1888

The Early English and Modern Doctrine of Corporate Liability for Torts

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Growth of Corporations.

That the law shapes its course in compliance with the demands of the times is nowhere more plainly seen than in the history of the development of the doctrine of corporate liability for torts. Scarce a century ago, the corporation was a creature mysterious and incomprehensible in its workings and movements. It was only here and there that one came in contact with them, and moreover, there was little to case them into being. Trade, commerce and speculation were confined to the resources of the individual and
whatever was undertaken beyond his means, or the united means of a few associates, was left to the State. But when the shadows of smoky factories fell as a curse upon the little workshops, and as the journeyman saw his work done by a child, and the stage coach gave way to the locomotive, new capital clamored for a new means in which to amass itself. The demands of commercial progress were not content with the advantages of a partnership. There was need of a system whereby men could unite capital in a joint enterprise without danger of confidence being misplaced in a partner and without fear of a man's losing all his means in the failure of one investment. From
demand, came the modern corporation.

Rise of Corporate Litigation. In the course of their transactions, corporations like men became involved in litigation, and thereupon this question came before the courts: Was the law to be applied to corporations in the same fashion as to other persons, and if so, how? The question in actions arising ex contractu was comparatively soon settled to be the same as that which governed persons natural. The rules of law, however, which were to be applied in corporate actions arising in tort have undergone a gradual but radical change since corporation cases first came before the courts. When it was considered that a corporation was an ar-
li/icial being, invisible, intangible and existing only in contemplation of law, it appeared unreasonable that it could be guilty of a wrong or loss, and furthermore the common law rules which would issue against a man in such action were obviously of no avail against a corporation.

At first, therefore, it appeared that a corporation could infringe upon the rights of others with impunity. It was a hydra-headed monster, the bête noire of that day and age. As corporate litigation increased, however, it was plain that justice could not be done unless corporations were brought wholly within the pale of the law, and the courts were steadily compelled to explore the
Early Actions in Tort. It is said that as early as the time of Bracton, a distinction existed between those actions which arose \textit{ex contractu} and those which arose \textit{ex delicto}. Anciely, the action of debt was deemed the only remedy for the recovery of money. Trespass was confined to cases of force. In the time of Edward I debt was the form of action in which debt was recovered, whether debt on parvere contracts or specifically, specific chattels in delinse, which trespass was restricted to cases of device-and immediate injury. In the reign of Edward III debt continued to be the usual remedy for the recovery of money on more-con.
lands, but action of account, annoy
and covenants were also in use.
Trespass became in this reign more
general, but was usually confined
to the redress of injuries to the person
as by battery or assault, and to proper-
ly by taking goods and entering
into houses and lands. It was
never held however to extend to
corporate bodies. About the mid-

de of the reign of Edward III, the
Statute of Westminster no authority
was held to be framed in con-
siderable cases under which the action
of trespass was greatly enlarged in
its scope, and so modified as to
be adapted to every man's own
case. The first action of this de-
scription occurred in the twelfth-second
year of this reign and was brought against a man who undertook to convey the plaintiff’s house across the river and so overloaded his boat that the house was lost. During the reigns of Richard II, Henry IV and Henry V, actions on the case became very frequent. In the time of Henry IV the term "trespass on the case" was in familiar use. Before that period, this action, though applicable to cases of consequent die damage, was caused an action of trespass only. Its nature and character were then better understood and the distinction between trespass and trespass on the case was marked by a more wide discrimination. Whether it would be maintained on an exemplary
proscribe was much discussed at this time. It was, however, discon-
tinued and did not receive the sanction of the judges until the reign
of Henry VIII. __________________________

It was never pretended that an action of trespass "vi et armis" would lie
against a corporation which from its nature seemed to be incapable
of committing a tort, nor could the same thing be done by changing
the form of action and calling it an action on the case. __________________________

Argument of counsel for plaintiffs in error
in Christ' Hill & Spring House Inn-

**Early English Doctrine.** In those
days, corporations were creatures of
the law of a higher refined and
and inanimate matter whose properties and attributes, lawyers alone understand. Devising their existence out of the law, it seemed plain that they had to be governed by the terms of the law which created them. They must proceed as we pursue in the path prescribed by the law. If the corporation did not act within their corporate powers, they as individuals and not the corporation of which they were members, must answer for it. If the corporation itself entered into a contract unauthorised by its charter, no action founded on contract could be sustained, though the individual members might be sued. Suppose, it was said, an ins.
service company showed unwarrantable to make a turnpike road or to build a church, caused those who were employed by them, recover against the corporation as such. Every principle of the law of corporations forbids it. A corporation never was and never can be authorized by law to commit a tort: they can invent no one with power for that purpose. If, therefore, an agent constituted for a legitimate purpose in fact an injury, the corporation is no more answerable than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorized to commit a wrong, it is out of the scope of its
corporate powers. The act of the law like the act of God can work an injury to no one, and if a man sustain damage by it, it is damnum absque injuria.

In _Orr v. Bank of the United States_, 10 O. 36. 1842, Judge Bunnell in delivering the opinion of the court said: "In _8 East 230_, Lawrence J. says: 'Inpass does non-lie against a corporation. _Thorp, Jones_ says: 'Inpass does non-lie against a corporation aggregate by its corporate name for a capias and exigens do non-lie against it.' 12 Edw. 67. A corporation can not deal nor be beset, nor commit treason or felony nor be outlawed._ 21 Edw. 47. 12
21. 67. They can not be assigned. Bac Ab 507. nor outlawed 10 C 32. nor attached 152. No reprieve lies against them by the name of their corporations. Brown 176. They can not be declared against in any way 6 Mod. 179. They can not sue as a common informer. 7 Sim. 1241. For torts, they must be sued individually Salk. 197. Trespass does not lie against a corporation but against its members. 4 Can Franchile f. 15. A corporation cannot commit a trespass but by their writing without notice. Vin. Ab. Cap. 14. 12. Trespass does not lie against a commonly, but shall be against the persons by their proper names for capias and ex fess lie not-
commonly. In spars does not lie against a corporation, viz: by the name of the corporation but against the persons who did it by their proper names for capias and exierit do not lie.____

Blackstone says a corporation can neither maintain nor be made defendant to an act of battery or such like personae injuries for a corporation can neither beat nor be beaten in a body politic. Br. 1 p. 503.____

In Riddle Propre Hodes to 7 May 1277. we find this statement: "One main why hispars does more lie is that at common law the process was capias, and the plaintiff might proceed to outlawry. But the principal reason is, that judgment against the defendant"
in lispa done always concluded with a capia-
tur and it would be absurd to render
such a judgment against a corporation.
This objection applies not only to action
of lispa done at arms but to all ac-
tions of lispa done in the case arising
ex delicto where the plea would be
as in this case not guilty ________

It was also reasoned that in com-
pliance with the rule of common
law all actions arising from acts which
were merely personal and which would
not survive against an executor would
not lie against a corporation. The
same reason was claimed in both cases.
Neither the members of a corporation,
or executors nor administrators were
liable to capias. (Burr Corp. 43). And
the original reason for deciding that
executors should not be liable to actions of this description, was to protect the person of the executor from the process of capias and mora to prevent the executors properly being answerable for the injuries done by him. Executors were not liable for the losses committed by their executors because mere sue the wrong would was answerable for his personal wrong and the same reason was applied to corporations. A corporation was said to be made up of a succession of individuals perpetually changing, and if a wrong be committed, the then existing members should be personally answerable for it and not the individuals who happened at
a future time to compose the corporation

Modern Doctrine. In the course of
judicial disputes, it was shown to the
courts that the early doctrine was founded
upon a misconception of expressions ap-
plied to corporations and which could
not rightly be used away in a figura-
tive sense. When, therefore, it
was considered that a corporation was
but an association of individuals,
like a partnership, and that the
only radical distinction between a
corporation and a co-partnership arose
from the fact that an incorporated
association was recognized by the state
as an aggregate body, acting in one
name, it was plain that there was
no reason founded on principle and
justice why a corporation should
now be charged with the acts of its agents through whom it must always act, to the same extent as an
insolvent or a co-partnership or other voluntary association under similar circumstances.

At first it was seen that directors might regularly direct or ratify under the corporate seal acts which
amounted to warrants for which the corporation would be liable, and this notwithstanding the fact that every
act committed by a corporation necessarily involved an unauthorized exercise of corporate powers and it
was further seen that there were numerous ministerial acts to which the solemnity need or could not be given.
Mr Justice Shaw said
Corporations are liable for every wrong they commit and in such cases the doctrine of ultra vires has no application.

The growth of the new doctrine at one time hesitated over the question whether it should be applied similarely in malfeasance as in misfeasance. It could be seen that an action might be maintained for neglect of duty as for not keeping a creek or bridge in repair but it was not so easily comprehended that a corporation could be guilty of a malicious act, such as assault and battery arising from the act of an agent.

[McCluskey v. Cricket, 1 East 105, 1800] was an action of trespass in which
it appears that the servant of the defendant will fairly argue a claim against the plaintiff's choice, but that the defendant was not in his self presumed act and he in any manner direct or consent to the act of his servant, and the question was whether for this wilful and designed act of the servant, an act in of despain lay against the defendant. Hence Magnan C. J. held when a servant quits right of the object for which he was employed and without having in view his master's orders pursues that which his own nature suggests, he no longer acts in pursuance of the authority given him and that his master would not be answerable
for such act—because by willfully committing this act, the servant gained a specific property in the chariot:

"The rule in this case can be extended no farther than to hold that where there is a legal source of authority in the servant to do an act resulting in injury to another, the mere fact that he was at the time in the employment of another does not render the master liable therefor. It is a question of authority on the part of the servant and not of intention."

Wood on Master Servants,

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Harborough et al. v. The Governor and Company of the Bank of England, 16 Beav. 6, 1817 was a bold stand in holding
corporation liable for their loss. The plaintiffs recovered an order against defendants for three promissory notes of the Bank of England, payable on demand each for 100 l. After verdict for plaintiffs, it was moved to arrest judgment on the ground that the action of trover which was founded in debt and not the assignee—a corporation. The bank had its name upon this occasion to protect the true owner of the notes who had been robbed of them and had directed the defendant—bank to stop payments on them under his indemnity. The plaintiffs who were bankers had several months afterwards received them in the course of their business in ex-
change for their own uses from a person who gave in the name of Capt. Johnson but whom they did not know and consequently are means of tracing the property was lost. In this case Lord Elinborough, Ch. J. said "The duty question was whether an act in
in favor is maintainable against a body corporate; or in other words whether a corporation can be guilty of a trespass or a lost. As a corporation, they can do no act, and even affix their corporate seal to a deed, but through the instrumentality of others: they can not as a corporation be subject to a capias or exigency (the process in trespass) because the remedies which attach upon living persons, can not-
be applied to bodies merely political and of an impersonal nature. But wherever they can completely do or order any act to be done on their behalf which as by their common sense they may do, they are liable to the consequences of such act, if it be of a lasting nature and to the prejudice of others.

Middle v Proprietors of the Locks and Canals on Merrimack River, 7 Mass 169. 1810. was an action brought against the proprietors of a canal who were bound by their incorporation to maintain their canal so deep and wide that rafts of a certain description could pass through it when the same could not pass the Merrimac. For damages plaintiff sustained in consequence of the canal's width being insufficient to pass a raft of such
description, the company having received
therefore. It was here held that
an action of trespass on the case
would lie against a corporation
aggregate for neglect of a corpora-
tion duty by which the plaintiff suffers.
In delivering his opinion, Parsons said
often referring to the early English
doctrine: "Let us now leave the au-
ciente cases and resort to the maxim
of common law which are founded in
good sense and substantive jus-
tice. It was one of these max-
ims that a man assicically in-
jured by the breach of duty in
another should have his remedy by
action. If the breach of duty
be by an individual there is no
question and why should a corpora-
him, receiving its corporate powers and
obeyed by its corporate duties with
its own consent be an exception when
it has, or must be supposed to have
an equivalent for its consent.

Hutter v Chestnut Hill and Spring
House Turnpike Co. 4 S. & R. 6, 1818. Herein
plaintiff brought an action on the case
against defendants for an injury due
to his lasso-yard in consequence of
certain piers erected by the defendants
on each side of a certain wall of water
by which the water was obstructed
and thrown back and overflowed
the plaintiff's land. In reply to an argument that a corpo-
ration can not be guilty of a let-and
that because the charter does not au-
thorize it to do wrong, it can do no
wrong said: "The argument is fallacious in its premises and misconceptions in its consequences, as it
leaves to individuals actual wrong and ideal remedies for a rut. A company may do great injury by means of laborers who have no property to assure the damages recovered against them. It is much more reasonable to say that when a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible in the same manner that an individual is responsible for the actions of his servants touching his business. The act of the
agree is the act of the principal. There is no solid ground for a distinction between contract and torts."

Church. C. J. said "The welfare of the community and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shore exempt them from the ordinary liabilities of natural persons for acts and injuries committed by them and for them. Their immunity for wrongs are no greater than can be claimed by others and they are entitled to an equal protection for all their rights and privileges and no more."

**Goodpeed v. The East Haddam Bank**, 26 Conn. 574, 1853.

Mr. Cooley in his work on torts says: "Many acts are unintentional and arise
though neglect of agents and servants, while others though unintentional are committed by agents or servants in the supposed interest of their employers and under circumstances which may justify them in believing what they do is fairly authorized, and a part of their duty under their employment. To deny redress against the corporation would in many cases be a denial of the remedy. "And generally it may be asserted," says Deere J. in Brockaw v. N.J.R. & I. Co. "That a corporation is liable civilly the same as a natural person for the tortious acts of its servants or agents, in the course of their employment, committed by the authority of the corporation express
or implied whether such acts fall within
the designation of forces, negligence,
malicious or fraudulent, and
without regard to the form of action
by which the appropriate remedy is
sought.

In an action upon the case against
a corporation for injury done by
their agents, it is not necessary to
prove that the agent had authority
under the corporate seal nor under
an order entered upon the books
of the corporation.

Hooe v. Mayor et al. (19th C.C. 1890).

We will now consider how the
modern doctrine of corporate liabili-
ity for torts has been applied
in specific cases.
Negligence. A locomotive fireman was injured by the explosion of the engine upon which he was employed. The boiler was defective and dangerous and its condition in this respect was and had for some time been known to the defendants through the reports of the engineer which were entered upon the book of the defendant's keep for that purpose. As the injury resulted from the improper conduct of the company in using the engine after it was known to be defective, the company was held liable for its negligence.


Trespass. A corporation in excavating a cause upon land of which it claimed to be owners hurched
down the slope of a neighboring house and part of the chimney and in blocking three large quantities of earth and stones upon the owner's premises and also darkened the windows by obstructing to prevent their being broken. In an action brought against the corporation for trespass, the corporate liability was assumed by the court without discussion to be the same as that of any other person.

Hay v. The Cohoes Company 2 NY 159, 1849

Ejectment. An action was brought to recover a piece of land which was occupied by a railroad. The owner appealed from the final order of a commission which approved his land and an increased appraisal was awarded which the railroad company
neglected to pay. In the first sentence of his opinion, Cowan J. said; "The old doctrine that ejectment will not lie against a corporation aggregate is exploded by modern authorities." Docket 1108.

**Conversion.** A traveler went to a railroad depot in Philadelphia and applied to the baggage master for checks for his baggage, but was informed that he must first procure tickets. While he was away for this purpose, the baggage master caused his baggage to be weighed, checked, and put into the baggage car. Upon the return of the traveler with his tickets, he was informed that under the rules of the company, the tickets were insufficient to transfer all his bag-
gage and for the excess a charge was
made which he refused to pay.
He demanded his checks, but there
were refused unless the extra charge
was paid. He then demanded his
trunks but they were refused for
the reason that they were covered
with other baggage and could not
be reached before the time for start-
ing the train. The traveler de-
clined to go through on the train but
his baggage went through to Chicago
and the night after its arrival it
was consumed by fire. It was
heed, without meeting a difference
between corporate and personal lia-
bility that the railroad company
was liable for conversion.

McComish, C. M. R. R. Co. 49, M. M. 1905.
Libel. An action was brought against a publishing company by an incumbent of a public office for an unfavorable criticism on his appointment. In rendering a decision against the company, the judge said: "Not only does common sense scouting the proposition that while a natural person is liable for damages for libel, an artificial one composed of several natural persons, is not, but has hereby license and immunity to libel as one whom it will.

Evening Journal Ass'n v. McDunnough, 44 N.J. 430 (1882).

Malicious Prosecution. An action was brought against an incorporated bank wherein it was alleged that the defendant, with out probable cause, acted with a malicious intent, unjustly to vex, harass, embarrass,
and unless the plaintiff commenced by writ of attachment and presented against him a certain vexatious suit. The allegations being proved the suit was sustained. The court said: "True malice must be proved and, as we suppose, very much in the same manner as it is proved in other cases of a criminal nature against individual persons," and would not limiter to the claim that a corporation would not be liable where a private person would.

Goodspeed v. The East Haddam Bank 23 Ct. 30, 1833

In relation to such actions, De Rue J. said: "If actions for malicious libel, for vexatious suits, for vexatiously and maliciously obstructing another in his business, for willful trespass and
for assault and battery in each of which the motive and intent of the mind are directly involved, can be maintained against a corporation, no reason for an action for malicious prosecution shown, nor also be maintained against a corporation.

Davis v. Erie R. R. Co. 32 N.Y. 334.

Fraud. An agent for an insurance company represented to an applicant for insurance that the capital of his company is the amount of $100,000 was all paid in and invested according to law, which was in fact false. Relying upon these representations, the applicant effects an insurance contract, giving his note
in payment of the premiums. In an action for the payment of the sums by the assignees of the insurance company, the court held for the assignees on the ground that fraud avoided the contract and said: A corporation can act only through agents. If they while exercising the authority conferred on them are guilty of falsehood and fraud, their principal is liable for the consequences which may flow therefrom.

Fogg v. Griffin 2 Allen 1.

False Imprisonment. A man purchased a ticket for a passage on an elevated railroad and entered a car. Before reaching his destination he lost his ticket and when he attempted to pass through the gate from the station...
platform, he was stopped by the gate-keeper and told that he could not pass until he produced a ticket or paid his fare. He stated the facts of his purchase of a ticket and its loss, and insisted upon passing out, but was pushed back by the gate-keeper who sent for a police officer and ordered his arrest. The next morning he was discharged. The company had given orders to its gate-keepers not to let passengers pass until they had either paid their fares or shown their tickets.

The company was held liable for false imprisonment and Lord J. said in delivering the opinion of the court: "It matters not that the gate-keeper exceeded the powers conferred upon him by his principal and that he acted an act which
he was not authorized to do, so long as he acted in the line of his duty or being engaged in the service of the defendant—attempted to perform a duty pertaining or which he believed to pertain to that service. 

Lynne v. Metropolitan Elevator R. R. Co. 90 NY 77.

Conspiracy. It was charged that certain oil companies had formed a conspiracy to injure another oil company and in pursuance thereof had done certain acts injurious to the latter. The conspirators by letters and other means, requested various customers of the rival company not to purchase oil from it and represented that the latter's oil was of inferior quality and that it had no right to make such oils and sold the same on the market and
threatened the customers with law suits and expense if they continued to patronize the competing company. These statements were made by an agent and by reason of such threats, the company lost customers and suffered damage in consequence thereof. The court in hearing for the plaintiff said that is well settled that the malicious and wicked intent requisite to sustain such actions may be imputed to corporations.

The Buffalo Locomotive Co. v. The Standard O. Co. 117 N.Y. 160

Assault and Battery. A boy jumped upon the platform of a baggage car belonging to a railroad company to ride to a place where the cars were being backed to make up a train. The company's rules forbade all
persons except certain employees riding on baggage-cars, and directed baggage-
men to rigidly enforce the rule. The boy being ordered off while the car was in motion, replied he could not see off on account of some wood which was near the track, whereupon the baggage-
man shot kicked him off. He fell against the wood and then under the cars and was injured. In an action for damages it was held that where authority is conferred to act for another without specific limitation, it carries with it by implication authority to do all things necessary to its execution and when it involves the exercise of discretion of the servant, or the use of force towards or against another, the use of such discretion or force is
a part of the thing authorized and when exercised, becomes, as to third persons, the discretion and act of the master and this although the servant departs from the private instruction of the master provided he was engaged at the time in doing his master's business and was acting within the general scope of his employment.

Reynolds v. A. H. & W. R. R. Co. 64 N.Y. 129

Summary of Modern Doctrine. We thus see that a corporation always acts through its agents; that these agents furnish whatever moral agency is necessary for a tortious act; that so long as they act in the line of their duty, the doctrine of ultra vires inapplicable; and that the relation of master and servant exists between the
corporation and its servants, and hence it appears that an action may be main-
ained against a corporation for its ma-
dicuous or negligent acts. However for-
ign they may be to the object of its
creation or beyond its granted powers
it may be sued for assault and
battery, for fraud and deceit, for
false imprisonment, for malicious prose-
cution and for libel."

Note: Banks v. Graham 100 NY 702