

**COMPASSION WITHOUT COMPENSATION:
THE NOVELISTS AND BARON BRAMWELL**

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Abstract

My purpose in this thesis is to explore the work of Nineteenth Century Condition of England novelists and to identify how and to what extent they addressed issues of industrial safety and used their skills to identify problems. I looked at the developing law of negligence over the period 1830-1880 with particular reference to compensation for injured workpeople and to the role played by the common law judiciary.

My researches revealed that one judge, Baron Bramwell, carried great influence but used the common law as a tool to prevent injured employees from recovering damages. I identified Charles Dickens, who was acquainted with Bramwell, as the novelist who had the skills and outlets to make the greatest impression in the fight for reform.

I consider whether there was any common ground between Dickens and Bramwell and thus seek to use Literature as a comfortable adjunct to Legal History in telling the story of the law's development over the period in the field of industrial safety and of the search for an humane compensation system.

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Preface

I have sought to bring together nineteenth century legal and industrial history and the literature of those times so as to compare the approach of the novelists with a judicial reluctance to award damages to those wronged by unsafe practices. I have surveyed the novels seeking evidence of concern for the working poor and an interest in safe industrial conditions. I have looked at Dickens' journalistic contribution, the new work spawned by the bicentenary of his birth in 2012, and the hitherto largely unexplored malign influence Baron Bramwell exerted on his colleagues and the law of compensation.

The Victorian period has several similarities to our modern age which include greedy bankers and industrialists, failing banks,¹ a lack of enthusiasm for the work of the Health and Safety Executive,² a disdain for constricting safety legislation³ and a widening gap between rich and poor.⁴ The Victorians could plead that they were facing unprecedented industrial change; our modern society should have learned to do better. One difference is that Victorian judges, keen not to open the floodgates, did not readily accept that employers and commercial enterprises had obligations to provide safe practices and environments and declined to make them accountable and liable in respect of preventable accidents; now we have an overblown compensation system.

¹ Overend & Gurney collapsed in 1866 owing £11m. with catastrophic effects on railways and commerce.

² Hari, J. (27/04/2011) *Independent*. Budget cut by 35%.

³ Gibb, F. (01/11/2012) *Times*. Proposal to disentitle claimants from automatic compensation for 'theoretical' breaches of statutory duty.

⁴ Stewart, S. (10/02/2013) *Observer*. 1% of the population pocket 10% of the national income while the poorest 50% earn 18%.

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White v Boulton (1791) Peake 113; 170 ER 98.
Whittaker v Manchester & Sheffield Railway (1870) unrep. ref. *Cockle supra*.
Wiggett decd. v Fox (1856) 11 Ex. 832; 156 ER 1069.
Wigmore decd. v Jay (1850) 5 Ex. 354; 155 ER 155.
Wildtree Hotels v London Borough of Harrow [2001] 2 AC 1.
Wilkinson v Fairrie (1862) 1 H & C 633; 158 ER 1038.
Williams v Clough (1858) 3 H&N 258; 157 ER 463.
Williams v Groucott (1863) 4 B&S 149; 122 ER 416.
Williams v Holland (1833) 10 Bing. 112; 131 ER 848.
Williams v Great Western Railway (1858) 3 H&N 869; 157 ER 720.
Wilson v Merry & Cunningham (1868) LR 1HL Scot. 326.
Wilson & Clyde Coal v English [1938] AC 57.
Withers v Great Northern Railway (1858) 1 F&F 165; 175 ER 674.
Woodhead v Gartness Mineral (1877) 14 SLR 320.
Woodley v Metropolitan District Railway (1877) 2 Ex.D 384.
Wright v London & North Western Railway (1876) 1 QBD 252
Yarmouth v France (1887) 19 QBD 647.

Note

The Letters of Charles Dickens in twelve volumes (1965 – 2002) edited by Graham Storey et al (Oxford: Clarendon) are referred to as the *Pilgrim Letters*.

Household Words appears as *H.W.* and *All the Year Round* as *A.Y.R.*

Unless otherwise stated:

References to the novels are to the latest Penguin Classics editions and:

Biographical details are from Oxford D.N.B..

Chapter 1

Introduction: The Novelists and the Law

A Multi-Disciplinary Study

This study involves nineteenth century 'Condition of England' novels, their authors, industrial safety, and legislative regulation and progress, or lack of it, towards an humane compensation system for the injured and bereaved. Such a study, encompassing literature and relevant aspects of legal and social history, may be controversial. Not all novelists seek justice whether in society or in their story-ends. Some novels such as Dickens' *Hard Times* do not contain a just, satisfactory and pleasing end.

After a negotiated settlement it is unusual for both parties to rejoice at the compromise and after a contested hearing it is rare for both to emerge unscathed for only finely balanced civil actions are litigated to trial and there will be weaknesses in both positions. The areas covered by a novel are unlimited whereas a civil action is closely circumscribed by the pleadings, the judge should follow precedent and statute and give a judgment which is not only fair but also clear and authoritative so that it may be referred to and relied upon in the future. The judge must explain and justify a decision whereas, subject to the demands of profit and the tastes of readers, novelists are free agents. There are added difficulties if the judge has little compassion or thirst for fairness.

Some legal historians have been reluctant to use literature in their work¹ because of limits to its power and influence.² History of truth and fiction

... dressed up with caricatures and jokes, set in every kind of devised excitement and pathos, allows uplifting emotions to play upon the past with a freedom that no professed historian could decently encourage.³

Law and literature lack a 'convergent thrust' and 'theoretical coherence'.⁴ Literature cannot humanise the law or solve any lack of legal objectivity.⁵ The factual information

¹ Finn, M. 'Victorian Law, Literature and History: Three Ships passing in the Night' *Journal of Victorian Culture* (2002) 7, 1, 134.

² Baron, J. B. 'Law, Literature and the Problems of Interdisciplinarity' (1999) *Yale L.J.* 108, 1063.

³ House, H. *The Dickens World* (London: Oxford U.P., 1941) 9.

⁴ Posner, R.A. *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard U.P., 1988) 356.

provided by novels may be ‘highly suspect’ and ‘spotty, impressionistic and inaccurate’.⁶ Not all novelists are sympathetic social reformers seeking to address an issue. An author’s imagination may produce inaccuracy or even untruth. Sentimental radicals were not systematic in their criticism.⁷

The contrary position has the novel as a verbal vehicle designed to make us look differently at the world by creating a parallel world in which every detail is part of a meaningful whole.⁸ There can be a link between fictional narrative and the search for just resolution. Literature can invigorate a reader’s sense of moral responsibility.⁹ The telling of stories can take in matters of conscience and compassion to help achieve social justice¹⁰ which can become the motivation for fictional plotting. Writers have helped to spread the spirit of reform.¹¹ Literature can reveal flaws in capitalism, socialism, Christianity and in the law.¹² A novel may bring needed emotion and poignancy to a consideration of the law.¹³ Texts may have an inherently spiritual power:

... the sacredness of the fictitious narrative ... [is] God’s gift to our own age , the gift of speaking in parables, the gift of addressing mankind through romance and novel and tale and fable.¹⁴

A novel containing the narration of imaginary events and the portrayal of imaginary characters can have educational potential to help in the understanding of legal dilemmas, interpretive to better understand the meaning of the law, poethic with a jurisprudential dimension, and supplemental to assist in the chronicling of history. Novels and contemporaneous journalism together may be considered with law to determine the influence of the one upon the other and to provide a picture of law and society. Literature and social history complement one another when literature is used as

⁵ Posner 361.

⁶ Aydelotte, W.O. ‘The England of Marx and Mill as reflected in Fiction’ (1948) *Journal of Economic History* 8, supp. 43.

⁷ Dolin, K. *A Critical Introduction to Law & Literature* (Cambridge: Cambridge U.P., 2007) 75.

⁸ Douglas-Fairhurst, R. *Becoming Dickens* (Cambridge, Mass.:Harvard U.P., 2011) 2 & 7.

⁹ Ward, I. ‘On Literary Jurisprudence’ *Journal of Law & Interdisciplinary Studies* (2010) 1, 1.

¹⁰ Dolin 212.

¹¹ Dolin 31.

¹² Posner 356 contra.

¹³ Flint, K. ‘The Victorian Novel and its Readers’ in David, D. (ed.) *The Victorian Novel* (Cambridge: Cambridge U.P., 2001) 30.

¹⁴ Stanley, A.P. *Sermon preached in Westminster Abbey* (on the Sunday following Dickens’ funeral) (London: Macmillan, 1870) 4-6.

evidence.¹⁵ Story telling can provide essential ingredients in a rational argument and contribute to legal reasoning.¹⁶ To teach law Martha Nussbaum and other scholars use a novel as a centrepiece rather than as a supplement.¹⁷ The novelists' intentions, their writings and the reader's interpretation can each be relevant when assessing the contribution of a particular novel to the educative debate.¹⁸ This inter-active relationship is two-tiered in that the then contemporary reaction may be different from that of the modern-day. The tiers bring both credit and debit in that today's readers can benefit from their historical knowledge but must be careful not to apply current standards and practices in the enquiry.

Law, common or statutory is language and language is the construction of society.¹⁹ Both law and literature are communal. Reading, whether of a novel, a judgment or even of a statute is an inter-active experience.²⁰ Readers 'negotiate and fashion' meaning.²¹ The law and lawyers can be hidebound by case law so that a schism develops between the professional and the human voice.²² Lawyers inhabit a separate intellectual sphere from that of artists, poets and novelists yet the novelists' work may help in the understanding of the development, or lack of development, of the law. However the outcomes can be uneven according to subject and author.

Literature can help to identify the marginalised,²³ to reveal the politics of the law and to become a socio-political force.²⁴ It can alter society's sense of justice.²⁵ Charles Dickens (1812-1870), as 'conductor' of his journals, implicitly encouraged the reading of novels alongside other forms of writing.²⁶ By the end of the nineteenth century the law had become an instrument for social improvement.

The mid-nineteenth century was a period of great change at a time when free trade, political economy and *laissez faire* were ascendant. Today negligence is the most

¹⁵ Petch, S. 'Law, Literature and Victorian Studies' *Victorian Literature and Culture* (2007) 35, 378.

¹⁶ Nussbaum, M.C. *Poetic Justice* (Boston, Mass.: Beacon, 1995) xv.

¹⁷ Hirshfield, C. 'Hard Times and the Teacher of History' *Dickens Studies Newsletter* (1982) 3, 2, 33.

¹⁸ Ward, I. *Law and Literature*: (Cambridge: Cambridge U.P., 1995) 42.

¹⁹ Ward 15.

²⁰ 18.

²¹ Ward, I. *Law and the Brontes*: (Basingstoke: Palgrave Macmillan, 2012) 6.

²² Ward (1995) 24

²³ 41.

²⁴ 42.

²⁵ Petch 370.

²⁶ Flint 23.

encompassing of torts but then it was but a querulous infant. The development of an humane damages system depended upon employers and commercial entities being held responsible for their operations. Some responsibility for safety came to be defined by statute. However novelists were not ideal candidates to seek reforms in that area. Some had sympathy but others disdain for the poor and oppressed. Few had a sanguine view of the capability of the law to achieve fairness.

A compensation system required the bolster of insurance and a willingness on the part of the judiciary to hold careless employers and operators to account. One judge, Baron Bramwell (1808-1892), was particularly reluctant to impose liability on commercial enterprises. Thus an enquiry into the approaches of individual writers and the work of Baron Bramwell inevitably uncovers tensions. Some writers of nineteenth century 'Condition of England' novels, such as Dickens, addressed topics of industrial safety in the context of employers' responsibilities and accountability and believed in state regulation to achieve a just outcome for the working poor. The common law judges, particularly Baron Bramwell, resisted the development of an humane system of compensation. Judges had the power and opportunity to redress gross injustice and to make basic changes which would have been morally appealing to campaigning novelists such as Dickens; instead their denial of a fair system became so ingrained in the common law that legislators could not directly touch it and eventually created a totally new system to run in tandem with the common law. Dickens and Bramwell were two prominent figures of the nineteenth century and their respective contrasting views are the subject of close analysis here.

Points and Method of Enquiry

The first area of enquiry therefore covers the relevance of nineteenth century contemporary literature to the need for the reform of industrial safety law. Any analytical assessment of that period is inevitably interdisciplinary and the study of how the law was shaped requires an historical approach²⁷ which also touches economics since, if the condition of working people was to become the prime responsibility of government, enquiry was inevitably necessary to ascertain whether a statutory or judicial shift of

²⁷ Ward (2012) 5.

financial responsibility from parish to employer was affordable. The period is relatively under-represented in the law and literature canon.²⁸ Does the literature considered in this study when set against the relevant statutes and judgments contribute to any reduction of that shortfall?

If Dickens had attended for dinner at Old Palace Yard, Westminster on 2 February 1859 in response to the Baron's invitation on what would they have agreed and of which achievements of Bramwell would Dickens have approved? What view would Dickens have taken of the two fictional defences which barred recovery of damages by injured employees and of Bramwell's antipathy to vicarious responsibility? How qualified was Dickens in the law, what was his experience of the factory floor and how persevering was he in debate and argument? What was the influence and impact of the novelists towards achieving reform? Did the novelists shape contemporary attitudes so that their work provided 'a vital supplementary jurisprudential chronicle'?²⁹ Did they provide 'imagination, inclusion, sympathy and voice'?³⁰ Was their work a useful and seamless supplement to legal history? To what extent were accidents used by the novelists as mere plot devices? Can such descriptive passages still provide fertile ground for analysis? Which novelists showed compassion (sympathy and fellow feeling) for injured workpeople and which of them were best equipped to engage with the need for an humane compensation system? Such a system, refined and nuanced, would require consideration of the position of the poor, needy disabled but be sensible and balanced to take into account the interests of capitalistic industry and what extra overhead could reasonably be afforded. Could and should the Victorians have responded less grudgingly to the imbalance between employer and employed and should Dickens' sensitivity have prevailed earlier over Bramwell's obduracy?

Method is complementary to the aims and objectives of the enquiry and is both investigative and interpretive. When considering the relevance, quality and impact of the novels and of the work of individual novelists reference is made to both contemporary and modern literary criticism; similarly judicial pronouncements and particular

²⁸ Ward 7.

²⁹ 6.

³⁰ Nussbaum 118.

judgments are looked at in the context of contemporary precedents and are compared with current law and practice.

The novels are scoured for references to working practices and conditions with the emphasis on safety. The novelists are considered by reference to their direct experiences down mines or in factories, as to their view of undesirable practices and conditions and their purpose in writing about them.

The development of the tort of negligence and of nineteenth century employers' liability law is related by reference to parliamentary and judicial approaches to the principle of vicarious liability, the then total defence of contributory negligence and the two fictional defences of *volenti non fit injuria* and of common employment. Included in the political thinking of the time are the utterances not only of parliamentarians but also of leading judges, particularly Baron Bramwell. Changes in political thought and in public sentiment are compared with leading judgments including those of the Baron.

Bramwell's lifetime work is then assessed in the context of the approach of the novelists, particularly Dickens, to the notions of responsibility and accountability on the shoulders of capitalists who included railway enterprises, mine and factory owners and owners and occupiers of commercial premises.

The Industrial Revolution and *Laissez Faire*

At the beginning of the nineteenth century the aristocracy, whose extensive ownership of land provided influence and political power, was supreme in both houses of parliament, and controlled the machinery of government. The role of central government was slight, being restricted to foreign affairs and defence, the regulation of overseas trade, the maintenance of law and order and the raising of revenue to pay for such purposes. People were left to run their own affairs in a non-interventionalist climate. Government was negative; its task was to control society and maintain fair play between assertive private interests.³¹ John Bright³² summarised its role:

³¹ Greenleaf, W.H. *The British Political Tradition* (London: Methuen, 1987) 3, 563.

³² (1811-1889) Quaker son of a Rochdale mill owner he campaigned against inequality and, on behalf of manufacturers and mill hands, with Richard Cobden (1804-1865), against the Corn Laws. He was the hero

[a] wholesome absence of interference ... in all those matters which experience has shown might wisely be left to private individuals stimulated by the love of gain and the desire to administer to the wants and comforts of their fellow men.³³

Britain began the period as a country of few officials with a weak national executive but gradually began to interfere in relations between the classes and transactions between individuals. Law came to cover relations between parent and child, landowner and tenant and employer and workman.³⁴ A general sense of responsibility began to increase. The value of the working poor's contribution to society was slowly recognised.

It is tempting, at the beginning of the twenty first century, to seek to apply current egalitarian and collectivist thinking to that era when the 'positive state' was only beginning to emerge. In the early nineteenth century individualism held sway. Paradoxically because judges traditionally favoured individual rights, especially property rights as against community interests, collectivists opposed court involvement.³⁵ An adult working male was not the beneficiary of the early Factory Acts out of respect for his status as a citizen for that status supposedly afforded him the civil right to freely enter into a contract of employment.³⁶ The Poor Laws were not passed or implemented for the benefit of the poor but rather as a mechanism of management. By reason of mindset and the limited franchise political parties were not representative of the poor. Pauperism was a troublesome and onerous financial burden. Some thought that destitution was the result of God's will and so impossible to eliminate or even mitigate and that it was improper to expect citizens to help mitigate the distress of the poor. It was not until the end of the century that factory regulation and employer responsibility became 'pillars in the collectivist edifice of social rights'.³⁷ Baron Bramwell campaigned long after the argument was lost but an assessment of him should take into account the age in which he sat.

of and mouthpiece for an extended franchise but, believing in independence and self-help, he opposed factory regulation. He thrice served in government under Gladstone.

³³ *Hansard* HC Deb 1844 xxvi.

³⁴ Greenleaf 1, 30.

³⁵ Greenleaf 3, 604.

³⁶ Marshall, T.H. *Citizenship and Social Class* (London: Pluto, 1992 (1950)) 15.

³⁷ Greenleaf 3, 22.

Cotton was the ‘pacemaker’ of industrial change.³⁸ Cities developed as workers fled from the country to the factories. The railways, the symbol of modernity, played their part in affording speedy access to the cities and transporting finished goods to consignees. Wages were higher in the cities but did not increase in line with output. Workers lost their sense of independence and their dissatisfaction was unprecedented. There was no certainty of work even for skilled workers and no guarantee of wage levels. In middle age they would become unfit for heavy work and so their prospects from then and into retirement were poor.³⁹ Hence the need for a compensation system for seriously injured workers.

Britain, soon to become the most modern and powerful nation in the world, was subject to the privations of hunger and poverty initially unalleviated by government intervention. National restlessness was caused by uncertainty and fear of decline.⁴⁰ Paley advised that there was no need for interference since happiness was best achieved in doing good to mankind only in obedience to the will of God.⁴¹ Bentham preferred the happiness of the greatest number so that there was no right to interfere in favour of the poor.⁴² Darwin argued that interference was inexpedient.⁴³ The outcome was that businessmen were left free to pursue their own private profit and unfettered private enterprise would promote the greatest good of the whole. Economic life should be unregulated. Wealth, commerce and machinery were the offspring of free competition. Interference would retard progress. Herbert Spencer (1820-1903), much admired by Baron Bramwell, was the principal exponent of *laissez faire* arguing that over-legislation was immoral, and that to prevent social degeneration, each should have liberty to gratify the faculties.⁴⁴ Early questioning of the laws of Political Economy, *laissez faire* being the most important precept, were dismissed as ignorant and misguided. As late as 1862 Ruskin, who had identified the inherent cruelty of those laws in *Unto This Last*,⁴⁵ was

³⁸ Hobsbawm, E.J. *Industry & Empire* (London: Weidenfeld & Nicholson, 1968) 40.

³⁹ Hobsbawm, E.J. *The Age of Capital 1848-1875* (London: Sphere, 1991 (1975)) 258.

⁴⁰ Gilmour, R. *The Victorian Period ... 1830-1890* (London: Longman, 1996) 244.

⁴¹ Keynes, J.M. *Collected Writings* (London: Macmillan, 1972) IX, 275.

⁴² Keynes 275.

⁴³ 276.

⁴⁴ Greenleaf 2, 63.

⁴⁵ Essay IV *Ad Valorem* (London: Penguin, 1997 (1862)) 204.

ridiculed when he tried to moderate and modernise them.⁴⁶ Political economists failed to distinguish between safer work regulation and legislation which encroached on an individual's freedom of action. Justice did not feature in their thinking and they believed that the working class had nothing to contribute to the nation's opinions.

After the Great Exhibition of 1851 where the poor were seen to be at least visually literate, the views of Thomas Malthus⁴⁷ and David Ricardo,⁴⁸ as set out by Jane Marcet,⁴⁹ that some must starve in the ruthless struggle for survival, came to be thought excessive and hateful. The economic advantages of fair wages began to be recognised though only by enlightened employers; many still thought that the only way to profit was by depressing wages. In terms of government policy and theory the period 1830-1880 marks the rise and fall of the concept of *laissez faire* involving self regulating and self expanding capitalism. After the repeal of the Corn Laws in 1846 there was a systematic fostering of national wealth by the state.⁵⁰ With an increased suffrage in and after 1867, a reduction in the power of the aristocracy, a widening of the influence of parliament and a recognition of the need for state welfare, the foundations of *laissez faire* began to crumble.⁵¹ In 1859 Samuel Smiles' *Self Help* was published. Smiles was both materialist and optimist. He argued for prudence, thrift and perseverance and took as his ideal the life of George Stephenson whose biography he wrote after meeting him in Newcastle when he, Smiles, worked for the railway. He thought that good character in daily life was the key to individual and social improvement. He deplored *laissez faire* but, unlike Dickens, he was more concerned with those who developed than with those

⁴⁶ Batchelor, J. (2000) *John Ruskin: No Wealth but Life* (London: Chatto & Windus, 2000) 178.

⁴⁷ (1766-1834) In the first edition of his *Essay on the Principle of Population* (London: Johnson, 1798) he argued that population should be regulated by the amount of food available and that those living beyond the balance should not be subsidised by the state or even by charity. A man should not marry and produce children unless he had the means to support his family. Relief of poverty merely increased the numbers of the poor. In later, tempered, editions Malthus argued for moral restraint.

⁴⁸ (1772-1823) Encouraged by J.S.Mill he wrote *Principles of Political Economy and Taxation* (1817) explaining that rent, profit and wages are determined naturally over time.

⁴⁹ (1769-1859) In her *Conversations on Political Economy* (London: Longman, 1827) she clarified that a capitalist would not employ labourers unless he retained all the profit of their work, (97), that he would always keep wages as low as he could so that labourers would seldom earn more than for necessities, (112), that greater riches for the capitalist would increase the demand for labour and that if children were born without their parents having the means to provide for them, they would slowly perish for want of care and food (147). The indolent should not be rewarded without similar gifts to the industrious (180).

⁵⁰ Greenleaf, 2, 210.

⁵¹ Greenleaf, 1, 214.

left behind.⁵² Yet most workers would remain workers all their lives and the economic system required them to do so.⁵³

It was increasingly understood that profit accrued to the individual sometimes by skill and sometimes by the good fortune of being in the right place at the right time. Inequalities of wealth impeded efficient production. Thus state intervention was appropriate to those topics which no one would tackle if the state did not.⁵⁴

The Novelists' Views of Law and Lawyers

The novel became the leading genre of literature in the nineteenth century. A division developed between intellectually demanding work and sensational and romantic fiction.⁵⁵ Fiction ceased to be the mere entertainment it had been in the previous century.⁵⁶ Many of the authors were female and, of the male authors, some, like Wilkie Collins and Frederic Montagu, were failed barristers. Writing remained a hazardous profession often pitifully paid.⁵⁷ The audience for works of fiction grew enormously helped by subscription libraries, and by the publication of cheaper editions and their availability on railway bookstalls.⁵⁸ Some novels were serialised in magazines which were passed around families and in clubs or read aloud. Charles Dickens serialised *Pickwick Papers* which engaged the nation and he was able to combine his fiction in *Hard Times* with hard-hitting factual pieces in his journals. He and other writers used their art to seek an improvement in factory and industrial work conditions. Dickens did not go into detail about either mechanical or legal technicalities⁵⁹ He did not regard the law as a guardian of liberty but instead a defective system kept in place by the vested interests of landowners and industrialists.⁶⁰ So Dodson and Fogg were greedy, Juggers

⁵² Smiles would have approved of Robert Blincoe (ch.3) but not of Stephen Blackpool (chs.4&6).

⁵³ Hobsbawm (1975) 255.

⁵⁴ Keynes 291.

⁵⁵ Flint 20.

⁵⁶ Attick, R.D. *The Presence of the Present* (Columbus: Ohio S.U.P., 1991) 50.

⁵⁷ Ashton, O. & Roberts, S. *The Victorian Working Class Writer* (London: Cassell, 1999) 122.

⁵⁸ Ashton & Roberts 22.

⁵⁹ Legal technicalities relating to inheritance and trust disputes were dealt with in Samuel Warren's *Ten Thousand a Year* (1841) and Frederick Liardet's *Tales of a Barrister* (1847) and George Eliot, with help from her lawyer friend Frederic Harrison, used entails as a plot device in *Felix Holt the Radical* (1866).

⁶⁰ Dolin, K. *Fiction & the Law* (Cambridge: Cambridge U.P., 1999) 75.

manipulative, Tulkinghorn a sadistic monster⁶¹ and Vholes a vampire leech. G.W.M.Reynolds, his competitor up to mid-century, shared his disparaging view:

... the law is vindictive, cowardly, mean and ignorant ... It is mean because it is all in favour of the wealthy, and reserves its thunders for the poor and the obscure who have no powerful interest to protect them.⁶²

Dickens had developed his dislike when in 1829 he worked as a law reporter in Doctors' Commons which dealt with 'wills, wives and wrecks'⁶³ and was therefore a predecessor of the Probate Divorce and Admiralty Division. He thought the lawyers to be pompous and the procedures arcane. Mr Spenslow, for whom David Copperfield worked in Doctors' Commons, thought his profession to be 'genteel' and more exclusive, less mechanical and more profitable than that of solicitors.⁶⁴ Copperfield despised 'those dim old judges and doctors':

... to a man. Frozen-out old gardeners in the flower-beds of the heart. I took a personal offence against them all. The Bar was nothing to me but an insensible blunderer. The Bar had no more tenderness or poetry in it than the bar of a public house.⁶⁵

Dickens attended the trial of George Norton's action against Lord Melbourne for criminal conversion, otherwise adultery, with Norton's wife Caroline, and his long report in *The Chronicle* for 23 June 1836 included a description of the offensive behaviour in court of a number of fledgeling barristers.

He was not afraid to lock horns with senior judges and criticised Baron Alderson who, on Special Commission at Chester in 1848, had lectured the jury on the need to promote the peace of the realm. Evil men were trying to persuade the labouring class that the rich were oppressors. The Baron expressed his fear of anarchy before beginning a trial for sedition.⁶⁶ In his letter to *The Examiner* Dickens denied any sympathy with physical-force Chartism and criticised the judge's approach to the evidence as 'gross and palpable'.⁶⁷

⁶¹ Also 'a tight unopenable oyster' in whose chambers lawyers lay like 'maggots in nuts'. *Bleak House* 158.

⁶² Reynolds, G.W.M. *The Mysteries of London* (London: Dicks, 1845) 1, 36, 101.

⁶³ Slater, M. *Charles Dickens* (London: Yale U.P., 2009) 32.

⁶⁴ *David Copperfield* 395.

⁶⁵ 481.

⁶⁶ *The Times* (08/12/1848). The Defendant Mantle, without representation or even a desk at which to sit and note, was duly convicted.

⁶⁷ 'Judicial Special Pleading' (23/12/1848) 2134.

When his philanthropic banking friend Angela Burdett Coutts was harassed by an action against her bank Dickens wrote to her:

... a more striking illustration of what I deliberately believe to be the only intelligible and consistent principle of English law – the principle of making business for itself – could scarcely be conceived.⁶⁸

Yet Dickens enjoyed friendships with several lawyers including Thomas Mitton,⁶⁹ Winter, the Manchester solicitor, who introduced him to the Grant brothers in November 1838,⁷⁰ Mitton's partner, Charles Smithson, with whom Dickens stayed in Malton in July 1843,⁷¹ and his solicitor at the time of his matrimonial settlement, Frederic Ouvry. He admired and was a close friend of the barrister (later judge) Thomas Talfourd.⁷² He was pleased to hobnob with senior members of the judiciary including the Lord Chancellor.⁷³ In and after November 1834 he had contemplated a career at the bar,⁷⁴ in

⁶⁸ Letter 07/02/1853 *Pilgrim Letters* 7, 21.

⁶⁹ Mitton had been his neighbour in Somers Town for two years from 1823.

⁷⁰ Dean, F.R. 'The Cheeryble Brothers' *Dickensian* (1930) 26, 214, 142.

⁷¹ Slater, 216. Smithson was the inspiration for John Brodie in *Nicholas Nickleby*.

⁷² He dedicated *Pickwick Papers* to Talfourd (1795-1854) for his energetic efforts in parliament in 1837 to protect writers' copyright. Dickens hoped he would enjoy the trial scenes. Talfourd was portrayed as the idealistic and loveable Thomas Traddles in *David Copperfield*. Talfourd came from a strong Anglican background. He was advised to take up the law by Lord Brougham. He worked variously as law reporter, pleader and drama critic but he wrote poetry, plays, essays and pamphlets and was a foremost dramatist. A Serjeant at Law from 1833 and until then a member of the Middle Temple, he became the Member for Reading in 1835 and sat in parliament until appointed a judge of Common Pleas on 23/07/1849. He was well liked and upright.

⁷³ Dickens accepted an invitation to dinner from Chief Baron and Lady Pollock on 05/12/1845. *Pilgrim Letters* XV, *Dickensian* (2011) 107, 2, 484, 137. Dickens declined an invitation to dinner from Lord Lyndhurst on 01/01/1857 because he was 'particularly engaged on Sunday'. *Pilgrim Letters* 8, 248. He first met Lord Lyndhurst at the home of Lord Brougham on 20/12/1841. 8, 297. Dickens' letters to Lord Lyndhurst and to Baron Bramwell contrast with his reply to the Duchess of Sutherland of 26/05/1843 where he went to some lengths to express regret at his unavailability. 3, 498.

⁷⁴ Slater 46. On 06/12/1839 Dickens, paying an initial £44 (Coutts Bank cheque book counterfoil), was admitted as a student of the Middle Temple. Talfourd and his publisher Edward Chapman were his guarantors. He paid his dues from Hilary Term 1840 until Michaelmas 1852. He paid the 'caution deposit' of £100 (worth £8,500 today) on 27/03/1849. They went walking together on the Isle of Wight in 08/1849. Letter to Talfourd 19/08/1849 *Pilgrim Letters* 5, 597. Dickens ate dinners from Michaelmas 1849 to Trinity 1852. For aspiring barristers there was a requirement to eat dinners thrice per term of four for three years but there was then no compulsory formal training and no examinations. He ate up to 16 dinners in total including three in each of at least two terms. At best he was just over halfway towards qualification. It is likely that, when keeping Commons, he met barristers so obtaining information about Chancery which enabled him to write *Bleak House*, and providing the opportunity to learn of factory law and legislation thus presaging *Hard Times*. When considering a title for the former he included 'factory' and 'mill' suggesting that he may have intended to set *Bleak House* in the North. Slater 336. He submitted chs. 1-4 to Talfourd before publication. Letter to W.H.Wills 22/02/1852 *Pilgrim Letters* 6, 608. Alternatively the bar may have been his safety net. Slater 252. Dickens' legal friends seem to have encouraged him to write rather than become a barrister. He may have dined with Talfourd at Middle Temple where Talfourd's son was a conscientious aspirant. Dickens' deposit was refunded in 04/1855 when he withdrew his application.

the forties expressed interest in becoming a police magistrate⁷⁵ and was enchanted by the intricacies of the work of police detectives.⁷⁶ As a juryman he was impressed by the humane conduct of the Coroner Thomas Wakley at an inquest into the death of a child.⁷⁷ These experiences enabled him better to understand the practicalities of the legal system.

In considering industrial safety and compensation law in the fifty years from 1830 factual accounts and civil case law are assisted by the novels in painting a picture of the realities of that age and Dickens was better qualified than many to assess the duties of employers and make ‘informed, logical and systematic’ appeals for reform. Other difficulties included the novelists’ conception of the poor and of the function of law.

... and the Poor

Most mid-nineteenth century novelists felt that the poor were different beings and undeserving of sympathy and attention.⁷⁸ In *Jane Eyre* (1847) Charlotte Bronte portrayed Jane in childhood believing poverty to be synonymous with degradation. Poor people did not have the means to be kind. Jane might have ‘poor low relations’ and she did not wish to belong to the poor who were uneducated, ill-bred and lived in cottages.⁷⁹ In *Shirley* (1849) Charlotte showed her Church Tory instincts when portraying the attack by rioting employees on the mill of the upright Robert Moore but she did not explore the

Talfourd had died 13/03/1854. Carlton, W.J. (1953) ‘A Companion of the Copperfield Days’ *Dickensian* (1953) 50, 309, 15. Also Student Ledger, Buttery Book, Petition to Withdraw and Order from Archives of Middle Temple.

⁷⁵ Bodenheimer, R. *Knowing Dickens* (Ithaca, N.Y.: Cornell U.P., 2007) 52. Dickens was not a barrister of seven years’ standing so did not qualify. He wanted to turn his social knowledge to good practical effect and thought he would have been ‘pretty good’. Letters to Lord Brougham 24/09/1843 in *Pilgrim Letters* 3, 570 and to Lord Morpeth 20/06/1846, 4, 566.

⁷⁶ Dickens, C. ‘A Detective Police Party’ *H.W.* (27/07/1850 & 10/08/1850) 1, 18, 409 & 1, 20, 457. Fielding, after whom Dickens’ eighth child was named, had been a magistrate. Dickens became friends with Inspector Field the model for Inspector Bucket in *Bleak House*. Bodenheimer 53.

⁷⁷ *Pilgrim Letters* 2, 9, n.2. Letter to John Forster 15/01/1840, Dickens, C. ‘The Uncommercial Traveller’ *A.Y.R.* (1863) 9, 276 and Carlton, W.J. ‘Dickens in the Jury Box’ *Dickensian* (1956) 52, 65. The child’s mother was subsequently prosecuted for concealment of birth and not for murder as a result of Dickens sympathetic questioning of witnesses with Wakley’s support. Later Dickens contributed to defence costs and a minimal penalty was imposed. Claire Tomalin in *Charles Dickens – A Life* (London: Viking, 2011) was so impressed by her subject’s magnanimity that she began her Prologue with the topic. xl.

⁷⁸ *Illustrated London News* of 12/09/1874 reported Sir Henry Clavering of Axwell Park, Blaydon to have suffered two broken legs in a coach accident and devoted the same amount of space (four lines) to the loss of four thousand jobs at Consett Iron.

⁷⁹ *Jane Eyre* 32.

plight of the rioters who became pitiable victims only after the riot was put down.⁸⁰ Nevertheless she exhorted the mercantile classes not to confine their efforts to their own commerce and the making of money.⁸¹

George Eliot appeared insensitive in *Felix Holt: The Radical* (1866) dealing with events in 1832 just after the passing of the Reform Act.⁸² The idealistic Felix, when seeking to deflect an election riot, killed Constable Tucker, a regular officer armed with a sabre. Felix captured the weapon but in the struggle the constable fell ‘undermost’ and later died.⁸³ Felix’s garrulous mother compared her own lot unfavourably with that of Tucker’s widow who as a result of her husband’s death would be better off financially:

... for the great folks’ll pension her, and she’ll be put on all the charities, and her children at the Free School, and everything.⁸⁴

Although the officer was blameless in his encounter with Felix, George Eliot did not address the widow’s plight. Felix, whether he intentionally assaulted the constable or was merely negligent, would not be held liable to the widow in damages. First, reliance was placed on a medieval rule that a felony could not give rise to a civil action.⁸⁵ Next there was no right to claim, as in Scotland, for grief or distress or loss of financial support by way of solatium. Lord Ellenborough had decided that in a civil court death could not be complained of as an injury.⁸⁶ Opportunity to recover limited damages was provided to next of kin by Lord Campbell’s Act of 1846⁸⁷ and the practice of proceeding with the claim was made easier by the 1864 Act⁸⁸.

Felix did not check Mrs Tucker’s financial situation. The death of the constable should have been a heavy and lifelong burden for the pious and reform-minded Felix. It was within Esther’s power to ensure that the widow was properly provided for before Esther forewent her inheritance. In that way a fairer conclusion was achievable. Felix

⁸⁰ 325. Charlotte’s father had opposed the Luddite riots in 1812 and he prayed for the safety of the Tory government during the Chartist riots of 1842.

⁸¹ 161. In 11/1852 Charlotte contended that she could not write books ‘handling the topics of the day’. Gaskell, E.C. *Charlotte Bronte* (London: Wordsworth, 2008 (1857)) 380.

⁸² Representation of the People Act 1832.

⁸³ *Felix Holt* 316.

⁸⁴ 352.

⁸⁵ Holdsworth W.S. *History of English Law* (London: Methuen, 1965 (1923)) III, 333 & 676. It was later realised that the commission of the felony merely postponed civil proceedings until the conclusion of the prosecution.

⁸⁶ *Baker v Bolton* (1808) 1 Camp.493; 170 ER 1033.

⁸⁷ Fatal Accidents Act 1846.

⁸⁸ Fatal Accidents Act 1864.

and Esther lived comfortably with their children but without a thought for the Tucker family.⁸⁹ Perhaps George Eliot's stamina for legal niceties was exhausted after her exposure to the complication of entails, remainders and base fees.

While Dickens' avowed intention was to help the poor, his humanity did not extend abroad. In his letter of 4 October 1857 to Angela Burdett Coutts he expressed murderous intent towards the Indian mutineers.⁹⁰ In 1865 he combined with Carlyle, Kingsley and Ruskin to oppose the prosecution of Governor Eyre of Jamaica for his murderous suppression of a riot there.⁹¹ J.S.Mill, Darwin, Thomas Hughes and Herbert Spencer supported the prosecution and Eyre was twice charged with murder though neither charge was proceeded with. Carlyle called Mill's committee 'a knot of nigger philanthropists' so appearing both patriotic and racist. Dickens deprecated Mill's meeting as 'jawbones of asses' and contended that foreign natives were not to be regarded of the same importance as 'men in clean shirts at Camberwell'.⁹² So the novelists were not inevitably promising campaigners for the working poor.

... and the Subverted Law

The writers regularly honed their plots to avoid middle class characters facing the full force of the law. Examples include Robert Moore's manipulation of the magistrates in Charlotte Bronte's *Shirley* (1849),⁹³ the escape to America of the fraudulent attorney Edward Browne in Mrs Gaskell's *The Moorland Cottage* (1850),⁹⁴ the demotion to the post of junior clerk in Glasgow of fraudulent Richard Bradshaw in Mrs Gaskell's *Ruth*

⁸⁹ Few critics take this point. Exceptions are Fisher, P. *Making up Society: The Novels of George Eliot* (Pittsburgh: Pittsburgh U.P., 1981) 153, and Horowitz, E. 'George Eliot: The Conservative' in *Victorian Studies* (2006) 49, 1,7-32. Horowitz, without citing supporting evidence, argued that Felix struggled with the guilt of Tucker's death.

⁹⁰ *Pilgrim Letters* 8, 459. He thought the Oriental race responsible for the Cawnpore massacre should be exterminated. He wanted to 'blot it out of mankind and raze it off the face of the earth'.

⁹¹ Edward John Eyre (1815-1901) became Governor in 1864. On 07/10/1865 a black man was imprisoned for trespass on an abandoned plantation. The militia shot seven people in a subsequent demonstration resulting in the rioters killing eighteen white people. The soldiers then killed 439 black people and arrested and executed a further 354 most without proper trial. Another 600 were flogged and/or imprisoned.

⁹² Letter 30/11/1865 to Cerjat in *Pilgrim Letters* 11, 115.

⁹³ *Shirley* 362.

⁹⁴ (London: Oxford U.P, 1934 (1850)).

(1853),⁹⁵ the prevention of an Inquest by Thornton to save Margaret Hale's brother in respect of the death of the villainous Leonards in her *North and South* (1855),⁹⁶ and in her *A Dark Night's Work* of 1863, the successful plea by Ellinor Wilkins to her former lover, now a judge, to absolve her father's former servant from a conviction for murder, the real culprit, Ellinor's father, having died years previously.⁹⁷

Similarly in Dickens' *Hard Times* (1854) the bank robbery was carried out by Louisa's whelpish brother Tom and not by the earlier accused Stephen Blackpool. Thomas Gradgrind M.P. sought help from the circus people to secrete his son away so as to avoid criminal conviction.⁹⁸

George Eliot in *Felix Holt* described the trial of the priggish Felix for manslaughter which resulted in a sentence of four years.⁹⁹ Subsequently Harold Transome met with the local magistrates and county gentlemen in the White Hart public house. They believed Felix to have been 'peculiarly unfortunate rather than guilty'.¹⁰⁰ Most were full of sympathetic ardour for the beautiful Esther who had mitigated so effectively at the trial. Representations were made to the Home Secretary by way of a Memorial which contained a character reference for Felix and the same material which had been before the trial judge. After a month Felix was released from prison and sought the arms of Esther without qualm as to the reason for and the method of his release.¹⁰¹ Such manipulation of the law established its ineffectiveness.¹⁰²

Exceptionally Mrs Braddon, in her sensation novel *Lady Audley's Secret*, questioned the justice of such subversion which amounted to 'paltering' with the law.¹⁰³ Generally the novelists were sceptical as to whether the law was the tool for justice.¹⁰⁴ They had little positive to say about lawyers. Samuel Warren in *Ten Thousand a Year* described

⁹⁵ *Ruth* 3, 342.

⁹⁶ *North and South* 276.

⁹⁷ (Stroud: Nonsuch, 2007 (1863)) 69. The story first appeared in five instalments in *All the Year Round* in January and February 1863.

⁹⁸ *Hard Times* 276.

⁹⁹ *Felix Holt* 450.

¹⁰⁰ 451.

¹⁰¹ 472.

¹⁰² Long, L.J. 'Law's Character in Eliot's *Felix Holt: The Radical*' (2004) *Law and Literature* 16, 237.

Fisher, P. (1981) in his *Making Up Society: The Novels of George Eliot* (Pittsburgh: Pittsburgh U.P., 1981) 153 described the commuting of the sentence as the most absurd moment in all of Eliot's novels.

¹⁰³ (Oxford: Oxford U.P., 1987 (1861)) 434.

¹⁰⁴ An exception was Jem Wilson in *Mary Barton* who did appear in the dock but was properly acquitted of the murder of the younger Carson. *Mary Barton* 328.

the legal adventures of Tittlebat Titmouse, a shopman on £35 p.a., who aspired to £10,000 p.a. so that a lady would not ‘cut him in the park’.¹⁰⁵ He was approached by solicitors seeking his instructions to pursue a claim in a Yorkshire estate. The author mischievously described each procedural step with apparent admiration while making it clear that such litigation would benefit only the lawyers who duly transpired to be dishonest.

George Eliot designated lawyers as ‘sleek and vicious conjurers’ with their secret of Law.¹⁰⁶ Mrs Gaskell regularly painted them as greedy people likely to engage in fraudulent activities at the expense of their client as in her *Ghost in the Garden Room* where an articled clerk Benjamin Huntroyd stole his parents’ life savings so as to make himself ‘known to the judges and tip-top barristers’.¹⁰⁷ Similarly Mrs Braddon’s Peter Borgrave graduated from his work as private detective to dishonest and violent lawyer in *The Factory Girl* of 1863.¹⁰⁸

Not all were portrayed as villains. George Eliot’s character Mrs Farebrother of Middlemarch recalled her late husband as having been in the law ‘exemplary and honest nevertheless’ a reason for the family never having been rich.¹⁰⁹ Lennox in *North and South* was relied on by Margaret Hale as straightforward despite her rejection of his suit.¹¹⁰

The novelists did not naturally alight on the idea of developing civil law so as to enforce safety precautions in industry or to provide an humane compensation system for the particular benefit of the working class.

... and Insurance

Such a system would have required insurance cover for employers. As early as 1828 Edwin Chadwick, writing about improving life expectation, pleaded for more accurate

¹⁰⁵ (Edinburgh: Blackwood, 1841) 7.

¹⁰⁶ *Felix Holt* 213.

¹⁰⁷ (Ware: Wordsworth, 2008 (1859)) 206. The tale first appeared in 12/1859 in *All the Year Round*.

¹⁰⁸ *Halfpenny Journal* (1863) II&III (40 instalments).

¹⁰⁹ *Middlemarch* 540.

¹¹⁰ Two of Mrs Gaskell’s daughters each married a barrister cousin. Mrs Gaskell was particularly fond of the philanthropic barrister and reforming writer Vernon Lushington whom she named ‘Cousin V’. Dickens’ sixth son Henry Fielding (1849-1933) was called to the Bar in 1873 and appointed Queen’s Counsel in 1892 and in 1917 became the second most senior criminal judge in London.

statistics so as to engender the growth of life and sickness insurance.¹¹¹ In ‘Be Assured’ George Dodd exhorted readers to consider insuring against death, personal accident, property damage, and even employees’ infidelity but did not mention employers’ liability.¹¹² The availability of injury insurance had been known to railway travellers from mid-century. The Carriage of Passengers in Merchant Vessels Act 1849 provided that sums paid under insurance policies were not to be set off against compensation awarded under the Act.¹¹³ Public liability policies were available from 1875 but the need for employers’ liability insurance was created by statute in 1880.¹¹⁴ Hitherto Chadwick’s and the general view was that liability insurance would increase rather than reduce the number of accidents and was thus contrary to public policy.¹¹⁵

The novelists were aware of the concept if not the potential scope of insurance. In Fanny Trollope’s *Michael Armstrong* (1840) the overlooker Parsons reported to Sir Matthew Dowling the burning down of his mill which Parsons described as well insured and which ‘would bring in a famous sum’.¹¹⁶ In Elizabeth Gaskell’s *Mary Barton* of 1848 when part of the Carsons’ mill burned down John Barton correctly forecast that the Carsons would not be ‘over-grieved’ by that event for they were well insured and, with trade slack, there was an excellent opportunity to refit the factory with first-rate improvements for which ‘the insurance money would amply pay’.¹¹⁷ In Fanny Mayne’s *Jane Rutherford* (1854) after the miner Pearce and two of his sons died in a pit accident Pearce’s widow was comfortably off because she was paid £200 from the funds of an Accident Death Association to which her husband had providently contributed.¹¹⁸

¹¹¹ Chadwick, E. *Essay on the Means of Insurance against the Casualties of Sickness Decrepitude and Mortality* (London: Charles Knight, 1836 (1829)). The essay first appeared in the *Westminster Review* (04/1828) 18. Also Chadwick on Railway Navvies in ch.3.

¹¹² *H.W.* (02/12/1854) 10, 245, 365. Dodd (1808-1831) was the author of cyclopaedias. E.L. insurance was not compulsory until the Employers’ Liability (Compulsory Insurance) Act 1969.

¹¹³ 1849 Act s.34.

¹¹⁴ Employers Liability Act 1880.

¹¹⁵ Dinsdale, W.T. *History of Accident Insurance in Great Britain* (London: Stone & Cox, 1954) 38, 133 & 147. Employers would not take precautions if others (insurers) paid the damages. He did not envisage premium loading for careless employers.

¹¹⁶ *Michael Armstrong the Factory Boy* (Stroud: Nonsuch, 2007 (1840)) 201.

¹¹⁷ *Mary Barton* 57.

¹¹⁸ (London: Clarke Beeton) 277.

Nineteenth Century Development of Tort

Tort is concerned with the allocation of losses occurring in society. With technical and mechanical progress the scope for litigation increases. Redress is granted usually by an award of compensation. Tort law is:

... a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches.¹¹⁹

Corrective justice requires somebody who has harmed another to indemnify that other whereas distributive justice requires a focus on the just distribution of burdens and losses among members of society.¹²⁰

A tort, an unlawful interference with a protected interest, is a wrong entitling the injured party to redress. Negligence, the most pervading tort, involves the breach of a duty to take care resulting in damage to the claimant, concepts which, in the nineteenth century, were undeveloped and incoherent. Negligence connotes a lack of intention whether in respect of the original act or of its consequences. It involves an accident or, in the case of disease, a succession of accidental events.¹²¹ The consequences are unforeseen and unexpected but retrospectively foreseeable.¹²² Industrial accidents were regarded in the nineteenth century as expected events and part of 'the normal flow and structure of everyday life'.¹²³ Society devoted more attention to criminal law than to tort since crimes involve intent and are properly likely to attract greater public concern and also because criminal law then was used as a tool to manage the working class. When society awakened it concentrated on the woes of young children whose bodies were deformed as a result of mine or factory working rather than on the dangers faced by adult workers in similar environments.¹²⁴ Employers were not regarded as having assumed responsibility for their adult workers' welfare. It was a matter of supply and demand of labour so their duty did not extend beyond the cash nexus and the payment of wages.

¹¹⁹ Lord Steyn in *McFarlane v Tayside H.B.* [2000] 2 AC 59, 83.

¹²⁰ *McFarlane* 82.

¹²¹ Dods, M. 'A Chapter of Accidents' (1928) 39 *LQR* 60, 63.

¹²² Figlio, K. 'What is an Accident?' in Weindling, P. (ed.) *The Social History of Occupational Health* (London: Croom Helm, 1985) 180. By the end of the century accidents were looked at as mishaps or untoward events neither expected nor designed but producing a loss as per Lord Lindley in *Fenton v Thorley* [1903] AC 443, 453.

¹²³ Cooter, R. & Luckin, B. *Accidents in History* (Amsterdam: Rodopi, 1997) 7.

¹²⁴ Sanders, M. 'Manufacturing Accident' *Victorian Literature & Culture* (2000) 28, 317.

Initially employers evaded statutes and defied regulations. A civil trial was taken up with the immediate causes of an accident and, once they were established, impediments were placed in a plaintiff's path. It was not until 1938 that a broad, encompassing duty was spelled out for employers:

... the provision of a competent staff of men, adequate material and a proper system and effective supervision.¹²⁵

In the previous century the courts did not give precedence to corrective justice so as to compensate a claimant for the wrong done to him but instead favoured distributive justice in gainsaying a remedy to an injured workman so as to protect the financial well being of commerce and thus of society.

Industrial Safety and an Humane Compensation System

With the Industrial Revolution came the growth of cities involving the movement from the countryside of impoverished agricultural workers. The cities were crowded and the potential for accidents increased with carriages colliding with each other and with pedestrians. As machinery and equipment on the railways, in mines and in factories became more sophisticated the dangers increased. Yet safety was not a priority, there was little established case law or statute to enable redress to be easily secured and the development of humane law over the second half of the century was, to the modern eye, depressingly slow. To commence a legal action against an employer was a serious step for an injured workman to take. He usually needed a wealthy patron to finance his suit. He would face dismissal and be regarded as a troublemaker so that no other local employer would take him on. Only really serious injuries were the subject of litigation.¹²⁶ Even then the judges were worried lest the floodgates open.¹²⁷ The first reported action by an employee seeking damages for injuries negligently caused at work was in 1837 but the general principle that the employer should take ordinary care to provide for his employee's safety was already clear.¹²⁸

¹²⁵ Lord Wright in *Wilsons & Clyde Coal v English* [1938] AC 57.

¹²⁶ The path was cleared by the Evidence Act 1851 amended by the Evidence Act 1853 allowing parties in a civil action to be treated as competent witnesses and thus enabling an innocent plaintiff in an unwitnessed accident to succeed.

¹²⁷ Bartrip, P.W.J. (1997) 'The Rise and Decline of Workmen's Compensation' in Cooter & Luckin 158.

¹²⁸ Bartrip, P.W.J. & Burman, S.B. (1983) *The Wounded Soldiers of Industry* (Oxford: Clarendon) 24.

The lack of an insurance habit was a barrier to progress. Hence the volume of civil litigation taken up by injury claims was small.¹²⁹ Judicial facilities were concentrated in London, court fees were high, and legal services prohibitively expensive. Criminal prosecutions took precedence and there were delays caused in part by the long summer vacation.¹³⁰

Baron Bramwell and Damages for Personal Injury

George William Wilshere Bramwell was the judge who denied remedies to the injured and bereaved more often and for longer than any of his colleagues. He was born in London on 12 June 1808, the son of a banker, and was educated privately¹³¹ before, at age sixteen, joining Dorrien's bank in which his father was a partner. He married Mary Jane Silva in New York in 1830. She bore him two daughters but died in 1836. He remained a widower until 1861 when he married Martha Sinden. He entered the law in 1830 initially as a pupil of the special pleader Fitzroy Kelly but was called to the bar in 1838. He was appointed Queen's Counsel in 1851 and sat on the Common Law Procedure Commission whose Report¹³² led to the Common Law Procedure Act 1852 which did away with the need for special pleaders and abolished procedural fictions. He was keen to be rid of procedural hurdles saying 'there should never be a question as to which was the form'.¹³³ He wanted barriers between solicitors' and barristers' professions to be broken down.¹³⁴ He was a member of the Mercantile Law Commission of 1854 but he and four others dissented in the Report,¹³⁵ arguing, on the basis of *laissez faire*,¹³⁶ for an extension of the concept of limited liability for companies. His view was supported and included in Acts¹³⁷ culminating in the

¹²⁹ Railways were the exception. See ch.2.

¹³⁰ From July to November. Polden, P. *A History of the County Court 1846-1971* (Cambridge: Cambridge U.P., 1999) 5 and *Bleak House* chs.19&20.

¹³¹ He attended school at Camberwell where his later colleague William Fry Channell (later Baron Channell) was Head Boy and Bramwell moved on to a school at Enfield where he became Head Boy at age fifteen. Heward, E. *Lives of the Judges* (Chichester: Barry Rose, 2004) 193.

¹³² PP 1851 (1389) XXII.

¹³³ *Bryant v Herbert* (1878) 3 CPD 390.

¹³⁴ Holdsworth, Sir W. (1965 (1923)) XV, 243.

¹³⁵ PP 1854 (1791) XXVII.

¹³⁶ Saville, J. 'Sleeping Partnership and Limited Liability 1850-1856' *Economic History Review* (1956) 8, 3, 430.

¹³⁷ 1855, 1856 &, to cover banks, 1858.

Companies Act 1862. His practice flourished and in 1856 he was appointed to be a Baron of the Court of Exchequer where he worked until 1876.¹³⁸ He was then elevated to the Court of Appeal sitting until 1881. He was raised to the peerage and sat in the House of Lords as Lord Bramwell of Hever until 1892. After leaving Exchequer his views some of which ‘had not commanded judicial assent became in later years more pronounced and extreme’.¹³⁹ While J.S. Mill,¹⁴⁰ Sidgwick¹⁴¹ and Spencer¹⁴² relented, he did not.

He was an entertaining judge and highly popular with members of the Bar. Veeder called him ‘sturdy, manly and kind’.¹⁴³ He contended that he had an anxious temperament¹⁴⁴ yet in court he was often terse.¹⁴⁵ He denied that it was his responsibility to make the law yet he was consciously concerned to ‘make the law to the ends he favoured’.¹⁴⁶ He was regarded as ‘bold’ and his contempt for grandmotherly legislation was great.¹⁴⁷ He was commended for his honesty, fearlessness, unconventionality and liveliness despite a lack of humility and sympathy for ‘weaker vessels’.¹⁴⁸ His kindnesses to the villagers of Four Elms whither he removed in or soon after 1861 did

¹³⁸ The Exchequer court office was located in the Inner Temple and these ‘various holes and corners’ were described by Dickens in *Pickwick Papers* 402. Holdsworth, W.S. *Charles Dickens as a Legal Historian* (New Haven: Yale U.P., 1929) 25. Each of the three courts with equal civil jurisdiction Queen’s Bench, Common Pleas and Exchequer sought litigious business. The Exchequer Division was originally the venue for royal, tax-collecting actions and there was little private litigation until the seventeenth century. A plaintiff suing there had to justify his choice of division by alleging that he was a debtor to the king, a fiction which could not be traversed. Baker, J.H. *English Legal History* (London: Butterworths, 2002) 48. In Bramwell’s time the share of work of the Exchequer Court and the amount of business greatly increased but it is a mystery as to why any individual plaintiff, suing for damages for personal injury, would have embarked on an action in his division.

¹³⁹ Veeder, V.V. ‘A Century of English Judicature 1800-1900’ *Select Essays in Anglo-American Legal History* (Boston: Little, Brown, 1907) 1 69.

¹⁴⁰ Mill (1806-1873) synthesised his father’s and Bentham’s Utilitarianism and Coleridge’s Romanticism. Capaldi, N. *John Stuart Mill* (Cambridge: Cambridge U.P., 2004) 257.

¹⁴¹ Henry Sidgwick (1838-1900) exponent of ‘common sense morality’ thought that people could better assess their own aims than government but came to accept that the times dictated a need for pragmatism and compromise. Havard, W.C. *Henry Sidgwick* (Gainesville: Florida U.P., 1959) 134.

¹⁴² Herbert Spencer (1820-1903) denounced paternalist social legislation including safety at work regulation but came to equate industrial employment with bondage and worried about the coercion of workers. Turner, J.H. *Herbert Spencer: A Renewed Appreciation* (London: Sage, 1985) 151. In 1855 Spencer advocated some regulation of railways. See ch.2.

¹⁴³ Veeder 34.

¹⁴⁴ His speech at his retirement dinner.

¹⁴⁵ Macdonnell, J. ‘Lord Bramwell’ *Temple Bar* (1896) 108, 500.

¹⁴⁶ Simpson, A.W.B. *Biographical Dictionary of the Common Law* (London: Butterworths, 1984) 74.

¹⁴⁷ Graham, E. *Fifty Years of Famous Judges* (London: Long, 1930) 69.

¹⁴⁸ Knott, G.H. ‘Lord Bramwell’ (1892) 4 *Jurid. Rev.* 347.

not extend to personal injury plaintiffs who came before him. Sir Frederick Pollock described him as ‘an out-and-out insular individualist’.¹⁴⁹ He was a libertarian seeking to limit the role of government because a high concentration of power was dangerous to individual choice and activity. He was in tune with the aspirations of the Manchester School, so called by Disraeli in 1848, a group of business men, economists and middle class radicals loosely united in support of free trade, self interest and *laissez faire*. They fought successfully for the abolition of the Corn Laws which had previously protected landowners from cheap imports of foreign corn. They argued for long term trust in market forces even at a cost of short term misery. They opposed government regulation of workmen’s hours and thought that ‘something for nothing’ produced a demoralising disease of dependence on others. The purpose of law was to exclude arbitrary power of constraint and to protect inherent rights without parliamentary interference.¹⁵⁰ The influence of ‘Manchesterism’ was at its greatest from 1839 until 1850 before and after the repeal of the Corn Laws and, despite Bramwell’s support, faded thereafter.¹⁵¹

Bramwell was a member of the Political Economy Club (founded 1821) from 1855 until 1891. Originally the Club’s members included Malthus, Ricardo, Nassau Senior and J.S. Mill. Bramwell debated with Edwin Chadwick on such as the need for employers, rather than the parish, to support and compensate injured workers, a regular contention of Chadwick.¹⁵² About 14% of the Club’s business was taken up with industrial organisation. In total Bramwell attended one hundred and fifty one meetings, an average of more than four per year.¹⁵³

Bramwell joined the Liberty and Property Defence League and in November 1882 spoke at its first general meeting:

¹⁴⁹ (1923) 39 *LQR* 163.

¹⁵⁰ Fay, C.R. *Life and Labour in the Nineteenth Century* (Stroud: Nonsuch, 2006 (1920)) 172.

¹⁵¹ Greenleaf, W.H. 1, 41. By 1861 *laissez faire* was ‘dead as economic theory but alive as social fact’.

Evans, R.J. *The Victorian Age 1815-1914* (London: Arnold, 1950) 159.

¹⁵² Chadwick (1800-1890) son of a Wesleyan pioneering journalist, qualified as a barrister but accepted but one brief. A utilitarian, he worked as private secretary to Bentham from 1830 until Bentham’s death in 1832, and then for Nassau Senior as assistant in the creation and administration of the 1834 Poor Law. He is best known for his work in sanitation reform with which he was busily involved 1839-1854. His influence waned thereafter and, in his retirement, he came to believe that free market competition was wasteful.

¹⁵³ Henderson, J.P. ‘The Oral Tradition in British Economics’ (1983) *History of Political Economy* 15, 2, 149. The minutes of Club meetings have not survived.

All we want is to be let alone, so that those who are kind enough to govern the people of this country should have as little trouble as possible in doing it; that they should mainly concern themselves with keeping order at home and defending us abroad.¹⁵⁴

Everything that has been done for this country has been done by that new subject of persecution – the capitalist.¹⁵⁵

In 1884 the League published Bramwell's pamphlet entitled *Laissez Faire* which included:

Please govern me as little as possible. Prevent me doing mischief to others, but let me do it to myself if I like.¹⁵⁶

He never flagged and in 1888 addressed the British Association:

The governing concepts of Political Economy are few. In my judgment its main one is 'Laissez Faire' – 'let be' ... Leave everyone to seek his own happiness in his own way provided he does not injure others. Govern as little as possible. Meddle not any more than you can help.¹⁵⁷

Because Bramwell had little knowledge of English law other than the Common Law he did not reach the intellectual heights of Blackburn or Willes.¹⁵⁸ He was neither scholar nor jurist but he had a wide knowledge of case law and was remarkably single-minded. He was 'ever faithful to the classical canons of Political Economy'¹⁵⁹ of which *laissez faire* was the most important, and, which, in his early judicial career, permeated the common law. He believed that the perfection of the human race came with the complete development of the faculties of individual people who were the best judges of their own interests and should be guided each by their own lights. Freedom of contract was the backbone of industrialisation. The contract itself was seen as the exchange of mutual promises, governed by the will of the parties rather than the substantive merit of what they agreed to and the parties alone were fit to decide the adequacy of the contract without the court paternalistically trying to uphold fair relations between them.¹⁶⁰ Accordingly the courts were not to imply terms where the parties had omitted to include

¹⁵⁴ Fairfield, C. *Some Account of George William Wilsher, Baron Bramwell of Hever and his Opinions* (London: Macmillan, 1898) 134.

¹⁵⁵ Fairfield, 135.

¹⁵⁶ 140.

¹⁵⁷ Lord Bramwell *Economics and Socialism* (London: Liberty and Property Defence League, 1888) 10.

¹⁵⁸ Holdsworth XV, 505.

¹⁵⁹ Fifoot, C.H.S. *Judge and Jurist in the Reign of Queen Victoria* (London: Stevens, 1959) 15.

¹⁶⁰ Lobban, M. *The Common Law and English Jurisprudence* (Oxford: Clarendon, 1991) 259.

them.¹⁶¹ Government interference did more harm than good because it checked the expansion of industry and fostered habits of dependence and listlessness.¹⁶²

Bramwell's death in 1892 made 'English political and controversial life the poorer'¹⁶³ for he did not confine the expression of views to the bench but wrote and published pamphlets and was a regular correspondent of *The Times*. He was the dominant and best known judge of his time and, with his *laissez faire* beliefs, he exercised a strong hold over his colleagues and the legal profession.¹⁶⁴ When he retired from the Court of Appeal he was afforded the rare compliment of being entertained by the entire Bar and twenty six judges in the hall of the Inner Temple. *The Times* account of the event approached eulogy. Bramwell was commended for his independent and open mind and 'fresh, racy and individual style'. No judge was more free of 'bias or preconceived opinion'. 'None paid less regard to the mere letter of precedent or authority, or more regard to reason and argument.' He paid 'little deference to old authorities of which he could not see the ground or reason'.¹⁶⁵ An analysis of his judgments in actions for personal injuries by railway passengers, employees and visitors will demonstrate that the second of these commendations was inaccurate. Charles Dickens may not have been congratulatory if, armed with foresight of the Baron's lifetime judicial record, he had attended for dinner on 2 February 1859. Bramwell's observatory had no windows through which he might see the impact of his approach to injured workpeople's damages.¹⁶⁶ Bramwell's partiality towards railway companies, capitalists and landowners, his impeding the development of the law of negligence and his judicial inflexibility deserve attention and criticism.¹⁶⁷ He was not a man to let his heart rule his head. Was there any common ground? The signs were not hopeful.

¹⁶¹ *Tarrabochia v Hickie* (1856) 1 H&N 183; 156 ER 1168 a charterparty dispute. Yet he did imply terms when it suited him. See ch.7.

¹⁶² Williams, R. 'Political Economy' *Fraser's Magazine* (1870) 72-82. Williams suggested the advantages of a moderated version.

¹⁶³ *Illustrated London News* (21/05/1892) 618.

¹⁶⁴ Macdonnell 498.

¹⁶⁵ 29/11/1881.

¹⁶⁶ *Hard Times*, 1, 15, 95.

¹⁶⁷ See chs. 5&6.

Framework

Dickens looms large in Chapters 2 (railways), 4 (novels), and 6 (*Hard Times*) and Bramwell in 2, 5 (employers' liability) and 6 (occupiers' liability). In Chapter 2 the rapid development of a system of landowners' compensation paid by railway companies is contrasted with the lack of such for tenants evicted to make way for the railways. Bramwell's antipathy to railway passenger claims is demonstrated while Dickens argued for the regulation of railway safety which eventually was achieved. Passenger claims for damages usually succeeded and a sensible and balanced system of compensation was established despite Bramwell's efforts to restrict the growth of the tort of negligence, to ignore the principle of vicarious liability and generally obstruct any private plaintiff who sought recovery against a commercial enterprise. Dickens' experiences in Middle Temple and at and after Staplehurst and his acquaintance with Edwin Chadwick are relevant to his legal knowledge. While fairness was achieved for railway passengers in claims for damages it was not achieved for employees against their masters. Chapters 3, 4 and 5 cover various theatres of employers' liability and the failure of parliament and the judiciary to evolve an humane system of compensation. In Chapter 3 the novelists' engagement with railway construction, railway work, mining and aspects of manufacturing (cotton dust and crippling injuries) is contrasted with the need for and progress with statutory safety regulation in each theatre. There were different problems in each. It is here that Dickens' journalism through the pen of Henry Morley deserves attention and encomium. Morley wrote extensively about mining accidents and safety underground. In Chapter 4 the emphasis is on fencing and reference made to Robert Blincoe's *Memoir* and to the formal reports produced by William Dodd in 1845 at the behest of Lord Ashley. The novelists' approach in their novels to unguarded machinery in factories and the fight for regulation and accountability is considered and the stirring fight between Dickens (through Morley) and Harriet Martineau as to the need to fence machinery recounted. Each novelist had an individual approach and purpose. Not all sympathised with the poor and disadvantaged. Some thought the poor to be dissolute and irresponsible and therefore undeserving of attention; others were too trenchant in their hostility to employers. Few had enough knowledge to describe industrial conditions with authority. In Chapter 5 Bramwell's opposition to vicarious liability and his support

for the unholy trio of defences is displayed. The defences amounted to a backstop. The first step might be a criminal prosecution brought by an inspector seeking a penalty allied to a requirement to compensate. Unhappily magistrates were often the same kind of factory owners as those against whom charges were preferred and they rarely did their duty. If a civil action was brought the defences usually prevented a recovery. The plaintiff's conduct was considered first at trial and if there was any material fault on the plaintiff's part the action failed without consideration of the defendant's defaults. If the plaintiff was found to have volunteered to undergo the risks of his work he was *volenti* and his action was defeated. If his injury was occasioned by the negligence of a fellow employee he lost because he was found to have agreed to that risk also. Baron Bramwell was relentless in his use of the defences long after his colleagues were seeking to abate their effectiveness. They overhung all aspects of work-accidents and disease here discussed but were never criticised by the novelists. Those with compassion would have opposed them if they had known of them. In Chapter 6 Bramwell's largely consistent habit of awarding damages to landowners for wrongs perpetrated by commercial enterprises is contrasted with his reluctance to compensate pedestrians injured on railway crossings and to visitors injured when visiting commercial premises. His surprising initial enthusiasm for the concept of *res ipsa loquitur* is also considered. Texts, including that of Stephen Blackpool's death, demonstrating the responsibilities of occupiers and Dickens' approach to industrial safety are analysed and compared with Bramwell's view of such liability and of related liabilities. The dinner to which Dickens was invited by Baron Bramwell is envisaged to have taken place and in Chapter 7 enquiry is made of their respective positions as to possible empathy and common ground.

The story began on the roads and, early in the century, moved to the railways where regulation was imposed and where a generally sensible, balanced system of compensation was established.

Chapter 2

Railways

The New Means of Travel

Trains were ‘the shuttles of power and trade that would weave the new fabric of the nation’.¹ ‘Railway Mania’ started in 1824,² the Age of Steam began on the Liverpool to Manchester Railway in 1830 the year after the Rainhill Trials were won by Stephenson’s ‘Rocket’³ and railway influence grew dramatically thereafter.⁴ Railways were initially unsafe and the large number of accidents, deaths and injuries demonstrated the need for regulation. A fair system of compensation followed from coach practice. Dickens published extensively on railway safety. He was himself a victim in the Staplehurst crash of 1865. The operators protested about the level of damages and general entitlement but everyone travelled by train and the protests were unavailing.

Existing competition came from the canals along which packets ‘glided’ in ‘easy enjoyable motion’⁵ though canals were used mainly for freight.⁶ Passenger travel by ship was also slow but was practicable for longer distances between a limited number of ports. In winter the ships afforded more warmth and comfort than both coaches and trains.⁷ Numbers carried by sea were not enormous and by about 1875 speed tipped the balance for such travellers in favour of the railways.⁸

¹ Douglas-Fairhurst, R. *Becoming Dickens* (Cambridge, Mass.: Harvard U.P., 2011) 325.

² Pollins, H. *Britain’s Railways: an Industrial History* (Newton Abbott: David & Charles, 1971) 22.

³ Barker, T.C & Savage, C.I. *An Economic History of Transport in Britain* (London: Hutchinson, 1973) 63.

⁴ Pollins 28, 40 & 48. In 1829 there were 51 miles of line, in 1836 400 miles, by 1840 1,700 miles, by 1846 just over 5,000 miles, by 1852 about 9150, by 1862 more than 12,610 and by 1868 the total had reached 15,687. The periods of most spectacular growth were from 1837 to 1840, from 1846 to 1847 and from 1862 to 1865. Freeman, M. *Railways and the Victorian Imagination* (New Haven: Yale U.P. 1999) 1.

⁵ Gaskell, E.C. ‘Life in Manchester: Libby Marsh’s Three Eras’ *Howitt’s Journal* (1847) 335.

⁶ The first canals were dug to serve coalfields in Lancashire from 1757. The busiest period of construction was from 1770 to 1800. By 1847 they ran to 2700 miles. By the early 1850’s freight carried on the railways exceeded freight carried by canal. Their disadvantages were frozen surfaces in winter, shallow water in summer, slow, circuitous routes and pilferage. Wolmer, C. (2007) *Fire and Steam: How the Railways Transformed Britain* (London: Atlantic, 2007) 23.

⁷ In 1834 Dickens used the service to reach Edinburgh to cover Lord Grey’s retirement banquet. Pope-Hennessy, U. *Charles Dickens* (London: Chatto & Windus, 1947) 38. Dickens was sea-sick.

⁸ Freeman M.J. & Aldcroft, D.H. (ed.) *Transport in Victorian Britain* (Manchester: Manchester U.P., 1988) 21.

Coaches had run from 1657 when a service was provided from London to Chester.⁹ It was an irony of the sudden and dramatic arrival of the railways in the early 1840's, that the road system, by then, had reached 'its peak of perfection'.¹⁰ Road surfaces were often in reasonable condition by reason of the influence of the Scottish road engineer J.L.McAdam. Journey times were shortened.¹¹ Travelling on non-turnpike roads was particularly uncomfortable and if an outside passenger went to sleep he was likely to fall off.¹² For onlookers stagecoaches connoted romance.¹³ Coach travel was nevertheless arduous, boring and slow as experienced by Nicholas Nickleby on his way from Mr Crummies in Portsmouth to London.¹⁴ A good coach with fresh horses, even over a short stage of ten miles, could average only 12-14 mph.¹⁵ Nicholas, following in the footsteps of his author,¹⁶ took two days to travel from the Saracens Head, Snow Hill¹⁷ to Greta Bridge on the way to Dotheboys Hall with Wackford Squeers and five small boys.¹⁸ Passenger travel involved expenses beyond the fare such as for meals, overnight accommodation and tips for the guards and coachmen who, on a long journey, had to be regularly changed at the designated stopping places.

Nicholas was flung out of the overturning coach onto the snow-carpeted road between Grantham and Newark without injury though other passengers suffered bumps and bruises. There was no claims culture for minor injuries and Dickens was not writing

⁹ Hart, H.W. 'Some Notes on Coach Travel' *Journal of Transport History*, (1959) 4,146.

¹⁰ Gash, N. *Robert Surtees and Early Victorian Society* (Oxford: Clarendon, 1993) 334. There were about 100,000 miles of public highway and 25,000 miles of turnpike roads mainly looked after by private enterprise where fixed charges were levied on vehicular traffic.

¹¹ Services from London to Manchester took 4.5 days in 1754, 26-30 hours in 1821 reducing to 18-24 hours by about 1830. Hart 147.

¹² Wragg, D. *Signal Failure* (Stroud: Sutton, 2004) 2.

¹³ George Eliot in her Introduction to *Felix Holt* wrote of 'the glory of the old coach roads' 3. Also the Pickwickians' journey to Dingley Dell on the Muggleton Telegraph in *Pickwick Papers* 362-3, Tom Brown's first journey to school from Berkshire into London and from there on the Tally Ho coach to Leicester in Thomas Hughes' *Tom Brown's Schooldays* (Oxford: Oxford U.P., 2008 (1857)) 75, the arrival of the Blenheim coach in Oxford in Disraeli's *Coningsby* (Stroud: Nonsuch, 2007 (1844)) 323 and the departure of the London stage from Manchester in Mrs G. Linnaeus Banks' *The Manchester Man* (Altrincham: Sherratt, 1954 (1876)) 217.

¹⁴ *Nicholas Nickleby* 390.

¹⁵ Gash 334.

¹⁶ In January 1838 Dickens spent two days in Yorkshire investigating schools there. He travelled with his illustrator Hablot Browne from Snow Hill. At Grantham they stayed overnight and then took the Royal Glasgow Mail to Greta Bridge meeting heavy snow. There was no overturn. Ackroyd, P. *Dickens* (London: Sinclair Stevenson, 1990) 520.

¹⁷ Specific inns in London operated as the termini and, in the country, inns were the staging-posts. Barker, & Savage 49.

¹⁸ *Nicholas Nickleby* 87.

to boost the fees of litigation lawyers.¹⁹ Although coach accidents may have been frequent,²⁰ claims were relatively few.²¹ Either modest payments were made or those injured made the best of it and resumed normality as soon as they could.

Travelling time was further reduced. A train from Liverpool to Manchester took under two hours; the coach had taken four and a half. By 1832 all but one of twenty six coaches on the route had ceased to operate.²² Although coach operators cut their fares rail fares were cheaper.

Initially there was a multiplicity of railway companies but amalgamations followed.²³ Each railway was regulated by an Act of Parliament which provided the authority to raise capital and acquire land. Only a small proportion of schemes were approved. The progress of construction in the country depended on the successful negotiation with individual landowners of rights of way and of compensation.²⁴ Initially they used their parliamentary presence to oppose applications but soon realised that opposition was a way of driving up the compensation. Mechanisms for resolution of valuation disputes were available but there were regular wrangles in Parliament involving the 'railway interests' of urban businessmen who proposed, financed and promoted the schemes, represented in 1865 by 157 members in the House of Commons and 57 in the

¹⁹ Today the claims culture is well established and thousands of claims are successfully pursued in respect of trivial injuries because such claims attract costs in addition to damages. The *Civil Procedure Rules* of 1998 debar a successful claimant from recovering costs in claims worth less than £5,000 (CPR r.26.6(3)) except in personal injury claims where the value of pain and suffering and loss of amenity exceeds £1,000 (r.26.6 (1) (b)). The practical effect of maintaining this low level of exemption has been to attract and nourish claims farmers and to instill into the travelling public a habit of exaggerating the severity of twinges and bruises suffered in traffic and other minor accidents. In early 2013 the point was the subject of government consultation but meanwhile ss.44&45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 implemented by the Conditional Fee Agreements Order 2013 further reduced fixed fees for small claims and prohibited the recovery from defendants of success fees under C.F.A.'s and of A.T.E. insurance premiums.

²⁰ One estimate is that in the 1870's road accidents involving vehicles and pedestrians occurred at the rate of 100,000 p.a.: W.T. Dinsdale *History of Accident Insurance in Great Britain* (London: Stone & Cox, 1954) 179.

²¹ Lobban, M. on 'Tort' in *Oxford History of the Laws of England* (Oxford: Oxford U.P., 2010) 12, IV, 905 contended that by 1830 claims were regularly made against coach owners who were often in large partnerships but he was able to cite only eight reports in *The Times* of trials of such actions over the 15 year period to 1830. Claims numbers were unlikely to have approached railway proportions.

²² Barker, & Savage 63. At first there were three trains each way per day but by 1835 there were nine. Wolmar 44.

²³ At one stage there were nine different companies with lines into Manchester. There were 4 railway companies quoted on the Stock Exchange in 1830, 8 in 1833, 62 by 1836 reducing to 40 by 1844: Freeman, 98.

²⁴ Carter, E.F. *An Historical Geography of the Railways of the British Isles* (London: Cassell, 1959) 5.

Lords.²⁵ In time the land-owning aristocracy took shares in the railways, adjoining land increased in value²⁶ and thus a compensation system for wealthy landowners was readily created.

In the cities the railway companies found it cheaper to take the lines through private tenanted housing than through industrial premises. Much squalid housing was destroyed and that which remained became visible to travellers for the first time. Displaced tenants had no entitlement to rehousing (until 1885) or to compensation.²⁷ The phenomenon was dealt with by Dickens in *Dombey & Son* when describing Staggs's Gardens²⁸ and in his 'An Unsettled Neighbourhood' in which he rued the unsettling and dissipating effect of the railways.²⁹ Dickens was pleased to see less squalor but not entirely seduced by the hectic, pressurising and ever-expanding railway.³⁰

Similarly in 'Attila in London' the railway developers were lambasted for the devastation they greedily wreaked. People were turned out of their homes, families broken up and jobs lost. The working class paid for industrial and social 'progress'.³¹ Dickens depicted the railways as a symbol of power and ruthlessness in 'Dullborough Town' (otherwise Rochester)³² and regarded coach travel nostalgically in 'An Old Stage-Coaching House'.³³ He contrasted the homes of rich and poor as seen by rail passengers.³⁴

The railways brought social change. Greenwich Mean Time came to be relied on throughout the country. People became more time-conscious and punctual. Dickens, a

²⁵ Freeman 89.

²⁶ Kostal, R.W. *Law and English Railway Capitalism 1825-1875* (Oxford: Clarendon, 1994) ch.4. In Elizabeth Gaskell's *A Dark Night's Work* (Stroud: Nonsuch, 2007 (1855)) the local townspeople wanted to have a line of their own instead of relying on the coach for the ten-mile journey to the nearest station. The heroine Ellinor became financially stable with the compensation paid by the railway company which dug a cutting through her land. 219.

²⁷ Freeman 124. In the 19th century up to 55,000 residents of Manchester lost their homes to the railways; from 1854 to 1900 at least 72000 members of the 'labouring classes' in London lost theirs. Dyos, H.J. 'Some Social Costs of Railway Building in London' *Journal of Transport History* (1957) 3, 23. They included 22,000 to enable St. Pancras station to open in 1862. Barker & Savage 86.

²⁸ *Dombey and Son* XV, 244.

²⁹ *H. W.* (11/11/1854) 10, 242, 289.

³⁰ Mengel, E. (ed.) *The Railway through Dickens's World* (Frankfurt: Verlag Peter Lang, 1989) 22.

³¹ Parkinson, J.C. *A.Y.R.* (26/05/1866) 15, 370, 466.

³² Dickens, C. *The Uncommercial Traveller and Reprinted Pieces* (London: Oxford U.P., 1968 (1858)) XII, 116.

³³ XXIV, 241.

³⁴ House, H. *The Dickens World* (Oxford U.P.: London, 1941) 142.

product of nineteenth century time, was never late, and hated unpunctuality.³⁵ Bradshaw's first Railway Timetable was published in 1838 and, although often impenetrable,³⁶ was regarded as representing the contracted arrival of a train so that in *Denton v Great Northern Railway*, a claim in misrepresentation for expense and loss of profit succeeded against the carrier whose train had been stated to exist in Bradshaw but was cancelled without notice.³⁷ London newspapers became national dailies and W.H.Smith's station bookstalls brought popular literature to a wider readership.³⁸

About half of the carriages in use up to 1900 were privately owned. Anthony Trollope soon learned that he could write when travelling in the relative comfort of his own carriage but reported Thomas Carlyle's disapproval of people reading on trains. They should 'sit still and label [their] thoughts'.³⁹ Similarly George Bramwell read not a brief (when of counsel) nor court papers (when elevated to the bench) nor anything else when travelling by train to Assizes or other trial venues.⁴⁰ *The Lancet* reported that many people 'never can read in railway carriages' and advised that the practice was 'fraught with danger for those with the sensation of swimming in the head'.⁴¹

Railway trains provoked sensations of bewilderment,⁴² shock,⁴³ thrill, exhilaration, fear of danger and even of annihilation (the last portrayed by John Martin (1789-1854) in his 1853 painting *The Last Judgement* showing the end of the world and a railway train tipping into the chasm of the mouth of hell). There was harassment, the feeling of being

³⁵ Ackroyd, P. *The Collection* (London: Chatto & Windus, 2001) 370.

³⁶ Dickens reported his 'brain addled by severe study of Bradshaw' in August 1852: Slater, M. *Charles Dickens* (New Haven: Yale U.P., 2009) 331 and Meason, M.R.L. *A.Y.R.* (11/03/1865) 13, 307, 168 'Wanted to Borrow: One Hundred Pounds' 'to find this gentleman's office was as difficult as to obtain reliable information out of Bradshaw'.

³⁷ (1851) 5 EL. & BL. 860; 119 ER 701.

³⁸ Capper, J. 'Iron Incidents' *H.W.* (31/12/1853) 8, 197, 413.

³⁹ Morrow, J. *Thomas Carlyle* (London: Hambledon, 2006) 19.

⁴⁰ Heward, E. *Lives of the Judges* (Chichester: Barry Rose, 2004) 205.

⁴¹ *Lancet* (25/01/1862) 79, 2004, 109.

⁴² Mary in Mrs Gaskell's *Mary Barton* (1848), on her way from Manchester to Liverpool in 1842 seeking the witness who would save her sweetheart from conviction for murder, had never previously travelled by train 26, 282. Railways had dual characteristics of oppression and release (as in *Mary Barton*), of linkage and separation, and of opportunity and anxiety. Shelston, A. 'Elizabeth Gaskell and the Development of the Railway System' *Gaskell Soc. J.* (2006) 20, 91.

⁴³ The factory reformer Richard Oastler (1789-1861) was imprisoned for debt and in July 1841 required to attend at York Assizes. He was recovering from illness and transported in a first class carriage. He was surprised by the speed, the transience and the containment. He was able to read a book but preferred the variety afforded by coach travel. *Fleet Papers* (07/08/1841) 1, 32, 252.

on tenterhooks and shredded nerves caused in part by the need for punctuality.⁴⁴ Railways were unsettling and threatened people's sense of order and place.⁴⁵ They were 'both agent and icon of the acceleration of the pace of everyday life'.⁴⁶

There was concern about the risks of speedier travel. As late as 1862 *The Lancet* contained several papers on the effects of railway travelling. Diagnoses included congestion of the brain, eye fatigue, giddiness, nerve damage, headaches, damage to skin and mucous passages, colds and consumption (from tunnels), rheumatism, pneumonia and dyspepsia. Those affected included barristers, merchant bankers and government employees. Such travel had little effect on healthy persons but older people, over thirty, were more susceptible.⁴⁷

Here also was ignorance. Some doctors feared brain damage for their patients if they were conveyed at speeds in excess of 30 mph and Mrs Gamp thought that pregnant ladies would be bound to miscarry, thus prejudicing her original work as a midwife, if they came near to or travelled on such as the Antwerp packet powered by a steam engine or 'screeching railroad ones'.⁴⁸ Mrs Maule, sister of Casaubon, in *Middlemarch*, described women of all ages as regarding 'travel by steam' as dangerous so that 'nothing should induce them to get into a railway carriage' and she feared for the cows who would cast their calves and the mares their foals.⁴⁹ Lord Tennyson, in his poem *Locksley Hall*, after attending the opening of the Liverpool to Manchester railway on 15 September 1830 erroneously referred to 'the ringing grooves of change' thinking that the wheels ran in a groove.⁵⁰

That day the former President of The Board of Trade, William Huskisson, a progressive Tory whom Peel wished to bring back into government, was seeking to converse with The Duke of Wellington. The Prime Minister was seated in a carriage and Huskisson foolishly thought it safe to stand on the adjacent line. He was struck by an

⁴⁴ Freeman 83.

⁴⁵ Nelson, H.S. 'Staggs's Gardens: the Railway through Dickens' World' *Dickens Studies Annual* (1974) 41.

⁴⁶ Daly, N. 'Railway Novels: Sensation Fiction and the Modernisation of the Senses' (1999) *ELH* 66, 2, 461, 463. Daly argued that railway travel equated to sensation novels because of its new potential for harm and explained that nervous shock was not always immediately manifest.

⁴⁷ 79, no.'s 2001-2010.

⁴⁸ *Martin Chuzzlewit* 40, 589.

⁴⁹ *Middlemarch* (1872) 553. Set in 1832.

⁵⁰ Roberts, A. (ed.) *Alfred Tennyson* (London: Oxford U.P., 2000) 102 & 571 n.

engine and killed.⁵¹ Railway engines carried connotations of death and destruction. Early passengers embarked in trepidation. Mr Dombey travelled in mournful mood after the loss of his heir ‘away with a shriek and a roar and a rattle’ and ‘like as in the track of the remorseless monster, Death!’⁵² Later Carker, beset with guilt, ‘disordered with wine and want of rest’, loitered at an out of the way station watching several ‘fiery devil[s]’ thundering through. He bought a ticket. ‘Death was on him’. He was amazed to see Dombey, his wronged employer from whom he had fled, emerge onto the platform. He slipped onto the track below, took a step away and:

He ... saw the face change from its vindictive passion to a faint sickness and terror – felt the earth tremble – knew in a moment that the rush was come – uttered a shriek – looked round – saw the red eyes, bleared and dim in the daylight, close upon him – was beaten down, caught up, and whirled away upon a jagged mill, that spun him round and round, and struck him limb from limb, and licked his stream of life up with its fiery heat, and cast his mutilated fragments in the air.⁵³

There was a terrifying vengeance exacted not by the wronged but, accidentally, without evidence of culpability, by the instrument of a railway engine.

Misfortune befell Captain Brown in Mrs Gaskell’s *Cranford* published in 1851 and set in 1836. He was of limited means, one of the few males in Cranford society, but popular nevertheless, and a railway employee. He was at the station waiting for his train, engrossed in the latest edition of *Pickwick*, then appearing in instalments in *Household Words*.⁵⁴ when he spied a small child walking on the line. He jumped down and saved the child but his foot slipped and he was run over. He was much mourned by the gentle ladies of Cranford.⁵⁵

The sensation of high velocity was commonly described.⁵⁶ Mrs Sparsit, keen to witness Louisa’s staircase descent in *Hard Times*, dived into the train and was borne along as if ‘caught up in a cloud and whirled away’:

⁵¹ The blackmailing Raffles in *Middlemarch* on boarding the new-made railway remarked to his fellow passengers that the railway was ‘well-seasoned now it had done for Huskisson’. 416.

⁵² *Dombey and Son* 20, 311.

⁵³ *Dombey and Son* 55, 842.

⁵⁴ *Cranford* 1, 48.

⁵⁵ 2, 55. Mrs Gaskell letter to John Ruskin 24/02/1865: ‘I never meant to write more [of Cranford] so killed poor Capt. Brown, – very much against my will.’ Chapple, J & Shelston, A. (ed.) *Further Letters of Mrs Gaskell* (Manchester: Manchester U.P., 2003) 268.

⁵⁶ *Our Mutual Friend* 4, 11, 731.

All the journey, immoveable in the air but never left behind; plain to the dark eyes of her mind, as the electric wires which ruled a colossal strip of music-paper out of the evening sky, were plain to the dark eyes of her body ...⁵⁷

Increasing demand for train travel provoked innovation.⁵⁸ Tickets were printed with the names of stations, the class of carriage, and the dates of the month. The Clearing House was set up in 1842 and from then, it was possible to purchase a ticket for a journey to any part of the country even if more than one railway company was involved.⁵⁹

The Factory Inspector Leonard Horner travelled from Manchester to Liverpool in July 1837 with the millowner W.R. Greg and he reported that the not unpleasant motion was superior to coaches.⁶⁰ From 1856 Dickens used the train to commute from home, Gad's Hill, at Higham near Rochester, into London. He travelled frequently to France using the steamer and the trains either side of the Channel. He first went to Paris on the South Eastern Railway's 'Double Special Excursion Service' on 22 June 1850, the entire journey taking twelve hours and he recorded the experience in 'A Flight' as 'dreamy pleasure'.⁶¹ In time, the railways became a part of the fabric of the age and travel by rail a concept of modernity with which the up-to-date, well-to-do wished to be associated.⁶² Mrs Gaskell planned her own route from London to Haworth on her way to see Charlotte Bronte in May 1853 and wrote to her daughter Marianne with details of route, cost and timings.⁶³

Yet the lives of the working class poor were most changed by rail travel particularly by excursion trains. Their liking for the seaside transformed the fortunes of resort businesses. Thomas Cook offered a service from London to Brighton in 1845. The line to Blackpool was opened in 1846 and by 1850 ten thousand people were visiting each

⁵⁷ *Hard Times* 2, 11, 202. The electric telegraph was operating from Paddington to West Drayton by 1839. By 1852 it was much in demand and there were 4,000 miles of line and, by 1862, 15,000 miles. Gash, 369.

⁵⁸ Wills, W.H. 'The Railway Wonders of Last Year', *H.W.* (17/08/1850) 1, 21, 481. In 1843 70 railways constructed at a cost of £60m carried 25 million passengers a total distance of 330 million miles at an average cost of under 2d. per mile at an average speed of 24mph.

⁵⁹ Martineau, H. 'The English Passport System', *H.W.* (25/09/1852) 6, 131, 31.

⁶⁰ Lyell, K.M. *Memoir of Leonard Horner* (Westminster: Women's Printing Society, 1890) 1, 328.

⁶¹ Dickens, C. *H.W.* (30/08/1851) 3, 75, 529-533.

⁶² Poetic examples in Warburg, J. (ed.) *The Industrial Muse* (New York: Oxford U.P., 1958) include Henley, W.E. (1876) 'We flash across the Level' & R.L.Stevenson (1885) 'From a Railway Carriage'.

⁶³ Chapple, J.A.V. & Pollard, A. (ed.) *The Letters of Mrs Gaskell* (Manchester: Manchester U.P., 1966). Letter 158, 233. In Mrs Braddon's *Lady Audley's Secret* (Oxford: Oxford U.P., 1987 (1862)), serialised in 1861 in *Robin Goodfellow* until that magazine was discontinued, and then in the *Sixpenny Magazine*, there were descriptions of 24 train journeys of which 14 had detailed timings.

weekend. Excursion trips were promoted by the railway companies, by employers and by such as Friendly Societies. By 1851, three South Western trains were carrying three thousand people to the coast and a similar number of coastal residents into the capital for the day.⁶⁴ In 1851 the Great Exhibition was held at Crystal Palace with the support of and to the delight of Prince Albert. It was visited by six million people, about one-third of the then population of England, most of whom arrived by train, many on excursions.⁶⁵

Dickens deprecated the over-commercialisation of the railways at the expense of safety and complained that blame was rarely accepted. In *Hard Times* he satirised the antics of Harthouse's brother:

Among the fine gentlemen not regularly belonging to the Gradgrind school, there was one of a good family and a better appearance, with a happy turn of humour which had told immensely with the House of Commons on the occasion of his entertaining it with his (and the Board of Directors') view of a railway accident, in which the most careful officers ever known, employed by the most liberal managers ever heard of, assisted by the finest mechanical contrivances ever devised, the whole in action on the best line ever constructed, had killed five people and wounded thirty-two, by a casualty without which the excellence of the whole system would have been positively incomplete. Among the slain was a cow, and among the scattered articles, unowned, a widow's cap. And the honourable member had so tickled the House (which has a delicate sense of humour) by putting the cap on the cow, that it became impatient of any serious reference to the Coroner's Inquest, and brought the railway off with Cheers and Laughter.⁶⁶

Dickens consistently believed that the railways were in need of regulation though not nationalisation. In 'Railway Dreaming' he called for 'centralisation and efficiency; not circumlocution and inefficiency'.⁶⁷ John Hollingshead rued the unregulated building of two separate lines into one manufacturing town whose attractions were unable to sustain both enterprises. The town overtraded itself and neither railway was financially viable. One line died for want of traffic while the other had to be nationalised with bureaucracy and overstaffing.⁶⁸ Later Britain led the way in regulation with a series of statutes.

⁶⁴ Macpherson, O. 'Excursion Trains' *H.W.* (05/07/1851) 3, 67, 354.

⁶⁵ Barker & Savage 83. Passengers from Leeds paid a fare of five shillings for the four hundred mile round trip.

⁶⁶ *Hard Times* 2, 2, 124.

⁶⁷ *H.W.* (10/05/1856) 13, 320, 385.

⁶⁸ Hollingshead, J. 'Bristles and Flint', *H.W.* (04/09/58) 18, 441, 265 & 'Railway Nightmares', *H.W.* (13/11/1858) 18, 451, 505.

Dickens published 'The Steam's Highway' containing criticism of railroads left 'in the absolute keeping of a great number of irresponsible bodies'.⁶⁹

Herbert Spencer in his *Railway Morals and Railway Policy* of 1855 deprecated the wild speculation of 1844-45, complained about the 157 Members of Parliament on the registers of new railway companies (he did not mention judges), and railed against the companies for 'reckless competition and ruinous extensions' so that a quarter of capital so far raised was needlessly spent on contests between companies on duplicate lines. His thrust, as a strong exponent of *laissez faire*, was that some regulation was essential but ineffective interference was no better than the American approach where the railways were wholly left to 'ordinary trading principles without any legislative limit or control'.⁷⁰

There were four main problems of operational safety. The first was that engine drivers often met oncoming unheralded special or experimental trains on their line. It was commonplace for down trains to be sent on the up-line and vice versa. If a train was substantially late, an engine would be sent on the same line to find it. In addition under the 'block system' trains were set away in the same direction at timed intervals but if one train stopped the only remedy was for the guard to run back along the track. The use of the telegraph for traffic control was suggested by Prince Albert in 1853. By the end of the decade the system, though not mandatory, was in general usage and in 1858 it became a requirement for the opening of new lines.⁷¹

Signals were a related problem. Only a red flag and/or a hand-held lamp were initially available. Fixed signals were installed from 1840. At first each signal and set of points had individual control levers. In 'Need Railway Travellers be Smashed?' Dickens described a patented invention of C.F. Whitworth which automatically brought an engine to a halt in the event of the driver passing through an adverse signal. The cost was put at

⁶⁹ A.Y.R. (18/03/1865) 13, 308, 175. The writer suggested nationalisation as the alternative. As early as April 1844 William Galt the author of a pamphlet 'Railway Reform' had argued before the Railway Bills Committee that the Government should purchase all railway property in the United Kingdom.

⁷⁰ Reprinted from *Edinburgh Review* with additions and postscript in *The Travellers' Library* (London: Longman Brown, 1856) 25, 9, 54 & 116. In his *Laissez Faire* Bramwell endorsed Spencer as 'the profoundest thinker of the age' (London: Liberty & Property Defence League, 1882) 6.

⁷¹ Parris, H. (1965) *Government and the Railways in Nineteenth-Century Britain* (London: Routledge & Kegan Paul, 1965) 177.

£25 per engine and Dickens invited support for safer rail travel.⁷² The Hexham solicitor John Oswald Head in ‘Signals and Engine Drivers’ suggested a practice of ‘affirmative signalling’ so that a driver would no longer assume that it was safe to proceed but would instead stand until positively told that it was safe.⁷³ In 1856 came ‘Saxby’s Patent’ by which one lever activated a set of points and the corresponding signal. In 1859 Chambers patented an improved version which interlocked the signal lever and the points lever so that the former could not be activated unless the latter was in the correct position.⁷⁴

The third was lack of brakes. Sometimes the guard’s van and sometimes the fireman’s tender might have a brake but the power of the braking system was rarely proportionate to the length of the train. Not until the Railway Regulation Act 1889 were continuous brakes made compulsory. These braking difficulties were initially related to the inability of guard and driver and of guard and passengers to communicate.⁷⁵ Events on the Bedford to London express in 1866 were related in ‘No Communication’. A faulty oil lamp suspended from the carriage ceiling had set fire to the timbered roof and to tarpaulins lying on it. Doors were opened and umbrellas and flags waved by the passengers who made as much noise as they could but to no avail. Two passengers climbed onto the roof and cut away the burning materials before the train stopped. A director of the railway reprimanded the brave pair for breach of regulation in leaving the carriage when the train was moving. The options had been to break the company’s rules or be burned alive.⁷⁶ The Regulation of Railways Act 1868 required that if a train exceeded 20 mph there must be a method of communication between passengers and the person in charge of the train. The communication cord was not introduced until 1891.

Fourthly, many litigated accidents occurred when either the train was longer than the station platform or the driver was unable to bring his engine to a halt at the

⁷² *H.W.* (29/11/1851) 4, 88, 217. On 02/12/1851 an inquest jury looking into the death of a stoker after two trains collided recommended Whitworth’s invention. *Household Narrative of Current Events* (12/1851) 271.

⁷³ *H.W.* (06/09/1856) 14, 337, 179.

⁷⁴ Parris 187.

⁷⁵ In 1845 Dickens’ dilettante and impecunious friend Count d’Orsay suggested a wire with ringing bell system to connect the guard in the rear carriage with the engine but no progress was made. Foulkes, N. *Scandalous Society* (London: Little Brown, 2003) 335.

⁷⁶ *A.Y.R.* (07/11/1868) 20, 498, 523.

appropriate point so that passengers were faced with the dilemma of alighting in hazardous conditions or, by staying put, risk the inconvenience of being taken on to the next station.

The Railway Department of the Board of Trade, established by the Railway Regulation Act 1840, originally tasked to produce statistics, soon assumed responsibility for public safety. Enquiries were made into the causes of specifically-selected accidents and recommendations made, sometimes to all operators. Information of the latest advances were received and evaluated and, if helpful, circulated. From 1840 there was a statutory responsibility on operators to report accidents but not many complied and the Board often had to rely on newspapers. Accident enquiries regularly resulted in blame being attributed to an individual rather than to the lack of safety equipment or to a defect in the system of work.⁷⁷ Although for passenger-claim purposes the operators were vicariously liable for the acts and defaults of railway employees and subcontractors, the mindset did not allow these shortcomings to be converted into moral failings.

Disasters provoked debate and reform. After the Sonning multiple fatal accident on 24 December 1841, when a Great Western train ran into a fall of earth, the Board's Inspector recommended that buffers be fitted to carriages which should have higher sides. Third class carriages were initially open. A slight impact was sufficient to throw passengers out. Yet there were problems with closed carriages too. In 1842 a bad crash occurred near Paris when occupants died being unable to emerge from burning locked compartments. Notice was circulated by the Board but not all operators took action, probably fearful lest travellers might seek to disembark from a moving train.⁷⁸ The Great Western Railway responded after being subjected to public scrutiny by Sydney Smith.⁷⁹ Smith wrote thrice in May and June to the *Morning Chronicle* criticising 'irresponsible monopolists' and was ready to follow up⁸⁰ by postulating a burnt train of carriages and passengers including 'a stewed duke', 'two bishops done in their own gravy' and

⁷⁷ Parris 144.

⁷⁸ 43.

⁷⁹ (1771-1845) By 1842 friend of Dickens.

⁸⁰ Cheney, E (ed.) 'Letters of Mr Sydney Smith' *Miscellanies of Philobiblon Society* 1877-84, vol.15. Letter to Mrs Fox. Not paginated.

‘lawyers stewed in their own briefs a la maintenon’.⁸¹ The company surrendered before the fourth letter was sent.⁸²

At first there were two classes of trains, first (yellow) and second (blue). Later third class passengers travelled in goods trains described as ‘horizontal shower baths’⁸³ and ‘only one and two degrees removed from cattle pens’.⁸⁴ Soon mixed class trains became the norm. Gladstone, when President of the Board of Trade in Peel’s Government, secured the passing of the Railway Regulation Act 1844 which required operators to run at least one train in each direction every weekday (certain holidays excepted) at fares not in excess of one penny per mile for adults with children under three and up to 56 lb. of luggage travelling free and children between three and twelve at half price.⁸⁵ These became known as ‘Parliamentary Trains’.⁸⁶

Minimum standards were then prescribed for third class passengers. Carriages were to be provided with seats and passengers to be protected from the weather. The new carriages of 160 square feet with seats for fifty-nine people had no windows and, usually, only one door, which, despite the lesson of the 1842 French calamity, and the submissions of Sydney Smith, was often kept locked during transit.⁸⁷ Second class carriages had a roof but were open to the elements at the side.

Segregation of passengers on stations perpetuated class distinction but the classes democratically travelled together in the same unit along the same line and, even if first class was located in the centre of the train (thought to be the safest if an accident

⁸¹ Savoury sauce containing ham and shallots.

⁸² Bell, A. *Sydney Smith* (Oxford: Clarendon, 1980) 205.

⁸³ *Punch* (22/02/1845) ‘The Battle for the Railways’.

⁸⁴ Wills, W.H. & Murray, G. ‘Railway Comfort’ *H.W.* (03/08/1850) 1, 19, 449.

⁸⁵ The Bill was Gladstone’s special project but he perceived a proposal to run such trains on Sundays to be a danger to public morality and his stance initially prevailed. Shannon, R. *Gladstone, God and Politics* (London: Hambledon, 2007) 43.

⁸⁶ *The Mikado* of Gilbert & Sullivan appeared in 1884 and The Mikado’s song *My Object All Sublime* in Act II, directed to letting the punishment fit the crime, included reference to Parliamentary trains. Green, M. (ed.) *Treasury of Gilbert & Sullivan* (New York: Simon & Shuster, 1961) 435.

⁸⁷ Freeman 112.

occurred), all were at risk together.⁸⁸ From 1872 the Midland Railway attached third class carriages to all its trains and in 1875 abolished second class travel.⁸⁹

Excursion trains carried passengers whose fares were much reduced on account of the large numbers certain to travel and which were often paid for by the arranging agency either from its own pocket (e.g. employers) or as agent for the traveller (e.g. on day or holiday seaside trips).⁹⁰

Involvement in a railway collision or other disaster was terrifying. George Walter Thornbury in 'My Railway Collision' described a London barrister travelling to his home county of Wiltshire to argue his first brief. The train hit a goods train. The engine was destroyed and the passengers were fearful, giddy and numbed. The line was soon cleared so that normal traffic might resume. No one admitted blame.⁹¹ Yet the express engine driver had gone too fast in the fog and failed to observe and act upon the signals, and the management allowed the 'goods' onto the express line and operated with an inadequate signals system.⁹²

While the novelists described what it was like to ride in a coach or travel on an early train they did not often recount disasters. There were many accounts of railway crashes in the press, the railway journals and in such as Dickens' *Household Narrative of Current Events* which may explain the paucity. Dickens deprecated the profiteering and argued for safety improvements. His railway wonderment declined after Staplehurst.

Dickens at Staplehurst

In May 1865 he was unwell and having problems with a swollen foot. He travelled to France and stayed with Ellen Ternan. He was anxious to keep secret their relationship. He returned to England by ferry from Boulogne to Folkestone. Ellen Ternan and her Mother travelled with him and, on boarding that 'tidal train', shared a first class carriage.

⁸⁸ Gash 87. In Disraeli's *Sybil* the reactionary Lord de Mowbray feared lest the railway would have 'a dangerous tendency to equality' (Oxford: Oxford U.P., 1998 (1846)) 101 but Walter Gerard, father of Sybil, considered that 'the railways would do as much for mankind as the monasteries did', 82.

⁸⁹ Acworth, W.M. *The Railways of England* (London: Murray, 1900) 205. By 1870 over 88% of all passengers on the Midland travelled third class and by 1888 the proportion was nearly 95%. 206.

⁹⁰ Workmen's trains came later and by 1882 over 25,000 workmen's tickets were issued in London alone

⁹¹ Nina Bawden, who lost her husband and who was severely injured in the Potters Bar disaster of 10/05/2002 wrote in *Dear Austen* (London: Virago, 2005) 21 of the overriding instinct of railway managers, the 'snakeheads', never to admit responsibility.

⁹² *A.Y.R.* (17/12/1859) 2, 34, 176.

Dickens had separated from his wife in 1858, to the disapproval of many friends, and his relationship with the young actress lasted from 1857 until his death. It originally had an artistic basis but became intimate.⁹³ There were 110 passengers on the train which had covered thirty miles to reach Staplehurst. There a gang of platelayers worked on a bridge fifteen feet above the modest River Beult replacing lengths of iron rail. Despite seven brakes being fitted⁹⁴ the train came off the track so that:

At the end of the bridge ... the engine and tender lay partly turned over against a hedge. Immediately behind the tender stood a brake, and a few paces back, suspended from the top of the bridge, with one end buried in the ditch below, was a first class carriage. At the other end of the bridge, stood upon the line the guards' and luggage vans, which were in the rear of the train, and which were altogether uninjured. A little in front of them were two second-class carriages, with one end resting on the bridge and the other in the ditch ... Between these two extremes and all across the ditch, huddled and crushed and forced into one another, lay the five or six first-class carriages which formed the centre of the train. Through their broken sides and shattered windows were to be seen protruding human legs, and arms, and heads, and from every one of them was to be heard the piercing cry of human suffering.⁹⁵

There were ten fatalities and forty injuries. Charles Dickens was noted as an uninjured passenger. Dickens reassured his two companions and with the use of planks he extricated them from the carriage and then went to help the dying. He and other survivors were later taken to London by emergency train. The next day he wrote to the Station Master at Charing Cross to ask whether specified items of jewellery (presumably the property of Ellen Ternan) had been retrieved. The letter was in his own hand rather than in that of his secretarial sister-in-law Georgina.⁹⁶ Dickens clearly knew of the

On 29/12/1845 *The Times* reported the inquest into the Thetford fatal accident five days earlier caused by the driver urging his powerful locomotive to excess speed in order to make up lost time. The directors were accused of mismanagement. Other journalists were less critical. In the *Cambridge Chronicle & Journal* for 27/12/1845 the Thetford accident was reported on p.3 but on the front page it was contended that the railway system should not be deserted 'because a herd of stags have been scared from it'.

⁹³ Tomalin, C. *The Invisible Woman* (London: Penguin, 1991). Dickens' third child Kate Perugini (1839-1929) related that her father and Ellen Ternan had a son who died in infancy. Storey, G. *Dickens and Daughter* (New York: Haskell, 1971 (1939)) 94. She probably became pregnant in the spring of 1862 and bore the child early in 1863. The child did not survive but the date of death is not known. Garnett, R.R. 'The Crisis of 1863' *Dickens Quarterly* (09/2006) 23, 3, 182. Ellen may have been pregnant again in early 1867 when she was moved to Peckham but any child did not survive. Isba, A. *Dickens's Women* (London: Continuum, 2011) 122. She later married George Wharton Robinson and in 1894 translated *Zermatt and the Valley of the Viege* by Emile Yung : Bowen, J. 'Acts of Translation' *TLS* (02/11/2007).

⁹⁴ (10/06/1865) *The Times* (also 12/06/1865).

⁹⁵ (17/06/1865) *The Illustrated London News* 'Dreadful Accident on the South Eastern Railway'.

⁹⁶ *Pilgrim Letters* 11, 53.

railway company's responsibility to compensate those who suffered financial loss caused by such an accident. It is not known if the jewellery was ever found and restored to Ellen, but, if not, Dickens either avoided publicity by not pressing the claim or he used his position to secure an early and adequate settlement without recourse to lawyers. He did not attend the Inquest and so avoided revealing the identity of his companions.

Ellen probably injured her left arm in the accident and suffered nervous shock. Dickens thereafter referred to her as 'The Patient' and her friends thought her poor state of health in later years had been caused by an accident. There is no record of any further claim made by Ellen or on her behalf even though there was no contestable liability issue. The platelayer foreman mistook the day and therefore the hour that the tidal train would arrive, the foreman carpenter's timetable had been cut in two in an accident on the rails and he had not sought a replacement, the gang had not displayed a red flag at the regulatory distance, the inspector of the Permanent Way had not inspected and reported the ten-week work period so that printed notices could be issued, the guard in the leading van of three was late in applying his brake, the train was probably travelling faster than the driver admitted because it was two minutes behind schedule and no means of communication was provided for him with the guards.⁹⁷ In addition the carriages were of flimsy wooden construction and 'shattered themselves to pieces'.⁹⁸

The casualties may have been less if the viaduct had been properly constructed. It was a cast iron structure which broke asunder when the tender left the rails and ran over the timber baulks. The girders were troughs of cast metal laid longitudinally with timber baulks positioned inside to form a platform for the track. The open top of the trough had allowed rainwater to collect and cause the baulks to rot.⁹⁹

In a letter to his Swiss friend W.W.F de Cerjat of 30 November 1865¹⁰⁰ Dickens criticised the South Eastern Railway for its failure to provide its 'head workman' with a timepiece. He also responded to Lord Shaftesbury as to strengthening walls on bridges and viaducts and complained of the strong parliamentary railway interest.¹⁰¹

⁹⁷ Rich, F.H. Capt. R.E. *Reports of Inspecting Officers of the Railway Department ... upon Certain Accidents on Railways for June 1865, Part IV* (London: Eyre & Spottiswood, 1865).

⁹⁸ Nock, O.S. *Historic Railway Disasters* (London: Allen, 1983 (1966)) 15.

⁹⁹ Lewis, P.R. 'Dickens and the Staplehurst Rail Crash'. *Dickensian* (2008) 476, 104, 3, 197.

¹⁰⁰ *Pilgrim Letters* 11, 116.

¹⁰¹ Referred to in letter to de Cerjat.

Dickens helped another passenger E.S.N. Dickenson at the scene and subsequently. The young Cornet had intended to serve with the Army in India. Dickens shepherded him to Charing Cross and kept in touch with him for many months. As unofficial claims agent he breached client confidentiality when writing to John Forster later in June :

The railway people have offered, in the case of the young man whom I got out of the carriage just alive, all the expenses and a thousand pounds down. The father declines to accept the offer. It seems unlikely that the young man ... would ever be passed for the Army now by the Medical Board. The question is, how far will that contingency tell, under Lord Campbell's Act?¹⁰²

Dickens had misunderstood that Act. It may have encouraged the pursuit of negligence claims but its remit was restricted to providing families with a right of action in fatal claims where hitherto there had been none.¹⁰³ However Dickens clearly knew that compensation in injury cases was not to be confined to general damages for personal injuries and to past financial loss.

Dickens himself did not pursue a claim. The concept of claiming damages for purely psychiatric damage was not yet established.¹⁰⁴ As Richard Bradshaw in Mrs Gaskell's *Ruth* (1853), he wanted to keep secret his private shortcomings.¹⁰⁵ Thus he told his friends of his experience without mention of Ellen and on 11 June 1865 wrote to Angela Burdett Coutts (who particularly disapproved of his matrimonial difficulties):

I was in the carriage that did not go over the bridge but caught in turning and hung suspended over the ruined brickwork. I worked hard afterwards among the dead and dying, and it is that shock - not the shock of the stumbling carriage, which was nothing - that I feel a little. I could not have imagined so appalling a scene.¹⁰⁶

His conduct at the scene was exemplary. He wrote to his friend and solicitor, Thomas Mitton, on 13 June 1865. He had retrieved his brandy flask, filled his hat with water and then:

¹⁰² *Pilgrim Letters* 11, 66. Young Dickenson, aged 17, was a surprise guest for the 1865 Christmas festivities at Gad's Hill. Tomalin, C. *Charles Dickens – A Life* (London: Viking, 2011) 347.

¹⁰³ Fatal Accidents Acts 1846 which created a right of action in fatal claims and abolished deodands. The action would be for the benefit of the spouse, parent and child of the deceased. See ch.6.

¹⁰⁴ The notion of awarding damages to Plaintiffs who had not been physically injured but who had been in fear of injury was mooted in *Coultas v Victorian Railways* (1888) 13 App. Cas. 222, an Australian Appeal to the Privy Council when floodgate fears defeated the Plaintiff's claim. The first such Plaintiff to recover did so in *Dulieu v White* [1901] 2 KB 669 where the court cast doubt on *Coultas*.

¹⁰⁵ *Ruth* 3, 31, 337. Richard was a passenger on the Dover coach which overturned but he had dealt fraudulently with a client's shares.

¹⁰⁶ *Pilgrim Letters* 11, 51.

Suddenly I came across a staggering man covered with blood (I think he must have been flung clean out of his carriage) with such a frightful cut across the skull that I could'nt bear to look at him. I poured some water over his face, and gave him some to drink, and gave him some brandy, and laid him down on the grass, and he said 'I am gone' and died afterwards. Then I stumbled over a lady lying on her back against a little pollard tree, with the blood streaming over her face (which was lead colour) in a number of distinct little streams from the head. I asked her if she could swallow a little brandy, and she just nodded, and I gave her some and left her for somebody else. The next time I passed her she was dead. Then a man ... came running up to me and implored me to help find his wife, who was afterwards found dead. No imagination can conceive the ruin of the carriages, or the extraordinary weights under which the people were lying, or the complications into which they were twisted up among iron and wood, and mud and water.¹⁰⁷

He suffered significant harm as a result of his involvement although there was no immediate specific physical injury. It was soon recognised that a passenger might not be conscious of having suffered physical injury during the first two days after an accident¹⁰⁸ and might well suffer nervous shock without physical injury.¹⁰⁹

Days later Dickens was still shaking:

I cannot do anything but keep quiet without turning rather faint and sick but thank God I am in all respects uninjured.¹¹⁰

He wrote to Forster later in the month:

I am getting right though still low in pulse and very nervous. Driving into Rochester yesterday I felt more shaken than I have since the accident. I cannot bear railway travelling yet. A perfect conviction, against the senses that the carriage is down on one side (and generally that is the left and not the side on which the carriage in the accident really went over) comes upon me with anything like speed and is inexpressibly distressing.¹¹¹

His left side, the site of his renal colic, seemed 'down'. Although he soon returned to train travel he could not abide the speed of expresses and found their noise distressing. Two years later he was still suffering sudden vague rushes of terror. Slight jolts in a

¹⁰⁷ 11, 56. For his services to the injured he was presented by the railway company with a piece of plate. Forster, J. *The Life of Charles Dickens* (London: Palmer, 1928) 711, n.470.

¹⁰⁸ *Lancet* (02/02/1867) 89, 2268, 159.

¹⁰⁹ (13/04/1867) 2276, 389. Three months before Staplehurst Richard Joseland, a Worcester wine merchant and a passenger on a crashed train, was not conscious of having been injured but after helping the wounded became seriously ill suffering from headaches, spasms and bad dreams. He was awarded £6,000. Lobban 12, IV, 993.

¹¹⁰ Letter to Sir George Russell 13/06/1865 *Pilgrim Letters* 11, 57. He fired off a number of letters about his post accident experiences but many had to be written by Georgina.

¹¹¹ 11, 65. The condition was first known as 'commotion shock' and later as 'railway spine neurosis'. Aird, C. 'Dickens and Railway Spine Neurosis' *Dickensian* (2012) 108, 1, 486, 25.

railway carriage caused him to panic. On journeys with his family he would fall into paroxysms of fear. Yet his energy was hardly diminished and he embarked on an arduous reading tour around the country, travelling mainly by train and he sailed to America and back for an intensive and successful second visit. Having reached Scotland via Manchester and Liverpool, George Dolby¹¹² recounted Dickens' regard for slow trains as the greater of two evils:

After this journey [Mr Dickens] complained very much of the effects of travelling by express trains, and he kept constantly referring to the Staplehurst accident which was ever present in his mind.¹¹³

This plan [to travel by slow trains] seemed to dispel his nervousness to a great extent but it had to be given up, as the delay and monotony of these journeys were almost worse than the shaking of the expresses.¹¹⁴

Even so he wrote to Georgina from Liverpool on 15 February 1867:

I am not quite right within, but believe it to be an effect of the Railway Shaking. There is no doubt of the fact that, after the Staplehurst experience, it tells more and more, instead of (as one might have expected) less and less.¹¹⁵

By 1869 he was still 'greatly shaken when travelling on express trains'¹¹⁶ and worn out by the rapidity:

[I] began to feel giddy, jarred, shaken, faint, uncertain of voice and sight and tread and touch, and dull of spirit.¹¹⁷

His son thought that he never altogether recovered from Staplehurst and he died five years after it to the day.¹¹⁸

Dickens never incorporated into his later work any fictional account of either a railway crash or the experiences of a rescuer. It was either too much for him to contemplate or he sought to preserve secrecy as to Ellen Ternan's presence on the train. However Andrew Halliday who contributed to *Mugby Junction* with his story 'Branch

¹¹² George Dolby was Dickens' Manager from 1866. He reported that Dickens was not discomfited on 25 April 1866 when, on their way to a reading in Manchester it was discovered that the carriage in which they had travelled was ablaze. Dolby, G. *Charles Dickens as I Knew Him* (London: Everett, 1912 (1885)) 29. Dickens was also calm in the face of danger when reading in theatres. See ch.6.

¹¹³ Dolby 67.

¹¹⁴ 68.

¹¹⁵ *Pilgrim Letters* 11, 314

¹¹⁶ Letter to C.E.Norton 24/04/1869 *Pilgrim Letters* 12, 343.

¹¹⁷ 'A Fly Leaf in a Life' *A.Y.R.* (22/05/1869) 25 NS, 589.

¹¹⁸ Ackroyd 958.

Line. The Engine Driver' chillingly described a driver who took care of his engine and fellow workers but did not count passengers in his casualty statistics.¹¹⁹

Dickens' entitlement to damages would be clear today. He was a primary victim who transpired to have suffered material personal injury and a rescuer who, after dealing with casualties, developed a psychological condition.¹²⁰

It became clear that railway travel was quicker, more dangerous and more likely to result in injuries and fatalities. Dickens in his journalism identified safety deficiencies and argued both for more responsibility and for state regulation. One month after Staplehurst he wrote:

Every day of my life, I think more and more what an ill-governed country this is, and what a pass our political system has got to. Here has this enormous Railway No-System grown up without guidance, and now its abuses are so represented in Parliament by Directors, Contractors, Scrip Jobbers ... that no Minister dare touch it.¹²¹

His writer called for a code of practice for engine drivers and managers and for safety information to be provided to the public.¹²² He equated poor safety with a lack of regulation whereas Baron Bramwell opposed regulation and was reluctant to award damages to passengers suing railway operators.

Railways and the Common Law

The coming of the railways brought a vast increase in the number of accidents, injuries and actions for damages. Victorian passengers, expecting to be reimbursed for losses and

¹¹⁹ Halliday, A. *A.Y.R.* (25/12/1866) 16, 597. The circulation of that Christmas issue reached 255,380 by 01/01/1867 when Dickens wrote to Forster. *Pilgrim Letters* 11, 294.

¹²⁰ In *Chadwick v British Railways Board* [1967] 1 WLR 912 the Plaintiff's claim arose from the Lewisham train disaster of 4 December 1957 in which ninety died. The collision of two trains occurred 200 yards from his home. Chadwick, a 'cheerful', part-time window cleaner, went to the scene to help. He was small in stature and able to crawl into carriages and, under supervision, administer injections and generally help the casualties. As a result of his experience he stopped working some five weeks after the accident and developed psychological problems. His health deteriorated, he spent six months in a mental hospital and he died from unrelated causes in 1962. Waller J. recorded that previously he had been hard-working and had operated a successful business from 1945. The problem was not caused by his being in danger but, as a rescuer, he was within 'the area of contemplation' and thus his injury was foreseeable and merited compensation. The decision in *Chadwick* was approved by the House of Lords in *White v South Yorkshire Police* [1999] 2 AC 455 although Lord Steyn's new definition of a rescuer as a primary victim as one who 'objectively exposed himself to [physical] danger or reasonably believed that he was doing so' did not lie happily with it. Also Mullender, R. & Speirs, A. 'Negligence, Psychiatric Injury, and the Altruism Principle' *Oxford Journal of Legal Studies* (2000) 20, 4, 645.

¹²¹ Letter to his friend Sir Edward Bulwer Lytton 06/07/1865 *Pilgrim Letters* 11, 68.

¹²² *A.Y.R.* (04/01/1868) 19, 454, 80. 'Railway Thoughts'.

injuries, were early exponents of Compensation Culture. Railway companies were more substantial targets than individual coach operators. Dilemmas as to the award of damages to the holder of a short distance ticket where the price of the ticket was but a tiny fraction of the value of the claim were overcome. Efforts were made to restrict the entitlement of passengers on Parliamentary trains, excursion trains and workmen's trains who had paid a much-discounted fare.¹²³

Coach passengers had been pioneers of travel and those injured on their journeys became pioneers of litigious claims for damages for personal injury. When pursuing such claims and/or claims for loss of luggage, plaintiffs relied on the law of bailment and the courts' strict approach to claims in respect of freight lost or damaged en route.¹²⁴ The same principle applied to accompanied luggage provided the plaintiff had paid extra for its transportation.¹²⁵ As the law developed passenger liability transpired to be less strict.¹²⁶ Operators were not to be liable for hidden construction defects.¹²⁷ The first reported overturn personal injury case was *White v Boulton*¹²⁸ where Lord Kenyon said that when coaches carried fare paying passengers, the proprietors were bound to carry them safely and properly.¹²⁹ The success of such claims depended on bailees and coach operators being vicariously responsible for the acts and defaults of their servants and agents.¹³⁰

Because many rail passengers travelled on tickets purchased by such as employers or Friendly Societies the courts were happy to afford them a remedy by countenancing a claim brought in negligence rather than in contract. There had been no attempt to limit the damages of those injured when travelling on the outside of a stagecoach merely

¹²³ 'By Workmen's Train' AYR (28/08/1882) 726 NS, 328.

¹²⁴ *Coggs v Bernard* (1703) Holt K.B. 131; 90 ER 971&1190. Act of God and Enemies of the King were the only defences. Carriers were in the nature of insurers. *Forward v Pittard* (1785) 1TR 27; 99 ER 953.

¹²⁵ *Middleton v Fowler* (1695) Holt K.B. 130; 90 ER 471 & 1 Salk. 282; 91 ER 247.

¹²⁶ *Aston v Heaven* (1797) 2 Esp. 533; 170 ER 445 at odds with *Ansell v Waterhouse* (1817) 6 M&S 385; 105 ER 1286 and with *Bretherton v Wood* (1821) 3 B. & B. 54; 129 ER 1203.

¹²⁷ *Christie v Giggs* (1809) 2 Camp. 79; 170 ER 1088 at odds with *Israel v Clark & Clinch* (1803) 4 Esp. 259; 170 ER 711 and *Sharp v Grey* (1833) 9 Bing. 457; 131 ER 457 but approved in the railway action *Readhead v Midland Railway* (1867) LR 2 QB 412 & (1869) 4 LR Exch. 379.

¹²⁸ (1791) Peake 113; 170 ER 98.

¹²⁹ This was a passenger coach which also carried mail. The Bath theatre manager John Palmer in 1784, persuaded the Post Office to the practice, the Post Office providing an armed guard for each journey. Barker & Savage 49.

¹³⁰ *Drummond v Macgregor* (1813) SC, VIII, 232. In England *Powles v Hider* (1856) 6 EL&BL 206; 119 ER 841 to similar effect.

because they had not paid full fare. Clearly a plaintiff-employer who bought the ticket but who did not travel had no claim when the servant-traveller was injured.¹³¹ A passenger who had not bought a ticket might still succeed. In *Harrison v Great Northern Railway*¹³² the Plaintiff was a reporter with *Bell's Life*.¹³³ He went to the races using a ticket which was not transferable and which bore the name of another reporter. He faced a fine or having to pay the fare. The ticket had been examined by a porter and it was usual practice for these tickets to be used by whoever was assigned to the task. George Bramwell argued for the Defendant that the ticket was not transferable, there was no authority to allow the Plaintiff to board the train and the practice of allowing such a course was not approved. Coleridge J. advised that the Plaintiff was not a trespasser and the jury awarded him £400. The very fact of the Plaintiff being on the train was enough to attract a duty of care.¹³⁴

In *Collett v London and North Western Railway*¹³⁵ the injured Plaintiff was a Post Office employee and the mail was carried by rail pursuant to statute.¹³⁶ Bramwell, unusually, appeared for the Plaintiff but was not called upon. Campbell L.C.J. said that the Defendant's duty to the Plaintiff did not arise in contract and Erle J. imposed a duty on the railway to carry public servants safely.¹³⁷

The curious concept of 'Association' was judicially advanced in *Thorogood decd. v Bryan*¹³⁸ (Dickens' friend Talfourd appearing as counsel for the Defendant) to the effect that a Plaintiff would not establish liability if there was negligence on the part

¹³¹ *Alton v Midland Railway* (1865) 19 CB NS 213; 144 ER 768.

¹³² (1854) 10 Exch 376.

¹³³ *Bell's Life* was published weekly, was Liberal in politics and contained sporting news and comic features. Dickens wrote for it as 'Tibbs' from 09/1835 until 01/1836 a series of articles on streets and characters.

¹³⁴ Similarly *Marshall v York Newcastle & Berwick Railway* (1851) 11 CB 655; 138 ER 638 & *Austin v Great Western Railway* (1867) LR 2 QB 442.

¹³⁵ (1851) 16 QB 984; 117 ER 1158.

¹³⁶ Conveyance of Mail by Railways Act 1838.

¹³⁷ In *Martin v Great Northern Railway* (1855) 16 CB 179; 139 ER724 the successful Plaintiff had been running on the track to catch his train when he tripped over a switch handle. Jervis C.J. decided that the action was founded on contract and that there might be some distinction if it was founded simply on negligence and Maule J. rode two horses in expressing doubt 'that this kind of action for negligence – for tort founded on contract is the same as a collision between two vessels on a river or two vehicles on a road – where there is no special duty'. Also *Muschamp v Lancaster & Preston Junction Railway* (1841) 8 M&W 421; 151 ER 1103 where the Plaintiff, a Lancashire stonemason, recovered the value of his tools carried by four separate railway companies pursuant to his contract with one.

¹³⁸ (1849) 8 CB 115; 137 ER 452. See ch.5.

of the driver of the coach or ‘bus in which the Plaintiff travelled. The concept may have been a makeweight attempt in contract cases to equate with the complete defence of contributory negligence. Coltman J. thought that the ‘deceased’ passenger,

having trusted the party by selecting the particular conveyance, has so far identified himself with the owner and her servants that if any injury results from their negligence, he must be considered a party to it.

The notion was not fully accepted either here or in America where it was named ‘the doctrine of imputed negligence’¹³⁹ and was later disapproved by the House of Lords in *Mills v Armstrong: The Bernina*¹⁴⁰ where Lord Herschell was unable to comprehend it because the Plaintiff had no control over the movement of the ‘bus. Lord Bramwell contrived not to dissent in *The Bernina* but yet supported *Thorogood* even though the cases were indistinguishable.¹⁴¹

Similarly an infant of five years was injured and his grandmother killed by a goods train as she took him across the track to the opposite platform for their train to Berwick upon Tweed. No warning of the goods train had been given by the stationmaster when the tickets were issued and there was no restriction on passengers emerging from the ticket office where they had been waiting and, usually, no restriction on crossing the line. The grandmother was found to have been negligent for not keeping a lookout before and during the crossing of the line and the infant Plaintiff ‘so identified with her’ that his action could not be maintained. Cockburn L.C.J. thought there was an implied condition that the child was to be conveyed subject to due and proper care on the part of the person having it in charge and Pollock C.B. likened the infant Plaintiff to a valuable chattel committed to the care of an individual. Thus, despite the child’s lack of blameworthiness, the existence of a contract and the material defaults of the stationmaster, negligence of the plaintiff’s grandmother scuppered the claim. Baron Bramwell agreed:

In form the action is for a wrong; but it is in fact for a breach of duty created by contract. The Plaintiff could only be lawfully on the railway if he had become a passenger through the instrumentality of himself or another. There must be a contract or duty. The Company did not contract a duty any different from that to the adult [otherwise the Defendant would be]

¹³⁹ Friedman, L.M. *A History of American Law* (New York: Touchstone, 1985 (1973)) 476.

¹⁴⁰ (1888) 13 App.Cas. 1.

¹⁴¹ In *Child v Hearn* (1874) LR 9 Ex 176 Bramwell B. found against the Plaintiff, a railway platelayer, who when travelling on a hand-propelled trolley, collided with the Defendant’s pigs which had escaped through a fence which the Plaintiff’s employers should have maintained because the Plaintiff ‘identified’ with them.

responsible for what would have occasioned no mischief but for the negligence of a person having the custody of the Plaintiff. The Plaintiff was under the direction and control of a person who, with the Plaintiff, was wrongfully on the railway.¹⁴²

A railway operator's duty to deal properly with luggage continued until it was put into the Plaintiff's hackney carriage by the Defendant's porter. It was the duty of a common carrier to warrant safe and secure carriage for her luggage. Negligence was immaterial and the Plaintiff did not have to allege fraud.¹⁴³ That line was not followed by the Court of Appeal including Bramwell L.J. in *Bergheim v Great Eastern Railway*.¹⁴⁴ However the majority in the House of Lords disapproved of *Bergheim* in *Bunch v Great Western Railway*.¹⁴⁵ Mrs Bunch, with a bag and two items of luggage, arrived at Paddington where a porter promised to put the three items onto the Bath train when it arrived so the Plaintiff went off to meet her husband and to obtain her ticket. On her return both bag and porter had disappeared. Four Law Lords held that it was reasonable for the Plaintiff to entrust her luggage to the porter at that time so the Defendant was liable as a common carrier. Lord Bramwell dissented saying that as the train had not arrived the porter could not be said to have acted as servant of the Defendant. He thought that the Plaintiff should have used the cloakroom and had imposed an unfair burden on the porter but he failed to address the porter's acceptance of the items. He argued that the porter could not, by his actions, impose extra duties on his employers but he was again trying to ignore the established principle of vicarious liability. In his dissent he described the majority decision as 'contrary to law and justice' and his idea of justice as protecting such defendants from findings of liability:

I make no remark on other authorities beyond this, that they show a generous struggle on the one hand to make powerful companies liable to individuals, and, on the other hand, an effort for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly.¹⁴⁶

¹⁴² *Waite v North Eastern Railway* (1858) EL BL & EL 719; 120 ER 679. The Plaintiff was only 'wrongfully' on the line because of his grandmother's decision to cross at that time.

¹⁴³ *Richards v London Brighton & South Coast Railway* (1849) 7 C&B 839; 137 ER 332.

¹⁴⁴ (1878) 3 CPD 221. Similarly *Talley v Great Western Railway* (1870) LR 6 CP 44.

¹⁴⁵ (1888) 13 App Cas 31.

¹⁴⁶ 51.

The judges were often perplexed as to whether the liability of railway operators was strict or any different from that imposed on coach operators.¹⁴⁷ Despite the view of Lord Denman in *Carpue v London and Brighton Railway*,¹⁴⁸ liability was found to be qualified in *Withers v Great Northern Railway*.¹⁴⁹ An express train travelling at 55mph collided with a five year old embankment which had collapsed onto the track in heavy rain. None of the witnesses had encountered such a flood before. Erle J. found that this was an extraordinary accident which no prudence could guard against or foresee and Baron Bramwell placed the onus on the Plaintiff to prove negligence. The excessive speed of the train in poor conditions did not trouble him.¹⁵⁰ The application of *res ipsa loquitur* was not considered. A contrary view on similar facts was taken by the Privy Council in *Braid decd. and Fawcett decd. v Great Western Railway Company of Canada*.¹⁵¹ Lord Chelmsford thought that Baron Bramwell's judgment in *Withers* was inconsistent with his decision in *Ruck v Williams*¹⁵² where he had found for the Plaintiff against the Cheltenham Commissioners who had failed to fit a penstock or flap when constructing new sewers. Baron Bramwell had there said:

Negligence is a relative term: it must mean negligence with reference to some circumstances of time, place or person: ... there was no negligence in not anticipating that which was not to be anticipated, ... and there would have been no negligence ... and no liability ... But with respect to the penstock or flap the case is different.

The Baron suggested that 'there is nothing so certain as the unexpected' when considering storms. The Defendant should have guarded against an event which might well happen in fifty years. Lord Chelmsford found that the Defendants in *Braid and Fawcett* should have constructed a line capable of withstanding Canada's climate.

The position was different in respect of mechanical failures. In *Readhead v Midland Railway*¹⁵³ a shattered wheel had caused the derailment but the defect was latent. Nine

¹⁴⁷ In *Grote v Chester and Holyhead Railway* (1848) 2 Ex. 250; 154 ER 485 the Plaintiff avoided testing whether liability was strict by suing the owner of the bridge which collapsed as he was carried over it.

¹⁴⁸ (1844) 5 QB 747; 114 ER 1431.

¹⁴⁹ (1858) 1 F&F 165; 175 ER 674.

¹⁵⁰ Similarly in *Bird v Great Northern Railway* (1858) 28 LJ Exch. 3 where the engine left the line, Pollock C.B. thought that the onus to prove negligence rested with the Plaintiff and that the Defendants should escape liability since their duty was not to carry safely but only with reasonable care.

¹⁵¹ (1863) 1 Moore NS 101; 15 ER 640.

¹⁵² (1858) 27 LJ NS Exch. 357.

¹⁵³ [1867] LR 2 QB 412 & [1869] 4 LR Exch.379 following earlier decisions in *Stokes v Eastern Counties Railway* (1861) 2 F &F 691 (wheel tyre); 175 ER 1243, *Ford v London and South Western Railway* (1862)

out of the ten appeal judges (Blackburn J. dissented) found for the Defendant. Lush J. concluded that a carrier of passengers did not have the same control over them as he had over goods nor the same opportunities of abuse and misconduct. The carrier was not an insurer. Blackburn J. acceded to that view in *Gee v Metropolitan Railway*. The operators were under a duty to take all reasonable care but the duty did not extend to carry safely 'at all events',¹⁵⁴

So in *Hart v Lancashire and Yorkshire Railway*¹⁵⁵ where the engine driver had a fit and his engine ran away, and the pointsman had the invidious choice of directing the engine to collide with the down express from Manchester or the up express from Rochdale, the court found for the Defendant and the pointsman, who had done his best, was acquitted of blame. After the accident a supplementary siding had been constructed onto which a runaway engine might pass. Baron Bramwell agreed with his three colleagues that this was not evidence of negligence:

... people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be ... to hold that, because the world gets wiser as it gets older, therefore it was foolish before.¹⁵⁶

Thus, improved post-accident arrangements were not prima facie evidence of negligence and liability would not attach despite system deficiencies. Today's judges often find that what was done post-accident could just as easily have been done pre-accident.

Hart was probably the first civil case in which the defence of automatism succeeded. There was no evidence of any particular enquiry made by the Defendants as to the driver's pre-accident medical history though the trial judge told the jury that 'the company did not know, nor was it proved that he was liable to fits'.¹⁵⁷ Baron Bramwell envisaged the pointsman being liable personally:

2 F&F 730; 175 ER 1260 (wheel) and *Dawson v Manchester Sheffield and Lincolnshire Railway* (1862) 5 LT 682 (fore-axle).

¹⁵⁴ (1873) LR 8 QB 161.

¹⁵⁵ (1869) 21 LT NS Ex. 261.

¹⁵⁶ 263.

¹⁵⁷ The decision is in tune with modern tort decisions involving road traffic collisions where there is no contractual relationship between the parties. Reliable recent authorities include *Waugh v Allan* [1964] SLT 173 and *Roberts v Ramsbottom* [1980] 1 AER 7 but not *Mansfield v Weetabix* [1998] 1 WLR 1263 where the Defendant who was twice, pre-accident, on notice of a real problem with his driving, was fortunate to

But, nevertheless, the man *did it*; it was his own voluntary and wilful act; and if the truth must be spoken, I cannot see what answer he would have had if an action had been brought against him.¹⁵⁸

This illogical approach to the pointsman's dilemma reveals the Baron's preference for personal rather than corporate responsibility and his lack of enthusiasm for the principle of vicarious liability. In *Collett v Foster*,¹⁵⁹ concerning the liability of a client for the unlawful excesses of her attorney, the Baron, one year into his judicial career, had reluctantly agreed with his brethren as to the outcome of the action though not with their line of reasoning:

But can this Defendant be made liable for an act of the attorney which he was not authorised by law to do? I have a great desire in all cases to make the actual wrongdoer alone responsible and to limit the doctrine of '*respondeat superior*'.¹⁶⁰

In *Hart* he thought of a way to make the pointsman personally liable but then remembered that the Defendants were vicariously responsible for the acts of the pointsman. He did not favour a burgeoning of the unruly tort of negligence. His colleagues Barons Channel and Cleasby were clear that the pointsman had done his best and was not to blame and that the employers were in no worse position.¹⁶¹

From 1865 'overshoots' were often litigated. The ability of an engine driver to bring his train to a halt depended partly on his skill and experience but mainly on the efficacy of the train's braking system. There was no system of communicating with passengers who at one end of the train had the dilemma of staying put until the next station with consequent inconvenience and expense or of seeking to descend at a point where there was no platform. The judges did not invariably find that if no advice was given by train and/or station staff, passengers were acting reasonably in trying to disembark.¹⁶² The

escape liability. Mullender, R. 'Fault, Fairness and Automatism in the Law of Negligence' *Juridical Review* (1998) 128 & 'Negligence, the Personal Equation of Defendants and Distributive Justice' *Tort L. R.* (2000) 8, 211.

¹⁵⁸ *Hart* 263.

¹⁵⁹ (1857) 2 H & N 355; 157 ER 147.

¹⁶⁰ *Collett* 147. Similarly Bramwell L.J. in *Weir v Bell* (1878) 3 Ex.D 238, 243 on liability for a fraudulent prospectus prepared by brokers.

¹⁶¹ *Hart* 263.

¹⁶² The Plaintiffs succeeded in *Foy v London & Brighton Railway* (1865) 18 CB NS 225; 144 ER 429, *Praeger v Bristol & Exeter Railway* (1869) 23 LT NS 366 & 24 LT NS 105, *Whittaker v Manchester & Sheffield Railway* (1870) referred to in *Cockle* but otherwise unreported, *Cockle v London & South Eastern Railway* (1872) LR 7 CP 321, *Weller v London & Brighton Railway* (1874) LR 9 CP 126 and *Robson v North Eastern Railway* (1875) LR 10 QB 271. Although Bramwell was not involved they lost in *Siner v*

Defendant prevailed in *Harrold v Great Western Railway*¹⁶³ where three carriages at the front of the train overshot. The Plaintiff followed two other passengers in alighting but missed his footing and fell over an embankment onto the road beneath. There was no light in the carriage and no fixed light on the platform though the station master was approaching with a lighted hand lamp. Baron Martin concluded that the Plaintiff had not waited to see ‘if the train would be backed’ and as he chose to get out in the dark, his claim must fail and Baron Bramwell optimistically suggested that the Plaintiff would have had a right of action ‘if he had been taken on against his will’. The impracticality of that was later demonstrated in *Hobbs v London and South West Railway*¹⁶⁴ by Blackburn J. who awarded damages for inconvenience but, for other heads of claim, imposed difficult hurdles of causation and remoteness. Better, perhaps, to jump.¹⁶⁵

The Plaintiff in *Plant v Midland Railway*¹⁶⁶ descended in the dark after his train had overshot and he sprained his foot on rough ground. Baron Bramwell said that he had hurt himself:

by want of ordinary caution on his own part. He got out without looking. He must be taught to take care of himself. Let him be non-suited.

In *Bridges v North London Railway*¹⁶⁷ he again failed to address the failure of the Defendant to establish and operate a system to enable drivers and station staff to deal with overshoots. The deceased season ticket holder reached Highbury where the platform exceeded the length of the train. There was a further narrow platform extending 12' into the tunnel, then a slope and then a pile of rubbish. The porter called out ‘Highbury’ whereupon the deceased, who was short-sighted, got out and fell. The visibility was poor due to smoke and steam. After the fall, the porter cried ‘keep your seats’. Blackburn J. non-suited the Plaintiff and Baron Bramwell, part of a majority of four to three upheld the decision on the grounds that if the deceased could not see, he should have been

Great Western Railway (1869) 4 Exch.117 and *Lewis v London Chatham & Dover Railway* (1873) LR 9 QB 66.

¹⁶³ (1866) 14 LT NS 440.

¹⁶⁴ (1875) LR 10 QB 111.

¹⁶⁵ In *Lax v Darlington Corporation* (1879) 5 Ex. Div. 28 the Baron sought to justify his overshoot decisions as examples of plaintiffs bringing hurt upon themselves.

¹⁶⁶ (1870) 21 LT NS 836.

¹⁶⁷ (1871) LR 6 Exch. 377.

accompanied, that the calling out of 'Highbury' was not an invitation to alight and the driver was not at fault for not bringing the train to a halt at the correct point:

As the best sportsman ... sometimes misses an early bird, the juggler sometimes misses his balls, the tightrope dancer tumbles, the cricketer and billiard player miss strokes they made ninety nine times in a hundred...there was no evidence of negligence ... If it was shown that ninety nine times in a hundred the platform was reached but that a particular driver missed it ten times in a hundred, I should say there was evidence of want of skill and care ...¹⁶⁸

He did not enquire whether the operator had provided proper equipment, instruction and system. Once the overshoot had been created it would have been logical and just for the onus to be transferred to the Defendant. Three other judges agreed with the Baron that there was no evidence of negligence but three more dissented including Willes J. Their 'modern' view was that the Defendant had not explained why the train had stopped short, passengers might be led to endanger themselves and trains should stop at platforms without difficulty. The duty of the carrier was:

... generally to abstain from exposing them, by any act or default of his, to unusual and unnecessary danger ... [and] ... to give the passengers a reasonable opportunity of alighting with safety at their destination.¹⁶⁹

A strong House of Lords supported the dissenters. It was a matter for the jury. The reasoning of Willes J. was commended, that of Bramwell B. rejected, and the Plaintiff was awarded £1200.¹⁷⁰

The Plaintiff in *Petty v Great Western Railway*¹⁷¹ may have recovered less than a full award after some mischief by Baron Bramwell. The Plaintiff's carriage had come to rest opposite a white path which was used by porters to reach the signal box and which resembled a platform. Willes J. left the issue of liability to the jury who found for the Plaintiff. On appeal Baron Bramwell recommended a new trial to find out whether the Plaintiff really thought the path was a platform. The Plaintiff's further evidence was likely to be positive so the action was compromised.

In *Jackson v Metropolitan Railway*¹⁷² the Plaintiff remonstrated with three passengers who boarded at one station and stood until the next with all seats taken. At

¹⁶⁸ *Bridges* 400.

¹⁶⁹ 405.

¹⁷⁰ (1874) 7 HL 213.

¹⁷¹ (1870) also referred to in *Cockle* but otherwise unreported.

¹⁷² (1877) 2 CPD 125.

the next station more passengers tried to enter the carriage and the Plaintiff rose from his seat to prevent them. They were pushed away by the porter who then slammed the carriage door injuring the Plaintiff's hand. He succeeded at trial and the Defendants' appeal failed. Amphlett J.A. thought the porter should have shouted a warning when he saw the crowd within the carriage and there should have been sufficient railway staff on the platform to prevent such a rush of people. Bramwell J.A.,¹⁷³ one of two dissenters, complained that the judges in *Bridges* took no account of the Defendant's arguments and that the outcome was reached 'by different roads'.¹⁷⁴ The Baron failed to spot any default of the Defendants in allowing the train to set off before the carriage door was closed:

The train may have been too small, so that there was no room for the three intruders; or too large, so that the three had not time to get beyond the first third-class carriage. Or it may have started too soon, giving not enough time to get in; or too late, and so people got out of the carriages, and had not time to get in again. Or there may have been too few porters to prevent what happened, or too many, and so they got in each other's way. In short ... it was preventable, and as the defendants did not prevent it they caused and permitted it. But it does not follow that they are guilty of negligence. No doubt by doubling the number of carriages, by letting passengers on to the platform one by one, by stopping at each station five minutes, by having a porter for every carriage or two or ten porters for every carriage, it would be possible to prevent persons getting into the carriages where there were no seats for them. But with precautions to insure this, and to make it absolutely certain, the traffic must stop. It would not pay the defendants to carry it on, nor worthwhile for the public to make use of it. All that the public has a right to expect, all that the defendants undertake for, is that which is consistent with practically working the railway.¹⁷⁵

Although he wanted the Defendants to be let alone to run their railway without responsibility for preventable accidents the tide was running away from him. The Defendants should have prioritised safety before punctuality as found by the majority in dismissing the Defendants' appeal. The terms 'reasonable' and 'foreseeable' were not then part of judicial language.

¹⁷³ Judge of Appeal.

¹⁷⁴ *Jackson* 131.

¹⁷⁵ 132.

The courts held that operators could effectively contract out of their responsibilities or otherwise limit their liability.¹⁷⁶ In *Stewart v London and North Western Railway*¹⁷⁷ the Plaintiff had paid for a first class return excursion ticket Liverpool-London. Under the Railway and Canal Traffic Act 1854 luggage under 60lb. was to be carried free but at the risk of the passenger. The Plaintiff's portmanteau was lost but he failed because the terms of the special contract were not void under the Act. Bramwell B. agreed that the Defendants did not incur the risks of common carriers on excursion trains remarking that the Plaintiff had paid a quarter of the price he would have paid if travelling by ordinary train. *Stewart* was overruled in *Cohen v South Eastern Railway*.¹⁷⁸ When a railway or steamboat passenger paid a certain sum for the carriage of himself and his luggage, the luggage was carried for reward just as if it was sent by goods train. The Defendant was not a gratuitous bailee and was liable as a common carrier. Brett L.J. thought that luggage was received in the same way as freight and he described *Stewart* as:

... the case of an excursion train, and Baron Bramwell in the court below, feeling that he must not overrule a case in a court of co-ordinate jurisdiction, went through the other process, which is never difficult to an ingenious mind, that is, where you do not like a case and must not overrule it, you distinguish it. That process he performed with his usual skill.¹⁷⁹

The Baron fought on and sitting in the Court of Appeal in *Parker v South Eastern Railway* delivered an apparently concurring judgment after his two colleagues had opted for a retrial. The Plaintiff had paid twopence for a cloakroom ticket which on its reverse excluded liability for any package exceeding ten pounds in value. There was a legible placard in the cloakroom but the Plaintiff had not seen it or read the conditions. The Baron favoured the Defendants whether or not he had read the conditions.¹⁸⁰

The Baron maintained his position on freedom of contract expressing his opinions ever more trenchantly. He always overlooked that the travelling public were in no position to impose or even suggest their own terms. In *Brown v Manchester Sheffield*

¹⁷⁶ *Crisp v York Newcastle and Berwick Railway* (1854) 16 CB 401; 139 ER 217 & *Van Toll v South Eastern Railway* (1862) 12 CB (NS) 75; 142 ER 1071.

¹⁷⁷ (1864) 3 H&C 135; 159 ER 479.

¹⁷⁸ (1877) 2 Ex.D. 253.

¹⁷⁹ 264. *Stewart* was an example of Bramwell's distaste for precedent if he did not like it.

¹⁸⁰ (1877) LR 2 CPD 416. The judgments were given some two months after those in *Cohen* yet the Baron relied on *Stewart* despite it having been overruled.

*and Lincolnshire Railway*¹⁸¹ the House of Lords dealt with an exclusion clause imposed after the Plaintiff fishmonger had freely elected to send his fish at a lower rate than common carrier's rate and their lordships agreed that the clause was just and reasonable in excluding liability for delay. Lord Bramwell would have overruled *Peek v North Staffordshire Railway*¹⁸² to the effect that an exclusion clause would be of no effect until shown to be reasonable. He believed that the burden of proof should be on the party seeking to show it to be unreasonable:

The assumption that he is obliged to do it because he cannot otherwise compete with his fellow fish-mongers is the most gratuitous one that was ever invented in this world.¹⁸³

... I really do not understand how such a conclusion could have been come to, except by some generous feeling that railway companies ought to be kept in order for the benefit of fishmongers.¹⁸⁴

The Baron never accepted that capitalists who made a profit also assumed responsibilities.

Progress despite Protestation

There was no reported Nineteenth Century case as to the efficacy of a clause limiting the amount of damages to be paid to injured passengers. It seems strange today that a reduced fare should bring an injury assessment system valuing one human body more highly than another. The Royal Commissioners on Railways in 1867 and the Select Committee on the Law of Compensation for Accidents of 1870 recommended that damages should be limited according to the class chosen by the traveller.¹⁸⁵ In evidence to the Select Committee Baron Bramwell was the only judge to suggest that an operator might effectively contract out of liability.¹⁸⁶ Without statutory authority, any judicial attempts were doomed to failure for the railways were extensively used by all classes which included parliamentarians, judges and jurymen. However, there were a number of

¹⁸¹ (1883) 8 AC 703.

¹⁸² (1862) 10 HLC 473.

¹⁸³ *Brown* 719.

¹⁸⁴ 720.

¹⁸⁵ (1867) XXXVIII, p.30. and (1870) PP Commons X, p.5.

¹⁸⁶ (1870) PP Commons X, Q 845.

Acts passed in 1864 mainly relating to smaller railways in London which countenanced the limiting of damages after payment of a much reduced fare.¹⁸⁷

Passengers knew many of the risks they ran on the railways but the judges never took the point. Passengers were in a much more favourable position than employees (whether employees building the railways or working on them or working in factories). Rail passengers also fared better than steamboat passengers whose damages were limited by statute to paltry sums¹⁸⁸ and better than pedestrians and others killed or maimed on the city streets where there was no strong culture of claiming. The public conception was that rail travel was dangerous and that awards of damages against operators would have a deterrent effect. The contemporary railway journals were full of criticisms of the legal system, of particular liability decisions and assessments of damages and of the juries who made them. Yet no railway company was rendered insolvent as a result of paying out accident damages. Many established Contingency Funds to cushion hefty payments and generally the tactic was, despite misgivings, to settle as early and cheaply as possible.¹⁸⁹

Henry Morley in 'Preventible Accidents' recorded a doctor's battle to persuade Coroners that particular fatal accidents were preventable and the reluctance of jurymen to bring in any special verdicts for fear of upsetting those Coroners. He concluded:

It seems to me that nine accidental deaths out of a dozen arise from culpable carelessness and negligence ... The regard for human life ought to become more tender with the growth of civilisation ... Those whose reckless conduct, or whose wicked economy, occasions preventable accidents must be punished for the wrong they do, and the suffering they cause. In a word, the law must, sooner or later, in all instances 'make mischance almost as heavy as a crime'.¹⁹⁰

Morley did not specify the process whereby such wrongdoers would be held responsible.

George Dodd, in 'Be Assured'¹⁹¹ supported insurance as being 'one of the very best modes of bringing about in a healthy way the maxim 'share and share alike''. Dodd's

¹⁸⁷ Godefroi, H. & Shortt, J. *The Law of Railway Companies* (London: Stevens & Haynes, 1869). In 'A Workman's Train' *A.Y.R.* (28/10/1882) 30, 726 NS, 328 it was reported that the operator sought to impose a limit of damages linked to the class of ticket purchased. In *Nunan v Southern Railway* [1923] 2 KB 703 Swift J. would have limited fatal damages to the amount printed on the ticket but for a mis-reading of Lord Campbell's Act.

¹⁸⁸ Kostal 309.

¹⁸⁹ 313.

¹⁹⁰ *H.W.* (18/03/1854) 208, 105.

¹⁹¹ (02/12/1854) 245, 365.

solution involved one payment and one ticket covering both insurance and the journey. The operators could have followed the shipowners who had pioneered mutual insurance societies and required standards of competence in merchant seamen by devoting resources to the instruction and training of staff. Henry Morley in 'Death's Cyphering-Book' included railway operators:

By land and sea, thousands of our countrymen are killed and maimed every year, in consequence of accidents that are distinctly preventible. Every such accident lies at the door of the man by whose neglect or indifference it is permitted to occur; and every such man ought to be made, by society, to feel, in a substantial way, the seriousness of the responsibility he has incurred.¹⁹²

Large awards of damages provoked hostility from the 'powerful interests',¹⁹³ who argued that an employer should not carry the responsibility for the effects of an isolated error by a servant who was carefully selected and generally competent. The blameless defendant was saddled with damages and both sides' costs. Supervision was more arduous in large organisations, juries were too generous and short cuts had to be taken to leave sufficient to pay the dividends. Liability was rarely contested because adducing evidence, although reducing the stigma of the accident, did not defeat the claim.¹⁹⁴

¹⁹² *H.W.* (12/05/1855) 268, 337. The barrister Graham Willmore wrote *Is Trial by Jury Worth Keeping?* (London: Ridgeway, 1850) lamenting the removal of jurisdiction from juries in smaller criminal cases. He argued that juries counterbalanced the power of the judges and could, if need be, refuse to put the law into force. 20. The same would have applied in civil matters where the function of the jury was to make findings of fact pursuant to the judge's legal directions. In *David Copperfield* Dickens described the jury system as 'the bulwark of our national liberties' (517) but wrote on 08/02/1850 to Willmore commending the pamphlet but disagreeing with Willmore's 'alarms' (*Pilgrim Letters* 6, 33). On 18/05/1850 William Taylor Haly and the sub-editor W. H. Wills contributed 'Law at a Low Price' to *Household Words* on the newly-established County Courts (1, 176-180) explaining that the right to a jury trial remained available but was in practice a rarity for small claims. The great experiment had worked well and the courts were open to 'a more numerous class of suitors' (180).

¹⁹³ In *Herepath's Railway and Commercial Journal* (11/09/1858) railway claims were labelled 'extortionate'. Following an award of £4,500 to the barrister Plaintiff in *Hall v Great Northern Railway*, before Baron Platt at York Assize on 21 July 1855 it was suggested that the Plaintiff should have declared when at the booking office that he was 'hazardous'. *The Railway Times* (28/07/1855) 917, XVIII, 30, 759. Later awards included *Pym v Great Northern Railway* (1861) 2 F&F 619; 175 ER 1212, (1862) 2 B&S 760; 121 ER 1254, (1863) 4 B&S 397; 122 ER 508 where the outcome was a reduced award of £9,000 and *Phillips v South Western Railway* (1879) LR 5 QBD 78 and (1879) LR 5 CPD 280 where an award of £16,000 to a physician earning £6,500 pa was defended in *Solicitors' Journal* (06/03/1880) 'Damages against Railway Companies'.

¹⁹⁴ These criticisms equally apply today to civil litigation. Defendants always have the dilemma as to whether to risk costs by a contest or to achieve certainty by settling at a compromise.

Baron Bramwell contended in *Cornman v Eastern Counties Railway* that railway companies were often ill-used by juries.¹⁹⁵ and in *Fair v London and North Western Railway*¹⁹⁶ Defendant's counsel submitted that smaller damages would have been awarded if the court had been hearing 'a common street accident'. Cockburn L.C.J. disagreed:

It is very true that these street accidents seldom come into our courts. They generally occur to poor persons who are satisfied with comparatively small compensation which is readily given them. In all cases we should see whether or not the damages are more than adequate. In many cases of compensation against private parties juries will look to their means of paying damages, and so will moderate them; but in a railway accident they feel they are not so restrained and so give full damages.

Under the Common Law Procedure Act 1854 judges were given the right to refuse trial by jury but this right was not generally exercised until the end of the century.¹⁹⁷

In 'Rather Interested in Railways' the author thought that damages awards which affected the company's treasury had a deterrent effect¹⁹⁸ and rarely was a disaster 'the uncontrollable fault of a single servant'.¹⁹⁹

Mr Joseph Brown Q.C.²⁰⁰ argued that damages were too high, there were too many claims and innocent operators were unfairly found liable for the defaults of negligent servants. Damages should be limited to £200 in any one claim. The negligent servant should always be the co-Defendant, the master should be absolved if free from blame in the selection of the servant and the servant should pay part of his weekly wages towards the damages. Railway damages should be related to the amount of the fare.

¹⁹⁵ (1859) 4 H&N 781;157 ER 1050.

¹⁹⁶ (1869) 21 LT NS 326.

¹⁹⁷ In 1918, for the first time, a party seeking a jury trial had to ask the court to exercise its discretion and order one. The discretion was removed from 1925 to 1933 but after 1933 the discretion was untrammelled. There was a total ban on juries in civil cases during the Second World War. By 1956 requests for juries were made in only 2% of cases. Vidmar, N. *World Jury Systems* (Oxford: Oxford U.P., 2000) 59 and Cornish, W.R. *The Jury* (London: Allen Lane, 1968) 227. The modern leading case is *Ward v James* [1966] 1 Q.B. 273 in which Lord Denning M.R. explained that trial by judge alone was 'more acceptable to the great majority of people' because the jury system was more expensive and juries were more difficult for the Court of Appeal to supervise. Awards needed to be, as far as possible 'uniform' and 'predictable'. In future conventional awards based on experience would be judge-made.

¹⁹⁸ *A.Y.R.* (28/09/1861) VI, 17.

¹⁹⁹ Thus an employee would never succeed because of the defence of common employment. See Ch. 5.

²⁰⁰ Joseph Brown (1809-1902) became a special pleader in 1834. He was called to the bar in 1845 and took silk in 1865. He developed a large commercial practice. He played a large part in the preparation and publication of the new series of *Law Reports*. He also campaigned on behalf of employers for the retention of the defence of common employment.

The contrary arguments were that the costs of paying claims were minute when compared to the number of journeys undertaken, and no extraordinary legislation was needed when railway companies were powerful and rich enough to identify any fraudulent claims. Poor safety standards were blamed on long hours and modest pay. Shareholders did not deserve public sympathy. The railway companies were gigantic monopolies. Arbitration was a possible mechanism for compensation. A working man injured on a train and deprived of his livelihood was entitled to a remedy. Damages and legal costs should be one of many annual charges for a commercial enterprise²⁰¹

The barrister Henry Godefroi²⁰² complained that claims, being dependant upon the plaintiff's own account of his symptoms, were unanswerable and had to be settled. Strict liability should be traded for a damages ceiling. Damages should be assessed by a court sitting without a jury since 'mere trifles of sentiment' were likely to sway a jury. Godefroi thought that 'the door is set open to fraud, to exaggeration, to the jobbery of unprincipled attorneys and doctors.' Damage done to a company's reputation for safety 'was a sufficient inducement to directors to provide against the occurrence of accidents.' Blanket insurance was not the answer because 'the public would lose a material check against incautiousness.' If limits were to be imposed on damages depending on the class travelled, problems would arise if the public were also entitled to buy their own insurance. On a short journey the cost of insurance might exceed the fare. It was fair that workpeople, many of whom had been displaced by the railways, should have the facility of 'cheap trains' and be subject to a damages limit. Godefroi suggested that Arbitrators should be appointed to assess damages and agreed with Baron Bramwell²⁰³ that instead of medical witnesses being called by the parties, there should be just one expert reporting for the guidance of the court.²⁰⁴ To avoid fraud, damages should be paid in instalments

²⁰¹ (18/10/1870) *The Law Journal*. Also edition of 26/10/1872 reporting on the 1872 Social Science Conference at which Brown railed against the fraud and trickery of claimants.

²⁰² *Juridical Society Papers* (1871) 689-703.

²⁰³ Evidence to Select Committee on Compensation for Accidents PP Commons X 56.

²⁰⁴ Remarkably Lord Woolf made such a proposal to reform civil procedure in his Final Report of July 1996 and this became Part 35 of the 1998 Civil Procedure Rules effective 04/1999. The presumption is that the parties agree to instruct a single joint expert 'unless there is good reason not to do so.'

with the balance to be invested meanwhile and only to be paid on an independent medical certificate after a further year.²⁰⁵

Thus the railway lobby wanted to limit damages whereas others thought that passengers should be properly compensated for their injuries and losses. On railway regulation and on contractual impregnability Dickens and Bramwell represented approaches which were diametrically opposed. Except for some remarkable decisions, mainly of Baron Bramwell, which were apparently designed to protect the pockets of the railway companies, the law generally dealt adequately with the conflicting interests of operator and passenger. Dickens after Staplehurst demonstrated some knowledge of passengers' entitlement to compensation. Horns were locked as to safety regulation and accountability by way of damages.

Baron Bramwell was inclined to reject the claim or put some difficulty in the path of an apparently meritorious plaintiff. He resented the principle of vicarious liability and ran with the notion of 'association'. Although when giving evidence to the Select Committee on Railways in 1870 he declared an interest as a railway shareholder and admitted to having been counsel 'for a good many railway companies' before he sat on the bench,²⁰⁶ he never declared an interest in court when hearing civil claims directed to railway companies.²⁰⁷ However this apparent bias was more defendant- than railway-inclined.²⁰⁸ He favoured commercial enterprises whose assets and funds required

²⁰⁵ Thus anticipating the concept of Provisional Damages now in use in disease and injury cases where there is a small, but material chance of major illness or disease or some serious deterioration in physical or mental condition in the future. The option was provided by s.32A of the Supreme Court Act 1981 and by s.51 of the County Courts Act 1984. It is now encapsulated in Part 41 of the Civil Procedure Rules 1998.

²⁰⁶ 1870 PP Commons XQ 341, 53. He gave evidence in tandem with Baron Martin and thought it 'wonderful' that a small amount of blame should result in full liability. His evidence on procedural matters was more forward-thinking when he advocated group actions arising from one disaster, suggested that defendants' payments into court should be kept secret from the jury until after they had made their award and that expert witnesses should be sole and nominated by other than the parties. 60. He came to accept trial of railway claims in the County Court without a jury. 64. These suggestions bore fruit eventually.

²⁰⁷ No one suggested that the Baron was debarred from hearing railway cases. That fate befell the Lord Chancellor, Lord Cottenham in *Dimes v Grand Junction Canal* (1852) 3 HLC 759; 10 ER 301 where he was disqualified from hearing an appeal by reason of his owning a substantial amount of shares in the Defendant enterprise. However where a juryman was found to be a shareholder in the Defendant railway Baron Bramwell thought there was no injustice since it was not known how many shares were involved, notwithstanding that there had been no opportunity to inspect the register. *Williams v Great Western Railway* (1858) 3 H&N 869; 157 ER 720.

²⁰⁸ In *Hammersmith Railway v Brand* (1867) LR 2QB 230 Baron Bramwell found against the Defendant railway in a commercial nuisance claim and his judgment was cited with approval by Lord Hoffmann in *Wildtree Hotels v London Borough of Harrow* [2001] 2 AC 1.

protection from individual claimants. Their profits took precedence over compensation for the maimed and the bereft. His attitude to rail passengers (and to employees) is to be contrasted with his views on adjoining landowners where he was in favour of strict liability in respect of escaping water and escaping sparks from railway engines.²⁰⁹ Railway operators should have built into their financial budgets the incidental costs of compensating such claimants though not, apparently, the costs of compensating innocent employee passengers.

Many claims in his court failed either on account of the plaintiff's actions (they being considered first during a contested trial) or due to a judicial reluctance, not unique to him, to look at the lack of training, equipment and instruction and to penalise commercial ventures, particularly employers, by imposing negligence-based liability. Such reluctance was embodied in his denial of a remedy where the Plaintiff and the negligent fellow servant were in the same service.²¹⁰ If a paying passenger had been killed or injured in the same accident that claim would succeed because the operator was responsible for the defaults of its servants. The background to this cruel and odd distinction, which was cherished by Baron Bramwell long after most of his colleagues were seeking ways to obviate its harsh effect, had a major impact on the injured poor.²¹¹

²⁰⁹ See ch. 6.

²¹⁰ *Hutchinson v York Newcastle and Berwick Railway* (1850) 5 Ex. 342; 155 ER 150.

²¹¹ See chs.3 & 5.

Chapter 3

The Responsibilities of Employers to their Workpeople (1)

The coming of the railways, the large-scale migration of people from the land into the city and the establishment of machinery-reliant factories brought unprecedented upheaval in society. The upper and middle classes benefited financially from the wealth generated by these new commercial enterprises but not so the labouring class. The gulf between them grew. The various theatres of struggle included railway construction, railway operation, mining and factory work. Each theatre was reported about and legislation proposed for it. Much of the legislation was opposed by interested factions and, as a result, watered down or not proceeded with. Parliament was bound to be the first port because the Common Law was initially of little help to the injured poor. Social conscience writers relied on government reports and factual accounts of working conditions to make their views known in their novels, in journal articles and in correspondence. Whereas railway passengers had the benefit of a sensible compensation system, those who built the railways and those who later worked on them did not. Mine and factory workers fell into the same disadvantaged category. How did the novelists portray work in each theatre?

Railway Navvies

The construction of railways, begun in 1824, proceeded in fits and starts.¹ During the mid forties a quarter of a million people were employed mainly by sub contractors whose business failures were frequent. The two main contractors were Samuel Morton Peto and Thomas Brassey.² The navvies who carried out this heavy work were well paid but their living conditions were dreadful, their lives godless and their alcohol consumption

¹ See ch.2.

² Wolmar, C. *Fire and Steam – How the Railways Transformed Britain* (London: Atlantic, 2007) 115 &143. Peto, (1809-1889), initially a building contractor responsible for Nelson's Column and various London clubs and theatres, in 1847 employed 15,000 men constructing railways. He then had 33 railway contracts worth £20m. He became M.P. for Norwich in 1847, but had cash flow problems and was bankrupt in 1866. He was a well meaning and philanthropic employer. Brassey (1805-1870) alone built one-tenth of the British network as well as double that mileage abroad including the Paris-Rouen line and at one stage, world-wide, employed 75,000 men. On his death in 1870, he left, in today's money, £225m.

enormous.³ Their working conditions were appalling and the casualties many. The work was not subject to government or outside inspection.

In 'Navvies as they Used to Be', published by Dickens in *Household Words*, H.J. Brown reported an improvement in working conditions over twenty years up to 1856.⁴ In 1834 at the age of sixteen Brown, determined upon becoming an engineer in the steps of Stephenson and Brunel, started work for a subcontractor as a bucket steerer in the Watford tunnel. Brown had to stand eighty feet above the rails in the tunnel on the projecting ledge of a scaffold. His exhausted predecessor had fallen down the shaft to his death.⁵ Brown next joined a gang of tunnel navvies but soon an in-fall buried thirty of whom fourteen died.⁶ Later Brown worked at another tunnel in treacherous ground and after five weeks, despite extra shoring, one stroke of a pick caused the collapse of a mass of earth, masonry, timber and sand to fall upon five men, two of whom were killed.⁷ As responsible employers gained influence social conditions and behaviour began to improve. Dwellings were built and cottages provided. The bosses were not allowed to keep food and drink shops so there was no more 'truck' and wages were paid in money.

By 1845 if a navvy was killed Peto would pay funeral expenses and deal 'liberally' with the widow. He agreed that such payments were not commensurate with the loss.⁸ A Select Committee included George Hudson, the Railway King, then member for Sunderland. There was evidence of fatal and other accidents caused by misuse of gunpowder, inadequate equipment, lack of supervision and unsafe systems.⁹ I.K. Brunel conceded that employers did not investigate the cause of accidents.¹⁰ The Committee provided an early opportunity for the utilitarian Edwin Chadwick to press his argument that employers rather than parish ratepayers should bear the financial cost of

³ There were plagues of navigators worse than locusts. Tonna, C.E. 'Christian Ladies and Iron Railroads' *Christian Lady's Magazine* (06/1839) 11, 497.

⁴ Lohrli, A. in her *Household Words* (Toronto: Toronto U.P., 1973) was unable to trace biographical information.

⁵ Brown, H.J. *H.W.* (21/06/1856) 13, 326, 543.

⁶ 546.

⁷ 550.

⁸ Bartrip, P.W.J. & Burman, S.B. *The Wounded Soldiers of Industry* (Oxford: Clarendon, 1983) 30.

⁹ 69.

¹⁰ PP 1846 XIII, Select Committee on Railway Labourers, Evidence, 503&581.

compensating employees injured at work.¹¹ He thought the system should cover accidents whether or not the employer was responsible.¹² He gave evidence in June 1846 and submitted his paper¹³ contending:

as a general principle of justice and as a measure of prevention, that those who erect machines, or conduct large and dangerous works, or undertake public conveyance, should be primarily responsible for all their unavoidable as well as their avoidable consequences.¹⁴

Compensation would be automatic unless the employer could establish ‘gross and wilful misconduct’ on the part of the injured or deceased workman. The burden of proof would be with the Defendant and negligence of a fellow-employee would not prevent recovery of compensation. He did not see employers as necessarily blameworthy but thought that they were in the best position to prevent mischief. In fatal claims children of a deceased would be educated up to ‘the age of working ability’ and widows would be paid a lump sum. Chadwick relied upon a scheme successfully used in the construction of the Paris to Rouen line where payments had amounted to half a percent of total costs. He argued that although the financial burden on employers would be modest, the threat of claims would cause them to raise levels of safety:

I believe that every labourer who, over and above his subsistence, produces a surplus, or a return to make it profitable and worthwhile to employ him, is of pecuniary value, and his death a loss, economically considered, as much of the destruction of a machine, worth its purchase and maintenance, and that the more there are of such labourers, the better for the community, merely economically considered, just as the community is all the better the more it has of productive machines in actual employment.¹⁵

¹¹ Chadwick first proposed that claims costs should be charged through the product to the consumer in the First Report of the Royal Commission as to the Employment of Children in Factories. PP 1833 XX.1. Employers argued that accidents were mainly due to culpable heedlessness and temerity but such could not be a defence for children. As for adults, the accident was itself evidence of the use of all caution and was rarely wantonly incurred. 72. Responsibility should rest with those who could best guard against dangers and the recommendation was in respect of under 14’s all medical expenses and half wages during absence and, for adults, the same provided there was no culpable temerity.73. Although he regarded self interest as ‘the spring of individual rigour and efficiency’ he doubted if social benefits ensued and so he thought the state should interfere to achieve communal welfare. Lewis, R.A. *Edwin Chadwick and the Public Health Movement* (London: Longmans Green, 1952) 27 & 130. He renewed his campaign whenever possible. See ch.4.

¹² He referred to ‘blameless accidents’ occurring from machinery and the erection of buildings.

¹³ Chadwick, E. *Demoralisation and Injuries occasioned by Want of Proper Regulation of Labourers engaged in the Construction and Regulation of Railways* (Manchester: Simms & Durham, 1846).

¹⁴ Chadwick 18.

¹⁵ PP 1846 XIII 589.

The Committee agreed that there was scope for improvement of safety standards and that the responsibility lay with employers who should be 'prima facie civilly responsible in all cases of injury to life or limb incurred in constructing such works'.¹⁶ The Report was printed at Chadwick's expense but it was neither debated nor subjected to press scrutiny¹⁷ and its recommendations were not implemented. There was insufficient impetus to overturn strong parliamentary railway interests. There was no contribution from the novelists. There may have been an improvement in conditions as described by H.J. Brown. Thus railway navvies never had the benefit of protective legislation peculiar to the risks they underwent.

Railway Workers

Railway employees were not given any statutory protection until 1880. They were different from paying passengers whose accidents featured in newspaper reports. Railway employees tended to be involved in one-off accidents many of which were caused by the carelessness of work colleagues. Their prospects of recovering damages were poor. They were faced with the trio of defences of Contributory Negligence, *volenti non fit injuria*, and common employment, each a complete bar, whose consequences the judiciary was not initially inclined to abate. The defining decision on common employment was made in 1850 in *Hutchinson decd. v York, Newcastle and Berwick Railway*.¹⁸ Hutchinson, an employee of the Defendants and on their instruction, was a passenger on their train which collided with another of their trains and was killed. Baron Alderson distinguished between vicarious liability to a stranger and the lack of it to a fellow servant. Hutchinson had agreed to run the risk of injury caused by the negligence of his fellow servants when he entered the employment. All the workers whose neglect contributed to the fatality were, with the deceased, engaged in one 'common service' so the claim failed. The deceased was, however, entitled to expect that his master had acted

¹⁶ PP 434.

¹⁷ Save for two pieces in *Chambers' Edinburgh Journal* 'Chadwick on Railway Labourers' (04/04/1846) 118, 220 & 'Chadwick on the Economy of Educated Labourers' (14/11/1846) 150, 309 in which Chadwick's proposals as to compensation for injuries suffered by improper methods of working or unsafe equipment, as to truck, the need for government inspectors and for the education of the workforce were summarised with approval.

¹⁸ (1850) 5 Ex. 343; 155 ER 150.

carefully in the selection of workmates of ‘ordinary skill and care’. This apparent sop transpired to be of little benefit to Plaintiffs as it was difficult to prove default on the part of the master in the selection process. After *Hutchinson* two passengers sharing the same compartment, injured in the same crash, achieved different outcomes if one was an employee and the other not.

The number of people employed on the railways was vast¹⁹ and mishaps were frequent.²⁰ There was a clear tendency for the railway companies to under-report the number of non-fatal mishaps.²¹ The Royal Commission on Railway Accidents, appointed in April 1874, largely because of concern over passenger safety, was urged to look to the safety of employees and to possible systems of arbitration and compensation. After three years the Commissioners agreed that railwaymen deserved ‘exceptional measures’, recognised the difficulty in blaming an employer remote from the claimant in a large commercial enterprise and recommended that officials entrusted with ‘essential authority’ should not be deemed fellow servants. As to *volenti* a servant’s knowledge of danger should not equate to acquiescence.²²

A public meeting was held in London in early 1877 to deprecate the failure of implementation. The union’s complaints were listed as excessive hours, failure to enforce rules, lack of safety devices, default in working the traffic, employment of inefficient persons and lack of sufficient numbers of men.²³ There were union demands for the abolition of the defence of common employment but little expectation that Parliament would interfere.²⁴

The Employers’ Liability Act 1880²⁵ removed the defence where the negligent fellow-employee was a superintendent, where the accident was caused by obedience to orders, where there was a breach of rule or by-law on the part of the careless employee or

¹⁹ 2,000 employed in 1841, 29,000 in 1851, 60,000 by 1861, 96,000 in 1871 and 188,000 by 1881. Bartrip & Burman 45.

²⁰ Fatalities alone were 28 in 1841, 117 in 1851, 128 in 1861, 213 in 1871 and 521 in 1881. The peak was reached in 1879 when the total was 952. Bartrip & Burman 44.

²¹ Between 1875 and 1899 there were 68,575 reported injuries from accidents and, as late as 1899 the ratio was 1:1000 killed and 1:115 injured. Cornish, W.R. & Clark, G.de N (1989) *Law and Society in England 1750-1950* (London: Sweet & Maxwell, 1989) 485 relying on PP 1900 XXVII Royal Commission on Accidents to Railway Servants.

²² PP 1877 XLVIII Royal Commission on Railway Accidents, 27.

²³ *Railway Times* (24/03/1877) 2046, XL, 12, 255.

²⁴ *Railway Times* (17/03/1877) 2045, XL, 11, 242.

²⁵ See ch.5.

when that employee had charge of any signals, engine or other train. Thus railway operatives were given special protection for the first time.

Whereas disasters involving railway passengers featured regularly in railway journals and newspapers (and also Dickens' *Household Narrative of Current Events*²⁶) there were no novels about railway workers so their plight did not feature.

Miners

In the Report of the 1842 Sanitation Commission Chadwick argued that, as a matter of good economy, mine owners should be responsible for all losses and for the support of the maimed. One penny would be added to the price of coal thereby reducing misery and destitution, saving lives, rendering the work less dangerous and lowering the poor rates.²⁷ Nothing came of it.

Mines were not much regulated until the second half of the century. A Bill was introduced by Lord Ashley following publication of the first report of the Children's Employment Commission. The Bill's principal purpose was to prevent the employment of children under thirteen and of women underground. The Marquis of Londonderry presented a petition against the Bill from the Northumberland and Durham coal owners contending that:

... the boys engaged in the collieries were as happy as the day was long, and they sat at their little trap doors amusing themselves cutting out figures. No young class of work people were so jolly and joyous.²⁸

Charles Dickens, writing under 'B'²⁹ complained that mines had been out of the legislative mind and responded scathingly:

²⁶ The *Narrative*, edited by Dickens' father in law George Hogarth, appeared from 02/1850 until 12/1855.

²⁷ PP1842 XXVI 1. HL 206.

²⁸ (25/06/1842) *Morning Chronicle*.

²⁹ Possibly for 'Boz' and because he had failed to fulfil a promise to Macvey Napier the editor of the *Edinburgh Review* that he would write on the topic for that magazine. *Pilgrim Letters* 2, 317, Letter to John Forster 30/06/1841 'I have made solemn pledges to write about mining children'. Letter to Macvey Napier 08/08/1841: 'I will write the paper at my leisure and you throw it over till the next Review but one.' 2, 353. Then 21/10/1841 prior to Dickens' departure for America: 'I had laid myself out to redeem my promise to you.' Redemption was postponed. 2, 405. Finally *Pilgrim Letters* 3, 288, letter to Macvey Napier 26/07/1842 suggesting the issue to be 'too stale'. It was easier for Dickens to write to the *Morning Chronicle* than to compose a serious article for Napier.

... it was stoutly contended by their collier lordships that there are no grievances, no discomforts, no miseries whatever, in the mines; that all labourers in mines are perpetually singing and dancing and festively enjoying themselves; ... that they lead such rollicking and roistering lives that it is well they work below the surface of the earth, or society would be deafened by their shouts of merriment. ... Exactly the same things have been said of slavery, factory-work, Irish destitution, and every other grade of poverty, neglect, oppression and distress.³⁰

Meanwhile Charlotte Elizabeth Tonna as editor of *The Christian Lady's Magazine*, compared an informal game of cricket played by preparatory schoolboys on a summer's evening with the work of other boys, cold, fearful and ill-treated, below ground opening trap doors for passing corves.³¹ She wondered how, without education and knowledge of God, he might occupy his mind. This was 'an enormity under the earth'³² and men should not make a profit from 'their babies' toil'.³³ Mrs Tonna followed with 'St. Paul's' in which she contrasted her daughter's inability at six years to mount the dome with the work done by girls of the same age underground. They carried heavy tubs of coal on their backs through traps and up ladders 18' high about twenty times a day with the risk of the load falling on the girl following.³⁴

After a watered-down Bill passed through the Lords on 1 August 1842 Lord Londonderry produced a pamphlet in which he accused Leonard Horner, then a member of the Children's Employment Commission, of being 'vindictive, quarrelsome and lacking in moral courage'. He contended that children needed only the rudiments of education and only to the age of ten.³⁵ Under the Mines Act 1842 the government was given power to appoint an Inspector to visit any Mine. Only H.S.Tremenheere,³⁶ was

³⁰ *Pilgrim Letters* 3, 281.

³¹ (12/1842) 18, 150.

³² 152.

³³ 154.

³⁴ *The Christian Lady's Magazine* (07/1842) 18, 160.

³⁵ Tyson, M. 'A Review and Other Writings by Charles Dickens' *Bulletin of the John Rylands Library* (1934) 18, 182. Dickens' scornful response is in Slater, M. (ed.) *Dickens' Journalism* (London: Dent, 1996) 2, 35, 44.

³⁶ Hugh Seymour Tremeneere (1804-1893), though not a democrat and not sympathetic to the advancement of workers' rights, sought to improve working conditions but the size of the task was enormous and his mark not large. In his annual reports on mines he advocated education to teach obedience and free-market economics. He condemned the evils of trades unions. He was the architect of the 1850 Act and favoured underground inspection. He befriended Harriet Martineau and helped with her garden when she moved to Ambleside in 1845 but in 1846 took exception to her writing for the socialist

appointed and he alone was responsible for enforcing the Act from 1843 until 1850. Although he encouraged adequate ventilation, he did not venture underground.³⁷

There was no need to record or report fatal mining accidents until the Coal Mines Inspection Act 1850 and non-fatalities until the 1855 Act of identical title. Major calamities came to public attention and the 1850 Act provided for more inspectors but their powers were minimal. They used their technical engineering expertise to advise colliery managers rather than to force improvements. Their powers were not greatly increased by the Act of 1855 renewed and only slightly extended by an Act of 1860.³⁸

Henry Morley³⁹ wrote stridently of mine safety on 1 November 1856 in 'Lost in the Pit',⁴⁰ referring to three recent fatal catastrophes caused respectively by explosion, flooding and lack of ventilation. The third, in Wales, came about after the mine had doubled in size without improvement of ventilation. The owner was found to have delegated to his managers and knew very little about the workforce, equipment and systems of work. Such an owner, like Harry Carson in *Mary Barton*, who did not know the names of the men he employed in the Carson factory,⁴¹ was at an advantage over more caring bosses such as John Thornton in *North and South* since, until 1880, his main risk of being found liable to his injured workmen arose from his being personally involved in the running of the venture. The defence of common employment relieved him of responsibility for managerial failures as well for defaults at a lower level.

magazine *The People's Journal*. He fell foul of her principles and they did not meet or correspond again. Webb, R.K. *Harriet Martineau: A Radical Victorian* (London: Heinemann, 1960) 255 & 267.

³⁷ Bartrip & Burman 45. The numbers of miners working in 1851 were 216,217, by 1861 282,473, by 1871 370,881, and in 1881 495,477.

³⁸ Act for the Regulation and Inspection of Mines.

³⁹ Morley (1822-1894) was the son of a doctor, educated abroad, who, after matriculation, practised medicine (1844-48) but fell into debt as the result of his partner's dishonesty before establishing a successful school run on Moravian principles at Liscard, Cheshire. His first piece for Dickens in *Household Words* was on 18/05/1850 and he joined the editorial board in 06/1851. In 1853 he gave geography lessons to Dickens' son Walter. He wrote Dickens' *Almanac* for 1856. He contributed in excess of 300 pieces to *Household Words*, more than any other of Dickens' writers. In 1857 he began lecturing at King's College and he became Professor of English Literature at University College, London in 1865, a post he held until 1889. He became a popular and prolific lecturer. When W.H.Wills was injured in a hunting accident in 04/1868 Morley acted as sub-editor of *All the Year Round* until Dickens' son Charley took over in 11/1868. Morley's last piece for Dickens was published 18/09/1869. He was instrumental in making available cheap editions of published works through 'Morley's Universal Library' and 'Cassell's National Library'. He supported the admission of women to university. Solly, H.S. *The Life of Henry Morley* (London: Arnold, 1898).

⁴⁰ *H.W.* 14, 345, 361.

⁴¹ *Mary Barton* 6, 70.

Morley urged that culpable neglect should attract punishment and that there should be criminal responsibility ‘for loss of life to those who are accountable for accidents which it was in their power ... to prevent.’⁴² On 12 May 1860 in ‘A Plea for Coal Miners’ annual deaths in coal mines were said to be eight times more than the average population. A collier’s wife would be widowed fourteen years earlier than an agricultural widow. The life expectation of metalliferous miners was 33 years with 37% killed by fall of coal due to lack of props, 28% from explosions and 20% from accidents in the shafts due to falls of stone and/or lack of cages. Preventable accidents were no longer to be accepted as the lot of the common man.⁴³

The disaster at New Hartley near Whitley Bay in which 199 men suffocated in a one-shaft mine in 1862 provoked prompt legislation. The huge beam from the pumping engine fractured and fell into the shaft and, with debris, blocked it for 36 hours⁴⁴ The event was the subject of Joseph Skipsey’s poem *The Hartley Calamity* describing the perception of the trapped miners.⁴⁵ On 25 January a meeting was held in Newcastle upon Tyne at which the Mines Inspector, Matthias Dunn protested that he had no power to ‘alter a pit’ with but a single shaft (if one shaft was blocked, a second would have provided an escape route).⁴⁶ The outcome was the Act of 1862 requiring dual shafts in all new mines and by 1865 in existing mines.⁴⁷

In ‘The Cost of Coal’ the author concluded that the men had a right to be protected in the ‘most distressing form of labour’ and that repentance and reform were needed on the part of the coal owners because:

⁴² ‘Lost in the Pit’, 361. Unsurprisingly Morley referred to criminal rather than to civil sanction since by 1856 there was statutory authority for monetary compensation to be paid within the framework of criminal proceedings.

⁴³ *A.Y.R.* (12/05/1860) 3, 102. Calamitous floods and fires were described in ‘In Peril Underground’ and ‘Fire in a Coal Mine’. (13/04/1861 & 27/04/1861) 5, 61 & 107.

⁴⁴ Satre, L.J. *Thomas Burt, Miners’ M.P.* (London: Leicester U.P., 1999) 15.

⁴⁵ Skipsey, J. *Carols from the Coal-Fields and other Songs and Ballads* (London: Walter Scott, 1886) 21. The poem was read by Skipsey (1832-1903) at meetings to raise funds for widows and orphans.

⁴⁶ The jury at the adjourned Inquest held in Blyth on 03/02/1862 demanded dual shafts. Other causes were the lining of the shaft with wood below the first 30ft. of brickwork, the construction of the beam from cast rather than malleable iron and the lack of a spare pump. McCutcheon, J.E. *The Hartley Colliery Disaster 1862* (Seaham: McCutcheon, 1862) 113. A subscription was organised for the bereaved families and £83,000 was raised. Queen Victoria contributed £200. Duckham, H.&B. *Great Pit Disasters* (Newton Abbot: David & Charles, 1973) 113.

⁴⁷ Act to Amend the Law relating to Coal Mines.

The miners had no protection; they had only their labour to depend on and when they spoke they were turned off their work.⁴⁸

So the defences of *volenti* and common employment were but fictions because in reality there existed no choice for a worker faced with an unsafe working environment.

The author of 'Pit Accidents' described experiences in the coalfields of South Wales when he encountered the aftermath of three separate accidents in one day, the first following a roof collapse, the second a run-over by a train causing fractured limbs and the third resulting in blindness when a charge went off prematurely. Deaths in South Wales exceeded those in the Durham coalfields and the quantity of coal raised in Durham per life lost was nearly double that of South Wales.⁴⁹

In 1872 major legislation was passed in respect of metalliferous mines and coal mines of which there were by then nearly five thousand.⁵⁰ More inspectors were appointed to enforce the extra regulations and they argued that mining employers should compensate their injured servants.⁵¹ Dickens in his journals brought to a wide middle class readership the dangers of mining work but his efforts did not directly bring about legislation. Although accident statistics improved, reformers were reluctant to impose yet more regulation on mine owners and attention turned to the common law which, if amended, might be used as a means of economic deterrence.

Miners: The Narrative

Fictional stories set in a workplace were new:

From the palace to the poor-house, from the forum to the factory, all have been searched for a new view of life, or a new picture of manners. Some have even gone into the recesses of the earth, and investigated the arcane of a coal mine, in the hope of eliciting a novelty.⁵²

G.W.M.Reynolds, the popular writer of racy and sensational fiction and plagiarist of Dickens,⁵³ described life underground in 'The Rattlesnake's History'.⁵⁴ Most of the

⁴⁸ A.Y.R. (15/02/1862) 6, 492.

⁴⁹ A.Y.R. (23/05/1868) 19, 568.

⁵⁰ Coal Mines Regulation Act & Metalliferous Mines Act.

⁵¹ Bartrip & Burman 94.

⁵² Lever, C.J. (pseud. Tilbury Tramp) *Tales of the Trains* (London: Orr, 1845) v. Lever dedicated *Barrington* to his friend Dickens saying no one more 'admires your genius'. (London: Chapman & Hall, 1863). The illustrations were by Phiz.

⁵³ Reynolds (1814-1869) came from Sandwich, Kent and, after two bankruptcies, edited literary magazines. He was a radical journalist but not trusted by the Chartists whose cause he supported in the 1848-1851

forebears of the principal characters had been injured or killed in the pit. Reynolds relied heavily on the 1842 Report of the Children's Employment Commission.⁵⁵ The narrator was born in a coal mine in Staffordshire. At age seven she returned underground to work. Her job was to carry on her back or push along 56 lb of coal to a cart. At ten she carried 1cwt of coal up a 'rudely formed ladder' with the danger of the load falling on the girl climbing up behind and the separate risk of losing her balance and falling off the ladder. Reynolds there listed other dangers which included drowning in water from old workings, explosions of gas, suffocation in foul air, the falling in of roofs and passages, breaking of ladders, running over by train wagons and explosion of gunpowder. Deaths were seldom reported to the Coroner. Many mineworkers grew deformed in stature so that 'holers',⁵⁶ were bow-legged and crooked while 'hurriers',⁵⁷ were knock-kneed and high-shouldered. Life expectation was much reduced and there was little laughter.⁵⁸

Fanny Mayne dealt with underground conditions in *Jane Rutherford or The Miners' Strike*.⁵⁹ In 1844 Jane's unprepossessing father Jonathan, addressing a strike meeting,⁶⁰ pointed to the dangers of mining with lives in the hands of fellow creatures so that:

One careless use of an unshaded light, one trap-boy asleep at his post, one hitch in letting down or drawing up the rope to which they are clinging like bees may send them into eternity at once.⁶¹

Jonathan had real grievances. He was once bedridden for ten weeks from hurts received in a serious explosion of fire damp, one spring he contracted miners' inflammation of the lung and was ever after 'touched in the wind' and then, in a pit accident he was rendered half-deformed after suffering a compound fracture of his thigh.⁶² He and two others were sinking a new engine shaft and two holes had been bored in a seam of rock. It was his

agitation. His works out-sold even those of Dickens. Dalziel, M. *Popular Fiction 100 Years Ago* (London: Cohen & West, 1957) 140. Reynolds' popularity waned after 1850: Maxwell, R.C. (1977) 'G.M. Reynolds, Dickens and *The Mysteries of London*' *Nineteenth Century Fiction* (1977) 32, 2, 188.

⁵⁴ *The Mysteries of London* (London: Dicks, 1850) 1, 116, 353.

⁵⁵ PP 1842 XV.

⁵⁶ The miners or 'getters' of coal.

⁵⁷ The narrator Bet Flathers was a hurrier otherwise carrier.

⁵⁸ Reynolds, G.W.M. *The Mysteries of London* (London: Dicks, 1848-1855) 353.

⁵⁹ (London: Clarke Beeton, 1854) It first appeared in instalments in *True Briton* a magazine edited by Fanny Mayne known as 'a home friend and evening companion' which was published from 1851 until 1854. It was then merged with *The Illustrated People's Paper* which continued but a further three months.

⁶⁰ *Jane Rutherford* 13.

⁶¹ 14.

⁶² 49.

job to light the fuses before joining his workmates but as he ascended the ladder it broke and he was precipitated to the bottom of the works.⁶³ His thigh was broken and the ladder useless and then an explosion caused him to be covered in rubble.

The new owner, Lord Westerland, ‘safe in Britain without guard or attendants’ wanted to find common cause with his workforce.⁶⁴ Pearce, a workman with a weak constitution who earned only half wages, had started as a trapper boy⁶⁵ at the age of ten. At twelve he was promoted to ‘carrying boy’.⁶⁶ He had suffered injury in nine separate accidents and in one, at age twelve, after a roof collapse, he had remained alone in the mine for five days until rescued. One of his sons started as a trapper boy at age six.⁶⁷ The author described her own visit below ground descending in a tub six feet deep. She saw passages with shallow seams where men had to wriggle like caterpillars⁶⁸ and where ‘danger and death stalk in fearful proximity’.⁶⁹ In a footnote she warned that higher wages would attract foreign labour or drive capital abroad so the classes had to be interdependent. Henry Stephenson, once a bargeman’s boy but now a millionaire who owned several collieries and mills ‘always wanted to turn a penny’.⁷⁰ He turned his employees out of their tied cottages as soon as they went on strike and neither the author nor the workers considered such action in any way untoward. The author reprimanded the workpeople for their improvidence, dirt, domestic extravagance, indulgence of animal passions, and unwise choice of reading material and contended that:

Many employers raised themselves ... by frugality, economy, hard work, foresight, providence, right-mindedness, a proper employment of their talents and rigid self-denial.⁷¹

The solution was in good relations without strikes, self help and social reform such as Lord Westerland’s scheme to build model lodging houses close by to be let at a fair rent.⁷² The six-month long strike, led by Jonathan Rutherford, was a failure. He

⁶³ 53.

⁶⁴ 85.

⁶⁵ The ‘trapper boys’ were young children whose job was to open and close the traps or doors through which the coal carts passed. They sat alone in the dark by their traps for twelve hours or more each day.

⁶⁶ They pulled loaded corfs on runners using a chain around the waist.

⁶⁷ 99.

⁶⁸ 97.

⁶⁹ 98.

⁷⁰ 156.

⁷¹ 173.

⁷² 223.

sabotaged the shaft with fatal consequences.⁷³ Fanny Mayne's conservatism precluded thought of rendering the owners responsible for work injuries. In *True Briton* she criticised Dickens' *Household Words* because it 'tends to separate class from class [and] to make the poor man feel that he is oppressed and overborne by the rich'.⁷⁴ She had some sympathy with the poor and advocated extra holidays. To avoid rancour they should demonstrate 'spunk and resolution', become thrifty, emigrate and enjoy the fruits of divine grace.⁷⁵

Little underground insight was afforded in Charlotte Yonge's *Heartsease* (1854).⁷⁶ Lord St. Erme, a young owner, took over the management of a recalcitrant workforce and the operation of a neglected and structurally unsafe mine. Few safety lamps were in use and the galleries were insufficiently supported. He insisted on the use of Davy lamps in the pit. When the roof fell in he and fourteen men were trapped until rescue was achieved via an old shaft. Lord St. Erme was the 'only one who kept his presence of mind'.⁷⁷ His brain and their brawn helped contributed to a successful rescue. He was oppressed by the close air and did not work but held the head of the one hewer who was badly injured. Once relief was assured he 'sank' and:

He was drawn up perfectly insensible, together with a great brawny-armed hewer, a vehement Chartist, and hitherto his great enemy, but who now held him in his arms like a baby, so tenderly and anxiously. ... he called out 'Here he is Miss, I hope ye'll be able to bring him to. If all lords were like he now!'⁷⁸

Once his lordship took the lead, the men followed.⁷⁹ The author commended reconciliation and social harmony within existing class boundaries but the miners were not capable of executive decisions and were only to be honoured as long as they were

⁷³ 278. She thought that the difference between rich and poor was determined by Providence and that the idea that all men were born equal to be 'distressing'. Dalziel, M. *Popular Fiction 100 Years Ago* (London: Cohen & West, 1957) 143.

⁷⁴ (1852) 1, 445 cited by Kestner, J. in 'Fanny N. Mayne's *Jane Rutherford* and the Tradition of Socio-Protest Novel in England' (1987) *Studies in the Novel* 19, 369 who liked the muted presentation.

⁷⁵ Dalziel 66.

⁷⁶ Charlotte Yonge (1823-1901) edited a girls' magazine *The Monthly Packet*. She lovingly depicted families and sibling relationships. She advocated ecclesiastical, educational and housing reform but accepted the inferiority of women. She also wrote some two hundred works of fiction and non-fiction.

⁷⁷ *Heartsease* (London: Macmillan, 1902 (1854)) 369.

⁷⁸ 370. The reviewer of *Heartsease* in *Fraser's Magazine* for 11/1854, 500 thought that the mine rescue scene was depicted 'in the graphic power of its masterly painting' but did not address the implications of the workforce enduring dangerous conditions.

⁷⁹ 406.

obedient. The accident was ‘owing [to the] negligence, cowardice and contempt of orders’ on the part of the owner’s agent.⁸⁰ As an employee of Lord St. Erme he was a fellow servant of the injured man. The author did not consider Lord St. Erme’s responsibility, moral or legal, for the defaults of his agent even though the agent had fulfilled the role of the master. One miner was ‘much crushed’ but the impact of his injuries on his working capacity was not considered. Any claim of his would have been defeated by the fictional defences of *volenti* and common employment. Charlotte Yonge did not deal with working practices.⁸¹

Factory Workers

Before the time of machinery the textile industry was largely based in rural homes where the spinners made the thread which the weavers used to make the product. Families contributed to the work, usually wives and daughters to the spinning and sons to the weaving. John Kay invented the flying shuttle in 1733 which increased the speed of weaving. James Hargreaves’ spinning jenny of 1765 helped the spinners produce more thread and, four years later, Samuel Crompton’s water-frame produced stronger thread. In 1785 Edmund Cartwright patented the first power loom. Two steam looms, looked after by a boy, could produce three and a half times more material than could a skilled weaver using a fly shuttle. Mills were built by the banks of rivers or streams and housed machinery easily operated by children. Remote valleys became centres of thriving industry. Demand for more children was met by parish authorities in London and other cities, pleased to be relieved of the financial burden of supporting them.⁸² Children were especially useful in being able to crawl under machines set six inches from the floor and also, as ‘piecers’, to tie the loose ends of fine thread. The system continued when, after steam power largely replaced water power, more mills were built near to coal fields

⁸⁰ 450.

⁸¹ Sanders, M. ‘Manufacturing Accident: Industrialism and the Worker’s Body in Early Victorian Fiction’ *Victorian Literature and Culture* (2000) 313.

⁸² Thomas, M.W. *The Early Factory Legislation* (Leigh-on-Sea: Thames Bank, 1948) 2.

rather than by rivers. The children worked as much as sixteen hours a day and often had to be beaten to ensure that they were awake.⁸³

The question of fencing factory machinery was not, at first, the major concern; the reformers concentrated on the condition of women and young children enduring long hours in heavy work. The first reform was championed by Sir Robert Peel, father of the later Prime Minister, wealthy from the profits of his cotton mill at Tamworth. He, guided by Robert Owen, was concerned about disease, children's education, and the crippling effects of working long hours. His Bill was resisted and reduced but became law in 1802. His Act⁸⁴ required washing of factory walls, windows to provide ventilation and apprentices not to work more than twelve hours a day with night work forbidden. There was provision for clothing, education and religious instruction. A magistrate and a clergyman had power to inspect mills and factories and were to report to Quarter Sessions as to observance of the Act. The Act had little practical effect because few, including magistrates, took any notice of it. There were two more Factories Acts, each promoted by the radical M.P. Sir John Hobhouse,⁸⁵ in 1825 and 1831. Neither was a success for there was no means of enforcement.

Using evidence from Blue Books⁸⁶ together with first hand evidence from Robert Blincoe and William Dodd⁸⁷ the novelists portrayed problematic working conditions in factories. Their purpose was to bring to public attention an unacceptable state of affairs. They were able to describe dust and crippling conditions without assimilating much technical knowledge. Crippling injuries in factories were preventable by the provision of seats and a reduction in hours. They were also suffered in mines where the remedy was in

⁸³ Henriques, U.R.Q. *The Early Factory Acts and their Enforcement* (London: Historical Association, 1971) 2.

⁸⁴ An Act for the Preservation of the Health and Morals of Apprentices and others employed in Cotton and other Mills.

⁸⁵ John Cam Hobhouse (1786-1869), later Lord Broughton, best man at the wedding of Lord Byron and executor of his estate, became a Member of Parliament in 1820 and attacked corruption. He wanted to extend the franchise but did not advocate universal suffrage. He was often the dinner guest, with Lord Melbourne, of Queen Victoria. He served as Minister in various posts under Melbourne and, later, under Palmerston, but by then his enthusiasm for child labour reform had abated.

⁸⁶ Parliamentary reports bound in blue.

⁸⁷ See ch.4.

shorter hours for children and less heavy work. Reform was slow and only in the matter of fencing⁸⁸ and after strong opposition from employers was legislative progress made.

Byssinosis

The state of the air in cotton mills rendered them unsafe. The snowflake-like atmosphere caused by cotton dust was perceived to be undesirable but the medical case on causation was not compelling (not every worker was troubled and symptoms were not always referable to work inhalation) and there was little impetus to reduce the harmful consequences.

Peel's Act of 1802, preceding the novels, required employers to provide a 'sufficient number of windows and openings in ... rooms or apartments to ensure a proper supply of fresh air'.⁸⁹ The general condition of all factories was to be reported to Quarter Sessions.⁹⁰ There was no enforcement mechanism and so the enactment was ignored.

The problem was identified by Charles Turner Thackrah (1795-1833) who investigated Yorkshire woollen mills and found that:

The ... sieving and examination of flocks produces great dust and decidedly injures both respiration and digestion. In proportion to the degree and continuance of this deleterious agent, is the head affected, the appetite reduced, respiration impeded, cough and finally bronchial or tubercular consumption induced.⁹¹

And:

Masters however enlightened and humane are seldom aware, never fully aware of the injury to health and life which mills occasion. Acquainted far less with physiology, than with political economy, their better feelings will be overcome by the opportunity of increased profit, and they will reason themselves into the belief that the employment is by no means so unhealthy as some persons pretend ...⁹²

He found that the worst conditions were in the heckling department (where the flax was dressed with a heckle to split and straighten the fibres for spinning) and he provided case

⁸⁸ See ch.4.

⁸⁹ s.2.

⁹⁰ s.9.

⁹¹ *The Effects of Arts, Trades & Professions ... on Health and Longevity ...* (London: Longman Green, 1832) 66.

⁹² 81.

studies of badly-affected hecklers.⁹³ He visited a Manchester cotton mill and noted that when the cotton was machined dust was produced in the process so that ‘light flakes of cotton float in the room’ but ‘the atmosphere’ was ‘scarcely fouled’ by reason of extraction through a casing and up a chimney.⁹⁴ In the carding and preparation room:

... the dust is not great. The children are however puny. Headache and gastric disorders are frequent especially among beginners. Common catarrh and coughs of short duration are found among the operatives.

In the spinning rooms ... particles of cotton float like thistle-down but there is little dust. At other mills moreover it appears that the dust is much greater particularly in the carding rooms, and less attention is paid to the health and comfort of the operatives.⁹⁵

Thackrah watched the operatives as they left the mills after work:

The children were almost universally ill-looking, small, sickly, bare-foot and ill-clad. The men ... were almost as pallid and thin as the children.⁹⁶

Thackrah cited the 1831 paper⁹⁷ of Manchester physician Dr James Kay, later Sir James Kay-Shuttleworth, who had identified ‘spinners phthisis’ (inflammation of the bronchial membrane causing pulmonary tuberculosis) as a progressively wasting disease. Work in the mill occasioned a short dry cough which ceased after the operative left. Progressively it disturbed sleep and exhausted strength. There was a little expectoration but the cough

⁹³ 70.

⁹⁴ 144.

⁹⁵ 145.

⁹⁶ 146.

⁹⁷ ‘Observations & Experiments concerning Molecular Irritation of the Lungs as one Source of Tubercular Consumption ...’ *North of England Medical & Surgical Journal* 1, 9, 360. Dr Kay (1804-1877) was later lauded for his contribution to education (Jenkins, A. ‘Dr James Kay: a Manchester Pioneer of the Welfare State’ *Applied Community Studies* (1991) 1, 1, 64 which Dickens satirised in the early chapters of *Hard Times*) but from his early career his work *The Moral & Physical Condition of the Working Classes Employed in the Cotton Manufacture in Manchester* (Manchester: Morton, 1969 (1832)) dealing with living conditions and disease is most well known. His wife was a regular correspondent with and friend of Mrs Gaskell. He sought the friendship of Angela Burdett Coutts, Harriet Martineau and Charlotte Bronte. He was the author of two long novels *Scarsdale* (1860) and *Ribblesdale* (1874) in which he covered relations between lords of the manor and their tenants, reforms in education and sanitation, distressed weavers and industrial unrest. Working conditions and industrial safety did not feature despite his brother owning a Rochdale calico mill. His biographer described his *Scarsdale*’s structure as ‘loose’, the plot ‘diffuse’, its characters as ‘stock’ and ‘not to life’ and the heroines as ‘remote’. Selleck, R.J.W. *James Kay-Shuttleworth: Journey of an Outsider* (Ilford: Woburn, 1994) 303. *Ribblesdale* was similar and neither were critical or popular successes. Kay Shuttleworth was disappointed in marriage, in health and in political and social advancement and Selleck described his novels as ‘the products of an obsessive, brave and blinkered man fighting illness, loneliness and disappointment’. 404. Dickens complained of Kay-Shuttleworth’s ‘supernatural dreariness’ and felt as if he had just come out of ‘the great desert of Sahara where my camel died a fortnight ago’. Letter to Burdett Coutts 01/04/1853 *Pilgrim Letters* 7, 56.

recurred incessantly.⁹⁸ Sir Edward Baines in his *History of the Cotton Manufacture in Great Britain*⁹⁹ of 1835 conceded that factory labour was not so ‘healthy as labour in husbandry’¹⁰⁰ and that ‘the severest labour in the mills is that of the women who clean the cotton by beating it with wands’.¹⁰¹ The effect of beating was to disperse greater quantities of fluff around the premises. While contending that flue was not harmful to children Baines accepted that older workmen suffered from spinners’ phthisis.

The Manchester surgeon, Peter Gaskell¹⁰² thought that conditions in the carding rooms of cotton mills did not immediately cause ‘any marked effect upon health’¹⁰³ because systems of ventilation did away with any ‘disadvantages’¹⁰⁴ although the particles were probably injurious.¹⁰⁵ He noted evidence from France that fine cotton dust ‘which excites the bronchi, provokes cough and maintains a perpetual irritation in the lungs’ often obliged workers to change employment ‘to avoid phthisis’.¹⁰⁶ He conceded that the processing of coarse and inferior cotton caused dust to be diffused in spite of every precaution.¹⁰⁷ It was questionable whether the dust did more than slightly irritate the mucous membrane so as to ‘induce organic disease of the substance of the lungs ... or even ... ulceration of air passages’ but conceded that bronchitis ‘may have become more obstinate as a result of exposure’.¹⁰⁸

George Dodd wrote of woollen manufacturing processes in *Curiosities of Industry*.¹⁰⁹ He describing ‘shoddy’, old woollen rags and remnants of clothing which were ‘devilled’ or torn to tatters by the spikes of the machinery, causing ‘devil’s dust’ to rise in ‘stinking clouds and befoul the whole town’ so that:

Women while sorting rags and men while feeding rags to devils muffle their mouths to ward off the choking effects of the unsavoury dust.¹¹⁰

⁹⁸ Thackrah 147.

⁹⁹ Chaloner, W.H. (ed) (London: Frank Cass, 1966 (1835)).

¹⁰⁰ Chaloner 455.

¹⁰¹ 456.

¹⁰² (1806-1841).

¹⁰³ Gaskell, P. *Artisans and Machinery* (London: Frank Cass, 1968 (1836)) 161.

¹⁰⁴ Gaskell 162.

¹⁰⁵ 221.

¹⁰⁶ 222.

¹⁰⁷ 223.

¹⁰⁸ 224.

¹⁰⁹ (London: Lea, 1852).

¹¹⁰ Dodd 4.

When Yorkshire mills began to produce linen there was a marked increase in mortality. Textile workers were found to experience breathing difficulties at the start of the working week, a phenomenon known as the ‘Monday Feeling’. Workers did not understand the dangers from dust and a belief that it was beneficial because it reduced appetites provided the masters with an excuse for not installing ventilation.¹¹¹

The balance of expert opinion was that exposure was sometimes harmful even if the impact was not immediate and the time scale for development not uniform. There follows a survey of the novels and of the views and purposes of their authors.

The Narrative

The novelists regularly painted the phenomenon as undesirable and unsafe, preventable by ventilation. In Harriet Martineau’s *A Manchester Strike*¹¹² Martha Allen, aged eight, daughter of the strike committee secretary, worked as a piecer on night shift in the same factory as her father but found the work tiring and fell asleep as soon as she sat down for an unauthorised rest for ‘the dust from the cotton made her cough’.¹¹³

Frances Trollope’s *The Life and Adventures of Michael Armstrong, the Factory Boy*, published in 1839 by instalments,¹¹⁴ was based upon the author’s researches in northern mills and Blincoe’s *Memoir*. Michael, taken in by Sir Matthew Dowling for the doubtful benefit of the mill-owner’s benevolence at home, was introduced to the housekeeper, Mrs Thompson who spotted ‘the cotton stuff mixed with his hair’.¹¹⁵ She

¹¹¹ Bowden, S. & Tweedale, G. ‘Poisoned by the Fluff’ *Journal of Law & Society* (2002) 29, 4, 562. An example of this misapprehension was related by Dr Andrew Ure in *The Philosophy of Manufactures* (London: Charles Knight, 1835) 381. The employer installed new ventilation, the workforce asked for increased wages to cover the extra cost of increased appetite, the employer declined the request but reduced the operation of the ventilation by 50%. Dr Ure failed to explore the dangers of inhaling cotton dust. His parting exhortation was ‘to tamper as little as possible with manufacturing or commercial industry by legislative regulation. Like love its workings must be as free as air.’ According to Engels, Ure was ‘the chosen lackey of the bourgeoisie’. Milada, I. *The Captain of Industry in English Fiction* (Albuquerque: New Mexico U.P., 1970) 89.

¹¹² *Illustrations of Political Economy* (London: Charles Fox, 1832) 3.

¹¹³ *A Manchester Strike* 64.

¹¹⁴ There were twelve monthly numbers and the work appeared in book form in 1840. Frances Trollope (1780-1863) was the mother of Anthony Trollope and embarked on her literary career at the age of fifty. Her family had fallen into poverty as a result of her husband’s unsuccessful business ventures (he was a barrister and farmer). She published forty novels in twenty five years and righted the family fortunes.

¹¹⁵ (Stroud: Nonsuch, 2007 (1840)) 44. Hereafter *Michael Armstrong*.

was shocked to think that such ‘an alien’¹¹⁶ from the ‘vulgar factory’ with ‘millions of cotton specks’ was to be entertained at Dowling Hall.¹¹⁷ Mary Brotherton, rich and philanthropic, visited a mill to assess working conditions and found breathing to be difficult but afterwards ‘the fresh air so carefully excluded within, soon revived her’. In a footnote, Mrs Trollope reported:

Except in the mills of Messrs Wood and Walker, at Bradford, it is difficult to find any factory properly ventilated – free admission of air being injurious to many of the processes carried on in them.¹¹⁸

Even Frederic Montagu, whose *Mary Ashley Factory Girl* was rushed out in 1839 to counter *Michael Armstrong*, conceded that extraneous fibres necessarily floated about.¹¹⁹ In Disraeli’s *Sybil* a five year old boy of no name had to leave home and went to sleep near the door of a factory. There was a vacancy in the Wadding Hole¹²⁰ so he was taken on and immediately named ‘Devilsdust’.¹²¹

Geraldine Jewsbury in her largely ‘silver fork’ novel *Marian Withers*¹²² described flue in the air from the devil spikes and workers using pieces of cotton as improvised masks.¹²³ Her suitor Cunningham noted that ‘as the work becomes finer, the people

¹¹⁶ Elliott, D.W. ‘Servants & Hands: Representing the Working Classes in Victorian Factory Novels’ (2000) *Victorian Literature & Culture* 379.

¹¹⁷ *Michael Armstrong* 45.

¹¹⁸ 337.

¹¹⁹ (London: Johnson, 1839) 97. The work was planned in ten monthly parts to be published by a Manchester bookseller but collapsed after the second instalment. Sutherland, J. *Victorian Fiction: Writers, Publishers, Readers* (Basingstoke: Palgrave Macmillan, 2006 (1995)) 90. Frederic Carlyle Montagu was the sixth son of the legal author on Bankruptcy Basil Montagu (1770-1851) and the second son by Basil’s third marriage. His third wife Anna became a friend of the Carlyles. Ashton, R. *Thomas and Jane Carlyle: Portrait of a Marriage* (London: Pimlico, 2003) 154-165. Basil’s household contained ‘a most difficult miscellany’ and his two sons by Anna were destined to ‘go astray and be unlucky’. Fielding, K.J. & Campbell, I. (ed.) *Thomas Carlyle: Reminiscences* (Oxford: Oxford U.P., 1997) 286. Frederic was born in about 1809 (the dates are inconsistent) and was admitted to Lincoln’s Inn on 26/11/1830 and as a pensioner (an undergraduate without financial support or college scholarship) to Jesus College on 08/07/1831 (Venn’s *Alumni Cantabrigiensis*). He left Lincoln’s Inn in 11/1838 ‘having resolved to retire from the profession of the law’. (Lincoln’s Inn Admission Register 1420-1893). The date of his death is not known.

¹²⁰ Wadding was the same loose fibrous material.

¹²¹ (Oxford: Oxford U.P., 1998 (1845)) 97.

¹²² (London: Colburn, 1851). Jewsbury (1812-1880) was the daughter of a Derbyshire cotton manufacturer who lost her faith in Calvinism, sought help from Thomas Carlyle, became Jane Carlyle’s closest friend and wrote stories including seventeen for *Household Words*. She wrote novels and children’s tales but her main achievement was in reviewing some two thousand works, mainly of fiction, for *The Athenaeum*. Fahnestock, J.R. ‘Geraldine Jewsbury: the Power of the Publisher’s Reader’ *Nineteenth Century Fiction* (1973) 28, 3, 253. Instalments of *Marian Withers* first appeared in the *Manchester Examiner* on 05/08/1850.

¹²³ *Marian Withers* 39.

engaged upon it look healthier, cleaner and more intelligent’ contrasting with the ‘miserable-looking children employed at ‘the devil’.¹²⁴ The author demonstrated a close knowledge of the processes and although she identified areas requiring advances in safety,¹²⁵ her novel was poorly received by G.H.Lewes in *The Leader*,¹²⁶ by Hepworth Dixon¹²⁷ in *The Athenaeum*¹²⁸ and by her biographer who thought the book to be ‘fragmentary and tame’.¹²⁹

Elizabeth Gaskell in *North and South*, published by instalments in *Household Words* in 1854/55, wrote the most compelling account of the impact of the dust related by Bessy Higgins, aged eighteen, to Margaret Hale who had moved from the South to ‘Milton’, a fictional suburb of Manchester. Bessy had difficulty in breathing and suffered a slow and painful death:

I think I was well when Mother died, but I have never been rightly strong sin’ somewhere about that time. I began to work in a carding room soon after, and the fluff got into my lungs, and poisoned me. ... Fluff. little bits, as fly off fro’ the cotton, when they’re carding it, and fill the air till it looks all fine white dust. They say it winds round the lungs and tightens them up. Anyhow there’s many a one as works in a carding room, that falls into a waste coughing and spitting blood, because they’re just poisoned by the fluff. ... Some folk have a great wheel at one end o’ their carding-rooms to make a draught and carry off th’ dust; but that wheel costs a deal o’ money – five or six hundred pound, maybe, and brings in no profit; so it’s but few of the masters as will put em’ up; and I’ve heard tell o’ men who didn’t like working in places where there was a wheel, because they said as how it made ‘em hungry, after they’d been long used to swallowing fluff, to go without it, and that their wage ought to be raised if they were to work in such places. So between masters and men th’ wheels fall through.¹³⁰

Dickens alluded to the dust in *Hard Times* where Harthouse was directed to Mr Bounderby’s home by a fellow who appeared to have ‘taken a shower-bath of something fluffy’.¹³¹ Charlotte Elizabeth Tonna detailed the manufacturing process in *Helen*

¹²⁴ 45.

¹²⁵ Howe, S. *Geraldine Jewsbury: Her Life and Errors* (London: Allen & Unwin, 1935) 4.

¹²⁶ 30/08/1851.

¹²⁷ (1821-1879) editor 1853-1869.

¹²⁸ 13/08/1851.

¹²⁹ Howe 111.

¹³⁰ *North and South* 102.

¹³¹ *Hard Times* 121. There is another reference during Stephen Blackpool’s rescue from the Old Hell Shaft.

Fleetwood (1846).¹³² Helen was an orphan, looked after by widow Green who, with her family and Helen, were deceived by parish authorities into moving from country to city so as to save the parish the cost of supporting them. The manufacturers 'allure[d] the industrious countryman from his healthful sphere, to perish, with his little ones, amid the noxious exhalations of those unnatural dens'.¹³³ Helen worked in the factory and became the family's main income earner. She recounted to her family the smothering and choking caused by the dust when scavenging (snatching off the loose material).¹³⁴

The novelists knew that cotton dust was somehow harmful after inhalation and were in the forefront by mentioning the undesirable phenomenon in their narratives. They tended to use it as a dramatic example of workers' general privations. They were aware that workers' did not press for efficient ventilation because it would increase their appetites, a luxury they could not afford. There was little pressure later from the Trades Unions and not much legislation to ensure ventilation.¹³⁵ Medical science was not sufficiently advanced to enable a civil suit to be successfully prosecuted and claimants would have faced the defence of *volenti*.¹³⁶

¹³² The work was first serialised in *The Christian Lady's Magazine* over 18 months beginning in 09/1839 and was published in book form in New York in 1844 and in London in 1846. Mrs Tonna edited the *Magazine* from 1834 until 1846 and it continued in publication until 1849.

¹³³ (London: Seeley Jackson, 1856) 35.

¹³⁴ *Helen Fleetwood* 91. Helen's employers thrice disclaimed responsibility for her wellbeing at work.

¹³⁵ The Factories Acts Extension Act 1864 which vaguely required (s.4) clean and ventilated factories 'to render harmless *so far as practicable* any ... impurities generated in the process of manufacture that may be injurious to health'. By s.5 employers were to make special rules 'to counter wilful misconduct and negligence of workmen' in connection with ventilation presumably requiring windows to be kept open in winter. The next statutory intervention was the largely consolidating Factories Act 1937, s.47 which dealt with 'dust or fume or other impurity'.

¹³⁶ Claims for damages caused by exposure to cotton dust were not made in the Nineteenth Century. In 1906 the Workmen's Compensation scheme was extended to cover some specified diseases but not to those caused by dust. The term 'byssinosis' was not used in England until about 1940. The disease could only be diagnosed from individual medical and working histories and not by clinical or radiological examination. Due to the moist climate of the North West of England there was nothing to differentiate workers' symptoms from those of patients with such as chronic bronchitis who had not been exposed. No method of recompense was created until the 1941 Scheme under which a claimant had to show total disability and twenty years of employment in the industry. At first it applied only to men even though the hazards were mainly encountered by girls and by women in the early stages of the process. The benefits paid were low and few claims were made. However after further research about 200 cases p.a. were intimated. In ten years from 1950 there were about 50 recorded deaths p.a. reducing to 25 p.a. by 1980. Bowden & Tweedale 566. A claim for damages on behalf of a lung disease-disabled textile worker first succeeded in 1973. Union-backed Thomas Simmons' claim against Waller Brothers settled at £13,000 and costs. The evidence came from the Plaintiff, his work colleagues, from medical experts and from a consulting engineer though Simmons was unable to persuade the Pneumoconiosis Medical Panel that he had contracted an industrial disease entitling him to state benefit. The Panel was not swayed by medical evidence which put his disability at 50% and assessed the reduction in his life expectation at four years. However by 1984 benefit

Crippling by Unnatural Pressure

Thackrah recorded:

In manufacturing districts we frequently see not very marked deformity, but such a degree as to affect the figure and capability of motion. Many operatives have an absolute defect of exertion. The smaller muscles only are brought into full activity. The limbs consequently and especially in the growing youth, take the form which is induced by the weight of the body and the posture required in the employ. The spine evidently suffers.¹³⁷

Gaskell published his *Artisans and Machinery* in 1836 and confirmed the causation of these deformities:

... the osseous system is incomplete, its structure, as yet, being in a very great proportion cartiliginous, and hence beautifully adapted for accommodating itself to the growth and extension of the body. It is however soft, yielding, bends beneath pressure, and is easily made to assume curvatures and alterations in direction, incompatible ... with the natural arrangements ...¹³⁸

... the spinal column bends beneath the weight of the head, bulges out laterally, or is dragged forward by the weight of the parts composing the chest; the pelvis yields beneath the opposing pressure downwards, and the resistance given by the thigh bones; its capacity is lessened ... : the legs curve and the whole body loses height, in consequence of this general yielding and bending of its parts.¹³⁹

Caroline Norton (1808-1877) wrote her moving poem, dedicated to Lord Ashley, 'A Voice from the Factories' referring to cramped limbs and 'body weakly bent'.¹⁴⁰ In 1841 Oastler commissioned John Critchley Prince (1808-1866), the Wigan-born 'People's Poet', to write 'The Death of the Factory Child' a poem of pathos and outrage at the children's 'wasted frames' and 'defiled souls' within 'the halls of tyranny' where 'the cruel spoiler palsied ev'ry limb'.¹⁴¹

was awarded by the Panel or on appeal to 63 claimants reducing in 1985 to 37. Lewis, R. *Compensation for Industrial Injury* (Abingdon: Professional Books, 1987) 285. The first recorded decision of a civil court in favour of a Plaintiff was in *Brooks v J.&P. Coates (UK) Ltd* [1984] 1 AER 702 where Boreham J. awarded the Plaintiff £22,688 which included £14,000 in respect of pain and suffering and loss of amenity and the balance in respect of past financial loss. Many subsequent claims were successful but the number of claims declined with reducing exposure in a contracting industry and now, in England, byssinosis is a disease of the past.

¹³⁷ Thackrah 207.

¹³⁸ Gaskell 147.

¹³⁹ 159.

¹⁴⁰ (London: Murray, 1836) 35, v.48.

¹⁴¹ *Fleet Papers* (17/07/1841) 1, 29. 3. In Maidment, B. *The Poorhouse Fugitives* (Manchester: Carcanet, 1992) 111. Prince was a maker of 'reeds' (instruments made of lath and wire used by the hand-loom weavers to separate threads) but he drank too much and was prone to unprofitable travel. Dickens twice

In 1841 Lord Ashley engaged the services of William Dodd to investigate factory safety and provision for injured employees.¹⁴² Dodd, born 18 June 1804, a former piecer, from the age of six, in a Kendal woollen mill, had become crippled by injury to his right knee and foot as a result of excessive pressure involved in piecing work.¹⁴³ His sister, having started work at seven, was similarly crippled. The crippling condition was caused by continuous standing allied to the unnatural application of pressure on a joint or limb and by lack of sunshine.¹⁴⁴ Dodd's own foot had become broad and flat and was dragged broadside first.¹⁴⁵ Factory children were generally weak, stunted, deformed and ignorant. The concept of family was weakened because such children grew up spending most of their waking time in factories carrying out repetitive work. Such children did not have the benefit of fresh country air and civilised habits.¹⁴⁶ One remedy was to provide seats for rest.¹⁴⁷

The Narrative

In 1805 the philosopher William Godwin¹⁴⁸ wrote the first British novel which exposed the injustices of the factory system. In 1797 Godwin had visited the Wedgwood pottery at Etruria, in 1800 and 1803 the industrial regions of the Midlands and in July 1804 a silk mill at Spitalfields.¹⁴⁹ In *Fleetwood*,¹⁵⁰ set in France, Ruffini, a friend of Fleetwood's father, recounted how, at the age of seven, his uncle put him to work in a Lyon silk mill. His work involved the reels or swifts which received the silk from the bobbins. There were twenty children on each of three floors and each child was concerned with fifty six swifts. The threads were liable to break so the child had to find the end and then attach it to the corresponding end attached to the bobbin:

subscribed to his published work. He wrote a poem for Dickens' *Household Words* (05/04/1851) 3, 54, 35 expressing reservations about the Great Exhibition. The 'poor toiler at the whirring wheel' could not share the 'triumph and the pageant' of 'that spectacle sublime'. Prince, in poor health and almost blind, died a pauper.

¹⁴² See also ch.4.

¹⁴³ Dodd, W. (1841) *A Narrative of the Experience and Sufferings [of] William Dodd, a Factory Cripple in The Factory System Illustrated* (London: Frank Cass, 1968 (1842)) 277.

¹⁴⁴ See children in mines.

¹⁴⁵ Dodd 305.

¹⁴⁶ 311.

¹⁴⁷ Letter XXX, (18/01/1842) Leeds 229. Also Robert Blincoe whose *Memoir* is dealt with in ch.4.

¹⁴⁸ (1756-1836) *Fleetwood* was the third of Godwin's six novels.

¹⁴⁹ *Fleetwood* 37.

¹⁵⁰ (Peterborough, Ontario: Broadview Press, 2001 (1805)).

Not one [child] exhibited any signs of vigour and robust health. They were all sallow, their muscles flaccid and their form emaciated.¹⁵¹

These children were uncouth and ill grown in every limb, and were stiff and decrepit in their carriage, so as to seem like old men.¹⁵²

Ruffigny found his days of labour to be days of oblivion which brought ‘weariness, ennui, imbecility and idiotism’¹⁵³ and thought the equivalent adult work to be ‘equally deadening’.¹⁵⁴

Frances Trollope, Charlotte Tonna and Dickens were persuaded that repetitive work over long hours put unnatural strain on child workers and caused crippling injury and deformity. In *Michael Armstrong* Mrs Trollope depicted Michael’s sleepy brother Edward, aged eleven, as ‘a miserably sick-looking child’, crippled due to factory work and having legs emaciated and knees sloping inwards.¹⁵⁵

Elizabeth Stone’s *William Langshawe the Cotton Lord* was the first industrial novel to be set in Manchester¹⁵⁶ Her purpose was to criticise both the thoughtless ostentation of the ‘cottonocracy’ and the illegal and violent practices of organised labour. She mistakenly argued that cruel conditions no longer existed because crippled limbs were caused by the old spinning frame which required ‘perpetual stooping almost to the ground’.¹⁵⁷ Children must work towards their own subsistence.¹⁵⁸

Harriet Martineau began *A Manchester Strike*¹⁵⁹ with her account of Martha Allen’s walk home from the cotton factory where she worked as a piecer on night shift. Martha limped. Her knees had ached all day. Her father carried her up the stairs to her third floor home. During the strike the children were not allowed to work and Martha’s knees were ‘so much better since she was at home’.¹⁶⁰ Martineau looked for the cessation of

¹⁵¹ 148.

¹⁵² 150

¹⁵³ 156.

¹⁵⁴ 162. Locke, D. in *A Fantasy of Reason* (London: Routledge, 1980) described *Fleetwood* as ‘pompous and long-winded’ with an ‘artificial story, cardboard characters [and] tedious development’. 211.

¹⁵⁵ *Michael Armstrong* 37.

¹⁵⁶ Mrs Stone (1803-1881), daughter of John Wheeler the late proprietor of the *Manchester Chronicle*, also wrote *The Young Milliner* (1843) about the oppression of seamstresses and these two social protest novels were her most successful.

¹⁵⁷ (London: Bentley, 1842) 1, 189.

¹⁵⁸ 1, 192.

¹⁵⁹ *Illustrations of Political Economy* (1832) 3, 2.

¹⁶⁰ 3, 115.

‘opposition of interests’ rather than improved conditions.¹⁶¹ She fought for child workers but not for adults who had the freedom to look after themselves.

In *Helen Fleetwood* Helen was introduced to her cousin, sickly Charles Wright and noted:

... the stoop of his projected head, the retiring curve of his chest, and the disproportionate length of his arms, betrayed a deficiency or perversion of natural growth.

[Charles] ... rose ... or rather stood; for no perceptible difference was made in his height by this change of position, owing to the curvature of his legs. The deformity was striking, and the irregular shuffle with which he crossed the room painful to witness.¹⁶²

Charles Wight’s sister, Sarah spent her time in the loft and was unlikely to live long. She was ‘so twisted and crooked that she scarcely reached her height’.¹⁶³ She had ‘only one arm and that one so contracted as to be nearly useless; while her feet were bent in, until she rested on her ankle-bones.’¹⁶⁴ Sarah died enlivened only by Helen’s Christian faith.

Helen Fleetwood was the first English novel to exclusively describe the lives of the working class and Helen was the first English working class heroine.¹⁶⁵ It was originally published in *The Christian Lady’s Magazine* in serial form in 1839-40.¹⁶⁶ The novel followed an article in the *Magazine* entitled ‘English Slavery’ in which Charlotte Elizabeth Tonna contended that ‘the general state of our infant labourers in factories is that of slavery [which] ... far exceeds slavery of adults even in our colonies’.¹⁶⁷ Her work was well known at home and in North America where Harriet Beecher Stowe wrote an appreciative introduction to the American edition of Mrs Tonna’s *Collected Works* in 1844.¹⁶⁸ She disliked the concept of a novel which involved imagination and sentiment. She concentrated on producing ‘instructional fiction’ based on ‘hard, cold, empirical fact’. She stressed Helen Fleetwood’s martyrdom in remaining at work despite knowing

¹⁶¹ 3, 126. Harriet Martineau repeated her view on the relation of capital to labour in *The Tendency of Strikes and Sticks to produce Low Wages and of Union between Masters and Men to ensure Good Wages* (Durham: Veitch, 1834).

¹⁶² *Helen Fleetwood* 65.

¹⁶³ 61.

¹⁶⁴ 62.

¹⁶⁵ It also contained an early description of bullying in the workplace by fellow workers.

¹⁶⁶ There are no circulation figures available in respect of the magazine. Fryckstedt, M.C. (1981) ‘Charlotte Elizabeth Tonna and *The Christian Lady’s Magazine*’ (1981) *Victorian Periodicals Review* 14, 2, 50.

¹⁶⁷ (1838) 10. 49. After *Helen Fleetwood* came *The Factories* in which she reported on cruel overlookers, the partisan decisions of magistrates, the high mortality rates in Bolton and Leeds (where 62% of children did not survive beyond the age of twenty) and the employment by the mill-owners of recruiting officers to draw country people to the city. *Magazine* (1842) 13, 56.

¹⁶⁸ Kovacevic, I. & Kanner, S.B. ‘Blue Book into Novel’ *Nineteenth Century Fiction* (1970) 25, 2, 153.

that life in the factory would kill her.¹⁶⁹ Her approach was ‘ultra Protestant evangelical’,¹⁷⁰ and she appears today as both startlingly anti-Catholic and anti-socialist. She relied heavily on the 1832 Report of the Sadler Committee.¹⁷¹ Although devoid of humour her novel remains readable as a well-plotted and moving historical document. Above all her sympathies were with the poor. She opposed Malthus and attacked Harriet Martineau for her allegiance to *laissez faire*.¹⁷² She knew that individual workers had no power to negotiate the terms offered by employers. Cazamian concluded that the novel was ‘moving and persuasive’, that ‘force of truth and genuine indignation’ compensated for ‘the lack of individual talent’.¹⁷³ Despite its ‘mediocre literary quality’ the didactic tale aroused ‘lasting indignation’.¹⁷⁴ Mrs Tonna provided details of the duties of piercers, spinners and scavengers, but the scene never shifted onto the factory floor.

Not all agreed that the deformities of cripples were caused by unnatural pressure on young limbs in the workplace.¹⁷⁵ One view was that such injuries were brought about by the practice of swaddling and bandaging infants but that was at odds with the observations of Thackrah and of Peter Gaskell, the experiences of Blincoe and Dodd and the fruits of Dodd’s investigations. Happily, with reduced hours and restful seats, the problem did not persist.¹⁷⁶ There were no reported civil actions and indeed any such

¹⁶⁹ Kowaleski, E. ‘The Heroine of Some Strange Romance: the Personal Recollections of Charlotte Elizabeth Tonna’ (1982) *Tulsa Studies in Womens’ Literature* 1, 1, 141.

¹⁷⁰ Kovacevic & Kanner 155.

¹⁷¹ 164.

¹⁷² She developed a strong pro-Jewish stance in her later work such as *The Perils of the Nation* (1843) and her fictional *The Wrongs of Woman* (1844) dealing with the hardships of milliners and dressmakers. She was motivated by Russian persecution of Jews. Kestner, J. ‘Elizabeth Tonna’s *The Wrongs of Woman*: Female Industrial Protest’ *Tulsa Studies in Women’s Literature* (1983) 2, 2, 193.

¹⁷³ Cazamian, L. *The Social Novel in England 1830-1850* (London: Routledge, 1973 (1903)) 239.

¹⁷⁴ 240. It was ‘a sermon addressed to a nation going to the devil’: Milada, I. *The Captain of Industry in English Fiction 1821-1871* (Albuquerque: New Mexico U.P., 1970) 101. Kathleen Tillotson thought Mrs Tonna to be a ‘diligent, fervent Evangelical writer’ and *Helen Fleetwood* ‘a vivid and authentic tale of factory life in which the main impetus is horror at its heathenism’: *Novels of the Eighteen-Forties* (Oxford: Clarendon, 1954) 127 but Patrick Brantlinger called it ‘social hysteria written by a rabid fan of Lord Ashley’s’ and ‘a masterpiece as a tract but wretched as a novel’: *The Spirit of Reform* (Cambridge, Mass.: Harvard U.P., 1977) 56.

¹⁷⁵ Indeed it now agreed that symptoms were caused by a combination of pressure and lack of sunlight and therefore of vitamin D. Rickets was identified as a child disease in about 1920. Without the vitamin bones would not harden but became curved and stunted resulting in bow legs and knock knees. Vitamin D was isolated in 1930. Dunn, P.M. ‘Sir Robert Hutchison (1871-1960) of London and the Causes and Treatment of Rickets’ *Arch Dis Child Fetal Neonatal Ed* (2005) 90, 538.

¹⁷⁶ The nearest modern equivalents are bursitis of the hand, of the elbow and of the knee caused by severe or prolonged external friction or pressure and tenosynovitis, traumatic inflammation of the tendons of the

would have faced the fictional *volenti* defence and children may have been saddled with a parent's knowledge rather as in *Waite v North Eastern Railway*.¹⁷⁷ As with byssinosis crippling injuries were obvious targets for the novelists who lacked mechanical knowledge but were generally sympathetic. The respective remedies were ventilation and rest. The writers did not help to bring about remedial legislation except perhaps in respect of children's hours.

The qualifications of the novelists to facilitate and join in the debate about safety and their proximity to the construction, operating, mining and manufacturing processes were sometimes questionable. Their approach to fencing of machinery in factories is considered next.

hand or arm caused by frequent or repeated movements of the hand or wrist. Lewis 331. These conditions are grouped together as 'Work-related musculo-skeletal disorders'.

¹⁷⁷ (1858) EL BL & EL 765; 120 ER 695. See ch.2.

Chapter 4

The Responsibilities of Employers (2): Fencing of Factory Machinery

Factual Evidence & Dickens' Journalism

In 1822 Robert Blincoe met with the idiosyncratic radical journalist John Brown who was looking for material to support the campaign for shorter hours for children. Brown drafted the *Memoir*, based on Blincoe's experiences, and in 1824 obtained Blincoe's suggestions on it. The draft lay untouched until Brown made contact with the radical Richard Carlile¹ but Brown took his own life in 1826. Carlile knew little of factories so he visited Manchester and, in 1828 published the *Memoir* in five parts in his new newspaper *The Lion*. In 1832 the Manchester trades unionist John Doherty² printed extracts in his newspaper *The Poor Man's Advocate* and, as a whole, in pamphlet form. Its impact was substantial and prolonged.³ The material was out of date but that deficit was balanced by the conviction of its content.

Robert Blincoe was born an orphan in 1792 and spent most of his first seven years in the workhouse at St. Pancras. In 1799 he was taken, with several others, by cart over four days to Lamberts' Lowdham Mill, near Nottingham, whose austere regime resembled that of a workhouse.⁴ Blincoe noted the absence of soap and an abundance of cotton flue.⁵ His first job was to pick up loose cotton from the floor. He found the noise, stench and heat excessive. He worked continuously for over six hours and per day a total of fourteen hours. He was promoted to be a roving winder but could not keep pace with the machinery and, when he reported his difficulty, was

¹ Richard Carlile (1790-1843) from Ashburton, an itinerant tin plate worker for fifteen years up to 1817, after moving to London, wrote radical tracts and, as a religious sceptic, was several times imprisoned for seditious libel and blasphemy. He edited several radical journals. He popularised the writings of Tom Paine and read *The Age of Reason* to the jury during his prosecution for the publication of his account of the Peterloo massacre. His popularity waned as reformists found Chartism and socialism more attractive.

² John Doherty (1797-1854) of an Irish labouring family, worked locally in the cotton industry until at nineteen he moved to Manchester where he worked as a cotton spinner. He was an orator and organiser and published several journals. He established various labour organisations. His great days ended by 1835 but, by then he had set up as a publisher, printer and bookseller and he remained politically active for another ten years.

³ Waller, J. *The Real Oliver Twist* (Cambridge, Icon, 2005) 298.

⁴ Brown, J. *A Memoir of Robert Blincoe* in Winn, S.A. & Alexander, L.M. (ed.) *The Slaughter-House of Mammon* (West Cornwall, CT: Locust Hill, 1992 (1828)) 12.

⁵ *Memoir* 18.

roundly beaten. The food provided was often covered in flue. The work was dangerous:

Many of his comrades had ... been ... injured by the machinery. Some had the skin scraped off the knuckles, clean to the bone, by the fliers; other a finger crushed, a joint or two nipped off in the cogs of the spinning frame wheels! – When his turn to suffer came, the fore-finger of his left hand was caught, and almost before he could cry out, off was his first joint ... ⁶

He ran off to Buxton where he received medical treatment but, although in pain on his return, he had to stay at his workstation. At the age of eight he witnessed an horrific accident to Mary Richards, then aged ten, who:

... attended a drawing frame, below which, and about a foot from the floor, was a horizontal shaft, by which the frames above were turned. ... just as she was taking off the weights, her apron was caught by the shaft ... [and she] was drawn by an irresistible force and dashed on the floor. ... [Blincoe] saw her whirled round and round with the shaft – he heard the bones of her arms, legs, thighs &c. successively snap asunder, crushed, seemingly to atoms, as the machinery whirled her round, and drew tighter and tighter her body within the works, her blood was scattered over the frame and streamed upon the floor, her head appeared dashed to pieces – at last, her mangled body was jammed in so fast, between the shafts and the floor, that the water being low and the wheels off the gear, it stopped the main shaft! When she was extricated, every bone was found broken! – her head dreadfully crushed! – her clothes and mangled flesh were, apparently inextricably mixed together, and she was carried off, as supposed, quite lifeless.

Amazingly Mary was saved by medical skill but:

Saved to what end? ... to be sent back to the same mill, to pursue her labours upon crutches, made a cripple for life, without a shilling indemnity from the parish, or the owners of the mill.⁷

After four years at Lowdham Blincoe was transferred to a Derbyshire mill where the overlookers were fierce and brutal, disease was common and the deprivation worse than that of a West Indian slave.⁸ Blincoe worked on a stretching frame but could not keep up so he was kicked, beaten and strung up. When he was twelve he was cleaning away cotton from under the frame. His head was caught between two parts of the frame but, although bloodied, he survived only to be beaten for lack of haste.⁹ He escaped but failed to persuade the magistrate to intervene and a further beating resulted on his return. He had become badly lame. He determined to leave and started 'at hazard'. He came to a cotton factory near Manchester, where he found more

⁶ 26.

⁷ 27.

⁸ 39.

⁹ 42.

children recently arrived from St.Pancras. Conditions were better but his wages were reduced by reason of his disability. When he complained, his wages were increased though not to the standard level, and, soon after, he was paid off.¹⁰

In 1819 he married and he began in business on his own account as a dealer in waste cottons, a risky step given the slump in cotton exports.¹¹ Great unrest, channelled into a move for parliamentary reform, culminated in a meeting on St. Peter's Field, close to the Blincoe's home, to be addressed by Henry 'Orator' Hunt¹² and Richard Carlile. The Manchester magistrates over-reacted resulting in indiscriminate use of the sabre by the amateur yeomanry and then by Hussars witnessed and recorded by the radical Samuel Bamford and later by Mrs G. Linnaeus Banks (1821-1897) in *The Manchester Man* (1876).¹³ Eleven died, including two women, and four hundred were injured.¹⁴ Efforts to bring the magistrates to justice failed whereas Hunt, Bamford and others were sentenced to imprisonment.

Happily Blincoe survived the slump. Although Brown's prose was over-dramatic, the *Memoir* convinced as an accurate account and Blincoe's story became well known. Novelists relied on the *Memoir* which was a rare item. Few progressed as Blincoe had done¹⁵ and few had the initiative to publicise their story.

Richard Oastler wrote to the *Leeds Mercury* of 29 September 1830 alleging that workers existed in a state of slavery so provoking a furore and beginning the movement for factory reform in Yorkshire.¹⁶ His agitation for a measure to restrict working hours was continued by Michael Sadler, M.P. for Newark.¹⁷ Sadler's Bill

¹⁰ 62.

¹¹ Waller 227.

¹² Henry Hunt (1773-1835) was born a gentleman farmer but fell out of favour with the Wiltshire gentry on the failure of his hasty marriage. His radical campaign was for universal suffrage for males and annual parliaments. He tried hard to ensure peaceful behaviour of demonstrators. After Peterloo he was imprisoned for two and a half years during which time he became a journalist, pamphleteer and autobiographer.

¹³ (Altrincham: Sherratt, 1876) 116.

¹⁴ Bamford, S. *Life of a Radical* in *The Autobiography of Samuel Bamford* (London: Cass., 1967 (1842)) 2, 155.

¹⁵ Samuel Smiles would have admired his perseverance.

¹⁶ Oastler (1789-1861) was from North Yorkshire. He became one of the principal merchants in Leeds but in 1820 his business failed and he was made bankrupt. He took employment as steward of an estate near Huddersfield. He fell into dispute with his employer Thornhill and was committed to prison for debt in December 1840 where he stayed for more than three years. From his prison cell he edited *The Fleet Papers* which were not financially successful. On his release he played no further part in the 'factory movement'. He was never in sympathy with the Chartists.

¹⁷ Sadler (1780-1835) son of a Derbyshire gentleman farmer, was self taught from the age of fifteen, and when twenty went into partnership with his brother Benjamin, a Leeds linen merchant. He had no head for business and devoted much time to philanthropy. He was not greatly interested in factory problems until approached by Oastler. His speech on 16/03/1832, when he moved the second reading

was referred to a Select Committee which did not produce any report but the minutes of the evidence of eighty-nine witnesses caused a sensation. Reform was sought by an alliance of radical clergymen and philanthropic mill owners supported by a groundswell of popular agitation although in 1832 Sadler, standing at Leeds in the General Election, was defeated by Macaulay.¹⁸ Lord Ashley (later Earl of Shaftesbury, 1801-1885), taking up the cause, proposed heavier financial penalties which the manufacturers successfully opposed, their motion for a Royal Commission passing by one vote. The Commission consisted of Benthamites Thomas Tooke, Southwood Smith¹⁹ and Chadwick and relied on local members for first-hand information. When they visited factories in Lancashire the public refused to co-operate, thinking the Commission to be the mouthpiece of the employers.²⁰ Their Report²¹ found that the labour of children was exhausting and debilitating and left no time for education. Chadwick slipped in, without the knowledge of his colleagues, provisions requiring employers to pay half wages to injured employees.²² Lord Ashley's Bill was defeated and the Chancellor, Lord Althorp,²³ was responsible for the Factory Act 1833 which provided for the employment of Inspectors. The government saw no need to protect adult workers, and so Lord Ashley's safety proposals were excluded.²⁴ Many employers took no notice of the Act and enforcement transpired not to be feasible, and when a further ten-hours Bill was proposed Lord John Russell undertook, in the name of the government, to enforce the Act.²⁵

Frances Trollope was a keen supporter of the Ten-hour movement but Dickens was not. Commenting to Dr Southwood Smith on the second report of the Children's

of the bill, was regarded as his best. He argued that employers did not meet with workers on equal terms and that statutory protection was essential.

¹⁸ Thomas Babington Macaulay, later Baron Macaulay (1800-1859).

¹⁹ Thomas Southwood Smith (1788-1861) worked in Yeovil as physician and Unitarian minister, came to London in 1820 and advised Bentham on medical and sanitary matters. He was a friend of Dickens who praised his good works and admired his medical expertise. His slow speech delivery may have provoked Dickens' criticism that he was 'born to confuse mankind'. Letter to Clarkson Stanfield 06/03/1846 *Pilgrim Letters* 4, 515.

²⁰ Thomas, M.W. *The Early Factory Legislation* (Leigh-on-Sea: Thames Bank, 1948) 45.

²¹ PP. (1833) XX.

²² Lewis, R.A. 'Edwin Chadwick and the Railway Labourers' *The Economic History Review* (1950) N.S. 3, 1,107, 117.

²³ John Charles Spencer, Viscount Althorp (1782-1845) was one of the Benthamite founders of the Society for the Diffusion of Useful Knowledge. In 1830 Lord Grey formed a government and relied heavily on Althorp as his 'right hand'. His draft formed the basis of the 1832 Reform Act. He helped to draft the new Poor Law of 1834 for which he was much criticised.

²⁴ Thomas 61.

²⁵ 91.

Employment Commission, while generally sympathetic, he worried lest shorter hours would merely go to reduce family income and thereby increase poverty.²⁶ Similarly in Mrs Gaskell's *Mary Barton*. Mary's father, John, was about to set off for London as a member of the Manchester delegation in the Chartists' march in June 1839 to present their petition. He held a surgery in his home prior to his departure. Widow Davenport argued that factory work was good for her son in keeping him off the streets and paying for his porridge.²⁷ Parliament did not respond to the marchers or to their petition. There were riots around the country including Newport in November 1839 and Preston in August 1842²⁸ without the Chartists' goals being achieved.²⁹

The Factory Act 1844 became law only after Lord Ashley had moved and chaired a Select Committee on the Regulation of Mills and Factories. The Committee sat for four months and published six reports in February 1841 which contained recommendations for the fencing of machinery and for the payment of compensation for accidents where the machine was negligently left uncovered. Inspectors were empowered to issue notices requiring fencing and to direct civil proceedings where dangerous machinery caused personal injury.³⁰ Lord Ashley funded at least one action on behalf of a minor injured in factory work.³¹

He engaged the services of William Dodd³² to investigate factory safety and provision for injured employees. Dodd's sister, having started work at seven, already similarly crippled, when tired and sleepy, injured her hand which was drawn into an unguarded revolving toothed wheel. She was left with 'a very feeble apology for a hand'. The employers paid her ten shillings, less than a penny a day for each day of her attributable absence, while her workmates raised seven shillings. The following

²⁶ *Pilgrim Letters* 3, 435. Letter 01/06/1843.

²⁷ *Mary Barton* 87.

²⁸ Named the 'Plug Riots' because workers stopped production by removing boiler plugs from factory steam engines.

²⁹ The leader Feargus O'Connor split the movement when he argued that force was justified. Matters came to a head in 1848 when O'Connor arranged a meeting on Kensington Common attended by some twenty thousand people. The authorities, fearing violent takeover, restricted the movements of the crowd and violence was avoided. O'Connor opted to take a taxi to hand in a petition allegedly signed by more than five million and the threat to a stable society was ended. Little notice was taken of the petition which was found to contain many suspicious signatures. Chase, M. *Chartism, A New History* (Manchester: Manchester U.P., 2007) 301.

³⁰ Bartrip, P.W.J. & Burman, S.B. *The Wounded Soldiers of Industry* (Oxford: Clarendon, 1983) 19.

³¹ *27. Cotterell v Stocks* heard at Liverpool in 1842. Further young Mary Howorth, mutilated by mill machinery, was referred by Lord Ashley to his own solicitor for redress.

³² See ch.3.

week a man lost two fingers in a similar accident on the same unboxed machine.³³ Another girl at the same mill had her leg torn off and both thigh bones broken.³⁴

Dodd set off in September 1841 and reported to Lord Ashley by letter after each visit to twelve manufacturing centres which included Leeds, Bradford and Manchester. The histories he related from each centre were depressingly similar. Dodd discussed the frequency and severity of accidents with local surgeons. Mr Samuel Smith of Leeds told Dodd that children inevitably pushed each other when close to unguarded machinery and were required to clean the machines when they were in motion with inevitable losses of entire arms.³⁵

Dodd reported four main causes of injury and disability. The first was the crippling effect of continuous standing allied to the unnatural pressure on a joint or limb.³⁶ The next cause was the lack of guarding of revolving machinery particularly during cleaning.³⁷ The third was the drawing of clothing or hair into such machinery. A weaver, Catherine Gunning, was in a small room below the warehouse, combing her long hair upwards, when an unguarded revolving shaft above her caught her hair and dragged her up breaking her arms, removing her hair and skin from her head and ultimately killing her.³⁸ The fourth came from the operation of power looms. If at first odd-numbered threads ascended and even-numbered threads descended there would follow a reversal of the process, all at a speed just discernible by the human eye, and, if a thread should break, the threads would not be able to pass each other thus checking the journey of the shuttle and causing it to fly out and strike any object or person nearby (usually the operator of an adjacent loom). Dodd reported two such accidents in Stockport, each resulting in the loss of an eye.³⁹

Usually the payments to injured or crippled workpeople were nominal and in no way compensated for past loss and not at all for future loss where severe injuries affected future earnings. Some employers made no payment at all and if a servant sought to return to work despite disability, wages were often reduced. William Firth had his leg amputated when caught between two revolving shafts, Dodd wondered

³³ Dodd, W. 'A Narrative of the Experience and Sufferings [of] William Dodd, a Factory Cripple' in *The Factory System Illustrated* (London: Frank Cass, 1968 (1846)) 285.

³⁴ Dodd 303.

³⁵ Letter IV (29/09/1841) Leeds, 21.

³⁶ See ch.3.

³⁷ Letter XXIII (23/11/1841) Stockport, 171.

³⁸ 178.

³⁹ 169.

‘what earthly possessions can repair or compensate his loss?’.⁴⁰ The remedy was to make the employer responsible unless he was free from culpability.⁴¹

By the 1844 Act child hours were restricted to six and a half hours, the minimum age for employment was increased to eight and Inspectors were given the power to appoint independent paid surgeons who would visit factories and issue certificates for those children assessed to be fit for work.⁴² Children’s time was to be divided equally between school and factory. Inspectors were empowered to classify as dangerous any machinery not covered by compulsory fencing regulations. Employers could challenge the classification but if an employee was injured after a Notice was ignored, financial penalties would be imposed.

For the first time there was provision for compensation for those injured by factory machinery with actions to be sanctioned by Government minister and to be brought at public expense. The idea of Government intervention in the previously sacrosanct relationship between master and servant was revolutionary and Sir George Gray, Whig Home Secretary for a total of thirteen years between 1846 and 1869, sanctioned few claims. Occasionally fines paid under s.60 of the Act were handed to the injured employee but they were inadequate reimbursement. In 1846, an opinion was obtained from Crown Law Officers that in cases of instantaneous death compensation was not obtainable under the section.⁴³ However the Inspectors often persuaded employers to pay compensation on a voluntary basis without the need for criminal or civil proceedings.⁴⁴ In 1856 it was judicially decided that an individual could sue his employer without the involvement of the Home Office.⁴⁵

From 1851 until the end of the century there were about 1.3 million people working in textile factories (more than worked in mines and on the railways added together).⁴⁶ The Home Secretary, Lord Palmerston, perceiving a widespread

⁴⁰ Letter XXII (20/11/1841) Ashton, 159.

⁴¹ 227. A copy of Dodd’s narrative was found in Dickens’ papers after his death in 1870. Dickens wrote to John Forster on 31/07/1841 commending the autobiographical Introduction and inviting Forster to ‘share the emotion it raised in me’. *Pilgrim Letters* 2, 346 & n.

⁴² By the Factories Act 1847 the hours of women and young persons were limited to 10 per day and 58 per week. The Act, originally the work of Lord Ashley and later of ‘Honest’ John Fielden (1784-1849) Quaker, later Methodist Unitarian, from Todmorden, was a crucial achievement and described by G.M. Young as ‘the turning point of the age’. *Portrait of an Age* (London, Phoenix, 2002 (1936)) 50.

⁴³ PRO, HO 87(2): Manners Sutton to Saunders, 20/05/1846, 11.

⁴⁴ Bartrip & Burman 56.

⁴⁵ *Caswell v Worth* (1856) 5 E & B 849; 119 ER 697.

⁴⁶ The number of reported factory fatalities was relatively modest averaging about forty five annually up to 1867 and thereafter increasing dramatically to 400 and beyond but much of the increase was due to wider reporting requirements. Bartrip & Burman 43, 47 & 51.

problem, invited the Inspectors to initiate enforcement and a circular was issued on 31 January 1854 notifying manufacturers of the need to fence all shafts. The employers objected by deputation to the Home Office resulting in the issue of a further circular on 15 March suspending the earlier notice and provoking vigorous debate.⁴⁷ Ironically Dickens' horror of industrial accidents was motivated by his reading accident statistics and he asked his subeditor to commission a piece from Henry Morley⁴⁸ who, in 'Ground in the Mill',⁴⁹ provided seven examples of horrific accidents to children and adults involving unfenced machinery. The lack of fencing above seven feet from floor level had resulted in many accidents ascribed by the employers to the 'wanton disobedience to orders'. What of the disobedience of the employers in the face of the statute? Financial penalties for breach of statutory duty were wholly inadequate as a measure of loss of life. Dickens wanted manufacturers to be commended when deserved but to enforce the principle of the workpeople being 'always protected from accident by every human precaution'.⁵⁰

A third circular was published in January 1855 requiring the inspectors to enforce the existing law. Employers meeting in Manchester contended that cotton flake and dust would find its way behind the fencing, interfering with oiling of the machines and creating a fire risk. They argued that most accidents came about as a failure to heed instructions and that horizontal shafts, above seven feet, were not dangerous.

Henry Morley responded in 'Fencing with Humanity' that people were 'rent asunder ... as a sacrifice to the commercial prosperity of Great Britain'.⁵¹ Inspector Howell refuted the fire risk argument because, when fencing was installed, there was no extra accretion of dust. Morley described the concerns of the employers as 'this magnificent picture of ruin which Martin might have been tempted to paint.' Morley pleaded for strap hooks to be provided so as to prevent the falling of straps, their lapping on the revolving shafts and thus the entanglement of feet in them. He reported on unsuccessful prosecutions where the magistrates were themselves mill-

⁴⁷ Roberts, D. 'Lord Palmerston at the Home Office' *Historian* (1958) 21, 1, 63.

⁴⁸ Letter to W.H.Wills 24/03/1854 *Pilgrim Letters* 7, 297.

⁴⁹ *H.W.* (22/04/1854) 9, 213, 224.

⁵⁰ Letter to W.H.Wills 29/09/1854 *Pilgrim Letters* 7, 428.

⁵¹ *H.W.* (14/04/1855) 11, 264, 241.

owners. However Morley commended the achievements of the alpaca manufacturer Titus Salt at the Saltaire settlement near Bradford.⁵²

At a meeting of the newly-formed National Association of Factory Occupiers later in April members argued that the level of casualties was acceptable for the numbers employed and much less than in mines. Morley reacted in 'Death's Cyphering Book' by quoting the inspectors' half-yearly reports as to casualties arising from lack of guarding and arguing that statistics based on percentages were irrelevant and that all preventable accidents, in factories, mines and railways should be addressed.⁵³

In 'Deadly Shafts' Morley wrote of two fatal accidents in Bradford. Shafts should be fenced so that they no longer mangled two thousand people a year.⁵⁴ In 'More Grist to the Mill' he described a fatal accident involving a fifteen year old boy who went to help two colleagues who were mending a strap running on a horizontal shaft four feet from the ceiling. He was drawn seven feet up, dragged round the shaft and killed when both legs were taken off at the knees. At the Inquest he was blamed as having acted contrary to instructions and being 'too much disposed to assist others'. Morley argued that employers who disregarded the law with fatal consequences should be imprisoned⁵⁵ and he mocked the National Association for establishing a fund for damages or penalties ordered to be paid by any of their subscribing members.⁵⁶ He exhorted members to use their subscriptions to fence machinery and thereafter to dissolve the Association.

That might have been an end of it but for the interference of Harriet Martineau⁵⁷ Her eccentric and dogmatic views contained a mass of contradictions. She was a Unitarian and a radical liberal. She campaigned against slavery and also to improve the lot of women. She contended that 'the principles [of Political Economy] are clear, conclusive, universal and incapable of change'.⁵⁸ The solution to the labour problem required enlightened factory owners and clear-sighted, sober working men. Work was necessary for survival and machinery had the potential to create opportunities for

⁵² 243.

⁵³ *H.W.* (12/05/1855) 11, 268, 337.

⁵⁴ *H.W.* (23/06/1855) 11, 274, 494.

⁵⁵ *H.W.* (28/07/1855) 11, 279, 605.

⁵⁶ 'Two Shillings per Horse-Power' *H.W.* (08/09/1855) 12, 285, 131.

⁵⁷ (1802-1876) Daughter of a failed Norwich textile manufacturer, an invalid for much of her life. At the suggestion of W.R.Greg she moved to Tynemouth in 1840. By mesmeric procedures most of her health problems appeared solved enabling her move to Ambleside in 1845.

⁵⁸ Webb, R.K. *Harriet Martineau, a Radical Victorian* (London: Heinemann, 1960) 104.

everyone. She expected employers to be fair and benevolent but, as Baron Bramwell, failed to appreciate the disparity in bargaining power between the employer and the individual labourer.⁵⁹ Yet she supported state intervention in education and Chadwick's sanitary reforms. Conditions of work and the hours worked by women and children were proper subjects for statutory regulation but hours worked by adult males were not. She favoured the inspection of collieries to prevent accidents there. She contended that her primary sympathy was with working men.⁶⁰ Like Dickens she opposed the establishment of Unions because that course led to division and probable violence.

Harriet Martineau's brother, Robert, was a successful Birmingham brass-founder. With his help, she had visited factory premises in that city and reported in detailed but readable form about different manufacturing processes for publication in *Household Words*. She showed no interest in the factory workers she must have met and seemed not to distinguish human beings from machines provided they were working.⁶¹ There were twelve articles in all, the first published 18 October 1851. Dickens was initially pleased with her contributions which he seldom amended. Every process attracted her unqualified admiration and the articles did not engage with working conditions, partly because she was deaf and anosmic and may have missed some unpleasant elements.

She deprecated the thrust of the Morley articles for which she blamed Dickens. Yet no logic could distinguish better education, sanitation, safety in collieries, and conditions of work for women and children, which she supported, from the need for fencing dangerous machinery, which she opposed. Her paper was rejected by John Chapman of *The Westminster Review* for its intemperate style so she sent it to the National Association in Manchester who paid her a handsome 100 guineas and produced it as a pamphlet.⁶² She complained that 'vicious legislation and social oppression ... [had been] upheld by men in high places'⁶³ She was not expert in employers' liability law which so restricted the situations in which damages might be recovered:

⁵⁹ 215.

⁶⁰ 214.

⁶¹ Fielding, K.J. & Smith, A. 'Hard Times & the Factory Controversy: Dickens vs Harriet Martineau' *Nineteenth Century Fiction* (03/1970) 24, 4, 424.

⁶² Martineau, H. *The Factory Controversy: a Warning against Meddling Legislation* (Manchester: National Association of Factory Occupiers, 1855).

⁶³ v of Prefatory Letter.

There is the Common Law, which operates for the protection of all; and there are the Factory Acts, which are intended for the special protection of factory operatives.⁶⁴

The Common Law provides securities against injuries from neglect or mismanagement in the regular course of the employments of workpeople of all orders.⁶⁵

She argued that the unenforced statutory fencing provisions were impracticable. She criticised Inspector Leonard Horner⁶⁶ for prosecuting a factory employer, who was also a magistrate, whose machinery was unfenced, and she supported the paltry fines imposed on such defendants. She thought that the factory employers were ‘men of the highest respectability’ who were not disqualified from ‘performing with fairness the duties of a magistrate’.⁶⁷ She referred to a fatal case which came before the court involving one Ashworth who ‘threw away his life’ when he sought to disentangle some straps and who could not have been other than aware of ‘his danger and his disobedience’.⁶⁸ Ashworth’s widow was encouraged by Horner to pursue a civil claim which was taken to trial where the judge encouraged a compromise and eventually the employers relented and, with ill grace, made a payment of one hundred and fifty pounds. The legal costs, ordered to be paid by the employers, were paid by the National Association.⁶⁹

She spoke of the ‘meddlesome tyranny of inspectors’,⁷⁰ thought that the employers rather than the inspectors could best represent the interests of working men⁷¹ and that many factory accidents could equally have happened in a dwelling house,⁷² contended that legal interference should stop and leave some scope for the exercise of a man’s own faculties since the ‘higher order of operatives’ did not want

⁶⁴ 18.

⁶⁵ 46.

⁶⁶ Leonard Horner (1785 -1864), an inspector from 1833 until 1859, covered the North of England. He came into conflict with those manufacturers who breached the law and with the magistrates who failed to enforce it. He was active, energetic and uncompromising and in 1842 the Home Secretary Sir James Graham referred to him as the ‘Inspector General of Factories’. He published works on Political Economy but criticised its most ‘cold and severe principles’. He believed in the education of workers and contended to Nassau Senior that children were not free agents and needed state protection. Intervention in trade was not justified but adult factory workers needed protection from dangerous machines. It was ‘mere sophism’ to pretend that only women and children needed protection and in his Annual Report of 1843 he wrote ‘there can be no such thing as freedom of labour when ... there is such a competition for employment’. Martin, B. (1969) ‘Leonard Horner: a Portrait of an Inspector of Factories’ *International Review of Social History* (1969) 14, 412.

⁶⁷ Martineau 24.

⁶⁸ 25.

⁶⁹ 30.

⁷⁰ Letter to *Daily News* 12/02/1856.

⁷¹ 07/04/1856.

⁷² 15/04/1856.

to be taken care of like children⁷³ and argued that unless the law was changed ‘manufacturers will transport themselves to a more free country’.⁷⁴

She criticised Dickens for the ‘sentimental philanthropy of *Oliver Twist* and condescended that a mere novelist was not capable of discussing ‘any matter of doctrine’. He needed ‘some soundness of principle and some depth of knowledge in political philosophy’. His *Hard Times* was so ‘unlike life’ that it lost its influence. Dickens should confine himself to fiction and if he wished to be a social reformer, he should consider both sides of the question⁷⁵ (which she manifestly failed to do). She accused Dickens of ‘unfairness and untruth’ and told him not to meddle in the affairs of ‘the great class of manufacturers – unsurpassed for intelligence, public spirit and beneficence’.⁷⁶ She warned that either ‘our manufactures must cease’ or ‘the Factory Laws, as expounded by Mr Horner, must give way’.⁷⁷

Morley⁷⁸ in ‘Our Wicked Mis-Statements’ complained of Miss Martineau’s partiality.⁷⁹ She sounded just like Mr Bounderby ‘who was always going to throw his property into the Atlantic’.⁸⁰ Morley argued that ‘momentary inadvertence’ should not attract blame (with which, in respect of contributory negligence, today’s judges would agree). He dealt with Harriet Martineau’s faith in the Common Law:

We are told that the Common law suffices for all cases. ... it does not and cannot provide for these cases. Common Law is the law as established for a given and considerable length of time ... It knew nothing of steam engines, and it is impossible that it should have foreseen such cases as arise out of the new systems of railway and factory. Common Law will not make factories safe working places for the operative.

The costs of making safe were modest and the mill owners should be compelled to take the necessary measures.⁸¹

Harriet Martineau’s inconsistent efforts were often resented because of her didactic, shrill and intemperate approach.⁸² J.S.Mill, who was not a principal in the

⁷³ 03/06/1856.

⁷⁴ 04/03/1856.

⁷⁵ Martineau 38.

⁷⁶ 44.

⁷⁷ 46.

⁷⁸ As pieces in *Household Words* were not attributed and as there is no mention of this debate in H.S.Solly’s *The Life of Henry Morley* (London: Arnold, 1898), Solly was probably unaware of Morley’s contribution.

⁷⁹ *H.W.* (19/01/1856) 13, 304, 13.

⁸⁰ *Hard Times* 2, 1, 111.

⁸¹ *H.W.* (19/01/1856) 18.

⁸² The American Thurlow Weed described her as an ‘ugly, deaf, sour old crab apple’. Webb 158. Thomas Carlyle suggested that she would have made a good hospital matron. 14.

factory debate, thought that she reduced *laissez faire* ‘to absurdity’ by ‘carrying it out to all its consequences’.⁸³ Dickens wrote to his editor W.H.Wills about her ‘vomit of conceit’⁸⁴ and three days later concluded ‘there never was such a wrong-headed woman born – such a vain one – or such a Humbug’.⁸⁵ Their relationship ended. They disagreed about Dickens’ criticism of Political Economy in *Hard Times*, his anti-Catholicism⁸⁶ and his mild attempts to supervise her work.⁸⁷ Despite some statistical inaccuracies, Dickens won the argument on fencing. She protested too much.⁸⁸

Henry Morley explained in ‘The Manchester Strike’ that unskilled workers had no bargaining power and that skilled workers were only afforded a chance of wealth in ‘a very brisk trade’. Intervention was necessary to protect the helpless working class whose constituents might regard free competition as an evil.⁸⁹

Dickens came late to the fencing controversy and retired too early.⁹⁰ Surprisingly no further articles appeared in *Household Words* while Colonel Wilson-Patten⁹¹ piloted an amending Bill whose outcome was the Factories Act 1856. The Inspectors believed that this Act set back the progress made in achieving redress for injured workpeople. It entitled manufacturers to contest in arbitration an Inspector’s Notice requiring fencing. It stipulated that only mill gearing encountered by women and children in their normal work had to be fenced so that it did not help such employees who were doing, as bidden, some task outside the usual scope of duty.⁹² After the 1856 Act the Inspectors, believing it to be impractical and unfair, and fearing the expense and risks of arbitration, decided not to serve Notices so ending the practice of compensation from s.60 fines. The 1856 Act negated the good of *Doel v Sheppard*⁹³ where Lord Campbell had decided that there was an obligation to fence under s.21 of

⁸³ Elliot, H.S.R. (ed.) *The Letters of John Stuart Mill* (London, Longmans Green, 1910) 1, 46.

⁸⁴ *Pilgrim Letters* 8, 6. Letter 03/01/1856.

⁸⁵ 8, 9. Letter 06/01/1856.

⁸⁶ Oldani, L.J. ‘Dickens, Roman Catholicism and Jesuits’ *Dickensian* (2011) 485,107, 3, 202.

⁸⁷ Hunter, S, *Harriet Martineau: the Poetics of Moralism* (Aldershot: Scolar, 1995) 214n.

⁸⁸ Fielding & Smith 413 express a similar view.

⁸⁹ *H.W.* (02/02/1856) 13, 306, 63.

⁹⁰ Bartrip, P.W.J. ‘Household Words and the Factory Accident Controversy’ *Dickensian* (1979) 75, 1, 387, 26.

⁹¹ John Wilson-Patten (1802-1892) a Conservative who voted against the second reading of the 1831 Reform Bill but in favour of the measure which became the 1831 Truck Act. In the 1850’s he was the parliamentary spokesman for the National Association of Factory Owners.

⁹² Bartrip & Burman 64.

⁹³ (1856) 5 EL & BL 856; 119 ER 700. This was one of two decisions of Campbell L.C.J. contemporaneous to the dispute between Dickens and Martineau. The former never alluded to it and Martineau criticised it arguing that statutory compliance was not practicable. Arbuckle, E.S. (1983) (ed.) *Harriet Martineau’s Letters to Fanny Wedgwood* (Stanford, Cal.: Stanford U.P.,1983). Letter to F. W. (15/02/1856) 144, also 136, n.3 & 146, n.10.

the 1844 Act irrespective of whether the machinery was perceived to be dangerous. Harriet Martineau believed that her pamphlet 'carried' the bill.⁹⁴ Notwithstanding the Act (not repealed until the Factory and Workshop Act 1878) it was still possible for some civil claims to succeed.⁹⁵

The early legislation applied to a relatively small number of premises and so the Factory and Workshop Act 1864 extended the safety provisions to cover non-textile mills where the work of fustian cutting and the making of Lucifer matches⁹⁶ was carried out without greatly increasing accident statistics but the Factory and Workshop Act 1867 covered 21,000 new premises such as bakeries, bleach and dyeing premises, lace factories and pinhook factories which resulted in an increase in recorded figures. Thus the ambit of safety legislation was extended but the prospects of damages claims succeeding were arrested.

It came to be realised that an unbalanced Common Law was preventing the recovery of damages and that the employers needed to be subject to financial sanctions on the way to a safer workplace. Dickens' and Morley's journalism impacted on public consciousness. The happening of a major disaster such as at New Hartley galvanised the public and parliament to early response on safety regulation in mines. There were ingenious efforts by Edwin Chadwick to introduce a system of compensation for injured workmen. Dickens' brother in law Henry Austin provided a line of communication between Dickens and Chadwick.⁹⁷ So information and tuition were available to Dickens if he had pressed.

Blincoe's *Memoir* and Dodd's Reports, supplemented by pieces from Dickens and Morley, identified some issues and responsibilities but their sentiments were not translated into an extensive compensation system until the Workmens' Compensation Scheme 1897.

⁹⁴ Arbuckle 134.

⁹⁵ As in *Holmes v Clark* (1861) 6 H & N 349 & 7 H & N 937; 158 ER 144.

⁹⁶ Phosphorus fumes were known to cause necrotic jaw bones particularly in 'scrofulous' subjects. *Chambers' Edinburgh Journal* (25/07/1846)134, 61.

⁹⁷ Chadwick wanted Dickens to publish his Sanitary Report (PP 1842 HL XXVI.1) in America. Letter to Henry Austin 25/09/1842. *Pilgrim Letters* 3, 330. Other such reports on Sanitation, London Burials and Police were sent to Dickens. Letters to Henry Austin 25/02/1848 & 29/01/1850. 5, 251 & 6, 19. At the behest of Chadwick Dickens spoke at a meeting of the Administrative Reform Association, the first political meeting he attended. Letter to Chapman 26/06/1855. 7, 658. Dickens differed from Chapman on the new Poor Law 'to the death' but he conceded that Chapman 'had done much good for the people' (letter to Dr S.G.Howe 04/06/1843. 7, 849). He accompanied Chapman to visit labourers' model cottages (letter to Mark Lemon 27/05/1851. 6, 402), to visit Limehouse schools (letter to Samuel Phelps 27/05/1863. 8, 251), and to visit an ingenious and cheap cottage (letter to W.H.Wills 24/06/1869. 12, 372).

The Narrative

In *Michael Armstrong* Mary Brotherton, rich, but initially ignorant of social deprivation, descended from her carriage to speak to two small children, the first who had been struck and injured by an overlooker wielding a 'billy roller' and the other who had lost three fingers in an unguarded machine and then her job.⁹⁸ Mrs Trollope had investigated working conditions in the North West during a month-long visit after the passing of the Factory Act 1833. She was armed with letters of introduction from Lord Ashley and accompanied by her eldest son. She met and admired Richard Oastler and the radical John Doherty, publisher of the *Blincoe Memoir*.

Her novel was criticised as being 'exaggerated' and 'without literary merit'. It was a 'gross, dauby libel'.⁹⁹ The *Athenaeum*¹⁰⁰ deplored its 'cant', 'vulgar method', 'miserable farce' and 'twaddle'. Mrs Trollope was prejudiced 'against the mercantile character' and had 'a careless indifference to the mischief she is doing and the dangers she is provoking'. The result would be 'the burning of factories and the plundering of property' and 'manufacture would be driven out of the kingdom' a conclusion as extreme as the contents of the novel but indicative of a material impact.¹⁰¹ Louis Cazamian thought the book to be 'well-meaning, inflated and bad', the story to be 'a clumsy imitation of Dickens' and the scenes of industrial life 'made unconvincing by exaggeration'.¹⁰² Dickens' biographer thought it 'neither interested nor moved anybody'.¹⁰³ The novel was without balance and nuance but its monthly instalments reached the middle classes and may have helped the momentum of reform in such as the 1844 Factories Act. However Cazamian concluded that the work succeeded only with those who already believed that industrial legislation was needed.¹⁰⁴

⁹⁸ *Michael Armstrong* 186.

⁹⁹ (18/04/1855) *The Leader* in Easson, A. (ed.) (1991) *Elizabeth Gaskell: the Critical Heritage* (London: Routledge) 333. 'Dauby' here probably means 'not artistic'.

¹⁰⁰ (10/08/1839) 615, 587.

¹⁰¹ 588. Her aim was to 'attract the public mind' and to awaken the national conscience on the plight of the factory children. She transformed parliamentary reports into 'palpable reality'. The novel may have helped change indifference into concern. Heineman, H. *Mrs Trollope: the Triumphant Feminine in the Nineteenth Century* (Athens, Ohio: Ohio U.P., 1979) 170 (a sympathetic biography).

¹⁰² Cazamian 236.

¹⁰³ Pope-Hennessy, U. *Charles Dickens* (London: Chatto & Windus, 1945) 50.

¹⁰⁴ Cazamian 237. Collins, P. 'Dickens and Industrialism' *Studies in English Literature* (1980) 20,4, 652 contended that 'such a lamentable fiction ... would never have been heard of, had it entered a competition more severe than this 'industrial novel' class'. Kovasevic, I. & Kanner, S.B. 'The Blue Book into Novel: the Forgotten Industrial Fiction of Charlotte Elizabeth Tonna' in *Nineteenth Century*

Mrs Stone in *William Langshawe the Cotton Lord* did not visit the factory floor. She explained that severe and fatal accidents frequently occurred but the risks were inevitable and twenty times less than in coal mines.¹⁰⁵ *William Langshawe* was criticised in *The Examiner* as ‘a poor and vapid story, clumsily eked out, and with little interest’.¹⁰⁶ She was critical of trades unions yet in *The Athenaeum* the novel was seen as an attack on ‘the social circles of Manchester’. She exaggerated when satirising the worship of money, coarse manners and a taste for ostentatious display in the newly enriched. The plot was meagre and the author’s few reflections were of a low moral standard. Mrs Stone had sought to represent the Cotton Lords as ridiculous, but the reviewer, revealing his allegiance, thought that they were ‘peculiarly sensitive on topics relating to the means of their rise’.¹⁰⁷

Disraeli’s *Sybil* included a working class heroine who transpired to be an aristocrat and who eventually married Egremont, the voice of ‘Young England’ and the reforming brush of the off-the-rails Tory party. Salvation was not to be found in a wider democracy but in a rejuvenated aristocracy and a more powerful monarchy.¹⁰⁸ In *Sybil* a model, enormous, well-ventilated factory, built by the owner Trafford, had advantages of better health and less danger and fatigue.¹⁰⁹ The owner provided housing with an option to purchase the freehold, gardens, a water supply, a school and public baths. Trafford resembled the enlightened Millbank in *Coningsby*. Disraeli saw the factory as an emblem of the new industrial aristocracy.¹¹⁰ Because his approach was ‘episodic’ he was able to cover a wider range of industrial activity.¹¹¹ He relied upon Blue Books to describe industrial scenes in Wodgate where working and social conditions were dreadful¹¹² and particularly upon the reports of Richard

Fiction (1970) 25, 2, 152 described *Michael Armstrong* as an ‘inferior and far-fetched extravaganza of mediocre literary value’. Dickens thought little of Mrs Trollope. In a letter to S.L.Blanchard of 09/02/1839 he wrote ‘Mr Trollope must have been an old dog and chosen his wife from the same species’. *Pilgrim Letters* 1, 506.

¹⁰⁵ (London: Bentley, 1842) 1, 190.

¹⁰⁶ (05/11/1842) 709.

¹⁰⁷ (01/10/1842) 846. Despite the satire Mrs Stone was ‘a staunch supporter of the manufacturers and an ardent Mancunian’. Kestner, J. ‘The Manchester Magnate in Elizabeth Stone’s *William Langshawe the Cotton Lord*’ *Papers on Language and Literature* (1983) 19, 62.

¹⁰⁸ Patrick Brantlinger in ‘Tory-Radicalism and ‘The Two Nations’ in Disraeli’s *Sybil*’ *Victorian Newsletter* (1972) 41,13 suggested that Disraeli’s cause was by 1846 ‘more laughed at than respected’.

¹⁰⁹ *Sybil* (Oxford: Oxford U.P., 1998 (1846)) 182.

¹¹⁰ Holloway, J. *The Victorian Sage* (New York: Norton, 1965 (1953)) 95.

¹¹¹ Pollard, A. ‘Sooty Manchester’ and the Social-Reform Novel 1845-1855’ *British Journal of Industrial Medicine* (1961) 18, 2, 85.

¹¹² Appendix to Second Report of the Children’s Employment Commissioners, Trades & Manufactures. Part II. Report and Evidence from Sub-Commissioners (1842) p.Q. 38 371. In

Henry Horne a subcommissioner who had visited Willenhall near Wolverhampton¹¹³ and William Dodd's report to Lord Ashley.¹¹⁴ The novelty was that Wodgate was operated by labour rather than by an uncaring capitalist so his message was that workers could not be left to govern themselves.¹¹⁵ Thackeray commended the purity of Disraeli's English but feared that the process whereby 'Young England will save us' was not revealed though it 'might be identified in any second edition'.¹¹⁶ He described the difficulty encountered in varying degrees by all novelists of the genre:

His description of mining and manufacturing districts fail; not from want of sympathy, but from want of experience and familiarity with the subject. A man who was really familiar with the mill and the mine might now ... awaken great public attention as a novelist.

It is a magnificent and untrodden field (for Mrs Trollope's factory story was wretched caricaturing and Mr Disraeli appears on the ground rather as an amateur): to describe it well, a man should be born to it. We want a *Boz* from among the miners and manufactories to detail their ways of work and pleasure – to describe their feelings, interest and lives, public and private.¹¹⁷

In *Sybil*, primarily a political novel,¹¹⁸ Disraeli, whom Sir Robert Peel had declined to take into government, criticised Peel's pragmatism. If there were Two Nations (of rich and poor) Egremont thought that 'the ruin of our common country was at

'Willenhall and Wodgate: Disraeli's Use of Blue Book Evidence' *Review of English Studies* (1962) 13, 368, Sheila Smith demonstrated Disraeli's close reliance on the material.

¹¹³ Horne (1802-1884) was the author of a three volume epic poem *Orion* (1843) and in 1850 was appointed by Dickens to be a sub-editor of *Household Words*. His novel *The Dreamer and the Worker* was published in 1851 (London: Colburn) and in it he encouraged the middle classes to be alert to the privations of the workers and the slave-like existence of children. Horne approached but never entered the iron foundries and coal mines of the Midlands (2, 273) though he painted an entertaining picture of the dangers of working from loose ladders, planks and platforms in the dark, noisy bowels of a ship under construction in Portsmouth Dockyard (1, 141). Dickens 'fell out' with Horne who in June 1852 left for Australia without his wife and failed to maintain her. Horne did not write for *Household Words* again and was later critical of Dickens for parading his own matrimonial difficulties.

¹¹⁴ Fido, M. 'From His Own Observation': Sources of Working Class Passages in Disraeli's *Sybil* *Modern Language Review* (1977) 72, 268.

¹¹⁵ Handwerk, G. in 'Behind *Sybil*'s Veil: Disraeli's Mix of Ideological Messages' (1988) *Modern Language Quarterly* 49, 4, 321 pointed to Disraeli's failure to explain how, in future, the poor should fare and concluded that he produced little debate and no clear practical solution. Schwarz, D.R. 'Art and Argument in Disraeli's *Sybil*' *Journal of Narrative Technique* (1974) 4, 19 described the plot as 'unlikely', Egremont as an ineffective reformer and the author as lacking in compassion. Robert O'Kell in 'Two Nations or One?: Disraeli's Allegorical Romance' *Victorian Studies* (1986) 30, 2, 211 argued that Disraeli, while acknowledging the grievances of the poor, had no political sympathy with their cause believing that the aristocracy and the poor had identical interests: 214.

¹¹⁶ (13/05/1844) *Morning Chronicle* reviewing *Coningsby* in Ray, G.N. *W.M. Thackeray: Contributions to the Morning Chronicle* (Urbana: Illinois U.P., 1955) 48.

¹¹⁷ Ray 80. William Makepeace Thackeray (1811-1863) founded the *Cornhill Magazine* in 1860 and edited it until his death.

¹¹⁸ V.S. Pritchett in *The Living Novel* (London: Chatto & Windus, 1946) 66 described Disraeli as 'our only political novelist ... the only one saturated in politics, the only one whose intellect feasts on polity'.

hand'.¹¹⁹ W.R.Greg complained fiercely about *Sybil*.¹²⁰ which was no improvement on *Coningsby* and Disraeli's pictures were not the result of any genuine regard for the poor. Greg disliked Disraeli's 'confined and pervading egotism and theatrical taste',¹²¹ and presaged Mrs Gaskell's work:

... nothing is really known of those classes except by the very few whose taste or avocations have brought them into close communion with them.¹²²

However Disraeli effectively identified one abuse. Until the 1831 Truck Act it was the widespread practice for employers to pay their people in alcohol and/or in goods from their own shop located on or near their own industrial premises. The Act required wages to be paid in coin, that the contract of hire should not restrict how or where the wages should be spent and that if goods were supplied on credit, the employer would not be able to recover the price. *Sybil* covered a time after the Act came into force but the violent demise of Diggs' monopolistic 'tommy' shop where food and provisions were bought, much of it on credit, indicated the people's dislike.¹²³ Baron Bramwell was reluctant to support legislative interference saying in *Archer v James*¹²⁴ that:

It may be that ignorance, improvidence or poverty or poverty of the working classes, as they are called – that is those who work for wages – is such as to require the protection the statute has provided for them.¹²⁵

It never occurred to him that the ignorant and improvident poor were the same people he assumed to know the risks and dangers of the often machine-reliant employments they entered. It was unusual for a judge to confess allegiance to a political theory yet

¹¹⁹ *Sybil* 65.

¹²⁰ *Westminster Review* (08/1845) 64, 141.

¹²¹ 146.

¹²² 146. He criticised working people for poor husbandry of their earnings, a point he repeated in his review of *Mary Barton*. After publication of the fifth edition of *Coningsby* in 1849 Disraeli was attacked by G.H.Lewes for disgracing parliament and literature. He was a disreputable and disrespected person, an adventurer in politics and an acrobat in literature who wrote nothing but verbiage which did not stir the heart, expand the soul or deepen the experience. (08/1849) *British Quarterly*. See Ashton, R. (1991) *G.H. Lewes* (London: Pimlico, 1991) 64. *Sybil* was anti-democratic and rhetorical and Disraeli an exotic novelist argued Smith, S. 'Mid Victorian Novelists' in Pollard, A. (ed.) *The Victorians* (London: Barrie & Jenkins, 1970) 203. Brantlinger 41,17 described the Two Nations as 'phantoms' and the novel a 'colourful muddle' and suggested that when *Sybil* called for a descent of angels Disraeli thought that he was one.

¹²³ *Sybil* 378. Thompson, J. & Rogers, H.R. (ed.) *Redgrave's Factories, Truck and Shops Acts* (London: Butterworth, 1956 (19th ed)) 1000.

¹²⁴ (1859) 2 B&S 67; 121 ER 998.

¹²⁵ 89: 1006.

the Baron cited Adam Smith's *Wealth of Nations*.¹²⁶ He relied on Ricardo's *Principles of Political Economy*¹²⁷ to show that a labourer who used tools was himself a capitalist so that part of his income was profit from his capital. Thus only a proportion of remuneration consisted of actual wages so as to justify the application of the Act.¹²⁸

Camilla Toulmin¹²⁹ contributed 'A Story of the Factory' in 1849.¹³⁰ Free labourers had 'noble' advantages, including the 'steady discipline of factory life' amidst 'beautiful machinery and processes' (the latter described in detail). Problems arose not from the employers but from a bad section of the workforce. One sickly girl became deformed only because her family insisted on sending her to work. Hard work would enable a man to build up a glorious home. At a time when machinery was 'much more exposed' the hand of one factory boy became entangled in it and had to be amputated. Market forces would prevail and the solutions were self-help, education and emigration. The moral was not to argue, strike or demonstrate but to trust conscientious employers. Presaging Mrs Gaskell's *North and South* the factory boy, now in a position of responsibility, was saved by the sickly girl from the 'sticks and staves' of the mob.

Marian Withers, the major novel of Geraldine Jewsbury, appeared by instalments in 1850 and in three volumes in 1851. It dealt with the contempt held by different stratas of society for others, but portrayed one employer who cared nought for his workers:

If they did not come to work they were scratched off the books, and no excuse asked or taken. His mill was old and dirty, for he would go to no expense, nor make the machinery safe for the work-people; it was all left open and unguarded and accidents were frequent; he even used old ropes for the hoists which conveyed goods from storey to storey.¹³¹

The author, as Camilla Toulmin, argued that mothers were better staying at home to look after their children to avoid neglect and quieting by means of cordial or gin.

Elizabeth Cleghorn Gaskell (1810-1865) based her Manchester novels on her personal experience. She taught at Sunday school, fed the starving poor from her

¹²⁶ *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Strahan & Cadell, 1778) 1, 10. Smith perceived the law to be concerned with property rights and did not foresee the Industrial Revolution.

¹²⁷ *Principles of Political Economy and Taxation* (New York: Macmillan, 1895 (1817)) 1, 3.

¹²⁸ *Archer v James* 95; 1009

¹²⁹ (1812-1895) later Mrs Newton Crosland. She wrote for *Chambers' Edinburgh Journal* for more than fifty years.

¹³⁰ *Chambers' Miscellany*. As Disraeli she described a violent strike based on the Plug Riots of 1842. *Chambers' Journal* had a self-professed circulation of in excess of 55,000.

¹³¹ *Marian Withers*, 2, 36.

kitchen and helped with food and clothing for the cellar-dwellers and the homeless.¹³² In 1832 she married William Gaskell (1805–1884), Unitarian Minister at the Cross Street Chapel in Manchester. She lived in that city for the rest of her life though she enjoyed long holidays at Silverdale on Morecambe Bay. Bereft at the loss of her son William who died at ten months, she wrote *Mary Barton* in 1848 as part of her grieving process.¹³³

The novel dealt with the lives of the poor and included detail of their homes, habits and outlook based on her close personal experiences. John Barton marched to London with the Chartists in 1838. Chosen by lot to murder careless, young Harry Carson, John Barton epitomised a good father and working man driven to the absolute extreme by the material poverty of his existence and the realisation that, short of breaking the law, there was nothing that he could do to effect change. After young Carson's murder and John Barton's confession, the elder Mr Carson recognised that the condition of his workpeople needed attention.

There was little in the novel of the dangers of factory work.¹³⁴ John Barton expressed the view to George Wilson that Mary should never work in a factory but he had in mind that girls earned well when work was plenty but, like his sister-in-law Esther, were at risk of falling into prostitution when work was scarce.¹³⁵ Alice Wilson contended that married women should not be in the factory because the home would be neglected and the husband likely to patronise the gin-shop.¹³⁶ Mrs Gaskell related what John Barton had heard when an in-patient at the Infirmary suffering from a fever. He was invited to stay a further week to help with sorting the surgeon's papers:

I've gotten no head for numbers, but this I know, that by *far th' greater part o' the accidents as comed in happened in th' last two hours o' work* when folk gotten tired and careless. The surgeon said it were all true ...¹³⁷

¹³² Uglow, J. *Elizabeth Gaskell* (London: Faber, 1993) 141.

¹³³ Uglow 182.

¹³⁴ Angus Easson in his *Elizabeth Gaskell* (London: Routledge & Kegan Paul, 1979) commented that the author 'never takes us into a mill' 51, and 'scarcely describes any machinery' 66. He concluded that Mrs Gaskell's strength was in 'the pattern and development of personal emotion' 96. Wright, T. *Elizabeth Gaskell 'We are not Angels'* (London: Macmillan, 1995) observed that 'we scarcely see anyone at work' 40.

¹³⁵ *Mary Barton* 9.

¹³⁶ 121.

¹³⁷ 84. Mrs Gaskell thereby turned on its head the argument of Nassau Senior set out in his letter to Charles Poulett Thomson, the President of the Board of Trade, of 28/03/1837: 'In a mill the whole net profit is derived from the last hour. If the hours are reduced by one hour the gross and net profit would be destroyed'. (1837) (London: Fellowes 1837) 4. Nassau Senior, a fervent advocate of *laissez faire*, and a mentor of Edwin Chadwick, in a letter to Thomson of 04/04/1837, urged that, if there were more

The only character to be directly affected by employment in the factories was George's wife Jane who was introduced as 'delicate' and fragile' and 'limping in her gait'. She had never been strong since her accident in which she 'cotched her side again a wheel. It were afore wheels were boxed up'.¹³⁸ The accident happened just before she was to be married but George took her anyway and she limped up the aisle. After Jem's acquittal Jane discussed her accident which had occurred twenty five years earlier and 'gave a jar to [her] temper it's never got the better of'.¹³⁹ Yet Jane survived and emigrated to Canada with Jem and Mary.¹⁴⁰

The strength of *Mary Barton*, a first novel, lay in its honest presentation of appalling living conditions and the lack of redress and opportunity available to the poor. Legislators, magistrates, employers and church ministers were together oppressors of the poor and alienation between the classes was the enduring evil.¹⁴¹ In her Preface, added at the request of her publishers, the author explained her anxiety 'to give some utterance to the agony which ... convulses this dumb people'.¹⁴² She denied knowledge of 'Political Economy, or the theories of trade'¹⁴³ but her account of the discussion between Job Legh and Carson Senior belied her denial. The elder Carson opted for 'understanding, confidence and love' between masters and men 'not tied by mere money bargains'.¹⁴⁴

Publication, then anonymous, in 1848, provoked a storm. The most trenchant criticism came from Mrs Gaskell's friend, the employer William Rathbone Greg, a doctrinaire Political Economist, writing in the *Edinburgh Review* for April 1849 who praised the high literary merit but criticised the partiality.¹⁴⁵ He contended that the paths of the rich and poor lay apart, that the rich also suffered at times of depression, that the poor were improvident for failing to save for a bad day, that they were not entitled to look to the rich for help, that their want was moral and their needs education and prudence.¹⁴⁶

regulation, many mill owners would cease to trade, children under thirteen would be forced into unregulated work and capital would be frightened away. 19.

¹³⁸ *Mary Barton* 89. By the Act of 1844.

¹³⁹ 343.

¹⁴⁰ 393.

¹⁴¹ 85.

¹⁴² 3.

¹⁴³ 4.

¹⁴⁴ 388.

¹⁴⁵ (04/1849) *Edinburgh Review* 403.

¹⁴⁶ 402.

Thomas Carlyle liked *Mary Barton* and described it as the first real contribution towards ‘developing a huge subject, which has lain dumb too long’. He found the author strong on ‘veracity or devout earnestness of mind’:

The result is a Book deserving to take its place far above the ordinary garbage of novels – a book which every intelligent person may read with entertainment; and which it will do everyone good to read.¹⁴⁷

Mrs Gaskell was delighted with this response and with Carlyle’s exhortation ‘may you live long to write good books’.¹⁴⁸ The implication was that *Mary Barton* fitted Carlyle’s bill better than did *Sybil* and *Helen Fleetwood*.¹⁴⁹ The many reviews were mainly favourable.¹⁵⁰ H.F. Chorley, friend of Dickens, welcomed the work as a vehicle for social ideas.¹⁵¹ Some dismissed the later stages as a mere adventure story but the criticism which most distressed Mrs Gaskell came from those with whom she regularly came into contact in Manchester.¹⁵² The *Manchester Guardian* was then a mouthpiece of the employers and unrestrainedly took the line of W.R.Greg.¹⁵³ Mrs Gaskell reported that ‘Half the masters here are bitterly angry with me – half (and the best half) are buying it to give to their work-peoples’ libraries’ and ‘I had no idea it would have proved such a firebrand’.¹⁵⁴

Mary Barton was a tale of life in Manchester¹⁵⁵ but not a tale of factory life. As Dickens, she did not rely on Blue Books. She probably visited a number of industrial premises without spending long periods of time in production areas.¹⁵⁶ She did not evince any interest in the detail and technicality of the machinery¹⁵⁷ and no such detail

¹⁴⁷ Letter Carlyle to Mrs Gaskell (08/11/1848) John Rylands Library MS 730/14.

¹⁴⁸ Uglow 217.

¹⁴⁹ Spencer, J. ‘*Mary Barton* and Thomas Carlyle’ *Gaskell Society Journal* (1988) 2, 3.

¹⁵⁰ Easson, A. (ed.) *Elizabeth Gaskell: the Critical Heritage* (London: Routledge, 1991) 19 refers to twenty five in the first two years after publication.

¹⁵¹ (21/10/1848) *Athenaeum*.

¹⁵² Uglow 216.

¹⁵³ Easson (1991) 23.

¹⁵⁴ Chapple, J.A.V. & Pollard, A. (ed.) *The Letters of Mrs Gaskell* (Manchester: Manchester U.P., 1966). Letter to Edward Chapman 01/01/1849. 37, 68.

¹⁵⁵ Easson, A. (1985) ‘Elizabeth Gaskell and the Novel of Local Pride’ *Bulletin of the John Rylands Library* 67, 688,709 suggested that the novel demonstrated the ‘hurt resentment, agony’ of the poor and also ‘a sense of pride in the Industrial Revolution as manifested in Manchester’.

¹⁵⁶ In a letter to her friends, the sisters Paterson, in late 1849, for the benefit of Dr Springer, a visiting art historian, she referred to Bellhouse’s, cotton spinners and Sharp & Roberts, foundrymen. Chapple, J. & Shelston, A. (ed.) *Further Letters of Mrs Gaskell* (Manchester: Manchester U.P., 2003 (2000)) 46. In March, 1864, she recommended that a visitor direct enquiries about local industry to seven nominated industrial concerns. She added that ‘these works are very interesting, if you do not get a stupid *fine* young man to show you over – try rather for one of the *working* men.’ Chapple & Pollard 549, 728.

¹⁵⁷ She visited the Great Exhibition of 1851 three times without being greatly interested; her husband and her daughters were more impressed. Letter to her sister in law ‘Nancy’ Robson of 01/09/1851 in

is to be found in either of her two industrial novels.¹⁵⁸ She did not suggest a solution for the nuts and bolts of factory work were neither her strength nor her intent.

For most of the working poor, Manchester was a lifelong prison. Salvation for Jane, Jem Wilson and Mary was not, as in *Lizzie Leigh*,¹⁵⁹ a journey back to the country. Those who escaped emigrated to a utopian Toronto. This evasive outcome, father Carson's conversion apart, did nothing to solve the problems of industrial Manchester.¹⁶⁰ A solution 'within the actual situation' would have been preferable.¹⁶¹

As a Unitarian Elizabeth Gaskell demonstrated little respect for either the Anglican or the Methodist Churches. She put mutual support and love before worldly ambition, goods and wealth.¹⁶² Charity was not a solution. She stressed the importance of family life.¹⁶³ Her description of domestic interchange is unrivalled. Yet she did not examine the intricacies of working relationships within the factory.

Dickens first touched the topic in *Pickwick Papers* describing half the inhabitants of Muggleton as being 'against any interference with the factory system at home'.¹⁶⁴ *Hard Times* was Dickens' one attempt at an industrial novel and the only one set entirely in the North of England. Dickens knew London like the back of his hand, assimilating as he walked.¹⁶⁵ He visited Manchester occasionally both as a newspaper reporter in the early 1830's, and as an amateur actor in the late 1840's but he was not as comfortable there as in London.¹⁶⁶ In 1838 he had travelled with Hablot Browne (his illustrator 'Phiz') to Manchester seeking further material for *Nicholas Nickleby*.

Chapple & Pollard 101,159 and letter to her daughter Marianne of 22/11/1852. 141, 211.

¹⁵⁸In *Cousin Phillis* (Stroud: Nonsuch, 2007 (1864)) the narrator, Paul Manning, and his superior, Mr Holdsworth, worked on the construction of a new railway but detail of day to day working life in railway construction was not provided.

¹⁵⁹Published in three instalments commencing in the first issue of *Household Words* on 30/03/1850. 1, 1, 2.

¹⁶⁰Flint, K. *Elizabeth Gaskell* (Plymouth: Northcote House, 1995) 19.

¹⁶¹Williams, R. *Culture and Society* (London: Chatto & Windus, 1958) 91.

¹⁶²Wright, T. *Elizabeth Gaskell 'We are not Angels'* (London: Macmillan, 1995) 41.

¹⁶³Bodenheimer, R. 'Private Grief and Public Acts in *Mary Barton*' *Dickens Studies Annual* (1981) 9, 204.

¹⁶⁴*Pickwick Papers* 98.

¹⁶⁵Rosemary Bodenheimer, reviewing a biography of George Gissing, described Dickens as 'saturated in London [which he] brought ... to life in animated flights of language'. *London Review of Books* (09/07/2009) 31, 13, 20.

¹⁶⁶Dickens' knowledge of industrial Manchester was not intimate though he contended otherwise in *American Notes* (Cologne: Konemann, 2000(1842)) 82. He described himself as a 'rare visitor' in his letter 18/07/1847 to Francis Robinson, a Manchester solicitor. *Pilgrim Letters* 7, 878. In 1857, Dickens appeared in Manchester with professional actors in a production of Wilkie Collins' *The Frozen Deep* and he included Manchester in his reading tours of 1857, 1858 and 1861. Sanders, A. *Charles Dickens* (Oxford: Oxford U.P., 2003) xv, xix & 32. Nor was he impressed by the factories in Birmingham. *Pilgrim Letters* 1, 447. Letter to Mrs Dickens 01/02/1838.

There he met the Grant brothers, William and ‘Daniel’ at dinner at Cheetham Hill.¹⁶⁷ Born respectively in 1769 and 1783 they came from Speyside farming stock but, penniless, they had left Scotland and established a smallwares shop in Bury. After setting up in Manchester as calico printers they bought other works including that of the elder Sir Robert Peel. They helped business people with loans and made donations to people in need.¹⁶⁸

Their remarkable generosity was introduced into *Nickleby* as of the brothers Cheeryble. When Nicholas, without work, first met Charles Cheeryble and was taken to the brothers’ place of business, Ned Cheeryble was receiving Mr Trimmers who was ‘one of the best friends we have’ because ‘he makes a thousand cases known to us that we should never discover ourselves’. Trimmers was:

... getting up a subscription for the widow and family of a man who was killed in the East India Docks this morning ... Smashed by a cask of sugar.¹⁶⁹

The deceased left a widow and six children so the brothers contributed a handsome £60. Dickens’ account of this meeting apart, the only reference in *Nickleby* to the woes of industrial work was in the unexpected passage about factory children as he introduced the racecourse at Hampton:

Even the sunburnt faces of gipsy children, half naked though they may be, suggest a drop of comfort. It is a pleasant thing to see that the sun has been there, to know that the air and light are on them every day, to feel that they *are* children and lead children’s lives; that if their pillows be damp, it is with the dews of Heaven, and not with tears; that the limbs of their girls are free, and that they are not crippled by distortions, imposing an unnatural and horrible penance upon their sex; that their lives are spent from day to day at least among the waving trees, and not in the midst of dreadful engines which make young children old before they know what childhood is, and give them the exhaustion and infirmity of age, without, like age, the privilege to die.¹⁷⁰

In 1838 on his visit to Manchester he wrote:

. . . I . . . saw the *worst* cotton mill. And then I saw the *best* . . . There was no great difference between them. . . I am going down again . . . and then into the enemy’s camp, and the very headquarters of the factory-system advocates . . . what I have seen has disgusted and astonished me beyond all measure. I mean to strike the heaviest blow in my power for these unfortunate creatures, but whether I do so in the ‘Nickleby’, or wait for some other opportunity, I have not yet determined.¹⁷¹

¹⁶⁷ Ackroyd, P. *Dickens* (London: Sinclair Stevenson, 1990) 273.

¹⁶⁸ Elliot, Rev.W.H. *The Story of the ‘Cheeryble’ Grants* (Manchester: Sherratt & Hughes, 1906).

¹⁶⁹ *Nicholas Nickleby* 431.

¹⁷⁰ 616.

¹⁷¹ *Pilgrim Letters* 1,483. Letter to E.M.Fitzgerald 29/12/1838.

In fact *Nickleby* was not the chosen vehicle. Further it seems unlikely that when in Manchester he saw other than mills operated by philanthropic owners who were sympathetic to the plight of their people. The 'worst' employers in 'the enemy's camp' would not have afforded him admission.¹⁷²

In 1854 Dickens, having completed *Bleak House*, needed rest. However he was concerned about the declining sales of *Household Words* so he began *Hard Times*. He had heard of the strike of 21,000 workers in Preston which had begun in September 1853. His writer James Lowe had visited Preston and reported in *Household Words* on 10 December 1853 under the title 'Locked Out'. Two thirds of the hands employed were under age. A widow left with six children would be, therefore, a real attraction for a suitor. Nine tenths of those tending machines could not read *and* write. Lowe concluded that ignorance had caused the problem and that 'every employer of labour should write up over his mill door that 'Brains in the Operative's Head is Money in the Master's Pocket''.¹⁷³

Dickens, as Mrs Gaskell and Harriet Martineau, already believed that strikes were wrong-headed and likely to do harm.¹⁷⁴ In Preston, which he thought to be dull and dingy, he was disappointed to find a lack of drama and confrontation. He attended a Union meeting for all of ten minutes.¹⁷⁵ He was impressed by the courage, honour and orderliness of the strikers and by the way strike benefit was contributed and distributed; the union leaders he saw merely confirmed his preconceptions of them as contentious men. The strike itself was an honest mistake. The strikers had to appreciate that demand for their product was not guaranteed to be constant. The parties needed trust and harmony so that they could work together. In his article of 11 February 1854 he advised arbitration.¹⁷⁶

Dickens wrote *Hard Times* over six months. It appeared in weekly instalments in *Household Words* from April to August 1854 and in book form in August. He concentrated on spiritual poverty.¹⁷⁷ He disparaged the view of Richard Redgrave, art superintendent at the Department of Practical Art which was concerned with the

¹⁷² Brantlinger, P. 'Dickens and the Factories' *Nineteenth Century Fiction* (1971) 26, 3, 275.

¹⁷³ *H.W.* 8, 194, 345.

¹⁷⁴ He wrote to Thomas Carlyle 13/07/1854 proposing to dedicate the story to Carlyle because it 'contains what I do devoutly hope will shake some people in a terrible mistake of these days' he may have had in mind the evil of Trades Unions but probably referred to the debit side of Political Economy. *Pilgrim Letters* 7, 367.

¹⁷⁵ Ackroyd 690

¹⁷⁶ 'On Strike' *H.W.* 8, 203, 553.

¹⁷⁷ Smith, S.M. *The Other Nation* (Oxford: Clarendon, 1980) 42.

teaching of drawing, that taste was a matter of principles and rules rather than ‘innate feeling and perception’ (the Marlborough House doctrine). Dickens may also have mocked his friend Henry Cole (an active Commissioner of the 1851 Great Exhibition) who was superintendent of the same newly-formed Department. Cole may have been the third man in the classroom seeking to teach Sissy Jupe, Bitzer and the other children about ‘facts’.¹⁷⁸ Everything had to be ‘susceptible of proof and determination’.¹⁷⁹

Dickens’ target widened to cover the new teacher training schools which favoured the ‘figures and averages’ approach. The training programme at Battersea initiated by Kay-Shuttleworth began in 1846 with the first candidates emerging in 1853.¹⁸⁰ By 1854 there were about six such schools with establishments in Glasgow and Edinburgh leading the way.¹⁸¹ Dickens satirised not educational utilitarianism but rather its fanatical exaggeration.¹⁸² Bitzer, Mr Gradgrind’s prize pupil, epitomised utilitarian political economy rationalism and, when debating whether to join the conspirators in shipping abroad the whelpish Thomas, weighed up the proposition not in terms of right and wrong but purely by reference to the practical consequences of each option. Human life was to be ‘a bargain across the counter’.¹⁸³ Dickens’ humane impulse was to rage against such dogma and absolutism which destroyed individual dignity and integrity.¹⁸⁴

If *Hard Times* embodied Dickens’ fear of Bentham’s utilitarianism he did not venture much into the homes of the industrial poor.¹⁸⁵ With sparse prose the novel was designed to persuade the reader that friendship and sympathy would solve most problems.¹⁸⁶ Coketown was where ‘the piston of the steam engine worked

¹⁷⁸ Fielding, K.G. ‘Charles Dickens and the Department of Practical Art’ (1953) *Modern Language Review* 48, 3. 274.

¹⁷⁹ *Hard Times* 14.

¹⁸⁰ Kay-Shuttleworth was at odds with Dickens as to the use of statistics and also as to his view of the poor. Kay-Shuttleworth equated poverty and grime with ignorance and degeneracy and saw no difficulty in maintaining a strict class distinction while trying at the same time to eliminate class hatred. Coles, N. ‘Sinners in the Hands of an Angry Utilitarian’ *Bulletin of Research in the Humanities* (1984) 86, 453,487. In Dickens’ letter to Angela Burdett Coutts of 11/07/1856 he suggested that Kay Shuttleworth would require thimbles to be melted down so as to provide medals for those who had acquired obscure and worthless knowledge. *Pilgrim Letters* 7, 160.

¹⁸¹ Alton, A.H. ‘Education in Victorian Fact and Fiction: Kay-Shuttleworth and Dickens’s *Hard Times*’ *Dickens Quarterly* (1992) 9, 2, 67.

¹⁸² Andrews, M. *Dickens and the Grown-Up Child* (Basingstoke:Macmillan, 1994) 13.

¹⁸³ *Hard Times* 3, 8, 278.

¹⁸⁴ Gold, J. *Charles Dickens: Radical Moralizer* (Minneapolis: Minnesota U.P., 1972) 200.

¹⁸⁵ Smith, S.M. (1980) 256.

¹⁸⁶ Ackroyd 696.

monotonously up and down, like the head of an elephant in a state of melancholy madness’¹⁸⁷ an evocation demonstrating the ‘formidable power of his imaginative influence’.¹⁸⁸ He later told Angela Burdett Coutts that ‘I am a reformer, heart and soul’.¹⁸⁹ The story, much shorter than Dickens’ average and apparently constrained by the ‘crushing’ pressures of writing by instalments, was really a tragedy, for Stephen Blackpool and Rachael when he fell to his eventual death down the Old Hell Shaft and for the Gradgrind family by reason of father Thomas Gradgrind’s mistaken rejection of Fancy and Louisa’s inability to recover from her fact-full early life.¹⁹⁰

Hard Times was not an industrial novel as *Michael Armstrong* and *Helen Fleetwood* might be designated. Dickens did not spend time within any cotton mill assimilating the processes and their dangers. He had no technical understanding of the machinery. The reader gains no sense of the dangers of working long hours at a loom in monotonous, unpleasant conditions for little reward. Stephen Blackpool, a toiling weaver, could not afford the enormous fees necessary to secure a divorce from his dissolute wife. Shortly after Rachael saved Stephen’s wife from death by unintentional overdose of tablets there appeared a reference to Rachael’s deceased sister :

‘Thou art an Angel. Bless thee, bless thee!’

‘I am, as I have told thee, Stephen, thy poor friend. Angels are not like me. Between them and a working woman fu’ of faults, there is a deep gulf set. My little sister is among them, but she is changed.’¹⁹¹

This mysterious passage replaced a longer and dramatic account of the sister’s misfortunes:

Thou changest me from bad to good. Thou mak’st me humbly wishfo’ to be more like thee, and fearfo’ to lose thee when this life is ower, and a’ the muddle cleared awa’.

Thou’st spoken o’ thy little sister. Ther agen! Wi’ her child arm tore off afore thy face!’

She turned her head aside, and put her hand to her eyes.

‘Where dost thou ever hear or read o’ *us* – the like o’ *us* – as being otherwise than onreasonable and cause o’ trouble? Yet think of that Government gentleman comes down and mak’s report. Fend off the dangerous machinery, box it off, save life and limb. Don’t rend and tear human creaturs to bits in a Christian country! What follers? Owners set up their throats, cries out ‘Onreasonable! Inconvenient! Troublesome!’ Gets to secretaries o’

¹⁸⁷ *Hard Times* 1, 5, 27.

¹⁸⁸ Cockshut, A.O.J. *The Imagination of Charles Dickens* (London: Collins, 1961) 59.

¹⁸⁹ *Pilgrim Letters* 7, 616. Letter 11/05/1855.

¹⁹⁰ Engel, M. *The Maturity of Dickens* (Cambridge, Mass.:Harvard U.P., 1959) 172.

¹⁹¹ *Hard Times* 1, 13, 89.

States wi' deputations, and nothing's done. When do *we* get there wi' *our* deputations, God help us! We are much too int'rested and nat'rally too far wrong t' have the right judgment. Haply we are; but what are they then? I' the name o' the muddle in which we are born and live and die, what are they then?'

'Let such things be, Stephen. They only lead to hurt; let them be.'

'I will, since thou tell'st me so. I will. I pass my promise. Thou'rt an Angel; it may be thou hast saved my soul alive!'¹⁹²

The replaced passage would have constituted the only account of an industrial accident in the novel. If Dickens had included detail of the working life of a power-loom weaver, more such accidents would have featured. He may have omitted the passage because the subject had already been dealt with by Henry Morley in 'Ground in the Mill' on 22 April 1854 which began:

'It is good when it happens' say the children 'that we die before our time'¹⁹³ Poetry may be right or wrong in making little operatives who are ignorant of cowslips say anything like that. We mean here to speak prose. There are many ways of dying. Perhaps it is not good when a factory girl, who has not the whole spirit of play spun out of her for want of meadows, gambols upon bags of wool, a little too near the exposed machinery that is to work it up, and is immediately seized, and punished by the merciless machine that digs its shaft into her pinafore and hoists her up, tears out her left arm at the shoulder joint, breaks her right arm, and beats her on the head. No, that is not good; but it is not a case in point, the girl lives and may be one of those who think that it would have been good for her if she had died before her time.¹⁹⁴

There is an asterisked note on the proof-sheet of the novel referring to the article but the reference did not appear as a footnote either in the instalments or in the published book.¹⁹⁵ Dickens wanted to campaign for work safety but may have thought the 'accident' passage in addition to the Morley article was 'bad drama' and better omitted.¹⁹⁶ Alternatively he may have been 'crushingly' constrained by space.¹⁹⁷ Belatedly he clarified the life and death of Rachael's sister as Stephen lay mortally injured at the foot of the mine shaft:

'Thy little sister, Rachael, thou hast not forgot her. Thou are not likely to forget her now, and me so nigh her. Thou know'st – poor, patient, suffrin', dear – how thou did'st work for her, seet'n all day in her little chair at thy winder, and ow she died, young and

¹⁹² Woodings, R.B. 'A Cancelled Passage in *Hard Times*' *Dickensian* (1964) 60, 42 relying on proof sheets in the Victoria & Albert Museum.

¹⁹³ An extract from the poem of Elizabeth Browning 'The Cry of the Children' published in 1843.

Monod, S. 'Dickens at Work on the Text of *Hard Times*' *Dickensian* (1968) 64, 98.

¹⁹⁴ *H.W.* 9, 213, 224.

¹⁹⁵ Woodings 43.

¹⁹⁶ Butwin, J. '*Hard Times*: The News and the Novel' *Nineteenth Century Fiction* (1977) 32, 2, 166.

¹⁹⁷ *Pilgrim Letters* 7, 282. Letter 02/1854 to W.H.Wills.

misshapen, awlung o' sickly air as had' no need to be, an awlung o'working people's miserable homes. A muddle! Aw a muddle!¹⁹⁸

Factory safety and remedies for default were therefore in Dickens' mind. He expected his readers to consider the story when they were reading of factory accidents in *Household Words*. Dickens probably wrote at least parts of those articles.¹⁹⁹ The purpose of his fiction was to entertain as well as to instruct so that readers should smile before they protested.²⁰⁰ Readers would take his journalism more seriously than his novel and, once they had read both, he left the responsibility for reform with them.

While protesting that it was all a 'muddle' he wanted to be even-handed. He was not confident of adequately depicting factory life being without any meaningful experience of such a scale of activity and of manufacturing processes. He did not have the capacity and knowledge to solve rather than merely identify complex and difficult social problems. He did not reveal what was produced in Bounderby's factories. He steered clear of the foundry operated by Rouncewell, the iron master in *Bleak House*, save for his description of the blighted scenery during Mr George's journey into the iron country²⁰¹ and of his arrival at the Rouncewell foundry where iron sights, sounds, smells and tastes predominated.²⁰² He did not need technical knowledge to describe Phil Squod, the crippled cleaner of guns at Mr George's shooting gallery, burned in a forge where the men were 'given to larking', scorched in a gas works accident and then blown out of a window when filling boxes with fireworks, these easily described events representing the dangers of the Industrial Revolution.²⁰³ Nor did Dickens provide details of the engineering business of Daniel Doyce in *Little Dorrit*.²⁰⁴ Cazamian believed Dickens to have been 'ill at ease in this new territory' and:

[He]could not become the great sombre poet of industrialism. The whole thing was too great a shock to his sensibility. As a writer he needed light and joy. The impression of industrialism is quite external.

¹⁹⁸ *Hard Times* 263.

¹⁹⁹ Morley nowhere expressed an interest in the topic or referred to his contributions in his autobiographical *Early Papers and Some Memories* (London: Routledge, 1891).

²⁰⁰ Flint, K. *Dickens* (Brighton: Harvester, 1986) 107.

²⁰¹ *Bleak House* (1853) 951.

²⁰² 952.

²⁰³ 421.

²⁰⁴ (1857) Bleeding Heart Yard contained 'the factory of Daniel Doyce, often heavily beating like a bleeding heart of iron, with the clink of metal upon metal' (1, 12, 150) with the 'long, low workshop, filled with benches and vices and tools, and straps and wheels which when they were in gear with the steam-engine, went tearing round' and the place was heavy with 'the filings of iron and steel that danced on every bench' (1, 23, 285).

... he could not get to the heart of industrial life because he had no intimate contact with it. His sensitivity was unaccustomed to machinery and his outlook was quite remote from those who tended it.²⁰⁵

Dickens' experiences were limited to his doleful work, when twelve years old, at Warren's of Hungerford Stairs, manufacturers of boot blacking, which inculcated a life-long sympathy with children. In 1822 he wanted to go to school in London after joining his family in Camden Town but his father was in financial trouble and his mother was not supportive. In September 1823, before his father was imprisoned for debt, he went to work at Warren's, owned by William Edward Woodd whose brother in law George, otherwise James, Lamert, a family friend of the Dickens, was the instigator.²⁰⁶ It was the stuff of nightmares in a damp, rotten, mice-infested, tumbledown house. He worked a ten hour day with two meal breaks and his job was to apply paper coverings to flower pot-like receptacles, tie the pots with string, trim the coverings and paste on a label. It seemed like the end of his childhood. At the same time he was attending his family in the Marshalsea Prison and becoming closely acquainted with pawnbrokers. At first he worked alone, optimistically expecting some training, but later migrated to join other boys some of whom were kind to him. He was shamed to be amongst the working classes, a sentiment inherited from his father who had aspirations to gentility.²⁰⁷ After Hungerford Stairs, he was moved to Chandos Street in January 1824 and worked there until his father removed him in September 1824.²⁰⁸ His childhood work imbued in him the element of anger to be found in *Hard Times* but it did not provide enough for him to write with confidence and authority about the reality of a working day inside a mine or a mill.

His mortification was similarly expressed in the semi-autobiographical *David Copperfield* (1850). There David was taken to work in his stepfather Murdstone's warehouse. The business involved the sale of wine to packet ships. Used bottles had to be inspected and, if suitable, washed. Labels, corks and seals were applied by the boys. On David's first day he mingled his tears with the water in which he washed the bottles.²⁰⁹ He was 'miserably unhappy' as he continued to work 'with the same

²⁰⁵ Cazamian 165.

²⁰⁶ George James was never the owner. Allen, M. (2010) 'New Light on Dickens and the Blacking Factory' *Dickensian* (2010) 106, 1, 480, 22.

²⁰⁷ Ackroyd 67.

²⁰⁸ Allen 28.

²⁰⁹ *David Copperfield* 148.

common companions, and with the same sense of unmerited degradation'.²¹⁰ Dickens told his readers what he thought of Copperfield's work and how David related to the other boys but it was all very different from northern factories. He was 'badly caught out by his lack of first-hand knowledge' and, in respect of living conditions, 'Elizabeth Gaskell was fated to bring off what was beyond Dickens' powers'.²¹¹ Yet Dickens' metaphors and symbols in *Hard Times* allied to the articles in *Household Words* gave a powerful message for reform of working conditions and industrial safety beyond what was achieved by any other novelist of his time.

Mrs Gaskell's *North and South* was published in *Household Words* in instalments over four months from September 1854. The Malthusian Thornton thought that he alone should determine the use of his capital and that he had no responsibility for the health and contentment of his workforce. He was not the dilettante Harry Carson of *Mary Barton* but a hard working master devoted to the profit of his mill and business. Margaret Hale's intervention caused him to see that a humanitarian approach and a sense of social responsibility might be consistent with commercial success.

The title was suggested by Dickens and the instalments appeared anonymously.²¹² Mrs Gaskell sought to assuage the feelings of her well-to-do Manchester friends, many of whom were influential industrialists who attended her husband's chapel, by emphasising the position of the employers. Cazamian suggested that she had been 'hurt by the accusations of bias her critics threw at her'.²¹³

The tale was one of reconciliation between masters and men and fitted well with the precepts of Thomas Carlyle who did not favour democracy but who saw salvation for society in the emergence of Captains of Industry, such as John Thornton, who would heroically ensure work and happiness for the workforce. However Mrs Gaskell thought that 'to be a Captain of Industry is clearly ... not to spring new-minted from some theoretical Valhalla, but to learn by painful mistakes'.²¹⁴ She

²¹⁰ 159.

²¹¹ Ackroyd 166. Raymond Williams in *Culture and Society 1785-1850* (Harmondsworth: Penguin, 1977 (1958)) 104 thought that Dickens was less successful than Mrs Gaskell 'in terms of human understanding of the industrial working people'. *Hard Times* is further considered in ch.6.

²¹² However Dickens allowed 'by the author of *Mary Barton*' and by then her identity was well known. Hopkins, A.B. (1946) 'Dickens and Mrs Gaskell' *Huntington Library Quarterly* (1946) 9, 4, 357.

²¹³ Cazamian 226.

²¹⁴ Campbell, I. 'Mrs Gaskell's *North and South* and the Art of the Possible' (1980) *Dickens Studies Annual* 8, 244.

rejected Utopias and absolutes and favoured compromise and gradual changes.²¹⁵ Humanly created social evil should be remedied in a practical way motivated by Christian values.²¹⁶ She believed that Northern industrial cities ‘for all the terrible effects of the factory ... are potentially good because divinely inspired’.²¹⁷

An unsigned review in *The Leader* contained practical criticisms. Mrs Gaskell was insufficiently knowledgeable of the cotton trade and the solution was ‘sound, strong, masculine, practical insight’.²¹⁸ W.R. Greg thought ‘it was not such a thorough work of genius’ as *Mary Barton* but he had less to complain about it.²¹⁹ H.F. Chorley commended the natural dialogue, the pathos, Mrs Gaskell’s humour and her keen eye for character.²²⁰ Cormell Price²²¹ in his review of her two industrial novels in the *Oxford and Cambridge Magazine* referred to an exposition ‘veritable and unbiased’.²²²

There was less squalor and misery than in *Mary Barton* because it was written from the middle-class perspective of Margaret Hale and also because social conditions had improved by 1853. The story was better structured and social issues were presented more credibly. *North and South* lacked the raw tautness of its predecessor. It contained neither detail of factory children nor any account of the dangers of machinery. Save for the effect of cotton dust on Bessy Higgins’ lungs, it was not a book about industrial conditions. It was not a factory novel.

In 1864 Henry Alfred Pettit (1848-1893), writing as Herbert Glyn, produced *The Cotton Lord*, set in Manchester, probably in the late 1840’s.²²³ As in *Helen Fleetwood* a poor family, the Ruebys, were driven from the country to the grime and disease of

²¹⁵ Uglow 371.

²¹⁶ Hotz, M.E. ‘‘Taught by Death what Life should be’’: Elizabeth Gaskell’s Representation of Death in *North and South*’ (2000) *Studies in the Novel* 32, 2, 174.

²¹⁷ Picoulis, J. ‘*North and South: Varieties of Love and Power*’ *Yearbook of English Studies* (1976) 6, 193.

²¹⁸ *The Leader* 14/04/1855.

²¹⁹ Duthie, E.L. *The Themes of Elizabeth Gaskell* (London: Macmillan, 1980) 84.

²²⁰ (07/04/1855) *Athenaeum*. The weekly literary, theatrical and scientific periodical had a circulation in 1851 of about 21,000.

²²¹ Price (1835-1910) was a friend of the artist Burne Jones, a member of the Pre-Raphaelite Brotherhood ‘Set’, who introduced Price to William Morris. Price founded the colonialist United Services College at Westward Ho!, North Devon, taught there for 20 years from 1874, and was described with affection in *Stalky & Co* by Rudyard Kipling whom he had taught. McCarthy, F. (1994) *William Morris* (London: Faber, 1994) 60.

²²² ‘Lancashire and *Mary Barton*’ (07/1856) 441.

²²³ (London: Smith Elder). If the dates are correct the novel was a splendid achievement because the author was but eighteen years old. Pettit became a schoolteacher and later (1875-1893) a prolific playwright. At one time 22 companies were on tour in England and 6 in America performing his work. He favoured melodrama and comedy. He achieved popular success and considerable wealth.

the city. The factory owner Candy Miles, learned of an accident to young Rueby in the mill. The boy injured his arm when he 'he got too near one of the shafts and it caught his shirt sleeve'. The shaft was unguarded and but for the prompt action of a workmate 'he would have been dragged in altogether'.²²⁴ The owner resented the happening of the accident:

'Is the arm broken Gilbert?' said the master with his face as livid as the boy's; 'the young fool might just as well have been crushed altogether'. 'I'm afraid it is broke Sir' said Gilbert 'at any rate the flesh is almost stripped off the bone'.²²⁵

[Candy Miles] most disliked an accident at his mill ... He was proud it was so much better ordered and the machinery much more carefully guarded than in other factories and to find a faulty part touched him to the quick.²²⁶

Pettit portrayed a successful but unsympathetic mill owner but there was no evidence of intimate knowledge of machinery and of what it was like to work in such an environment.²²⁷

Thus, Dickens apart, not one of the novelists ever carried out a day's work in a factory and none ever witnessed an industrial accident. A literary equivalent of the artist James Sharples was needed. He completed his painting *The Forge* in 1847.²²⁸ Mrs Braddon used characters who happened to work in factories²²⁹ whereas Camilla Toulmin, Mrs Tonna and Geraldine Jewsbury sought to explain the mechanical stages in the making of cotton thread. Mrs Trollope conscientiously spent a month in Manchester before writing *Michael Armstrong* and she and Disraeli relied on Blue Books, he being particularly adept in *Sybil* at condensing relevant parts. Harriet Martineau probably saw more different factory processes than any but she visited the premises without thought of safety and working conditions. Her reactionary attitude to fencing precluded her from addressing the question of responsibilities for injured operatives. Mrs Gaskell, if she had directed her fire towards factory work rather than

²²⁴ *The Cotton Lord* 83.

²²⁵ 83.

²²⁶ 84.

²²⁷ No review has been traced.

²²⁸ He was a foundry worker and a self-taught artist who had attended evening classes at the Mechanics' Institute. Wood, C. (1999) *Victorian Painting* (Boston: Little Brown) 70.

²²⁹ Mary Elizabeth Braddon (1835-1915) was the writer of 'penny dreadful' short stories mostly for her lover, the publisher John Maxwell. Braddon wrote eighty novels the most well-known being *Lady Audley's Secret* (1861) and *Aurora Flood* (1862) both sensational bigamist tales. On 01/07/1861 Maxwell launched the *Halfpenny Journal* to which 'Mrs Braddon' contributed eight novels over four years. Wolff, R.L. (1979) *Sensational Victorian: the Life and Fiction of Mary Elizabeth Braddon* (New York: Garland, 1979) 119. One was *The Factory Girl or All is not Gold that Glitters: a Romance of Real Life*. This novel, hardly touching a factory, appeared over nine months in 1863. It was never published in book form. Carnell, J. (2000) *The Literary Lives of Mary Elizabeth Braddon* (Hastings: Sensation Press, 2000) 207.

living conditions could have struck the ‘greatest blow’ but she had neither the knowledge nor the inclination. A combination of Mrs Gaskell’s empathy, Mrs Tonna’s Christian message, Mrs Trollope’s zeal and Dickens’ genius would have had greater potential to influence.

The novelists made a contribution towards increasing public knowledge of the scandals of industrial exploitation and hoped that parliament would respond appropriately. Mrs Gaskell expected change:

... there are duties connected with the manufacturing system not fully understood as yet, and evils existing in relation to it which may be remedied in some degree, although we as yet do not see how; but surely there is no harm in directing the attention to the existence of such evils.²³⁰

Similarly John Forster:

Fiction cannot prove a case but it can express forcibly a righteous sentiment.²³¹

Despite their hopes Parliamentary vested interests (mainly the mainstream liberal Whig establishment closely connected to the manufacturing interest) prevented speedy progress towards improving industrial safety. The novelists generally avoided the mechanics of accountability. Dickens alone had personal experience of industrial work and in *Household Words*, with Henry Morley, he tackled the issues of industrial safety and the responsibilities of employers. Responsibility, a major element in his life and in his fiction, was assumed by Dickens in his childhood, undertaken by him for his parents, siblings, children and friends, felt by him in respect of his readers and public and imbued in his heroes and heroines.²³² Yet, for all his imagination, he did not have the knowledge or the confidence for further challenge and, in the end, produced less than he had threatened. He could have adopted Chadwick’s campaign to shift responsibilities onto the owners. He never reached the defences described in the next chapter which Baron Bramwell so fervently applied nor the issue of vicarious liability which the Baron detested. Judicial support for the defences was so strong that it became difficult for parliament to abolish them.

²³⁰ Letter in late 1848 to Mary Ewart in Chapple & Pollard 6, 67.

²³¹ (1924) *The Life of Charles Dickens* (London: Palmer, 1924) 566.

²³² Slater, M. *The Genius of Dickens* (London: Duckworth, 2011) 66.

Chapter 5

The Liability of Employers to their Workpeople for Industrial Accidents: the Common Law

The novelists never enveloped the concept of vicarious liability¹ and could not therefore be expected to grapple with the three fictional defences. The way was open to Baron Bramwell and other judges to mould the Common Law to suit their preconceptions. Few were aware of what they were conjuring. The Baron supported the controversial notion of ‘Association’. The demise of the defence of common employment was painfully slow.

Vicarious Liability

The notion that one person might be held liable for the acts or torts of another was well established by the early nineteenth century although not all jurists agreed with it. It had the support of Blackstone as early as 1765² and was founded on *Hern v Nichols*³ a contract case involving an agent who misrepresented the quality of the silk which he was selling, *Michael v Alestree*⁴ where a horse owner was held liable for the negligence of his groom in exercising horses in Lincoln’s Inn, and *Turbervill v Stamp*⁵ where a freeholder was liable for the effects of a fire kindled on his land by his servant. The headnote to that report proclaimed that ‘a master is responsible for all acts done by his servant in the course of his employment’. There followed *obiter dicta* of Holt C.J in *Jones v Hart*⁶ an action in contract involving a pawnbroker: ‘if my servant doth anything prejudicial to another it shall bind me [when] he acts by my authority being about my business’ and he gave the example of a carter’s servant running a cart over a boy. In an early Scottish coach case it was held that if a master entrusted a task to a servant the master would be liable for the servant’s lack of skill, malversation⁷ and culpable negligence.⁸

¹ Charlotte Yonge in *Heartsease* identified a mining accident the fault of the owner’s agent but did not pursue the point. See ch.3.

² Chitty, J. (ed.) *Blackstone’s Commentaries on the Laws of England* (London: Walker, 1826) 1, 430.

³ (1709) 1 Salk. 289; 91 ER 256.

⁴ (1676) 2 Lev. 172; 83 ER 504.

⁵ (1697) Skinner 681; 90 ER 303.

⁶ (1698) Holt 642; 90 ER 1255. Followed in *Joel v Morrison* (1834) 6 Car. & P 501; 172 ER 974.

⁷ Incompetence.

⁸ *Drummond v Macgregor* (1813) SC 58, 232. See ch.2.

O.W. Holmes could not find any abstract principle to justify the concept and thought it anomalous.⁹ Baty in his *Vicarious Liability*¹⁰ listed nine possible reasons in justification but as he also did not favour the notion, disposed of all of them except that identified by Lord Bramwell, namely ‘punishment’, meaning that employers generally had deep pockets.¹¹ Atiyah in his *Vicarious Liability in the Law of Torts*¹² explained that as the sum paid by a defendant bore no correlation to the degree of blameworthiness, so that if the defendant did not pay, the taxpayer in one form or another would have to do so. It was purely a question of allocating the loss. Since the nineteenth century the defendant has generally been insured to cover negligence on the part of employees.¹³

Baron Bramwell opposed the notion throughout his judicial career.¹⁴ He dissented in *Udell v Atherton*¹⁵ where the principal was found liable in deceit for the false and fraudulent representations of his agent as to the quality of a mahogany log whereby the purchaser was induced to pay more than it was worth, arguing that there was no actual moral fraud committed by the principal personally. The agent would be liable to the principal. Thus the Plaintiff had not made out any cause of action. Greater responsibility should rest with the purchaser who, oddly, should bear the loss between the two innocent parties because he had dealt with and wrongly trusted the fraudulent agent thereby enabling the commission of the fraud.¹⁶

The Baron contrived a fearful tangle in *Hart v Lancashire and Yorkshire Railway*¹⁷ where a pointsman had to make the unenviable and instant decision as to the line upon which he should divert a runaway train which would inevitably collide with one train or another. All agreed that the pointsman was not negligent so that

⁹ ‘The Theory of Torts’ (1873) 7 *American Law Review* 652 and Horwitz, M.J. *The Transformation of American Law 1870-1960* (New York: Oxford U.P., 1992) 106.

¹⁰ Baty, T. (Oxford: Clarendon, 1916).

¹¹ Baty 148.

¹² Atiyah, P.S. (London: Butterworths, 1967).

¹³ Atiyah 14. The principle did not extend to subcontractors (often regarded as entrepreneurs and therefore to be protected) as demonstrated in a series of decisions unfavourable to plaintiffs who often sued the wrong party. *Rapson v Cubitt* (1842) 9 M&W 710; 152 ER 301, *Reedie v London & NW Railway* (1849) 4 Ex. 244 ; 154 ER 1201, *Knight v Fox* (1850) 5 Ex. 721; 155 ER 316, *Overton v Freeman* (1852) 11 CB 867; 138 ER 717 & *Murray v Currie* (1870) LR 6CP 24. Generally however an occupier who brought a contractor onto his land for work to be done would be liable for harm emanating from that work: *Randleson v Murray* (1838) 8 Ad. & E 109; 112 ER 777 & *Sadler v Henlock* (1855) 4 EL & BL577; 119 ER 209.

¹⁴ *Collett v Foster* (1857) 2 H&N 355; 157 ER 147, 361; 150. See ch.2.

¹⁵ (1861) 7 H&N 192; 158 ER 437.

¹⁶ *Udell* 187; 443.

¹⁷ (1869) 21 LT NS 261 Ex.. See Ch. 2.

there was no liability on the part of the operator but the Baron suggested that as his act of diversion was ‘voluntary and deliberate’ the Plaintiff might have a remedy against him. His brethren were quick to disagree with that unnecessary foray into an area not argued.¹⁸

*Weir v Bell*¹⁹ involved a fraudulent prospectus where two judges found for the Defendant because he had not been aware of the falsehood of the statements made in the prospectus. The Baron went further saying that the Defendant was not the principal of the brokers making the statement and did not himself commit the fraud or knowingly procure its commission. He criticised the view of his friend Willes J. in *Barwick v English Joint Stock Bank*²⁰ that fraud was no different from any other wrong so that the master was liable for the act of his agent. Bramwell B. contended that there was no such liability if the agent’s act was wilful. He relied on his judgment in *Udell v Atherton*²¹ and slyly suggested that his brother Willes had only considered equity cases cited to him.

In *Abrath v North Eastern Railway*²² Lord Bramwell again went much further than he needed when agreeing with his brethren that the onus was on the plaintiff in an action for malicious prosecution to show want of reasonable cause and malice. He announced that a corporation aggregate was incapable of malice. The shareholders and directors might act maliciously and *ultra vires* but they would have no authority to bind the company. The malice of a subordinate officer would be ‘immaterial’.²³ He was rebuked by Lord Fitzgerald because the issue had not been argued before the court.²⁴

In *Bunch v Great Western Railway*²⁵ Lord Bramwell dissented in an action involving the plaintiff’s luggage which she entrusted to a porter in advance of the arrival of her train. The porter disappeared and the House held the railway company liable but Lord Bramwell would not accept any vicarious liability on the Defendant given that the train had not arrived and arguing that the porter could not impose extra

¹⁸ *Hart* 263. Similarly *Holmes v Mather* (1875) LR 10 Exch. 261, 268 where Bramwell thought the Defendant would only be liable if he ‘was immediately doing the act which did the mischief’.

¹⁹ (1878) 3 Ex D 238.

²⁰ (1867) LR 2 Ex 259.

²¹ (1861) *supra*.

²² (1886) 11 App.Cas. 247.

²³ *Abrath* 251.

²⁴ 255.

²⁵ (1888) 13 App.Cas. 31.

responsibility on his employers without their knowledge and consent. Companies should not be found liable to individuals merely because of their power.²⁶

He made his last sally in *Little v Port Talbot: The Apollo*²⁷ where the ship had entered dock with a fouled propeller. The harbour master negligently invited the ship into a lock for inspection and repair but the ship was damaged by a sill in the base of the lock. Three judges found for the Plaintiff on the basis of the harbour master's assurance which was within the scope of his authority so that the Defendant was vicariously liable but Lord Bramwell dissented saying that the assurance was not a warranty but, if it was, the master had no authority to make it, and in any event there was no consideration. The notion of *respondeat superior* was clear insofar as it covered 'stranger relationships' but Bramwell's dislike of it never faltered.

Contributory Negligence

The idea that losses should be borne according to the comparative blameworthiness of the parties did not feature in the nineteenth century; instead a plaintiff's negligence was regarded as a total bar. Thus the court would scrutinise the plaintiff's actions before considering any neglect of the defendant.²⁸

The notion of apportioning blame was favoured in a shipping case *Raisin v Mitchell*²⁹ where the jury found fault on both sides but this sensible approach did not influence any non-Admiralty court to extend the principle. It would have been eminently suitable for road collisions but would have involved an enlargement of the compensation system.

So Bramwell B. in *Dynen decd. v Leech*³⁰ was in tune with his brethren when hearing a claim arising from the fall of a weight being raised by the deceased. The decision of the trial judge not to put the case to the jury was supported by the Exchequer judges even though there was a safer and more usual mode of lifting such weights which had been discarded on the order of the Defendant. The Baron

²⁶ *Bunch* 51. See ch.2.

²⁷ [1891] AC 499.

²⁸ Lord Abinger in *Butterfield v Forrester* (1809) 11 East 60; 103 ER 926. Also *Sills v Brown* (1840) 9 Car & P 546; 173 ER 974.

²⁹ (1839) 9 Car & P 617; 173 ER 979 not followed in another shipping action *Dowell v General Steam Navigation* (1855) 5 E&B 195; 119 ER 454.

³⁰ (1857) 26 LJ Ex. 221.

concluded that the act of the workman was the proximate cause. Lack of humanity was compatible with justice:

There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others might have adopted. It may be inhuman to carry on his works as to expose his workmen to peril of their lives but it does not create a right of action.³¹

In *Williams v Clough*³² the Defendant told the Plaintiff to carry corn into a granary using a ladder which the Defendant knew to be defective. The Plaintiff had not known of the defect and such knowledge was not pleaded against him. All four members of the court agreed that the Plaintiff should succeed but Baron Bramwell was unable to resist adding:

A master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master.³³

In the Baron's mind actual or constructive knowledge would have defeated the claim.³⁴ There were some halfhearted, arcane and generally unsuccessful efforts to use the judgment in *Davies v Mann*³⁵ as a basis for evading the vicious old rule if the plaintiff's actions were not the 'immediate cause' of the injury.³⁶ The rule, though not a fiction, was indicative of judicial intent in the creation of the fictional defences of *volenti* and common employment.³⁷

The Defence of *volenti non fit injuria*

The underlying principle came from Aristotle who, in his *Ethics*, contended that what was suffered voluntarily could not be an injustice according to law and fairness.³⁸ In

³¹ *Dynen* 223.

³² (1858) 3 H&N 258; 157 ER 463.

³³ *Williams* 260; 469.

³⁴ Also *Fletcher v Peto* (1861) 3 F&F 368; 176 ER 164.

³⁵ (1842) 10 M&W 246; 152 ER 588.

³⁶ In *Radley v London & NW Railway* [1876] 1AC 754 the Plaintiff succeeded after Bramwell was criticised on appeal for taking the traditional line but that was an isolated success. Lord Wright described 'immediate cause' as a 'fallacious principle': 'Contributory Negligence' (1950) 13 *MLR* 2.

³⁷ The rule was abolished by the 1945 Law Reform (Contributory Negligence) Act following the Reports of the Monckton Committee on Workmen's Compensation Cmd 6580 (1945), Cmd 6642 (1945) & Cmd 6860 (1946). Nevertheless until about 1965 the courts made high deductions (often 50%) even in cases of breach of statutory duty. Whincup, M.H. 'Employees' Contributory Negligence' (1968) 118 *NLJ* 972 & Fagelson, I. 'The Last Bastion of Fault' (1979) 42 *MLR* 646.

³⁸ Ingman, T. 'A History of the Defence of *volenti non fit injuria*'. (1981) *Juridical Review* 1.

early cases the defence was often confused with or not distinguished from contributory negligence.³⁹

The defence reached employers' liability in *Seymour v Maddox*⁴⁰ where the Plaintiff was employed as a chorus singer in the Defendant's theatre. Under the stage a hole had been cut by which performers passed but it was unfenced, uncovered and unlit. The Plaintiff fell into it but her claim failed. It was no part of her contract that the floor would be lit and she had not been bound to enter that particular service. Hence, although she was not aware of the existence of the hole, she was *volenti*. The defence was employed in *Skipp v Eastern Counties Railway*⁴¹ where the Plaintiff guard, employed for several months to attach carriages of luggage to the locomotive engine, was thrown under a carriage due to the negligence of fellow workers and lost his arm. Others had complained previously. He pleaded limited time and not enough men to do the job but Parke B. rejected his cause, saying that if he felt that he was in danger, he should not have accepted the service. Martin B. thought that if the Plaintiff found that he could not do the work which was set him, he ought to have declined it. Yet the Plaintiff had no control over the number of trucks which required coupling (forty two on that occasion⁴²) and he was under more than the usual pressure to get the work done before the next train arrived. As an accident was likely if he failed to complete the work in time he had no choice than to do his best.

If there was no knowledge of the causative defect the plaintiff might succeed.⁴³ If there was knowledge then, paradoxically, the more the plaintiff knew and the more he complained, the stronger the defence. In *Holmes v Clarke*⁴⁴ the Plaintiff was employed to oil machinery. When, after he started, the broken fencing was removed, the Plaintiff complained to the Defendant's manager in the presence of the Defendant who assured the Plaintiff that it would be restored. The Plaintiff succeeded because,

³⁹ As in *Cruden v Fentham* (1798) 2 Esp.685; 170 ER 496. Also the spring gun off the right of way. *Iott v Wilkes* (1820) 3 B&Ald. 304; 106 ER 674.

⁴⁰ (1851) 16 LT OS 387; 117 ER 904.

⁴¹ (1853) 9 Exch.223; 156 ER 95. Also *Assop v Yates* (1858) 2 H&N 766; 157 ER 317. In *Griffiths v Gidlow* (1858) 3 H&N 648; 157 ER 628 the court contrived to use all three defences to stymie an apparently strong claim. Similarly in *Senior v Ward* (1859) 1 El&El 385; 120 ER 954 where special colliery rules had been made pursuant to statute (Inspections of Coalmines Act 1855, s.55) and the rope used to control the descent of men into the pit was damaged by fire and unsafe, the Plaintiff failed because he knew that the banksman habitually failed to test the rope each morning and yet he did not insist on testing. Campbell L.C.J. confused the Plaintiff's 'material contribution' with *volenti*.

⁴² *Household Narrative of Current Events* (27/10/1853 – 27/11/1853) 244.

⁴³ *Holmes v Worthington* (1861) 2 F&F 533; 175 ER 1175. Similarly *Mellors v Shaw* (1861) 30 LJR (NS) QB 333; 121 ER 778.

⁴⁴ (1862) 7 H&N 937; 158 ER 751.

as per Cockburn L.C.J., he only submitted to extraordinary danger on the basis that it would be remedied and, as per Byles, J.:

It is, in most cases impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both. The master again is a volunteer, the workman ordinarily has no choice. To hold that the master is [not] responsible to his workman for ... absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient.⁴⁵

That new approach was not adopted by Bramwell B. in *Ogden v Rummens*⁴⁶ where a labourer, engaged to shore up an arch, was killed when it collapsed onto him. His widow alleged defective foundations and inadequate shoring but the Baron directed a verdict for the Defendant:

If a master knew of a danger which his servant did not and set him to it, why he would be liable; but otherwise if he did not know of it, or if his servant did, if a man chose to run a risk it was his own lookout. One of the witnesses had given ... a very sensible answer – that if he had complained of the danger of the work he would have been told that someone else would do it; but that showed that he had an option to do it or not to do it ...⁴⁷

So a workman did have a theoretical but not a practical choice between working in dangerous conditions or losing his job. Bramwell B. concurred in *Lynch v Marchmont*⁴⁸ when rejecting a claim for injuries suffered by a plasterer when a scaffold, negligently constructed by the Defendant's foreman Horrigan, collapsed:

Besides if the plaintiff knew that Horrigan was unfit for the post he occupied, why did he go and work under him?⁴⁹

The judges did not seem to realise the difficulty with *volenti* namely that the more extreme the employer's default, and the more serious and obvious the danger, the stronger appeared the defence.

The decision in *Holmes v Clarke* was reluctantly followed by Baron Bramwell in *Britton decd. v Great Western Cotton*,⁵⁰ a claim involving an employee of six days whose job was to grease a steam engine. Contrary to statute⁵¹ the fly wheel was not fenced. The outcome should have been clear but the Baron agonised suggesting that to

⁴⁵ *Holmes* 948; 755. Also relevant to the defence of common employment and as to breach of statutory duty.

⁴⁶ (1863) 3 F&F 751; 176 ER 344.

⁴⁷ *Ogden* 346.

⁴⁸ (1865) 29 JP 375.

⁴⁹ *Lynch* 376.

⁵⁰ (1872) LR 7 Exch.130.

⁵¹ Factories Act 1844, s.21.

defeat the defence it would be necessary to paint the deceased's dangerous workplace in sanitised terms:

The jury have found him not guilty of contributory negligence either in going or being there, and I cannot say that they were wrong. I do not myself see that the place was necessarily dangerous. At any rate the deceased may well have thought that it was not. Indeed the accident seems to have resulted not from the necessarily dangerous character of the place, but from some misfortune which might have happened anywhere. It is further contended that at any rate the deceased knew the danger as well as his employers. That may be doubtful, in fact, for he seems not to have been a skilled workman, but a coal trimmer.⁵²

We might ... found our judgment on the case of *Holmes v Clarke* where indeed there was a weaker case for the plaintiff than there is here. But though I agree in the decision arrived at there, I cannot follow the reasoning of some of the judges in the Exchequer Chamber.⁵³

The reference to the Plaintiff's occupation almost suggested that the defence would only be viable if the plaintiff was skilled. A workman located in one department of industrial premises should not logically have been found *volens* in respect of disaster occurring in another but that was the Plaintiff's fate in *Saxton v Hawksworth*.⁵⁴ The Plaintiff, a foreman sheetroller, worked in the mill which was separate from an area housing five steam engines two of which provided power to the mill. The five engines were at any one time looked after by one tenter. During his legitimate absence one engine 'ran away' causing a connected drum to disintegrate. A piece from the drum flew across a yard and into the mill, there striking the Plaintiff. In the court below (and its decision was upheld on appeal) Baron Bramwell denied a remedy to the innocent Plaintiff whom he regarded as having assumed the risk, saying:

The plaintiff must have had a general knowledge of steam engines. It is obviously common knowledge that engines require care. Here is a man, no engineer if you like, but still a man who has been for three years where engines are.⁵⁵

Debate continued on what exactly workmen consented to when taking up employment and the tide began to turn against employers when in *Woodley v Metropolitan District Railway*⁵⁶ the Plaintiff lost but only by three Exchequer judges to two. He had been struck by a train in a dark tunnel when working twenty yards from a curve so that he had little warning of a train approaching. The majority thought that he had

⁵² *Britton* 137.

⁵³ 136.

⁵⁴ (1872) 26 LT NS 851. Judgment 03/08/1872 seven months after the judgment in *Britton*.

⁵⁵ *Saxton* 852.

⁵⁶ (1877) 2 Ex.D 384.

continued with full knowledge whereas the dissenters pointed to the lack of a contract to modify the Defendants' normal duty. The idea that *volenti* required acquiescence in danger was gaining ground.⁵⁷ In *Thomas v Quartermaine*⁵⁸ Lord Esher, M.R., dissenting, decided that the Employers' Liability Act 1880⁵⁹ removed the defence of *volenti* but such was not the view of the majority who thought that the Act merely placed workmen in the same position as the rest of the world. The majority decision was not followed by Willes J. in *Baddeley v Earl Granville*⁶⁰ the fatal accident occurring when the deceased was travelling in the shaft and a boy gave an incorrect signal to the engineman in the absence of the banksman whose presence was required by statute.⁶¹ *Volenti* had no application. Lord Esher was in the majority in *Yarmouth v France*⁶² and cast doubt on *Thomas v Quartermaine* when finding for the Plaintiff because there had to be 'assent to accept the risk with a full appreciation of its extent'. He thought:

... it is a horrible way of stating the duty to say that a master owes no duty to a servant who knows that there is a defect in machinery and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural and ... utterly abominable.⁶³

It came to be accepted that knowledge - *scienti* was different from acquiescence to danger - *volenti*. What mattered was the risk that materialised. Thus Hawkins J. in *Thrussell v Handyside* concluded that where a workman complained of a danger but carried on working so as to avoid dismissal he did not volunteer to take the risk upon himself. It was 'his poverty and not his will' that consented to undergo the danger.⁶⁴

Lord Bramwell again exceeded his brief in *Membery v Great Western Railway*⁶⁵ where the Defendants agreed with a contractor that he should provide horses and men to shunt trucks on their line, with the help of boys if available and, if not, without boys. This arrangement had worked well for several years. All members of the House properly agreed that there was no evidence of negligence or breach of contract

⁵⁷ *Weblin v Ballard* (1886) 17 QBD 122 & *Bacon v Dawes* (1887) 3 TLR 557.

⁵⁸ (1887) 18 QBD 685.

⁵⁹ s.1(1).

⁶⁰ (1887) 19 QBD 423.

⁶¹ Coal Mines Regulation Act 1872, s.52.

⁶² (1887) 19 QBD 647.

⁶³ *Yarmouth* 657.

⁶⁴ (1888) 20 QBD 359,364 and similarly Mathew J. in *Bacon v Dawes* (1887) 3TLR 557. Yet the defence had not disappeared as in *Church v Appleby* (1888) 58 LJQB 144, a scaffold case, and *Hedley v Pinkney* [1894] AC 222 where the 1880 Act did not apply to seamen.

⁶⁵ (1889) 14 AC 179.

to go to the jury but Lord Bramwell used *volenti* as a further ground for rejecting the claim:

I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is volens? Willing; and a man is willing when he wills to do a thing and does it.⁶⁶ ... There seems to be a strange notion, either that a man who does a thing and grumbles is nolens, is unwilling, has not the will to do it, or that there is something intermediate between nolens and volens, something like a man being without a will, and yet who wills.⁶⁷

But by then he was almost a lone voice. Coleridge L.C.J. in *Sanders v Barker*⁶⁸ said that the Plaintiff may have known of the defect but did not have full knowledge of the risk.⁶⁹ In *Brooke v Ramsden* Cave J. concluded that:

If everyone who complained or knew of a defect was held to be disentitled to recover, bad masters would only have to point out defects to put themselves in a better position than masters who took all possible pains to ensure the safety of their workmen.⁷⁰

Bramwell made his last stand in his dissenting judgment in *Smith v Baker*⁷¹ where the Plaintiff was working in a cutting holding a drill struck alternately by hammers wielded by two workmates. Nearby another group of men in the same employment as the Plaintiff, worked with a steam crane to cut and remove pieces of stone. The stones were swung over the area where the Plaintiff worked and one stone, for no explained reason, slipped and fell onto the Plaintiff. The action succeeded under the 1880 Act with Lord Bramwell the only dissident. The Plaintiff knew the system to be unsafe and, when he saw stones coming over, he got out of the way. The majority held that the Plaintiff had not consented to the 'particular thing done' namely the dropping of the stone on his head. Lord Bramwell could have relied on unsafe system and equipment but thought the case 'the plainest possible' for the Defendants⁷² because the Plaintiff knew of the possibility. There was no evidence that the particular stone was improperly slung, the Plaintiff knew that there was nobody employed to warn

⁶⁶ *Membery* 187.

⁶⁷ 188. In *Thrussell v Handyside supra* the Court of Appeal followed *Membery*, distinguished the majority in *Woodley* and held that the defence needed consent to incur danger and this approach was adopted in the Plaintiff's favour in *Osborne v London & North Western Railway* (1888) 21 QBD 220 where the Plaintiff had slipped on worn station steps made slippery by ice and snow when descending to reach the platform.

⁶⁸ (1890) 6 TLR 324.

⁶⁹ Similarly in *Crocker v Banks* (1888) 4 TLR 324 the 17 year old Plaintiff, well used to filling soda water bottles, succeeded though she did not wear the mask provided. She was aware of some risk but her employers should have insisted on the use of the mask.

⁷⁰ (1890) 63 LT 287.

⁷¹ [1891] AC 325.

⁷² *Smith* 339.

him and *res ipsa loquitur* did not apply. He thought that only the personal negligence of the master or the use of dangerous plant not known to the servant would render the master liable⁷³ and:

It is said that to hold the plaintiff is not to recover is to hold that a master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel. But do not people go to see dangerous sports? Acrobats daily incur fearful dangers, lion-tamers and the like. Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets.⁷⁴

The force of *volenti* as a defence continued to abate and in *Bowater v Rowley Regis B.C.*⁷⁵ Scott L.J. said:

For the purpose of the rule, if it be a rule, a man cannot be said to be truly 'willing' unless he is in a position to choose freely; and freedom of choice predicates, not only full knowledge of the circumstances upon which the exercise of choice is conditioned, in order that he may be able to choose wisely, but in the absence from his mind of any feeling of constraint, in order that nothing shall interfere with the freedom of his will. ... I venture to doubt whether the maxim can very often apply in circumstances of an injury to a servant by the negligence of his master.⁷⁶

Thus the judges gradually found a way to avoid the fiction of *volenti* and its hardships by requiring full knowledge for the defence to be effective, a course open to them from and after the 1850's if only they had had the will to look for it.

The Defence of Common Employment

If *respondeat superior* applied in respect of wrongs done to strangers, logic suggested that it should also have applied in respect of the defaults of fellow employees. A passenger on a train ought to recover damages for injuries suffered in a crash whether a 'customer' or a railway worker. The risks were identical. Yet English and American judges created a defence which precluded employees from being compensated as passengers on their employer's railway or otherwise when fellow servants were to blame.⁷⁷

⁷³ 344.

⁷⁴ 346.

⁷⁵ [1944] 1 AER 465.

⁷⁶ *Bowater* 466. This judicial prophesy proved correct and *volenti* is rarely pleaded today. It only applies if, unusually, the claimant has 'freely and lucidly' accepted the risk of injury.

⁷⁷ As in *Hutchinson v York, Newcastle & Berwick Railway* (1850) 5 Ex. 842; 155 ER 150.

Until 1836 there was no record of any worker claiming personal injury compensation, successfully or not, against his employer.⁷⁸ The duty to support disabled workers fell on the parish. Lord Abinger set the ball rolling in *Priestley v Fowler*⁷⁹ where the Defendant, a butcher, employed his helper to carry meat using the Defendant's cart. Although not specifically pleaded, the evidence was that the Defendant knew that the cart was overloaded.⁸⁰ The Defendant then instructed the Plaintiff to proceed which the Plaintiff did. The cart duly broke and the Plaintiff's leg was fractured. A finding for the Plaintiff would not have created any new principle because of the Defendant's personal knowledge about the state of the cart. So Lord Abinger was really dealing with *volenti* and ventured into unnecessary territory when referring in effect *obiter* to 'the misconduct or negligence of others who serve him' and to the negligence of 'inferior agents'. Due to lack of precedent the judge felt free to decide by reference to principles and consequences.⁸¹ The worker was the master of his own fate and free to negotiate the terms of his labour.⁸² His approach assumed complete mobility of labour, an unlimited supply of work and the workman under no compulsion to enter the employment whereas the actual options were starvation or the acceptance of all dangers known or not.⁸³

Priestley v Fowler was used as a basis for the defence of common employment in England, the Empire and in America. Credit was given to Shaw C.J. of the Massachusetts Supreme Court in *Farwell v Boston and Worcester Railroad*⁸⁴ for formulating the principle in a more presentable way. The risks and perils would be regulated by contract whether the terms were express or implied and the risks, including the negligence of co-workers, would be thrown upon those best able to guard against them. The judge knew of *Priestley v Fowler* and of a majority decision of the Court of Errors of South Carolina in *Murray v South Carolina Railroad*⁸⁵ where the court rejected the Plaintiff fireman's claim for leg injuries arising from the negligence of the engine driver in allowing the train to collide with a horse and

⁷⁸ Simpson, A.W.B. *Leading Cases in the Common Law* (Oxford: Clarendon, 1999) 101.

⁷⁹ (1837) 3 Murph & H 305; 150 ER 1030.

⁸⁰ Simpson 107. Also Ingman, T. 'The Rise and Fall of the Doctrine of Common Employment' (1978) *Juridical Review* 106.

⁸¹ *Priestley* 306 ; 1031.

⁸² Kostal, R.W. *Law and English Railway Capitalism 1825-1875* (Oxford: Clarendon, 1994) 259.

⁸³ Best, G. *Mid-Victorian Britain* (New York: Schocken, 1972) 75. Posner, R.A. (1972) 'A Theory of Negligence' (1972) *JLS* 29, 67 & Epstein, R.A. 'The Historical Origins and Economic Structure of Workers' Compensation Law' *Georgia Law Rev.* (1982) 16, 4,775.

⁸⁴ (1842) 4 Metc. (Mass.) 49; 4 Metcalf 49.

⁸⁵ (1838) 26 SCL (1 McMullen) 385.

adopted the detailed written submissions of Defendants' counsel Colonel Abram Blanding.⁸⁶ He argued that the Company could not warrant the watchfulness of every servant, that there was no precedent for a finding of liability⁸⁷ and that it was a matter of policy as to how best, in deciding the case, to ensure proper precautions and high standards:

Every person who enters into the service of a railroad company takes upon himself the risk of all injuries he may sustain from the ignorance of the servants of the company who are engaged in conducting the train of cars.⁸⁸

His argument was adopted by Evans, J. who delivered the majority judgment of six Judges (another, Johnson, the Chancellor, agreed but added his own gloss while three judges dissented).⁸⁹ The Company was not liable to one employee for the misconduct of another.⁹⁰

Priestley v Fowler was initially ignored in England⁹¹ but twice clarified in May 1850. In *Hutchinson decd. v York, Newcastle and Berwick Railway*⁹² Alderson B. concluded that the dependants of an employee train passenger could not recover because the deceased had consented to undergo the risk of a negligent collision with another train and said of the Plaintiff:

He knew when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but from the want of it on the part of his fellow servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk.⁹³

In *Wigmore decd. v Jay*⁹⁴ a bricklayer was working on his employer's scaffold, which, because negligently constructed, collapsed. The negligence was in respect of

⁸⁶ Blanding (1776-1839) came from Massachusetts to Carolina in 1797 to be a schoolmaster. He was admitted to the bar in 1802 and then served two terms in the legislature. He was Mayor of Camden in 1816. He built a bridge near Columbia in 1820, later became the Organiser of Public Works and built the town's first waterworks. He became Director of Public Works in 1822 and was influential in the construction of the Columbia Canal in 1824. He became President of the Commercial Bank, Columbia in 1831. Despite devoting himself to these other pursuits he was able to practise as a lawyer for twenty years and was regarded as foremost in his profession by reason of careful preparation and clear, logical and learned presentation. In 1839 he was elected president of the South Western Railroad Bank but died of yellow fever a year later. O'Neill, J.B. (1859) *Bench and Bar of South Carolina* (Charleston: Courtenay, 1859) 2, 236.

⁸⁷ Neither Blanding nor the court knew of *Priestley v Fowler*.

⁸⁸ *Murray* 257.

⁸⁹ Two possible explanations for the preference for the *Farwell* judgment to that in *Murray* were that the South Carolina Court was 'divided' and 'litttle regarded'. 'The Creation of a Common Law Rule: the Fellow Servant Rule, 1837-1860' *University of Pennsylvania Law Review* (1984) 132, 579, 592.

⁹⁰ *Murray* 400.

⁹¹ By Parke, B. in *Armsworth v South Eastern Railway* (1848) 11 Jurist 758.

⁹² (1850) 5 Ex. 343; 155 ER 150. See ch.2.

⁹³ *Hutchinson* 351;154.

⁹⁴ (1850) 5 Ex. 354; 155 ER 155.

the use of a defective ledger pole of which complaint had been made to the foreman. The claim failed because there was no negligence in the selection of the foreman and there was no liability for the negligent actions of fellow workers including the foreman. Pollock C.B. emphasised that the Plaintiff in *Priestley v Fowler* had not proceeded to a Court of Error, implying that he had accepted the correctness of the decision. The Chief Baron was unaware that, soon after the decision, the Defendant, Fowler had been declared bankrupt.⁹⁵

There was logic and humanity in Scotland where in *Gray v Brassey* the court held the defence not to apply where the person causing the accident had a ‘totally distinctive calling and occupation’. The reasoning of the English court was ‘not altogether satisfactory or reasonable’.⁹⁶ Nevertheless English judges regarded the defence as ‘well established’ for an employer did not warrant the competence of other employees.⁹⁷ A defendant was responsible for his own personal negligence and had a duty to take on competent servants but he was not liable for a defective ladder whose defects were well known to his workers but not reported to him.⁹⁸ The principle was applied to labour-only subcontractors’ employees by Alderson, B. in *Wiggett decd. v Fox*⁹⁹ because the work was common.

In *Degg decd. v Midland Railway*¹⁰⁰ the Baron widened the defence to cover volunteers. The deceased was an employee of Pickfords engaged in unloading a truck in a siding. Three railway workers had difficulty when trying to turn another truck on a turntable. Seeing this, the deceased called on them to stop so that he could help. When pushing he was trapped by the force of a steam engine which had arrived in the siding without warning. The deceased had no contract with the Defendants so there was no question of an implied term that he consented to the risk. The court could have rewarded him as a member of the public but instead decided that he was in the same position as an employee. Baron Bramwell gave the judgment:

... it seems impossible to suppose that the deceased, by volunteering his services, can have any greater rights or impose any greater duty on the defendants than would have existed had he been a hired servant. But we were pressed by an expression to be found in

⁹⁵ Simpson 110.

⁹⁶ (1852) 15 SC 135. In *Paterson v Wallace* (1852) 1 Macq. 748 the deceased had died in a pit fall and the Defendants were held liable for the negligence of their manager, a fellow servant, who had given an assurance about the safety of the roof.

⁹⁷ *Tarrant v Webb* (1856) 18 CB 797; 139 ER 1585.

⁹⁸ *Ormond v Holland* (1858) El B1&El 102; 120 ER 445.

⁹⁹ (1856) 11 Ex. 832; 156 ER 1069.

¹⁰⁰ (1857) 1 H&N 771; 156 ER 1413.

those cases ... that 'a servant undertakes as between him and the master to run all ordinary risks of the service, including the negligence of a fellow-servant', *Wiggett v Fox*, and it was said that there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workmen as it would be if he were paid for his services.¹⁰¹

There was in fact no consideration and he over-stretched the concept of fellow-workman.¹⁰²

However the defence was held not apply to the negligence of employees of a different railway operator in *Vose decd. v Lancashire and Yorkshire Railway*.¹⁰³ Pollock C.B., while finding for the Plaintiff, stressed the need for caution in relaxing the rule.¹⁰⁴ The defence did not avail a Defendant from whose warehouse a bale of cotton was dropped onto the Plaintiff employee of transport contractors.¹⁰⁵ Nor did it apply if there was personal interference and negligence on the part of the master.¹⁰⁶

The disagreement with the Scottish judiciary came to a head in *Reid decd v Bartonshill Colliery*¹⁰⁷ where Lord Cranworth, who delivered his judgment two years after the appeal hearing, decided that there was no liability when the fellow servant was negligent even if he performed a different job from the plaintiff. If a fellow worker was not up to standard, the plaintiff might report him or leave the job. The Scottish cases were distinguishable.

¹⁰¹ *Degg* 780; 1415.

¹⁰² *Degg* was followed in *Potter v Faulkner* (1861) 1 B&S 800; 121 ER 911. However in two later cases the Plaintiffs succeeded because they were principals who had contracted with the defendants and were thus engaged in a transaction of common interest: *Holmes v North Eastern Railway* (1871) LR 6 EX. 123 where Bramwell B. reluctantly concurred and *Wright v London & North Western Railway* (1876) 1 QBD 252 where *Holmes* was approved. Because the Plaintiff was there to carry into effect a contract of carriage when helping to move his heifer, he was not to be regarded as a volunteer. Presumably if John Baxendale, the owner of Pickfords, had attended in place of *Degg*, his claim would have succeeded. However in an occupier's liability claim *Kelly C.B.* said that if a plaintiff was on lawful business it mattered not whether he was servant or employer because the same duty was owed: *Indermaur v Dames* (1867) LR CP 311.

¹⁰³ (1858) 2 H&N 728; 157 ER 300. A similar conclusion was reached by Baron Bramwell and two Exchequer judges in *Swainson v North Eastern Railway* (1878) 3 Ex. D. 341. It all depended upon the task being undertaken by the Plaintiff at the time of the accident.

¹⁰⁴ *Vose* 734; 303, a sentiment repeated by Watson B. in *Griffiths v Gidlow* (1858) 3 H&N 648; 157 ER 628.

¹⁰⁵ *Abraham v Reynolds* (1860) 5 H&N 143; 157 ER 1133. Similarly *Warburton v Great Western Railway* (1866) LR 2 Ex. 30.

¹⁰⁶ *Roberts v Smith* (1857) 2 H&N 211; 157 ER 89. In *Ashworth v Stanwix & Walker* (1860) 3 EL&EL 701; 121 ER 606 the personal negligence of one partner rendered the other partner also liable. Also *Mellors v Shaw* (1861) 1 B&S 437; 121 ER 778 where the Defendant was the superintendent of the mine and visited daily so that there was a personal default.

¹⁰⁷ (1858) 3 Macq. 265.

The Scottish judges took heart at not being entirely overruled and continued to avoid the defence whenever possible. The Pursuer in *McAulay v Brownlie*¹⁰⁸ was a labourer who fell from a defective scaffold whose planks had been removed by order of the Defender's foreman. The court held that the onus was on the Defender to show the foreman to be a competent person and the accident circumstances constituted the only available evidence. Lord Deas thought the Pursuer, having been ordered to go onto the scaffold, had no option than to obey or run the risk of dismissal without wages and perhaps without other employment to go to.¹⁰⁹ The defence should not apply to a thirteen year old girl whose arm was lost when her gown was caught in a toothed wheel even though the machine had operated like that for eight years and no government inspector had intervened.¹¹⁰ Nor would a boy of the same age whose hand was injured by an unfenced roving frame be deprived of his damages since the foreman or general superintendent was not a fellow worker.¹¹¹

The English courts applied *Bartonshill* despite sympathy for the injured Plaintiff.¹¹² In *Holmes v Clarke*¹¹³ Cockburn L.C.J. found the danger to be extraordinary with the Plaintiff only submitting to it on the promise of replacement.¹¹⁴ Byles J. stressed the danger of unfenced machinery whose owner had a duty to present it in safe and proper condition:

... the principles laid down in *Priestley v Fowler* ... relate to the conveniences or casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery.

Why may not the master be guilty of negligence by his manager, or agent, whose employment may be so distinct from that of the injured servant, that they cannot with propriety be deemed fellow servants?¹¹⁵

The question of different occupations was considered in *Waller decd. v South Eastern Railway*.¹¹⁶ The railway line had been badly constructed with poor materials, had not been properly maintained and was unsafe. Waller had worked as a guard and was

¹⁰⁸ (1860) 22 SC 975.

¹⁰⁹ *McAulay* 978.

¹¹⁰ *Gemmills v Gourock Ropework* (1861) 23 SC 425.

¹¹¹ *Darby v Duncan* (1861) 23 SC 529. In *Somerville v Gray* (1863) 1 Macph.768 the court held that a pit underground manager was not a 'collaborateur' of the collier Pursuer. An owner should be liable if he delegated his own powers and authority.

¹¹² *Searle v Lindsay* (1861) 11 CB NS 429; 31 LJ (CP) 106.

¹¹³ (1862) 7 H&N 937; 158 ER 751. Also authority for the ineffectiveness of the defence where there was a breach of statutory duty and followed the decision of Pollock C.B. to that effect in the court below (1861) 6 H&N 349; 158 ER 144.

¹¹⁴ *Holmes* 945; 754.

¹¹⁵ 947; 755. And see *Volenti* supra.

¹¹⁶ (1863) 32 Exch. 205.

badly hurt when his carriage came off the defective rails and overturned. He later died and his widow's claim was rejected. Pollock C.B. found that deceased and platelayers had a common object, namely the safe running of the railway.¹¹⁷ Martin B. referred to the *Bartonshill* and *Farwell* decisions and held that the separate duties all 'tended to the accomplishment' of the same purpose. Bramwell B. concurred referring to *Priestley v Fowler* and *Farwell*.¹¹⁸ *Waller* was followed in *Lovegrove v London & Brighton Railway* and *Gallagher v Piper*¹¹⁹ heard together and resulting in a unanimous finding for the Defendants in *Lovegrove* and a majority decision in their favour in *Gallagher* where Byles J. dissented on the grounds that a general manager of twenty five years should be regarded as an acting-master and not a fellow servant. It was argued that 'it will always be easy for a master to avoid liability, if personal knowledge is necessary, by keeping out of the way'.¹²⁰ In his judgment in *Gallagher*, Byles J. identified the further illogicality that if a corporation was incapable of misconduct, there remained no remedy based on the manager's negligence.¹²¹

Cockburn L.C.J. sitting in the court below in *Morgan v Vale of Neath Railway*¹²² doubted whether a carpenter was a fellow servant of those conducting railway traffic but felt bound to follow the decisions in *Hutchinson* and *Waller*. When the appeal came before a full Exchequer Court¹²³ Bramwell B. in argument suggested that the common object did not have to be immediate for the defence to succeed¹²⁴ and he concurred with the judgment of Pollock C.B., who worried about floodgates¹²⁵ and resisted the notion of splitting up large establishments into different departments, and with that of Erle L.C.J. who thought that both the Plaintiff and the negligent operators of a turntable had a common object in 'fitting the line for traffic'.¹²⁶ The defence was bolstered by the House of Lords in *Wilson v Merry & Cunningham*¹²⁷ who stressed

¹¹⁷ *Waller* 208.

¹¹⁸ 209.

¹¹⁹ (1864) 16 CB (NS) 669; 143 ER 1289.

¹²⁰ *Lovegrove* 680; 1294. The difference between young Carson in *Mary Barton* and Thornton in *North and South*.

¹²¹ 697; 1300.

¹²² (1864) 33 QB 260, 266.

¹²³ (1865) 1 LR QB 149.

¹²⁴ *Morgan* 153.

¹²⁵ 155.

¹²⁶ 154. There followed a string of decisions upholding the defence including *Edwards decd. v London & Brighton Railway* (1865) 4 F&F 530; 176 ER 677, *Hall v Johnson* (1865) 29 JP 245, *Murphy v Smith* (1865) 19 CB NS 361; 144 ER 827, *Brown v Accrington Cotton* (1865) 12 QBD 439; 116 ER 932, *Tunney v Midland Railway* (1866) LR 1CP 291, *Smith v Howard* (1870) 22 LT NS 130 & *Allen v New Gas* (1876) 1 Ex. D.251.

¹²⁷ (1868) LR 1HL Scot. 326.

that a servant might choose for himself whether to work for a master who attended in person to his business.¹²⁸ Lord Cranworth overruled the Scottish decisions in *McAulay* and *Somerville* and held there to be no distinction where the negligent employee was in a supervisory position.¹²⁹

Baron Bramwell in *Rourke v White Moss Colliery*¹³⁰ further extended the defence where the negligent engine man, although employed by the Defendant colliery owner, was under the control of a contractor, Whittle, who employed the Plaintiff:

I think it most undesirable that where two men are in the same service the master should be liable to the one for damage caused by the negligence of the other. I can see no reason for it, except that it may be convenient that there should be a defendant who can answer in damages. It seems to me to be a sufficient protection to the servant that the master is under the obligation to provide servants competent for the work in which they are to be employed. If the plaintiff and [the engine man] had been in the defendants' service and [the engine man] had been proved to be unskilful, and the accident had happened through his unskilfulness, the plaintiff would have had a right of action against the defendants; so if the engine had been ill-constructed.¹³¹

The Baron with three others in the Court of Appeal deprived the Plaintiff of his remedy. It did not occur to the court in the days before insurance that such defendants ought not to escape liability when the work was delegated to impecunious contractors. The Plaintiff's assessment of the degree of risk he was undertaking by working with employees of another employer was even more speculative.¹³²

The defence of common employment had the inhumane justification that the loss should rest where it fell. It was based upon a nonsensical fiction that risks, yet to be identified and often unknowable, were undertaken voluntarily by both existing and new employees. Priestley may have known that the van was overloaded but Farwell did not know of the defective points which caused his accident. Farwell had not assumed the risk of his master's negligence so there was no reason why his position on the negligence of his fellow servants was any different. The maxim *respondeat*

¹²⁸ Lord Cairns 332.

¹²⁹ 338. In *Howells v Landore Siemens Steel* (1874) LR 10 QB 62 Cockburn, L.C.J. thought that after *Wilson v Merry* there was no room for dispute. Sometimes the rule was applied with regret as in *Lovell v Howell* (1876) 1 CPD 161.

¹³⁰ (1877) 2 CPD 205

¹³¹ *Rourke* 211.

¹³² The same result was reached in *Woodhead v Gartness Mineral* (1877) 14 SLR 320 but that decision was disapproved by the House of Lords in *Johnson v Lindsay* [1891] AC 371 where *Wiggett v Fox* was stigmatised as inconsistent with other English authorities.

superior was supposed to apply irrespective of any contract. Paying passengers on a train might sue in contract or in tort and so employee passengers such as Farwell and Hutchinson should not have been disadvantaged. In large enterprises a plaintiff might never see or know the negligent fellow worker. Nor could a manual worker practically and sensibly be regarded as the fellow servant of a senior manager. If the burden was placed on workers there was no inducement on employers to take on competent and careful workers. They would only take precautions to avoid their pocket being hit. The judiciary was blind. Working people were not able to surrender their jobs at will. The argument of risk assumption was premised on the consent of workers yet the premise was exactly what the judges sought to establish. Damages and legal costs could readily be added to the costs of running a railway or to the production of goods and then passed on to the paying traveller or consumer. As suggested in argument by Colonel Blanding in *Murray*, and in the judgment of Shaw C.J. in *Farwell*, the outcomes were determined by policy. Injured workpeople were not to be a financial burden on manufacturers and businessmen.¹³³

Thus the defence, suggested by Lord Abinger, formulated in South Carolina, bolstered in Massachusetts, adopted in England, but resisted in Scotland before and after *Bartonshill*, became firmly established in the common law. It was supported and extended by Baron Bramwell but he was not its originator.¹³⁴ It was a fiction whose purpose was to prevent claims from succeeding so as not to impede industrial progress and profit-making. Its impact was unjust and inhumane and its logical foundation, at best, precarious.¹³⁵

¹³³ Levy, L.W. *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, Mass.: Harvard U.P., 1957) 166. In Wisconsin the doctrine was repudiated entirely but in other states efforts were made to distinguish those situations where fellow workers were not 'associated' by their work or where they worked in different departments or where the senior manager was carrying out the responsibilities of the business owner: 175.

¹³⁴ He was reluctant to part with it. In *The Bernina* (1888) 13 App.Cas.1 Lord Bramwell suggested that a ship's engineer's family could not sue his own employer since he had accepted the risk of negligence in his fellow servants but then remembered that the engineer was in no worse position than the paying passenger also drowned in the same accident. See ch.2.

¹³⁵ Its end was slow and tortuous. Decisions in *Wilsons & Clyde Coal v English* (1937) 53 TLR 944 (Duties relating to safe systems and conditions of work could not be delegated so as to enable the employer to avoid liability) and *Radcliffe v Ribble Motor Services* [1939] AC 215 (Deceased coach driver in collision with another coach operated by Defendants and negligently driven by their servant held not to be in common employment, the deceased having no interest in the driving skills of the other driver when employed on independent pieces of work) marked the end of its effectiveness. 'Lawyers who are gentlemen have long disliked it'. MacKinnon L.J. in *Speed v Swift* [1943] KB 557, 569 dealing with the Defendants' pleading that 'casual negligence' of fellow worker would still be covered by the defence. He regretted that the House of Lords had had to pursue its 'ameliorative task' by judicial

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Baron Bramwell used this risible notion (otherwise ‘identification’, a kind of inverted vicarious liability) from the coach case of *Thorogood v Bryan*¹³⁶ to deprive the plaintiff in *Child v Hearn*.¹³⁷ He was a platelayer on the Great Eastern who, when operating a hand-propelled trolley, ran over the Defendant’s pigs which had escaped from adjoining land by crawling under a fence erected by the railway company under the Railway Clauses Consolidation Act 1845. The fence did not confine the pigs and so was held insufficient. Bramwell B. identified the Plaintiff with his employers and found that he could not recover. The Defendant’s failings did not require discussion and ‘the servant can be in no better position than the master when using the master’s property for the master’s purposes’.¹³⁸ Similarly in *Armstrong v Lancashire and Yorkshire Railway*¹³⁹ where the Plaintiff inspector employed by the London and North Western was travelling under a pass on the Defendants’ line when ‘his’ train collided with loaded wagons being shunted from a siding. His own driver was speeding and had gone through a red light in hazy conditions. Bramwell B. was ‘not at all dissatisfied with *Thorogood v Bryan*’¹⁴⁰ and agreed with Pollock, B. that the Plaintiff had to be taken in the same position as the owner or driver of the omnibus. Yet in 1861 Dr Stephen Lushington, father of Godfrey and Vernon, when giving the judgment of the Admiralty Court in *The Milan* concerning a naval collision, had described *Thorogood* as a ‘single case’, ‘doubted by higher authority’ and ‘irreconcilable with Common Law principles’.¹⁴¹

Breach of Statutory Duty

A breach of a statutory duty was not inevitably a guarantee of a plaintiff’s success.¹⁴² In *Coe v Platt*¹⁴³ Baron Alderson delivered judgment against the thirteen year old

decision rather than legislation and he hoped for abolition. It was finally abolished by the Law Reform (Personal Injuries) Act 1948, s.1(1). Robson, W.A. (1937) ‘Common Employment’ 1 *MLR* 224.

¹³⁶ (1849) 8 CB 115; 137 ER 452. In *Bridge v Grand Junction Railway* (1838) 3 M&W 244; 150 ER 1134 Parke B. had rejected the notion.

¹³⁷ (1874) 9 LR Exch. 176

¹³⁸ *Child* 182.

¹³⁹ (1875) LR 10 Ex.47.

¹⁴⁰ *Armstrong* 51.

¹⁴¹ (1861) 31 LJ PMA 105.

¹⁴² Availability of financial penalty for failure to provide medicines on board ship did not preclude a claim *Couch v Steel* (1854) 3 EL&BL 402; 118 ER 1193 but contra in *Gorris v Scott* (1874) LR 9 Ex. 125. where sheep were lost overboard and the Plaintiff failed because the purpose of the relevant Act was sanitary. *Couch v Steel* was doubted in *Atkinson v Newcastle & Gateshead Waterworks* (1877) 2

female Plaintiff whose clothes were caught in an unfenced shaft. He held that fencing was only required under the Factories Act 1844 when the machine was in motion for a manufacturing process.

The relationship between contributory negligence and breach of statutory duty was not dealt with consistently. In *Caswell v Worth*¹⁴⁴ the Plaintiff failed when injured by an unfenced shaft even though the Defendants were in breach of the 1844 Act which Campbell L.C.J. decided was not intended to protect persons from the 'consequences of their own misconduct'.¹⁴⁵ However in *Doel v Sheppard*¹⁴⁶ the Defendants contended that fencing was unnecessary but Lord Campbell held that they could not 'pick and choose' and the fencing was required irrespective of whether there was danger.¹⁴⁷ In *Holmes v Clarke*¹⁴⁸ the Plaintiff's job as overlooker included oiling the 'scutching' machinery. The fence had been missing for a year and the Plaintiff frequently complained. When his arm was torn off the Defendants were in breach of their duty under the Factories Act 1856 and the Plaintiff succeeded.

After the 1880 Act many more claims succeeded such as *Heske decd. v Samuelson*¹⁴⁹ where the deceased was killed by falling coke in a blast furnace due to the lift sides not being fenced and the platform not roofed. There was held to be a defect within the Act because the entire 'machine' was defective.¹⁵⁰ Similarly in *Baddeley decd. v Earl Granville*¹⁵¹ a claim for breach of s.52 of the Coal Mines Regulation Act 1872, where statutory mine rules required a banksman to be present at the pit mouth when men were travelling up and down the shaft, a boy gave the wrong

Exch.441 where Cairns L.C. thought it clear that Parliament had not intended to create a right of action because the Act provided financial penalties for breach.

¹⁴³ (1852) 7 Exch 923; 155 ER 748.

¹⁴⁴ (1856) 5 EL&BL 849; 119 ER 697.

¹⁴⁵ (1856) 855; 869. Disapproved in *Britton decd. v Great Western Cotton* (1872) LR 7 Ex.130 though not by Baron Bramwell.

¹⁴⁶ (1856) 5 EL&BL 856; 119 ER 700.

¹⁴⁷ This decision was criticised by Harriet Martineau during her fencing dispute with Dickens and Henry Morley. She thought that compliance with the decision and the Act was not practicable. In fact Lord Campbell decided that the construction of the Act as argued on behalf of the Defendants would amount to a repeal of the Act and was therefore erroneous. See her piece in the *Daily News* for 12/02/1856, and her letter of 15/02/1856 to Fanny Wedgwood in Arbuckle, E.S. (ed.) *Harriet Martineau's Letters to Fanny Wedgwood* (Stanford, Calif: Stanford U.P., 1983) 145 and Arbuckle, E.S. (1985) 'Dickens and Harriet Martineau: Some New Letters' *Dickensian* (1985) 407, 81, 3, 157.

¹⁴⁸ (1861) 6 H&N 349; 158 ER 144. Pollock C.B. was upheld by five judges on appeal who thought that *Priestley v Fowler* should not be stretched so as to apply to dangerous machinery (1862) 7 H&N 937; 158 ER 751.

¹⁴⁹ (1883) 12 QBD 30.

¹⁵⁰ Followed in *Cripps v Judge* (1884) 13 QBD 583.

¹⁵¹ (1887) 19 QBD 423.

signal to the engine man when the deceased was coming up, the court held *volenti* to have no application.

In *Groves v Lord Wimborne*¹⁵² there had been no fencing on a steam winch in the Defendants' iron works for six months pre-accident contrary to s.5 of the Factory and Workshop Act 1878. The Court of Appeal held that this statutory duty could not be delegated and confirmed that the defence of common employment could not apply where there was such a breach.

Thus two of the three defences were largely negated if there was a breach of statutory duty and the practice of denying a remedy to a contributorily negligent plaintiff reduced as the courts came to regard such breaches as serious events.

The Slow Demise of 'Common Employment'

Edwin Chadwick's proposals in 1833 and subsequently that employers should assume responsibility for the maintenance of injured employees had come to nought. Concern grew about the unfairness of the Common Law as moulded by the judiciary. In 1856 the one year of publication of *The Oxford and Cambridge Magazine*¹⁵³ it was contended that:

The more barbarous the nation, the less regardful it is of human life. ... Now an increasing regard for human life may be fairly taken as an evidence of civilisation, inasmuch as it implies increasing absorption of the individual into the common interest; industry and economy in the governed and wisdom in the governing class.

There is no force in the excuse that men are willing to engage in such employments with the dangerous or absolutely destructive nature of which they are fully acquainted, and that no injustice can be argued for refusing to spend energy and money to remove evils of which no complaint is made. The skilled workman will always find difficulty in changing his occupation without loss, and in the majority of cases is absolutely unable to do so; hence the cruelty of reducing him to the alternative of starvation or the wasting of his physical powers.¹⁵⁴

¹⁵² [1898] 2 QB 402.

¹⁵³ 'Unhealthy Employments' (London: Bell & Daldy, 1856) 265.

¹⁵⁴ 265. The authors were C.J. Faulkner and Cornell Price (see ch.4). Similarly Laura Remorden in Mrs Braddon's 'The Factory Girl' *Halfpenny Journal* (19/01/1863) 2, 82, 233 and Stephen Blackpool to Bounderby in *Hard Times* 2, 5, 150.

Labour became better organised and its voice was increasingly heard in the House of Commons. In 1862 Acton Ayrton M.P.¹⁵⁵ introduced a Bill to abolish the defence of common employment. It imposed liability on employers who by themselves or any employees defaulted causing injury. If mill-owners became personally responsible for accidents in their mills they would take safety precautions. Detailed accounts of all mill accidents should be presented half yearly to every millowner. The Bill was opposed by all who spoke in the Commons including Morton Peto, the railway contractor, who emphasised the difficulty employers had in making workmen take care for their own safety. Owners would be forced to emigrate. The Bill was withdrawn on the basis that Ayrton would prepare a new one. The House had not recognised the poverty imposed upon workers disabled by industrial accidents; instead Members worried about the large bills which awards of damages would bring.¹⁵⁶ The proponents of *laissez faire*, so strong in Parliament, had won the day on compensation and the employers had their way until the passing of the Employers' Liability Act of 1880.¹⁵⁷

Subsequently there developed a swell of legal and middle class opinion in favour of reform. The National Association for the Promotion of Social Sciences, influenced by Vernon Lushington,¹⁵⁸ pressed for change.¹⁵⁹ Lushington presented a paper to the Association before the debate on Ayrton's Bill.¹⁶⁰ He argued that intensive industry had produced more accidents, legislation had granted increased rights and that litigation could now be conducted more cheaply in the County Courts. The first object of the law should be to prevent accidents and the second to achieve justice particularly

¹⁵⁵ Acton Smee Ayrton (1816-1886) made his fortune as a solicitor in Bombay and was Liberal member for Tower Hamlets 1857-1874. He was a government minister from 1868 for five years and the first Commissioner of Works for the last four where his stringency made him unpopular. Port, M.H. 'A Contrast in Styles at the Office of Works' *The Historical Journal* (1984) 27, 1, 151.

¹⁵⁶ Bartrip, P.W.J. & Burman, S.B. *The Wounded Soldiers of Industry* (Oxford: Clarendon, 1983) 111.

¹⁵⁷ See also ch.5. The only other relevant statute was the Employers and Workmen Act 1875 which removed the possibility of a criminal prosecution in the event of a workman electing to leave his employment of his own volition. The earlier existence of this sanction further undermined Bramwell's assertion that a working man had the freedom to choose whether to remain in an unpleasant or unsafe working environment or to go.

¹⁵⁸ (1832-1912) Lushington was a friend of Elizabeth Gaskell, whom she named 'Cousin V', was twin brother of Godfrey, was initially a Positivist, later a Christian Scientist, and a barrister who became a legal government officer from 1864 until 1877 and county court judge sitting from 1877 until 1900. In 1856 he wrote *The Oxford & Cambridge Magazine*. In the 1850's he edited the collected edition of the works of Thomas Carlyle. Fielding, K.J. 'Vernon Lushington: Carlyle's Friend and Editor' *Carlyle Newsletter* (1987) 8,7.

¹⁵⁹ Cornish, W.R. & Clark, G.de N. *Law and Society in England 1750-1950* (London; Sweet & Maxwell, 1989) 521.

¹⁶⁰ Reprinted with an explanation of the unreformed law in *The Upper Canada Law Journal* (1862) 8, 253 & 283 under the title 'On the Liability of Master to Servant in Cases of Accident'.

for those suffering injury and loss. The law had insufficiently appreciated that master and servant had a common purpose and benefit, that the common man was poor in funds and in education whereas the employer was capable of complex considerations, that the master chose his servants, determined the machinery, the materials and the method of work, that the master was often better placed to appreciate the dangers, and that in an accident while the master might suffer some property damage, the workman paid with his body and sometimes with his life.¹⁶¹ Lushington advocated the master warranting the safety of machinery and materials and advised that where the greater blame lay with the master, any lack of care on the part of the Plaintiff should not be a bar to recovery. The common employment defence was wrong because the master, for his own profit, had set the Plaintiff to work. A servant rendering good service should not be worse off than a member of the public. A contract should impose rather than remove responsibility. A bailee of goods, a railway passenger, a rider or passenger on the highway were all aware of risks to at least the same extent as a workman contracting for employment.¹⁶² The defence rested not on the fact of the contract, nor on knowledge of the risks but on public policy, the opinion being that the worker should better assume the risk. The balance was skewed because the worker depended on bodily effort to earn his wage, whereas a rich master was then able to avoid liability by delegation to a subordinate. Dickens would have empathised with this approach. Masters needed a friendlier partnership with their workers and an incentive to take care and supervise the work.¹⁶³

During the next decade as limited inroads were made by some judges into the impact of the defence, Bills were drafted by the Home Office. It was argued that if employers were insured against such risks, safety would improve because insurers would increase premiums if precautions were not taken. The engineer Peter Holland contended that men did not consent either to illegal risks or to needlessly dangerous employment. Employers should insure. The cost would not be prohibitive and there would be gains all round from increased safety.¹⁶⁴ Thomas Brown Q.C. countered that workmen should not be protected from the folly of their own acts and it was their business to check their master's equipment to see that it was in 'right state'.¹⁶⁵ Other

¹⁶¹ Lushington 284.

¹⁶² 286.

¹⁶³ 287.

¹⁶⁴ Sessional Proceedings of the National Association of Social Science (09/05/1872) V, 17, 281.

¹⁶⁵ 289.

Bills such as the 1876 Bill of Thomas Burt and Alexander McDonald, sought to abolish the defence completely. E. L. O'Malley presented a paper to the National Association in 1876¹⁶⁶ and in debate argued that if members :

... took the view that had been propounded by Mr Baron Bramwell that when a man engaged in a dangerous occupation, for which he received wages, then a mine owner or a railway employer, made a contract with him which amounted to paying him £5 to break his leg ... the position of the workman, upon the legal presumption, was not only a very hard one but also a very immoral one; for he was presumed, by having become a workman, to have contributed to his own destruction by an act of contributory negligence; and also presumed to have been guilty of making a contract which, if met with anywhere else in the law, would be deemed an immoral contract and one having no force at all.¹⁶⁷

Burt's unsuccessful Bill of 1878 sought to abolish the defence save as to men working in teams of four in mines.¹⁶⁸ It was sometimes possible for sponsors and government to agree but the House of Lords repeatedly 'scuppered' them. The Trades Unions then had other priorities. Lawyers in parliament, such as Brown, commended the stability of the common law rule and argued that if insurance was the way forward, the workforce should bear the cost.¹⁶⁹

Lord Justice Bramwell wrote to *The Times*:

The fundamental error ... is to assume that there is some general law or natural right that everybody who is hurt by the negligence of a servant acting in his employment shall have a remedy against the master; that in the nature of things masters are to make good the damage done by servants, and that the law which makes them not liable to a fellow servant is an unjust exception to the general law.

Why should A, who has done no wrong, who has been careful and just, make good to B the damage done by C?¹⁷⁰

¹⁶⁶ Sessional Proceedings (31/05/1876) IX, 15, 333 et seq.

¹⁶⁷ 354. At the conclusion of the debate Thomas Brown Q.C. conceded some vicarious responsibility for acts of foremen.

¹⁶⁸ Satre, L.J. *Thomas Burt, Miners' M.P. 1837-1922: The Great Conciliator* (London: Leicester U.P., 1999) 52. Burt never joined the Labour Party but campaigned for an effective system of compensation.

¹⁶⁹ Sessional Proceedings (11/07/1878) XI, 9, 169, 172. Brown, in tune with Lord Shand who had sat in the Scottish Court of Session in *Woodhead v Gartness Mineral* [1877] SLR 320 and applied the doctrine of common employment where the negligence was on the part of the mine manager and the Pursuer an employee of an independent contractor working under the supervision of that manager, sought insurance arrangements for those working in ultra-hazardous occupations such as coal miners and railway workers. The onus for obtaining insurance would be on the worker and none should be employed who were uninsured. Most of the speakers at that meeting thought it unlikely that workers would submit to such compulsion.

¹⁷⁰ 24/04/1878 included in *Employers' Liability for Injuries* (London: Mining Association of Great Britain, 1878).

Bramwell published his pamphlet¹⁷¹ setting out the views which he had expressed to the Select Committee in 1877.¹⁷² He denied any hardship or anomaly. The dangers of the employment were taken into account in the wages paid. To compensate such a worker in damages would enable a double recovery because he should have used part of his wage to pay an insurance premium. He suggested that a worker might persuade a new employer to agree to compensate for work injury and equally the employee might agree to contract out of the proposed Act. Increased overheads caused by payment of premiums could only result in reduced wages. The only good might be that some employers would take extra care.

In the 1880 General Election employers' liability was an important issue. Gladstone's Government promised in the Queen's Speech to deal with the problem. The Act¹⁷³ allowed manual workers to sue their employers vicariously for the negligence of non-manual supervisors and railway companies might be found liable for the negligence of signalmen and the like to train drivers. Employers would provide safe machinery and plant. Damages were to be limited to three years' earnings. A Plaintiff who knew of a defect would fail in his claim if he had not reported it.

The Act did not prevent contracting out.¹⁷⁴ Bramwell argued that to prevent a binding agreement about the application of the Act:

[would be] a most mischievous interference with the freedom of contract, and would give rise to gross injustice and fraud on the master. I cannot suppose anything so outrageous, and proceed to consider what will follow if the liability is optional, but to exist where the parties have not agreed to the contrary.¹⁷⁵

Edwin Chadwick regarded the 1880 Act as 'temporary legislation' and argued that each common workman 'has nothing to do with the general conduct of the concern'. Lord Bramwell was mistaken in his belief that the imposition of liability

¹⁷¹ *Employers' Liability* (London: King, 1880).

¹⁷² PP 1877 (285) X, Qs, 1103 & 1122. Bramwell had there reluctantly conceded that it might be just for an employer to be held liable for the defaults of his vice-master or senior manager performing the responsibilities of the employer though only if a clear formula could be devised.

¹⁷³ By s.9 it came into force 01/01/1881.

¹⁷⁴ In *Griffiths v Earl of Dudley* (1882) 9 QBD 357 contracting out was held not to be contrary to public policy when the employers had made clear by notices in workmens' hovels and in conspicuous places that they would continue to contribute to a compensation fund but would not be liable in damages under the 1880 Act. However although the court reached a similar conclusion in *Walsh v Whiteley* (1888) 21 QBD 371 where the majority thought that if a workman used a dangerous machine and was injured without negligence on the part of the employer it could not be right that he should be found liable unless he could establish contributory negligence, there was a strong dissenting judgment from Lord Esher, M.R. who argued that there should be liability for a dangerous machine under the Act even if its safety could not be improved upon.

¹⁷⁵ Bramwell (1880) 13.

would result in a reduction of wages and Chadwick provided evidence in support. Curiously Chadwick opposed the notion of insurance, believing that there would be no incentive to improve safety and not realising that insurers would penalise careless employers by increasing premiums.¹⁷⁶

From 1881 until 1897 at least twenty one Bills were put forward to outlaw the practice but they failed, the Trades Unions not agreeing as to whether abolition of common employment or contracting out was the main problem. The Select Committee of 1886 did not advise prohibition of contracting out. By then most proponents, except Lord Bramwell, were agreed about common employment but no further Bill was confined to that one point. In 1888 Lord Esher M.R.¹⁷⁷ opined that ‘when the law was first declared, it had been declared erroneously’. There was nothing to justify an implication that a fellow servant had contracted himself out of a claim for compensation. It was a mistake that ‘had made a difference’.¹⁷⁸

In 1892 Godfrey Lushington¹⁷⁹ conceded that the defence of contributory negligence caused great hardship, doubted whether vicarious liability could be got rid of, suggested that workmen would only claim if the injuries were very great and warned that if employers were to insure against such claims, the cost would fall to the workers.¹⁸⁰ Unsurprisingly a completely new scheme was chosen. Joseph Chamberlain was the pilot of the Workmen’s Compensation Act 1897¹⁸¹ which provided an alternative system enabling all injured workmen to be compensated, albeit at a lower rate.¹⁸² He argued that the costs of this compulsory scheme, to be borne by employers, would be readily recouped by the employers from consumers¹⁸³ just as, if the Baron could only have seen it, the costs of damages claims could have

¹⁷⁶ Chadwick, E. ‘Employers’ Liability for Accidents to Workpeople’ *Fraser’s Magazine* (1881) 23, 680.

¹⁷⁷ William Baliol Brett (1815-1899) was called to the Bar in 1846 and appointed Queen’s Counsel in 1860. As a Tory he sat from 1866 as member for Helston and was appointed Solicitor General in 1868, and six months later a judge of Common Pleas, to be Master of the Rolls in 1883 and to the House of Lords in 1885.

¹⁷⁸ (21/12/1888) *Hansard* P.Deb. 3, 332, 949. Hilbery J. in *Dorrington v LPTB* [1948] 2 AER 85 described the fiction as ‘highly artificial and now unfashionable’. It was finally abolished by the Law Reform (Personal Injuries) Act 1948.

¹⁷⁹ (1832-1907) Brother of Vernon who in 1878, as a Home Office lawyer, had advised the government to play for time.

¹⁸⁰ Lushington, Sir G. (02/1892) *Memorandum on the Liability of Employers for Injuries to their Servants* (London: Home Office) 27.

¹⁸¹ Extended to diseases by the Workmen’s Compensation Act 1906 and to seamen by the 1923 Workmen’s Compensation Act and repealed by the Law Reform (Contributory Negligence) Act 1945.

¹⁸² Cornish & Clark 524.

¹⁸³ Mallalieu, W.C. ‘Joseph Chamberlain and Workmen’s Compensation’ *Journal of Economic History* (1950) 10, 1, 45, 51.

been recouped if the fictional defences had never existed. It is likely that the ‘compassionate’ writers, Mrs Gaskell, Mrs Tonna, Mrs Trollope and Dickens, would have opposed the three defences if they had known of them.

Lord Bramwell’s diehard support for the three defences, two of which were fictions, lasted longer than that of most colleagues and of those who, for commercial reasons, found solace in the Common Law. One judge alone could not have changed the courts’ approach to contributory negligence; parliamentary action was needed but there was no campaign for that end. However by persisting with the two fictional defences and not transferring the burden from parish and injured worker on to the employer Bramwell was instrumental in delaying the implementation of a modern, humane compensation system. The transitional scheme of 1897 allowing modest awards would not have been necessary if the defences had been diluted by Bramwell and his fellow judges earlier than the 1870’s by restricting *volenti* to those rare cases where the plaintiff had exact knowledge of both risk and danger and common employment by not regarding managers as fellow servants and not penalising plaintiffs if the neglect was of another department or of an activity unrelated to them.

Bramwell’s views on the responsibilities of train operators and landowners when faced with commercial claims fall to be compared with his practice of restricting individual personal injury claims against such bodies. The judicial approach to occupiers’ liability was largely unencumbered by statute during the nineteenth century as is dealt with in the next chapter.

Chapter 6

Commercial and Individual Plaintiffs

Occupiers and the Common Law

The Common Law had been developed to protect landowners. The birth of *res ipsa loquitur* reduced the hurdles in limited circumstances. Baron Bramwell favoured some land claims against commercial enterprises. Material such as the description of Stephen Blackpool's fatal accident enabled an assessment of Dickens' approach to capitalistic responsibility. Limited legislative progress followed for out of use shafts.

Originally the courts were keen to preserve the free use and enjoyment of land by an occupier but from the early nineteenth century he was at risk to be found liable for injuries caused by the falling, spread or escape of items or commodities and even for accidents occurring on the land he occupied. Acknowledging the growing importance of commerce, judges developed a grading of standards which depended on the status of the plaintiff. The highest duty was owed to contractors, the next to invitees such as customers in a shop and less to licensees such as houseguests. Trespassers were at their own risk subject to a duty not to cause willful injury.¹

Conflicts arose between the courts' wish to hold to account defendants who left their property in a dangerous state particularly if close to the highway and the principle of no liability for the actions of independent subcontractors. In *Bush v Steinman*² the Defendant had bought a house which adjoined the road and his builder's subcontractor left a pile of lime on the road which caused the Plaintiff's carriage to overturn. The Plaintiff succeeded on the basis of *respondeat superior*. Eyre C.J. thought that a Plaintiff should not have to enquire into the detail of the Defendant's dealings with contractors.³ However by mid

¹ *Latham v Johnson & Nephew* [1913] 1 KB 398.

² (1799) 1 Bos. & Pul. 404; 170 ER 728.

³ Similarly in *Payne v Rogers* (1794) 2 HBL 350; 126 ER 590 where the Defendant was the owner of a tenanted property adjoining the highway and, the court, avoiding circuitry of action, was found liable when the Plaintiff's leg slipped through a hole caused by plates being out of repair and in *Sly v Edgley* (1806) 6 Esp.6: 170 ER 813 where inhabitants jointly instructed a brick layer to sink a sewer and were liable when he left the excavation open and the Plaintiff fell into it. Also *Matthews v West London Waterworks* (1813) 3 Camp. 401: 170 ER 1425 where contractors left an unguarded pile of rubbish on the street into which was driven the Liverpool coach which overturned. Similarly *Burgess v Gray* (1845) 1 CB 578; 135 ER 667 where the Defendant was found liable because he had not abandoned control of the work. Bramwell

century the contrary view was taken. In *Reedie v London and North Western Railway*⁴ it was decided that a defendant would only be liable if he had control over the contractor. The law did not recognise a several liability in two unconnected principals.⁵

A raft of Scottish cases established the liability of Road Trustees for the dangerous state of roads which they were obliged to maintain.⁶ A land occupier was held liable for injuries caused to the trespassing Plaintiff by a dangerous trap.⁷ However a plaintiff's chances were improved by a change in the burden of proof effected by the judiciary who applied the new maxim of *res ipsa loquitur* though with greater relish to occupiers' than to master and servant cases.

Res Ipsa Loquitur

Baron Bramwell contributed positively to the early implementation of the maxim. In *Byrne v Boadle*⁸ the Plaintiff was walking along a street past the Defendant flour-dealer's shop when he was struck by a barrel of flour which fell from a window above. The Defendant argued that the Plaintiff could not prove the Defendant's responsibility particularly as the Defendant was not personally present at the time. Pollock C.B. gave the judgment confirming *prima facie* evidence of negligence with which Bramwell B. concurred but in argument had commented:

Looking at the matter in a reasonable way it comes to this - an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury.⁹

appeared for the Plaintiff, led by Serjt. Talfourd. In *Corby v Hill* (1848) 4 CB NS 556; 140 ER 1209 a contractor placed a stack of slates on the road at night and the court observed that if the owner had given unqualified approval of this action he might well be liable. In *Barnes v Ward* (1850) 9 CB 392; 137 ER 945 the Defendant's workpeople left unfenced an excavation adjoining the public highway and the Defendant was held liable without any enquiry into the status of his workers.

⁴ (1849) 4 Ex. 244; 154 ER 120 following *Allen v Hayward* (1845) 7 QB 960; 115 ER 749.

⁵ *Reedie* was followed in *Knight v Fox* (1850) 5 Ex. 721; 155 ER 316 and in *Overton v Freeman* (1852) 11 CB 867; 138 ER 717.

⁶ *Maclachlan v Wigtonshire Road Trustees* (1827) J.T. 216. In *Miller v Mid Calder R. T.* (1828) J.T.563 the court made clear that those travelling had to take reasonable care even with unlawful obstructions so that a finding of contributory negligence would have defeated the claim. Also *Watson v Scott* (1838) J.T.146 and *Crombie v Cramond R.T.* (1838) J.T. 155.

⁷ *Deane v Clayton* (1817) 7 Taunt. 489; 129 ER 196.

⁸ (1863) 2 H & C 722; 159 ER 299.

⁹ *Byrne* 727; 301.

That decision was not cited to the Exchequer court in *Scott v London and St. Katherine Docks* but by a majority a similar conclusion was reached.¹⁰ Bramwell B. was in the majority in *Briggs v Oliver*¹¹ and robustly applied the new concept:

There is abundant evidence that the defendant was responsible for this packing case. It was his, it was close to his premises, and there was evidence that his servant was watching it. If therefore it was in an unsafe position, and did damage, he is responsible. ... Packing cases carefully placed in a proper position do not naturally tumble down of their own accord; and we have no right to assume that the fall of this packing case was caused by the act of some one who was not the defendant's servant.¹²

The maxim gained strength and was much pleaded and relied upon in the next century in road traffic and master and servant cases.¹³ In the time of Baron Bramwell it had a minimal impact on the latter because of the fictional defences which may explain why he did not oppose it.

Property Damage: The Common Law

Baron Bramwell was inclined not to develop the tort of negligence and favoured strict liability in limited circumstances. He regularly found for plaintiffs where both parties were landowners and/or commercial enterprises thereby disproving that he always favoured railway operators and defendant corporations.

At first he took the established view of 'no liability without negligence'¹⁴ but in *Vaughan v Taff Vale Railway*¹⁵ where the Plaintiff's eight acre wood adjoining the

¹⁰ (1865) 3 H & C 596; 159 ER 665.

¹¹ (1866) Exch. Rep. 403.

¹² *Briggs* 407. Similarly loose bricks falling from a railway bridge in *Keaney v London and Brighton Railway* (1871) LR 6 QB 759.

¹³ Examples of the former are *Jones v Dennison* [1971] RTR 174 and *Mansfield v Weetabix* [1998] 1 WLR 1263 involving epileptic car drivers who were unaware of their condition and who successfully discharged the burden and an example of the latter is *Bennet v Chemical Construction(GB)Ltd.* [1971] 1 WLR 1571 where a foreman steel erector was hit by falling electrical control panels. In *Kealey v Heard* [1983] 1 AER 973 the successful Plaintiff was an independent contractor on the Defendant's property injured when the Defendant's scaffold collapsed. For a claim to succeed the defendant must be unable to offer an explanation, the harm must be of a kind which does not ordinarily happen when proper care is taken, and the defendant must be in control of whatever caused the accident. A recent decision in a deafness claim included a similar concept. In *Keefe decd. v Isle of Man Steam Packet* [2010] EWCA Civ 683 the Claimant succeeded where the defendants had failed to keep noise records in accordance with their statutory responsibility making it more difficult for the Claimant to establish excessive noise levels. In such a case the court would judge a claimant's evidence benevolently and the defendant's evidence critically: Longmore L.J. at para.19.

¹⁴ *Blyth v Birmingham Waterworks* (1856) 11 Ex 780; 156 ER 1047.

¹⁵ (1858) 3 H&N 679; 157 ER 667.

Defendants' line was destroyed by fire caused by sparks from the Defendants' locomotive engine, at trial, the Baron, considering the Plaintiff's property rights as paramount, regarded the engine as a dangerous implement for which the Defendants should be held liable even without evidence of negligence:

... if, to serve his own purposes, a man does a dangerous thing, whether he takes precautions or not, and mischief ensues, he must bear the consequences; that running engines that cast forth sparks is a thing intrinsically dangerous, and that if a railway engine is used, which in spite of the utmost care and skill on the part of the Company and its servants is dangerous, the owners must pay for any damage occasioned thereby.¹⁶

On the appeal the Baron delivered the court's judgment:

... the locomotive was the cause of setting fire to the Plaintiff's banks, not daily but occasionally; ... the locomotive was productive of mischief, ... its use was dangerous, and ... [this] was not a particular accident, but one of the habitual incidents to the use of the locomotive.¹⁷

Thus he expressed his dislike of negligence and used a utilitarian approach to determine which party might better bear the loss.¹⁸ The Defendants succeeded on further appeal before six judges who concluded that there had to be some evidence of negligence for a finding of liability, the Defendants having been authorised by statute to operate the railway.¹⁹

In *Stockport Waterworks v Potter*²⁰ the Defendant, who called no evidence that he had acted reasonably, was found liable. In *Bamford v Turnley*²¹ the Plaintiff's home was badly affected by fumes and stench coming from the Defendants' adjoining brick kiln. At trial Cockburn L.C.J. directed that if the site was a convenient, proper and reasonable use of the Defendants' land, the ruling should be for the Defendants. On appeal, with Pollock C.B. dissenting, four judges including Bramwell B. found for the Plaintiff but he went beyond his colleagues when referring to a use of land which was 'exceptional', not

¹⁶ *Vaughan* 745; 668.

¹⁷ 750; 670.

¹⁸ Bramwell thought that private property was a basis for efficiency. Atiyah criticised the Baron's judgment as being confused and difficult to follow and wrongly read into the judgment that the Baron was finding negligence on the part of the Defendants. Atiyah, P.S. 'Liability for Railway Nuisance in the English Common Law: A Historical Footnote' (1980) *J.L. & Econ.* 23, 191, 192.

¹⁹ (1860) 5 H&N 679; 157 ER 1351.

²⁰ (1861) 7 H&N 160; 158 ER 433. A further appeal succeeded on the newly argued basis that the Plaintiff had no riparian rights and therefore no cause of action: (1864) 3 H&C 300; 159 ER 545.

²¹ (1862) 3 B&S 62; 122 ER 25.

‘common or ordinary’, albeit not ‘unnatural or unusual’.²² A defendant who inflicted a loss could not plead that his public benefit activity precluded recovery. Expenses or overheads including claims costs should be borne first.²³ Expenses would include the value of the burned-down wood. His view was rejected on appeal by Cockburn L.C.J. who sat with five others including Blackburn J. and held that if every precaution was taken, there would be no liability.²⁴ The decision constrained the Baron’s position in *Brand v Hammersmith Railway*²⁵ where he was in dissent in supporting the Plaintiff whose home abutted the Defendants’ railway. The passage of trains caused vibrations, noise, smoke and damage. He held that the Defendants should bear the loss for the very reason that their operation was for the public benefit.

That argument could equally have been applied to passenger claims and to worker claims where the Baron was keen not to impose extra burdens on the operators and manufacturers. The court was bound by the appeal decision in *Vaughan* and to circumvent it he improvised in construing the statute so as to ‘give a remedy by implication’.²⁶ The Baron was in the majority but Channell B. dissented saying that there was nothing in the statute which provided a remedy and his view was supported on appeal by Lords Chelmsford and Colonsay with Lord Cairns dissenting thus throwing that area of law into disarray. In a written response to Lord Chelmsford the Baron expressed the view that the majority in *Vaughan* was wrong.²⁷ He repeated that view in his judgment in *Powell v Fall*²⁸ where he went further than necessary, when finding for the Plaintiff, using his ‘social cost’ argument in respect of the Defendant’s operation of a steam engine on the public highway producing sparks which set fire to the Plaintiff farmer’s adjoining haystack, even though the Defendant operated an engine constructed in conformity with the requirements of the Locomotive Acts 1861 and 1865. In *Cooke v*

²² *Bamford* 83; 33.

²³ 85; 33.

²⁴ (1860) 5 H&N 679; 157 ER 151.

²⁵ (1867) LR 2 QB 223.

²⁶ *Brand* 234.

²⁷ (1869) LR 4 HL 171; [1861-73] AER Repr. 60. Although his decision in *Powell v Fall* was not cited the Baron followed it in *Ross v Ruge-Price* (1876) 1 Exch. D. 269 and found that rules applying to adjoining coalmines made pursuant to statute did not preclude a right of action after the Defendant stopped an engine at his mine with adverse effects on the Plaintiff’s.

²⁸ (1880) 5 QB 597, 601.

*Waring*²⁹ he had described the basis of the decision in *Vaughan* as the legislature 'legalising the act which caused the damage'. In *Atkinson v Newcastle & Gateshead Waterworks*³⁰ the Defendants were required by statute to keep their pipes at pressure and when a fire occurred in the Plaintiff's timber yard a proper supply of water could not be obtained to put out the fire. The Baron concluded that where a duty was imposed there must be a correlative right to justify an action at common law.

The Baron played an early part in *Rylands v Fletcher*³¹ where the Defendants, mill owners, engaged contractors to build a reservoir to supply water to their mill. During construction the contractors encountered mine shafts of whose existence the Defendants were previously unaware. The contractors were negligent and allowed water from the reservoir to flow into the Plaintiff's colliery which the Plaintiff was obliged to abandon. At trial a verdict was found for the Plaintiff. The majority on appeal favoured the Defendants saying that there was no negligence and no trespass but Bramwell B. thought that the Plaintiff had a right to be free from 'foreign water'.³² The Defendants should be held to act at their peril. His view was supported on appeal to the Exchequer Chamber where a seven-strong court included Blackburn J. who favoured liability for anything brought onto land which was likely to do mischief if it escaped.³³ The Defendants' appeal to the House of Lords was not successful where Cairns L.C.J. introduced the term 'non-natural use'.³⁴ The Baron did not extend the ambit of the case to an innocent tenant whose stock was ruined when a rat gnawed through the Defendant landlord's drainpipe causing water to flow into the warehouse.³⁵ More surprisingly he denied a remedy to the

²⁹ (1863) 2 H&C 332; 159 ER 138.

³⁰ (1871) LR 6 Exch. 404.

³¹ (1865) 34 LJ Exch. 177.

³² *Rylands* 181.

³³ (1866) LR 1 Ex. 265, 279.

³⁴ (1868) LR 3 HL 330. In his close analysis A.W.B.Simpson (1984) in 'Legal Liability for Bursting Reservoirs: the Historical Context of *Rylands v Fletcher*' in *Journal of Legal Studies* (1984)13, 209 revealed that the claim was originally pursued in negligence, there being no precedent for any alternative, but changed during the course of trial to a claim based on a strict liability and that the outcome was influenced by two reservoir disasters, one at Holmfirth in 1852 with 78 killed and the second at Dale Dyke near Sheffield in 1863 with at least 238 deaths. *Rylands v Fletcher* was not followed in America where negligence was a pre-requisite and in *Losee v Buchanan* (1873) WL 10187 (NY) the judgment of Blackburn J. was criticised.

³⁵ *Carstairs v Taylor* (1871) LR 6 Ex. 217. There had been an inspection of the gutter only four days pre-accident.

Plaintiff in *Nichols v Marsland*³⁶ where the Defendant dammed up some artificial embankments on his land so as to create a number of artificial pools, a situation similar to that in *Rylands v Fletcher*. One of the pools overflowed onto the Plaintiff's land after unusually heavy rainfall and the Baron fell back upon the jury's finding of Act of God to deny the Plaintiff.³⁷ The outcome in *Nichols v Marsland* did not lie happily with his rejection of exceptional rainfall as a defence in *Smith v Fletcher*.³⁸

The Baron generally thought that justice would be best served by the imposition of strict liability in such cases.³⁹ His commitment to the notion is explained by his enthusiasm for landowning rights which took preference over the burdens imposed on capitalistic industry.⁴⁰

Railway Premises: The Common Law

In contrast passengers who came to grief in stations did not attract much sympathy.⁴¹ In *Cornman v Eastern Counties Railway*⁴² the Plaintiff went to the station to collect a parcel and was driven by a crowd into collision with a portable luggage-weighing machine. Baron Bramwell said that the machine was visible so there was no evidence of

³⁶ (1875) LR 10 Ex 255.

³⁷ The defence in the days of few weather statistics had a greater relevance than it does today. Anita Ramasastry called these two decisions a 'retreat' in her 'The Parameters, Progressions, and Paradoxes of Baron Bramwell' (1994) *American Journal of Legal History* (1994) 38, 322, 362. The Baron could have invoked the defence and agreed with Baron Alderson in *Blyth v Birmingham Waterworks* (1856) 11 Ex 780; 156 ER 1047 where in icy conditions a stopper on a water main failed forcing water up into the Plaintiff's home. Baron Alderson referred to frosts 'which penetrated to a greater depth than any which ordinarily occurs south of the polar regions' 704; 1049.

³⁸ (1872) LR 7 Ex. 305.

³⁹ Lord Hoffmann in *Wildtree Hotels v Harrow London B.C.* [2000] 3 AER 289 at 295 set out the two opposing positions and concluded that the more logical views of Lord Cairns and Baron Bramwell had gradually but eventually held sway.

⁴⁰ Molloy, R.T. 'Fletcher v Rylands: a Re-examination of Juristic Origins' *University of Chicago L.R.* (1941) 9, 266, 268 & 278. *Rylands v Fletcher* had a limited ambit and did not cover pollution. The courts were anxious to help industrial progress and in nuisance tended to apply less rigorous approaches to an industrialist's responsibilities. Brenner, J.F. (1974) 'Nuisance Law and the Industrial Revolution' *JLS* (1974) 3, 2, 403.

⁴¹ *Toomey v London and Brighton Railway* (1857) 3 CB NS 146; 140 ER 694. No negligence in failing to sign and illuminate the entrance to the toilets.

⁴² (1859) 4 H&N 781; 157 ER 1050. An exception was the Plaintiff's win in *Longmore v Great Western Railway* (1865) 19 CB NS 183; 140 ER 757 after he fell through an aperture on a bridge on to the platform below. Yet worn brass nosings on a station stairway without previous complaint or accident did not result in liability: *Crafter v Metropolitan Railway* (1866) LR 1CP 300. Willes J. did not identify any failure to inspect, maintain and repair.

negligence to go to the jury. However in *Tebbutt v Bristol and Exeter Railway*⁴³ there were three stations adjoining, one belonging to the Defendant. The Plaintiff was on the Defendant's platform on his way to the booking office of a competitor when struck by a portmanteau which fell off a truck laden with luggage and controlled by the Defendant who argued that the Plaintiff was not lawfully on the station. The Defendant was held liable 'as if it happened in the street'. There was no close relationship to prevent recovery (the implication being that the station owner/operator's conditions of contract could not stymie that Plaintiff).

In 1865 not all agreed with Baron Bramwell about accidents to pedestrians crossing railway lines. In *Bilbee v London Brighton and South Coast Railway*⁴⁴ the Plaintiff had to contend with a considerable curve on the line and limited vision due to a nearby bridge. Swing gates were provided for foot passengers but they were unmanned. The Plaintiff won when Erle C.J. noted the large number of trains, the sharpness of the curve, and the high risk were supported on appeal. Six months later a different outcome was reached in *Stublely v London and North West Railway*⁴⁵ with a finding that there was no general duty to put watchmen on level crossings. The Defendants had provided gates and caution boards and the deceased had waited for a luggage train to go by on the line nearer to him and was killed by the express train on the further line. Visibility was limited until he reached the further line. Bramwell B. and two others agreed with Pollock C.B. that the line itself was a warning of danger. Bramwell B. calculated that even a woman walking at a slow pace would be able to cross the line before the train arrived if she looked at the time when the train first came into view;

Need there be anyone to warn persons of a train which they can see so far off that, if only they take the trouble to look out for it, it cannot overtake them in crossing? But it is said that the trains are so timed that they meet and pass one another at this point. Can it be said that the defendants must not so arrange them? This is not contended; but Mr Manisty says that, if they do, they must warn the passengers. Warn them of what? That when a carriage on your own side of a road is passed, you will often find on the other side of the road a carriage which has not passed. A policeman is then to be placed there to tell them, not what they do not know, but what from carelessness and heedlessness they forget at the moment

⁴³ (1870) LR 7QB 73.

⁴⁴ (1865) 16 CB (NS) 534; 144 ER 571.

⁴⁵ (1865) LR Exch. 13.

when it ought to be remembered. If such a precaution is necessary here, it must also be used elsewhere; and the argument would show that on every road, every canal, every railway in the kingdom, means must be taken to warn people against the consequences of their own folly. It would cost too much to provide such a machinery of precaution. But besides this I look upon all those rules, regulations and provisions which are made to take care of people when they should take care of themselves as positively mischievous.⁴⁶

Seven days later a different view was taken by Pollock C.B. in *Stapley v London Brighton and South Coast Railway*.⁴⁷ There the Defendants, who operated under a special Act, provided gates (partly open at the time) and turnstiles at the crossing but the deceased was killed when crossing. Pollock C.B., sitting with Channell B. but without Bramwell B., summed up for the Plaintiff on the ground that the Defendant by not being there intimated to the deceased that no train was approaching. The difference in the two approaches demonstrated the dominance of Baron Bramwell.

Later the courts took the view, contrary to that of the Baron, that if the gates were open there was an invitation to the public to cross and so in *Wanless v North Eastern Railway*,⁴⁸ an appeal from Brett J. sitting at Durham Assizes, the Plaintiff succeeded even though, with care, he might have been able to see the train which hit him.

Careless Action: The Narrative

Two impacts between horses and pedestrians were recounted by Dinah Maria Mulock⁴⁹ in her *John Halifax, Gentleman*. Halifax, a working class orphan, became a loving husband and father and, as a result of hard work, a prosperous and benevolent mill owner, respected by his workforce. When Lord Luxmore, landlord of Halifax, diverted his tenant's water supply, the hero installed a steam engine. Luxmore rode over to inspect it and upon Halifax explaining the independent source of power, rode away in a rage knocking down his tenant's blind daughter Muriel and inflicting injuries from which

⁴⁶ *Stubley* 17.

⁴⁷ (1865) LR Exch. 21.

⁴⁸ (1874) LR 7 HL 12.

⁴⁹ (1826-1887) Later Mrs Craik. Daughter of a Minister from Stoke-on-Trent, she began her writing career with childrens' stories. *John Halifax, Gentleman* remains her most popular work. In 1851, when she was twenty two and not long embarked upon a literary career, she was offered help by Elizabeth Gaskell but rebuffed it for she was doing well enough already. Uglow, J. *Elizabeth Gaskell: a Habit of Stories* (London: Faber, 1993) 311.

she later died. With Muriel unconscious Luxmore threw a guinea to her brother Guy who had berated him. The Halifax family made no claim since, as Luxmore put it, it had been a pure accident and in any event there was no provision for a parents' damages claim in the early part of the century when that stage of the story was set.⁵⁰

Later, in 1825, at a time of crisis with little work, industrial unrest, impending bank failure and eviction of Luxmore's tenants, the Halifax family coach was set upon by workers-turned-vagabonds who sought work and money. One such man leaped and clung to the neck of the plunging mare but was dashed to the ground and killed. Halifax had warned that the men would be trampled but he stopped the coach, jumped down and ministered in vain. He later visited the family of the dead man and agreed with his hungry attackers to hush up the inquest and not to prosecute them.⁵¹ As the judges Mrs Craik concentrated on the wrongdoing of the deceased rather than any shortfall on the part of John Halifax.

Elizabeth Gaskell wrote *The Heart of John Middleton* in which John, a child-factory worker and later a poacher, courted Nelly Hadfield who was pressed by the factory overseer Dick Jackson. She flew to Middleton's arms resulting in Jackson aiming a 'sharp, shaley stone' at him. The stone hit Nelly causing her lifelong disability.⁵² Jackson's act was intentional but the consequences to Nelly were unintended. Nelly would have established his liability because he owed to her a duty of care and breached it when he threw the stone, indifferent to the consequences if his aim was not accurate. The test was, from an early stage, objective and the defendant should demonstrate 'the degree of caution expected from a person of ordinary prudence'.⁵³

In *Mary Barton* the elder Mr Carson, after the murder of his son, witnessed a collision between a little girl, on her way home, with her nurse, from a musical gaiety,

⁵⁰ (Stroud: Nonsuch 2005 (1857)) 297.

⁵¹ 346. This event has in common the shooting of a burglar by a householder. In *Murphy v Culhane* [1977] QB 94 Lord Denning suggested that even if the Defendant went beyond the bounds of self defence he would not be liable by reason of the Plaintiff's illegal enterprise. To the consternation of the public this view was not followed in *Revill v Newberry* [1996] QB 567 where the Defendant was held liable for his excessive reaction subject to a reduction of two thirds by reason of contributory negligence.

⁵² *H.W.* (28/12/1850) 2, 40, 325.

⁵³ Tindale L.C.J. in *Vaughan v Menlove* (1837) 3 Bing.NC 468; 132 ER 490. The notion of unintentional trespass was known from at least *Williams v Holland* (1833) 10 Bing. 112; 131 ER 848 and the burden of proving the negligence was with the plaintiff: *Brown v Kendall* (1850) 6 Cush. 292 (a decision of Shaw C.J. in Massachusetts).

and a rough young errand boy who brushed past knocking down the girl onto the hard pavement which caused her nose to bleed. The nurse seized the terrified boy and threatened to give him to a policeman but her charge intervened. The boy had not meant to do it and, like John Barton (suggested Mrs Gaskell), did not know what he was doing.⁵⁴

Unsafe Premises: The Narrative

In 1850 Mrs Gaskell in *The Well of Pen-Morfa* depicted beautiful Nest Gwynne dislocating her hip when slipping on the sloping pieces of stone on the road adjacent to the village well. The smooth, treacherous stones were:

... always slippery; slippery in the summer's heat, almost as much as in the frost of winter, when some little glassy stream that runs over them is turned into a thin sheet of ice.⁵⁵

Due to her ensuing illness Nest was forsaken by her betrothed and consigned to a life as a depressive cripple. Mrs Gaskell was not suggesting responsibility on the parish for the safety of the facility.

The Manchester Man of Mrs G. Linnaeus Banks (1876)⁵⁶ contained texts of three separate disasters resulting in injury and loss of life. By 1805 with Napoleon constituting a major threat, volunteer regiments were re-formed and Sally Cooper, a 'scolding wife' and a malicious gossip attended a royal celebration arranged on Sale Moor. She stood by the support of an elevated platform with a fine view. The post crackled and broke and the platform collapsed. One died but other multiple casualties were not recorded.⁵⁷ Sally suffered orthopaedic and internal injuries and was treated in Manchester Infirmary but she did not co-operate with her doctors until it was too late and she died repenting of her malicious slander. In 1805 it was not possible in England to pursue a fatal claim and in any event the defendant would have denied liability on the grounds that Sally, not having paid, was therefore a trespasser and also that her death was caused by her unco-operative

⁵⁴ *Mary Barton* 368. In respect of children the standard is calibrated according to age: *McHale v Watson* (1966) 115 CLR 199. This sensible proposition was not followed by Butler Sloss L.J. in *Mullin v Richards* [1998] 1 WLR 1304 where a 15 year old girl was held not liable for the Plaintiff's blindness caused by the fracturing of a plastic ruler in a fun-motivated sword fight.

⁵⁵ *H.W.* (16/11/1850) 2, 34, 182 & (23/11/1850) 2, 35, 205.

⁵⁶ *The Manchester Man* (Altrincham: Sherratt, 1954 (1876)).

⁵⁷ 35-6.

behaviour in hospital. The wealthy, elderly and frail Mrs Aspinall suffered no physical injury, but suffered a shock to her system requiring constant expert attendance at home until she was pronounced to be out of immediate danger. Her injury, though she was a primary victim only, was similar to that suffered by Dickens in the Staplehurst crash. Shock to the system was not at the time a recognised basis for a claim but Mr Aspinall had paid for tickets in the stand and the promoter would have been held liable for any provable injury.⁵⁸

In 1821 at the Coronation celebrations of George IV stations were established in Manchester for the distribution of food and ale to the people. A platform erected in front of the main storehouse for the use of the recipients collapsed resulting in several injuries and one death. The scene was described by the excitable cleric Joshua Brookes who bewailed not the accident and resultant injuries but the ‘drunken savages’, ‘maniacs’ and ‘hogs’.⁵⁹ Mrs Banks did not examine the origins of the alcohol, its likely impact on consumers, the responsibility for the safety of the platform and the questionable role of celebratory alcohol in improving the lot of the poor and ill-educated.

Jabez Clegg prospered in the cotton trade in partnership with Mr Ashton who, in 1822, took an active part in the formation of a New Quay Company which built quays, warehouses and boats and increased river traffic. In 1828 a flat boat, the *Emma*, designed to carry cargo to Liverpool, was to be launched but on release, when the band began to play, those on board flocked to one side to listen. Once in the water the boat heeled over and sank.⁶⁰ Jabez and others rescued many from the river but thirty three lives were lost and his two elderly partners never recovered. The well-intentioned organisers would today be held liable to all those injured save for those involved in and responsible for the launch. Mrs Banks’ sympathies were with Jabez who, like Mrs Craik’s John Halifax, was largely self-made. They did not explore the issue of accountability. The three incidents were plot devices and not designed to encourage law reform.

⁵⁸ In *Francis v Cockerill* (1870) LR 5 QB 184 a grandstand constructed by contractors for the viewing of the Cheltenham steeplechases collapsed injuring the Plaintiff who had paid the admission fee. The Defendant’s appeal failed because there was an implied contract that the grandstand would be reasonably fit for purpose.

⁵⁹ *The Manchester Man* 208.

⁶⁰ 300.

On 25 February 1828 the roof and walls of the Brunswick Theatre collapsed killing thirteen and injuring twenty. A public meeting was arranged by the Lord Mayor of London in the London Tavern when losses were summarised and subscriptions of £750 taken. The inquest jury found the theatre owners 'highly reprehensible' in allowing heavy weights to be hung from the roof and the jury fined the owners a deodand⁶¹ of two pounds in respect of each life lost.⁶²

Matters of safety were often to the fore in Dickens' mind even when travelling around the country on his mainly sold-out reading tours. In his letter to John Forster from Sunderland of 29 August 1852 he may have had in mind the Brunswick disaster when he wrote of his experience reading to twelve hundred people in the Lyceum, Sunderland, a theatre whose roof had been completed by torchlight overnight. Competitors had suggested the building to be unsafe and Dickens 'didn't know what to do. The horrible responsibility of risking an accident of that awful nature seemed to rest wholly upon [him]; for [he] had only to say [he] wouldn't act, and there would be no chance of danger'. He was reassured by the builder but performed in a state of great anxiety. Afterwards his relief was great and he would never 'be able to bear the smell of new deal and fresh mortar again'.⁶³ Dickens was concerned about the safety of the hall at which

⁶¹ Deodands existed in Anglo-Saxon times. They were used as a punishment when death was caused by a moveable object which was ordered to be forfeit to the Crown. They were largely obsolete by the early nineteenth century until juries began to award compensation by deodands in respect of deaths caused by railway engines and factory machinery. Thomas Wakley (1795-1862) was the founder and first editor of *The Lancet* and the Member for Finsbury from 1835 until 1852. A radical social reformer and champion of the poor, when appointed as Coroner for West Middlesex in 1839 he encouraged juries to be more generous in their valuation of deodands. In *R v Eastern Counties Railway* (1842) the sum of £125 was awarded by way of deodand to the families of each of three deceased and the Exchequer Court declined to intervene. Awards were very much ad hoc (most were awarded in London and usually where a railway engine or steamship was involved) and tended to vary according to culpability. However the size of awards increased and the judges of Queen's Bench held that deodands were only relevant in respect of wilful crimes. Lord Campbell then piloted through two bills, one abolishing deodands and the other providing for the first time a right of action in respect of a death. Hostettler, J. 'Thomas Wakley – an Enemy of Injustice' (1984) *JLH* 5, 1, 60,70, Wakley was described as 'seeking notoriety' but 'sometimes in the right' by the elder citizens of Middlemarch: *Middlemarch* 157. Also Nolan, D. 'The Fatal Accidents Act 1846' in Arvind T.T & Steele, J. (ed.) *Tort Law & the Legislature* (London: Hart, 2012).

⁶² Thornbury, G.W. 'The Accident at the Brunswick Theatre' *A.Y.R.* (18/07/1868) 20, 133. Thornbury (1828-76), artist, poet, novelist and literary critic for *The Athenaeum*, wrote extensively for both of Dickens' journals.

⁶³ *Pilgrim Letters* 6, 748. The Lyceum, Sunderland which burned down in 1856 so Dickens on his next visit to Sunderland on 23/08/1858 would have been relieved to find himself in the Wilson Street Music Hall. Dickens reported another incident of 22/11/1861 when reading *Nickleby* to a 'tremendous hall' in the Music Hall, Nelson Street, Newcastle. The gas batten providing light 'came down'. Dickens laughed it off thereby preventing audience panic pending repair of the light. Letter to Mamie Dickens 23/11/1861.

he had contracted to read and contemplated his own responsibility should collapse occur. It is difficult to see what more he could have done and how he might have been at risk of liability. He was the promoter as well as the performer but the designer, the builder and the theatre owner would have preceded him in the firing line.

Unsafe Premises: The Common Law

Baron Bramwell was involved in the mid-century debate as to the liability of occupiers of houses and commercial buildings for the unsafe state of such premises. He did not want to extend the ambit of the emerging tort of negligence. In *Southcote v Stanley*⁶⁴ the Defendant owned an hotel and the Plaintiff was an invited visitor. As he was leaving he opened a door, as the Defendant knew and authorised, but the door was dangerous and a piece of glass fell from it and injured the Plaintiff. The Defendant did not know of the defect and avoided liability because, said Pollock C.B., a visitor was in the same position as a servant and that there was no duty to take greater care for them as he might reasonably be expected to take for himself. Bramwell B. concurred:

... where a person is in the house of another, either on business or for any other purpose he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance that he will not allow a trap door to be open through which the visitor may fall.⁶⁵

He rejected the claim because the Plaintiff alleged only failures and not positive acts of commission such as the placing of a spring gun in a garden. Yet by 1856 most judges were prepared to look at negligence in terms of default and failure to act.

A similarly perverse outcome was achieved by the Baron as trial judge in *Wilkinson v Fairrie*.⁶⁶ The Plaintiff was employed as a cart driver and was sent by his master to collect sugar from the premises of the Defendants who were sugar refiners. He was directed by the Defendants' gatekeeper as to where he should wait but, as no one attended to him, he approached the gatekeeper who directed him to the counting house which the

Pilgrim Letters 9, 517. Dickens again proved calm under pressure in the aftermath of Staplehurst on 09/06/1865 and also on 25/04/1866 when the roof of his carriage caught fire on the way to Manchester. See ch.2.

⁶⁴ (1856) 1 H & N 247; 156 ER 1195.

⁶⁵ *Southcote* 250; 1197.

⁶⁶ (1862) 1 H & C 633; 158 ER 1038.

plaintiff had not previously visited. The Plaintiff entered the building but it was late in the evening and dark and he could not see where he was going. He fell down an unguarded staircase which was safe enough in daylight. He was nonsuited by Baron Bramwell who thought the accident was the Plaintiff's own fault because 'if he could not see his way, he ought not to have proceeded without a light'.⁶⁷ He overlooked that the Plaintiff had been directed there by the gateman who knew of the existence of the staircase and of the lack of lighting but failed to accompany the Plaintiff or to warn him of the danger. Further the Plaintiff was visiting on the instructions of his master who had either entered into a contract of supply with the Defendants or was about to do so.

That point was taken by Campbell L.C.J. when finding for the Plaintiff in *Chapman decd. v Rothwell*⁶⁸ and in *Indermaur v Dames*⁶⁹ where the Plaintiff was an employee of a gas fitter who had previously fitted apparatus to the defendant's sugar refinery. The Plaintiff fell down an unfenced shaft and Kelly C.B. decided that as he was on lawful business there was no distinction to be drawn between the master and his servant and Willes J. agreed that the Plaintiff should recover because he was fulfilling a contract in which both his master and the Defendant had an interest.

Baron Bramwell persisted but in *Paddock v North Eastern Railway*⁷⁰ his conclusion that there was no evidence of negligence to go to the jury was overruled by seven Exchequer judges. The Plaintiff was the travelling exhibitor of a panorama of incidents from the American Civil War. He went to Ripon station to arrange the conveyance of his exhibition to Otley. He was directed to the goods station on the other side of the track where unlit arches were used for coal storage. The Plaintiff fell into a coal receiver. Baron Bramwell found the Plaintiff contributorily negligent in not looking out in the dark. Seven judges, but not the Baron, were influenced by the Plaintiff having been directed there.

⁶⁷ *Wilkinson* 634; 1038. A defendant car driver was held to be negligent 'if he could not pull up within the limits of his vision' by Scrutton L.J. relying on Bramwell's dictum that 'if you cannot see where you are going you must not go'. *Evans v Downer* (1933) 102 LJKB 568n.

⁶⁸ (1858) 1 EL BL & EL 168; 120 ER 471.

⁶⁹ (1867) LR CP 311.

⁷⁰ (1868) LT 60.

A volunteer was in no better position than an employee. In the remarkable Scottish case of *Lumsden v Russel*⁷¹ the Pursuer, a miner, sued for the loss of his nine year old son who had brought gunpowder to his father at his place of work. He was directed by the Defender's pit-head man to fetch some water. When stepping over the unguarded winding shaft the boy took hold of the winding chain which was coincidentally put in motion drawing him in and crushing him to death. The court held the father to blame for bringing the boy onto the premises and created the risk of his being sent on an errand. A modern court would have identified a break in causation. Baron Bramwell did not favour volunteers.⁷²

Today a court would be expected to find liability if the defendant placed a dangerous instrument in a public place but, echoing his judgment in *Cornman v Eastern Counties Railway*,⁷³ the Baron rejected the infant Plaintiff's claim in *Mangan v Atterton*.⁷⁴ The Defendant was a whitesmith who had constructed a machine for crushing oil-cake which he displayed for sale in street markets. The machine was unguarded and unsupervised even though the cogs which worked the crushing rollers were exposed and the handle operating the rollers was without restraint. The four year old Plaintiff was on his way home from school with his seven year old brother who encouraged him to put his fingers into the cogs while other friends turned the handle. It was pleaded that the handle should have been secured or removed and the cogs guarded. The county court jury found for the Plaintiff but on appeal Baron Bramwell disagreed:

The Defendant is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of very delicate construction, and had been injured by the child's fingers, would not the child in spite of his tender years, have been liable to an action as a tortfeasor? This shows that it is impossible to hold the Defendant liable. But further I can see no evidence of negligence in him.⁷⁵

The Baron overlooked the age of the Plaintiff and his incapacity for negligence, the inherent danger in the machine, the introduction of it into a public place, the lack of

⁷¹ (1856) 18 Dunlop 949.

⁷² *Degg decd. v Midland Railway* (1857) 1 H&N 771; 156 ER 1413 and see ch.5.

⁷³ (1859) supra in *Railway Premises*.

⁷⁴ (1866) LR 1 Ex. 239.

⁷⁵ *Mangan* 240. Disapproved by Cockburn C.J. in *Clark v Chambers* (1878) 3 QBD 327.

guarding of the cogs, the failure to secure the handle, and the lack of supervision and of a warning by notice or otherwise. Today his prejudice appears remarkable.

Unsafe Openings: the Narrative

The growth of coalmines was rapid. When operating they were identifiable by 'huge scaffoldings, like mammoth witches' spinning wheels'⁷⁶ but dangerous traps were created by the abandonment of a shaft without infill, notice or fencing. The artist John Martin, born in 1789, who later painted lead mines as the mouths of infernal regions, after leaving school, was prone to roam the hills of Upper Allendale, then an important lead-mining centre⁷⁷ at risk of falling into 'chaotic lead-mines'.⁷⁸

In *Hard Times* when Stephen Blackpool's innocence was established he had found work in a different town. A message was sent to him that he should return but he did not respond. Sissy and Rachael, after taking the train, found a peaceful green landscape blotted with heaps of coal :

They walked on across the fields and down the shady lanes, sometimes getting over a fragment of a fence so rotten that it dropped at a touch of the foot, sometimes passing near a wreck of bricks and beams overgrown with grass, marking the site of deserted works. They followed paths and tracks, however slight. Mounds where the grass was rank and high, and where brambles, dockweed and such-like vegetation, were confusedly heaped together, they always avoided; for dismal stories were told in that country of the old pits hidden beneath such indications.⁷⁹

They discovered Stephen's hat and then 'before them, at their very feet, was the brink of a black ragged chasm, hidden by the thick grass'⁸⁰ with Stephen at its foot. Rescuers came to the Old Hell shaft and when contact was made with Stephen he recounted how:

He had come straight away from his work, on being written to, and had walked the whole journey; and was on his way to Mr Bounderby's country house after dark, when he fell. He was crossing that dangerous country at such a dangerous time, because he was innocent of

⁷⁶ 'Railway Thoughts' *A.Y.R.* (11/01/1868) 19, 455, 112. Fanny Mayne in *Jane Rutherford* pointed to the risk of fire from coal and rubbish from worked-out pits left to lie. (London: Clarke Beeton, 1854) 164.

⁷⁷ Feaver, W. *The Art of John Martin* (Oxford: Clarendon, 1975) 5.

⁷⁸ Balston, T. *John Martin 1789-1854: His Life and Works* (London: Duckworth, 1947) 18.

⁷⁹ *Hard Times* 3, 6, 256.

⁸⁰ 257.

what was laid to his charge, and couldn't rest from coming the nearest way to deliver himself up.⁸¹

The implication was that Stephen had taken a short cut (which would constitute contributory negligence and thus totally bar any civil suit) and, as he was not close to the highway, there was no primary liability.⁸²

Stephen was extricated from the shaft and he delivered to Rachael this plea for safer mines:

I ha' fell into th' pit, my dear, as have cost wi'in the knowledge o' old fok now livin, hundreds and hundreds o' men's lives – fathers sons brothers, dear to thousands an thousands, an keeping 'em fro' want and hunger. I ha' fell into a pit that ha' been wi' the Fire-damp crueller than battle. I ha' read on't in the public petition, as onny one may read, fro' the men that works in pits, in which they ha'pray'n an pray'n the lawmakers for Christ's sake not to let their work be murder to 'em, but to spare 'em for th' wives and children that they loves as well as gentlefolk love theirs. When it were in work, it killed wi'out need; when 'tis let alone, it kills wi'out need. See how we die an no need, one way an another – in a muddle- every day!⁸³

Before he died he gazed at a star which showed him 'where to find the God of the poor' and he entreated the world to come together for a better mutual understanding.⁸⁴

Coketown, whose 'hands' were reduced to the level of tiny cogs in a vast machine,⁸⁵ was painted as a place from which there was no escape and where individual virtues were eliminated. Dickens had wanted to 'strike the heaviest blow':

Why I found myself so used up after *Hard Times* I scarcely know. Perhaps because I had intended to nothing in that way for a year, when the idea laid hold of me by the throat in a very violent manner.⁸⁶

⁸¹ 262.

⁸² When plotting Stephen's demise Dickens may have had in mind his *Narrative of Household Words* reporting a fatal accident on 05/02/1850. A nine year old boy and his father were on their way to work in a pit at Darlaston, Staffordshire when the boy's cap blew off in the wind. While searching for it in the dark he fell into an old, unfenced pit some twenty yards from the public road. The jury returned a verdict of accidental death and criticised the occupier for his want of care in not protecting the opening.

⁸³ *Hard Times* 263.

⁸⁴ 264. This prayer echoed the last verse of Thomas Bracken's poem *Not Understood*. Rodd, W.B. 'Stephen Blackpool's Prayer' *Dickensian* (1910) 6, 7, 186. It also reflected the words of Dickens' friend Thomas Talfourd who died on 13/03/1854 after charging the jury at Staffordshire Assizes. He 'feelingly deplored the want of sympathy which existed between the higher and lower classes'. Slater, M. *Charles Dickens* (New Haven: Yale U.P., 2009) 372. Dickens wrote a eulogy to Talfourd in *H.W.* (25/03/1854) 209, 117 commending the 'righteous warning'.

⁸⁵ Smith, G. *Charles Dickens: A Literary Life* (New York: St. Martin's P., 1996) 93.

⁸⁶ *Pilgrim Letters* 7, 453, letter to Hon. Mrs R. Watson 01/11/1854.

Dickens dedicated the work to Thomas Carlyle to whom he wrote on 13 July 1854:

It contains what I do devoutly hope will shake some people in a terrible mistake of these days. ... no man knows your books better than I.⁸⁷

His admiration of Carlyle was not fully reciprocated. Carlyle, thinking that great writers should be heroes and prophets, cavilled at the frivolity of popular novels.⁸⁸ He considered Dickens' acting to be his real forte.⁸⁹ Nevertheless there is much of Carlyle's view to be found in the story though 'what seemed to Dickens to be a muddle was to Carlyle a cosmic disease'.⁹⁰ In *Sign of the Times* (1829) Carlyle wrote of the increased distance between rich and poor, the brutalising impact of machinery upon the internal and spiritual. Wonder, love, fear and enthusiasm, poetry and religion were all infinite as established by the example of Christianity.⁹¹ Dickens used a similar approach to the demise of Stephen Blackpool. *Hard Times* is full of biblical allusion, more than in any other of Dickens' novels.⁹² Dickens had no time for the church but he was in tune with Christian values. His agenda was that of a broad church social reformer and he sought a broader Christianity with a strong redemptive element. He equated Heaven with peace and rest.⁹³ He felt great need for religion but little for worship and none for dogma.⁹⁴ Stephen's martyred death illuminated the need for faith, love and imagination as the antibodies to heartless mechanisation.⁹⁵

Dickens presented Stephen as the central figure representing the dullened, downtrodden working people of the industrial north. Dickens' early sallies on educational methods, while relevant to his argument for fancy in the first half of the book, ran parallel with Stephen's muddles. Stephen, although the author's cogent

⁸⁷ 7, 367. Dugger, J. M. in 'Hard Times' Industrial Imperative' *Dickens Studies Journal* (2002) 32, 158 suggested that Blackpool 'closely resembled' Carlyle.

⁸⁸ Goldberg, M. *Carlyle and Dickens* (Athens, U.S.A: Georgia U.P., 1972) 15. Also Dunn, R.J. 'Dickens, Carlyle and the *Hard Times* Dedication' *Dickens Studies Newsletter* (1971) 2, 3, 90 who concluded that Carlyle, by 1854, had a general influence on Dickens which was well 'assimilated into his creative genius'.

⁸⁹ Carlyle T. *Reminiscences* (Oxford: Oxford U.P., 1997 (1881)) 368.

⁹⁰ Kaplan, F. *Dickens: a Biography* (Sevenoaks: Hodder & Stoughton, 1988) 308.

⁹¹ Tennyson, G.B. (1984) (ed.) *Selections from the Writings of Thomas Carlyle* (Cambridge: Cambridge U.P., 1984) 35.

⁹² Smith, G. 41 thought that the Bible was formative at the level of 'language, structure, character and theme'.

⁹³ Wheeler, M. *Heaven, Hell and the Victorians* (Cambridge: Cambridge U.P., 1994) 221.

⁹⁴ Fielding, K.J. *Charles Dickens: A Critical Introduction* (London: Longmans, 1965) 169. Also ch.7.

⁹⁵ Saint Stephen, the first martyr, was accused of blasphemy and stoned to death. Jacobson, W.S. 'The Muddle and the Star' *Dickensian* (2007) 103, 2, 144.

mouthpiece when enquiring of Bounderby on divorce, industrial relations and the need for meaningful human relationships,⁹⁶ had limited education and he had been weighed down by the monotony of his existence in Coketown. However Stephen's searching questions suggested surprising intelligence inconsistent with his humble role. Stephen was 'weak, ordinary, fallible' and 'morally exhausted'.⁹⁷ He would not have enthused Samuel Smiles despite his determination to clear his name. He appeared overwhelmed and in need of Rachael's guidance.⁹⁸ Blackpool was 'an extreme example of a worker, honourable and even noble in nature, pursued by relentless impersonal forces to his downfall and death'.⁹⁹ His allegorical character was both noble and dismal.¹⁰⁰ Dickens was driven to idealise Stephen as a result of his exasperation with the views of the factory owners.¹⁰¹ Dickens used pathos and sentiment to express his social concern.¹⁰² The muddle continued so that his successor would be similarly oppressed. His death was lachrymose and bitter.¹⁰³

Dickens did not have the experience of work in a northern mill. He considered the employers to be responsible because they were careless of the workpeople's plight. He disputed that their task in life was to maximise profits and that it was up to the oppressed to escape from the clutches of their station.

The publication of the work in weekly instalments¹⁰⁴ boosted the circulation of *Household Words*¹⁰⁵ but, when it was published in book form, most reviews were unfavourable. Some passages were 'coarse, violent and awkward', the framework 'prosaic' and the characters 'repulsive and vulgar'.¹⁰⁶ The reviewer in the *Gentleman's Magazine* thought the exaggerations 'unreasonable' and complained that the reader

⁹⁶ *Hard Times* 77 & 149.

⁹⁷ Smith, A. 'The Martyrdom of Stephen in *Hard Times*' *Journal of Narrative Technique* (1972) 2, 159.

⁹⁸ Dereli, C. 'Stephen Blackpool's 'Muddle' in *Hard Times*' *Dickensian* (2004) 100, 2, 463, 101.

⁹⁹ Dyson, A.E. '*Hard Times*: The Robber Fancy' *Dickensian* (1969) 65, 358, 73.

¹⁰⁰ Johnson, E. *Charles Dickens: His Tragedy and his Triumph* (London: Gollancz, 1953) 803.

¹⁰¹ Fielding, K.J. & Smith, A. '*Hard Times* and the Factory Controversy: Dickens vs. Harriet Martineau' *Nineteenth Century Fiction* (1970) 24, 4, 404, 416.

¹⁰² Shelston, A. 'Dickens' in Pollard, A. (ed.) *The Victorians* (London: Barrie & Jenkins, 1970) 78 & Gardiner, J. *The Victorians* (London: Hambledon, 2002) 162.

¹⁰³ Manning, S.B. *Dickens as Satirist* (London: Yale U.P., 1971) 148.

¹⁰⁴ Butt, J. & Tillotson, K. in *Dickens at Work* (London: Methuen, 1957) 203 suggested that the discipline of writing for weekly publication resulted in economy of detail.

¹⁰⁵ From 40,000 to 60,000.

¹⁰⁶ *Athenaeum* (12/08/1854) 1398, 992.

needed a picture of something higher by way of remedy.¹⁰⁷ The story was ‘stale, flat and unprofitable, a mere dull melodrama.’¹⁰⁸ Margaret Oliphant thought it not a ‘real work’ because the characters did not ‘proceed with the natural compulsion and impulse of life’.¹⁰⁹ He was charged with ‘cant and hypocrisy’ in introducing religious elements when believing that humanity was better without religion.¹¹⁰ Many of the characters were ‘unbelievable’.¹¹¹ Those critics had not grasped Dickens’ metaphors and symbols. John Forster explained that Dickens was expressing ‘a righteous sentiment’ rather than trying to prove a case.¹¹² Macaulay had read the tale by August 1854 and noted ‘one excessively touching, heartbreaking passage’ (presumably Stephen’s death for Macaulay was a sentimentalist) ‘and the rest sullen socialism’.¹¹³ Later John Ruskin was famously fulsome in his praise of Dickens for, despite his partiality and choosing ‘to speak in a circle of stage fire’, he told the truth and his version was the right one.¹¹⁴

Edwin Whipple criticised the novel as ‘ungenial and unpleasant’ and Dickens as a satirist for being inevitably intolerant and one-sided but was nevertheless moved by the pathos of Stephen’s singularly pure relationship with Rachael.¹¹⁵ George Gissing dismissed the work as ‘practically forgotten’ with little in it demanding attention¹¹⁶ and it was also disdained as ‘one of Dickens’ failures’.¹¹⁷ Chesterton liked it while agreeing with Gissing that none of Dickens’ characters qualified as an intellectual working man.¹¹⁸ Dickens was not political but he perceived that any theory that tried to run society ‘entirely on one force and motive’ was probably nonsense. He cared much for liberty but nothing for *laissez faire*.¹¹⁹

The novel’s reputation was revived after F.R. Leavis praised it as an ‘unrecognised masterpiece’. He wrote of ‘the packed richness’ of the work and if Dickens was mistaken

¹⁰⁷ (09/1854) 42, 276

¹⁰⁸ *Rambler* (10/1854) 2, 10, 361.

¹⁰⁹ *Blackwood’s Edinburgh Magazine* (04/1855) 77, 474, 453.

¹¹⁰ *British Quarterly Review* (10/1854) 20, 40, 581.

¹¹¹ *Westminster Review* (10/1854) 6, 604.

¹¹² *Examiner* (09/09/1854) 568.

¹¹³ Trevelyan, G.M. *The Life and Letters of Lord Macaulay* (Oxford: Oxford U.P., 1978) 2, 307.

¹¹⁴ *Cornhill Magazine* (08/1860) ii. 159.

¹¹⁵ *Atlantic Monthly* (03/1877) 29, 353.

¹¹⁶ *Charles Dickens: a Critical Study* (Stroud: Nonsuch, 2007 (1898)) 48.

¹¹⁷ Williams, H. *Two Centuries of the English Novel* (London: Smith Elder, 1911) 176.

¹¹⁸ Chesterton, G.K. *Charles Dickens* (Ware: Wordsworth, 2007 (1906)) 128. Presumably Mrs Gaskell’s Job Legh in *Mary Barton* would have qualified.

¹¹⁹ Chesterton 66.

in his view of Trades Unionism, his understanding of Victorian civilisation was enough to support the justice and penetration of his criticism.¹²⁰ The Leavis view was opposed by John Holloway who contended that Dickens' outlook was shallow with 'defects of the bourgeois Philistine'.¹²¹ Dickens' imagery and symbolism was superficial and thin and the work Dickens' dullest and least successful.¹²² Robert Garis thought the reaction to Leavis was overdone and suggested that Dickens' great authority as a critic of Utilitarianism derived from his untheoretical amiability and generosity.¹²³ Yet John Lucas complained of a 'bleakly determinist view of the hopelessness of the human situation'.¹²⁴ Cockshut thought *Hard Times* to be a work of great distinction 'which performed for the first time the very important imaginative task of integrating the factory world into the world of nature and humanity'.¹²⁵ It was special, angry and successful¹²⁶ although it granted 'a scant measure of the very quality for which it argued, imaginative pleasure'.¹²⁷ It was a consummately plotted tragedy for Mr Gradgrind and for Louisa who was unable to regain normal feelings as her father managed to do as well as for Stephen¹²⁸ and 'totally dedicated to pursuing to its monstrous, logical conclusion the consequences of self-interest carried into practice'.¹²⁹ Humans could not flourish in arid Coketown where all spark of human feeling was drilled out.¹³⁰ There was no reference to the topical scandal of child labour and hours worked¹³¹ on which Dickens was ambivalent.

Thus Stephen's fall, in the dark, down the Old Hell Shaft of which he had no knowledge or warning, and which was unfilled and unguarded, represented the dangers of coal mines as working places, the irresponsibility of the particular mine operator who had left the opening as a dangerous trap, possibly the arrogance of cotton owners who failed

¹²⁰ Leavis, F.R. *Dickens the Novelist* (Harmondsworth: Penguin, 1972) 206.

¹²¹ Holloway, J. 'Hard Times: A History and a Criticism' in Gross, J. & Pearson, G. (ed.) *Dickens and the Twentieth Century* (London: Routledge & Kegan Paul, 1962) 171.

¹²² Hirsch, D.M. *Hard Times* and Dr. Leavis' *Criticism* (1964) 6, 1-6 & 14-16.

¹²³ Garis, R. 'Dickens Criticism' *Victorian Studies* (1964) 7, 376, 383.

¹²⁴ Lucas, J. *The Melancholy Man* (London: Methuen, 1970) 254.

¹²⁵ Cockshut, A.O.J. *The Imagination of Charles Dickens* (London: Collins, 1961) 141.

¹²⁶ Dyson, A.E. 'Hard Times; The Robber Fancy' *Dickensian*, 1969) 65, 358, 70 & 73.

¹²⁷ Engel, M. *The Maturity of Dickens* (Cambridge, Mass: Harvard U.P., 1967) 172.

¹²⁸ Gomme, A.H. *Dickens* (London: Evans, 1971) 134 & 135.

¹²⁹ Gold, J. *Charles Dickens: Radical Moralizer* (Minneapolis: Minnesota U.P., 1972) 198.

¹³⁰ Mackenzie, N. & J. *Dickens: A Life* (Oxford: Oxford U.P., 1979) 265.

¹³¹ Collins, P. (1980) 'Dickens and Industrialism' *Studies in English Literature* (1980) 20, 4, 657.

to box in moving shafts in their mills, and generally the default of industrialists in looking to the interests of anyone other than themselves. Dickens was a social reformer whose purpose in his writing was to entrust others with the responsibility of progress and implementation. He did not follow through for his priority was to earn his living from his writings and reading tours. He had little grasp of complex institutions and his judgements were impulsive and not the fruits of research. *Hard Times* was best read in conjunction with Morley's pieces in *Household Words*.¹³² The issue of compensation only tenuously connected with industrial safety.¹³³

Dickens plugged away, arguing for affection and compassion, and it was his achievement that he wrote such a different, uncomfortable and challenging story.¹³⁴ *Hard Times* may now fairly be described as a flawed classic, notable for its bitterness and lack of sun.

Unsafe Openings: the Common Law

The early cases were inconsistent. In *Blyth v Topham*¹³⁵ the Plaintiff failed after his mare fell into a pit dug by the Defendant on a common because the mare had strayed and had no right to be there. In *Black v Cadell*¹³⁶ the deceased, a tenant of the Defender, when returning home on horseback through the Defender's estate, fell into an old coal pit near the road and was drowned together with his horse. As the pit was close to a road used by the general public and had not been filled in the claim succeeded.¹³⁷

Proximity to the highway transpired to be crucial. Baron Bramwell, on 21 January 1859 just prior to inviting Dickens to dinner, sat with Pollock C.B. (who delivered the judgment of the court), Martin B. (the trial judge), and Watson B. in *Hardcastle decd v*

¹³² Butwin, J. 'Hard Times: the News and the Novel' *Nineteenth Century Fiction* (1977) 32, 2, 166.

¹³³ Bartrip, P.W.J. 'Household Words and the Factory Accident Controversy' *Dickensian* (1979) 75, 1, 17, 24.

¹³⁴ 'At once discomfoting and fun to read'. Eagleton, T. *The English Novel* (Oxford: Blackwell, 2006) 156.

¹³⁵ (1603) CRO. JAC. 159.

¹³⁶ (1804) Dict. 13,905.

¹³⁷ Similarly *Coupland v Hardingham* (1813) 3 Camp. 398; 170 ER 1424. In *Sybray v White* (1836) 1 M&W 435; 150 ER 504 the Plaintiff's horse was killed by falling into an old uncovered mineshaft. The Defendant agreed that he should pay for the horse if the shaft was his and the court decided that there was liability subject to that proof. cf. *Hislop decd. v Durham* (1842) 4 Dunlop 954.

South Yorkshire Railway.¹³⁸ The Defendants owned a reservoir and the land dividing it from the highway. The deceased was walking from Rotherham to Sheffield and fell into the unfenced reservoir at night. The claim failed and Pollock C.B. identified the dividing line between an excavation ‘adjoining to a public way’ and:

when the excavation is made some distance from the way, and the person falling into it would be a trespasser upon the defendant’s land ... the case seems to us to be different. We do not see where the liability is to stop.¹³⁹

The Chief Baron fancifully suggested that it was up to the users of the way to put up the fencing.¹⁴⁰

Thus the decision in *Hardcastle* was pivotal and unless the claimant owned the land or had rights of user or he was using the highway or an area immediately adjoining it he was unlikely to succeed. Dickens might have expected civil liability to attach to the operator of the mine who left the shaft unguarded but Stephen Blackpool’s death could not have justified a claim. He was contributorily negligent. Additionally, the creator of the danger had no obligation to passers-by unless the excavation adjoined the highway. Rachael was not married to Stephen and had no right of action. He rarely saw his legal wife who depended on him on her occasional visits so that a claim for a small dependency based on his low wages was the best to be hoped for.

Unsafe Openings: Legislation

The Regulation and Inspection of Mines Act 1860 applied to coal mines and to ironstone mines and included general rules of which required that (4) ‘every shaft or pit which [was] out of use, or used only as an airpit, [should] be securely fenced’ and (5) ‘every working or pumping pit or shaft [should] be properly fenced when operations ...

¹³⁸ (1859) 4 H&N 67; 157 ER 761.

¹³⁹ *Hardcastle* 74; 764.

¹⁴⁰ *Hardcastle* was followed in *Hounsell v Smyth* (1860) 7 CB NS 731; 141 ER 1003 where the public was prone to cross waste ground close to a quarry without interruption but the trespassing Plaintiff failed. He would succeed if the excavation was but two feet away from the highway as in *Hadley v Taylor* (1865) LR 1 CP 53. In *Prentice decd. v Assets Co. Ltd* (1889) 17 Retties S.C. 484 the sober Plaintiff failed when he fell into a disused quarry 150 yards from the highway. It was different if the Plaintiff held acquired rights such as arose from ownership of the land worked by the Defendant: *Williams v Groucott* (1863) 4 B&S 149; 122 ER 416.

ceased or [were] suspended'. It is clear from the report of the proceedings¹⁴¹ in which Acton Ayrton¹⁴² and Henry Bruce¹⁴³ took part that the safety of abandoned shafts was not the main bone of contention for those rules were passed without debate. Bruce moved a new Bill in February 1872 based on the Report of the Select Committee on Mines of 1867¹⁴⁴ and the Reports of the Mines Inspectors of 1870.¹⁴⁵ Two Acts were passed, the 1872 Coal Mines Regulation Act and the 1872 Metalliferous Mines Regulation Act and by sections 13 and 41 respectively where a mine was abandoned or its working discontinued the top of the shaft and any side entrance was to be and be kept securely fenced and by sections 14 and 42 respectively notice of abandonment was required to be given to the Secretary of State.¹⁴⁶

Otherwise the liability of occupiers was left to the judges.¹⁴⁷ Dickens had publicised an existing abuse and legislation followed six years later. Dickens thought that uncovered shafts were traps which ought to be guarded but he also used them in a broader sense to depict the decay left in its wake by capitalistic industry.

¹⁴¹ HC Deb 25/06/1860 159, 970.

¹⁴² Ayrton tried hard to rid the common law of the defence of common employment. See ch.5.

¹⁴³ Henry Austin Bruce (1815-1895) was the member for Merthyr Tydfil from 1852 until 1868. He supported amendments to the Truck Act in 1854, was appointed Under Secretary at the Home Office in 1862 and Home Secretary under Gladstone in 1869 a post he held for four years. He became Baron Aberdare in 1873 but was not politically active thereafter.

¹⁴⁴ PP HC 1867 XIII 127.

¹⁴⁵ PP 1870 C124 XV 459.

¹⁴⁶ Under s.151(1) of the Mines and Quarries Act 1954 the owner of an abandoned mine or of a mine not worked for twelve months must provide every shaft or outlet with an efficient enclosure, barrier, plug or other device to prevent persons accidentally falling down the shaft or entering the outlet and properly maintain such device.

¹⁴⁷ It was not until the Occupiers Liability Act 1957 that parliament interfered by incorporating negligence concepts and doing away with gradations of plaintiffs. It imposed a duty of care on occupiers to visitors. Trespassers' rights were as before until the House of Lords in *Herrington v B.R.B.* [1972] AC 877 decided that they should be treated humanely and decently and imposed an objective duty of care. That was replaced by a subjective duty in the Occupiers Liability Act 1984.

Chapter 7

Conclusion: The Skirmisher Novelist and the Unbendable Judge

The Invitation to Dinner

Baron Bramwell invited Charles Dickens to dinner on 2 February 1859 at 3 Old Palace Yard but Dickens was beset with a violent cold and was worried about his ability to read in St. Martin's Hall the following day.¹ The cold was a genuine excuse for him to decline:

My Dear Baron Bramwell.

It is with the greatest reluctance and regret, I assure you, that I resign the pleasure of dining with you today. But I was seized on yesterday by an unusually severe cold in the throat and chest, to which the consideration that I have to read tomorrow evening, forces me to attach more importance than otherwise I should bestow upon it. After arguing with myself, with a prolixity worthy of Westminster Hall, I am driven to the conclusion that I must get to bed at about your dinner hour, and must be mustard-poulticed and messed and made wretched in a variety of ways. If I went out tonight, I could have no reasonable hope of being fit for tomorrow.

As my daughter [Mamie]² has not the courage to face the judicial Presence without paternal support, I take the burden of her excuses on my aching shoulders.

Believe me.

Very faithfully yours

Charles Dickens³

It is not known if any further invitation was issued or whether Dickens ever dined with the Baron. How would they have fared if the invitation had ever been fulfilled? It arose from a family connection in that the Bramwells were related by marriage to Henry Austin, a civil engineer and pupil of Robert Stephenson, an assistant of Jeremy Bentham and, later of Edwin Chadwick, and husband of Dickens' sister Letitia. Further the

¹ *Pilgrim Letters* 9, 24. Letter to Wilkie Collins 03/02/1859.

² Mamie was Dickens eldest daughter born in 1838 who took over the management of Dickens' home after he separated from Catherine and 'heads the table gracefully'. Letter to Cerjat 01/02/1859 *Pilgrim Letters* 9, 20. Mamie worked with her sister Katey, one year younger, and with her aunt Georgina Hogarth who was the driving force but an unsuitable candidate for the invitation.

³ *Pilgrim Letters*, Supp. XI in *The Dickensian* (2009) 105, 1, 477, 44.

Baron's younger brother Henry Frith Bramwell had acted in Dickens' private theatricals performed in Bentinck Street on 27 April 1833.⁴ The Baron attended a grander production, that of Wilkie Collins' *The Frozen Deep* at Tavistock House on 14 January 1857, the last of five performances. Other front-row attenders included Cockburn L.C.J. and Willes J. who enjoyed supper after the play. Perhaps the dinner invitation was a belated response to Dickens' hospitality.⁵

The invitation came at a difficult time for Dickens. His matrimonial difficulties caused him to be gloomy. He was not in control of rumours which swirled around about his incestuous relationship with his sister in law Georgina Hogarth (untrue) and an improper liaison with the actress Ellen Ternan (true). He foolishly brought these difficulties to the attention of a generally unsuspecting public in June 1858 by his notice in *Household Words* seeking to deny some of the more scurrilous talk.⁶ The more the chatter, the worse he treated his wife Catherine.⁷ In the summer of 1858 he was relieved to leave the heat and stench of London on a provincial reading tour. The tour was profitable and his performances were rapturously received. Yet he was nervous and ill at ease when not being acclaimed in the halls where he read. He became something of an actor in conversation.⁸ He quarrelled with the publishers of *Household Words* Bradbury and Evans, the latter being part proprietor of *Punch* whose editor Mark Lemon, friend of Dickens, had declined to publish Dickens' personal statement about his marital

⁴ Slater, M. *Charles Dickens* (London: Yale U.P., 2009) 37. Bramwell was then working as a special pleader and had not been called to the bar.

⁵ There was nearly a Furnival's Inn connection. On 13/11/1834 Dickens applied to the Steward of New Inn to take a set of chambers saying that he wished to enter the bar when circumstances permitted. He had financial support from Baird and Mitton and took rooms at 13 Furnival's Inn, a 'three pair back' with cellar and lumber room in the roof and he moved in with his 14 year old brother Frederick the following month. He began *Pickwick Papers* there and married Catherine Hogarth on 02/04/1835. They moved to 15 Furnival's Inn on 18/02/1836 which had larger rooms but similar configuration. Their first child was born there 05/01/1837 and they moved out to Doughty Street in 04/1837. Furnival's Inn, dissolved in 1817, was originally a lesser Inn of Court with connections to Exchequer and to Chancery and housed court clerks and attorneys. By 1835 the chambers there were rooms mainly occupied by the aristocracy, gentry and young men who aspired to be gentlemen and who sought a smattering of legal training. Bramwell lived at 15 Furnival's Inn in 1839 and again in 1841.

⁶ Ackroyd, P. *Dickens* (London: Sinclair-Stevenson, 1990) 818.

⁷ In a letter to his readings manager Arthur Smith, intended for partial publication, he criticised Catherine for her shortfalls as a wife and mother. The letter was released in full by Smith and published in the New York *Tribune* and repeated later in British newspapers attracting almost universal condemnation of Dickens. Mackenzie, N & Mackenzie, J. *Dickens: A Life* (Oxford: Oxford U.P., 1979) 304.

⁸ Ackroyd 839.

difficulties.⁹ That was the end of Dickens' friendship with Lemon. The 'conductor' wanted to dissolve *Household Words* if he could not buy it. There were acrimonious and abortive negotiations culminating in dissolution. In early 1859 Dickens was mulling over a new publication and its title which later became *All the Year Round*.¹⁰ There was already in his head the notion of self sacrifice he had acted out in *The Frozen Deep* which he combined with Thomas Carlyle's *The French Revolution* published in 1837 to create *A Tale of Two Cities*.¹¹ Dickens had agreed to sit in Tavistock House for a portrait by William Powell Frith¹² who liked him and described his expression as 'settled into that of one who had reached the topmost rung of a very high ladder and was perfectly aware of his position'.¹³ In the week before the dinner date Dickens was also arranging his readings, attending to the payment of the Ternans' rent and corresponding with Lord Campbell about the Lord Chancellor's 'Shakespeare's Legal Acquirements Considered', an early sally into Law and Literature.¹⁴

Meanwhile the Baron was engrossed, albeit in a more structured way. On 21 January he sat in the Exchequer to hear the appeal in *Hardcastle v South Yorkshire Railway*.¹⁵ There followed in January and early February an action on a bill of exchange, a dispute on bankruptcy procedure, an adjudication on an advocate's right to fees from a successful infant plaintiff, a decision on the legitimacy of an arrest by a sheriff's officer, another concerning the distraint of sheep, the resolution of a dispute on a contract of service, and a hearing on the efficacy of a pre-bankruptcy bill of sale.

The Dinner

Dickens was strongly anti-Catholic¹⁶ whereas the Baron contended that he had gained intense pleasure from the passing of the Catholic Emancipation Act 1829.¹⁷ Chesterton, a

⁹ *H.W.* (12/06/1858) 17, 429, 601.

¹⁰ The first issue was published on 30/04/1859 and the last of *Household Words* on 28/05/1859. Slater 474.

¹¹ Johnson, E. *Charles Dickens* (London: Allen Lane, 1977 (1952)) 479. The first instalment of *A Tale of Two Cities* appeared in the first issue of *All the Year Round*. Slater 473.

¹² (1819-1909) painter of *Ramsgate Sands* (1854) *Derby Day* (1858), and *The Railway Station* (1862).

Wood, C. *William Powell Frith: A Painter and his World* (Stroud: Sutton, 2006) chs. 4 & 6.

¹³ Frith, W.P. *My Autobiography and Reminiscences* (London: Bentley, 1887) 1, 309.

¹⁴ *Pilgrim Letters* 9, 1-18.

¹⁵ (1859) 28 LJ Exch. 139 and see ch.6.

¹⁶ Oldani, L.J. 'Dickens, Roman Catholicism and Jesuits' *Dickensian* (2011) 107, 3, 485, 202.

Catholic, thought Dickens an orthodox Christian whereas T.A.Jackson, a Marxist, believed he was a communist.¹⁸ Dickens had referred to Christian values on the death of Stephen in *Hard Times* and in his novels ‘translated and reinterpreted the religious beliefs’ embedded in him.¹⁹ He wrote to the Reverend R.H. Davies²⁰ on 24 December 1856:

There cannot be many men ... who have a more humble veneration for the New Testament or a more profound conviction of its all-sufficiency than I have. If I am ever mistaken on this subject it is because I discountenance all obtrusive professions of, and tradings in Religion, as one of the main causes of real Christianity’s having been retarded in this world; and because my observation of life induces me to hold in unspeakable dread and horror those unseemly squabbles about the Letter which drive the spirit out of hundreds and thousands.²¹

Dickens in his literature, if not in his married life, in his dealings with his publishers and in his assessment of such as Frances Trollope, Harriet Martineau, Kay-Shuttleworth and Southwood Smith, was the upholder of Christian values including human charity and love of one’s neighbour²² and when he sent his sixth son, Edward (‘Plorn’) aged sixteen, to join Alfred, his third son, in New South Wales his letter included:

Never take a mean advantage of anyone in any transaction, and never be hard upon people who are in your power. Try to do to others, as you would have them do to you, and do not be discouraged if they fail sometimes. It is much better for you that they should fail in obeying the greatest rule laid down by our Saviour, than that you should.

I put a New Testament among your books, for the very same reasons, and with the very same hopes that made me write an easy account of it for you when you were a little child;²³ because it is the best book that ever was or will be known in the world, and because it teaches you the best lessons by which any human creature who tries to be truthful and faithful to duty can possibly be guided.²⁴

¹⁷ Fairfield, C. *Some Account of George William Wilshere, Baron Bramwell of Hever and his Opinions* (London: Macmillan, 1898) The contention must be treated with caution for Bramwell was denying bias against Ireland in ‘Irish Hatred’ which appeared in *The Liberal Unionist* (01/08/1888) 31,1. He was a regular contributor.

¹⁸ Engel, M. *The Maturity of Dickens* (Cambridge, Mass.: Harvard U.P., 1959) 33.

¹⁹ Knight, K. & Nelson, E. *Nineteenth Century Religion and Literature* (Oxford: Oxford U.P., 2006) 153.

²⁰ (1821-1908) the incumbent of Old Church, Chelsea from 1856 until his death.

²¹ *Pilgrim Letters* 8, 244.

²² He invited his readers to ‘participate imaginatively in the making and revising of interpretations’. Larson, J.L. *Dickens and the Broken Scripture* (Athens: Georgia U.P., 1985) 315.

²³ He wrote the eleven chapters of *The Life of Our Lord* in 1846 for his children and not for publication. Letter to John Forster 08/06/1846 in *Pilgrim Letters* 4, 573.

²⁴ Slater 115.

Dickens devoted much time and energy in raising funds for families and organisations in need of financial help. In September 1838 he helped the bereaved family of the publisher John Macrone,²⁵ in 1843 the children of the actor Edward Elton whose mother had died,²⁶ and in 1845 for the family of the budding writer John Overs and for the family of the journalist Laman Blanchard.²⁷ In 1847 he organised theatricals for Leigh Hunt then in his sixties,²⁸ in 1855 he arranged the funeral of Dr. Brown, husband of the companion to Angela Burdett-Coutts, and in 1857 he revived *The Frozen Deep* to raise funds for the family of Douglas Jerrold.²⁹ In 1858 he was fundraising for Great Ormond Street Children's Hospital³⁰ and for the Artists' Benevolent Fund. There were many more and in addition he established and managed Urania Cottage, a home for fallen women, for Miss Burdett-Coutts over ten years up to 1858. Claire Tomalin suggests that by then, despite all these good works, with his treatment of Catherine and then his involvement with Ellen Ternan, he was losing his moral compass.³¹ The Baron, who had strict views on breach of marital relations,³² would have been aware of Dickens' mainly self-inflicted difficulties. It is not known whether others were invited to dinner. Both host and guest may have been relieved when Dickens declined.³³

Both men were devoted to hard work, Bramwell stolid and Dickens slightly manic. David Copperfield described himself as having:

... the habits of punctuality, order and diligence ... and the determination to concentrate myself on one object at a time that whatever I have devoted myself to, I have devoted myself completely.³⁴

Dickens was an organiser. His life was 'ceaseless activity'. He expended the energy of 'three normal mortals' and enjoyed the 'labour of production'.³⁵

²⁵ *Pilgrim Letters* 12, 187. Dickens loved the New Testament but was 'morally asunder from Rome', had no interest in exploring 'the sacred name and origin' and attended the Unitarian Church in Great Portland Street for three years: Storey, G. *Dickens and Daughter* (New York: Haskell, 1971 (1939)) 140 & 142.

²⁶ Tomalin, C. *Charles Dickens – A Life* (London: Viking, 2011) 146.

²⁷ Tomalin 173.

²⁸ 198.

²⁹ 282.

³⁰ 294.

³¹ 295.

³² Fairfield 296.

³³ See ch.1 as to Dickens' replies to other dinner invitations.

³⁴ *David Copperfield* 613.

³⁵ Gissing, G. *Charles Dickens: A Critical Study* (Stroud: Nonsuch, 2007 (1898)) 52 & 169.

At dinner the two would have identified a common interest in fell walking. Dickens and Collins climbed Carrick Fell north of Skiddaw in difficult conditions in September 1857, as he related in *The Lazy Tour of Two Idle Apprentices*,³⁶ prior to journeying on to Doncaster where Ellen Ternan was appearing on stage. Dickens was a compulsive walker.³⁷

Bramwell was four years older than his guest. He was a big, burly man, fit, an early riser for a breakfast in his shirtsleeves at seven after nine hours sleep³⁸ and an insatiable walker and mountain climber.³⁹ In the summer of 1856 he and his friend and fellow judge James Shaw Willes spent a Sunday climbing Helvellyn.⁴⁰ Later, after moving to Kent, he enjoyed his dogs, by the fireside, and walking in his garden and in the fields.⁴¹ When on assize he would walk in the country around the town and was once rebuked by a local newspaper for doing so on a Sunday in preference to attending church. He did not attend university but instead worked in his father's bank from age sixteen. He does not seem to have been enormously wealthy from inheritance or from earnings at the bar. He was a keen bather though not a strong swimmer. He was devoted to music and enjoyed playing the piano.⁴² Dickens liked the music of Mozart, Chopin and Mendelssohn and enjoyed listening to his daughters singing and at the piano so they may have found common ground there.⁴³

Dickens, something of a dandy,⁴⁴ once the 'high priest of home and hearth' came to loathe the reality of his own domestic hearth⁴⁵ and yearned for activity and excitement.⁴⁶ He had purchased Gad's Hill at Higham near Rochester in March 1856, initially as an

³⁶ Originally published in *Household Words* from 03/10/1857, 16, 393 in five issues and later included in *Christmas Stories* (London: Oxford U.P., 1964) 669.

³⁷ In 08/1852 when on a reading tour he walked sixteen miles from Newcastle to Sunderland, his next venue. Letter to John Forster 29/08/1852 *Pilgrim Letters* 6, 49. In 09/1857, when his relations with Catherine were at a low, he stayed at Tavistock House for a night but left, after a contratemps, at 2 am and walked thirty miles to Gad's Hill. Slater 438.

³⁸ Slater 359.

³⁹ 177.

⁴⁰ Macdonell, J. 'Lord Bramwell: A Sketch' *Temple Bar* (1896) 108, 508.

⁴¹ Macdonell 507.

⁴² Graham, E. *Fifty Years of Famous Judges* (London: Long, 1930) 74.

⁴³ Ackroyd 933.

⁴⁴ Hibbert, C. *Charles Dickens: The Making of a Literary Giant* (Basingstoke: Palgrave Macmillan, 2009 (1967)) 213.

⁴⁵ *Pilgrim Letters* 5, 374. Letter to Mrs Cowden Clarke 22/07/1848.

⁴⁶ Mackenzie, 207. Before his marriage to Catherine he had hoped for domestic tranquillity. Slater 48.

investment, and kept dogs there from at least December 1857⁴⁷ partly as walking companions, usually on a long ‘tramp’ in late afternoon after writing and dealing with correspondence, and partly for security.⁴⁸ At Gad’s Hill, separated from his wife, he once more felt at home. As host he was a charming conversationalist. His visiting writers were required to work from ten in the morning and after lunch to walk ten miles at a furious pace. Dinner was followed by billiards and then card games and charades with the ladies, sometimes music and dancing, and then gin and punch in the smoking room with bedtime, for Dickens at least, at midnight.⁴⁹ Such a programme would not have suited the Baron. He was to buy Holmwood Place a mediaeval mansion in Four Elms near Edenbridge where he lived with his second wife Martha until her death, childless, in 1889 and thereafter until his in 1892.⁵⁰

During dinner they would have agreed on the rights of the working and middle classes to besport themselves on Sundays without statutory interference as Dickens had argued in his polemical pamphlet *Sunday Under Three Heads*.⁵¹ They both opposed the 1855 bill to prevent trading on Sundays.⁵² In 1885 Bramwell opposed legislative interference into the availability of alcohol in his pamphlet *Drink*.⁵³ Dickens favoured the pleasure to be derived from moderate intake of alcohol. He wanted to make the connection between poor living conditions and an excess of drink.⁵⁴ He thought that education was the solution and he would have agreed with the Baron that nothing could be done by legislation to diminish the mischief caused by over reliance.⁵⁵

If their conversation had strayed into political economy, a gulf would have become manifest. Mrs Gaskell had contended ignorance of the topic in her preface to *Mary Barton* and George Eliot poked fun at it as a weighty subject from which her mind easily

⁴⁷ In a letter to Mrs Watson (07/12/1857) he wrote ‘I have taken to Dogs lately’ *Pilgrim Letters* 8, 489. He had a bloodhound, Turk and a St. Bernard, Linda. The dogs lived until 1865 when Turk was killed on the railway and Linda developed a cancerous growth. Letter to Fechter 21/07/1865 *Pilgrim Letters* 11, 75.

⁴⁸ Ackroyd 925. There were tramps and undesirable wayfarers passing close by.

⁴⁹ 932.

⁵⁰ The 1861 Census showed the Baron living in London with his daughter Jane aged 29, and staff consisting of a cook, a ladies’ maid, a butler and a footman. He was recorded in *Kelly’s Post Office Directory* (1869) as being there until 1866.

⁵¹ (London: Jarvis, 1836).

⁵² Slater 395.

⁵³ London: Liberty and Property Defence League.

⁵⁴ Slater 297.

⁵⁵ Fairfield 256.

slipped.⁵⁶ Dickens believed that *laissez faire* was a concept that produced misery and poverty and, although not a socialist, he had no objection to state interference redressing the fault. Dickens identified the falsity of the assumption that everyone would take good care of the welfare of others. If Bramwell was a libertarian, Dickens might be designated a collectivist for he believed that society was more than the sum of its members and that the common good overrode individual interest. He argued that society had a responsibility to address social suffering and that positive government could create harmony.⁵⁷ In *Hard Times* Mr Gradgrind spent time ‘trying to prove that the Good Samaritan was a Bad Economist’.⁵⁸ The odious Bitzer, whose heart was ‘accessible to reason but to nothing else’, wanted to take the whelp back to Mr Bounderby not out of respect for law and due process but so that Bitzer might be promoted in the whelp’s place because ‘the whole social system is a question of self-interest’.⁵⁹ Indeed:

It was a fundamental principle of the Gradgrind philosophy that everything was to be paid for. Nobody was ever on any account to give anybody anything, or render anybody help without purchase. Gratitude was to be abolished, and the virtues springing from it were not to be. Every inch of the existence of mankind, from birth to death was to be a bargain across a counter. And if we didn’t get to Heaven that way, it was not a politico-economic place, and we had no business there.⁶⁰

Stephen Blackpool explained Dickens’ position to Mr Bounderby:

... I can tell ... what I know will never do’t. Victory and triumph will never do’t. Agreeing fur to mak one side unnat’rally awlus and for ever right, and toother side unnat’rally awlus and forever wrong, will never, never do’t. Nor yet letting alone will never do’t.⁶¹

Dickens wanted those responsible for avoidable accidents to be accountable. The disagreement would have been total. Dickens was dismissive of the pigheadedness of the political economists:

Because the Manchester school deserves all the schooling it can get, touching its reduction to the grossest absurdity of the supply-and demand dogmatism ...⁶²

⁵⁶ *Middlemarch* 805.

⁵⁷ Greenleaf, W.H. *The British Political Tradition* (London: Methuen, 1983) 1, 22.

⁵⁸ *Hard Times* 2, 12, 207.

⁵⁹ 3, 8, 277.

⁶⁰ 3, 8, 278.

⁶¹ 2, 5, 149.

⁶² Letter to W.H.Wills 25/11/1862 *Pilgrim Letters* 10, 166.

He deplored parliament and its members, the formal church and its dogmas, the law and lawyers and would not adhere to any one political or economic theory especially if strict and inflexible. Rather as Carlyle he favoured experts who were committed, skilful and knowledgeable such as Coroner Wakley, Police Inspector Field (later Bucket) and Factory Inspector Leonard Horner.

Bramwell referred to Factory Inspectors as ‘wooden images with red clothing’,⁶³ begrudged the Truck Acts because ‘it would be better to teach the wage-receivers to take care of themselves’,⁶⁴ argued that there was no need to extend the factory acts because grown up men could protect themselves by combination,⁶⁵ and was content that employers should seek to impose contracts on workmen seeking to exclude the provisions of the 1880 Employers’ Liability Act since there was no ‘forcing’ but only voluntary action on the part of the men.⁶⁶ He conceded that work should not be excessive and not be injurious to health with time available for fair recreation, education and for the society of wife and children but he opposed statutory imposition of limited hours believing that it was a matter for the men who were the real masters.⁶⁷

George Bramwell was proud of his involvement in the innovation of limited liability companies. He believed that investment in entrepreneurial projects would be encouraged whereas Dickens was generally scathing for he viewed such vehicles as another way for employers and occupiers to avoid their responsibilities. Overtrading and excessive speculation would result. His writers complained of an insurance company which failed to pay its first claim,⁶⁸ deprecated dishonest bankers⁶⁹ satirised greedy businessmen⁷⁰ and scorned the fraudulent promoters of a non-existent railway.⁷¹

⁶³ Fairfield 138.

⁶⁴ 142.

⁶⁵ 143.

⁶⁶ 146.

⁶⁷ Letter 02/02/1891 to *Liberal Unionist* published 01/03/1891, 62, 149.

⁶⁸ Halliday, A. ‘Your Money and your Life’ *A.Y.R.* (30/04/1864) 11, 275.

⁶⁹ Meason, M.R.L. ‘How we floated the Bank’ *A.Y.R.* (31/12/1864) 12, 493.

⁷⁰ Meason, M.R.L. ‘Going into Business’ *A.Y.R.* (13, 20 & 27/05/1865) 13, 378,404 &428.

⁷¹ Meason, M.R.L. ‘Starting the Rio Grande Railway’ and ‘Working the Rio Grande Railway’ *A.Y.R.* (11 &18/11/1865) 14, 368 & 393. Meason, born 1824, military man and journalist worked in India and later as a foreign correspondent and wrote books on fraudulent financial practices.

On the two fictional defences Bramwell was unbendable.⁷² He forever assumed what he set out to prove.⁷³ He believed that the bargain struck by employer and workman for wages excluded any right to damages for injury although a workman might well think differently and pursue a claim. So his argument begged the question. The workman would not know that his wages were calculated to include a premium to cover his bearing such losses. Bramwell believed that there existed a contract under which there was no recourse to damages. There was no provision in it for recovery and none was to be implied. When arguing that workers did not contract in to a right to compensation he forgot that the tort of negligence was sufficiently developed so as to envelop employers and thus required a contracting out rather than in.

Bramwell's idiosyncratic individualism was not later shared by his judicial colleagues. Willes J. and Lord Esher M.R. made inroads into *volenti* and Byles J. and Cockburn L.C.J expressed disquiet on common employment. He was apart from mainstream judicial thought on the topic of vicarious liability believing that a person should be liable for his own mis-deeds but not those of others. Despite his railings against the principle it was well-established. Atiyah also labelled him a fanatic.⁷⁴ Bramwell's views were prejudiced, partial and biased against working people. He wrote to *The Times* on 24 April 1878 on the Employers' Liability Bill:

Anyone with any experience knows the recklessness, not merely of workmen, but of all undisciplined minds.

Yet when it came to working hours these same reckless workmen were the masters who should be left to work or play as they liked. It would be 'intolerable oppression' and the 'grossest tyranny' to stop some men working twelve hours. If they could not fix the time, parliament could not do it either.⁷⁵ He never realised that working people were making a crucial contribution to the wellbeing of the nation and ought to have rights consistent

⁷² The word used by Mrs Gaskell to describe Florence Nightingale. Shelston, A. (2010) *Elizabeth Gaskell* (London: Hesperus, 2010) 65.

⁷³ Atiyah, P. (1979) *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon, 1979) 377 echoing Sir William Holdsworth in *A History of English Law* (London, Methuen, 1965 (1923)) XV, 500 who believed that Bramwell 'fanatically believed the dogma of non-interference with freedom of contract'.

⁷⁴ Atiyah 380.

⁷⁵ Lord Bramwell's letter 02/02/1891 to *The Liberal Unionist* published 01/03/1891.

with that contribution. He failed to see that ‘Laws grind the poor and rich men rule’⁷⁶ and that social inequality nullified the concept of equality before the law:

... no contract [is] worthy of respect unless the parties to it are in relations, not only of liberty but of equality.

... if one of the parties be without defense or resources, compelled to comply with the demands of the other, the result is a suppression of true freedom.⁷⁷

He held little back in court and readily declared that hardship was not a consideration.⁷⁸ He failed to fashion employers’ liability law so as to adequately accommodate the interests of injured people and to make the law a source of guidance for employers. Unlike Mrs Gaskell, Mrs Tonna, Mrs Trollope and Dickens who expressed compassion for working people, he never accepted that with profit came responsibility.

Dickens devoted his efforts in *Bleak House* to a denunciation of the Court of Chancery for its delays and its neglect of the interests of litigants for the benefit of Chancery lawyers.⁷⁹ He wrote about it in ‘A December Vision’:

I saw a great library of laws and law-proceedings, so complicated, costly and unintelligible, that, although numbers of lawyers united in a public fiction that these were wonderfully just and equal, there was scarcely an honest man among them, but who said to his friend, privately consulting him, ‘Better put up with a fraud or other injury than grope for redress through the manifold blind turnings and strange chances of this system.

I saw a portion of the system, called (of all things) EQUITY which was ruin to suitors, ruin to property, a shield for wrong-doers having money, a rack for right-doers having none: a by-word for delay, slow agony of mind, despair, impoverishment, trickery, confusion, insupportable justice.⁸⁰

Yet the concept of equity should have appealed to him as promoting justice at the expense of strict and inflexible law. Equity aligned law and conscience, mitigated hardship and answered to the needs of the community.⁸¹ It would not enforce a contract not freely entered into where there was a large imbalance between the negotiating strengths of the parties. It did not appeal to Baron Bramwell who later wrote to his

⁷⁶ Goldsmith, O. *The Traveller* (Oxford: Oxford U.P., 1966 (1764)) 1, 386.

⁷⁷ Cardozo, B.N. *The Paradoxes of Legal Science* (Westport, Conn.: Greenwood Press 1970 (1928)) 82.

⁷⁸ Concurring in the rating case of *Weavers Hall* (1875) 1 TC 15.

⁷⁹ *Bleak House*, chs. 1-4 & 24.

⁸⁰ *H.W.* (14/12/1850) 2, 38, 265.

⁸¹ Petch, S. ‘Law, Equity and Conscience in Victorian England’ *Victorian Literature and Culture* (1997) 127.

friend Vernon Harcourt describing equity judges as ‘loose dogs’.⁸² In 1872 when hearing a claim about fraudulent share dealing he refused to decide the claim on equitable principles.⁸³ That year he repeated his firm belief in the sanctity of contract:

Where is the injustice of holding people to mean what they say? Where is the injustice of making a man perform what he chooses to promise? I protest I can see none. And to relieve a man from his obligations on some supposed equitable considerations, seems to me to be a mischievous thing. If relief is required, let the legislature interfere. It is there that the remedy must be sought. It is not the function of Courts of law to apply it. They have to administer the law as it is., and any attempt on their part to mend it only leads to uncertainty in the administration of justice.⁸⁴

In 1880 he concurred in the Court of Appeal in a Chancery action:

But it seems that a practice sprang up in the Courts of Equity of disregarding the old sensible rule that a bargain is a bargain, and that people should be held to it, and of making bargains for the contracting parties which they never would have made for themselves. Lord Eldon said that in his time the Court was becoming more and more in the habit of holding people to the contracts they had made.⁸⁵

Equity had started to become more rigid and technical from 1801 when Lord Eldon was appointed as Lord Chancellor.⁸⁶ In *Greaves v Tofeld* Bramwell commented:

... the doctrines of Equity ... seem to me ... the result of a disregard of general principles and general rules in the endeavour to do justice.⁸⁷

And in 1887, concurring in the Privy Council, on the issue of whether a Building Society had acted *ultra vires*:

It seems to me to be so utterly wrong, when people have entered into a defined bargain, that it should be set aside upon some more or less fanciful notion of equity or right, that I will not discuss it. I will say ‘Hold to your bargain’.⁸⁸

⁸² Correspondence Bramwell-Harcourt: Letter 28/11/1871. (Bodleian, Oxford) Sir William George Granville Venables Vernon Harcourt (1827-1904) was appointed Queen’s Counsel in 1866 and became Member for Oxford in 1868 and was encouraged by Bramwell towards further reform of civil procedure.

⁸³ *British and American Telegraph v Albion Bank* (1872) LR 7 Exch. 125.

⁸⁴ *Preston v Dania* (1872) LR 7 Exch.22.

⁸⁵ *In re Arnold* (1880) 14 LR Ch. 284.

⁸⁶ Denning, A.T. (1952) ‘The Need for a New Equity’ (1952) *Current Legal Problems* 5, 1. Lord Denning, as he later became, thought that Parliament was ‘much too busy to do all it should for law reform’ Often valuable reforms were achieved in Parliament but the machinery was ‘slow and uncertain’. 5, 6.

⁸⁷ (1880) 14 Ch.Div.578.

⁸⁸ *Auld v Glasgow Working Men’s Building Society* (1887) 12 HL 203. Bramwell would have had little sympathy for Dickens in his several disputes with his publishers. In 1839 he fell out with Richard Bentley because the agreed terms of contract had become less favourable as Dickens’ literary stature increased. He wrote to Forster 21/01/1839 ‘morally, before God and man, I hold myself released from such hard bargains as these’. *Pilgrim Letters* 1, 494. Early in 1859 he breached his agreement with Bradbury & Evans as to

His stance was well known:

He had great respect for Lord Bramwell; but they knew that he had strong views on the rights of property. He was in favour of the full pound of flesh; and probably would have given a decision in favour of Shylock.⁸⁹

On Chancery lawyers' fees Dickens would have shared his sentiments. Sitting in the House of Lords just prior to retirement Bramwell did not spare equity practitioners:

We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise.⁹⁰

Neither man was a democrat. Dickens gave pleasure to all classes and ages. He admired the ordinary, decent, labouring poor but did not regard them as equals and he evinced no interest in extending the franchise. He described representative government as a 'miserable failure'⁹¹ and reviled both parliament and its members.⁹² In *Hard Times* Mr Gradgrind was:

... sifting at his parliamentary cinder-heap in London (without being observed to turn up many precious articles among the rubbish), and was still hard at it in the national dustyard.⁹³

The Baron was anxious to preserve the influence of 'intelligence and property' and thought that it was not worthwhile to extend suffrage as long as a risk existed of a diminution of that influence. He concluded his letter to the *Morning Herald* thus:

I sincerely trust that if the franchise is lowered, it may be as little as possible, and I firmly believe that if those who will have to vote on it, vote according to their convictions, a measure which I believe to be the first step to an unmitigated democracy would be avoided.⁹⁴

Bramwell saw no contradiction in opposing franchise extension and yet assuming that working people were perfectly capable of looking after themselves in their contractual dealings with powerful employers. He opposed the 'mischievous' Bill to prohibit payment of wages in public houses because it sought 'to protect grown-up men from

the production of *Household Words* for the not very good reason that they declined to publish his self-serving letter about the state of his marriage in *Punch*. *Pilgrim Letters* 9, 54.

⁸⁹ Sir William Harcourt on the Waterworks Clauses Bill *Hansard* HC Deb. (19/02/1885) 294, 886.

⁹⁰ *Salt v Marquess of Northampton* [1891] HL 18-19.

⁹¹ *Pilgrim Letters* 8, 292. Letter 01/03/1954 to his liberal friend Sir Joseph Paxton Member for Coventry.

⁹² Dickens particularly disliked Tories including Disraeli whom he met through W.H. Ainsworth in 1835, and again at a dinner in Manchester in October 1843 and they both attended the same formal dinner in London in May 1870. Slater 218. Disraeli contended that he had never read Dickens' work and he deprecatingly portrayed Dickens as 'Gushy' in *Endymion* (1881).

⁹³ *Hard Times* 2, 9, 191. Also 2, 11, 207.

⁹⁴ (19/01/1860) signed 'L.L.'.

themselves'.⁹⁵ The Baron was a traditional Whig worried about the progressive path that party was following.⁹⁶ He wanted society and the economy to operate without restraint so that rewards would accrue to those who deserved them. Private property was sacred. He wrongly assumed that people were sufficiently rational and altruistic to make society work and overlooked the exploitation of an impoverished workforce, the accumulation of vast wealth by the few and the lack of equal bargaining power between consumers and commercial organisations and between workers and railway companies, mine and factory owners.

Dickens did not approve of trades unions and in *Hard Times* painted union representatives in unattractive colours though he saw that strikes were a possible last resort. Bramwell allowed combination and picketing but was quick to interfere if they involved threats or intimidation.⁹⁷ Dickens, as the other novelists, had a horror of the mob and saw revolution as a tyrannical monster.⁹⁸

Dickens by reason of the knowledge he gleaned for and from his journalism, his experiences as a factory worker, as a law clerk and later as a parliamentary reporter, as a regular acquaintance of Edwin Chadwick, in the Middle Temple eating dinners with aspiring and admitted barristers, as performer in buildings whose integrity was suspect, or at and after Staplehurst as passenger, rescuer, potential claimant and as claims agent, was the best qualified of the novelists to debate with the Baron.⁹⁹ He and Bramwell were emblematic in their opposing positions on *laissez faire* and an humane compensation system. Yet he had tended not to persevere when shown the other side of the argument and would have been nonplussed by Bramwell's immoderate and unwavering line. Whereas, twenty years after the dinner invitation, most judges were enlightened as to the value of working people and the need for their rights to be recognised, Bramwell was, in 1859 and later, intransigent, as father Dombey and unbendable, as Florence Nightingale. His observatory was windowless as to industrial safety and the impact of the three defences.

⁹⁵ (06/03/1883) *Hansard* P.Deb. ser.3, 46 Vict. vol.276, col.1567.

⁹⁶ Fairfield 110. In 1859 Gladstone, aged fifty, having previously stood aside from the two main parties joined the Liberals. The influence of traditional Whigs waned thereafter.

⁹⁷ *R. v Druit et al* (1867) 16 LT NS 855. Also *R v Bailey et al* (1867) 16 LT NS 859.

⁹⁸ Orwell, G. *Collected Essays* (Harmondsworth: Penguin, 1970 (1945)) 48.

⁹⁹ Imbuing Dickens with knowledge of all Bramwell's lifetime works.

However Dickens' debating skills were questionable. Macaulay thought him best at skirmishing and sharpshooting.¹⁰⁰ Unlike the Baron, Dickens did not stick to his course. He either changed his view when given the other side of the problem¹⁰¹ or he moved on to another topic. Dickens in February 1838 had promised to strike 'the heaviest blow' against the employers, whom he then regarded as the enemy, but he never did.¹⁰² He did not have the experience and therefore the confidence to take his readers inside a cotton mill or other manufactory. He never followed up his assurance to Dr Southwood Smith in 1841 that he would visit a coal mine to see children at work underground. Lord Ashley wrote to him on 12 February 1841 seeking to enlist his help by reason of Dickens' 'knowledge of the poorer classes' but Dickens did not produce any material in response¹⁰³ although, in 1843, 'perfectly stricken down' by the Second Report of the Commission.¹⁰⁴ He disappointed Macvey Napier of the *Edinburgh Review* as to the article he had promised to write about those mining children, preferring the easier option of decrying the coal owners and Lord Londonderry in two letters to the *Morning Chronicle* on the Mines and Quarries Act of 1842.¹⁰⁵ His reluctance to campaign for working children is partly explained by his perception that family income would be prejudiced but does not lie happily with the prominence he gave to childhood as a precious state.¹⁰⁶ He omitted from *Hard Times* compelling detail of the factory accident suffered by Rachael's sister. He failed to instruct Henry Morley to produce more hard-hitting pieces on industrial safety when in 1856 Wilson-Patten was steering through the

¹⁰⁰ Letter to McVey Napier (19/10/1842) in Trevelyan, Sir G.O. (ed) *Life and Letters of Lord Macaulay* (Oxford: Oxford U.P., 1978 (1876)) 2, 67.

¹⁰¹ He turned with the tide on the dangers of employment in lead works. He wrote 'A Small Star in the East' *A.Y.R.* (23/05/1868) NS 1, 3, 568 in which he described the risks of ulceration and paralysis. He looked on wretchedly at disabled workers unable to find any work, and suggested cultivation of waste ground and help with emigration as solutions. He was invited to inspect the family-run works where he was interested in the process, concluded that the work was 'inimical to health' but could find no fault in the employers who had 'sidulously' tried to reduce the dangers and so there was 'nothing to be blamed for'. 'New Uncommercial Samples: On an Amateur Beat' *A.Y.R.* (27/02/1869) NS 1, 13, 312. He did not deal with the employers' responsibility for those already disabled by exposure to lead.

¹⁰² See ch.4.

¹⁰³ *Pilgrim Letters* 2, 165n.

¹⁰⁴ Letter to Southwood Smith 06/03/1843 *Pilgrim Letters* 3, 459.

¹⁰⁵ *Pilgrim Letters* 3, 278. Also Tyson, M. (1934) 'A Review and Other Writings by Charles Dickens' *Bulletin of the John Rylands Library* (1934) 18, 177.

¹⁰⁶ Gilmour, R. *The Victorian Period* (London: Longman, 1993) 10. It is certain that Dickens would have disagreed with Pollock C.B. (Bramwell concurring) in *Waite v North Eastern Railway* (1858) EL BL & EL 765:120 ER 695 that a small child was the legal equivalent of a chattel.

Factories Act whose effect was to put back reform by over twenty years and to limit the effects of the 1844 Act. In contrast the Baron was steadfast throughout his judicial career in his views on vicarious liability, on the three defences, on sanctity of contract¹⁰⁷ and on *laissez faire*.

Vernon Lushington was well placed to provide Dickens with detailed instruction as to the fictional defences.¹⁰⁸ The notion that working men consented to undergo risks of a range and sophistication unknown to them at the start of their employment is today widely repudiated as unrealistic and illogical, if not nonsensical. By the end of the century it was not accepted by most of Bramwell's colleagues. Even Herbert Spencer, whom Bramwell so admired, came to accept that to leave one job and take another was merely the exchange of one slavery for another.¹⁰⁹ The defence of common employment lasted longer though its impact was reduced as courts came to find liability on wider bases such as deficiencies in system of work, equipment and supervision. In 1859 these defences were the subject of legal debate but generally accepted as the law and the Baron was dedicated to their efficacy and survival.

Dickens, fully armed, and putting aside his reluctance to provide more work for lawyers, would have disagreed about the defences whose outcome was inhumane and unjust and did not represent law's function. Dickens might have identified the defences as fictions designed to suppress the poor. He used fictions in *Hard Times* to pour scorn on those who, like Bounderby, contended that workers unreasonably expected 'to be set up in a coach and six, and to be fed on turtle soup and venison, with a gold spoon',¹¹⁰ that if efforts were made to hold an employer accountable he would 'sooner tip his property into

¹⁰⁷ Sometimes the Baron was prepared to imply terms. In *Hall v Wright* (1859) EL BL & EL 765; 120 ER 695 he implied conditions into a marriage contract. In *Atkinson v Denby* (1861) 6 H&N 778; 158 ER 321 the insolvent Plaintiff succeeded with his claim for repayment of money wrongly paid to the Defendant when there were other creditors. The Baron, with two others, the trial judge, Martin. B. dissenting, regarded the payment as having been made under coercion. It was a case of oppressor and oppressed though evidently different from the relationship between master and servant. According to the Baron judge-made law, 'most salutary law', as an exception had been engrafted onto the general rule: 789; 325. The Defendant's appeal to Exchequer Chamber failed before Cockburn L.C.J. even though both parties were *in delicto*. (1862) 7 H&N 934; 158 ER 749. In *Makin v Watkinson* (1870) LR 6 Ex. 25 he interpolated into a lease that for the lessor to be liable for want of repair he had first to be given notice of the defect. Baron Martin dissented on the ground that the words of the lease should be adhered to and no extra stipulation imported, a stance usually taken by Bramwell.

¹⁰⁸ Talfourd may have provided information. Dickens' *Household Narrative* provided reports of trials and also of the verdicts of juries who became competent pleaders of the failings of employers.

¹⁰⁹ Turner, J.H. (1985) *Herbert Spencer: A Renewed Appreciation* (London: Sage, 1985) 151.

¹¹⁰ *Hard Times* 1, 10, 72.

the Atlantic’,¹¹¹ that poor people were in default because ‘what one man can do another can do’,¹¹² and that a dissatisfied hand was ‘fit for anything bad’.¹¹³ Dickens sought to disprove these fallacies or fictions.¹¹⁴

Legal fictions were originally used to create new causes of action so as to secure remedies where none otherwise existed but they became ‘dark curtains which obscured realities’.¹¹⁵ Dickens found unlikely common ground with Jeremy Bentham in deploring legal fictions as not conducive to justice and he published articles about them.¹¹⁶ Bentham disagreed with Blackstone who had argued that these fictions, originally designed to refashion feudal law, helped equitable correction of the law. Bentham contended that they encouraged judicial mendacity and made the law inaccessible to all but lawyers. Bentham thought all of the Common Law to be a fiction because it was retrospective and judge-made. Bramwell played his part in simplifying procedure but, with Bentham, deplored equity. Bramwell adhered to precedent when it suited him but would not have followed Bentham in replacing precedent and the Common Law although in both minds was the view that law, whose purpose was the preservation of property, equated with justice (fairness and humanity were not relevant).¹¹⁷ Dickens disagreed.

Dickens was interested in the development of County Courts seeing them as being economic in operation and available to the poor.¹¹⁸ He knew about the concept of Tort as including road collisions resulting in damage to property such as a gentleman’s carriage.

¹¹¹ 2, 1, 113.

¹¹² 2, 1, 118.

¹¹³ 2, 8, 179.

¹¹⁴ Stone, M. ‘Dickens, Bentham and the Fictions of the Law’ *Victorian Studies* (1985) 29, 146.

¹¹⁵ Lord Denning 5, 1.

¹¹⁶ Lady Caroline Norton (1808-1877) campaigned to change the legal lot of married women and received support from an unlikely quarter. Eliza Lynn Linton (1822-1898), a strong anti-feminist, in 1848 became the first female newspaper writer with a fixed salary. In ‘Rights and Wrongs of Women’ (01/04/1854) *H.W.* vol.9, no.210, p.158 she deprecated the notion of woman as a teacher, preacher, voter, judge, naval commander and an army general as ‘an amorphous monster’ and praised woman’s homely ambition and the time she devoted to her hair and her clothes. Yet she supported the call for reform because Lady Norton had laboured hard to show the cruelty of the law and women were entitled to their natural rights and to justice. ‘One of Our Legal Fictions’ *H.W.* (29/04/1854) 9, 214, 257. She was followed by W.H.Wills in ‘A Legal Fiction’ *H.W.* (21/07/1855) 11, 278, 598 supporting Caroline Norton’s letter to Queen Victoria. These persistent literary campaigns helped to bring about real, if limited, legal reform.

¹¹⁷ Postema, G.J. *Bentham and the Common Law Tradition* (Oxford: Oxford U.P., 1986) 271. Bramwell probably read work by Bentham for he borrowed one volume from Edwin Chadwick and returned it on 07/04/1885. UCL Archive. Corresp. Chadwick-Bramwell. By then Bramwell was finding Chadwick rather tiresome.

¹¹⁸ The delay in effecting reform was ‘profoundly unedifying’. Polden, P. *A History of the County Court 1846-1971* (Cambridge: Cambridge U.P., 1999) 35.

He thought the jurisdiction should be extended to Tort subject to the then existing limit of fifty pounds.¹¹⁹ His thinking did not extend to the lot of employees injured at work who might use the County Court to gain redress if the law had favoured such action; the Baron seemed doubtful about the extended jurisdiction.¹²⁰

In his later years the Baron saw no need to acclimatise to the views of colleagues.¹²¹ He failed to recognise that contracting parties, especially if working people, assumed obligations which went to reduce their freedom.¹²² In 1859 the Baron was largely in step with his colleagues on the three defences and Dickens, even if armed and if he had persevered, would not have made inroads into the Baron's position. The Baron did not accept that times were changing and that the rights of working people should be extended rather than suppressed. He should have fitted windows to his observatory.

George Bramwell appears as a model husband and father who was kind to his servants, considerate of his tenants and a major contributor to the welfare of the village of Four Elms. Yet his contribution as a judge was stained by his dogmatism and bias which resulted in the oppression of working people. He was ever alert to an opportunity to preserve the funds of commercial enterprises if the alternative was to divert damages into the pockets of railway passengers and especially of employees. His approach was distributive. He was not a compassionate judge for he disregarded hardship and was incapable of fancy and sympathy. He was emblematic of the extremes of Political Economy, not realising that they could not have universal application, whereas Dickens forewent dogma and favoured such as Coleridge and Southey who denounced Malthus and his supporters. Although Dickens may not have understood the complexities of industrial society he recognised the evils but he feared involvement with the technicalities and did not venture into solutions.¹²³

Against a backdrop of unparalleled upheaval the possibility of host and guest finding any common ground falls for speculation. Dickens came from the lower middle class. He

¹¹⁹ 'Legal and Equitable Jokes' *H.W.* (23/09/1854) 10, 235, 121.

¹²⁰ The Baron favoured a system in the higher courts whereby the parties and witnesses came to London rather than the judges travelling about the country. He worried lest County Court judges would be appointed from 'old failures'. Letter Bramwell to Harcourt 28/11/1871 in the Bramwell - Harcourt Correspondence: Bodleian, Oxford.

¹²¹ Heward, E. *Lives of the Judges* (Chichester: Barry Rose, 2004) 202.

¹²² Farrer, T.H. 'Freedom of Contract' *Fortnightly Review* (1881) 29, 169, 45.

¹²³ Williams, R. *Culture & Society* (Harmondsworth: Penguin, 1971 (1958)) 119.

had experienced deprivation and well knew what it was like to be poor. He empathised with poor people and their children and would have detested the Baron's 1866 judgment in *Mangan v Atterton*.¹²⁴ The Baron came from a more comfortable banking and mercantile background and had no empathy with the poor. In his mind law did not require the deployment of imagination. Dickens, despite his distaste for parliament and the judiciary, sought social justice whereas Bramwell stuck to individualism and limited government as the bases of his creed. Dickens, while a radical and a rebel, made only mild, tentative demands. As an opponent of one exclusive ruling class he was the precursor of the Fabians¹²⁵ and therefore of socialism¹²⁶ though he would not have joined any such formal political body. He opposed extremism, absolutism and therefore fanaticism. As Carlyle he would have liked technical experts to run the country as an accountable elite (though the Fabians required such elite to be democratically elected). He was a moralist and although he attacked institutions he was primarily interested in the improvement of human nature.¹²⁷ Whereas Bramwell might be said to have had one dogma or theory to which he consistently adhered, Dickens was not a man of dogmas or theories.¹²⁸ His main role was that of entertainer and he had a living to earn but he was sensitive to the shortcomings of the law and in his ability to convey them to his wide and beloved readership can be found a goad to action.

Dickens wanted society to be naturally benevolent, sensitive and gregarious. He had grasped the helplessness of well-meaning people in a corrupt society. His approach was founded on heart rather than head. He encouraged fancy and imagination, language possibly derived from *The Merchant of Venice*:

Tell me where is fancy bred
Or in the heart or in the head?¹²⁹

Louisa had lost 'the sentiments of [her] heart'.¹³⁰ She had been taught to 'strive against every natural prompting that has arisen in [her] heart' yet there lingered in

¹²⁴ Hand in the unguarded oil cake machine. See ch.6.

¹²⁵ The Fabian Society was founded in London in 1883 and sought a democratic socialist Britain by evolution.

¹²⁶ Involving a fair share of work and provisions for each and with ideals of justice, liberty and decency. Orwell, G. *The Road to Wigan Pier* (Harmondsworth: Penguin, 1962 (1937)) 149 & 189.

¹²⁷ Orwell, G. (1970) *Collected Essays* (Harmondsworth: Penguin, 1970) 1, 454.

¹²⁸ Eagleton, T. *The English Novel* (Oxford: Blackwell, 2006) 157.

¹²⁹ *Merchant of Venice*, III, ii.

her breast ‘sensibilities, affections, weaknesses capable of being cherished into strengths’.¹³¹ Bramwell believed his own position to be based on reason and practicability rather as Mr Gradgrind before Louisa’s revelations to him:

Some people hold that there is a wisdom of the Head ... and a wisdom of the Heart. I have not supposed so; but ... I mistrust myself now.¹³²

Unlike Mr Gradgrind, Bramwell did not mistrust himself. He neither relented nor repented.

Yet the argument was eminently winnable. Dickens did not have to choose between heart and head (as Thomas Jefferson who considered a romantic attachment to Maria Cosway in Paris in 1786 or as Marianne Dashwood when opting for Willoughby in Jane Austen’s *Sense and Sensibility* of 1811). In the case of the defences, the heart’s inclination was the same as that of the head for Bramwell himself had demonstrated that in landowner claims against statutorily authorised enterprises such as railways it was perfectly logical and practical for the costs of claims to be treated as any normal overhead just as Edwin Chadwick had suggested for railway construction projects as early as 1833.¹³³

Bramwell was a moderniser in his work on limited liability entities, on the re-organisation of the courts and in reforms of the criminal law and the rights of a defendant. He was progressive when offering a civil remedy against a defendant in breach of statute which imposed a criminal penalty, on *Rylands v Fletcher* liability and on *res ipsa loquitur* (which he could have applied more widely). Yet whenever an individual claimant was before him suing a commercial entity he strove to find a way to favour commerce and used the two fictional defences with enthusiasm to the huge prejudice of injured workers. As the dominant judge of his time, he, more than any of his judicial colleagues, was responsible for bolstering those defences so that parliament felt unable to abolish them. A creature of the earlier part of the century, he was hidebound in defending individualism, self reliance and a free market. He may have been ideologically more comfortable with Harriet Martineau as his dinner guest. He did not change course as had J.S. Mill in the face of Coleridge’s Romanticism or as had Mr Gradgrind. Nor did

¹³⁰ *Hard Times* 2, 12, 208

¹³¹ 2, 12, 209.

¹³² 3, 1, 217.

¹³³ See ch.3.

he seek to synthesise the conflicting strands of selfishness and benevolence.¹³⁴ He failed to recognise the need for artists and poets to contribute to social topics. Nor did he abate his utilitarian thesis to incorporate Christian values as did Henry Sidgwick.¹³⁵ His influence over his fellow judges waned as the century moved towards its end. When faced with the intransigent judge, the novelist and part time reformer was not on home territory and would surely have been uncomfortable in the argument. It would have been an unhappy evening. There would have been a collision with minimal common ground as to the stuff of a socially just future.

Law and Literature

It is clear from the literature exactly how it was to journey on a stagecoach and how risk-laden and excited passengers felt when riding on the early trains. The novelists kept away from accounts of railway disasters but such were reported in detail in the press and were the subject of expert formal reports. The accounts of Staplehurst come from the formal report, the contemporary newspaper reports and from Dickens' many letters about his experience.

In the factories cotton and other dust was a well known hazard but medical knowledge was incomplete and insufficient to support a claim. Similarly crippling injuries were known to be caused at work. Both kinds of claim would have been defeated by the defence of *volenti*. The problems were largely solved and the conditions abated before successful actions were brought. The novelists wanted to be rid of the fluff and the unnatural pressures imposed on children's limbs but they were not sufficiently confident of their ground and tended to set their stories decades earlier so as to avoid criticism and controversy as to working conditions at the time of publication.¹³⁶ Because of their lack of direct experience the novelists could not identify particular reforms in industrial safety and worker rights and so tended to look for workers' sanctuaries. Thus Mary Barton lived happily in Canada whereas Michael Armstrong made his escape by joining the middle

¹³⁴ Capaldi, N. *John Stuart Mill* (Cambridge: Cambridge U.P., 2004) 25 & 89.

¹³⁵ Sidgwick countenanced government intervention with effective aid whenever there was acute distress caused by changes in trade. *Principles of Political Economy* (London: Macmillan, 1901 (1883)) 508.

¹³⁶ Davis, P. *The Victorians* (Oxford: Oxford U.P., 2002) 238.

class, Stephen Blackpool suffered a martyr's death and Helen Fleetwood faded away due to her terrible work conditions.

Since parliamentarians paid little regard to public opinion and since no political party of the period thought that it had any responsibility to see to the interests of the poor the judiciary did not initially demur. An adequate system of damages recovery for workers was slow to evolve. Trades Unions were not sufficiently powerful and were not always agreed on their priorities. There was no established habit of employers' liability insurance. The courts should have removed the burden from the parish and imposed it on employers earlier and George Bramwell's approach, initially shared by his fellow judges, was partly causative of that delay. The public and the novelists for much of the century were unaware of what the judges had conjured. The outcome was not the abolition of the fictional defences but instead the introduction of the 1897 scheme which was not fault-based and which prevailed as one option of two until 1945.

Literature may be subversive and may stimulate the imagination ('fancy' in *Hard Times*), inculcate passion and, after identifying social problems, encourage compassion.¹³⁷ Thus the imbalance in society between rich and poor and between master and hand was exposed in *Mary Barton* where Job Legh debated with the bereft elder Carson¹³⁸ who afterwards set about improving working practices in Manchester.¹³⁹ Although Harriet Martineau saw many manufacturing processes, Fanny Mayne went down a mine, Geraldine Jewsbury knew about textile factories and Frances Trollope visited northern mills, most novelists were hamstrung by their lack of technical knowledge of industrial production and lack of knowledge of employers' liability law. Even the compassionate were restricted to expressing a righteous sentiment:

My poor Mary Barton is stirring up all sorts of angry feelings against me in Manchester; but those best acquainted with the way of thinking and feeling among the poor acknowledge its truth ... because evils being once recognised are halfway on towards their remedy.¹⁴⁰

And:

¹³⁷ Nussbaum, M. *Poetic Justice* (Boston: Beacon, 1995) chs. 1&2.

¹³⁸ *Mary Barton* 383.

¹³⁹ 388.

¹⁴⁰ Chapple, J.A.V. & Pollard, A. (ed.) *The Letters of Mrs Gaskell* (Manchester: Manchester U.P., 1966) Letter 39a 13/01/1849 to Edward Holland, 826.

To interest and affect the general mind on behalf of anything that is clearly wrong – to stimulate and rouse the public soul to a compassionate or indignant feeling that *it must not be* without obtruding any pet theory of cause or cure ... I believe to be one of fiction's highest uses.¹⁴¹

In order to tell readers of the iniquities of industrial life they relied on Blue Books, the *Blincoe Memoir* and/or the Reports of William Dodd. Dickens, particularly, was clear that with profit from industry came responsibility for the welfare and safety of the workforce. His view slowly but eventually prevailed but did not impact on the three defences because he had not identified the compensation system as one means of correcting the imbalance between rich and poor and had not latched onto Chadwick's campaign to transfer responsibility to employers.

Dickens brought to public attention deficiencies in the law and its practice in *Pickwick Papers*, *Oliver Twist* and *Bleak House*. Lord Denning wrote:

... the novels by Charles Dickens ... did more for law reform than all the treatises of Jeremy Bentham.¹⁴²

Holdsworth described Dickens' treatment of law and lawyers as 'a very valuable addition to our authorities'.¹⁴³ However in *Hard Times* Dickens managed less than he should partly because he shied away from controversy but mainly because he lacked some legal and much mechanical knowledge. Nevertheless he succeeded in stimulating the reader's fancy. It cannot be contended that Dickens or any of the novelists contributed to specific reforms of industrial safety and employers' liability law although Raymond Williams thought Dickens 'a social ... and committed novelist' whose criticism was 'pervasive and imaginative'.¹⁴⁴

With Dickens' imagination and vision he provided his and succeeding generations with an immense volume of glorious work which gave both pleasure and challenge. He saw the sunshine above the world's dark places.¹⁴⁵ As his daughter Katie put it 'He was not a good man ... but he wasn't fast ... he was wonderful'.¹⁴⁶ Dickens made clear:

¹⁴¹ Dickens' letter 24/08/1854 to the American publisher and political economist Henry Carey (1793-1869) *Pilgrim Letters* 7, 405.

¹⁴² Denning, A.T. *What Next in the Law?* (London: Butterworths, 1982) 83.

¹⁴³ Holdsworth, W.S. *Charles Dickens as a Legal Historian* (New Haven: Yale U.P., 1929) 1.

¹⁴⁴ 'Social Criticism in Dickens' *Critical Quarterly* (1964) 6, 216.

¹⁴⁵ Gissing 174.

¹⁴⁶ Hibbert 268.

A nation without fancy, without some romance, never did, never can, never will, hold a great place under the sun.¹⁴⁷

As to the Points of Enquiry the conclusions are that the social-condition literature of the mid nineteenth century provides a helpful and seamless supplement to legal history and that this study goes a modest way to making up the shortfall in the canon ; that, of the four ‘compassionate’ novelists, Dickens was the most influential by reason of the wide circulation of his novels and journals and his life experiences in and close to the law, at and after Staplehurst, and in a Sunderland theatre; that the dominant and unbendable Baron Bramwell was invariably biased against personal injury plaintiffs, that he incorporated political theory into his judgments and court conduct to an extent that was unusual then and which would be unacceptable today, that this political theory was extreme and, after 1860, no longer prevalent; yet his stance was a major factor in the inability of the legislature to abolish the entrenched common law defences which prevented injured workmen from recovering damages and in parliament’s decision to introduce an alternative collectivist statutory system in 1897. At dinner there would have been minimal common ground on the issue of capitalist society’s responsibilities and the need for regulation to protect working people.

So this multi-disciplinary enquiry, incorporating material from different kinds of sources, enabled consideration of the function and effect of the novel, of conflicting views as to the need for state regulation, of the duties of that society to the poor and for the employed, of the responsibilities of employers for industrial safety, and of the need for an humane compensation system. It has not been possible to demonstrate that Dickens and the other compassionate novelists brought about specific industrial reforms but they informed their readers of the issues and conditions and helped to identify the problems. Their mitigation was that they had livings to earn as writers, and in Dickens’ case, as editor and as performer. Yet they provided rich materials in their texts (including accounts of accidents used as plot devices) worthy of modern analysis. Their contributions were inevitably uneven but, subject to strict selection, their works assist in a modern understanding of mid-nineteenth century legal history and raise issues which resonate today.

¹⁴⁷ ‘Frauds on the Fairies’ *Household Words* (01/10/1853) 8,184, 97.

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21/06/1856 'Navvies as they Used to Be' [Brown, H.J.]
06/09/1856 'Signals and Engine Drivers' [Head, J.O.]
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- 17/12/1859 'My Railway Collision' [Thornbury, G.W.]
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