

face the same question. They may decide the case, but only the courts of New Jersey can establish binding precedent on the question what New Jersey law is.

Notice that the Court does not say whether its holding in *Swift* will bind state courts considering the same question. Can you read *Swift* to say that commercial law is a domain of *federal* law—and if so, would the Court’s judgment then have precedential force for all American courts? Or do you read it to say that New York and federal courts *share* authority over commercial questions, so that neither system’s decisions are binding on the other? For which alternative does Fessenden seem to argue? Dana?

As recently as the fall of 2004, the Supreme Court decided a commercial law case that it concluded was governed by federal law—in this case admiralty, or maritime law, which the text of Article III, quoted above, makes an exclusive federal domain. Although the specific event that precipitated the case was a railroad accident occurring many miles from the sea, the contract as a whole was a maritime contract and so, the Court unanimously concluded, admiralty law governed. “When the contract is a maritime one, and the dispute is not inherently local, federal [common] law controls the contract interpretation.” *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 125 S.Ct. 385, 392 (2004). In reasoning about the need for uniform national treatment of commercial transactions such as these, Justice O’Connor’s opinion matched Justice Story’s argument quite precisely. “A maritime contract’s interpretation may so implicate local interests as to beckon interpretation by state law. . . . But when state interests cannot be accommodated without defeating a federal interest . . . then federal substantive law should govern. . . . [O]ur touchstone is a concern for the uniform meaning of maritime contracts . . . Article III’s grant of admiralty jurisdiction ‘must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.’ ” *Id.* at 395.

B. COMMON-LAW COURTS ENCOUNTERING NEW ISSUES

Priestly v. Fowler

Exchequer of Pleas, 1837.
3 Mees. & Wels. 1, 150 Eng.Rep. 1030.

Case. The declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with him and take certain goods of the defendant, in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a

certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the said van with the said goods; and it became the duty of the defendant on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby, in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was fractured. . . .

At the trial before Parke, J., at the Lincolnshire Summer Assizes, 1836, the plaintiff, having given evidence to show that the injury arose from the overloading of the van, and that it was so loaded with the defendant's knowledge, had a verdict for 100 pounds. In the following Michaelmas Term, Adams, Serjt., obtained a rule to show cause why the judgment should not be arrested, on the ground that the defendant was not liable in law, under the circumstances stated in the declaration.

Goulburn and Clark, for the plaintiff:

. . . [T]he action is maintainable on general principles of law. There is no valid distinction between this case and that of an ordinary coach passenger; the service of the servant is the consideration here, as the money of the passenger is there. [Lord Abinger, C. B. The passenger pays his money in consideration of being carried, and there is an implied contract that he shall be carried safely: and he has no means of knowing how the coach is constructed or loaded. Here the servant is on the premises, and has the means of knowledge. It is not the case of a servant hired for that particular occasion, but of a general servant.]⁴ It does not appear on the face of the declaration, that the plaintiff knew the van was overloaded, and it cannot be intended after verdict: on the other hand, it does not appear that the defendant knew it. The question therefore is, whether a master, who directs a servant to get upon an overloaded vehicle, the servant giving his service for taking care of the master's goods carried therein, is not liable if the servant sustains an injury by its breaking down in consequence of such overloading. It is not merely the omission of not using a sufficient vehicle, but an act of commission in allowing it to be overloaded. Suppose a coach passenger saw, when he got up, that the coachman was intoxicated or the horses unruly, would his right to recover for an injury in consequence be affected? [Parke, B. I apprehend the contract would only be to carry as safely as could be, in the condition in which the passenger knew the vehicle to be. Lord Abinger, C. B. Could a

4. In general, brackets in these materials indicate text changes made by their editor. Here, however, the brackets occur in the original. This is a report of an oral argument,

not a summary of a written brief, and the reporter is giving us a sense of the questions asked by the judges of the Exchequer of Pleas during the course of that oral argument.

stage-coachman, who has a restive horse to drive, which he knows to be so, sue his master for an injury done him by the horse? The plaintiff was not bound to go by an overloaded van; he consents to take the risk. If it had appeared that the master undertook that the van was sufficient, it would be different.] It might have been more proper to allege that the defendant so undertook, but the declaration is in substance equivalent to that, at least after verdict, since it states that it was the defendant's duty to use proper care that the van should not be overloaded. The promise and the duty are co-extensive.

Adams, for the defendant:

The cause of action, supposing that any exists, arises out of an implied contract on the part of the master so to load the van as that the plaintiff should be carried safely; but he cannot be made liable in this action on the case except there be a common-law liability, such as to raise a duty. To found any action against the defendant, several circumstances must combine. First, it must appear that the carriage was overloaded by the defendant's direction or with his knowledge; and this it may be admitted the declaration does disclose. Secondly, it ought to appear that the plaintiff was ignorant of the overloading, which is nowhere suggested. Thirdly, the defendant must have ordered the plaintiff to go on the van. There is no clear averment that that was the fact; the "desire and direction" of the defendant, in pursuance of which the plaintiff alleges that he went on the van, is only to go with it and take care of the goods. [Lord Abinger, C.B. That is an ambiguous expression; the plaintiff interprets the ambiguity to mean that he was to go in the van; and we may so interpret after verdict.] But further, it ought to be shown that it was necessary for the plaintiff to do so in order to perform his duty; and (which is perhaps the same proposition in more general terms), that the order was a lawful command, which he was bound as a servant to obey. The mere command of the master will not render him liable, unless the thing commanded fell fairly within the necessity of the servant's duty. There ought to have been an averment that it was necessary for the performance of his duty of conveying the goods that he should go in the van. But even if all these circumstances concurred, they would not constitute a common law liability, but a liability arising out of a contract, and the action should have been *assumpsit*, not *case*. To render the defendant liable in *case*, the existence of malice, express or implied, was necessary.

THE judgment of the Court was now delivered by:

■ LORD ABINGER, C. B. This was a motion in arrest of judgment, after verdict for the plaintiff, upon the insufficiency of the declaration. (His Lordship stated the declaration). It has been objected to this declaration, that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant,

arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the Court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, afford a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of the judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he

is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

We are therefore of opinion that the judgment ought to be arrested.

Rule absolute.

NOTES

(1) Reading legal materials from another era can be challenging. The opinion in *Priestly* starts with an extremely short expression, followed by a sentence that consumes the remainder of a paragraph, written in an unfamiliar and evidently formal style. Still, this paragraph tells us what the dispute is about and you need to figure that out.

(a) Five terms in the first line of the opinion, and the last three lines of the second paragraph, convey essentials that would orient any lawyer to this dispute: “Case,” “declaration,” “plaintiff,” “servant,” “defendant,” and “rule to show cause why the judgment should not be arrested on the ground that the defendant was not liable in law, under the circumstances stated in the declaration.” “Case,” short for “trespass on the case,” informs the reader which of the common law writs, or causes of action, the plaintiff has invoked in his complaint, or declaration. Pleading rules at the time were quite strict, and this choice by plaintiff committed him to the particular theory of legal wrong evoked by “trespass on the case.” Do you know what the rest of the quoted terms mean?

(b) But any lawsuit springs from real world events. Can you construct a narrative of the human events that underlay this opinion? Can you find any difference between two accounts given of these events in connection with this legal dispute—first, what plaintiff alleged in his complaint; and second, what he proved at trial? If you find a difference, and you should, how did that prove to be significant to the outcome of the dispute?

(2) What, *precisely*, was the *new question* presented to the court in *Priestly v. Fowler*? In this connection, note that English law had recognized two possibly relevant heads of liability long before the decision in *Priestly v. Fowler*. One, the doctrine of *respondeat superior*, imposed liability on a master or principal for injuries caused to strangers by the fault of his servant or agent. For example, in *Bush v. Steinman*, 1 Bos. & Pul. 404, 126 Eng. Rep. 978 (1799),

A. contracted with B. to repair a house, and B. contracted with C. to do the work, and C. contracted with D. to furnish the materials; and the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff’s carriage was overturned; it was held that A. was answerable for the damage, on the ground that all the sub-contracting parties were in the employment of A.

2 KENT, COMMENTARIES ON AMERICAN LAW 260 (Lecture XXXII, of Master and Servant) (6th ed. 1848) explained:

The master is bound by the act of his servant, either in respect to contracts or injuries, when the act is done by authority of the master. If the servant does an injury fraudulently, while in the immediate employment of his master, the master, as well as the servant, has been held liable in damages; and he is also said to be liable if the injury proceeds from the negligence, or want of skill in the servant for it is the duty of the master to employ servants who were honest, skillful, and careful.⁵

This theory sounded in what today we would call tort, a body of law generally concerning the consequences of acts among strangers, acts not governed by a pre-existing voluntary legal relationship between the parties.

The second possible head of liability was an implied term of contract. It started from the proposition that plaintiff and defendant had a mutually agreed relationship of some kind, and asked what duties each owed to the other under their agreement. Sometimes a court could be persuaded to find (or imply) an element of the relationship—a duty—on which the parties had not explicitly agreed. Here an example would be a coachman’s duty of care toward an ordinary coach passenger who had bought a ticket for passage on his line. The ticket for which the passenger paid might not say anything about such an obligation, but English courts had long been willing to imply that obligation as an element of the contract.

Under the pleading rules of the time, plaintiff had to choose which of these theories to invoke. What was the *Priestly* plaintiff’s theory respecting the duty defendant owed him? Why do you suppose he chose that theory, rather than the alternative?

(3) What is the principle on the basis of which the house-owner is liable to the plaintiff whose carriage was overturned? Why is it not applicable to *Priestly v. Fowler*? Throughout these materials, we will be dealing with alternative bodies of doctrine that could be used to analyze the legal consequences of the facts in the lawsuits we study, “contracts” and “torts.” You will recognize these as two of the principal subject matters of the first year fall semester curriculum. While much could (and will) be said about each, here it will be useful to stress that—in recent contemplation at least—the two have different characteristic starting points. “Contracts” typically concerns itself with the legal consequences of consensual relationships that have been formed (or are asserted to have been formed) with some end in view—for example, an employment agreement. “Torts” typically concerns itself with the legal consequences of behavior between strangers. Thus, the law establishing liability in “contract” starts with what the parties to the contract have agreed upon as the duties they owe to

5. 1 Blacks. Comm. 431. Dy.161. pl. 45. & Johnson. 291. Cowen, J. in *Wright v. Wilcox*, 19 Wendell, 345. *Pothier on Obligations*, No. 453–456. *Domat*. 1. 16. 3. No. 1. *Harris v. Mabry*, 1 Iredell N.C. Rep. 240.

one another; in contrast, any “duty” to be enforced between strangers (i.e., in “torts”) must be supplied by the court from some other source—a statute, the common law, or public policy concerning the culpable causation of harm.

Please understand that this is a very rough and largely ahistorical description of the fields of play of two subject matter areas with which you will soon become much more familiar. Nonetheless you should find it useful in understanding much of the legal maneuvering in the cases we will be reading. You might think, for example, that a court might be rather quicker to imply a “duty” between strangers when an act traceable to one had unjustifiably harmed the other, than to imply a duty between the parties to an agreement, when the parties did not appear to have thought of that duty for themselves in striking their bargain. Which kind of case is the case of the lime-pile in the road? *Priestly*?

(4) Even in cases in which an agreement exists, one could not expect it to spell out every single aspect of the relationship between the parties to it. As just remarked, courts sometimes imply terms that are not explicit. In one kind of case, described as “implied in fact,” they may conclude that the terms were actually agreed to, and just not made explicit. On occasion, courts believe that terms not conceived by the parties best fit with terms the parties chose; in such a case, the choice of such terms might be cast either as relying on the parties’ “presumed intent” or as carrying out a policy of giving effect to the bargain the parties made. But another kind of case, described as “implied in law,” is indifferent to the parties’ actual understanding or intent. In this kind of case, the implied terms reflect important public policies. Note that when terms are implied on the basis of important public policies, the importance of the policies may lead the courts to refuse to permit parties to reach other agreements, even explicitly.

In the years leading up to *Priestly*, courts had introduced “implied in law” terms into the agreement between a stagecoach passenger and the stagecoach company, providing that the passenger was to be carried *safely* (without negligence). The excerpts from the report of counsels’ arguments show plaintiff’s lawyers trying to build from these established terms in passenger contracts. They argue for a similar implication of duty into the employment contract between *Priestly* and *Fowler*. What argues for or against making that implication? What was Lord Abinger’s holding? His reasoning?

(5) While we cannot tell if the reports of counsel’s argument are complete, they do not address the broader social consequences Lord Abinger considers in reaching his decision. Do you find Lord Abinger’s consideration of those consequences a rational exercise? Could it be improved upon? Consider the following:

(a) “By 1837, the steam railway had supplanted the horse-drawn vehicle as a means of long distance travel; factories in textile and other industries were flourishing; intricate and high-powered machinery was coming more and more into use and its products were displacing those of individual craftsmen. It is noteworthy that all the analogies set forth in

Lord Abinger's opinion were drawn from domestic service, or from trades essentially of the cottage type, carried on by local artisans; and that not a single example was taken from the large units of industry, such as the factory, the steam railway, or the shipbuilding or mining industries, all of which were being carried on in England at that time. Therefore, the law which was to be applied by the courts to those employees injured through complicated or dangerous industrial processes was based on instances taken from an already dying . . . age." Dodd, **Administration of Workmen's Compensation** 5-6 (1936).

(b) In unpublished materials for a course like this one, Professor Roy Schotland of Georgetown suggested two series of questions about ways in which this process of value choice might be made more of a rational art:

(i) Consider first the matter of ultimate ends. A "critical consideration of the ultimately good or worthwhile"⁶ would have required Abinger to ask himself what his more remote ends were; to state why he wanted to make workers more careful and employers free from heavy economic burdens; and if the answer was in some such terms as a glowingly prosperous society, then to analyze the precise components of this vague ideal. Did it involve, and should it involve, economic prosperity only? Prosperity of employers only? What kind of balance should be struck as between the human costs and money costs of achieving the end? . . .

(ii) What of the less ultimate value-judgments (the means-ends assumptions) that Lord Abinger explicitly made: that judgment ought to be for the defendant, because we ought to make workers more careful and ought to avoid a heavy burden upon employers? Here reliable knowledge was not at hand; experience could yield only the roughest kind of verification. Will the means actually produce the ends envisaged? Might freedom from liability make the employer more careless and thus produce more employee injuries and thus impose a heavier economic burden through absenteeism and labor turnover? Moreover, might this means-end inquiry turn up the fact that even if the means under consideration (freedom from liability) was efficacious in producing the contemplated end of freeing employers from heavy economic burdens, the means were too costly, i.e., they had other *additional* results, e.g., high human costs which were too undesirable (enter another value judgment). In this way the inquiry into means affects the choice of the ends themselves, by showing what is involved in that choice.

Today, of course, more "experience" is available than would have been available to Lord Abinger even if he had asked himself questions of this kind. For example, Lord Abinger could not easily have anticipated the adoption of an insurance system for workplace accidents, making employers absolutely liable under workmen's compensation laws but protecting them from unduly heavy economic burdens. Statistics seem to show a declining

6. M.R. Cohen, *Reason and Law* 181 (1950).

accident rate in industry since the enactment of these laws. Does this show Lord Abinger was wrong in asserting that the employer liability contended for by the plaintiff would make workers more careless? Has this declining rate been caused by the fact that employers' liability has been increased? Doubtless other factors were at work, e.g., improved safety devices, but to what extent were these in turn stimulated by the increased liability of employers, rather than by, e.g., an increased humanitarianism? The problem of causation is obviously complex. The "verification" of means-ends judgments is still a rough one.

(6) Before you think too poorly of Lord Abinger, consider that it took about half a century for the British Parliament to begin to "correct" his judgments. On the whole, law school materials present the work of better judges—but they are products of their times, when values and issues may have been quite different to those of our own. Born in 1769 on the island of Jamaica as James Scarlett, Abinger was a well-regarded English barrister before he became a judge, and in that character was particularly esteemed for his jury skills. William Holdsworth, in **15 History of English Law 469–70 (1965)** says Abinger/Scarlett had come to the conclusion that the best jury technique "was not so much eloquence or rhetoric or carefully studied compositions . . . but a plain statement of the essential facts expressed in the simplest language. He . . . made it a rule always to understate rather than to overstate the facts which he was about to prove. 'For whatever strikes the mind of a juror, as the result of his own observation and discovery, makes always the strongest impression upon him, and the case in which the proof falls much below the statement is supposed for that very reason not to be proved at all.' . . . The success of these methods is illustrated by a tale told by Wightman. . . . He got into conversation with a jurymen at the end of an assize and asked him what he thought of the two leading counsel Brougham and Scarlett [Abinger]. The jurymen replied:

'Well that Lawyer Brougham be a wonderful man; he can talk, he can; but I don't think nowt of Lawyer Scarlett.'

'Indeed,' exclaimed Wightman, 'You surprise me. Why, you have been giving him all the verdicts.'

'Oh! There's nothing in that,' said the juror, 'he be so lucky, you see, he be always on the right side.'"

PROBLEM

Imagine yourself a Boston attorney in 1840. A few months ago, you represented Gilham Barnes, a contractor who had been engaged by the Boston & Worcester Railroad Corporation to carry out maintenance work on several of its bridges. While he was riding one of its work trains to the site, as he had been encouraged to do, a wheel on the train broke, derailing the train and severely injuring him. Investigation disclosed that the Corporation regularly used on its work trains wheels that had been "pulled"

from passenger cars because of cracks or other flaws; it was such a wheel that broke.

You were aware that the Corporation regularly furnished voluntary relief to its workers injured in accidents. It had already done so for some of those injured by this derailment. You also know that the amounts it had provided were limited—a year’s wages (\$200), for example. You brought suit for \$10,000 and won a jury verdict in the Suffolk County Court of Common Pleas. The railroad appealed to the Supreme Judicial Court of Massachusetts and (under an available procedure) the matter was then put before a panel of referees. After extensive hearings, they awarded your client \$3000.

This success brought Nicholas Farwell to your door. He had been the engineer of another train that derailed, in this instance because a switchman working on the ground (i.e., not a member of the train crew) had left a switch in an improper position. You may assume the switchman did this carelessly and that Farwell had no way to protect himself from this negligence. Farwell, too, was badly injured. Again, it would be possible to ask the Corporation for relief, and it seems probable that it would respond favorably, albeit in a limited way, to such a petition. You are aware of the decision in *Priestly* and of the recent adoption of the *Priestly* rationale by the highest court of South Carolina (*Murray v. South Carolina RR.Co.*, 1 McMullan 385 (1841)). In *Murray*, the plaintiff was a railroad fireman injured by the negligence of the engineer working in the same cab with him. In explaining its conclusion that recovery should be denied, the South Carolina court had reasoned in part from a general understanding that engineers and firemen constituted a workplace team—to such an extent that firemen, when hired, were given their choice of engineer with whom to work. Recovery from the employer for the consequences of negligence between two such teammates, it thought, was insupportable.

Should Farwell petition the railroad for voluntary relief, or should he sue? If you decide to bring suit, how will the facts of *Barnes* (your prior case), *Priestly* and *Murray* compare with Farwell’s facts? What factual distinctions do you expect you or your opponents will be able to use?

Farwell v. Boston & Worcester R.R. Corp.

Supreme Judicial Court of Massachusetts, 1842.
45 Mass. (4 Met.) 49.

In an action of trespass upon the case, the plaintiff alleged in his declaration, that he agreed with the defendants to serve them in the employment of an engineer in the management and care of their engines and cars running on their rail road between Boston and Worcester, and entered on said employment, and continued to perform his duties as engineer till October 30th 1837, when the defendants, at Newton, by their servants, so carelessly, negligently and unskillfully managed and used, and put and placed the iron match rail, called the short switch, across the rail or track of their said rail road, that the engine and cars, upon which the plaintiff was engaged and employed in the discharge of his said duties of engineer, were thrown from the track of said rail road, and the plaintiff, by means thereof, was thrown with great violence upon the ground; by means of which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same.

[Plaintiff lost in trial court and, under an available procedure, the case was submitted to the Supreme Judicial Court on the following facts agreed by the parties: "The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandize cars, and afterwards with the passenger cars, and so continued till October 30th 1837, at the wages of two dollars per day; that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

"On the 30th of October 1837, the plaintiff, then being in the employment of the defendants, as such engine-man, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition, (as alleged by the plaintiff, and, for the purposes of this trial, admitted by the defendants,) by one Whitcomb, another servant of the defendants, who had been long in their employment, as a switch-man or tender, and had the care of switches on the road, and was a careful and trustworthy servant, in his general character, and as such servant was well known to the plaintiff. By which running off, the plaintiff sustained the injury complained of in his declaration.

"The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

"If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion, as matter of law, that the defendants may be liable in this case, then the case shall be submitted to a jury upon the facts which may be

proved in the case; the defendants alleging negligence on the part of the plaintiff.”

C.G. Loring, for the plaintiff:

The defendants, having employed the plaintiff to do a specified duty on the road, were bound to keep the road in such a condition that he might do that duty with safety. If the plaintiff had been a stranger, the defendants would have been liable; and he contends that the case is not varied by the fact that both the plaintiff and Whitcomb were the servants of the defendants; because the plaintiff was not the servant of the defendants in the duty or service, the neglect of which occasioned the injury sustained by him. He was employed for a distinct and separate service, and had no joint agency or power with the other servants whose duty it was to keep the road in order; and could not be made responsible to the defendants for its not being kept in order. He could not, by any vigilance or any power that he could exercise, have prevented the accident. His duties and those of Whitcomb were as distinct and independent of each other, as if they had been servants of different masters.

The plaintiff does not put his case on the ground of the defendants’ liability to passengers, nor upon the general principle which renders principals liable for the acts of their agents; but on the ground, that a master, by the nature of his contract with a servant, stipulates for the safety of the servant’s employment, so far as the master can regulate the matter.

The defense rests upon an alleged general rule, that a master is not liable to his servant for damage caused by the negligence of a fellow servant. But if that be sound, as a general rule, it does not apply here; for Whitcomb and the plaintiff, as has already been stated, were not fellow servants—that is, were not jointly employed for a common purpose.

The case of *Priestley v. Fowler*, 3 Mees. & Welsb. 1, on which the defendants will rely, was rightly decided. The case was clearly one of equal knowledge on the part of the two servants, and of voluntary exposure by the plaintiff to a known hazard not required by his duty; and both servants were jointly engaged in the same business when the accident happened to the plaintiff. But the reasoning and *dicta* of the court went much beyond the case—in undertaking to lay down a general rule, as applying to all cases of damages sustained by a servant in the employment of his master, without discrimination as to the peculiar relations of the servant, and the causes of the injury received by him—and lead to unsound conclusions.

No general rule can be laid down, which will apply to all cases of a master’s liability to a servant. But it is submitted that a master is liable to one servant for the negligence of another, when they are engaged in distinct employments, though he is not so liable, where two servants are engaged jointly in the same service; because, in the latter

case, each servant has some supervision and control of every other. This principle may be illustrated by the relation which subsists between the owner of a ship and the master and crew. The owner contracts with them to navigate his ship, and of necessity he impliedly contracts that she is capable of navigation—seaworthy for the voyage. And if she prove otherwise, by reason of the carelessness of the builder or the shipwright employed to repair her, and the master and crew lose their wages, the owner must be liable and pay a full indemnity; and he has his remedy against the shipwright. See *Eaken v. Thom*, 5 Esp. R. 6. *Abbott on Ship*. (4th Amer. ed.) 457. In such case, the master and crew have no remedy against the shipwright by whose misconduct they suffer, because there is no privity of contract between him and them. But there is a privity of contract between them and the ship-owner, and this gives a perfect remedy, in the theory of the law. Many similar illustrations of the principle might be given. And unless the servant has a remedy against the master, in such cases, the great fundamental legal rule, that where there is a wrong there is a remedy, is violated or departed from.

In case of servants jointly employed in the same business, it may reasonably be inferred that they take the hazard of injuries from each other's negligence; because such hazard is naturally and necessarily incident to such employment; because they have, to a great extent, the means of guarding against such injuries, by the exercise of mutual caution and prudence, while the master has no such means; and because, between persons employed in a joint service, there is a privity of contract, that renders them liable to each other for their carelessness or neglect in the discharge of such service.

It is a well settled general rule, that a servant is not liable to third persons for his neglect of duty. *Story on Agency*, §§ 308, 309. If that principle applies to this case, so that the plaintiff has no remedy against *Whitcomb*, it would seem to be a sufficient reason for holding the defendants liable.

It is also a well established rule, that if an agent, without his own default, has incurred loss or damage in transacting the business of the principal, he is entitled to full compensation. *Story on Agency*, § 339.

Fletcher & Morey for the defendants:

The plaintiff must maintain his action, if at all, either on the rule of *respondeat superior*, as for a tort, or on an implied contract of indemnity. The early cases in which masters were held liable to a stranger in an action or tort, for the misconduct of their servants, were mostly those which respected the safety of passengers on highways, and were decided on grounds of policy. The doctrine of such liability was afterwards extended to cases that were deemed analogous. See 1 Bl. Com. 432, *Christian's note*. But no rule of policy requires that masters shall be liable to one servant for injuries received by him from a fellow servant. On the contrary, policy requires an entirely different rule, especially in the present case. The aim of all the statutes concern-

ing rail roads is to protect passengers; and if this action is maintained, it will establish a principle which will tend to diminish the caution of rail road servants, and thus increase the risk of passengers.

The defendants have been in no fault, in this case, either in the construction of their road, the use of defective engines, or the employment of careless or untrusty servants. So that the question is, whether they are liable to the plaintiff, on an implied contract of indemnity. The contract between the parties to this suit excludes the notion that the defendants are liable for the injury received by the plaintiff. He agreed to run an engine on their road, knowing the state of the road, and also knowing Whitcomb, his character, and the specific duty intrusted to him. The plaintiff therefore assumed the risks of the service which he undertook to perform; and one of those risks was his liability to injury from the carelessness of others who were employed by the defendants in the same service. As a consideration for the increased risk of this service, he received higher wages than when he was employed in a less hazardous business.

The defendants are doubtless bound, by an implied contract, to use all the ordinary precautions for the safety of passengers, and are liable for injuries which a passenger may receive in consequence of the negligence of their servants. But the plaintiff was not a passenger, and his counsel does not place his claim on that ground.

The only cases in which a servant has attempted to recover of a master for another servant's misconduct, are *Priestley v. Fowler*, 3 Mees. & Welsb. 1, and *Murray v. South Carolina Rail Road Company*, 1 McMullan, 385; and in both those cases, it was held that the action could not be maintained. In those cases, it is true that both servants were on the same carriage when the accident happened by which one of them was injured. And the counsel for the present plaintiff has invented a rule of law, in order to escape from the pressure of those decisions. But admitting the distinction, and the rule which he advances, to be sound, the case at bar is not thereby affected. The plaintiff and Whitcomb were not engaged in distinct and separate employments, but in the same service. They both were acting to the same end, although they had different parts to perform.

It will not be necessary for the court to lay down a general rule, in order to decide this case for the defendants. Ordinary care is all that a master is bound to use in behalf of his servants; and the defendants have used such care. They used due diligence in selecting Whitcomb, who was careful and trustworthy. The case is analogous to that of a ship-owner, who is insured, and who has employed a competent master and crew. Though his ship is lost by the negligence of some of the crew, yet he does not thereby suffer the loss of his insurance. *Walker v. Maitland*, 5 Barn. & Ald. 174.

Loring, in reply:

In the case in 1 McMullan, 385, the plaintiff, as in the case in 3 Mees. & Welsb. 1, was jointly engaged in the same service with the other servant, whose negligence caused the injury. It therefore does not affect the principle on which the present plaintiff rests his cause.

■ SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a rail road, and to employ their trains of cars to carry persons and merchandize for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431. *McManus v. Crickett*, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskillful act of his servant in the conduct of his

affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law—like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy; or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests—it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestley v. Fowler*, 3 Mees. & Welsb. 1. *Murray v. South Carolina Rail Road Company*, 1 McMullan, 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, what ever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskillfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. *Copeland v. New England Marine Ins. Co.* 2 Met. 440–443 and cases there cited. I am aware that the maritime law has its own rules and analogues, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of

justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590, & *seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.¹

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the

1. See *Winterbottom v. Wright*, 10 Adolph. & Ellis, 737. *Mees. & Welsb.* 109; *Milligan v. Wedge* 12

plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the rail road corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine: Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper rail road track, a well constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously

denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained

Plaintiff nonsuit.

NOTES

(1) The “problem” stated before the opinion in *Farwell* in fact approximates the history of the case. Abraham Moore, a Boston trial attorney, represented both Barnes and Farwell, and did not bring *Farwell* to trial until he had finally prevailed in *Barnes*. Unfortunately—because of the differing facts?—it was the railroad, not the worker, that prevailed in the trial court in Suffolk. Farwell had to appeal, and that led to the procedure used in *Farwell* rather than to the use of referees, as in *Barnes*. For his appearance before the Supreme Judicial Court, Moore brought on C.G. Loring as co-counsel; Loring had been his adversary in *Barnes*—that is, the railroad’s attorney. This strategy did not succeed.²

Consider, now, the more technical problems of legal strategy confronting Moore and Loring, as if you had been present at their conferences. What choices would have been available in framing Farwell’s case? If you had to choose between the two, would it be better for you to present the case as one of “contract” (implied term of agreement) or as one of “tort” (respondeat superior)? Consider the facts of the case as well as the principles already established as part of Massachusetts common law, and the recent English decision in *Priestly v. Fowler*. Was the latter binding in Massachusetts? (Would it have been had it been decided in 1737?) What are the advantages and disadvantages of the approaches available? To what extent are public policy considerations relevant, and how should you present them?

Next imagine yourself as counsel for the defendant railroad. Once you received the complaint, you knew that an “implied term of contract” theory had been selected. Plaintiff had a contract of employment with your client, that said nothing one way or the other about this issue. The passengers on the train also had contracts with the railroad, for passage from Boston to Worcester; and those contracts were equally silent about any duty of care. Yet for them, settled law implied as a term of those contracts a requirement that your client use reasonable care in transport-

2. In the end the railroad appears to have held no grudge. Minutes of the Board of Directors meeting of September 19, 1842 reflect a payment of \$720 to Farwell in return

for a release—\$120 for lost wages in 1837, \$100 for medical expenses, and the remainder as a benevolence.

ing them. How will you distinguish the engineer's case from that of the passengers? Should you argue that the railroad could *never* be liable to its employees? That the engineer's wages already included compensation for any risk?³

Finally, consider the importance both parties attached to the implications for future railroad safety. In that regard, what if any legal (or other) relevance can be drawn from information about legislation under consideration at that time? As you might imagine, the prevention of railroad accidents was a matter of considerable moment. A study by Christopher Tomlins of Latrobe University,⁴ from which much of the background information in these notes is drawn, reports that, while these actions were pending, a series of accidents on the Boston & Worcester and on the Western Railroad killed one passenger and nine employees and injured at least forty passengers and six workmen. These accidents led to the creation of a legislative committee of inquiry. Tomlins reports that this committee was instructed to investigate the Western Railroad accidents and to report on "the expediency of enacting such laws as will have a tendency to prevent a recurrence of similar accidents." The committee's report absolved the Western Board of Directors of any culpability, finding rather that their management inspired confidence. Expressing the hope that "increased vigilance and care will hereafter prevent the recurrence of the accidents which have so alarmed the community," the committee was unable to "suggest any legal enactment which can aid in producing this desirable result." The best means to prevent accidents was to leave management unencumbered in its pursuit of safety, free (inter alia) to "discharge [any employee] from service, upon the slightest evidence of negligence, or wantonness, or incompetency."⁵

Should these findings, on a matter of pressing public concern, have influenced Judge Shaw? Do you think they did? Can you imagine an argument counsel Loring might have made (but did not) supporting the proposition that railroad liability would "have a tendency to prevent a

3. If the law already settles the implication question in the railroad's favor, it is easy to argue that wages must include some compensation for the risks the employee would therefore know he would have to protect himself against. Employees could make their own insurance arrangements against the fruition of the risk the common law treated them as having been paid to assume. See pp. 193–94 below. But suppose the legal question has not yet been settled. If this is so, what makes it likely that a portion of each employee's wages represents a "risk premium" that will permit him to self-insure? Absent a knowable legal rule, isn't it at least as likely that his wage has been reduced from what it would otherwise be, to permit the railroad to insure? In the passenger case, one imagines that ticket prices have been increased from what they

would otherwise be, given the stagecoach company's insurance costs. So here, one would think the railroad worker's wages reduced by the company's insurance costs, if that was the company's responsibility.

By hypothesis, the law has not yet established which of these approaches is the right one. Does the fact of higher wages for engineers make this a case for implication "in fact," or can you imagine alternative reasons for that phenomenon?

4. A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800–1850, 6 *Law & History Review* 375 (1988).

5. Report of the Committee on Railroads and Canals (Sen.Doc. 55, 1842), 6–9.

recurrence of similar accidents”? That is, is there any way you can imagine to tie the fact of the accident to corporate policy encouraging employee risk-taking, as had evidently been successful in *Barnes*?

(2) Judge Lemuel Shaw is widely regarded as one of the great early American judges. Chafee describes him, 17 **Dictionary of American Biography** 42, 43, as a person who, unlike Lord Abinger, would have been fully aware of the societal implications of his decision. He was “attracted by new mechanical processes and . . . a member of many learned and charitable societies.” “Probably no other state judge has so deeply influenced commercial and constitutional law throughout the nation. Almost all the principles laid down by him have proved sound. . . . An opinion by Shaw rarely lends itself to isolated quotations; its strength lies in the entire solidity of its reasoning.” In Robert Cover’s description, he was “one of the principal carriers of what Llewellyn called the grand style of common law jurisprudence . . . who tested precedent against [the] threefold criteria of person (of the judge who authored the precedent), principle, and policy.” **Justice Accused** 251 (1975).

Can you find a basis for these words of praise in this opinion?

(3) As we shall see, the *Farwell* holding spread like wildfire (whether as the product of Shaw’s persuasiveness, or of the readiness of the prairie for this lightning bolt, wherever it struck). Yet this outcome was not foreordained.

Thoughtful commentators in the common law tradition often are reacting to a recent opinion, and do not yet have information about its reception. They understand it to be part of their responsibility to challenge new holdings that seem possibly germinal with other cases they can imagine, that may test its limits. Thus, Joseph Story (in addition to being the author of *Swift v. Tyson*, a Harvard law professor and a leading American legal commentator in his time) wrote in his COMMENTARIES ON THE LAW OF AGENCY § 453d (4th ed. 1851):

Whether the same rule [as was recently adopted in the *Farwell* case] would apply to a case, where the agents are engaged in different and distinct employments or business by the same principal, is a point, upon which there does not seem hitherto to have been any positive adjudication; and the principles, asserted in the other case, where the employment or business is the same, do not necessarily govern it. Suppose two ships, owned by the same person, and engaged in different voyages, and by a collision between them, caused by the negligence of the master of one, the master of the other should receive a grievous injury in his person or property; would he have no redress against the principal, upon the ground of the Maxim, *Respondeat superior*? Suppose a commission-merchant, employed by the owner to sell goods for him in Boston, should embark in a steamboat, owned by the same person, for New York, on his own private business, and, in the course of the voyage, he should suffer great personal injury from the gross carelessness of the master of the steamboat; would it be a good answer to an action brought by him against the owner, that he was the agent

of the latter, as well as the master? Suppose a foreign factor should embark his own private goods in a ship belonging to the principal, paying therefor the customary freight for the carriage of the like goods, and during the voyage, by the gross negligence of the master of the ship, the goods should be damaged or destroyed; would the owner be exempted from all liability therefor? Suppose a carpenter, employed to build a house for the owner of a stagecoach, should, in traveling in the coach, paying the usual fare, by the overturning of the coach, through the gross negligence of the coachman, have his limbs fractured; would the owner be free from all liability; and the suit lie solely against the wrong-doer? These questions are propounded for the mere purpose of showing, that there are, or may be, intrinsic difficulties and inconveniences in pressing the doctrine, resulting from the relation of agency, to such a large extent.

You may often be led through similar testing exercises in your classes.

(4) Consider the following three excerpts from scholarly commentary on *Farwell*. The secondary legal literature can often be a source of profound insight about the law, and you will spend much of your time in law school reading it, and perhaps contributing to it as well. Which of these strikes you as the most persuasive, and why?

(a) ROSCOE POUND, *ECONOMIC INTERPRETATION AND THE LAW OF TORTS*, 53 *Harv. L.Rev.* 365, 366–67, 374, 378–80, 382 (1940) discusses at length the possibility of explaining *Priestly v. Fowler* as the product of the “desires and self interest of an economically dominant class.” That explanation may be apt, he concedes, for

... many laws framed by legislative lawmakers. The legislator is not trained in a technique of referring his action to general principles. He has no settled habits of applying an authoritative technique to authoritatively given materials. Much of legislation can be explained very well by the economic interpretation as developed by our American juristic realists. Yet one has only to read colonial legislation as to certain religious sects (to take an example which cannot be controversial today) in order to see that even legislation need have no economic explanation but may go on deep-seated beliefs or prejudices quite apart from economic considerations.

In contrast, he argues, the “taught tradition” of the common law makes it resistant to any such interpretation.

It is not that economic power has dictated decision of particular cases or judicial promulgation of particular rules, but rather that economic progress has led to new wants, new claims, new demands, new desires. As I have said elsewhere, “the pressure of new interests has required that the taught tradition be made to serve new purposes as old doctrines were called on to solve new problems. There has been a gradual shaping of obstinate traditional precepts and traditional doctrines through the need of applying them to new economic conditions in the light of reshaping ideals of the legal order.” In this way

economic changes have in time a profound effect. But that is another story. Does it follow that single decisions are shaped by class interest? Does the economic status of the parties determine the action of the courts in particular cases? Are legal reasoning, doctrinal exposition, systematic development of authoritative starting points for reasoned decisions mere pretense, mere camouflage of results reached apart from reason solely on the basis of class interest or the social and economic position of the respective parties?

Law is neither wholly reason nor wholly experience. It is experience developed by reason, and reason checked and directed by experience. The strongest single influence both in determining single decisions and in guiding a course of decision is a taught tradition of logically interdependent precepts and of referring cases to principles. Admittedly there are often competing precepts, competing principles, competing starting points for legal reasoning, often of equal authority. It is here that the ideal element in law comes into play, since the results of choosing one starting point rather than another are measured by the received social ideal, as it has been taught to judges and lawyers. The effect of economic changes upon this ideal is for the most part gradual and slow, no matter what class is affected. The business man and the leader of industry have had quite as much cause of complaint in this respect as the labor leader; and the farmer, long dominant in American politics, no less than either. . . .

Priestly, Pound reminds us, was a case in which “the butcher and the boy working for him, who presently as he learned the business would set up for himself as a master butcher, were or would be regarded by the court as of the same class. We cannot assume that the court thought of the case in terms of a packing company of today and a laborer, one of some hundreds in the plant.” The conception of liability it expresses was entirely consistent with tort doctrine as generally applied in that day.

[I]t would have been too much to expect in 1837, when the whole thought of the time was moving away from thinking of employer and employee as a domestic relation, that a court would hark back to that conception in order to require an employer to answer for the safety of the employee in matters where the employer was in no wise at fault. In general, one has a duty to protect those whom the law makes dependent upon him. But the traditional technique of the law is to generalize and refer cases to principles so as to bring about a body of logically interdependent precepts. When employees were asserting their independence and a contract idea was taking them out of the category of domestic dependents, no common-law court could have been found, of whomsoever composed, to turn back to the old dependent idea and impose a liability to take care of the employee on that basis. Workmen’s Compensation depends upon a wholly different conception of liability from that entertained by any one in the first half of the nineteenth century. . . .

It remains to say something of *Farwell v. Boston & Worcester Rail Road Corporation*, decided in 1842 in an opinion by no less a judge than Chief Justice Shaw, which received the doctrine of *Priestley v. Fowler* for America. Certainly the bench which sat in that case could make an argument for the economic interpretation, since the judges who concurred were old line Federalists of an ultra conservative bringing up, were it not that the same court, the same year, in a case reported in the same volume, rendered the leading decision on the law of conspiracy in favor of the labor unions. *Commonwealth v. Hunt* [4 Metc. 111 (1842)], to use the words of a leading exponent of the economic interpretation, “overthrew the substructure upon which a Tory criminal law against labor organizations could respectably have been established.” If the first decision was a formulation of the interest of the dominant employer class, what of the second? When one studies the history of the law of conspiracy and the origin of the doctrine contended for in the prosecution, it is clear that the same mode of juristic thought that led the judges to follow *Priestley v. Fowler* led them also to reject a theory of conspiracy out of line with the common law. . . .

An exclusively economic interpretation of single decisions and single items of judicial action leaves out of account the tenacity of a taught tradition. It takes no account of the instinctive tendency of the lawyer to refer every case back to some general principle. It ignores the prevailing mode of thought of the time which often reflects an economic situation of the past when the taught ideal was formative. Specifically in the cases we have been considering it ignores the nineteenth-century attempt to reduce liability to contract and culpable causation of harm. In 1882 this founding of liability upon undertaking and fault seemed to Mr. Justice Holmes the common sense view. No speculation as to class bias is needed to explain how common-law judges of that time in general, where not bound by authority, thought likewise.

(b) MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 208–210 (1977): This gradual decay of a paternalistic and hierarchical relationship among employers and workers explains in part the absence of American cases before the 1840s in which employees sue their employers for injuries resulting from negligence. There were surely many instances of worker injuries before 1840, but many were probably compensated out of benevolence or charity, depending on the extent of personal relationship between master and servant. The introduction of railroads after 1830, however, not only magnified the risk of serious employment injuries; it also seems to have established the first really impersonal system of employment in America. Only after this breakdown of paternalistic relationships between workers and employers in the developing corporate economic structure do we find laborers turning to courts to seek compensation for injuries arising from their employment.

It is worthy of note that in both England and America the question of the legal liability of employers for the negligent injuries of workers is first

posed at virtually the same moment. In 1837 an English employee for the first time sues his employer for on-the-job personal injuries. In America the issue is first presented in a South Carolina railroad case in 1841.⁶ And in the landmark case of *Farwell v. Boston and Worcester R. R.* (1842), Chief Justice Shaw of Massachusetts settled the issue for the rest of the century by elevating the paradigm of contract to its supreme place in nineteenth century legal thought.

In all these cases, the judges were torn between competing conceptions of legal relations. First, there was the ancient customary principle of *respondet superior* that held a master liable for the tortious acts of his servants. Thus the South Carolina court acknowledged that there could be “no question, that, in general, the principal is liable for acts of the agent, performed in the execution of his agency.” Before the nineteenth century, jurists would not have conceived of this principle as deriving from private agreement, but as imposed by a normatively superior customary law. Now, however, the South Carolina court was prepared to hold that the principle of *respondet superior* was suspended for those in a bargaining relationship, that the liability of the employer “can, in general, be readily ascertained from the object of the contract, and the relative position of the parties.” In short, both the liability of a railroad and the legal rights of an injured “fellow servant” were to be determined exclusively by contract.

Is it incident to the contract that the company should guarantee him against the negligence of his coservants? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract.

But why did the contractarian framework necessarily require the court to assume that employer liability for “extraordinary” risks was excluded from the contract? “No prudent man,” one judge answered, “would engage in any perilous employment, unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger.”

Thus, the contractarian ideology above all expressed a market conception of legal relations. Wages were the carefully calibrated instrument by which supposedly equal parties would bargain to arrive at the proper “mix” of risk and wages. In such a world the old ideal of legal relations shaped by a normative standard of substantive justice could scarcely coexist. Since the only measure of justice was the parties’ own agreement, all preexisting legal duties were inevitably subordinated to the contract relation.

Chief Justice Shaw’s opinion in *Farwell*, more than any other nineteenth century case, reveals the triumph of these intellectual premises. And the pervasiveness of those premises could not be more clearly underlined than by the astonishing fact that even the injured employee’s counsel conceded at the outset that the case should be decided only on principles of contract. “The plaintiff does not put his case . . . upon the general principle which renders principals liable for the act of their agents,” he acknowl-

⁶ *Murray v. South Carolina R.R.*, 26 S.C.L. (1 McMul.) 385 (1841).

edged, “but on the ground, that a master, by the nature of his contract with a servant, stipulates for the safety of the servant’s employment.”

Rarely in the history of American law has so significant a case of “new impression,” as Chief Justice Shaw called it, been so thoroughly determined by the intellectual impoverishment of counsel. “It was conceded,” Shaw thus began his opinion, that the doctrine of *respondeat superior* could be applied only to the liability of a master to compensate *strangers* for his servant’s negligence. In the present case, however, between parties in a bargaining relationship, “the claim, therefore, is placed, and must be maintained at all, on the ground of contract.” Having arrived at this point, the result was inevitable. “The general rule, resulting from considerations as well of justice as of policy,” Shaw concluded, “is, that he who engages in the employment of another . . . for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly.”

The doctrine of “assumption of risk” in workmen’s injury cases expressed the triumph of the contractarian ideology more completely than any other nineteenth century legal creation. It arose in an economy which already had all but eradicated traces of an earlier model of normative relations between master and servants. And without the practice of enforcing preexisting moral duties, judges and jurists could no longer ascribe any purpose to legal obligations that were superior to the expressed “will” of the parties. As contract ideology thus emasculated all prior conceptions of substantive justice, equal bargaining power inevitably became established as the inarticulate major premise of all legal and economic analysis. The circle was completed; the law had come simply to ratify those forms of inequality that the market system produced.

(c) LAWRENCE M. FRIEDMAN & JACK LADINSKY, *SOCIAL CHANGE AND THE LAW OF INDUSTRIAL ACCIDENTS*, 67 *Colum.L.Rev.* 50, 53–58 (1967): It is neither possible nor desirable to avoid passing judgment on human behavior; but one’s understanding of social processes can sometimes be hindered by premature moral assessments. The history of industrial accident law is much too complicated to be viewed as merely a struggle of capital against labor, with law as a handmaid of the rich, or as a struggle of good against evil. From the standpoint of social change, good and evil are social labels based on *perceptions* of conditions, not terms referring to conditions in themselves. Social change comes about when people decide that a situation is evil and must be altered, even if they were satisfied or unaware of the problem before. In order, then, to understand the legal reaction to the problem of industrial accidents, one must understand how the problem was perceived within the legal system and by that portion of society whose views influenced the law.

B. *Birth and Acceptance of the Rule*

The origin of the fellow-servant rule is usually ascribed to Lord Abinger’s opinion in *Priestley v. Fowler*, decided in 1837. Yet the case on its facts did not pose the question of the industrial accident, as later

generations would understand it; rather, it concerned the employment relationships of tradesmen. . . .

The case might have been totally forgotten—or overruled—had not the onrush of the industrial revolution put the question again and again to courts, each time more forcefully. *Priestley v. Fowler* and the doctrine of *respondeat superior* each stood for a broad principle. Whether the one or the other (or neither) would find a place in the law relative to industrial accidents depended upon needs felt and expressed by legal institutions in response to societal demands. Had there been no *Priestley v. Fowler*, it would have been necessary—and hardly difficult—to invent one.

In the United States, the leading case on the fellow-servant situation was *Farwell v. Boston & Worcester Railroad Corp.*, decided by Massachusetts' highest court in 1842. The case arose out of a true industrial accident in a rapidly developing industrial state. Farwell was an engineer who lost a hand when his train ran off the track due to a switchman's negligence. As Chief Justice Shaw, writing for the court, saw it, the problem of *Farwell* was how best to apportion the risks of railroad accidents. In his view, it was superficial to analyze the problem according to the tort concepts of fault and negligence. His opinion spoke the language of contract, and employed the stern logic of nineteenth century economic thought. Some occupations are more dangerous than others. Other things being equal, a worker will choose the least dangerous occupation available. Hence, to get workers an employer will have to pay an additional wage for dangerous work. The market, therefore, has already made an adjustment in the wage rate to compensate for the possibility of accident, and a cost somewhat similar to an insurance cost has been allocated to the company. As Shaw put it, "he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in *legal presumption, the compensation is adjusted accordingly.*" The worker, therefore, has assumed the risk of injury—for a price. The "implied contract of employment" between the worker and employer did not require the employer to bear any additional costs of injury (except for those caused by the employer's personal negligence).

In *Priestley v. Fowler* too, counsel had argued in terms of implied contract. But Lord Abinger had not framed his logic accordingly. Shaw did, and his opinion had great influence on subsequent judicial reasoning. The facts of the case were appropriate and timely, and Shaw saw the issue in clear economic terms. His decision helped convert the rules and concepts of the status-bound law of master and servant to the economic needs of the period, as he understood them.

Shaw's opinion makes extreme assumptions about behavior, justified only by a philosophy of economic individualism. Partly because of this, it has a certain heartlessness of tone. A disabled worker without resources was likely to be pauperized if he had no realistic right to damages. Unless his family could help him, he would have to fall back upon poor relief, the costs of which were borne by the public through taxation. The railroads

and other industrial employers paid a share as taxpayers and, in addition, a kind of insurance cost as part of their wage rate—but no more. Additional damages had to be borne by the worker; if he could not bear them, society generally would pay the welfare costs. Thus the opinion expresses a preference for charging the welfare cost of industrial accidents to the public generally, rather than to the particular enterprise involved.

It is not surprising that such a preference was expressed. Shaw's generation placed an extremely high value on economic growth. As Willard Hurst has noted, that generation was thoroughly convinced it was "socially desirable that there be broad opportunity for the release of creative human energy," particularly in the "realm of the economy." The establishment of a functioning railroad net was an essential element in economic growth. Furthermore, Shaw's resolution of the *Farwell* case is cruel only insofar as society makes no other provision for the victims of accidents—that is, if social insurance and public assistance are inadequate, degrading, or unfair. In a society with a just and workable system of state medical insurance and disability pensions, the *Farwell* solution would be neither inhumane nor inappropriate, even today. Indeed, it could be argued that the broader social responsibility is preferable to one which taxes a particular industry for the claims of its workers. Whether the one side or the other is correct, in economic or political terms, is not here relevant.

Of course, from today's viewpoint, the word "inadequate" is too weak a judgment on what passed for public relief in the early nineteenth century. Social insurance was unknown. Local poor relief was cruel, sporadic, and pinchpenny. Institutions for the helpless were indescribably filthy and heartless. Villages sometimes shunted paupers from place to place, to avoid the burden of paying for them. Moreover, the whole system was shot through with what strikes us today as an inordinate fear of the spread of idleness and a perverse notion that pauperism generally arose out of the moral failings of the poor. The most that can be said is that the system usually made a minimum commitment to keeping the poor alive.

But our condemnation of nineteenth century welfare administration is based on a certain amount of hindsight. Social welfare is looked upon today as a task of government, and government can lay claim to far greater resources to accomplish welfare goals. In Shaw's day, private charity was assigned a higher place in the relief of misery. Probably most people would have agreed then that the disabled and wretched poor ought not to starve. Where private philanthropy failed, local poor relief stepped in. It was the most miserable sort of minimum, but its deficiencies were not apparent to the average middle or upper class citizen who seldom gave the matter a second thought—just as today the inadequacies of mental hospitals and prisons are only vaguely known and rarely given a second thought by most Americans. Poor relief was not *perceived* as a major social problem in the most literal sense. Furthermore, in Shaw's day certain kinds of crises and risks had to be accepted as inevitable, far more than they would be accepted today. High mortality rates from disease threatened all classes of society. Business entrepreneurs ran heavy risks; business failure was

common and could be avoided only by great skill and good fortune. The instability of the monetary system threatened an entrepreneur with sudden, unpredictable, and uninsurable ruin. At the onset of the great business panic of 1857, for example, banks failed by the score; currency turned to ashes, and chain reactions of default were set off by distant collapse or defalcation. Hardly any businessman was safe or immune. Furthermore, imprisonment for debt was still a living memory when Shaw wrote; the present national bankruptcy system did not exist, and local insolvency laws were chaotic and unpredictable. Men like Shaw, the bearers of power and influence, might have conceded that the misfortunes of factory workers were real, but insecurity of economic position cursed the lot of all but the very rich. The problem was one of *general* insecurity.

Shaw and his generation placed their hopes of salvation on rapid economic growth. Perhaps they were anxious to see that the tort system of accident compensation did not add to the problems of new industry. Few people imagined that accidents would become so numerous as to create severe economic and social dislocations. On the contrary, rash extension of certain principles of tort law to industrial accidents might upset social progress by imposing extreme costs on business in its economic infancy. The 1840's and 1850's were a period of massive economic development in New England and the Midwest, a period of "take-off" (perhaps) into self-sustaining economic growth. Textiles, and then iron, spearheaded the industrial revolution; westward expansion and the railroads created new markets. Communities and states made social contribution to the construction of railroads through cash subsidies, stock subscriptions, and tax exemptions. The courts, using the fellow-servant doctrine and the concepts of assumption of risk and contributory negligence, socialized the accident costs of building the roads. That these solutions represented the collective, if uneasy, consensus of those with authority and responsibility is supported by the fact that every court of the country, with but one transient exception, reached the same conclusion in the years immediately following *Farwell*. Moreover, the fellow-servant rule was not abolished by any legislature in these early years. Although legislative inaction is not a necessary sign of acquiescence, it at least indicates lack of a major feeling of revulsion.

(5) If one broadens one's gaze from an employer's liability for his employees' workplace injuries to other subject areas, it becomes difficult to explain the *Farwell* result as *simply* the reflection of pro-management, pro-enterprise or anti-employee leanings on the part of the judges. As Dean Pound remarked, *Commonwealth v. Hunt*, 4 Metc. 111 (1842), one of the opinions that built Justice Shaw's reputation, was issued almost simultaneously with *Farwell*. He did not favor management in that case, where he refused to find that a union planning to strike was engaged in a criminal conspiracy. His opinion applauds union activities as "highly meritorious and public-spirited" and characterizes union activities as an aspect of the healthy process of competition basic to the American economy. Nor did the law, generally, invariably favor corporate enterprise over those injured by its activities. The late Professor Gary Schwartz of UCLA Law School, after

reading every tort case he could find in nineteenth century New Hampshire and California reports, reported a negligence system “applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare.” G. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *Yale L.J.* 1717, 1720 (1981). A subsequent study, embracing the decisions in South Carolina, Delaware and Maryland during the period 1790–1860, confirmed that view. “The nineteenth century’s negligence standard developed naturally, without major rejection of pre-existing or proposed rules of strict liability; moreover, with the important exception of worker injury cases, nineteenth century tort law tended to be generous in affirming the tort liabilities of emerging industry.” G. Schwartz, *The Character of Early American Tort Law*, 36 *UCLA L.R.* 641, 641–42 (1989). Nor are Justice Shaw’s opinions inconsistent with this general trend; Schwartz shows that in three opinions written in the 1840’s, Justice Shaw found railroads liable in tort to persons other than employees, in a manner indicating a general disposition to resolve such matters favorably to plaintiffs.⁷

Schwartz speculated that the courts’ failures to be equally generous in dealing with workplace injury may reflect the special circumstances of railroad employees, who were plaintiffs “in something like ninety percent of the first generation of fellow servant rule cases.” At 711. Railroad employees held the most desired jobs of their time, with liberal wages, high job security, and satisfaction “evidently high.” Do you think these characteristics make the contract-bargain heuristic especially attractive in cases brought by such employees—perhaps engineers, especially? Schwartz contrasts the lot of the railroadmen, near the top of the worker social system, with that of the equally numerous class of seamen, at or near the very bottom. Not long before the fellow servant rule found near universal favor, Justice Story—sitting as an admiralty judge in Massachusetts—twice ruled strongly in favor of seamen, and against their employers, on issues of liability for workplace harms, suggesting that this would enhance the employer’s care and solicitude for his workers.⁸ “It was only when judges considered the claims of higher status railwaymen that they responded coldly.” At 712.

(6) Isn’t it hard to know whether or not an employee’s wage includes a “premium” for risk, in the absence of a legal rule placing the insurance responsibility here, or there? In **The Accidental Republic—Crippled Workingmen, Destitute Widows, and the Remaking of American Law** 90 (2004), Prof. John Fabian Witt reviews the historical data and remarks that commercial insurance was simply unavailable to workers in

7. *Id.* at 667–70. *Hart v. Western Railroad*, 54 *Mass.* 99 (1847) broadly interpreted a statute to provide liability for fires created by engine sparks; *McElroy v. Nashua & Lowell RR* 58 *Mass.* 400 (1849) held that the railroad owed a duty of “most exact care and diligence” to its passengers; *Bradley v. Boston & Maine RR*, 56 *Mass.* 539 (1848) re-

quired the exercise of “reasonable care” by railroads to avoid accidents at railroad crossings.

8. *Id.* at 704–09; the cases were *Harden v. Gordon*, 11 *F. Cas.* 480 (C.C.D. Me. 1823) (No. 6,047) and *Reed v. Canfield*, 20 *F. Cas.* 426 (C.C.D. Mass. 1832) (No. 11, 641).

hazardous occupations at the time; that it took a few decades for railroad workmen to organize themselves into workers' cooperatives that could provide an insurance function; *and that it was only with the development of this cooperative insurance that they were able to persuade employers to see the importance of raising wages to include a risk premium.* By the 1880's some railroads had themselves begun to develop similar funds on their own. At 114.

C. THE EFFECT OF A PRECEDENT ON A SUBSEQUENT CASE

Perhaps now we are in a position to begin to expand on the very brief accounts of *stare decisis*, holding, dictum, and material fact you may have read in the introductory chapter. If you have ever heard oral argument in an appellate court, you undoubtedly have heard counsel for one side or the other quote a statement from some past judicial opinion in support of his legal argument in the case then before the court. And, it is almost equally certain, you have heard some member of the court interrupt the quoting counsel and ask: "Yes, but what were the facts in that case?" Why do judges—and law professors, for that matter—insist on asking that question? If the statement being quoted was, in truth, made in the earlier judicial opinion, what difference does it make what the facts of that case were? You are perhaps already beginning to see that the question, "What were the [material] facts of that [earlier] case?" is closely related to asking, "Was the statement in the past judicial opinion 'holding' or 'dictum' in that case?" Yet these issues are subtle ones; central as they are to our system of precedent, the concepts of holding, dictum and material fact are elusive.

Please consider the following case—decided late enough to fall in Gilmore's Age of Faith rather than that of Discovery—and ask yourself how it relates to the holding, dicta, and material facts of the *Farwell* case (and *Priestly*). Had you been in Judge Fletcher's place, could you have found other ways to resolve the dispute, without violating the obligations of *stare decisis*? What do you think would have been the best line of argument for plaintiff to attempt to develop?

Albro v. The Agawam Canal Co.

Supreme Judicial Court of Massachusetts, 1850.
60 Mass. (6 Cushing) 75.

This was an action on the case, to recover damages for an injury sustained by the plaintiff, while in the employment of the defendants, in consequence of the gross negligence of their superintendent. The case was tried before Fletcher, J., who, being of opinion, upon the facts stated and the evidence offered, that the action could not be maintained, reserved and reported the case for the consideration of the whole court.

It appeared in evidence that the defendants were the proprietors of a large manufacturing establishment in West Springfield, and engaged in the