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THE COMMON LAW PROHIBITION ON PARTY TESTIMONY AND THE DEVELOPMENT OF TORT LIABILITY

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THE received view of the history of accident law is that tort liability as we know it emerged around 1850, with the displacement of strict liability for bodily injury and the rise of the negligence standard.¹ Students are taught this story.² Treatises summarize it.³ Scholars debate its nuances.⁴

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¹ See, e.g., G. Edward White, *Tort Law in America* 12–19 (expanded ed. 2003); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 *Va. L. Rev.* 359, 365–70 (1951); Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29, 29–30 (1972).

² See, e.g., Richard A. Epstein, *Cases and Materials on Torts* 101–27 (9th ed. 2008); Marc A. Franklin et al., *Tort Law and Alternatives* 31–39 (8th ed. 2006); Victor E. Schwartz et al., *Prosser, Wade and Schwartz's Torts* 2–10 (11th ed. 2005).

³ See, e.g., 1 Dan B. Dobbs, *The Law of Torts* § 14 (2000); 3 Fowler W. Harper et al., *Harper, James and Gray on Torts* §§ 12.2–12.3 (2007); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §§ 28–29 (5th ed. 1984).

⁴ See, e.g., Lawrence M. Friedman, *A History of American Law* 351 (3d ed. 2005) (the negligence system developed because “[c]apital had to be spared for its necessary work”); Morton J. Horwitz, *The Transformation of American Law, 1780–1860*, at 99–101 (1977) (the shift from strict liability to negligence liability subsidized infant industry); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 *Ga. L. Rev.* 925 (1981) (pre-twentieth-century liability is more accurately understood to involve pockets of negligence liability operating against a background of no liability); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *Yale L.J.* 1717, 1772–75 (1981) (disputing the Friedman and Horwitz contentions).

The trouble with this story is not that it is wrong, but that it is radically incomplete. It omits a crucial, and from the modern standpoint, astonishing fact about common law trials. For two and a half centuries of accident law's history, between about 1600 and 1850, neither the plaintiff nor the defendant in a tort suit could testify in that suit. In fact, during this period the parties could not testify in any civil suit, and the defendant could not testify in a criminal case. These prohibitions were features of a broader common law rule providing that any potential witness who had an "interest" in the outcome of a case was not competent to testify in it.⁵ It was not until statutes abolishing this evidentiary prohibition were enacted in England in the 1840s, and in the United States between the late 1840s and the 1890s, that the parties were permitted to testify in tort (and other) suits.⁶

Almost every legal scholar to whom I have mentioned this prohibition has been as astounded to learn of its existence as I was when I recently came across it.⁷ Whether or not this "discovery" turns out to be paradigm-shifting, at the least it is inconvenient, awkward, and demands reorientation of the received view of the history of accident law, and perhaps of other fields as well. Like the common dream in which we come upon a room in our home that we had not known was there, what we thought we knew about something important and secure has now been called into question. Can it really be that the cases that figure centrally in the history of such fundamental common law fields as contract, property, and torts—the seminal cases that have been included in casebooks and taught for over a century in first-year law school courses—were governed by this rule? Have we been unaware of the ways that the prohibition on party testimony may have shaped the legal rules reflected in the holdings of these classic cases? Is it possible that

⁵ 1 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 575, at 688 (1904) (describing the prohibition).

⁶ *Id.* § 577 (discussing abolition of the prohibition); see also *id.* § 488 (listing state statutes abolishing the prohibition).

⁷ The rule is discussed in George Fisher, *The Jury's Rise as Lie Detector*, 107 *Yale L.J.* 575, 624–25 (1997), and John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 *Colum. L. Rev.* 1168, 1184–86 (1996). John Witt notes the probable impact of the rule on the frequency of nineteenth-century tort litigation. See John Fabian Witt, *The Accidental Republic* 56–57 (2004).

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many other cases were never brought because the prohibition would have made it pointless to sue?

The answer is yes, on all counts. The prohibition on party testimony existed; it was universal; and there is no evidence that it was subject to evasion or subterfuge. The history of each field of law where the prohibition operated may turn out to benefit from the same kind of rethinking that I will do here about the development of tort law. Because I am a torts teacher and scholar, however, my focus will be on tort law alone. To say the least, the influence of an absolute prohibition against testimony by the parties in a tort suit on the development of tort liability prior to the middle of the nineteenth century is worth exploring. The scope and import of tort liability during this period, and the law governing the damages that were recoverable in tort during this same period, remain matters of debate to this day. Indeed, controversies about how tort law should operate today have long turned at least in part on how tort law is thought to have operated several centuries ago.⁸ If tort law's past is to be invoked in support of contentions about what tort law's future should be, then we would do well to understand that past as accurately as possible. To do this, we must begin to uncover the influence of the prohibition on party testimony on the development of tort liability.

I. THE PROHIBITION

There is ample and extensive evidence of the existence and application of the prohibition on party testimony. For example, the leading mid-nineteenth-century expert on the American law of evidence was Simon Greenleaf, Royall Professor of Law at Harvard. Greenleaf's great work, *A Treatise on the Law of Evidence*, was first published in 1842, when every state held that party testi-

⁸ See, e.g., O.W. Holmes, Jr., *The Common Law* 77–129 (1881) (seeking to identify a “general principle of civil liability at common law” and arguing that this principle should determine the scope of liability); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *Yale L.J.* 524, 529 (2005) (arguing, based in part on the historical development of tort liability, that there is a constitutional right to the private redress of wrongs through tort law); Gregory, *supra* note 1, at 396 (arguing that the manner in which tort liability developed in the past should guide current decisions about the scope of liability).

mony was inadmissible. Sixteen editions of Greenleaf's treatise were published between 1842 and 1899, the later editions having been edited by his successors. An entire chapter of the original treatise, entitled "Of the Competency of Witnesses," begins with a general rationale for the rules of evidence that protect the judicial process from contamination by "deceit and falsehood":

[I]n judicial investigations, the motives to pervert the truth, and to perpetrate falsehood and fraud, are so greatly multiplied, that if statements were received with the same indiscriminating freedom as in private life, the ends of justice could with far less certainty be attained. . . . [T]he situation of Judges and Jurors renders it difficult, if not often impossible, in the narrow compass of a trial, to investigate the character of witnesses And while all evidence is open to the objection of the adverse party, before it is admitted, it has been found necessary to the ends of justice, that some kinds of evidence should be uniformly excluded.⁹

The basis for distinguishing between a competent and an incompetent witness, says Greenleaf, is the "experienced connexion between the situation of the witness, and the truth or falsity of his testimony. Thus the law excludes, as incompetent, those persons, whose evidence, in general, is found more likely, than otherwise, to mislead juries."¹⁰ Therefore the common law has "merely followed the common experience of mankind," and

rejects the testimony (1.) of parties, (2.) of persons deficient in understanding, (3.) of persons insensible to the obligations of an oath, and (4.) of persons, whose pecuniary interest is directly involved in the matter in issue; not because they may not sometimes state the truth, but because, in general, it would be unsafe to rely on their testimony.¹¹

If there were any doubt about the firmness of the rule prohibiting party testimony, Greenleaf confirms it several pages later, as he begins his nearly 100-page explication of the four categories of incompetent witnesses he has just identified: "And *first*, in regard to *parties*, the general rule of the common law is that a *party to the re-*

⁹ Simon Greenleaf, A Treatise on the Law of Evidence § 326, at 375 (1842).

¹⁰ Id. § 327, at 376.

¹¹ Id.

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cord, in a civil suit, *cannot be a witness*, either for himself, or for a co-suitor in the cause.”¹²

Greenleaf does cite several exceptions to the rule. The only exception that is even conceivably relevant here applied to testimony by a party “to prove facts, which, from their nature, none but a party could be likely to know.”¹³ But this was not a general exception in cases of necessity. Only a few examples are given, none involves tort actions, and the exception is not again mentioned in many subsequent pages discussing the rule. Some of the other evidence treatises from the same period mention the exception, but none of the few cases they cite as examples of the exception’s application involves a tort action,¹⁴ and I have not located a single case in which the exception was applied in a tort action. Rather, as one of the treatise writers put it, “the necessity must be one resulting from the subject as constituted by general law, not a casual and accidental want of proof.”¹⁵

J.H. Baker, author of a leading modern history of English law, describes the rule succinctly: “At common law (though not in equity) the testimony of the parties and interested persons had been excluded . . .”¹⁶ And Baker makes clear that bringing an action in equity was often, perhaps usually, precluded: “Nonsuits were constant, not because there was no cause of action, but because the law refused the evidence of the only persons who could prove it.”¹⁷ It appears that Baker is referring to cases heard in the Royal courts, not the local courts, where the prohibition may not have

¹² Id. § 329, at 378.

¹³ Id. § 349, at 395. Greenleaf also separately discusses what might be considered another exception: a servant may testify for his master, but only if the servant has been released by the master from any liability for which the servant might have to indemnify the master in the event that the master is held vicariously liable for damages caused by the servant’s commission of a tort. Id. §§ 394–97.

¹⁴ See, e.g., Thomas Peake, *A Compendium of the Law of Evidence* 209–12 n.q (Joseph P. Norris ed., Philadelphia, Abraham Small 1824) (listing exceptions to the rule); S.M. Phillipps, *A Treatise on the Law of Evidence* 59–66 (London, J. Butterworth & Son 1814) (same).

¹⁵ John Appleton, *The Rules of Evidence: Stated and Discussed* 81 (Philadelphia, T. & J.W. Johnson & Co. 1860) (internal quotation marks omitted).

¹⁶ J.H. Baker, *An Introduction to English Legal History* 91 (4th ed. 2002).

¹⁷ Id. at 91 n.99 (quoting Lord Coleridge, *The Law in 1847 and the Law in 1889*, 57 *Contemp. Rev.* 797, 798 (1890)). In any event, whatever evasion might have been possible in England because of the sometimes overlapping jurisdictions of the Law and Chancery Courts, there was nothing analogous on this side of the Atlantic.

applied.¹⁸ But it is from the Royal courts that the canonical common law precedents come down to us, and in any event there was no analogous division of courts on this side of the Atlantic, where the prohibition applied across the board.

Late in the period it apparently became possible, at least in some cases, to obtain a Bill of Discovery in equity, compelling the other party to give testimony that would then be admissible at law.¹⁹ But at least judging from the absence of reported decisions in which either of the parties actually did testify, and from Baker's finding that "nonsuits were constant," the availability of this procedure seems not to have had much impact.

Reference to the prohibition in cases decided before it was abolished is not frequent, but is easily discovered.²⁰ Apparently the prohibition was so clear, and so firmly established, that it was not questioned. In his chapter on trial by jury, for example, Blackstone makes only passing reference to the prohibition, as if it is too obvious to require discussion.²¹ A careful reading of appellate opinions in cases decided before 1850, however, reveals that one never finds a court saying that the plaintiff "testified" or that the defendant "admitted" something at trial.²² Rather, the opinions typically use

¹⁸ The local courts are not much studied. For a short discussion of these "courts of requests," see Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 *J. Legal History* 253, 267 (2005).

¹⁹ 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1484 (Boston, Hilliard, Gray, & Co. 1836); 3 William Blackstone, *Commentaries* *382.

²⁰ See, e.g., *Blanchard v. Sprague*, 3 F. Cas. 640, 641 (D. Mass. 1859) (No. 1516); *Nichols v. Bellows*, 22 Vt. 581, 586 (1849); *Aston v. Jemison*, 17 Ala. 61, 62 (1849); *Nisbet v. Lawson*, 1 Ga. 275, 277 (1846).

²¹ 3 Blackstone, *supra* note 19, at *370 ("All witnesses, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause.").

²² I conducted a Westlaw search of all federal and state cases decided before 1850 that used the phrase "plaintiff testified." There were 494 such cases. All but about a dozen turned out not to involve the plaintiff testifying at all. Instead typically the opinion indicated that "a witness for the plaintiff[] testified," see, e.g., *Kinney v. Nash*, 3 N.Y. 177, 181 (1849), or the "father of the plaintiff[] testified," see, e.g., *Denman v. Bloomer*, 11 Ill. 177, 178 (1849). Most of the handful of cases in which the plaintiff did testify involved proof of a debt based on a book of account, which a party was apparently permitted to authenticate through his own testimony. See, e.g., *Jones v. McLuskey*, 10 Ala. 27, 28 (1846); *Bates v. Bulkley*, 7 Ill. (2 Gilm.) 389, 391 (1845). None of the cases in which the plaintiff testified were actions in tort. There are a few nontort cases in which the plaintiff testified that state no basis for permitting this tes-

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such phrases as “[t]he evidence tended to show,”²³ “[t]he plaintiffs proved,”²⁴ or “[e]vidence upon that point was laid before the jury.”²⁵ What one finds in the later cases, fairly frequently, is reference to the rule as it had previously existed, after the rule was changed by statute.²⁶

In 1848 the states began to enact statutes abolishing the prohibition on party testimony.²⁷ The passages in Greenleaf’s treatise that defend the prohibition are nevertheless included, virtually unchanged, in fourteen subsequent editions of his treatise. Beginning with the fifth edition of his treatise in 1850, however, Greenleaf begins dropping a footnote to the passages I quoted earlier, indicating that “several of the United States” have enacted legislation reversing the common law rule.²⁸ The number of states enacting such legislation increases with each subsequent edition. The fifteenth edition, published in 1892, contains the same text, but the ever-present footnote indicates that the “general rule now is that parties to the record of a suit are competent witnesses” and lists forty states that have reversed the common law rule by statute.²⁹ Whether the text persisted in the treatise because of academic inertia, or because of a belief of Greenleaf and the treatise’s successor

timony. See, e.g., *Bulkley v. Waterman*, 13 Conn. 328, 328–29 (1839). I suspect that in these cases there was simply no objection to this testimony.

I also conducted a Westlaw search of all federal and state cases decided before 1850 that used the phrase “defendant testified.” There were 384 such cases. The results of my review were the same. The defendant had actually testified in only a handful of cases, none of them tort actions.

²³ *Davis v. Nash*, 32 Me. 411, 411 (1851).

²⁴ *Holbrook v. Utica & Schenectady R.R. Co.*, 12 N.Y. 236, 237 (1855).

²⁵ *Murdock v. Ripley*, 35 Me. 472, 473 (1853).

²⁶ See, e.g., *Murray v. Joyce*, 44 Me. 342, 347–48 (1857). Referring to a statute enacted in 1856, the court stated, “In civil suits by the common law, not only the parties, but all others having a certain and direct interest in the event of the suit, however small, were excluded from testifying. This rigid rule of the common law has been, from time to time, very much relaxed by legislation in this and some other states. So also in England. In this state it has been entirely repealed.” *Id.* at 347.

²⁷ See *An Act in relation to Evidence*, 1848 Conn. Pub. Acts 38; Fisher, *supra* note 7, at 709–11. Wigmore, *supra* note 5, § 488, catalogues the statutes repealing the prohibition as of 1904. The United States abolished the prohibition via the Act of July 2, 1864, ch. 210, 13 Stat. 344, 351 (codified at U.S. Rev. Stat. § 858 (2d ed. 1878)).

²⁸ 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 329, at 430 n.3 (5th ed., Boston, Charles C. Little & James Brown 1850).

²⁹ 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 329, at 449 n.a (Simon Greenleaf Croswell ed., 15th rev. ed., Boston, Little, Brown, & Co. 1892).

editors that the rationale for the common law prohibition on party testimony remained persuasive and that the statutes modifying it were ill-conceived, is unclear.

The Greenleaf treatise's attachment to what today seems the myth that the parties were too "interested" to be permitted to testify in their own cases, even after the majority rule was otherwise, was finally severed when the young John Henry Wigmore became editor of the sixteenth edition of the treatise, published in 1899. Wigmore's edition speaks of the rule against party testimony in the past tense, referring to the rule even while it existed as "incongruous."³⁰

But the fatal blow to any semblance of respect that still remained for the old rule was delivered by Wigmore in the first edition of his own treatise, published in 1904.³¹ Wigmore first indicated that the "disqualification of parties and interested persons as witnesses on their own behalf is now practically obsolete throughout our law."³² He then bluntly criticized the old rule on the ground that "pecuniary interest does not raise any large probability of falsehood, and that, even if it did, the risks of false decision are not best avoided by excluding such testimony."³³ Greenleaf's myth that party testimony was inherently untrustworthy had been replaced by Wigmore's myth that cross examination and jury assessment of credibility are wholly adequate ways of addressing the problem of biased testimony by the parties.

Be that as it may, the foregoing material should be sufficiently convincing to put to rest any doubts about whether the rule I have described in fact existed and was broadly applied. There is much to be learned about the legal and intellectual context within which the prohibition arose and then operated, although Wigmore a century ago and George Fisher a decade ago offered explanations for its existence.³⁴ My focus here, however, will not be on the reasons that

³⁰ 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 328 b., at 488 (John Henry Wigmore ed., 16th rev. ed., Boston, Little, Brown, & Co. 1899).

³¹ 1 Wigmore, *supra* note 5.

³² *Id.* § 575, at 688.

³³ *Id.* § 576, at 699–700.

³⁴ Wigmore argued that the rule was the product of the much stronger influence, up to the 1800s, of the emotional element in all human conduct. The belief that a partisan would likely falsify, or at least distort unconsciously the truth, was then much closer than now to the facts of life; be-

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the prohibition came into being or the reasons for its abolition, but on the manner in which the prohibition, while it did operate, influenced the development of the law of torts, and more specifically, the law governing accidentally caused bodily injury.

II. PRE-CIVIL WAR ACCIDENTS AND THE HISTORICAL SIGNIFICANCE OF THE PROHIBITION

A threshold question is whether there is reason to think that the prohibition on party testimony did have any influence on the development of tort liability. After all, modern torts scholars have for the most part been completely unaware of the prohibition's existence, and in all the recent decades of studying tort law's history they have not observed anything in the operation of common law tort liability that would have led them to suppose that the prohibition existed. Perhaps the explanation is that the prohibition simply had little impact.

I want to suggest two reasons why, although the prohibition did have influence, that influence has not been observed. First, there were comparatively few otherwise-actionable accidents involving bodily injury during the period in question.³⁵ The small universe of occurrences whose legal consequences might have been influenced by the rule is therefore difficult to observe today, especially since one of these consequences was that certain suits were not brought at all. Second, the accidents that generated the leading precedents of the period appear to have taken place in public, where there would have been third-party witnesses. The canonical common law tort cases are therefore a biased sample, precisely because of the

cause partisanship did then have an influence which has now largely given place to cooler and more rational motives of action.

Id. at 703. Fisher's interpretation is that both this rule and many other developments in the role of the jury over the centuries can be explained by reference to the legal system's concern with maintaining its own legitimacy. Fisher, *supra* note 7, at 704.

³⁵ For this reason, it is also difficult to discern any immediate impact on tort actions brought in the years immediately following abolition of the rule. I reviewed all the cases decided by the Supreme Court of Maine during the five years before and the five years after abolition of the rule in that state, see *An Act Additional in Relation to Witnesses*, ch. 266, § 1, 1856 Me. Acts 314, and all the cases decided by the Court of Appeals of New York during the five years before and five years after New York's abolition of the rule, see *Act of April 13, 1857*, ch. 353, § 1, 1857 N.Y. Laws 744. There were few cases involving tort actions and in none of them was any impact of the rule or its abolition evident.

prohibition's influence. They are the very cases that could be brought notwithstanding the prohibition.

A. The Incidence of Accidents

Before the second half of the nineteenth century, there were few accidents that would have warranted bringing a tort suit.³⁶ The parties involved in accidents on family farms would typically have been close relatives, against whom suit would either have been economically pointless or barred by intrafamily immunity rules. Off the farms, there were few transportation accidents until there were railroads, trolleys, and steamships carrying large numbers of passengers.³⁷ And at the very point at which injuries on the factory floor would have been increasing as the industrial revolution took hold in the United States, the courts adopted the fellow-servant rule, which severely restricted employees' right to recover from their employers for on-the-job injuries.³⁸ In addition, at common law there was no cause of action for wrongful death. It took Lord Campbell's Act in England in 1846³⁹ and state statutes on this side of the Atlantic enacted around the same time to make a cause of action available.⁴⁰ Finally, in part because there was so little liability, there was no such thing as liability insurance, and therefore not even the beginning of widespread, deep-pocketed potential defendants worth suing until the 1880s.⁴¹

The law governing accidentally caused injury evolved slowly into the early nineteenth century, and did not crystallize into a clear

³⁶ For discussion of the increasing rate of accidents in the nineteenth century, see Witt, *supra* note 7, at 25–29.

³⁷ For example, as I have noted elsewhere, in Boston as late as 1880 there were only a dozen suits alleging the negligent operation of a horsecar. By 1900, however, after an electric streetcar system had been introduced, there were 1400 suits alleging negligent operation of this new method of urban transportation. Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11*, at 35 (2008) (citing Robert A. Silverman, *Law and Urban Growth: Civil Litigation in the Boston Trial Courts, 1880–1900*, at 105 (1981)).

³⁸ The seminal case is *Farwell v. Boston & Worcester Railroad*, 45 Mass. (4 Met.) 49 (1842).

³⁹ Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.

⁴⁰ Wex S. Malone, *The Genesis of Wrongful Death*, 17 *Stan. L. Rev.* 1043, 1043–44, 1070–73 (1965).

⁴¹ Abraham, *supra* note 37, at 26–35; Langbein, *supra* note 7, at 1178–79.

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body of negligence law until about 1850.⁴² That was the point at which the rate of accidental injury began to accelerate. But it was also the point at which the states had begun, for what were almost certainly other reasons,⁴³ to abolish the rule that prohibited the testimony of interested witnesses in civil cases generally. If the testimonial prohibition had not been overturned at that point, over the ensuing decades it would undoubtedly have acted as a powerful brake on the development of tort liability, since it would have precluded at least some, and perhaps many, of the lawsuits that were brought in the later decades of the nineteenth century. But because by then the prohibition had been abolished, it could not exercise any influence during this period.

The confluence of a rise in the accident rate, the emergence of negligence as the principle basis of liability for accidental harm, and the abolition of the rule prohibiting party testimony may appear to be more than coincidence. I doubt, however, that there was much causal connection between the first two developments and the abolition of the prohibition. The testimonial prohibition applied across the board, to all cases. It is unlikely, for example, that the incipient but still small growth in accidental injury would have been responsible for the legislatures' overturning a longstanding rule that affected so many other areas of the law as well. In fact, as I will explain below, there is reason to think that the existence of the rule prohibiting party testimony actually delayed rather than hastened the time when the negligence principle would become dominant.

B. Accidents in Public

Another reason to wonder whether the prohibition influenced the development of tort liability is that the canonical tort cases from the period when the prohibition was in force show no apparent evidence of its impact. But this absence of evidence is misleading. It turns out that the accidents that produced these cases occurred in public. And because they occurred in public, there would have been third-party witnesses to these accidents. In cases where

⁴² See, e.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850) (adopting the negligence standard); sources cited *supra* note 1.

⁴³ See sources cited *supra* note 34.

such witnesses were available, the prohibition on party testimony would have had little impact. It is no surprise, therefore, that studying the canonical cases has not led torts scholars and torts historians to recognize the existence of the prohibition. The canonical cases show no trace of the prohibition because they constitute what amounts to a biased sample. They are the very cases that the prohibition did not visibly influence.

For example, *Weaver v. Ward* involved an accidental shooting that occurred during a military exercise.⁴⁴ The defendant's method of constructing the hayrick in *Vaughan v. Menlove* had been the subject of discussion in the neighborhood, and the defendant had talked with his neighbors about this issue.⁴⁵ In *Scott v. Shepherd* the defendant threw a lighted squib into a market house, where there were undoubtedly witnesses.⁴⁶ There is nothing definitive in the opinion by Chief Judge Shaw in *Brown v. Kendall* about who was present at the dog fight that produced the suit, but it is plausible to suppose that the dogs' angry snarling drew the attention of more than just their owners.⁴⁷ The plaintiff in *Butterfield v. Forrester* was riding his horse on a highway, having just left a public house not far away, and there was a witness to his accident.⁴⁸ The injury in *Farwell v. Boston & Worcester Railroad* was caused by the derailment of a train.⁴⁹ And perhaps most revealing is the fact that the earliest general category of liability for negligence was the duty of care owed by common carriers⁵⁰—the innkeepers and operators of stage coaches whose services not only were provided *to* the public, but ordinarily were provided *in* public, where the presence of witnesses was most likely.

Thus, the cases that are commonly accepted as exemplars of accident law's history are representative of only part of this history.

⁴⁴ (1616) 80 Eng. Rep. 284, 284 (K.B.) (citing the potential defense that the defendant was utterly without fault).

⁴⁵ (1837) 132 Eng. Rep. 490 (C.P.) (adopting the objective standard for assessing reasonable care).

⁴⁶ (1773) 96 Eng. Rep. 525 (K.B.) (addressing the difference between direct and indirect harm).

⁴⁷ 60 Mass. (6 Cush.) 292 (1850) (holding that proof of negligence is required regardless of whether harm is direct or indirect).

⁴⁸ (1809) 103 Eng. Rep. 926 (K.B.) (adopting the contributory negligence defense).

⁴⁹ 45 Mass. (4 Met.) 49 (1842) (adopting the fellow-servant rule).

⁵⁰ 1 Dobbs, *supra* note 3, § 111, at 261–62; Keeton et al., *supra* note 3, § 28, at 161.

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They involved claims that could be proved and defended without the testimony of the parties. In contrast, claims that could not be proved in this manner were much less likely to have resulted in suits, because they had little or no chance of succeeding. Of course, merely potential claims that were never brought have been much more difficult for modern scholars to observe. The implication of this recognition, I think, is that in seeking to identify the ways in which the prohibition on party testimony may have influenced the development of tort liability, we should attend not only to the prohibition's influence on the suits that were brought. At least as important may have been the ways in which the disincentives to sue that were created by the prohibition affected the course of tort liability.

III. MODES OF INFLUENCE

On the whole, the prohibition on party testimony burdened plaintiffs more than defendants. The reason is that plaintiffs had the burden of production. Without admissible evidence on each element of a cause of action, the plaintiff could not maintain a suit. Yet sometimes the plaintiff himself would have been the only witness to relevant facts. For this reason, a significant tendency of the prohibition on party testimony would have been to discourage lawsuits and to limit the scope of the suits that were brought. This would have inhibited legal change generally, slowed the development of liability for negligence in particular, constricted the scope of the general damages that plaintiffs could prove they had suffered, and mitigated the amount of sympathy that juries felt for plaintiffs.

But the prohibition had other effects as well. Its existence probably added weight to the arguments for adopting an objective standard of negligence. And the prohibition would have affected defendants' pleading choices in ways that make more explicable what previously have been thought to be pleading blunders in some classic torts cases.

In this Part, I discuss each of these modes of influence. We will never know exactly what would have happened to the common law of torts if the prohibition had never been in force. But both a priori analytics and our knowledge of what happened after the prohibition was abolished, though abolition occurred at the beginning of a

very different era, at least provide us with a benchmark for assessment.

A. Limiting the Number of Suits Brought

It seems likely that the net effect of the prohibition on party testimony was to limit the number of tort suits that were brought. Then, as now, plaintiffs had the burden of production. A potential plaintiff could therefore contemplate bringing suit only when he or she could satisfy that burden and make out a prima facie case entirely through the testimony of nonparties. But this ordinarily would have required the event that injured the plaintiff to have taken place in the presence of nonparty witnesses. If there were no such witnesses then there would have been no way for the plaintiff to go forward with the necessary evidence. Although I suggested above that more tortiously caused accidents occurred in public than we might otherwise have thought, certainly not all such accidents occurred in public, where there would be third-party witnesses.

In the early years of the prohibition's application, before rules prohibiting hearsay testimony developed, it might have been possible to prove what the plaintiff knew through testimony by a nonparty about what the plaintiff had later said to him about the accident and his injuries. But the law of evidence crystallized in the late eighteenth century,⁵¹ and certainly hearsay rules were firmly in place by the time Greenleaf wrote. At this point, under rare circumstances it nonetheless might have been possible to adduce the necessary proof through evidence that fell within some exception to the hearsay rule. Possibilities include the *res gestae* (excited utterance) exception, which permitted evidence about what the plaintiff said about the accident in its immediate aftermath,⁵² and the present physical condition exception, which permitted evidence of what the plaintiff later said about his injuries.⁵³ But it would have been a rare situation in which the plaintiff would have been able to

⁵¹ See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 96 (1983).

⁵² Greenleaf, *supra* note 9, § 108, at 120.

⁵³ *Id.* § 102, at 114.

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prove all of the required elements of a prima facie case through testimony falling within hearsay exceptions.

Of course, the prohibition on party testimony applied as much to defendants as to plaintiffs. Therefore, it is conceivable that there were cases in which the plaintiff was able to adduce the requisite evidence from a combination of nonparty eyewitness testimony and admissible hearsay, whereas the defendant had no way to prove what would in fact have been a good defense except through his own inadmissible testimony. The effect of the prohibition in such instances would have been to encourage, rather than to discourage, bringing suit. But these would have been cases in which a nonparty had witnessed an accident but was willing only to give testimony, or could only give testimony, favorable to the plaintiff, and the plaintiff knew this. That would have been unusual.

Consequently, it seems likely that, however many instances there were in which a suit was brought and the defendant lost because the defendant could not testify, there would have been substantially more instances in which the plaintiff was unable to satisfy his burden of production because of the evidentiary prohibition, and therefore did not bring suit to begin with, or brought suit and was later nonsuited. To the extent that this was the case, the net effect of the prohibition would have been that the total number of tort suits brought was smaller than it would have been in the absence of the prohibition.

We will probably never know how many potential plaintiffs did not bring lawsuits because the evidentiary prohibition would have made a suit pointless. But if this number were significant even in a relative sense, it would have inhibited potential legal development. At least up to a point, the more lawsuits there are, the greater opportunity there is for legal change. It takes a critical mass of cases presenting fact situations warranting change in the law before the law has a suitable opportunity to change. And the prohibition on party testimony would have made it more difficult for a critical mass of suits to be brought, and could thereby have limited the velocity of legal change.

It may be that until the middle of the nineteenth century it would not have mattered if there had been more tort suits, because the other prerequisites to change in the law of torts, such as increased industrialization, greater population density, the introduc-

tion of more powerful but also more dangerous forms of transportation, and an evolving legal culture had not yet occurred. The general consensus seems to be that the negligence standard became dominant when it did—in the mid-nineteenth century—because of these factors.⁵⁴ Yet given this consensus, the possibility that, if the parties had been permitted to testify, tort law actually would have evolved earlier, or at a more rapid pace than it did, is tantalizing.

B. Inhibiting the Rise of Liability for Negligence

Liability for accidentally caused bodily injury during the period from about 1600 through the first part of the nineteenth century was imposed in two principal situations. First, there was liability in trespass for directly caused injury, although as time went on the defense that the defendant was “utterly without fault,” or that there had been an “inevitable accident,” seems in practice to have become more available. The conventional wisdom for decades was that liability in trespass was for all intents and purposes strict.⁵⁵ Subsequently, S.F.C. Milsom and others argued, however, that the matter was more complex, and that the defendant’s fault may have figured in trespass.⁵⁶ However true this may have been in theory, I will suggest below that in practice the prohibition on party testimony marginalized the role of fault in trespass actions.

Second, there was liability on the part of common carriers and certain other categories of defendants in case (so-called “trespass in a similar case” or “trespass on the case”) even for indirectly caused or consequential injury, but only upon proof of misfeasance or negligence.⁵⁷ During the period with which we are concerned, this latter form of liability was increasingly applied beyond the common carrier setting and eventually came to displace trespass as the principal form of liability for accidentally caused physical harm. By the middle of the nineteenth century, there was liability for accidentally caused bodily injury, whether direct or indirect, but that

⁵⁴ See, e.g., Friedman, *supra* note 4, at 357; White, *supra* note 1, at 5–6.

⁵⁵ 3 Harper et al., *supra* note 3, § 12.2, at 131; Keeton et al., *supra* note 3, § 29, at 163.

⁵⁶ Baker, *supra* note 16, at 402–05; S.F.C. Milsom, *Historical Foundations of the Common Law* 295–300 (2d ed. 1981).

⁵⁷ Baker, *supra* note 16, at 406–07.

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liability could be imposed only when the plaintiff proved that the defendant had been negligent.

The prohibition on party testimony in civil cases probably slowed the evolution of liability for negligence in two ways. Other things being equal, the prohibition would have made trespass easier to prove than the newer cause of action for negligence. And because for practical purposes the prohibition widened the actual difference between trespass and negligence, it would have been more difficult to fashion some form of compromise between, or synthesis of, the two causes of action.

1. Proving Trespass Versus Proving Negligence

The prohibition on party testimony would almost automatically have made it much easier to prove the elements of trespass than the elements of negligence, and thereby would have slowed the pace of the evolution from trespass to negligence. Proving trespass required showing only that the defendant directly injured the plaintiff.⁵⁸ This would ordinarily have involved evidence focused exclusively on the moment of impact—the contact between the defendant and the plaintiff or between a force set in motion by the defendant and the plaintiff. In paradigm situations of trespass, the defendant struck, collided with, or shot the plaintiff. The nonparty eyewitness testimony that would satisfy this paradigm required only that a bystander have witnessed the moment of impact, or have witnessed the conduct of the defendant moments before impact, setting in motion a force that then directly injured the plaintiff.

In contrast, to prove negligence it would often have been necessary to have nonparty eyewitness testimony regarding matters further removed in the chain of causation from the moment of impact. What had the defendant done, perhaps out of the presence of the plaintiff, to cause the plaintiff's injury? What precautions had the defendant taken to reduce the risk of injuring people in the plaintiff's situation? Evidence on these matters would often have been necessary to demonstrate that the defendant had been negligent, at some point in time and space that was remote from the moment of impact. To make out a prima facie case of negligence, therefore, the plaintiff typically would need nonparties who were eyewit-

⁵⁸ *Id.* at 402.

nesses to the defendant's prior conduct. The plaintiff would have to identify these eyewitnesses and secure testimony from them. Yet at least sometimes there would have been no such eyewitnesses, or the plaintiff would have been unable to identify them, or even if identified they would have been associated in some way with the defendant and therefore reluctant to testify for the plaintiff.

These and other difficulties associated with adducing evidence of the defendant's negligence might have been overcome in some cases if party testimony had been admissible. The plaintiff himself might have witnessed the defendant's prior conduct, or the plaintiff might at least have called the defendant to testify to the facts about his conduct. With such testimony ruled out, however, there was a smaller number of cases in which the plaintiff could avail himself of admissible evidence of the defendant's negligence. There would therefore have been a smaller number of cases presenting the question of when, and under what circumstances, the law permitted the plaintiff to recover from the defendant for indirectly caused injury, upon proof of the defendant's negligence. Yet until there was a sufficient number of situations in which there was such recovery, there would not have been a salient alternative to the stricter liability standard that prevailed in trespass. With a smaller number of cases seeking to push the envelope of liability for negligence than there would have been if party testimony had been admissible, the pace of evolution toward the new standard of liability would have been slowed.

2. The Actual Gulf Between Trespass and Negligence

Whatever the formal law on this issue was, for practical purposes the gulf between trespass and case (later, negligence) would have been exacerbated by the prohibition on party testimony. This is because one of the principal ways in which fault figured in trespass was through the affirmative defense that the defendant had been "utterly without fault," or, as it was sometimes said, had exercised extraordinary care. Whatever this meant—and there is uncertainty about it⁵⁹—at least sometimes the defendant himself would have had the only evidence of the amount of care that he had exercised. Yet the defendant could not testify. Consequently, however broad

⁵⁹ See, e.g., 3 Harper et al., *supra* note 3, §12.2, at 132–33.

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the defense was in theory, in practice it was unavailable to defendants who were in sole possession of the evidence relevant to the defense. In this respect the action in trespass would have amounted to strict liability whenever a fault-based defense was available in theory but in practice could not be proved because of the prohibition on party testimony.

Conversely, the prohibition on party testimony would have produced precisely the opposite effect in actions on the case, for the reason I noted earlier. When the only individuals with access to evidence of the defendant's negligence were the parties themselves, then the plaintiff would have been unable to satisfy his burden of production and his suit would have failed, or would never have been brought. In such situations the action on the case would have produced no liability, even when the defendant had in fact been negligent. Robert Rabin has written of the way in which common law liability for accidental harm was so shot through with no-duty exceptions that in practice the dominant rule was more like "no liability" than strict liability.⁶⁰ My analysis suggests that in practice this was even truer in the action on the case than he has argued.

The prohibition on party testimony thus widened the actual gulf between trespass and case. Trespass more frequently involved strict liability, and case more frequently involved no liability, than would have been true in the absence of the prohibition. And the magnitude of this gulf would have prolonged the separation of the two causes of action. It is much easier to find an acceptable compromise between competing approaches when they are similar than when they are radically different.

As it actually happened, ultimately there could be no such compromise. The substantive liability rules and burdens of proof that characterized the action on the case prevailed over those of trespass. But this dominance probably took longer to emerge than it would have taken to arrive at a compromise between trespass and case if the two actions had not differed so much in practice. Indeed, negligence did not become completely dominant until after the middle of the nineteenth century, the very point at which the prohibition against party testimony was being abolished. It may well

⁶⁰ Rabin, *supra* note 4.

be that the abolition of the prohibition hastened this development, by facilitating the introduction of evidence regarding the defendant's negligence in both forms of action, and thereby rendering each action more similar to the other in practice.

C. Damages

The prohibition on party testimony not only affected substantive rules governing liability, but also would have influenced the law governing the damages available in a tort action. We are accustomed today to the almost self-evident distinction between special and general damages—that is, between out-of-pocket economic loss and the intangible loss generally referred to as “pain and suffering.”⁶¹ But during the period with which we are concerned, the typical victim's losses were less distinctly categorized than they later became. Medical expenses were likely to have been minimal or nonexistent, since there was little medical care that could be provided to accident victims. Wage labor was far less common in the eighteenth and early nineteenth centuries than it was thereafter.⁶² Clear proof of lost income resulting from tortiously caused bodily injury would therefore have been more difficult to adduce. And as I noted earlier, there was no recovery by a victim's survivors for the losses resulting from his wrongful death until a few years before the evidentiary prohibition began to be repealed.⁶³

Moreover, as John Goldberg has recently shown, the common law understanding of general damages during the period in question was more fluid than it became toward the middle of the nineteenth century. Damages were not always or necessarily directed at making the plaintiff whole. In addition to the plaintiff's losses, a variety of factors, such as the comparative social stations of the parties and the degree of blame attributable to the defendant, could also be taken into account in determining the amount of damages to be awarded the plaintiff. Arguably, then, the measure of damages available in tort was not the current notion of full com-

⁶¹ See, e.g., 2 Dan B. Dobbs, *The Law of Torts* § 377 (2001).

⁶² Witt, *supra* note 7, at 35–36.

⁶³ See *supra* text accompanying notes 38–39.

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pensation. Rather, the plaintiff was entitled to fair compensation, all things considered.⁶⁴

It is no surprise that, where the plaintiff's testimony about how much pain and suffering he had experienced was not admissible, the focus of general damages would have been elsewhere. The hearsay exception for statements by an individual about his present physical condition might have made certain third-party testimony about the plaintiff's pain and suffering admissible.⁶⁵ But that testimony would not always have been available, and when available, it certainly would not have had the same gravity or intensity as would testimony by the plaintiff himself. Until the plaintiff could testify, his subjective, post-accident physical experience would naturally have remained a marginal, or at most a secondary, consideration in calculating damages.

Only once the plaintiff's testimony became a routine feature of every tort trial could a jurisprudence of subjectively experienced loss begin to develop. Indeed, even the late-nineteenth-century cases that refused to impose liability for negligently inflicted "pure" emotional loss could not easily have arisen at all until the plaintiff could testify about the nature and scope of her fright or distress.⁶⁶ In short, until a fully embodied, concrete individual could testify as a victim in an action for bodily injury or emotional distress, it seems inevitable that the law governing the damages recoverable by such a victim would be underdeveloped and undertheorized. The rule prohibiting party testimony would have stood in the way of precisely this sort of development.

D. Jury Sympathy for the Plaintiff

A prominent issue in tort history and theory is the extent to which certain common law rules reflected the courts' distrust of juries. Some scholars have contended that the contributory negligence doctrine, for example, was formulated at least in part to permit courts to rule in favor of defendants as a matter of law. The idea is that keeping cases from juries was a check on their pre-

⁶⁴ See generally John C.P. Goldberg, Two Conceptions of Tort Damages: Fair v. Full Compensation, 55 DePaul L. Rev. 435 (2006).

⁶⁵ See Greenleaf, *supra* note 9, § 102, at 114.

⁶⁶ See, e.g., *Mitchell v. Rochester Ry.*, 45 N.E. 354 (N.Y. 1896).

sumed tendency to favor plaintiffs, regardless of the merits, in suits against wealthy and powerful defendants.⁶⁷ Other scholars have disputed this contention.⁶⁸

Whatever tendency to favor plaintiffs juries may have had, however, it seems likely to have been much less pronounced while the prohibition against party testimony was in force than after the prohibition was repealed. After all, it is testimony by the plaintiff that has the most potential to create sympathy for himself, by describing the pain and suffering he experienced and enhancing the credibility of his other contentions. The result is a more meaningful observation of the plaintiff than the jury could undertake if the plaintiff did not have a testimonial role in his own case.

Similarly, it was surely more difficult to make the trial in a tort action a morality play without the testimony of the defendant. To maximize sympathy for his client, plaintiff's counsel needs both an appealing client and an unappealing opponent. A defendant who is prohibited from defending himself on the witness stand is more difficult to portray as an appropriate object of jury animosity than a defendant whose excuses and explanations are exposed to cross-examination.

As a consequence, trials in tort suits prior to repeal of the prohibition on party testimony would have been more oblique exercises than they later became. With the parties' stories told by others, trials would have often have been somewhat disembodied affairs, without as much opportunity for the jury to develop sympathy for the plaintiff as there was after party testimony could become the centerpiece of a trial. Only after the prohibition on party testimony was repealed could trials have fulfilled their full potential for creating jury sympathy in favor of the plaintiff.

E. The Objective Standard

The reasons that the law adopted an objective standard for assessing the reasonableness of behavior are well known and need not be discussed at length here.⁶⁹ Among other things, the standard

⁶⁷ See, e.g., Friedman, *supra* note 4, at 352–54; Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 *Ill. L. Rev.* 151 (1946).

⁶⁸ See, e.g., Schwartz, *supra* note 4, at 1759–63.

⁶⁹ See Holmes, *supra* note 8, at 108–13.

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enhances predictability, reduces the variability of outcomes, and promotes safer behavior. I want to suggest that, in addition, the objective standard was all the more attractive at the time it was adopted because the alternative—a subjective standard—would have been much more awkward to apply in the absence of testimony by the defendant.

Prior to the nineteenth century, jurors frequently were already personally familiar with the defendant.⁷⁰ In a rural world with small populations and little mobility, jurors would often have known the defendant and appreciated his strengths and weaknesses. They would not have needed testimony about these matters in order to determine how to assess his conduct. But as time went on and more cases involved parties whom jurors did not already know, the choice between an objective and a subjective standard would have increasingly involved evidentiary implications. The objective standard evaluates the behavior of the defendant by reference to facts external to him and his abilities. Testimony by the parties was not necessary to the application of this standard. In contrast, application of a subjective standard would depend on the defendant's abilities, or—in the case of contributory negligence—those of the plaintiff.

Admittedly, it is possible to envision applying a subjective standard in the absence of testimony by the party whose conduct was being evaluated. In *Vaughan v. Menlove*, for example, one of the earlier cases in which the difference between the two standards was clearly posed, there could have been testimony about the defendant's skills and intelligence by nonparties who knew him.⁷¹ But that would have been an awkward and indirect method of getting at the issue. Of course, the prohibition on party testimony probably made it awkward to resolve many issues and required going about lots of things indirectly. The objective standard emerged, however, at the very time when dissatisfaction with the prohibition was growing. Bentham had recently written critically about the prohibi-

⁷⁰ Baker, *supra* note 16, at 75 (noting that jurors were “supposed to know somewhat of the truth before they came to court; hence the rules requiring them to be drawn from the vicinity where the facts were alleged”).

⁷¹ (1837) 132 Eng. Rep. 490 (C.P.) (holding that the defendant's conduct was to be judged by reference to an objective, not a subjective, standard).

tion,⁷² and the first statute modifying the prohibition would be enacted in England just six years after the decision in *Vaughan*.⁷³ So the superiority of the objective standard over a subjective one would have been all the more evident in view of growing dissatisfaction with the prohibition during the very years when the choice of an objective standard was being made. The objective standard was attractive for many already-sufficient reasons, but the unavailability of testimony from the parties probably made it even more attractive.

F. Common Law Torts Pleading

It has always been something of a mystery that until the late eighteenth century so few defendants in trespass actions avoided liability by successfully asserting the affirmative defense that they had been utterly without fault because there had been an “inevitable accident.”⁷⁴ One explanation is that defendants sometimes improperly selected this defense when they should instead have pleaded the general issue, which amounted to a general denial, and sometimes improperly pleaded the general issue when they should have selected the affirmative defense.⁷⁵ Another explanation is that being “utterly without fault” was a very narrow concept, such that merely having exercised reasonable care did not suffice.⁷⁶ Few defendants whose conduct was a cause in fact of a plaintiff’s harm

⁷² 1 Jeremy Bentham, *Rationale of Judicial Evidence* 366 (John S. Mill ed., London, Hunt and Clarke 1827).

⁷³ The first such statute was Lord Denman’s Act: An Act for Improving the Law of Evidence, 1843, 6 & 7 Vict., c. 85, §1. See Fisher, *supra* note 7, at 659 n.387.

⁷⁴ See, e.g., Harper et al., *supra* note 3, §12.2, at 133 (noting that there is not a single recorded case before the nineteenth century in which a defendant successfully pleaded and proved in a trespass action that he was utterly without fault).

⁷⁵ See, e.g., Baker, *supra* note 16, at 404–05 (citing cases in which defendant selected the wrong plea given the facts he alleged); Milsom, *supra* note 56, at 300 (citing paradigm case in which the defendant “made the elementary mistake of pleading specially,” that is, pleading the affirmative defense that he was utterly without fault); Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 *Emory L.J.* 575, 620 (1994) (referring to what had been termed “pleading blunders” in certain classic trespass cases).

⁷⁶ See, e.g., Gilles, *supra* note 75, at 576–80 (suggesting that the defense of inevitable accident meant that the defendant was “utterly without fault,” and that the defense required both that the defendant have exercised reasonable care and that avoiding the harm was impossible as a practical matter).

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were actually utterly without fault in this sense, and therefore few defendants would have been able to assert the defense successfully. A third possibility, much disputed, is that defendants who pleaded the general issue were nonetheless permitted at trial to introduce evidence of the absence of fault, whatever that meant.⁷⁷

The existence of the prohibition on party testimony, however, suggests another possibility that would have worked as follows. Answering the plaintiff's allegations with a denial of the facts (pleading the "general issue") and asserting the affirmative defense that the defendant was utterly without fault were mutually exclusive. Relying on the affirmative defense therefore required the defendant to admit that the facts the plaintiff had alleged were true, because of the rule precluding "duplicate" pleading, or what we would today call pleading in the alternative.⁷⁸ But admitting the truth of the plaintiff's allegations in any case in which only the plaintiff had knowledge of certain essential facts meant surrendering the enormous advantage that the prohibition on party testimony afforded the defendant in that situation. So it may be that many of the cases that have seemed perplexing because the defendant pleaded the general issue rather than the affirmative defense actually make sense in light of the prohibition on party testimony.⁷⁹ Some defendants may have had plausible affirmative defenses, but have been unwilling to admit the truth of allegations that the prohibition would have precluded the plaintiff from proving. Having selected a legal position (the general issue) that turned out not to dispose of the suit as a matter of law, these defendants may nonetheless have subsequently prevailed at trial because of the unavailability of admissible evidence on behalf of the plaintiff. In contrast,

⁷⁷ See, e.g., Baker, *supra* note 16, at 403 (arguing that defendants would plead the general issue and explain the circumstances before the jury); Milsom, *supra* note 56, at 298–99 (concluding that whatever discussion there was of fault when the general issue was pleaded would have been before the jury). But see Gilles, *supra* note 75, at 620–21 (disagreeing with Baker and Milsom and arguing that excuses were pleaded as defenses, not under the general issue, until late in the seventeenth century).

⁷⁸ Although it is not entirely clear how firm this rule was later in the period, it apparently prevailed prior to 1700, when all of the classic cases over which there is controversy about pleading were decided. See Baker, *supra* note 16, at 88; Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* 264–65, 271, 296 (London, Joseph Butterworth and Son 1824).

⁷⁹ See, e.g., *Dickenson v. Watson*, (1682) 84 Eng. Rep. 1218 (K.B.); *Gilbert v. Stone*, (1647) 82 Eng. Rep. 539 (K.B.).

if these defendants had admitted the plaintiff's allegations and then unsuccessfully asserted the affirmative defense that they were utterly without fault, they would have lost.

Similarly, there may have been cases in which the only evidence that the defendant was utterly without fault would have been the defendant's own testimony, which was prohibited.⁸⁰ In such instances a general denial was the only meaningful alternative, perplexing though the choice of that alternative has sometimes seemed. Even if a general denial was unlikely to succeed, at least it put the plaintiff to his proofs, and thereby held out some hope for the defendant seeking to avoid liability, whereas it would have been pointless to plead an affirmative defense that the rule prohibiting party testimony precluded the defendant from proving at trial.

Thus, the pleading intricacies in certain canonical common law trespass cases, often taken to be deeply reflective of the uncertain scope and nature of the defenses to those actions, may actually reflect strategic choices by defendants. They may have chosen their pleading positions in anticipation of the way the prohibition on party testimony would have affected them and their adversaries if the suits against them had gone beyond the pleading stage and proceeded to trial. The seemingly surprising pleading errors that some defendants appear to have made in these cases turn out not necessarily to have been errors at all.

IV. CONCLUSION

I hope that this Article will mark the beginning of serious inquiry into the influence of the prohibition on party testimony on the development of the common law. This is therefore not the place for a conclusion, for it is only a prologue that has ended. Among other things, we need to know more about how trials in tort actions actually proceeded when there was no testimony from the parties. We need to identify in detail the different impacts of the prohibition on party testimony on other areas of tort law, and on the many other common law fields whose development the prohibition might have influenced. We need to assess what occurred as the prohibition interacted with a variety of other factors that were influencing the development of the common law while the prohibi-

⁸⁰ See, e.g., cases cited *supra* note 79.

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tion was in force. And we need to understand whether and how abolition of the prohibition may have influenced the rapid and active common law developments that occurred during the second half of the nineteenth century.

All this will not be done quickly, since it requires that we first reorient ourselves to a world in which common law trials were very different from what we had previously imagined they were. In the meantime, however, one thing is clear: the story that torts scholars have been telling for generations about how the law of accidents emerged in the eighteenth and nineteenth centuries leaves out something surprising, important, and complex.