate cause of the loss was intended to be produced by the defendant. But it will be seen that the same result may be caused by a choice at different points. For instance, a man is sued for having caused his neighbor's house to burn down. The simplest case is, that he actually intended to burn it down. If so, the length of the chain of physical causes intervening is of no importance, and has no bearing on the case.

But the choice may have stopped one step farther back. The defendant may have intended to light a fire on his own land, and may not have intended to burn the house. Then the nature of the intervening and concomitant physical causes becomes of the highest importance. The question will be the degree of danger attending the contemplated (and therefore chosen) effect of the defendant's conduct under the circumstances known to him. If this was very plain and very great, as, for instance, if his conduct consisted in lighting stubble near a haystack close to the house, and if the manifest circumstances were that the house was of wood, the stubble very dry, and the wind in a dangerous quarter, the court would probably rule that he was liable. If the defendant lighted an ordinary fire in a fireplace in an adjoining house, having no knowledge that the fireplace was unsafely constructed, the court would probably rule that he was not liable. Midway, complicated and doubtful cases would go to the jury.

But the defendant may not even have intended to set the fire, and his conduct and intent may have been simply to fire a gun, or, remoter still, to walk across a room, in doing which he involuntarily upset a bottle of acid. So that cases may go to the jury by reason of the remoteness of the choice in the series of events, as well as because of the complexity of the circumstances attending the act or conduct. The difference is, perhaps, rather dramatic than substantial.

But the philosophical analysis of every wrong begins by determining what the defendant has actually chosen, that is to say, what his voluntary act or conduct has been, and what consequences he has actually contemplated as flowing from them, and then goes on to determine what dangers attended either the conduct under the known circumstances, or its contemplated consequence under the contemplated circumstances.

Take a case like the glancing of Sir Walter Tyrrel's arrow. If an expert marksman contemplated that the arrow would hit a certain person, *cadit quæstio.* If he contemplated that it would glance in the direction of another person, but contemplated no more than that, in order to judge of his liability we must go to the end of his foresight, and, assuming the foreseen event to happen, consider what the manifest danger was then. But if no such event was foreseen, the marksman must be judged by the circumstances known to him at the time of shooting.

The theory of torts may be summed up very simply. At the two extremes of the law are rules determined by policy without reference of any kind to morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community.

But in the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which lead to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests, of morals. But as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril.

In general, this question will be determined by considering the degree of danger attending the act or conduct under the known circumstances. If there is danger that harm to another will follow, the act is generally wrong in the sense of the law.

But in some cases the defendant's conduct may not have been morally wrong, and yet he may have chosen to inflict the harm, as where he has acted in fear of his life. In such cases he will be liable, or not, according as the law makes moral blameworthiness, within the limits explained above, the ground of liability, or deems it sufficient if the defendant has had reasonable warning of danger before acting. This distinction, however, is generally unimportant, and the known tendency

of the act under the known circumstances to do harm may be accepted as the general test of conduct.

The tendency of a given act to cause harm under given circumstances must be determined by experience. And experience either at first hand or through the voice of the jury is continually working out concrete rules, which in form are still more external and still more remote from a reference to the moral condition of the defendant, than even the test of the prudent man which makes the first stage of the division between law and morals. It does this in the domain of wrongs described as intentional, as systematically as in those styled unintentional or negligent.

But while the law is thus continually adding to its specific rules, it does not adopt the coarse and impolitic principle that a man acts always at his peril. On the contrary, its concrete rules, as well as the general questions addressed to the jury, show that the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct. And it is certainly arguable that even a fair chance to avoid bringing harm to pass is not sufficient to throw upon a person the peril of his conduct, unless, judged by average standards, he is also to blame for what he does.

→ LECTURE FIVE ←

THE BAILEE AT COMMON LAW

SO FAR THE DISCUSSION HAS BEEN CONFINED TO THE GENERAL PRINCIPLES of liability, and to the mode of ascertaining the point at which a man begins to act at his own peril. But it does not matter to a man whether he acts at his own peril or not, unless harm comes of it, and there must always be someone within reach of the consequences of the act before any harm can be done. Furthermore, and more to the point, there are certain forms of harm which are not likely to be suffered, and which can never be complained of by anyone except a person who stands in a particular relation to the actor or to some other person or thing. Thus it is neither a harm nor a wrong to take fish from a pond unless the pond is possessed or owned by someone, and then only to the possessor or owner. It is neither a harm nor a wrong to abstain from delivering a bale of wool at a certain time and place, unless a binding promise has been made so to deliver it, and then it is a wrong only to the promise.

The next thing to be done is to analyze those special relations out of which special rights and duties arise. The chief of them—and I mean by the word "relations" relations of fact simply—are possession and contract, and I shall take up those subjects successively.

The test of the theory of possession which prevails in any system of law is to be found in its mode of dealing with persons who have a thing within their power, but who do not own it, or assert the position of an owner for themselves with regard to it, bailees, in a word. It is necessary, therefore, as a preliminary to understanding the common-law theory of possession, to study the common law with regard to bailees.