

THE DEGREE OF MORAL FAULT AS AFFECTING  
DEFENDANT'S LIABILITY

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It is our purpose to study the tendency of courts to consider the degree of the defendant's moral fault in the judicial administration of the so-called rules or principles of causation and of proof. At least as early as 1858, a distinguished writer seemed greatly troubled at the possibility that distinctions as to the degree of fault might cause our courts to "lose themselves in the maze of abstract casuistry, as to the different degrees of fault,"<sup>1</sup> or, despairing of the attainment of principle, to throw each case to the all but uncontrolled decision of the jury. Although our law does not recognize any such arbitrary classification as that of *dolus* and *culpa* under the civil law, it seems that there is a fairly clear tendency to pay attention to the degree of the defendant's fault, even independently of the theory of exemplary damages.

Perhaps it will be contended that, in undertaking this study of a mere tendency, as contrasted with supposedly fixed "principles" or "rules," we are giving attention to that which is no real part of the law; but is it not both sensible and scientific to bring out into the light of day any important tendency in our law and to study it as a mere tendency, without falling into the nineteenth century error of promptly placing upon it the label of "principle" or "rule"? Is not the study of important judicial tendencies worth while, as a practical matter, in adding to predictability of judicial result, if predictability is as desirable as most lawyers apparently believe it to be? Only by studying the tendency of courts to regard degree of fault can we come to any understanding of the real workings of the supposedly rigid, but really very elastic "rules" of causation and certainty.

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<sup>1</sup> SEDGWICK, DAMAGES (3d ed. 1858) 118. The author quoted Hasse, the German writer, at 117 note *t*, on the distinction between *dolus*, or *culpa lata*, and mere *culpa*, under the civil law, and expressed his own dread lest the common law system come to entertain a similar distinction and thereby bring about confusion in the administration of the law. Sedgwick said: "The danger to be apprehended is, either that the courts will lose themselves in a maze of abstract casuistry, as to the different degrees of fault; or that in despair of reducing the subject to principle, they will throw the responsibility of the matter on the jury, leaving everything to their vague, fluctuating, and all but uncontrolled discretion."

"Better, I humbly think, it would be, in all matters of tort where the wrong is not so flagrant as to warrant vindictive damages, to adhere as closely as possible to a fixed rule—to declare that in no case shall the measure of relief depend on the motive of the party, and that the remuneration is in all cases to be limited to the natural and proximate consequences of the act. Even this is vague enough; for language confesses itself incompetent to depict the nicer shades of right and obligation; and all rules will be found valueless unless applied and expounded by tribunals as sagacious as they are learned."

For the text of Hasse and its translation, see Bauer, *Consequential Damages in Contract* (1931) 80 U. OF PA. L. REV. 699, note 35.

In the study of cases and in attempts to arrive at rigid and fully determined principles, it is easy to fail to examine the realities and to indulge in thinking that is both wishful and futile,<sup>2</sup> and this has been an ordinary fault in much of legal reasoning.

However desirable "sound legal principles" may seem in the abstract, it must always be borne in mind that the statement of "legal principles" in a judicial opinion is not a primary function of a court. The judge's primary, if not sole, duty, in the decision of any case, is to do justice to the parties on the particular facts of the case before him. Too much weight should not be accorded the remarks contained in a judicial opinion, whether made in the actual decision of the case or by way of mere *obiter dicta*, although it must of course be borne in mind that the principle *stare decisis*, as often interpreted, has seemed to constitute words spoken in the actual decision of a case as the law of the jurisdiction. Many of the sayings of courts in regard to causation and certainty cannot be considered as general rules, but rather as statements made in the decision of the particular case. In cases on these subjects, it is much more important to know what the courts have actually done.<sup>3</sup> Tendencies must be studied as a part of our legal system.

In their desire for predictability—perhaps on the whole a laudable desire, lawyers have frequently if not usually overlooked the fact that, in a great many cases, the combination of facts is such as has never occurred before and pretty certainly will not occur again. A case in a law court is a social phenomenon, and often it is based upon a more or less complicated series of social phenomena. Naturally, social phenomena are complex and not repeatable in detail.<sup>4</sup> The phenomena dealt with in causation and certainty are essentially unrepeatable and complex, and therefore cannot properly be made the basis of rigid rules.

<sup>2</sup> See FRANK, *LAW AND THE MODERN MIND* (1930) chs. viii and xiii.

<sup>3</sup> See GREEN, *JUDGE AND JURY* (1930) 57-58: "It would be as futile to attempt to state for the judge the limits of the law's protection in advance of the particular conduct, as it would be to state to the jury the sort of conduct they should condemn. Conduct is infinite in its variety. The most a legal science can do with the classes of cases here involved [negligence cases] is to employ broad formulas both for judge and jury and rely upon their respective judgment-passing capacity to dispose of the cases satisfactorily as they arise."

<sup>4</sup> "With the greater complexity of social facts are connected (1) their less repeatable character, (2) their less direct observability, (3) their greater variability and lesser uniformity, and (4) the greater difficulty of isolating one factor at a time. These phases are so dependent on one another that we shall not treat them separately.

"The practical difficulties of repeating social facts for purposes of direct observation are too obvious to need detailed attention. What needs to be more often recognized is that social facts are essentially unrepeatable just to the extent that they are merely historical. The past fact cannot be directly observed. Its existence is established by reasoning upon assumed probabilities. In the case of physical history or geology our proof rests on definitely established and verified laws of natural science. In the case of human history the principles assumed are neither so definite nor so readily verifiable." COHEN, *REASON AND NATURE* (1931) 351.

"It is of course scientifically useful to resist the suggestion of proposed plausible generalization by discovering contrary 'tendencies'. Also the existence of opposite tendencies must be considered before we can proceed to measure them. But the temptation to set up tendencies as laws makes social science essentially indeterminate in the sense that diverse schools set up diverse principles all with the same show of truth." *Id.* 363.

There is often danger lest a judge, having become convinced of the truth of certain premises, actually true in a precedent case in which they have been enunciated, but utterly false in the instant case, will proceed by syllogistic reasoning to a judgment that is unreasonable. The supposed rigidity of most of the so-called principles or rules of law contributes materially to this undesirable result.<sup>5</sup> We shall find that there is usually no rigidity in the administration of "rules" of causation and of certainty. When, as occasionally happens, there is such rigidity, the court may reach an unreasonable result.

Although causation itself is the same problem in negligence, in reckless misconduct, and in intentional wrongs, the so-called rules of causation, which really cover both causation and the question whether the damage sued for is within the protection of the rule of conduct invoked, are administered in such a manner as to be most severe upon the intentional wrongdoer and more severe upon the reckless wrongdoer than upon the negligent wrongdoer.<sup>6</sup> It would shock the feelings of a court to be as lenient with the intentional or even the reckless wrongdoer as with the person merely failing, perhaps by very little, to live up to the standard of care required. The intentional wrongdoer cannot successfully invoke the doctrine of accident in order to relieve himself from paying damages for unintended results of his intended wrong or of his attempt to do a wrong; but the defendant charged with negligence is often able to plead accident with complete success. Courts temper the so-called rules of causation to fit the moral conduct of the defendant.

"Causation, as distinguished from duty, is purely a matter of producing a subsequent event. In determining how far the law will trace causation and afford a remedy, the facts as to the defendant's intent, his imputable knowledge, or his justifiable ignorance are often taken into account. The moral element is here the factor that has turned close cases one way or the other. For an intended injury the law is astute to discover even very remote causation. For one which the defendant merely ought to have anticipated it has often stopped at an earlier stage of the investigation of causal connection. And as to those where there was neither knowledge nor duty to foresee, it has usually limited accountability to direct and immediate results. This is not because the defendant's act was a more immediate cause in one case than in the others, but because it has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault are present. Treating all these cases as turn-

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<sup>5</sup> "Upon reflection, it must be clear that, for any case wherein there is a clash of two groups having conflicting interests, two conflicting major premises can always be formulated, one embodying one set of interests, the other embodying the other. Each group has had its advocate to formulate its interests into general propositions and our novel cases all involve some such conflict of interests." Oliphant and Hewitt's Introduction to English translation of RUEFF, *FROM THE PHYSICAL TO THE SOCIAL SCIENCES* (1929) xv-xvi.

<sup>6</sup> See GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927) 170 *et seq.*

ing upon an issue of immediateness of causation has resulted in much confusion of ideas and made the conflict of decisions appear to be greater than it is. Most of the cases wherein liability to foresee has been held to be an answer to the plaintiff's claim of causation are those where the result is not immediate, but depended largely upon extrinsic and intervening causes. The result was somewhat remote, and a morally innocent party ought not to be held liable, though one morally guilty should be. The decisions do not turn on remoteness of causation alone, but upon such remoteness plus freedom from moral fault."<sup>7</sup>

Courts are so little inclined to limit closely the liability of a defendant for an intentional wrong that, in such cases, they give much less attention to questions of proximate cause than in negligence cases. In negligence cases, courts are inclined to hold down liability and the measure of damages rather closely, by a very strict interpretation of such terms as "proximate result." In doing so, it would seem that, without the Roman theory as to kinds or degrees of fault, they are operating very much as did the ancient Roman courts, which allowed damages for resulting harm more readily in cases of *dolus* than in those of *culpa*.<sup>8</sup>

In allowing damages for physical consequences of fright wilfully caused by defendant, the Supreme Court of Minnesota said: "Cases holding that illness caused by fright is too remote a consequence of a negligent act to permit a recovery, unless there was some immediate physical harm, are not in point, for in such cases there is no element of wilful wrong."<sup>9</sup>

In cases of reckless misconduct, courts, in a number of instances, have held the defendant liable for resulting damage for which he almost certainly would not have been held liable if he had been guilty of negligence only.

In the famous case of *Scott v. Shepherd*,<sup>10</sup> the conduct of the defendant in throwing a firecracker into a crowd in the market place, was obviously not merely negligent, but reckless, and the court proceeds to hold him liable

<sup>7</sup> Snow, J., in *Derosier v. New England T. & T. Co.*, 81 N. H. 451, 463-464, 130 Atl. 145, 152-153 (1925).

<sup>8</sup>"*Dolus* . . . always created liability for resulting harm. *Culpa* is a more difficult notion to deal with. It may be roughly described as negligence, or, with more apparent precision, as failure, in any given relation, to observe the standard of conduct which the law requires: more care may be reasonably asked for in some relations than in others." BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW (1931) 337.

"Where a man wounded another not mortally, who died in consequence of being neglected, he was liable for the wounding but not for the death. But if the original act was wilful it is generally held, though there is no explicit text, that intervening negligence of the injured person was no defense, though there was the same breach of causal *nexus*." BUCKLAND, A TEXT-BOOK OF ROMAN LAW (1921) 582.

<sup>9</sup>Johnson v. Sampson, 167 Minn. 203, 206, 208 N. W. 814, 815 (1926). See also: *Wilkinson v. Downton* [1897] 2 Q. B. 57; *Janvier v. Sweeney* [1919] 2 K. B. 316; *Great A. & P. Tea Co. v. Roch*, 160 Md. 189, 153 Atl. 22 (1930).

Where defendant committed an assault and battery upon plaintiff's father, in the presence of plaintiff, while plaintiff was pregnant, causing plaintiff such anguish and distress that she became very ill and disordered and thereby suffered a miscarriage, defendant was held liable. *Lambert v. Brewster*, 97 W. Va. 124, 125 S. E. 244 (1924).

Cf. *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222 (1888) (negligence case).

<sup>10</sup>2 Black. W. 892 (Eng. 1773).

for results directly brought about by the intervening act of a fourth person after another intervening act of a third person. It may be said, in passing, that the court went still farther and stretched the action of trespass in order to hold the defendant liable, over the dissent of Blackstone, *J.*

In *Bremer v. Lake Erie & Western R. Co.*,<sup>11</sup> the court allowed recovery for the death of a trespasser riding on the train of defendant. The death was caused by the reckless misconduct of the train crew in passing a signal. Defendant's servants did not even know of the presence of plaintiff's decedent until about the time of the impact of the crash that caused his death, when it was already too late to exercise any effective care in his behalf.

In an interesting English case,<sup>12</sup> the court holds the defendant liable for damage that has resulted from a rather unexpected type of intervening act of a third person, apparently viewing defendant's act as one of reckless misconduct. Defendant was the occupant of premises abutting on a private road leading to certain other premises as well as to his. The private road consisted of a carriage road and a footway. Defendant used his premises as a place for athletic sports carried on by persons resorting thereto for their amusement. To keep his customers from being annoyed by persons coming along the road in carts and vehicles and stationing themselves opposite his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds. This barrier consisted of a hurdle set up lengthways next to the footpath, then two wooden barriers armed with spikes, then there was left an open space through which a vehicle could pass; then came another large hurdle set up lengthways, which blocked up the rest of the road. Plaintiff, coming rightfully along the footpath at night, came into collision with one of the spikes in such a way that one eye was forced from its socket. The jury expressly found that the use of the spikes in the way was dangerous to persons using it. The defense was that, although if the injury had resulted from the use of the spikes as placed by defendant in the road, the defendant, on the facts as admitted or as found by the jury, might have been liable; yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording him the

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<sup>11</sup> 318 Ill. 11, 148 N. E. 862 (1925).

<sup>12</sup> *Clark v. Chambers*, 3 Q. B. D. 327 (1878).

occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Judgment was given for the plaintiff. The court said:

"If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. . . . It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."<sup>13</sup>

When the court says that the defendant "is not only guilty of negligence, but of negligence of a very reprehensible character," it seems to indicate that the defendant has really been guilty of "gross and wilful negligence" or "reckless misconduct." When the court further says "not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion," it seemingly evinces a tendency to pursue consequences more remote than would be considered in the case of ordinary negligence.

In negligence cases, courts are somewhat careful in administering rules of causation and the rule against excessive damages so as to be rather lenient with the defendant.

In *Ryan v. New York Central R. Co.*,<sup>14</sup> it seems obvious that the court rationalized to save a defendant merely negligent from being liable for results for which a wilful, and perhaps even a reckless wrongdoer would have been held liable. In order to accomplish its end, the court goes so far as to lay down an unusual and arbitrary rule.

In *Castle v. St. Augustine's Links, Limited*,<sup>15</sup> an action brought against the owner of a golf course for damages for the putting out of plaintiff's eye by being struck by a piece of glass from the windshield of the taxicab in which plaintiff was riding, the windshield being struck by a ball driven from a tee on defendant's golf course, the court allowed only £450 and costs. The facts indicated negligence in locating this tee and the green toward which it was directed. The court said:<sup>16</sup>

<sup>13</sup> At 338-339.

<sup>14</sup> 35 N. Y. 210 (1866).

<sup>15</sup> 38 T. L. R. 615 (K. B. 1922).

<sup>16</sup> At 616.

"Nothing was so difficult as to assess compensation. No money that he could give would put the plaintiff back into the same state as before the accident, but, on the other hand, he could not make the golf club pay thousands of pounds for the very regrettable occurrence."

Here the court is very evidently rationalizing in support of a small verdict against a defendant merely negligent, and negligent in such a manner as to make only very infrequent injuries foreseeable.

The tendency to temper rules to fit moral conduct is fully as marked in the field of certainty of proof. The rule laying emphasis upon the necessity of certainty of proof is applied chiefly to cases of negligence and of apparently non-wilful breach of contract. The rule laying emphasis upon the necessity of *only reasonable* certainty of proof is applied chiefly to cases of wilful or reckless torts and of wilful breach of contract.<sup>17</sup>

<sup>17</sup> "In cases admitting of such proof, the amount of damages must be established with reasonable certainty." (1919) 17 C. J. 759. The American cases cited in support of this proposition are as follows:

Roller v. Leonard, 229 Fed. 607 (C. C. A. 4th, 1915), a case in which defendant's performance was rendered difficult and perhaps in fact impossible, by the condition of his plant and his lack of experience.

Chesapeake Transit Co. v. Walker, 158 Fed. 850 (E. D. Pa. 1908), in which circumstances attending the breach do not appear.

Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co., 142 Fed. 41 (C. C. A. 3d, 1905) was an action brought for breach of contract of the construction of a canal to protect and save harmless the plaintiff from claims against the company for work done or omitted to be done. The action was brought against the construction's surety.

Parke v. Frank, 75 Cal. 364, 17 Pac. 427 (1888), where defendant had wrongfully revoked agency of plaintiff after a disagreement between plaintiff and defendant.

Selden v. Cashman, 20 Cal. 56 (1862), where an action of trespass for seizing plaintiff's goods on execution was brought under a void judgment. Defendant at the advice of attorneys and apparently in good faith, had obtained a judgment against plaintiff which was void because the court did not have jurisdiction.

Marconi Wireless Telegraph Co. v. North Pac. S.S. Co., 36 Cal. App. 653, 173 Pac. 103 (1918). Action for breach of contract. The Wireless Co. agreed to install a wireless outfit on a steamer operated by defendant under a charter, and to furnish a competent operator. Defendant agreed to pay for installation and to pay \$100 a month for the service. Upon termination of defendant's charter, defendant broke the contract.

Richner v. Plateau Live Stock Co., 44 Colo. 302, 98 Pac. 178 (1908). Action on a contract, alleging defendant's refusal to deliver hay as agreed. (The proposition stressed here is, that it is not necessary to show the exact amount of damages with certainty.)

Silver Springs etc., R. Co. v. Van Ness, 45 Fla. 559, 34 So. 884 (1903). Action for breach of contract of a railroad company to remove its tracks from right of way to adjacent ground, to permit plaintiff, grantor, to mine phosphate. Method of estimating amount of phosphate in hand was held not too uncertain.

National Refrigerator Co. v. Parmalee, 9 Ga. App. 725, 72 S. E. 191 (1911). Breach of warranty in sale of refrigerator. There seems to be no indication of wilfulness in the breach. The court said at 727, 72 S. E. at 192: "The evidence . . . showed with reasonable clearness that the plaintiff's loss was not less than the amount allowed by the jury; . . ."

Bayer v. St. Louis, etc. R. Co., 188 Ill. App. 323 (1914), a negligence case.

Hair v. Barnes, 26 Ill. App. 580 (1887). Breach by a salesman of a contract to solicit advertising patronage for plaintiff's hotel registers. There was a high degree of uncertainty of the amount of damage.

Johnston v. Lanter, 98 Kan. 62, 157 Pac. 266 (1916). Breach of implied warranty of quality of goods sold. There seems to be no evidence that the breach was wilful, and the facts seem rather to indicate that it was not wilful.

Mergenthaler Linotype Co. v. Kansas State Printing Co., 61 Kan. 860, 59 Pac. 1066, 1067 (1900) (breach of contract by lessee of linotype machines). "The company failed to show by competent evidence, and with reasonable certainty, that there was a substantial loss. . . ."

In certain specific types of action, anomalous rules as to measure of damages have developed, in some instances evidently in part because of the desire to be more severe with the person seriously at fault in the moral

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*School District v. Lund*, 51 Kan. 731, 33 Pac. 595 (1893). Breach by constructor under building contract. Plaintiff failed to show the rent or value of the use of such a house. Whether the breach was wilful is not shown.

*Hotchkiss v. Patterson*, 5 Kan. App. 358, 48 Pac. 435 (1897). Damage alleged was founded upon a vague and uncertain stipulation in a lease.

*Williams v. Hall*, 2 Dana 97, 98 (Ky. 1834). Seemingly at most a negligent failure of a constable to levy execution. "The execution was for notes of the bank of the commonwealth. The judgment against the plaintiffs in error, is for specie; and there was no proof of the value of the notes of the bank of the commonwealth." The bond on which the execution was based was not properly acknowledged, and so was not to be deemed to have effect as a judgment upon which execution could issue directly.

*Brown v. Producers' Oil Co.*, 134 La. 672, 64 So. 674 (1914). Action by lessor against lessee to cancel mineral lease and for damages. Plaintiff alleged that defendant had abandoned the oil well on plaintiff's land and said that both plaintiff and others had drained the oil from plaintiff's land through wells on other land. Plaintiff made out only a very uncertain case as to measure of damages.

*Clement v. Louisiana Irrigation & Mill Co.*, 129 La. 825, 56 So. 902 (1911). Action for wrongful flowing of plaintiff's land by defendant's dam, causing salt water from oil fields to settle on plaintiff's land, killing his trees. Not even the approximate number of trees was shown.

*Ellerbe v. Minor*, 49 La. Ann. 863, 21 So. 583 (1897). Damages were claimed by defendant, in reconvention, for plaintiff's failure to complete work on time. There seems to have been no proof of wilfulness in the breach. There was no proof of the amount and value of the unfinished work.

*Minor v. Wright*, 16 La. Ann. 151 (1861). Damages were claimed by defendant, in reconvention, for unintentional erection of a fence by plaintiff on defendant's land. No damages were proved specifically.

*Ransom v. Labranche*, 16 La. Ann. 121 (1861). Action for damages resulting to plaintiff from break in defendant's levee, which was alleged to have been negligently maintained. The court acquitted the defendant of neglect.

*Cooke v. England*, 27 Md. 14 (1867). Action for breach of covenant, refusal to repair.

*Dickinson v. Pere Marquette R. Co.*, 148 Mich. 461, 111 N. W. 1078 (1907). A case of excessiveness of damages, rather than of uncertainty.

*Pullen v. Wright*, 34 Minn. 314, 26 N. W. 394 (1885). Breach of warranty of goods sold. It was held that plaintiff must prove damage, although his allegation of damage in a particular sum was untraversed.

*Fairchild v. Rogers*, 32 Minn. 269, 271, 20 N. W. 191, 192 (1884). Breach of contract to sell land. "Proof establishing the facts, in the estimation of the jury, to a reasonable degree of certainty, would be sufficient," is the principal proposition as to certainty in this case.

*Dunn v. Cass Ave. etc. R. Co.*, 21 Mo. App. 188 (1886). A negligence case, in which it was a close question whether there was any negligence at all in relation to the damage sued for.

*Biglow v. Carney*, 18 Mo. App. 534 (1885). Action brought for value of services. No evidence of value was adduced.

*Wolcott v. Mount*, 36 N. J. L. 262 (1873), 38 N. J. L. 496 (1875). Action for breach of warranty as to variety of seed. Defendant's breach was in good faith, being caused by mistake.

*Mendleson v. Van Rensselaer*, 118 App. Div. 516, 103 N. Y. Supp. 578 (1907); a negligence case.

*Foley v. Forty-second Street R. Co.*, 52 Misc. 183, 101 N. Y. Supp. 780 (1906); a negligence case.

*Glass v. Hauser*, 38 Misc. 780, 78 N. Y. Supp. 830 (1902). Non-wilful failure of bailee to return goods to bailor, because of taxation replevin by marshal, which according to the evidence, may have been on a valid writ and may not.

*Schwartz v. Schendel*, 24 Misc. 733, 53 N. Y. Supp. 829 (1898). Negligence.

*De Noyelles v. Joline*, 116 N. Y. Supp. 662 (1909). Negligence. *Besson v. Levey*, 110 N. Y. Supp. 230 (1908). Defendant, in a counterclaim, made an unsustained contention of conversion of silk by plaintiff. The court said, at 231: "The claim that plaintiff ruined the silk is based upon the statement of the defendant that when the silk was returned 'it was a sight'. This does not show that the silk was ruined or valueless, and plaintiff could not be charged with its value upon that testimony alone."



sense. For instance, in cases of fraud and deceit, where the cold logic of the law of torts would dictate that plaintiff should recover only what he is "out of pocket," as many courts do hold, many other courts permit the

New York Metal Ceiling Co. v. City Homes Improvement Co., 88 N. Y. Supp. 233 (1904). Counterclaim against contractor for failure to put in cornice, with no proof as to what it would cost defendant to put it in.

Perry v. Kime, 169 N. C. 540, 86 S. E. 337 (1915). Breach of contract, failure to furnish a mule for cultivation of crops, and breach of warranty of fitness of mule furnished. Evidence as to diminished crop yield was meager.

Wilkinson v. Dunbar, 149 N. C. 20, 62 S. E. 748 (1908). Counterclaim on agreement denied by plaintiff.

Patterson v. Plummer, 10 N. D. 95, 86 N. W. 111 (1901). Action for breach of contract for failure to deliver bank stock to plaintiff. There was a fairly complete failure to prove the value of the stock.

Bredemeier v. Pacific Supply Co., 64 Ore. 576, 131 Pac. 312 (1913). Wilful breach of contract for exclusive right to sell a certain washing compound. But judgment for plaintiff is affirmed, and the principal pronouncement of the decision on certainty is: "A person violating his contract should not be permitted to entirely escape liability for the reason that the amount of damages which he has caused is uncertain." At 581, 131 Pac. at 313.

Slater v. La Grande Power Co., 43 Ore. 131, 72 Pac. 738 (1903). Damages were counterclaimed for breach of contract to drive piling in a river. As to amount of damage, one witness for defendant had testified: "We cannot really estimate the damage that was done us by reason of their not being driven according to the plans and specifications. It has cost us a great deal of money to stop the leaking." Another witness for defendant said: "Well, I could not possibly estimate the damage—how much it is." It is clear that such evidence was of no value in establishing the amount of damage with certainty.

Byrne v. Cambria, etc. R. Co., 219 Pa. 217, 68 Atl. 672 (1908). Negligence. Evidence of amount of damage is scant, and unsatisfactory. The principal proposition here on certainty is: "The opinion of [expert] witnesses must not be speculation or conjectural, but must be based upon facts and conditions existing and proved." At 220, 68 Atl. at 673.

Forrest v. Buchanan, 203 Pa. 454, 52 Atl. 267 (1902). Action by tenant against landlord for breach of covenant to repair. There had been no refusal or neglect to repair, repairs having been made with reasonable promptness.

Latimer v. Marchbanks, 57 S. C. 267, 35 S. E. 481 (1899). Action for specific performance and damage. Breach was probably wilful, but only "exceedingly indefinite and uncertain" evidence was offered as to amount of damage.

Feder v. Gass, 59 S. W. 175 (Tenn. 1900). Breach of contract to deliver bonds. Plaintiff claimed to have resold the bonds to a party in New York, but declined, without reason, to name the party. The court refused to credit his testimony. Besides the facts were held to warrant a reformation of the contract to condition defendant's duty to deliver such bonds upon his ability to get them.

Western U. Tel. Co. v. Brown, 62 Tex. 536 (1884). Action for negligent failure to transmit and deliver promptly a message for the purpose of meeting and protecting plaintiff's acceptance. Evidence of amount of damage done was vague and uncertain.

Consolidated Kansas City Smelting, etc. Co. v. Dill, 188 S. W. 439 (Tex. Civ. App. 1916). A negligence case, in which judgment for plaintiff was affirmed.

El Paso, etc. Co. v. Hall, 156 S. W. 536 (Tex. Civ. App. 1913). Negligent handling of live stock.

City of Van Alstyne v. Morrison, 33 Tex. Civ. App. 670, 77 S. W. 655 (1903). Action for wrongfully shutting off of water service. No evidence was given of the value of the water of which plaintiff had been deprived.

First Natl. Bank of Cuero v. San Antonio, etc. Ry. Co., 72 S. W. 1033 (Tex. Civ. App. 1903). Action for conversion of cotton, which was withheld by defendant, a carrier, probably in good faith. The evidence as to value was clearly insufficient.

Houston, etc. Ry. Co. v. Cluck, 31 Tex. Civ. App. 211, 72 S. W. 83 (1903). Trespass to try title. Plaintiff sought to recover value of water taken from spring on plaintiff's homestead. There was no evidence as to value of water, used or as to value of land occupied by defendant's pipes. Besides, defendant may have come upon the land in good faith, for it had a conveyance from the husband without the necessary execution from the wife.

Hearne v. Strahorn-Hutton-Evans Commission Co., 51 S. W. 867 (Tex. Civ. App. 1899). Action to recover value of cattle. No proof as to value.

Orient Mining Co. v. Freckleton, 27 Utah 125, 74 Pac. 652 (1903). Action to quiet plaintiff's title to a spring. No damages could properly be assessed, because there was a failure to prove with reasonable certainty the amount of damage. Also, it seems probable that defendant was asserting his claim in good faith, although guilty of *laches* in its assertion.

plaintiff to recover the difference between the represented value and the actual value of the property sold by the defendant to the plaintiff, which is the contract measure of damages and usually gives the plaintiff a much larger sum than he would get if this were treated like other tort cases. Courts have no compassion for defrauders. The application of this

*Burruss v. Hines*, 94 Va. 413, 26 S. E. 875 (1897). Trespass on the case. Defendant's warehouse overhung plaintiff's lot and interfered with plaintiff's erecting a building. Defendant, under an honest mistake as to his duty to remove, refused to remove it.

*Loutzenhisser v. Peck*, 89 Wash. 435, 154 Pac. 814 (1916). Action for violation of agreement not to engage in business in a limited locality for a limited time in competition with plaintiff. The breach was, of course, wilful. The court sustained the assessment of large damages as supported by sufficient proof.

*Torgeson v. Hanford*, 79 Wash. 56, 139 Pac. 648 (1914). Negligent personal injuries to newsboy. Evidence of amount of tips that he would otherwise have earned, held too uncertain.

*Spokane Casket Co. v. Mitchell*, 76 Wash. 425, 136 Pac. 481 (1913). Action for obstructing a street, compelling plaintiff to close its factory. Evidence clearly insufficient as to amount of damage.

*Herrick Improvement Co. v. Kelly*, 65 Wash. 16, 117 Pac. 705 (1911). Breach of contract to install water. No evidence of damage.

*Jones v. Nelson*, 61 Wash. 167, 112 Pac. 88 (1910). Bill in equity to foreclose mechanic's lien. Defendant claimed an offset in damages by reason of plaintiff's delay but offered no evidence of damage.

*Wiggin v. Marsh Lumber Co.*, 77 W. Va. 7, 87 S. E. 194 (1915). Breach of contract, failure to supply goods sold by plaintiff to defendant. Probably not a wilful breach. Proof of amount of damage insufficient.

*Wilson v. Wiggin*, 77 W. Va. 1, 87 S. E. 92 (1915). In an action for breach of contract, defendant seeks to recoup for breach of warranty of lumber. The evidence offered by defendant as to damage by such breach of warranty was very indefinite.

*Rodgers v. Bailey*, 68 W. Va. 1, 68 S. E. 698 (1910). An action brought under a "civil damage act", for loss of support. The judgment for plaintiff was set aside in part because of the uncertain and indefinite measure relied upon for fixing damages. It does not appear whether the liquor was sold in wilful violation of law.

*State v. Dahl*, 165 Wis. 272, 162 N. W. 186 (1917). Action for alleged breach of bond by state treasurer, by unlawfully surrendering securities deposited with him as state treasurer. The securities were surrendered in good faith. No evidence of damage was given.

*Hammond v. Sandwich Mfg. Co.*, 146 Wis. 485, 131 N. W. 1097 (1911). Action for breach of warranty. The court held that lost profits could not be recovered unless proved with reasonable certainty.

*Richey v. Union Central Life Ins. Co.*, 140 Wis. 486, 122 N. W. 1030 (1909). Apparently on wilful and unjustified breach. Judgment for plaintiff was affirmed. What is actually decided in this case tends rather to emphasize the fact that only *reasonable* certainty is required.

*Hatch Bros. Co. v. Black*, 25 Wyo. 109, 165 Pac. 518 (1917). The amount of damage done by injury to crops was held to be insufficiently shown by the evidence.

" . . . absolute certainty [of amount of damage] is not required." (1919) 17 C. J. 760.

On this proposition, the following cases are cited:  
*Hetzel v. Baltimore & O. R. Co.*, 169 U. S. 26, 18 Sup. Ct. 255 (1897); *Bowen v. Harris*, 146 N. C. 385, 59 S. E. 1044 (1907); *Shepard v. Milwaukee Gaslight Co.*, 15 Wis. 318 (1862); *Allison v. Chandler*, 11 Mich. 542 (1863); *cases of wilful tort*.

*Gagnon v. Sperry*, 206 Mass. 547, 92 N. E. 761 (1910); *Barnett v. Caldwell Furn. Co.*, 277 Ill. 286, 115 N. E. 389 (1917); *Hitchcock v. Supreme Tent*, 100 Mich. 40, 58 N. W. 640 (1894); *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 38 N. E. 266 (1894); *Stevens v. Amsinck*, 149 App. Div. 220, 133 N. Y. Supp. 815 (1912); *Raymore Realty Co. v. Pfotenhauer-Nesbit Co.*, 145 App. Div. 163, 129 N. Y. Supp. 1002 (1911); seemingly all cases of *wilful breach of contract*, excepting possibly the Raymore case.

*Moss v. Georgia R. & B. Co.*, 144 Ga. 173, 86 S. E. 550 (1915); *Squires v. Chillicothe*, 89 Mo. 226, 1 S. W. 23 (1886); *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 104 Pac. 820 (1909); *Drake v. Industrial Works*, 174 Mich. 622, 140 N. W. 933 (1913); *cases of negligence*.

The note cites no case of what seems to be reckless misconduct. In (1915) 8 R. C. L. 441 it is said that, "It is evident that the damages recoverable are nearly always involved in some uncertainty and contingency, and, therefore, it is a rule that reasonable certainty only is required," and examines all of the cases cited thereunder, the result is even more striking. Of the nineteen cases there cited, there is not a single negligence

anomalous measure of damages is in part a manifestation of the judicial tendency to be more severe with the person morally at fault.<sup>18</sup>

Justice is made more or less roughly to fit the kind and degree of fault in the particular case. Without using such terms as *dolus* and *culpa*, and without anything that approaches exactitude of plan, our courts are recognizing, more or less tacitly, the fact that the person in serious moral fault may well be held to a high degree of accountability. By continually tempering the so-called rules of causation and of certainty of proof to fit ever-varying degrees and kinds of moral fault and by varying the operation of general rules as to measure of damages, the courts have brought about a situation in which degree of fault probably plays a much larger part than is usually supposed.<sup>19</sup>

case, there are only two cases of apparently non-wilful breach of contract, there is one case of reckless misconduct, there are three cases of wilful tort, and there are thirteen cases of apparently wilful breach of contract. The cases are as follows:

*Apparently Non-wilful Breach of Contract:* Walcott v. Mount, 38 N. J. L. 496 (1875); Moulthrop v. Hyett, 105 Ala. 493, 17 So. 32 (1894) (refusing uncertain profits).

*Reckless Misconduct:* People's Ice Co. v. Steamer Excelsior, 44 Mich. 229, 6 N. W. 636 (1880).

*Wilful Tort:* Shepard v. Milwaukee Gas Light Co., 15 Wis. 318 (1862); Wellington v. Spencer, 37 Okla. 461, 132 Pac. 675 (1913); Paul v. Cragnas, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983 (1900).

*Wilful Breach of Contract:* Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440 (C. C. S. D. Ga. 1889); Wells v. Nat. Life Ass'n, 99 Fed. 222 (C. C. A. 5th, 1900); McConnell v. Corona City Water Co., 149 Cal. 60, 85 Pac. 929 (1906); Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621 (1896); Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264 (1886); Emerson v. Pacific Coast & Norway Packing Co., 96 Minn. 1, 104 N. W. 573 (1905); Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025 (1892); Holt v. United Security Life Ins. Co., 76 N. J. L. 585, 72 Atl. 301 (1909); Oldham v. Kerchner, 79 N. C. 106 (1878); Erie etc. R. Co. v. Douthet, 88 Pa. 243 (1878); Wilson v. Wernwag, 217 Pa. 82, 66 Atl. 242 (1907); Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Pac. 717 (1891); Cooke v. England, 27 Md. 14 (1867).

<sup>18</sup> Drew v. Beall, 62 Ill. 164 (1871); Barr v. Butler, 197 Iowa 575, 195 N. W. 980 (1924); Lian v. Henry Bradford & Co., 209 Mich. 172, 176 N. W. 412 (1920).

In Green v. Williams, 45 Ill. 206 (1867), Lawrence, J., in an action of covenant for wilful refusal of a landlord to admit a tenant to possession, decides that the measure of damages is the difference between the value of the term and the rent to be paid, plus the amount of the expenses incurred by plaintiff because of the breach; but he gives a *dictum* to the effect that a less severe rule would prevail were the eviction of the tenant by a third person having a paramount title.

<sup>19</sup> In order to keep the situation as clear as possible, all consideration of the questions involved in exemplary damages is omitted from this article.