

Part II

ACCIDENT LAW: IN TORT AND BEYOND

A. THE NEGLIGENCE SYSTEM

Chapter 5

EMERGENCE OF FAULT

THE CASE OF THE THORNS

1466. Y.B. 6 Ed. 4, 7a, pl. 18.

[The case is summarized as follows in *Lambert v. Bessey*, T. Raym. 421 (1679).] Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit in six acres. The defendant pleads, that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they ipso invito fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another ipso invito, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the shallows growing upon the riverside, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea*.

WEAVER v. WARD

King's Bench, 1616. Hobart 134.

Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff: and that they were skirmishing with their muskets charged with powder for their exercise in *re militari* against another captain and his band; and as they were so skirmishing, the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his