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Experience or Reason: The Tort Theories of Holmes and Doe

John Phillip Reid[*]

Oliver Wendell Holmes is credited with awakening the American bar to the utility of tort theory. The author here emphasizes the contributions to tort theory made by a Chief Justice of the New Hampshire Supreme Court, Charles Cogswell Doe, during the latter half of the nineteenth century and compares and contrasts the tort theories of Holmes and Doe through analysis of the judicial opinions and other writings of each man.

"The theory of Torts," Edwin A. Jaggard wrote during the closing decade of the nineteenth century, "was essentially terra incognita until the contributions of Oliver Wendell Holmes, Jr., appeared on the subject."[1] History supports this view. The first American treatise on torts, written by Francis Hillard, had been published in 1859.[2] Yet, for a good many years thereafter, the very idea of such a book was "a matter of ridicule."[3] In 1871 Holmes himself suggested that torts might not be "a proper subject for a law book"; that it had not yet arrived at the stage where anyone but a self-sacrificing" writer could treat it as "an integral part of a commentary on the entire body of the law."[4] Just eight years later, Thomas M. Cooley, perhaps fearful the profession might not understand the meaning of the word, was careful to give his volume on torts an alternative title, calling it, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contracts.*[5] By 1895 all had changed. In that year Jaggard was able to quote Sir Frederick Pollock to the effect that "there is really a law of Torts, not merely a number of rules about various kinds of Torts,— that there is a true, living branch of the common law, and not a collection of heterogeneous instances."[6]

The dates are significant; not only in the history of torts but also in the general history of American law. They span the judicial career

* Associate Professor of Law, New York University. The author extends his appreciation to the William Nelson Cromwell Foundation for supporting this research and to his colleague, Professor Edward J. Bloustein, who contributed valuable insight during preparation of this article.

1. I JAGGARD, HANDBOOK OF THE LAW OF TORTS vi (1895).
2. HILLARD, THE LAW OF TORTS OR PRIVATE WRONGS (1859).
3. I JAGGARD, *op. cit. supra* note 1, at vi.
4. Holmes, Book Notice, 5 AM. L. REV. 340, 341 (1871).
5. See discussion, PROSSER, SELECTED TOPICS ON THE LAW OF TORTS ix (1953).
6. I JAGGARD, *op. cit. supra* note 1, at vi.

of Charles Cogswell Doe who was appointed to the New Hampshire Supreme Judicial Court in 1859, the year Hillard's treatise was published. He died while serving as Chief Justice of the New Hampshire Supreme Court, just five months after Jaggard quoted Pollock. Although none will gainsay the fact that credit for awakening the American bar to the need for a theory of torts, and for developing the main lines along which that theory has been formulated, belongs to Oliver Wendell Holmes, it is time to recognize that others, such as Judge Doe, were also working in the vineyard. While Holmes has left his discoveries in the permanent and easily accessible form of his classic book, *The Common Law*, the efforts of judges like Doe remain buried in the most neglected area of American legal research, the story of our state courts. Until that story is told the history of the emergence of torts as a distinct and disciplined topic in Anglo-American law will not be fully known.

By the 1870's, many scholars, both on and off the bench, recognized the need for a theory. "The lack of general conceptions on this subject," Jaggard observed, "is apparent in the absence of any consistent theory as to why a man is liable for his tort, although in contract and in crime the reason for legal responsibility readily suggests itself to any inquirer, and is to be found in any book on those subjects."[7] As Holmes put it, "The law did not begin with a theory. It has never worked one out."[8] Judge Doe explained why.

> Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often held liable "because," as Raymond says, "he that is damaged ought to be recompensed"; and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party suffering," more than the negligence and blameworthiness of the defendant: but how much more it regarded the former than the latter, was a question not settled, and very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him: When and why the "loss and damage" should, and when and why they should not, be transferred from one to the other, by process of law, were problems not solved in a philosophical manner. There were precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject.[9]

Although nineteenth-century legal thought placed stress on the deterrent aspects of the law of torts, there is little in Judge Doe's

7. *Ibid.*
8. Holmes, The Common Law 77 (1881).
9. Brown v. Collins, 53 N.H. 442, 444-45, 16 Am. Rep. 372, 375 (1873).

writings which indicates (aside from his emphasis on fault) that he considered that the prevention of socially-harmful actions should be a factor in formulating a theory of liability. For Doe, the essential function of torts—which he saw largely in terms of negligence—was to adjust loss resulting from damage caused either by or to another. This is the basic problem which the legal order of a civilized society must solve, yet well into the second half of the nineteenth century, the Anglo-American common law lacked a theory to guide courts when allocating the resources available for just settlement. Some New England lawyers, mesmerized by the writ system, believed Chief Justice Shaw of Massachusetts had answered all questions in the famous case of *Brown v. Kendall.*[10] Doe disagreed. He thought Shaw's decision shed little light on the matter, and, properly viewed, dealt only with questions of remedy and proof.[11] Admittedly, what Shaw had done was evolutionary. Up to his time the law of personal liability had been divided between the actions of trespass and of trespass on the case. Trespass, which was concerned with immediate and direct injuries, had merely required proof of an immediate and direct overt act. Case, on the other hand, required proof of negligence. In *Brown v. Kendall,* an action of trespass, the defendant had injured the plaintiff by accidentally striking him with a stick while trying to separate two fighting dogs. The defendant had acted lawfully and without intent to injure. The plaintiff had offered no evidence of negligence. Shaw, superimposing upon "trespass" the traditional "case" burden of proof, held that the plaintiff had failed to prove an actionable tort. The decision became the leading precedent for the rule, that, to sustain liability, intent or negligence is necessary.

Brown v. Kendall may have satisfied the average lawyer as the last word in tort liability, but not Holmes and Doe. What was needed, according to Holmes, was "to discover whether there is any common ground at the bottom of all liability in tort."[12] The difficulty which he and Doe encountered, and the factor explaining why a theory of torts had not evolved at an earlier day, was inherent in a constituent glossed over by Shaw—the historical integrity of the forms of actions. What Shaw was not in a position to appreciate was that the concept of tort liability had not yet acquired a generic significance.[13] Wrongs still were considered as incidental to remedies and the law of personal injury was looked upon as a system of forms rather than principles.[14]

10. 60 Mass. (6 Cush.) 292 (1850).
11. Brown v. Collins, 53 N.H. 442, 451, 16 Am. Rep. 372, 383 (1873).
12. HOLMES, THE COMMON LAW 77 (1881).
13. ADLOW, THE GENIUS OF LEMUEL SHAW 210 (1962).
14. See discussion in *Preface to the First Edition* in I HILLARD, THE LAW OF TORTS OR PRIVATE WRONGS vi-vii (2d ed. 1861). A careful reading of this Preface will show that while Hillard recognized the problem, he did not solve it.

The action in *Kendall v. Brown* was trespass and Shaw's decision became authority for ignoring the distinction between trespass and case on matters of proof and on the question of culpability. But this was all. The heritage of the writ system still remained. For centuries, as Holmes said, "each of the recognized torts had its special history, its own precedents, and no one dreamed, so far as I know, that the different cases of liability were, or ought to be, governed by the same principles throughout."[15] His biographer, Mark DeWolfe Howe, has placed the problem in sharper perspective:

> While the forms of action prevailed it was possible for lawyers, though doubtless impossible for philosophers, to see structure in the English legal system. The common-law practitioner saw no need for a theory of liability in tort when he knew the scope of the action on the case and the reaeh of an action of trespass. . . . The common law, in other words, had not felt the need for a philosophical classification of its elements while it had a procedural scaffolding from whieh the practitioner could pursue his disorderly calling.[16]

Accepting Howe's analysis, it becomes evident why Holmes and Doe were among the first who sought to replace the old system with a workable theory of liability. For it was during their own era that "reformers pulled down the scaffolding" which had previously served as an artificial substitute for philosophic order.[17] Indeed, it was Judge Doe who, in New Hampshire at least, was primarily responsible for casting aside the forms of action and who robbed the common law of its procedure-based rationale.[18] If he felt need for new doctrine, it was need he had largely created.

History must be cautious, however, when embracing generalities. What Howe gives as Holmes's motivations only partially explain Doe's. The fact is, that even without the revolution in pleading, the New Hampshire jurist would have sought a theory of torts. This was because of Judge Doe's special jurisprudential interest in ridding the law of the "fragmentary rules or disorganizing exceptions" which, he thought, robbed legal science of its "reason" and its "ancient uniformity, consistency and symmetry."[19] Few things annoyed him more than a legal formulae which courts treated as presumptions of law, but which should be, and which Doe was sure once had been, ques-

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15. Collected Legal Papers 210, 223 (1920); Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 451 (1899).

16. Howe, Justice Oliver Wendell Holmes: The Proving Years 65-66 (1963).

17. *Id.* at 66.

18. Reid, *From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire*, 1 N.H.B.J. 27 (No. 3 1959).

19. Kendall v. Brownson, 47 N.H. 186, 196, 205 (1886) (dissenting opinion).

tions of fact.[20] An illustration of this is the *Mink Case*,[21] in which the defendant appealed a fine assessed against him for shooting minks out of season. He claimed he shot the minks in self defense; to keep them from killing his geese. The plaintiff, relying on analogies drawn chiefly from English precedents, asked the court to rule that a threat to property would have constituted a valid defense only if the geese were unable to retreat from the area of danger. Judge Doe thought this a ridiculous extension of an unreasonable law.

> If the defendant's geese were bound to retreat before these vermin, it follows that horses, cattle, sheep, swine, and poultry are bound at common law, to retreat and to be driven by their owners from their own land, if retreat is possible, regardless of course or distance, before every dog that chooses to attack them. . . . [A]nd in many ways, the human industries and liberties of the country are subject to interruptions, hindrances, and restrictions not heretofore judicially established or practically acknowledged.[22]

Judge Doe believed the rule requiring retreat could be traced to the days when English courts advised the jury on the facts and weight of evidence. Concerned with "spring guns," "man-traps," and "other engines calculated to destroy human life," they had turned a question of fact into a question of law, and, as time went on, had forgotten that the correct test is whether violence, used to effect defense, "was or was not commensurate with the danger, and, consequently, that the violence was or was not reasonably necessary."[23]

> It is reasonable that the kind and amount of defensive force should be measurably proportioned to the kind and amount of danger, to the apparent consequences of using the force, and the apparent consequences of not using it. The probable consequences on both sides are to be considered and compared.[24]

This was the general principle of which the English courts, in their refinement of the law of defense, had lost sight. It was based upon the reason of the law, and properly framed constituted a question of pure fact.

> It was for the jury to say, considering the defendant's valuable property in the geese, the absence of absolute property in the minks, their character, whether harmless or dangerous, the probability of their renewing their pursuit if he had gone about his usual business and left the geese to their

20. Reid, *A Peculiar Mode of Expression: Judge Doe's Use of the Distinction Between Law and Fact*, 1963 WASH. U.L.Q. 427.
21. Aldrich v. Wright, 53 N.H. 398, 16 Am. Rep. 339 (1873).
22. *Id.* at 371.
23. *Id.* at 347.
24. *Id.* at 348.

> fate, the sufficiency and practicability of other kinds of defence,—considering all the material elements of the question, it was for the jury to say whether the danger was so imminent as to make the defendant's shot reasonably necessary in point of time. If, but for the shot, some of the geese . . . apparently would have been killed by these minks within a period quite indefinite, and if other precautionary measures of a reasonable kind, as measured by consequences, would have been ineffectual, the danger was imminent enough to justify the destruction of the minks for the protection of property.[25]

Doe's lesson in the *Mink Case* was that the law of torts must not be based on rules and exceptions precast to cover each particular situation. Rather, it should rest on a few general principles. The first inquiry is whether the defendant had acted from reasonable necessity. This was the broad test of lawfulness and, in the absence of a statute, should always be a question of fact and not of law. This would be the only issue in a litigation (such as the *Mink Case*) in which liability is based on a statute. A finding that the defendant acted with reasonable necessity is a finding that he is not liable. But in the ordinary tort situation, when the complaint alleges accidental rather than intentional or statutory injury, a finding that the defendant acted with reasonable necessity raises a second issue. Did he act without fault?

During 1873 Holmes completed the first major step in the study which resulted in his memorable lectures on torts in *The Common Law* when he published his article, "The Theory of Torts."[26] Believing the law's concern is not with the sins of men but with their actions,[27] Holmes sought to disprove Austin's thesis that tort liability depends on fault alone.[28] Adopting an historical approach, Holmes suggested "that the legal liabilities defined by a book of torts are divisible into those in which culpability is an element and those in which it is not."[29] For some reason, as yet unexplained, but which surely can be viewed as demonstrating his interest in Holmes's emerging work, Doe received, while still in proofs, a copy of the article. It apparently made a strong impression on him.[30] He had no quarrel with the validity of Holmes's history or with his main thesis. If he had any quarrel at all it was one of emphasis. Since Doe did not share Holmes's strong reaction to the Austinian concept of duty and its accompanying subjective

25. *Id.* at 346.
26. Holmes, *The Theory of Torts,* 7 AM. L. REV. 652 (1873).
27. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 80 (1963).
28. I AUSTIN, JURISPRUDENCE chs. 24, 25, 26 (3d ed.); see especially *id.* at 474, 484-85, 492, 504, 512.
29. Holmes, *The Theory of Torts,* 7 AM. L. REV. 652, 659 (1873).
30. The manner in which he used it caused resentment on Holmes's part. See HOWE, *op. cit. supra* note 27, at 83-85; Reid, *Brandy in his Water: Correspondence Between Doe, Holmes and Wigmore,* 57 NW. U. L. REV. 522, 529 (1962).

standard of tort liability,[31] he also did not share his concern for the need to show that liability without fault was well entrenched in common law. While Judge Doe acknowledged the existence of non-fault liability for accident, he was far more interested in limiting than in re-establishing it in the law of torts. In the very year Holmes's article was published, Doe wrote his opinion in *Brown v. Collins*[32] which became the leading American precedent restricting liability to circumstances from which fault could be imputed.

The moment for doing so was opportune. *Rylands v. Fletcher*,[33] the chief judicial pronouncement with which Doe had to contend was only five years old and still fresh in the minds of American lawyers. To many, for whom the law of torts began with Shaw's opinion in *Brown v. Kendall*, the thought that liability could rest on a non-culpable, accidental occurrence, seemed a radical departure. Doe knew better, and made clear that he, like the English judges who had decided *Rylands*, did not regard that case as establishing a novel proposition.[34] He took pains in recounting that the ancient law of England often based the plaintiff's right to compensation on the theory, "he that is damaged ought to be recompensed," and not upon culpability.[35] Doe doubted, however, the usefulness of early cases because, by focusing upon the loss to the party suffering rather than upon the intent of the party acting, they had not been founded on a rationale consistent with nineteenth-century public policy. Indeed, he felt it doubtful if they were based on any acceptable rationale, since they had disregarded "whether, by transferring the hardship to the other party, anything more will be done than substitute one suffering party for another," and had not considered "what legal reason can be given for relieving the party who has suffered by making another suffer the expense of his relief."[36]

Under the *Rylands* doctrine, a man is liable for damage caused by things he has lawfully brought upon his land and which subsequently escape. This rule, Doe believed, was "substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom damage had fallen, and required no legal reason for transferring the damage to the defendant."[37] That Doe, himself, was guilty of extending the

31. HOWE, *op. cit. supra* note 27, at 76-88. It is not known if Doe was familiar with Austin.
32. *Supra* note 9.
33. L.R. 3 H.L. 330 (1868).
34. 2 HARPER & JAMES, TORTS 792 (1956).
35. Brown v. Collins, *supra* note 9, at 445, 16 Am. Rep. at 375.
36. *Id.* at 446, 16 Am. Rep. at 376.
37. *Id.* at 447, 16 Am. Rep. at 378.

holding of *Rylands* is seen from the fact that he agreed with Holmes that it was based "on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders."[38] *Rylands* says nothing about "extra-hazardous activities" and, in the Exchequer Chamber at least, it was probably not intended to limit the doctrine to special, commercial situations.

To sustain his view of *Rylands,* Doe emphasized Mr. Justice Blackburn's decision; especially Blackburn's famous paragraph which began:

> We think that the true rule of law is that the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.[39]

"This," said Doe,

> is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which seems to be man's duty carefully to do.[40]

To be sure, Judge Doe did not dismiss *Rylands* merely because it harked back to primitive notions unsupported by modern policy or judicial reasoning. He acknowledged that the case rested on what Blackburn thought an equitable principle. "[I]t seems but reasonable and just," he quoted Blackburn as saying, "that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."[41]

Seeking an example sustaining this principle, Blackburn had cited the rule that an owner of cattle "must keep them at his peril, or he will be answerable for the natural consequences of their escape."[42] Holmes pointed out that in many prairie states the rule did not prevail,[43] but to Judge Doe this was probably irrelevant. The economic and physical characteristics of contemporary New Hampshire were

38. Holmes, *The Theory of Torts,* 7 AM. L. REV. 652, 653 (1873); Brown v. Collins, *supra* note 9, at 445, 16 Am. Rep. at 375.
39. Fletcher v. Rylands, L.R. 1 Ex. 265, 279 (1866).
40. Brown v. Collins, *supra* note 9, at 448, 16 Am. Rep. at 379.
41. Fletcher v. Rylands, *supra* note 39, at 279; Brown v. Collins, *supra* note 9, at 446, 16 Am. Rep. at 377.
42. Fletcher v. Rylands, *supra* note 39, at 280.
43. Holmes, *The Theory of Torts,* 7 AM. L. REV. 652, 653 (1873).

closer to those of England than mid-west America, and Doe seems to have had no objection to Blackburn's example. At least he admitted that at common law an owner "'was at his peril to keep his cattle on his own close and to prevent them from escaping.'"[44]

What Doe did object to was Blackburn's attempt to distinguish employments conducted at the landowner's peril from other activities which involved risks common to nineteenth-century urban life. For in effect *Rylands*, by singling out for special consequences certain enterprises because of their particular danger, created an exception to the general rule governing inevitable accidents. Blackburn admitted that, when the activities are not particularly dangerous, fault has to be proven. This, he said, is necessary or no man would dare live in the crowded cities of modern society.

> Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near the warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident. . . .[45]

If this is so, Doe asked, why make an exception of (as he called it) an extra-hazardous employment? General principles, not special exceptions are the reason of the law. As justification for the *Rylands* exception the assumption of risk defense is not a very helpful rationale with which to explain tort liability. It would, for example, be authority for holding that a plaintiff, by locating an object near a street

> took upon himself the risk of its being broken by an inevitable accident carrying a traveler off the street. But such a doctrine would open more questions, and more difficult ones, than it would settle. At what distance from a highway would an objejct be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbor's but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country because he could avoid that class by migrating to a region of solitude, why should he not, for a like

44. Morse v. Boston & Lowell R.R., 66 N.H. 148, 149 (1889), quoting Avery v. Maxwell, 4 N.H. 36, 36-37 (1827).

45. Fletcher v. Rylands, *supra* note 39, at 286-87; Brown v. Collins, *supra* note 9, at 449, 16 Am. Rep. at 380.

> reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?[46]

What rankled Doe was Blackburn's suggestion that civilized man assumes risks ordinary and familiar in civilized society, but does not assume risks for newer dangers which are products of that civilization and upon which progress may depend.

> If danger is adopted as a test, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort, into a question of reasonableness in a form much broader than has been generally used; or courts will be left to devise tests of peril, under varying influences of time and place that may not immediately produce a uniform, consistent, and permanent rule.[47]

Here we see what most worried him. That under the *Rylands* doctrine the law would eventually be fragmentized into almost as many rules as there are precedents. To prevent this in New Hampshire law, and in American law if possible, Judge Doe wrote his decision in *Brown v. Collins*. The defendant had been driving along a street in the town of Tilton when his horses, frightened by a passing train, bolted, left the road, and damaged a stone post which stood on the plaintiff's land. Not only was there no dispute as to what had happened, but the action has all the earmarks of a test case. The facts, according to the reporter, "were agreed upon for the purpose of raising the question of the right of the plaintiff to recover in this action."[48] Doe wanted to come to grips with *Rylands* and it seems likely he persuaded counsel in this minor litigation to give him the chance. "We take the case," he wrote, "as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent, and desire of the defendant."[49] The issue could not have been drawn more clearly. Can a defendant who acted lawfully, be made to answer for damages resulting from an inevitable accident not his fault?

Judge Doe's answer was no. His chief objection to the *Rylands* concept of liability for accident was that it "pays no heed to the essential elements of actual fault."[50] As a result it was too sweeping, for, logically applied, it forced the law to hold an owner of real property liable for all damage resulting to a neighbor from anything done on his own land, and made answerable those who, while

46. *Id.* at 449, 16 Am. Rep. at 380-81.
47. *Id.* at 446, 16 Am. Rep. at 376.
48. Brown v. Collins, *supra* note 9 (reporter's note).
49. *Id.* at 443, 16 Am. Rep. at 372.
50. *Id.* at 448, 16 Am. Rep. at 379.

improving their own land for their own benefit according to their own best skill and diligence, had not foreseen the injury which the improvement might produce and had unwittingly damaged their neighbors.[51] To avoid this harsh result, Doe stated what he thought a better ground for tort liability:

> When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted, and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act; or by an act of which he knew, or ought to have known, the damage would be a necessary, probable, or natural consequence; or by an act which he knew, or ought to have known, to be unlawful,—we understaud the general rule to be, that he is not liable.[52]

This was Doe's answer to *Rylands v. Fletcher.* If an act which accidentally produces harm was lawful and proper—that is, one both reasonably necessary and which the defendant might perform by the use of proper and safe means—and "if the plaintiff's injury was caused by such an act done with due care and all proper precautions, the defendant was not liable."[53] Applying this rule to the facts in *Brown v. Collins,* Doe concluded that the defendant was not liable

> unless everyone is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through the plaintiff's window.[54]

This became Charles Doe's most famous judgment in the field of torts. It has been called "the leading American case against the English rule of absolute liability for damages done by things brought on and escaping from the defendant's land."[55] Some observers have doubted *Brown v. Collins* can stand for this proposition. They feel Doe made a questionable choice selecting it as an instrument to attack *Rylands.* As Dean William Prosser points out, the fact pattern had nothing to do with activities which are performed at the actor's peril. *Brown v. Collins,* he said, was clearly a case "of customary, natural uses, to which the English courts would certainly never have

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51. *Id.* at 445-46, 16 Am. Rep. at 376.
52. *Id.* at 450, 16 Am. Rep. at 382.
53. *Id.* at 451, 16 Am. Rep. at 383.
54. *Ibid.*
55. Note, 63 HARV. L. REV. 513, 519-20 (1950).

applied the [*Rylands*] rule."[56]

Prosser is undoubtedly correct. Far from involving a dangerous enterprise, *Brown v. Collins* arose from use by a traveler of a public highway. This was exactly the customary and natural employment which Blackburn (when discussing assumption of risk as a defense for inevitable accident) had singled out as not coming within the *Rylands* exception.[57] But to disregard *Brown v. Collins* on this score is to condemn Judge Doe merely for departing from the accepted canons of opinion writing. If this is error, it is error which Doe frequently committed. He simply refused to be confined within the narrow limits of specific facts. When he had something to say he seized the first opportunity for saying it,[58] as well he had to, for he could not depend on the economy of little New Hampshire to produce the precise case he needed. Had he restrained himself, many of his greatest pronouncements would have remained unwritten,[59] and American jurisprudence would have been a good deal poorer. In New Hampshire, at least, there was never any doubt that *Brown v. Collins* was binding precedent on the *Rylands* doctrine.[60]

Had Doe not gone beyond the facts—had he not broadened the holding in *Brown v. Collins*—his decision would have been limited to the proposition that lawful accident is not a ground for liability,[61] more or less what Shaw had held in *Brown v. Kendall.* Doe wanted to go beyond this and get at the issue of culpability; to lay stress on the positive, that is on the fact that the defendant had acted without fault. By making *Rylands v. Fletcher* his whipping boy, Doe left no room for doubt that in a tort action (even one which in earlier days would have depended on the writ of trespass) the plea of inevitable accident is not only admissible but the plaintiff must prove culpability.

Another criticism by Prosser is that *Brown v. Collins* misstated the *Rylands* doctrine; an error Prosser finds especially disturbing since Doe "was beyond all question one of the greatest . . . [American judges]."[62] He suggests that Doe, borrowing the term "liability without fault" from Holmes's article, invented the notion that *Rylands* stood for that proposition, and by misinterpreting *Rylands* was better able to reject it.[63]

Doe did not do this. He recognized "liability without fault" as the

56. PROSSER, *op. cit. supra* note 5, at 150.
57. See text accompanying note 45 *supra.*
58. Reid, *A New Light Dawns,* 9 VILL. L. REV. 233 (1964).
59. Reid, *Almost a Hobby,* 49 VA. L. REV. 58 (1963).
60. Garland v. Towne, 55 N.H. 55 (1874).
61. This is how Pollock interprets *Brown.* POLLOCK, A TREATISE ON THE LAW OF TORTS 164 (New Am. ed. 1894).
62. PROSSER, *op. cit. supra* note 5, at 150.
63. *Id.* at 180.

ancient common-law doctrine from which Blackburn drew his inspiration, but did not confuse it with Blackburn's rule that one who introduces danger to a neighborhood is liable for accidental damage resulting from that danger regardless of fault.[64] As Dean Wigmore himself concedes, Doe did not reject Blackburn's principle entirely (although he undoubtedly did so with regards the facts both in *Brown v. Collins* and *Rylands v. Fletcher*).[65] What Doe sought to do, as previously suggested,[66] was to restrict to as few as possible the situations governed by the exception.[67]

A third criticism leveled by Dean Prosser is that Doe paid too much heed to what Blackburn had said in Exchequer Chamber, and dismissed Lord Cairns's decision in the House of Lords "as a foolish distinction made as to land in a state of nature."[68] Cairns had emphasized "non-natural use" as the distinction upon which the *Rylands* exception turned. A "non-natural use," he said, is a use "for the purpose of introducing into the close that which in its natural condition was not in or upon it."[69] By "non-natural," Prosser suggests, Cairns meant "the ordinary, normal, customary and common."[70] He seems to feel Cairns offered his distinction between a "natural" and a "non-natural" use as an alternative to Blackburn's holding. And since Cairns spoke in the higher court, Prosser believes that "the basis of the final decision in *Rylands v. Fletcher* was the unusual, abnormal and inappropriate character of the defendant's [activity]."[71]

Doe apparently would not have agreed. He seems to have assessed the two opinions much as did Professor Bohlen; feeling they dealt, not with different tests, but with different areas of consideration. Of the two opinions Professor Bohlen writes: "that of Mr. Justice Blackburn deals solely with the *prima facie* liability of the defendant, while that of Lord Cairns deals with the question as to how far acts, *prima facie* actionable, may be justified because done by the defendant in the cause of his use of his land for his own purpose."[72]

Regardless of whether Bohlen or Prosser is correct, it seems clear that Doe anticipated Bohlen and did not view Cairns's decision in the House of Lords as formulating a test to supplant Blackburn's. "The opinion of Mr. Justice Blackburn," Bohlen would write thirty-eight

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64. See text accompanying note 47 *supra*.
65. See text accompanying note 44 *supra*.
66. See text accompanying notes 31 & 32 *supra*.
67. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441, 455 n.3 (1894).
68. PROSSER *op. cit. supra* note 5, at 150.
69. Rylands v. Fletcher, *supra* note 33.
70. PROSSER, *op. cit. supra* note 5, at 141.
71. *Id.* at 142.
72. Bohlen, *The Rule in Rylands v. Fletcher, Part I*, 59 U. PA. L. REV. 298, 302 (1911).

years after *Brown v. Collins*, "deals purely with a question of law. The opinion of Lord Cairns deals with the question of social and economic expedience."[73] In *Brown v. Collins* Doe took much the same approach. When criticizing the legal doctrine in *Rylands* he concentrated upon Blackburn's opinion. When criticizing its social and economic implications, he concentrated on Cairns's. Far from dismissing Cairns's "natural" and "non-natural" use "as a foolish distinction," Judge Doe gave it serious consideration; so serious, in fact, that Professor Jeremiah Smith would later say that his criticisms have "never been satisfactorily answered."[74] As Doe pointed out, to make the *Rylands* exception to the law of inevitable accident turn upon whether the activity involved a natural or non-natural use of the land, would impede progress by penalizing acts of commerce conducted in a lawful, skillful, and careful manner.

> The distinction made by LORD CAIRNS between a natural and a non-natural use of land, if he meant any thing more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement.[75]

How serious an obstacle would *Rylands* be with Cairns's test attached? Very serious indeed, Doe thought, since any principle which makes a man liable for the natural consequences of "non-natural" things escaping from his land, cannot be limited to those things alone. "[I]t must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to process or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been."[76] Here was where the concept of absolute liability entered the picture; when the *Rylands* doctrine was extended to situations beyond the specific fact pattern of that case. Not to extend it, to limit it to reservoirs of the type in *Rylands v. Fletcher*, would be to fragmentize the law by creating special rules for special activities. To extend it to all "non-natural" uses, in line with the Cairns test,

73. *Id.* at 303.
74. Smith, *Tort and Absolute Liability—Suggested Changes in Classification—III*, 30 Harv. L. Rev. 409, 411 n.7 (1917).
75. Brown v. Collins, *supra* note 9, at 448, 16 Am. Rep. at 379.
76. *Ibid.*

would place a crushing load on manufacturers and industrialists, few of whom would be making "natural" use of their property, yet all of whom might be acting both lawfully and carefully.

A great deal has been written concerning the economic and social reasons which Judge Doe gave for rejecting Lord Cairns's "non-natural" rule. It seems safe to say that most observers have treated them as the heart of his decision.[77] The influences and forces which motivated him to decide *Brown v. Collins* in the manner which he did have been debated by those who credit and those who doubt the economic interpretation of the development of torts.[78] The favorite hypothesis has been that Doe developed the distinction between liability imposed for accidents regardless of fault and liability imposed only where there is failure to use reasonable care or skill, in order to make this distinction the ounce of legal difference by which courts sanctioned the social objectives of industrial development.

This distorts the meaning and value of *Brown v. Collins.* That case was written by a man in search of a theory of torts useful to the lawyers and courts of his state. The social and economic arguments which he used were important, true enough, but were primarily designed to refute the "non-natural" test proposed by Lord Cairns; a test based on social and economic arguments. Anyone familiar with the jurisprudence of Charles Doe would not hesitate to say that the true heart of *Brown v. Collins* is to be found in the legal arguments which Doe directed against the holding by Mr. Justice Blackburn.[79]

77. *E.g.*, BOHLEN, STUDIES IN THE LAW OF TORTS 352 (1926).

78. Pound, *The Economic Interpretation and the Law of Torts,* 53 HARV. L. REV. 365, 383 (1940). Dean Pound suggests that Professor Bohlen erred when explaining Blackburn's decision in terms of England's dominant class (the landed gentry) unsympathetic towards industry, and Doe's decision in terms of New England's dependence on cotton mills. Pound points out that Blackburn came to the bench from a commercial practice, while Doe was the one associated with the gentry and pastoral land, spending his life on his ancestral aeres. This overlooks, however, such facts as the source of the Doe fortune which was partly rooted in commerce, and the area, for the Doe home was located in a region of concentrated manufacturing. Moreover, Doe's closest associate on the court at that time was William Ladd. The year after *Brown,* Ladd wrote an opinion showing that New Hampshire judges were worried by *Rylands* implications that the "large class of our people engaged in various manufacturing operatious, who use water-power to propel their machinery, and for that purpose maintain reservoirs," would be held to the rule that, "in case of the breaking away of such reservoirs, there is no question of care or negligence to be tried, but that he who has thus aceumulated water in a 'non-natural' state on his own premises is liable, at all events as matters of law, in case it escapes, for the damage caused by it." Garland v. Towne, *supra* note 60, at 57.

79. In one instance Doe did rely upon social arguments to buttress the legal principle. Thus when examining the old English rules of absolute liability, he said: "They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages

Blackburn would have set up a special rule, an exception to the general principle of tort liability. Judge Doe detested special rules, and finding no need for introducing one to cover the situations in either *Brown v. Collins* or in *Rylands v. Fletcher,* rejected Blackburn's exception to the principle that, if an accident producing damage results from a lawful act, fault must be proven before liability will be imposed.

The general common-law rule of tort liability (designed to be applied with as few exceptions as possible) which Judge Doe established for New Hampshire was that, an inevitable accident, "without actual fault in either party, is not a cause of action."[80] The question to which Doe did not give a detailed answer in *Brown v. Collins* was, what constitutes "fault?" He got his chance to do so exactly a year later in the *Androscoggin River Case.*[81] The plaintiff was a property owner whose lands lay along a river. The defendants were incorporated for the purpose of regulating water levels for commercial needs; most particularly for lumbermen running logs downstream. The plaintiff sought damages for injury to his land resulting from flowing caused when the defendants released water from their upstream dams. There was no issue of reasonable necessity, for the defendants had been authorized, by statute, to do what they did, and the plaintiff conceded that they had acted lawfully. Moreover, the plaintiff agreed that the defendants had "used and managed said water in a prudent manner . . . and in the use thereof were careful to do as little damage as possible. . . ."[82]

Doe held there could be no recovery. He approached the problem as though it were similar to the *Rylands* situation, viewing the plaintiff and the defendants as owners of adjacent property. Doe ruled there was no cause of action, for a right of ownership cannot be invaded by the reasonable use of neighboring land.[83] Fault then cannot be established by use, but by the manner of use; reasonable use is an answer to the charge of fault. In *Androscoggin* the defendants were not liable for the use which they made of the water—that is, for holding it back at one time and releasing it when there were logs to float—since they had always used it reasonably.[84]

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and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade, and productive enterprise, when the common law had not been set forth in the precedents, as a coherent and logical system on many subjects other than the tenures of real estate." Brown v. Collins, *supra* note 9, at 450, 16 Am. Rep. at 381.

80. Lyons v. Childs, 61 N.H. 72, 74 (1881).

81. Thompson v. Androscoggin River Improvement Co., 54 N.H. 545 (1874).

82. *Id.* at 547 (reporter's note).

83. *Id.* at 552.

84. *Id.* at 558.

As to what constitutes reasonable use as a matter of law, Doe would not say. It is not, he thought, necessary "to compose a catalogue of all the possible elements of reasonableness and unreasonableness."[85] Properly they are questions of fact. He was willing to let the jury weigh subjective factors. Reasonable care was to be considered. A landowner along a river who, when using his property, makes a cut to divert the flow of water "without taking precautions necessary to prevent the natural, apparent, and expected consequences" of flooding his neighbor's farm, would be liable "because such a cut, causing such an injury, would have been unreasonable use of his own land."[86] And, as Doe said in another case, "Reasonable care often depends upon actual knowledge, or reasonable and rightful expectation."[87]

> A reasonably careful person, introducing dangers, in the use of force or the possession of destructive materials, on highways or elsewhere, with full knowledge of probable consequences, adopts the measures known by him to be necessary to avoid an unreasonable exposure of others to risks that are less apparent to them than to him. His knowledge of their uninstructed and unskillful condition may be a material element of his duty.[88]

Thus, in Doe's theory of torts, not only was the defendant's "full knowledge of probable consequences" an element to be considered when determining due care, but so was his "knowledge" of any peculiar inability under which the public in general might labor when confronted by the danger which he has created. Doe was careful to point out, however, that "reasonable expectation of damage," objective or subjective, was but one criterion for determining reasonable care. "Light, air, water, and many natural and artificial agencies, may render a reasonable use of one's own [property] detrimental to others; and many considerations, besides reasonable expectation of damage, may enter into the broad question of reasonable use."[89]

This is not to say that Doe grounded fault in personal morality. The standard by which he judged the subjective aspect of a man's act was external, not internal. He never received an opportunity to express himself on this point,[90] but there is every reason to believe he agreed with Holmes.[91]

One explanation as to why Judge Doe never discussed the standard of judgment may have been that it did not strike him as especially

85. *Id.* at 551.
86. *Id.* at 557.
87. Huntress v. Boston & Maine R.R., 66 N.H. 185, 190 (1890).
88. *Id.* at 191.
89. Thompson v. Androscoggin River Improvement Co., *supra* note 81, at 551.
90. He did concur in Jewell v. Colby, 66 N.H. 399, 24 Atl. 902 (1891).
91. HOLMES, THE COMMON LAW 110 (1881).

important. This could be a result of his approach to the problem of liability. He did not look at the law of torts in terms of wrongs, but in terms of rights. Consider for example his opinion in the *Androscoggin River Case*. He did not speak of the flowing as a wrong committed by the defendant. Rather he began by establishing the plaintiff's right, as an owner of real estate, not to be injured by a neighbor making unreasonable use of his land. This, Doe said, is one of the proprietary rights of which his general and comprehensive right of property is composed.[92] A violation of it can be grounds for an action in tort. Putting it another way, he explained why the careful and skillful use of fire on one's own land, for a reasonably necessary commercial or domestic purpose, would not form a basis for liability if that fire spread to an adjacent estate. It would not be actionable because such a reasonable use of one's own property, without fault, "is not an invasion of another's right."[93]

It might be argued that the emphasis on "right" rather than "wrong" is inconsistent with Judge Doe's general objectives of "reasonableness" and "flexibility," since "right" is a more positive concept requiring greater precision in treatment and should not fluctuate in consequences with changes in fact situations. But in Doe's scheme of the legal order, the notion of "right" no more called for the cataloging of elements or the accumulating of definitions than did "wrong." Most rights in society, he believed, whether property rights or personal rights, "are not absolute, but relative."[94] The establishment of a "right" could be as much a question of fact as the finding of a "wrong."

One result of approaching the problem of liability in terms of "right" rather than wrong, was that Doe was led at times to think of the defendant as assuming the risk for violating the plaintiff's right. "Taking the risk," Holmes observed in 1899, was "an expression which we never heard used as it now is until within a very few years."[95] Perhaps so, but Doe had used the term in the sense which Holmes understood it as early as 1860 when he said that, if a servant "takes the risks of known defects of machinery, it would seem that he also assumes, to some extent, the risks of known incompetency and insufficiency of fellow-servants."[96] This is the conventional meaning of the assumption-of-risk doctrine—as an element in the fellow-servant

92. Thompson v. Androscoggin River Improvement Co., *supra* note 81, at 552.
93. *Id.* at 556. Likewise, in the *Mink Case* he approached the question of reasonable necessity in terms of "the defendant's right." Aldrich v. Wright, 53 N.H. 398, 403 (1873).
94. Brown v. Collins, 53 N.H. 442, 448, 16 Am. Rep. 372, 375 (1873).
95. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899); HOLMES, COLLECTED LEGAL PAPERS 210, 230 (1920).
96. Fifield v. Northern R.R., 42 N.H. 225, 240 (1860).

rule; the harshness of which Doe tried to mitigate during his last years on the bench by making the test entirely subjective, holding that an employee assumes only the risks which are "apparent to his observation," and not those which, "on account of his want of experience, he could not reasonably be expected to apprehend."[97] Today in New Hampshire, the assumption-of-risk doctrine is confined to master-servant relationships,[98] but in his time, like Blackburn before him,[99] Doe believed that assumption-of-risk might be used as a general defense in other types of tort actions. For example, he suggested, just as Blackburn had, that a person who locates along a highway may be held to the risks of inevitable accident incident to the exercise of the public's right to use that highway in a reasonable manner.[100] This is the conventional assumption-of-risk doctrine.

What seems significant is that Doe turned the concept of assumption of risk around. He employed it not only as a defense against liability, but also as a test for liability. And he did so when approaching the issue of liability in terms of either the plaintiff's or the defendant's right. Thus, in the passage from *Brown v. Collins* which was cited as summarizing his theory of liability for accidents,[101] Judge Doe said that a defendant, who assumes he has a right to act as he does, undertakes the risk of maintaining the right which he asserts and the responsibility for the natural consequences of his voluntary actions.

It has been suggested that in an earlier case, *Underhill v. Manchester*,[102] Judge Doe perhaps anticipated this doctrine—"the risk theory of tort liability."[103] Underhill kept a saloon in the city of Manchester, using the front room to sell "spirituous liquors" and the rear for gambling. As Doe laconically described the events, "A bank bill was offered to be passed at a gambling table in the back room, the bill was alleged to be counterfeit, a dispute arose, the dispute grew into an assault, the assault into a riot, in which his property in the saloon was destroyed."[104] Both the sale of spirituous liquors and public wagering were illegal, yet Underhill had the gall to sue the city under the "rioters' statute," which made the city liable for destruction of property by mobs. The statute barred recovery by one whose illegal or improper conduct caused the riot, and the issue was whether the plaintiff's action had caused the riot which destroyed his property. Judge Doe held that they had; that a saloon keeper could not recover

97. Demers v. Glen Mfg. Co., 67 N.H. 404, 406 (1892).
98. Dowse v. Maine Cent. R.R., 91 N.H. 419, 421, 20 A.2d 629, 631 (1941).
99. See text accompanying note 45 *supra*.
100. Thompson v. Androscoggin River Improvement Co., *supra* note 81, at 558.
101. See text accompanying note 52 *supra*.
102. 45 N.H. 214 (1864).
103. Note, 63 HARV. L. REV. 513, 520 (1950).
104. Underhill v. Manchester, *supra* note 102, at 216.

where the riot grew out of a gambling dispute between two of his patrons. By way of dictum, Doe went on to consider whether Underhill could have been held liable at common law to innocent third parties whose property had been damaged by the rioters. It was here that he first expressed the risk theory of liability. Doe began by admitting that saloon keepers usually are not considered liable for damage done to the property of others by men whom they have made drunk. He also conceded that such damage is remote and that it would be difficult to set a limit on the consequences which an ordinary person is likely to anticipate. But these difficulties, within Doe's scheme of the legal order, are properly difficulties of fact and not difficulties of law and should not be used by a court as an excuse for barring a just claim.

> Notwithstanding the dearth of exact precedent which there has been so frequent opportunity to establish, it might not be futile to enquire why one . . . should not be liable for damage done by men whom he has drawn together in the same place, and aided in making irrational, uncontrollable, and dangerous . . . [and] why the keeper of a drinking and gambling house should not be regarded as one who negligently sets mechanical forces in operation beyond his power to stop or safely direct, or carelessly puts destructive implements or materials in situations where they are likely to produce mischief . . . .[105]

This dictum, written the year before Blackburn handed down *Rylands*, contains elements which at first glance seem to anticipate the extra-hazardous activity doctrine as much as the risk theory of liability. The teetotaling Doe, however, would probably have drawn a distinction on the grounds that the excessive sale of spirits is not a reasonably necessary occupation and that an illicit saloon keeper may well be guilty of fault by the very nature of his enterprise. "By openly keeping a saloon for such purposes, he invited such company as usually frequent such places, solicited them to gamble, and offered them a stimulus highly promotive of brawls, affrays, riots and all other crimes."[106] The owner of such a place assumes the risk and should be held to abide the consequences.

One might argue that Doe was not really anticipating the assumption-of-risk theory of liability. Rather he was formulating an assumption-of-risk theory of negligence; that he was defining culpability by saying fault is in the assumption of risk. The unreasonable assumption defines the fault which created the liability. This, however, was not what Doe had in mind. He made it quite clear that a person who is without fault might still be liable for merely asserting and acting

105. *Id.* at 218.
106. *Id.* at 216.

upon a right, for he has "assumed the risk of maintaining the right which he has asserted, and the responsibility of the natural consequences of his voluntary act."[107]

In *Brown v. Collins* Doe mentioned four possible grounds for tort liability: damage caused by (1) fault on the part of the actor; or by (2) his voluntary and intended act; or by (3) an act which he knew, or ought to have known, to be unlawful; or by (4) an act of which he knew, or ought to have known, the damage would be a necessary, probable, or natural consequence.[108] In other words, a person who acts lawfully and without either fault, or an intent to inflict injury, may be liable for damage which is a necessary, probable, or natural consequence of his act. This is because he knew, or ought to have known, he was assuming a risk that injury could result.

Again the question arises, how does this differ from the *Rylands* doctrine? The answer is that liability is based on a general principle of reasonable conduct, and not on technical exceptions which depend on the definitions of "extra-hazardous nature" and "non-natural use." Moreover, knowledge of the unreasonableness of the risk takes the happening out of the category of "accident" which requires fault for liability.

Unfortunately Judge Doe never received an opportunity to explore this theory of liability to its ultimate conclusion. The chief question left unresolved was how far liability for an assumption of risk would carry. Did it extend, for example, to the stranger or even the trespasser whose presence within the area of danger is unsuspected? Doe answered this partly by his qualification of actual or constructive knowledge which the actor must have of the necessary, probable, or natural consequences of his act. This Doe would undoubtedly have left to be determined on the general grounds of reasonableness as a question of fact for the jury.[109]

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107. Brown v. Collins, *supra* note 94, at 448, 16 Am. Rep. at 375.

108. *Ibid.* See text accompanying note 52 *supra*. When Doe mentions liability for an intended injury he does not qualify it with privilege. Yet it seems unlikely that he thought an intended injury inflicted within the reasonable bounds of a legal justification is actionable.

109. Judge Doe's emphasis upon "fact" in tort liability was questioned by the law-school trained generation which succeeded him. When the issue of scope finally arose in a negligence matter, Judge Peaslee answered that as a matter of law the plaintiff had to prove that the defendant's act or omission constituted a breach of duty owed to him. This, he said, is "a rule of relation" and thus an unsuspected trespasser is barred from recovery. Garland v. Boston & Maine R.R., 76 N.H. 556, 563 (1915). Since fault was an issue, this was perhaps a case in which Doe would not have the assumption-of-risk doctrine of liability. But the concept of "duty owed" swallowed up the concept of "risk taken" for now negligence could be found in the taking of the risk in violation of the duty. This robbed the assumption-of-risk theory of liability of much significance. *Garland* is an overlooked predecessor of *Palsgraf*. In that case Cardozo said: "The risk reasonably to be perceived defines the duty to be obeyed,

Perhaps Doe was not too serious about the risk doctrine of tort liability. Had he been interested, he undoubtedly could have found a case with which to develop it further. Yet he at no time indicated an intention to abandon it, and it must still be accepted as part of his theory of torts. With this in mind, Judge Doe's theory of torts may be summarized as follows: *A person will be liable for damage resulting from an accident for which he is at fault*[110] (the test for which is whether he acted "reasonably"[111] or as a man of "average prudence"[112]); *for damage resulting from his intention to inflict an injury not justified or privileged at law; for damage resulting from unlawful actions; and for damage resulting from the assumption of an unreasonable risk.*

As previously suggested, Holmes began his search for a theory of torts at about the same time as Doe. He ended, however, with a radically different concept. He divided the law of torts into three sections. At either end he placed the rules "determined by policy without reference of any kind to morality"—at one, harms intentionally inflicted; at the other, acts for which, "although his conduct has been prudent and beneficial to the community," the actor must answer at his peril when they result in damage.[113] In the vast center section, Holmes placed acts for which liability attaches when, as Howe says, "the defendant's conduct did not satisfy the objective standard established by current morality."[114] Holmes determined this standard by weighting the risk, not in terms of reasonableness as Doe would have done, but in terms of danger; that is, "by considering the degree of danger attending the act or conduct under the known circumstances."[115] Once experience showed that a given act had the tendency to cause harm under given circumstances, Holmes would turn the standard from a question of fact into a concrete rule of law designed to govern specific cases. Thus Holmes envisioned each section of his tripartite division of tort law containing rules which would lend certainty and predictability to the issue of liability.

The question is, how did these two men, coming as they did from

and risk imports relations; it is risk to another or to others within the range of apprehension." Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

110. "[A]n accident, without fault in either party, is not a cause of action." Lyons v. Child, 61 N.H. 72, 74 (1881).

111. See text accompanying note 84 *supra.*

112. See opinion by Parsons, J., in which Doe concurred, Davis v. Boston & Maine R.R., 68 N.H. 247, 44 Atl. 388 (1895).

113. HOLMES, *op. cit. supra* note 91, at 161.

114. HOWE, OLIVER WENDELL HOLMES: THE PROVING YEARS 189 (1963).

115. HOLMES, *op. cit. supra* note 91, at 162. A year before Doe died, and thirteen years after the publication of *The Common Law,* Holmes summarized his theory in Holmes, *Privilege, Malice, and Intent,* 8 HARV. L. REV. 1 (1894).

roughly the same strata of the same society, and working with the same tools, evolve such completely different theories. Many answers may be offered. For one thing, Holmes was a writer while Doe was a judge. As a writer Holmes could range far afield and consider problems and consequences which would be beyond the scope of Doe's area of investigation, limited as he was by the fact patterns with which he had to deal. On the other hand, Holmes as a writer had to come to terms with established precedents such as the *Rylands* doctrine and adjust his theory to accommodate them. Doe as a judge, and especially as a judge who accorded little weight to precedent, could ignore rules which did not accommodate themselves to his way of thinking. A more basic and meaningful explanation, however, is that the two men began their search for a theory of torts with totally opposite ends in mind. The key to Holmes's effort, Mark DeWolfe Howe points out, "was Holmes's desire for certainty in law."[116] The key to Doe's search, on the other hand, was Doe's desire to establish a few basic principles which would end the need for special rules and exceptions designed to govern almost every conceivable fact situation. Holmes sought to create a philosophical order which would encourage the formulation of concrete rules (and exceptions to those rules) drawn from the experience of jury verdicts, and which would, in time, reduce the jury's lawmaking role and replace capriciousness with stability.[117] Doe sought to increase the jury's role by decreasing the lawmaking function of the court, in order to bring flexibility, justice, and reasonableness to the law of tort liability.

That divergent tort theories can lead to discordant results is seen by the different solutions offered by Holmes and Doe to one of the most common liability problems of their day—accidents at railway crossings. Both were asked to determine the standard of due care which must be exercised by a person seeking damages for injury sustained when struck by a train while driving over railroad tracks at a public junction. Holmes's case was *Baltimore & Ohio R.R. v. Goodman*.[118] Doe's was *Huntress v. Boston & Maine R.R.*[119]

In *Goodman* the deceased had been traveling in a motor truck at the rate of ten or twelve miles an hour, but had slowed to half the speed about forty feet from the crossing. Goodman's view of the track was obstructed by a section house until he was twenty or so feet from the rails. It was daylight and Goodman was familiar

116. HOWE, *op. cit. supra* note 114, at 197. *But see*, Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 221-22 (1964).
117. *Ibid.*
118. 275 U.S. 66 (1927).
119. 66 N.H. 185 (1890).

with the location. The train which killed him was traveling at sixty miles an hour and sounded no warning of its approach. It is probable he could not see it until within eleven and one-half feet of the danger point. Even then, at the rate he was traveling, about seven to eight feet per second, this gave him only one and one-half seconds to avoid impact. He had, counsel argued, "been led into a trap."[120]

In *Huntress* the plaintiff's wife was traveling in a carriage on a public highway. There was no gate or flagman, but in obedience to the only applicable statute, the railroad had erected the familiar "warning signs." The track was straight for a mile or more in the direction from which the train was coming, and there was an unobstructed view "for a long distance." It was a May afternoon, which in New Hampshire meant there was probably plenty of light. At the whistling-post the signal required by law was given, and the bell was rung constantly from post to crossing. Yet, despite these precautions and the favorable conditions, the plaintiff's wife attempted to cross in front of the train. She was struck and killed.[121]

The two cases can be distinguished on their facts. But since Justice Holmes used *Goodman* as a platform for laying down a broad principle of law not limited to the circumstances, the differences between them are inconsequential.

The defendant-railroads in both actions pleaded contributory negligence by the deceased. A traveler is barred from recovery, they urged in *Goodman,* if his view is obscured and he fails to stop,[122] "The deceased could have seen the train had she looked," they argued in *Huntress.* "If she saw it she could have avoided collision by stopping her horse."[123] Justice Holmes agreed, and decided as a matter of law that Goodman had been contributorily negligent.

> When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precautions he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.[124]

120. Baltimore & Ohio R.R. v. Goodman, *supra* note 118, at 68.
121. Huntress v. Boston & Maine R.R., *supra* note 119, at 187.
122. Baltimore & Ohio R.R. v. Goodman, *supra* note 118, at 67.
123. Brief for Defendant, Huntress v. Boston & Maine R.R., *supra* note 119.
124. Baltimore & Ohio R.R. v. Goodman, *supra* note 118, at 69-70.

On reading these words, Sir Frederick Pollock expressed surprise how anyone could disagree with them.[125] Doe would have been surprised how anyone could have written them.

Perhaps Doe was not as confident as Holmes that "the standard is clear." More likely he was not so concerned with standards. To lay down a legal rule in effect freezing conduct, he thought, left many factual issues unresolved. He refused to agree with the Supreme Court of the United States that, as a matter of law, people who dart in the path of trains they are able to see, are conducting experiments for which railroads cannot be made to pay.[126] A man, Doe pointed out, might pass in front of a moving train and not be at fault.

> In the full possession and vigorous use of his faculties, without even a momentary absence or preoccupation of mind, with his intelligence alert and diligently applied to the question of waiting for the train to pass, he might act upon an error of judgment in regard the speed of the train and the time that would elapse before its arrival. There is reason to believe a mistake on this point is the cause of many accidents. A large portion of the community have such knowledge of the danger of crossing a street in front of a horse team moving at a moderate gait as is necessary in determining whether safety requires them to wait for the team to pass. But high rates of speed create a degree of danger that is not generally realized by those who have no special means of information on the subject. Whether a train is going twenty miles an hour or forty, is a question on which the opinion of but few observers would be considered valuable by a railway expert.[127]

It is, therefore, always a question of fact whether the particular defendant, against whom contributory negligence is alleged, could accurately estimate the danger into which he placed himself by measuring speed in terms of time, distance, and visible rapid motion.

Less of a legal strategist than Holmes, but more of a legal tactician, Doe gave careful thought to the implications of placing upon the plaintiff the burden of proving the deceased's exercise of due care where there is no direct evidence aside from the fact the deceased voluntarily entered the area of danger and was struck by the defendant's train.

> A person of ordinary prudence, exercising the caution and vigilance which the law has adopted as the test of duty, might make an extremely hazardous attempt to cross a railroad in front of a train. From the mere fact of great danger, it does not necessarily follow that he exposed himself recklessly and consciously. When there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the

125. Pollock, *Mr. Justice Holmes*, 44 HARV. L. REV. 693, 695 (1931).
126. Railroad Co. v. Houston, 95 U.S. 697, 702 (1877).
127. Huntress v. Boston & Maine R.R., *supra* note 119, at 190.

> instinct provided for the preservation of animal life, it may be inferred from this circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk.[128]

This was the question of fact. Did this deceased person, judged by the ability which the prudent man has of measuring speed in terms of time and distance, understand the danger and knowingly assume the risk?

Mr. Holmes would have objected to Doe's emphasis on understanding the risk; a conjecture both unscientific and inexact. It was precisely to avoid law by supposition that he urged courts to formulate external standards of conduct. These standards, reflecting the morality of the community, were to be gathered from experience. But how, Doe might have asked, are they to be gathered? "A judge who has long sat at *nisi prius*," Holmes said, "ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury."[129] Doe disagreed. He thought judges, after a period at the bar and on the bench, are inwardly turned towards rules, technicalities, and fine distinctions, and are apt to lose sight of "the common sense of the community." Suffering "the mental fetters of habitual nomenclature & vocabulary,"[130] they are more likely to follow legal pedantisms than social experience, and thus subvert the reason of law by a "process of fossilization."[131] Had he been asked, Doe might well have said this was what had happened to Holmes in the *Goodman* decision. Holmes had been too intent on his pet legal theories and had lost sight of the reason of the law. Surely the opinion has been criticized;[132] and by Holmes's admirers, too.[133] Holmes had sought a standard drawn from experience, but as Judge Cuthbert Pound remarked, he had come up with "a standard not in accord with the present conduct of the prudent man."[134]

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128. *Ibid.*

129. HOLMES, *op. cit. supra* note 91, at 124.

130. Draft Opinion, p. 50, File 580, *Doe Papers*, New Hampshire Supreme Court Vault.

131. "One of the disturbing & obstructive elements in the formation of sound opinions is the influence of usage & habits of thought, & associations of ideas originating therein & based thereon. This influence, varying in degree in different cases & different persons, has, on some subjects, in some ages, in some persons of powerful intellect & faultless moral constitution, created a state of mind equivalent to an invincible bigotry in which the reasoning powers were practically suspended, & no evidence & no argument had any force. The law has not been wholly exempt from a danger of the process of fossilization. No man can be sure that he enjoys absolute mental freedom." *Id.* at 48.

132. See Note, 43 HARV. L. REV. 926 (1930).

133. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 205-08 (1943).

134. Pound, Book Review, 44 HARV. L. REV. 1303, 1304 (1931).

If Doe believed that Holmes's method of finding "the common sense of the community was bound to fail, what alternative did he offer? The answer lay in the very principle which Holmes rejected as basically fallacious and dangerously unsound—that most tort issues are questions of fact for the jury. It was this principle, broadly applied in an unprecedented manner, which permitted Judge Doe to place in practice his jurisprudential norm that law must reflect the conditions and attitudes of contemporary society.[135] What better way is there to seek the standards of the community than by asking the jury—the theoretical cross-section of society? But, as previously noted, Holmes felt the law of torts needs greater predictability and he would have diminished the role of the jury.[136] Doe felt it needs fewer rules and would have diminished the role of the court.[137] Holmes said that the sphere in which a judge is able to rule without taking the opinion of a jury "should be continually growing."[138] Doe said that if judges would accord facts a more prominent place in relation to law, "the profession would be relieved and justice promoted."[139] Holmes thought that judges who left standards of conduct as questions of fact for the jury were surrendering a judicial function.[140] Doe thought there were few tort issues which could be treated as pure matters of law.[141]

In *Goodman* Holmes, having held the plaintiff contributorily negligent as a matter of law, never took up the issue whether the defendant-railroad, which had not sounded a warning as it approached the crossing, was guilty of fault. In *Huntress* Doe had to consider the issue of the defendant's culpability. There the engineer and other employees had not been at fault. Everything required by statute had been done, and in addition the bell had been rung constantly from the whistling-post to the point of impact. Doe did not waste time on fine points which seem to fascinate some other judges, such as whether the statutory standard represents only the minimum degree of care

135. Note, *supra* note 103, at 518-19.

136. HOWE, *op. cit. supra* note 114, at 197.

137. For a discussion of Doe's tort cases in relation to his ideas about questions of fact see, Reid, *A Peculiar Mode of Expression: Judge Doe's Use of the Distinction Between Law and Fact*, 1963 Wash. U.L.Q. 427, 440-42.

138. HOLMES, *op. cit. supra* note 91, at 124.

139. State v. Hodge, 50 N.H. 510, 526 (1869).

140. HOLMES, *op. cit. supra* note 91, at 126. See also Holmes, *supra* note 95, at 467; HOLMES, *op. cit. supra* note 95, at 234.

141. See Squires v. Young, 58 N.H. 192 (1877). A statute permitted spouse to sue for loss of support of husband caused by his intoxication from liquor unlawfully sold. Here husband has died and plaintiff brings action against seller. Doe said: "It cannot be held, as a matter of law, that the frequent intoxication of the plaintiff's husband during the last five years of his life could not have caused his death. And the court cannot adjudge habitual drunkenness to be a cause of death too remote for legal cognizance." *Id.* at 193.

or whether statutory duties can fall below the common law requirements. This, he thought, was for the jury to decide. There was a factual issue present, and Doe made it as wide as all outdoors:

> Railway managers may be presumed to have special knowledge of the dangers of their business, and to be aware of the constant peril arising at level crossings from the fact that intelligent and careful people frequently overestimate the safety of attempting to cross in front of trains moving at high speed. The danger thus caused was probably not foreseen when the defendants' road was built. The speed required by public convenience on railways is found to be inconsistent with the public safety at level crossings where there are no gates or watchmen. The expense of watchmen, or gates and watchmen, at all such crossings, would increase the cost of transportation . . . . But the practical difficulties resulting from the conflict of public interests do not change the legal principles applicable to this case, or affect the plaintiff's cause of action. The knowledge which the defendants may be presumed to have of the fact that persons of ordinary prudence frequently go upon level crossings in front of moving trains, when they would wait for the trains to pass if they had been long employed as railroad managers or trainmen, is a knowledge of a danger caused by high speed, and common misapprehensions and miscalculations. The defendants, presumably aware of this customary danger and its cause, are bound to act upon their superior knowledge, and to take such precautions as men of ordinary prudence would take, under the circumstances, in their situation.[142]

All this is rather speculative and gives the jury a vast area in which to let its imagination range, especially since it is allowed to impute "superior knowledge" to the railroad on conjectures such as whether the average laymen can judge speed. Without the least apology or reservations, Doe was permitting the triers of fact to apply a subjective test to this defendant within the external standards of what the prudent expert, possessing "superior knowledge," would have done. Moreover, by framing the issue in terms of preference between safe crossings and cheap transportation, Chief Justice Doe was asking the jury to set the public policy of the law. This shows how far he had departed from Holmes's theory of the jury's function in tort activities. To Holmes the only question with which the jury should concern itself is the conduct of the parties. The standards to be applied to that conduct are for the court to establish.[143] In *Huntress*, Doe took a stand for the exact opposite. It is, he insisted,

> a question of fact whether a person of ordinary prudence, operating the defendants' road with their knowledge of the dangers of level crossings, would guard against accidents by stationing flagmen there, or slackening the speed of the trains. If wrong is done in the decision of questions of faet,

142. Huntress v. Boston & Maine R.R., 66 N.H. 185, 191 (1890).
143. Holmes, The Common Law 124 (1881).

> it cannot be legally prevented or rectified by a judicial alteration of the law.[144]

In 1894, twenty-three years after he had doubted whether torts was "a proper subject for a book,"[145] Holmes announced that, "The law of torts as now administered has worked itself into substantial agreement with a general theory."[146] The fact that he and Doe disagreed on fundamental issues did not trouble him. Holmes believed Doe "second rate" and probably gave his theory little thought.[147] John Henry Wigmore, who held Doe in the highest regard,[148] immediately challenged Holmes's statement, asserting there were many fundamental issues still to be resolved.[149] But on the whole, he accepted Holmes's tripartite division of tort liability, and probably would have agreed with Howe's recent claim that Holmes "had provided a structure of theory which shaped the common law of torts for many generations."[150]

"Structure" is the key word here. Holmes was interested in the structure, in the order, in the theory of the common law. Charles Doe was less interested in structure than in function. But it is not enough to say that this led him to stress the jury as the instrumentality for settling tort issues. The role of the jury is only the symbol of the sunderance between Doe and Holmes. The root goes deeper and is buried in their definitions of law. "The life of law has not been logic," goes Holmes's most famous saying, "it has been experience."[151] Not so, Doe thought. "Reason is the life of law."[152] By "reason" Doe did not mean the syllogistic logic which Justice Holmes and the Realist School of jurisprudence would associate with his generation of judges in order to disparage them. Neither Doe nor most of his contemporaries used this approach to the solution of legal problems. Rather, by "reason" Doe meant a process of decision making which reconciled law with experience, not through the formulation of rules, but through the application of felt and articulated "justice" discoverable in the norms and practices of changing society.[153]

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144. Huntress v. Boston & Maine R.R. *supra* note 119, at 191-92.
145. See text accompanying note 4 *supra*.
146. Holmes, *supra* note 115.
147. Letter From O. W. Holmes to J. H. Wigmore, Jan. 14, 1910, quoted in HOWE, *op. cit. supra* note 114, at 84. It is known that Holmes read *Brown v. Collins*. *Id.* at 85 n.55.
148. Pike, *President's Address—Memories of Judge Doe,* 3 N.H. BAR ASS'N PROC. 463 (1916).
149. Wigmore, *The Tripartite Division of Torts,* 8 HARV. L. REV. 200 (1894).
150. HOWE, *op. cit. supra* note 114, at 194.
151. HOLMES, THE COMMON LAW 1 (1881).
152. Kendall v. Brownson, *supra* note 19, at 205 (dissenting opinion).
153. This is why, as noted earlier, Doe said: "And it is of some importance that the ancient uniformity, consistency and symmetry of the law, as a system of general prin-

Not only did Doe think "justice" a definable and practical standard by which a judge could administer every-day law,[154] but so was "reason." As he said of New Hampshire jurisprudence: "The doctrine of reasonable necessity, reasonable care, and reasonable use prevail in this state in a liberal form, on a broad basis of general principle."[155]

It was on this "general principle" that Doe built the law of torts. Once he had placed a wrong within one of the four parts to his theory of liability, Doe could resolve most issues by the test of "reasonableness." Thus the issue whether the defendant had acted lawfully was resolved by the question of fact—did he act from reasonable necessity.[156] The issue of fault in cases of inevitable accident could sometimes be resolved by asking if the defendant had acted reasonably. And the issue of assumption of risk was resolved by the question whether the defendant had been reasonable in assuming the risk knowing the consequences which might result from his act. Indeed, it may be said that in one decision Judge Doe went all the way and defined the tort in terms of "unreasonableness" alone. This occurred in an action on the case in which the plaintiff sued a railroad for rate discrimination. Ignoring all pertinent statutes, Doe pointedly based liability on common law principles. The important question, he held, was not discrimination or inequality of service, it was unreasonableness.

> Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one; and the law does not require a court or jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main queston is, not whether the unreasonableness was in this or in that, but whether there was unreasonableness, and whether it was injurious to the plaintiff.[157]

Again we find Doe framing a question of fact in terms which permit the jury to set public policy.

"Reasonableness," Doe thought, could be used to determine the presence of, and the weight to be accorded to, each element at issue in a tort litigation. His handling of the right to self defense serves as an illustration. "The chronological part of the doctrine of defence, like the rest of it," he wrote in the *Mink Case*, "is a matter of reason-

ciples, should not be unnecessarily impaired by the introduction or extension of fragmentary rules or disorganizing exceptions, not founded in the reason of the law." *Id.* at 205.

154. Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 Colum. L. Rev. 60, 63 (1963).

155. Haley v. Colcord, 59 N.H. 7, 8 (1879).

156. Green v. Gilbert, 60 N.H. 144 (1880); Aldrich v. Wright, 53 N.H. 398 (1873) (the *Mink Case*).

157. McDuffee v. Portland & Rochester R.R., 52 N.H. 430, 452 (1873).

ableness; and reasonableness depends upon circumstances."[158] This means that no question raised by the doctrine of defense can be settled as a matter of law. The place and probative value of each action depends upon its reasonableness within the situation which the evidence shows had existed at the time, and is a question of fact.

> In defense, it may be reasonable that a man should strike quicker for human life than for property; that he should strike quicker at a habitual fighter, professional robber, or notorious assassin, from whom there would be reason to expect sudden or extreme violence, than at a man previously inoffensive, from whom there would be little reason to apprehend a serious attack; that he would strike quicker at a strong man than a weak one; that he should shoot a dog quicker than he should shoot a man; and that he should shoot mischevious wild animals, which are the absolute property of nobody, quicker than he should shoot a valuable domestic animal, the property of his neighbor. The consequences of shooting, compared with the consequences of not shooting; are material to be considered on the question when he should shoot, as well as on the question whether shooting is a defence of a reasonably necessary kind.[159]

Here, in its clearest expression, can be seen why Judge Doe rejected legal tests devised by courts to settle such issues as the right of self defense. The concept of "reasonableness" would produce a truer and more just result. "Imminence of danger," he concluded, "in this broad and relative sense, creating a reasonable necessity, was the test of the defendant's right."[160]

If Chief Justice Doe was carried to extremes, it was because he wished to restore to the common law its "ancient uniformity, consistency and symmetry."[161] He seized upon the doctrine of "reasonableness" as the unifying factor in the law of torts and at times lost sight of the truth that law, to be useful, must be predictable as well as just. Oliver Wendell Holmes never lost sight of this fact. He had, as Professor Howe says, taken some pride in developing his theory of torts because of its "uniformity." But he took even greater pride from the conviction that "he had formulated a theory which might increase the law's certainty and, therefore, the law's utility."[162] Above all else Holmes objected to uncertainty, and it was on this point that he offered his most basic challenge to Doe's philosophy of law. The elements of most tort cases, Holmes wrote in that 1873 article which Doe had read in proofs, "are permanent, and there is no reason why a case should be decided one way to-day, and another way tomorrow. To leave the question to the jury forever, is simply to leave the law

158. Aldrich v. Wright, 53 N.H. 398, 403 (1873).
159. *Ibid.*
160. *Ibid.*
161. *Supra* note 153.
162. HOWE, *op. cit. supra* note 114, at 199.

uncertain."[163]

Doe did not question the utility of predictability. But he thought other things more important. He had taken his stand a year earlier when he wrote: "[T]he reason of the law has some regard for the fundamental principles of justice as well as the demands of convenience."[164] At the very moment when Holmes's article was being published, Doe was handing down an opinion in which he offered to Holmes a challenge of his own. He was considering whether the concept of "reasonableness" is so vague that courts would find it too difficult for practical application.

> But such difficulty as there may be will arise from the breadth of the inquiry, the intricate nature of the matter to be investigated, the circumstantial character of the evidence to be weighed, and the application of the legal rule to the facts, and not from any want of clearness or certainty in the general principle of the common law applicable to the subject. The difficulty will not be in the common law, and cannot be justly overcome by altering that law. The inquiry may sometimes be a broad one, but it will never be broader than the justice of the case requires. A narrow view that would be partial, cannot be taken; a narrow test of right and wrong that would be grossly inequitable, cannot be adopted. If the doctrine of reasonableness is not the doctrine of justice, it is for him who is dissatisfied with it to show its injustice; if it is the doctrine of justice, it is for him to show the grounds of his discontent.[165]

That was why Holmes wrote *The Common Law*. Doe thought Holmes had failed to prove his case.

163. Holmes, *The Theory of Torts*, 7 Am. L. Rev. 652, 654-55 (1873).
164. Rixford v. Smith, 52 N.H. 355, 362 (1872).
165. McDuffee v. Portland & Rochester R.R., 52 N.H. 430, 453-54 (1873).