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**Vincent v. Lake Erie Transportation Company: Liability
for Harm Caused by Necessity**

The Storm and the Escape of “the Reynolds”

In the evening of November 27, 1905, a ferocious storm struck Duluth, Minnesota. Although Duluth’s port in the early 20th century was one of the busiest in the world, by 10:30 p.m. that night shipping traffic had been suspended. A combination of fierce winds that eventually reached about 70 miles an hour and heavy snow brought visibility down to nearly zero. The storm caused rough and high waves that pounded against and over Duluth harbor’s many docks. With gale winds that did not abate until mid-day on the 28th, the tempest left great destruction in its wake.

Eighteen ships were damaged or destroyed by the storm, including the Mataafa, a 430 foot long iron ore carrier, whose name the storm has since carried. Thirty-six lives were lost, as well as considerable cargo. Afterward, many old-time Duluth seamen swore that the Mataafa Blow was the worst they had ever known, and Duluth weather records show that it would be another 70 years before the area experienced as severe a storm.

The steamship S C Reynolds, subsequently known to generations of law students, was one of many vessels to enter Duluth harbor earlier in the day of the big storm. Built in 1890 for the Lake Erie Transportation Company, a subsidiary of the Wabash Railway, the Reynolds had always plied the Great Lakes as a cargo ship. That season she was under charter to Anchor Lines out of Toledo, Ohio, and on this voyage she was set to discharge most of her cargo at the City Dock in the port of Duluth. More than 250 feet long, 40 feet wide, and made of steel, the Reynolds was under the command of Captain T. C. Herrick. Herrick had been a captain of steamships for more than thirty years and had been sailing freighters in Duluth for more than ten.

Like many other captains that day, Herrick was no doubt initially pleased with the fairly calm weather he found at Duluth upon the Reynolds’ arrival late in the afternoon of the 27th. Another big storm had passed through Duluth on November 23-24, and the end of the fall season was fast approaching, as Duluth’s port was traditionally closed to shipping from the start of December until April, owing to the rugged winters along the western shores of Lake Superior.

As the Reynolds came abreast the City Dock between 4 and 5 p.m. that afternoon, those in charge of the dock positioned her, not along side the dock where she would be

closest to the shore, but rather along the exposed end of the dock that stuck out into the harbor. There was nothing uncommon about docking at this location, however, and a crew of stevedores was on hand to unload the cargo, which commenced around 5 p.m. Following a break of about an hour for dinner, the work continued until it was completed at around 10:30 p.m.

Although the storm was then raging, Captain Herrick nonetheless sought to push off, and signaled to the Union Towing and Wrecking Company to send tugs for assistance, which was the routine practice in heavy weather. No tugs were provided, however, because those in charge of Union Towing had concluded by then that it was too dangerous, even with tugs, for any ship to attempt to leave the port.

At that point, Captain Herrick concluded that it would be foolhardy to try to leave on his own. So, rather than pushing off, he ordered his men to do what they could to secure the Reynolds to the dock. Herrick was by then clearly aware that were his ship to come free, it would likely crash into another ship or some other pier or perhaps simply sink because of the rough seas in the harbor. His crew's effort, which involved the ongoing replacement of ropes as they chaffed, was a success, and the Reynolds was saved the fate of the many other vessels that were lost during the night and the next morning. Eventually, in the afternoon of the 28th when the storm subsided sufficiently, the Reynolds safely pulled away from the City Dock.

The Lawsuit – Participants, Pleadings, and Trial

Although the Reynolds escaped the Mataafa blow unscathed, the owners of City Dock claimed their property was seriously damaged by the Reynolds' relentless pounding into the dock during the storm. As a result, plaintiffs R. C. Vincent and Lillian M. Kelly filed a lawsuit in state court against the Lake Erie Transportation Company, owner of the Reynolds. Plaintiffs sought damages in the amount of \$1200 (roughly the equivalent of \$25,000 today).

Vincent is famous now as the seminal case in which a party, acting out of necessity, intentionally enters (or uses) another's property for his benefit, and, even though that necessity privileges the entry (or use), the actor is nonetheless held liable for harm done to the property regardless of whether the actor was at fault or not. Although not typically characterized in this way, this is a form of strict liability imposed on permissible self-help efforts, and it stands in contrast to most of contemporary tort law that conditions recovery on proof of fault.

Vincent now appears in all of the leading casebooks and in the Restatement of Torts as part of the law of intentional torts. But, as will be explained, before the case reached the Minnesota Supreme Court it was formally cast as one involving the defendant's negligence, although the plaintiffs' lawyer appeared to oscillate between two very different notions of what it means to be negligent. The majority of the Minnesota Supreme Court viewed the case very differently, handing down a memorable opinion

filled with intriguing analogies that are perhaps far less persuasive than the justices imagined. But that is getting ahead of our story.

Vincent pitted two experienced Duluth attorneys against each other. Plaintiffs engaged E. F. Alford from the Duluth firm of Alford & Hunt. Alford had been admitted to the Minnesota bar in 1893 and had served in the Minnesota legislature from 1900-02. Duluth admiralty lawyer Henry Ransom Spencer represented the defendant. Spencer too had served in the Minnesota legislature, and in 1895 he had published a Treatise on the Law of Marine Collisions. Although Alford and Spencer surely knew each other, this did not prevent both from vigorously making objection after objection to questions put to witnesses by the opposing lawyer during the trial.¹

Vincent was tried before Judge Josiah D. Ensign and a jury of twelve, with the trial commencing on September 14, 1908. This was less than four months after the state court complaint was filed, an incredibly rapid pace for litigation as compared with common experience today.²

At the pleading stage, Alford squarely cast the plaintiffs' lawsuit in terms of fault, claiming that the defendant had negligently kept the Reynolds tied to the plaintiffs' dock. In presenting the plaintiffs' side of the case at trial, however, Alford did not even to try to prove that Captain Herrick had been negligent in the way we now understand the term. Alford first called two witnesses who basically testified that they saw the ship tied to the dock and they saw the damage it did to the dock. These two witnesses were F. H. Bidwell, who was the manager of the City Dock at the time of the famous storm, and W. H. Brewer, who had then been an assistant to Bidwell and who had become the dock manager by the time of trial. Alford also called R. C. Vincent, one of the plaintiffs, and offered depositions and interrogatories of two additional witnesses, O. S. Olson and George Vincent. Alford's purpose was to use the testimony of these three men to prove the amount of damages that the Reynolds did to the dock.

Nowadays, we clearly understand that negligence requires a showing by the plaintiff that a reasonable defendant would have acted differently. Therefore, based on the evidence discussed so far, if Alford's claim is to be viewed as truly based on our

¹ Alford had originally filed Vincent and Kelly's claim in federal court in admiralty. The appropriate scope of admiralty jurisdiction was contested in that era, however, and at that very time defendant's lawyer Spencer was involved in a case that was decided by the U.S. Supreme Court on February 24, 1908. In that case, *Duluth and Superior Bridge Company v. Steamer "Troy,"* 208 U.S. 321 (1908), owners of a draw bridge brought an action *in rem* against the steamer Troy that struck and damaged the bridge. On the same day, the Court first decided a case concerning a ship that damaged a dock, a pier, and a bridge, and concluded that those properties pertained to commerce on land and were not aids to navigation in the maritime sense, *Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co.,* 208 U.S. 316 (1908). On that basis, the Court concluded that there was no U.S. admiralty jurisdiction over the matter merely because a ship was involved (contrary to what then appeared to be the law in England). That decision doomed the plaintiff's case in the *Troy* decision as well, and, in light of these outcomes, Alford re-filed his claim a few months later in state court.

² Yet, it is to be noted that the depositions used at trial had been taken earlier while the case was pending in federal court, see note 1 *supra*.

current understanding of negligence, his was a very aggressive position, because it essentially asserted that the reasonable thing to have done was to sacrifice the Reynolds. Although it is not known from the historical record how much the Reynolds was worth at the time, it seems clear that its value was a great deal more than the amount of the damage it plausibly could have done to the dock. Hence, if Captain Herrick were to be judged at fault, it seemingly would be for causing a small harm by failing to incur a much larger one. In the 21st century at least, it is hard to view someone as negligent on that basis.

It is not surprising therefore, that, when the plaintiffs completed their part of the case, Spencer, the defendant's lawyer, moved to have the case dismissed on the ground that no proof of fault had been offered. Although there seemed to be considerable merit to the defendant's legal position, Judge Ensign denied the motion.

Notwithstanding the way we would today interpret his pleadings, it appears that, in presenting his case, Alford was actually relying upon the legal theory that, if plaintiffs could prove that the defendant's ship damaged their dock, they were entitled to recovery, unless the defendant could prove that the harm was the result of an inevitable accident. Moreover, Alford viewed the idea of an inevitable accident narrowly. In effect, his position was that if there was any way that the defendants could have avoided the harm to the dock but they chose not to take that step, the accident was not inevitable. Clearly, Alford believed he would win were this legal theory accepted because harm to the dock presumably could have been avoided had the Reynolds merely been cut loose, albeit with the probable loss of the ship (and possible damage to other ships or docks in the harbor). Put differently, because the defendants chose to keep the vessel securely tied to the dock, this made the harm to the dock no longer an inevitable accident, but rather something of a deliberate outcome.

This way of thinking might imply that one should be deemed "negligent" for knowingly taking a substantial risk to another, regardless of the reasonableness of that risk – a very different view of negligence than we have today, but one which was supported as late as 1951 in a well known concurring opinion by Lord Reid in a famous English case involving a passerby who was struck by a cricket ball that was hit beyond the cricket field.³

Later, in his brief on appeal, Alford traced his legal theory to a maxim from Blackstone: *Sic utere tuo ut alienum non laedas* -- use your own property in such a manner as not to injure that of another.⁴ A narrower way of putting this claim might be to restrict it to instances in which the defendant intentionally used and then harmed the plaintiff's property in order to obtain a benefit from that property. Either way, although it seems odd today to consider it necessarily *blameworthy* merely for one to put her interests ahead of those of another, possibly Alford sensed that what people would find blameworthy was the failure to offer to pay for the harm done in such instances.

³ Bolton v. Stone, [1951] A.C. 850.

⁴ Blackstone, 's Com. Book III, page 217.

Oddly, Alford appears to have had something of a change of heart later in the trial, because, after the defendants put forward their side the case, he belatedly introduced evidence seemingly intended to prove specific acts of negligence by the defendants after all -- the failure initially to tie up the Reynolds elsewhere than at the exposed edge of the dock, the failure to move the Reynolds earlier in the evening during the unloading as the weather turned worse, and the failure to move the Reynolds to a position of greater safety along the side of the dock after the unloading was completed. If proved, any of these would certainly have been a proper ground for finding the defendants at fault in today's sense, thereby clearly vindicating Alford's initial pleading.

However, from the written record of the testimony, the evidence Alford presented concerning the defendant's fault seems weak. Moreover, by that point in the trial, the defendant had already introduced considerable testimony by other experienced local ship captains, sailors from the Reynolds, and seamen who had staffed tugboats in Duluth harbor on the day of the storm to the effect that Captain Herrick had, in all respects, acted reasonably.

Because the Reynolds had been in the Duluth harbor several times earlier that season, Herrick was surely well aware of where he might tie up. But he testified that on November 27, 1905 the Reynolds was put where she docked at the direction of those operating the dock, and there is no evidence that anyone thought that a foolish thing to do at the time. Indeed, Herrick stated that at around 5 p.m., when he tied up to the dock, the weather conditions were not unusual and that he had actually steamed into the dock without the assistance of tugboats. Alford challenged no aspect of this part of Herrick's story on cross-examination.

Apparently in hopes of helping to prove the great danger she faced if the Reynolds were set loose late in the evening without the assistance of tugs, Spencer sought to have several of his witnesses testify as to the many other ships that went down in the Mataafa storm. But Alford objected to such questions at every opportunity, and Judge Ensign sustained those objections. The effectiveness of those objections must be doubted, however, first because a few witnesses off-handedly blurted out references to the storm and its general consequences before objections could be made, and, second, because surely every juror in the case must have been well informed about the Mataafa storm anyway.

In rebuttal to Spencer's side of the case, Alford introduced the pre-trial deposition he had taken of Herbert W. Richardson, who had been in charge of the United States Weather Bureau at Duluth on the days of the storm, as well as two exhibits, which were the official weather records made by Richardson on those two days. The first of these exhibits shows that the wind, which was less than 20 miles an hour before noon, had picked up to 34 miles an hour by 4:52 p.m. the approximate time when the Reynolds docked. The exhibit also shows that snow began at 6:30 p.m. and that the wind continued to increase reaching 54 miles an hour at about the time the Reynolds had finished unloading and 62 miles an hour by 11:58 p.m. According to the second exhibit, the wind

continued at more than 60 miles an hour during the night, reaching a maximum of 68 miles an hour between 8 and 9 a.m. on the 28th. At noon, however, it suddenly calmed down considerably, and by 1 p.m. on the 28th was back to below 40 miles an hour for the rest of the day. The first exhibit also shows, and Richardson confirmed this in his deposition, that a storm warning had been given at 10:00 a.m. on the 27th (which warning was also published in the evening paper) with all ships told to remain in port because of the very dangerous storm that was expected (although notes on the exhibit show that in fact several large craft actually departed late in the afternoon, presumably around the time the Reynolds docked).

The problem with this evidence from the perspective of proving fault on the part of Captain Herrick is that the dock manager Bidwell and his assistants surely were also aware of the storm warning and yet did nothing to direct Herrick to tie up the Reynolds at what might possibly have been a safer spot along side the City Dock instead of out at the end where she was placed. Indeed, to the extent that the failure to act on Richardson's storm warning made Captain Herrick negligent, that failure to act implied contributory negligence on the part of those in charge of the dock (which would have been a complete defense in the early 1900s). So, too, as for moving the ship either before or after the unloading was complete, again there was no suggestion from the dock operators that, in view of the storm warning and the increasing wind, they believed that the Reynolds should be shifted.

To bolster the assertion that the Reynolds should have been moved to a safer place, Alford called Captain Alexander McDougal. McDougal claimed that the proper, and rather easy, thing to do was to shift the Reynolds away from the end of the City Dock to the side, where she would be more sheltered by lying between the City Dock and the next dock to the west. McDougal asserted that this is what Herrick should have done earlier in the evening as the storm grew, and that this is as well what Herrick should have done once the unloading was complete and the tugboats were unavailable. Moreover, Captain McDougal testified that had the Reynolds been moved as he proposed, then not only would the dock not have been battered, but the Reynolds itself would not have been harmed. If believed, this is rather powerful expert testimony for the plaintiffs.

Yet, in his cross-examination, Spencer made considerable headway in undermining McDougal's credibility on the issue of what Captain Herrick should have done. Most importantly, McDougal, who was age 62 at the time of the trial, conceded that he had not been active as a captain for a quarter of a century, had not been present in Duluth during this storm, and had last commanded a wood, not a steel, ship. Although there is no way to know, it would be surprising if McDougal's testimony was ultimately convincing to the jury. As Spencer later wrote in his brief on appeal: "By reading the testimony of Captain McDougall {sic} it is apparent that he has reached that complacent period in life when old men look back upon what they did, when young, when everything is measured by the magnified prowess of their own youth."

At the end of the trial, Judge Ensign rejected Spencer's motion for a directed verdict for the defense, and then both sides submitted jury instructions. Alford's

proposed instructions make no mention of negligence or any of the alternative actions that Captain McDougal argued Captain Herrick should reasonably have taken. Instead, Alford stuck with the approach underlying his initial presentation of the plaintiffs' case – that if the Reynolds damaged the dock, the defendants were liable unless the damage was the result of an inevitable accident.

Spencer's proposed instructions first include the proposition that if the defendant had acted lawfully and with the proper precautions, any harm to the dock was the result of an inevitable accident. They also include the conventional fault-based proposition that no recovery is to be allowed if the master and crew of the Reynolds "endeavored by every means consistent with due care and caution and a proper display of nautical skill to move said steamer from plaintiffs' dock after delivery of the goods consigned to the City dock..."

Judge Ensign generally accepted Alford's proffered jury instructions, rejected most of Spencer's and went on to give a rambling, repetitive, somewhat incoherent and, to today's way of thinking, internally conflicting set of instructions to the jury.

On the one hand, Judge Ensign repeated several times that the jury had to find that the defendant was negligent before it could find for the plaintiffs, and this was the one important place in which he actually gave Spencer's requested instruction about fault just quoted above. But the judge also gave the plaintiffs' requested jury instructions about the defendant being liable if its ship caused harm and this was not the result of an inevitable accident narrowly defined (having refused Spencer's requested instruction to include within the definition of an inevitable accident harm that occurs notwithstanding due care having been taken by the defendant). Ensign also put forward Blackstone's maxim noted earlier about using your property in a way that it does not injure another. He then further stated "The defendant had no right to save its ship at the expense of the plaintiffs and if it was to save – that is, in saving its ship – if it was so saved and damage was done to the defendant {here Ensign must mean either "by" the defendant, or to the "plaintiff"} by reason of its laying at the dock and being saved, *and the defendant was negligent*, then the defendant should be liable for that damage." (emphasis supplied)

If the jurors followed Ensign's instructions, they probably would have been puzzled by exactly what they were supposed to decide if they concluded that the harm to the dock was not an inevitable accident in the narrow sense, but that the defendant had exercised due care under the circumstances by choosing to keep the Reynolds tied up.⁵

⁵ This was a disappointing performance from a prominent judge who, having gone on the St. Louis County (Duluth) bench in 1889, had many years of judicial service by the time the *Vincent* case came before him. Having originally moved to and opened his law practice in Minnesota in 1868, Ensign was one of a group of men granted a franchise for a street railway in Duluth and he became a director of the First National Bank of Duluth. A Republican, Ensign was elected Mayor of Duluth in 1880 and again in 1884.

On September 17, 1908, the jury in the *Vincent* case returned a verdict in favor of the plaintiffs in the amount of \$500. As noted above, Alford had claimed damages of \$1200. There are two very different explanations for the size of the award.

One explanation is that the jury believed that the dock was damaged in the amount of approximately \$1000 but that, despite the judge's instructions, the jurors thought it fairest for the loss to be shared by the two essentially innocent and reasonable parties. On this theory, the jury deemed the Reynolds' operators to be at fault even though they were not, but then asked them to pay for only half of the harm done. While completely at odds with tort law's all-or-nothing outlook (especially in an era when contributory negligence was a complete defense), what might be termed a "compromise" verdict would be viewed by some as a highly just result.

A different explanation rests on the difficulties that Alford had in proving what might have been thought a simple point – the amount of damage to the dock. As already noted, his strategy was to have plaintiff R. C. Vincent testify as to how much he paid to fix the dock and then to use a deposition from O. S. Olson, the foreman for Whitney Brothers who repaired the dock, to confirm that they indeed did the work and that is what they charged for it. But Spencer sniped at this effort relentlessly. One attack was that Whitney Brothers might have overcharged. Another was that they might have billed for repairs that had nothing to do with damage done during the Mataafa storm. Along these lines Spencer insinuated that since Olson had not been there at the time of the storm and did not make the repairs in June 1906, Olson could have no idea whether he was actually repairing damage done later on by other ships, well after the Reynolds was long gone. During all of this, despite a slew of Spencer objections, Alford somehow managed to get Vincent to estimate, based on his expertise in the business, that the damage done to the dock was about \$1000 worth and to disclose that Whitney Brothers' repair bill was \$932.09. Alford also disclosed that the dock, in good repair, was worth about \$23,000.

Spencer did not give up, however. One defense witness, Peter Grignon, who had been repairing docks in Duluth for 10 years, claimed that the cost of repairs should only have been \$400. Spencer called several other witnesses who testified that the storm itself battered the dock and caused it harm. Surely this damage was not chargeable to the defendant, even if Captain Herrick had been at fault in not moving the Reynolds. Indeed, some defense witnesses asserted that the Reynolds never actually touched the dock. Rather, although it was tossed about by the waves and the wind, and although it was carefully tied to the dock by ropes, the ship somehow miraculously avoided striking the dock itself. On this theory, presumably, all of the harm was done by the storm on its own. However, evidence from plaintiffs' witnesses that repairs were needed only at the place on the dock where the Reynolds was tied up seemed to counter this argument rather persuasively. Nonetheless, it is possible that after all of this question-raising, the jury concluded that the amount of harm actually done to the dock by the ship was just the \$500 it awarded.

The Appeal

Six months later, on March 20, 1909, Spencer filed motions for a judgment notwithstanding the verdict and in the alternative for a new trial. These were denied, and on May 24, 1909, Spencer served on Alford a notice of appeal to the Minnesota Supreme Court. This section critically examines the arguments made in the briefs for both sides, and provides a background against which the court's opinion, discussed later, can be viewed.

Spencer's brief on behalf of the defendant was a very substantial piece of work. Nearly 80 pages in length, it alleged 33 errors in the trial of the case – 14 concerning rulings on matters of evidence, and 15 concerning charges to the jury, plus the failure of the judge to grant Spencer's 4 motions -- to dismiss, for a directed verdict, for a judgment notwithstanding the verdict, and for a new trial.

As might be expected, Spencer argued that, apart from the testimony of Captain McDougal, which he dismissed as unpersuasive, there was no evidence upon which the jury could find that Captain Herrick was negligent. And Spencer cited several cases in which ship and railway owners had escaped liability for damage done by their property because the defendants had not been at fault. These cases appear to be ones in which storms of various sorts overwhelmed the defendants' efforts, such as blowing the defendant's ship into the plaintiff's barge. Just as he claimed at the trial, Spencer asserted that the harm to the plaintiffs' dock in the *Vincent* case was also the product of an inevitable accident.

When he came to discuss jury instructions that Spencer argued should not have been given, he gave special focus to the instruction quoted earlier in which Judge Ensign talks about the defendant having no right to save its ship at the expense of the plaintiff. To this Spencer argued "As between two equally innocent parties, how can the Court saddle such a damage on to one rather than the other?"

In support of the view that in such circumstances the loss should fall on the plaintiffs, Spencer cited the case of *The Chickasaw*,⁶ a case decided by what was then a federal court of appeals for Western Tennessee. There a steamship, the *Chickasaw*, was in the process of taking on coal from a barge that was tied up along side the steamship when a large piece of timber suddenly floated down the river and struck the barge. When it seemed clear to the *Chickasaw* operators that the barge was about to sink and smash into their boat, those in charge ordered the lines to the barge cut so as to avoid the injury. Alas, rather than harmlessly sinking, the barge floated down the river and struck another steamship. The owners of that ship sued the owners of the *Chickasaw*, but the defendants won the case. Although a case in admiralty and hence perhaps not technically applicable to common law decisions, the *Chickasaw* decision might seem at first blush quite parallel to the *Vincent* case. After all, the *Chickasaw* operators acted to save their own property at what turned out to be the expense of the plaintiff, and yet the defendant was held not liable.

⁶ 41 Fed. R., 627 (1890).

But in deciding the *Chickasaw* case, the court stated that it was “not foreseen” that the coal barge would keep afloat and therefore be in a position to harm the plaintiff’s ship. To try to fit within this phrasing, Spencer then stated about the Reynolds “There was no design to shift the danger to the plaintiffs by remaining at the dock. In fact it was not anticipated that any damage would be done.” The problem with this argument, of course, is that when Captain Herrick decided not to depart and instead ordered the Reynolds secured to the City Dock, damage to the dock was hardly unforeseeable.

Alford’s brief for the dock owners began with a statement that might seem surprising in view of what seemed to be Alford’s legal position earlier. In that statement Alford simply argued that the defendant was evidently negligent – negligent in initially tying up at the exposed end of the dock when a storm was plainly brewing, negligent in continuing to unload rather than moving the ship as Captain McDougal testified should have occurred as the storm grew, and negligent again in not sliding the ship into a safer location after the unloading was finished. According to Alford, by keeping the Reynolds at the exposed end of the dock, the defendant unreasonably endangered the plaintiff’s dock and was properly found liable by the jury for the harm done. One explanation for Alford taking this approach, of course, is that his clients won below and the trial judge, arguably, charged the jury in terms of negligence; therefore, to protect his verdict, Alford might have felt no need to argue for the Blackstone maxim or any other legal theory that sounded more like strict liability.

However, as soon as he began the “argument” section of his brief, Alford immediately returned to the Blackstone maxim. Moreover, he deftly turned the defendant’s reliance on the *Chickasaw* case around by emphasizing what was noted above – namely that *if* the foreseeable consequences of cutting the coal barge loose would have been to harm the plaintiff’s steamship, *then* the implication (albeit not the holding) of the *Chickasaw* decision was that the defendant would have been liable. And here in the *Vincent* case, Alford must have felt on reasonably safe grounds in asserting that the natural and probable consequence of tying the Reynolds to the City Dock during the ferocious storm was damage to the dock.

Notice that Alford might also have distinguished the *Chickasaw* case in a different way. There, the *Chickasaw* operators in no way used the plaintiff’s steamship in order to obtain a benefit from it; but in *Vincent*, those in charge of the Reynolds clearly did use the plaintiffs’ property in order to obtain a benefit. Alford, however, did not pursue this line of argument.

The Decision in *Vincent v. Lake Erie Transportation Company*

The five-member Minnesota Supreme Court heard the case and on January 14, 1910 issued a divided (3-2) opinion upholding the plaintiffs’ victory in the court below. This section provides a detailed description and critique of the reasoning offered by the majority, as well as a few words about the disappointing quality of the dissent.

Associate Justice Thomas Dillon O'Brien, who had been appointed to the Court only a few months earlier, wrote the opinion for the majority.⁷ Justice O'Brien quickly dispatched the claim that Captain Herrick had been negligent, notwithstanding the apparent jury finding that he was. As O'Brien saw it, even if it might have been possible to move the Reynolds in the way imagined by plaintiffs' witness Captain McDougal, it was not negligent to fail to try. Rather, according to O'Brien, the record clearly supported the defendant's position that it was "prudent seamanship" to keep the Reynolds where she was once the cargo was unloaded. As for any possible fault in not moving the ship earlier, O'Brien simply concluded that the storm turned out to be far more violent than could have reasonably been anticipated and therefore it was plainly reasonable both to dock where the Reynolds first tied up and to keep her there during the early evening of November 27 as she was being unloaded. In short, by the time it was appreciated just how ferocious the Mataafa blow was becoming, it was too late to expect Captain Herrick to do more than he did, which was to tie down as snugly as possible.

O'Brien also made clear that had the Reynolds damaged property in the Duluth harbor as a result of what Alford had termed an inevitable accident narrowly defined, then the defendant would not be liable. O'Brien gave two such examples: 1) a ship entered the harbor and was blown against the dock, or 2) a ship was tied to a dock but was blown loose by the storm and struck another ship or dock.

This case, however, was different. Here, rather, "the defendant prudently and advisedly availed itself of the plaintiff's property for the purpose of preserving its own more valuable property..." and for the consequences of those "deliberate... and direct efforts" the defendants were liable. No mention was made either of Blackstone's maxim or the holding and dicta of the *Chickasaw* case.

One explanation for O'Brien's approach in crafting the *Vincent* opinion is suggested in a memorial published in the Minnesota Reports following O'Brien's death in 1935. Among the tributes to O'Brien from various judges is this observation by then Justice Royal A. Stone, who had been O'Brien's law partner during much of the period 1907 to 1923: "He was frank in expressing his dislike for the mounting volume of law books and for the increasing vogue of the case lawyer. Against their technique, he wanted liberty to invoke and apply, to the ever changing situations presented by human evolution, those principles that would work out what to him seemed justice."⁸

⁷ Voting with O'Brien were Chief Justice Charles Start and Associate Justice Calvin Brown. Associate Justice Charles Lewis wrote the dissent, in which Associate Justice Edwin Jaggard joined. All but O'Brien were Republicans. Start had been first elected Chief Justice in 1894. Brown was elected as an Associate Justice in 1898. Lewis went on to the Court in 1900 and Jaggard in 1904. Before coming on to the Court, Jaggard was a member of the law faculty at the University of Minnesota and authored a Handbook of the Law of Torts, first published in 1893. Hence, all but O'Brien had at least a reasonable amount of judicial experience when the *Vincent* case came before them.

⁸ 198 Minn. xli (1935).

Simply put, O'Brien must have believed it was only fair that the owners of the Reynolds pay for the damage done to the dock, even if damaging the dock was a reasonable thing to do. So, rather than offering a close analysis of legal doctrine, O'Brien put forward, with a certain rhetorical flourish, five plausible analogies. This was not reasoning by analogy in the traditional sense, in which the outcomes of actual cases are analogized to the case at bar as a way to justify the decision in the current case. Rather, this was an attempt to pile up several examples in which it seemed intuitively fair to O'Brien that the party in the position of the defendant in *Vincent* should have a legal obligation to pay for the injury in question.

Two of these analogies are variations on actual cases, neither of which was cited by either of the lawyers in *Vincent*. One is the now famous case of *Ploof v. Putnam*.⁹ There, under stress of unexpectedly bad weather, a sloop tied up at a private dock at an island on Lake Champlain, Vermont but was unmoored by the agent of the dock owner, with the result that the boat, its cargo and the boat owner and his family suffered injuries. *Ploof* itself held that it was not a trespass to tie up to the dock in such circumstances of "necessity," with the consequence that the dock owner's agent had no right to remove the boat from the island. Rather, to unmoor the boat was a wrongful act entitling the boat owner to damages. To this O'Brien added in his *Vincent* opinion: "If, in that case, the vessel has been permitted to remain, and the dock had suffered an injury, we believe the ship owner would have been held liable for the injury done."

Although the Vermont Supreme Court might have awarded damages to the dock owner under the circumstances supposed, it might not have, as this issue was clearly not addressed in *Ploof*. But, again, O'Brien was not relying on *Ploof* as legal precedent. Rather, O'Brien is best seen as asserting that it is only fair that, in return for the privilege of using the dock in circumstances of necessity, the ship owner in *Ploof* would have a legal duty to pay for any harm he did to the dock.¹⁰

O'Brien next offered a variation on the then recent Minnesota Supreme Court decision in *Depue v. Flatau*.¹¹ In the actual case a traveler, who had come to the

⁹ 71 Atl. 188 (Vt. 1908).

¹⁰ In a recent article about the *Ploof* case, Professor Joan Vogel discloses that the dock owner was a wealthy absentee yachtsman from New York, someone who might well not have had the sympathy of the Vermont courts. Joan Vogel, *Cases in Context: Lake Champlain Wars, Gentrification and Ploof v. Putnam*, 45 St. Louis U. L. Rev. 791 (2001). Superficially, this information might not only help to explain the result in *Ploof*, but also it might cast doubt on O'Brien's prediction about what the Vermont courts would have done had the ship damaged the dock. On the other hand, Vogel further explains that the people in the boat were known in the area as thieving pirates and that the agent for the dock owner, like probably most such agents in the area, was undoubtedly on notice to keep this particular family off the premises in light of all sorts of objects having gone missing in recent years. Moreover, Vogel further shows that the French-Canadian background of the boat-owing family may have caused it to be more disliked in the Lake Champlain area than was the absentee New York dock owner. This additional information about the real story behind *Ploof* makes it even more uncertain exactly how O'Brien's hypothetical case would actually have been decided.

¹¹ 100 Minn. 299 (1907).

defendants' premises to consider buying their cattle, claimed that he became so ill after dining in the defendant's home as to be unable to travel safely on his own. Nonetheless, the plaintiff asserted, the homeowners compelled him to leave, and when the traveler suffered harm from being stranded out in the cold night, he sued his allegedly ungenerous hosts. Although the trial court had dismissed the case, the Minnesota Supreme Court (before O'Brien went on the bench) concluded that the hosts owed their visitor a duty of due care and sent the case back for trial to determine whether the defendants were aware of the plaintiff's condition and if so whether sending him home on his own was an unreasonable thing to do. This is, essentially, the same case as *Ploof*. O'Brien again rhetorically asked "If, however, the owner of the premises had furnished the traveler with proper accommodation and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?" As with the *Ploof* hypothetical, O'Brien's strategy is to get the reader to agree with him as to what would be fair in this hypothetical case and then by analogy to agree with the Court's outcome in *Vincent*. Of course, the answer to O'Brien's hypothetical question was in no way decided in *Depue* and, in any event, a legal action by the providers of care might well have been brought in contract for the value of the services provided, and that difference might make any decision in the hypothetical *Depue* case weak legal precedent for *Vincent*. But, again, it would be a mistake to view O'Brien as resting his argument on any particular legal doctrine.

O'Brien sought further to persuade the reader by imagining that, for the purpose of tying the Reynolds tight against the City Dock, the ship's employees had simply helped themselves to someone else's ropes that they found lying on the dock. Even if this use of the ropes were fully justified, O'Brien asserted that surely the ship owner would be liable to the ropes owner. This is more of the same type of argument already discussed. O'Brien cited no authority for the legal outcome he imagined and he provided no real argument for why the ship owner would indeed be liable to the ropes owner. Presumably, he found self-evident the fairness of his assumed outcome.

On closer examination, the rhetorical power of this hypothetical case is somewhat compromised. First, had the ropes merely been used and then returned after the storm died down and the ship could sail away safely, it is by no means obvious that the ship owner would owe the ropes owner something like the rental value of the ropes for the night. Moreover, even had the ropes broken and been made useless by the force of the storm, would everyone really agree that the ship owner had to pay for the loss? Suppose the ship had been tied to the dock by the ropes and then had been blown loose by the storm, thereby destroying the ropes? Elsewhere in O'Brien's opinion he stated that in such event the ship owner would not be liable if the loose ship then bashed into something causing harm. On that assumption, liability to the ropes owner is surely not self-evident.

O'Brien next argued that in times of "public necessity" the government may take private property for public purposes, but when it does so, it is obligated to provide compensation to the property owner. Here he was of course invoking the "just

compensation” principle of the Fifth Amendment. By analogy, he was suggesting that surely when someone takes property for private purposes, there is all the more reason to insist on compensation.

There are at least three problems with this comparison, however. First, government is a very good loss spreader and that alone might be a reason for imposing liability on the state that might not so readily apply to private persons. Second, because those with political power could be invidiously selective in terms of whose property they take for public purposes, Fifth Amendment rights might be seen as vital in helping to assure that when government takes private property there is a good economic reason for doing so. These fears of invidious selection might well not apply to rare private necessity situations illustrated by *Vincent*. Third, and perhaps far more damning, in truly analogous settings of government takings *in emergency situations of necessity*, it turns out that the law, both at the time and today, is actually the opposite of what O’Brien suggests. That is, where, for example, public officials reasonably destroy private property for a greater public good in the face of forces comparable to the storm in *Vincent* (e.g., a huge fire), the victims must bear their losses themselves – notwithstanding that the rest of the citizenry broadly benefited from the action by public officials on their behalf.¹² In short, on closer examination, this analogy offered by O’Brien perhaps better supports the dissent.

Finally, O’Brien offered a religious-based analogy. He noted that theologians believe that a starving man may morally take food from another to save his life. But then, O’Brien asserted, surely such a man would have an obligation to pay for the food taken when he is able to do so. O’Brien was not asserting that theologians have taken a position on what the law is on this question. Presumably their concern, in any event, would have been with whether there is a moral obligation to repay. O’Brien’s idea must have been that once the reader agrees there is a moral obligation to repay, then it follows that there should also be a legal obligation – an obligation that applies by analogy to *Vincent*.

O’Brien was of Irish ancestry and a devout Catholic.¹³ Yet, despite his religious background, in preparing his opinion in the *Vincent* case O’Brien apparently did not consult the writings of the great 13th Century Catholic theologian Saint Thomas Aquinas,

¹² See e.g., *Surocco v. Geary*, 3 Cal. 69 (1853); *Harrison v. Wisdom*, 7 Heisk. (55 Tenn.) 99 (1972); and Restatement of Torts (Second) section 196.

¹³ At the start of the 20th century, Minnesota was predominantly Republican, Protestant and Scandinavian. Quite exceptionally John Johnson, a Democrat, was elected governor, and in 1905 he appointed O’Brien, a fellow Democrat, to be insurance commissioner, a post he held for two years. But, although O’Brien was possibly the second most prominent Democrat in the state at that time, he was not viewed as a viable candidate to succeed Johnson because of his Irish Catholic background. Nonetheless, O’Brien was appointed by Johnson on September 1, 1909 to the Minnesota Supreme Court for a term ending January 1, 1911. In that era, there were contested partisan elections to serve on the Minnesota Supreme Court, and when O’Brien ran for a full term in November, 1910 he was defeated by David Simpson, as the Republican slate was victorious for all state offices. Hence, his service on the Court lasted but 16 months.

who actually deals with this matter in his famous *Summa Theologica*.¹⁴ After asking “Whether it is lawful to steal through stress of need?” Aquinas concludes that one may “take secretly and use another’s property in a case of extreme need: because that which he takes for the support of his life becomes his own property by reason of that need.” He also states that in such cases “all things are common property” and that taking another’s property when in “imminent danger” is not theft or robbery. Although Aquinas does not squarely address the obligation to repay, the implication of his notion that in times of necessity what human law normally terms private property becomes common property as a matter of natural law is that there is no obligation to repay.

Moreover, even if there were a moral obligation to offer to pay for the food, it does not necessarily follow that the person from whom the food was taken should be given a legal right against the formerly starving man. Surely most decent people, if asked, would happily provide the food for free in order to save the other’s life – at least if they are not asked too often. Of course in the O’Brien-Aquinas example, the person was not asked to provide the food, and instead it was simply taken. This setting might suggest to some that, later on, the starving man should at least offer to pay for the food as an expression of gratitude. But then surely many people would refuse that offer if made and would find it ungracious to accept the money that was tendered. In short, whether it is appropriate to grant a legal right to a possibly ungracious host against an arguably ungrateful food-taker is a difficult question.

Given O’Brien’s seemingly dismissive attitude towards the growing proliferation of reported cases, it is probably not surprising that his opinion pays no attention to the English law on this subject. Nevertheless, the classic early 17th century decision in *Mouse’s Case*¹⁵ seems inconsistent with O’Brien’s analysis in *Vincent*. Although not cited in the briefs, *Mouse’s Case* was cited in *Ploof*. When an unexpected storm on the Thames threatened to sink the Gravesend ferry, a passenger deliberately threw some of the cargo overboard, thereby saving himself, the ship, the crew, the other passengers, and the other cargo. The owners of a casket that was sacrificed for the common good sued the passenger-hero for their loss. But the court held for the defendant, saying that it was lawful, under circumstances of necessity, to have tossed the casket overboard and that no compensation was owed. To be sure, one could distinguish *Mouse’s Case* from *Vincent* on that ground that different rules should apply to cases such as the former where property is sacrificed to save lives and those like *Vincent* where merely other property is saved (although had Captain Herrick actually set out in the Reynolds in the teeth of the storm, surely life as well as property would have been at risk). But, given several of the analogies O’Brien put forward, this is a distinction that his analysis rejects. Others might seek to distinguish *Mouse’s Case* from *Vincent* on the ground that the passenger defendant in the former case acted on behalf of a much wider public and not merely for his own benefit. But, once more, given the analogy O’Brien offered based on his view of

¹⁴ Part II – II, Question 66, Article 7.

¹⁵ 12 Co. 63.

public necessity cases, it would be difficult for him to have suggested such a distinction.¹⁶

Mouse's Case was re-affirmed in the case of *Cope v. Sharpe (No. 2)*,¹⁷ a case that was wending its way through the English courts at the very moment of *Vincent*, and hence perhaps the decision was not readily available to the Minnesota Supreme Court when it was preparing the *Vincent* opinion. In *Cope*, the plaintiff leased his land to the defendant for pheasant hunting. A fire broke out on the plaintiff's land that threatened some pheasants nesting nearby. The defendant came onto the land and set fire to some heather, in effect to create a firebreak to protect the pheasants. This act was judged to be reasonably required by necessity at the time, even though, in the end, it turned out to be unnecessary in fact. The plaintiff sued for trespass and the court held for the defendant, making it clear that the defendant not only had the right to enter the land to create the firebreak, but also that he was not liable for any damage done thereby. Because property was damaged out of necessity in order to save even more valuable property, this case seems highly analogous to *Vincent* – but opposite in result.

In sum, the analysis put forward in the opinion by O'Brien is not likely to convince those who start out far more uncertain about the proper outcome of the case than O'Brien must have been.

Justice Lewis' dissent is also disappointing. It basically asserts that liability in American tort law should be based on fault and the defendant here was not at fault, as the majority itself recognized. The dissenters did not believe that so much should turn on whether additional cables were used to secure the ship to the dock. Lewis asked, suppose Captain Herrick happened to use cables at 5 p.m. that were strong enough to hold the ship throughout the night. Since the eventual strength of the storm was not to be anticipated at that time, how could securing the ship at 5 p.m. be seen as a foreseeable sacrificing of the plaintiffs' property for the benefit of the defendant? And if not, Lewis asserted, the majority would seemingly have found against the plaintiffs. But for Lewis, having the outcome of the case turn on when the cables were tied had no moral force.

Yet, it is actually not at all clear that the majority would have sided with the defendant in the example given by Lewis. While it is true that the late-night tying of extra cable was a fact emphasized in O'Brien's opinion, surely the majority, if pressed,

¹⁶ Some have suggested that in the circumstances of *Mouse's Case* the damages incurred by those who owned the property that was thrown overboard would have been paid for as a group by those whose property was not sacrificed under the principle of "general average" that applies to admiralty cases. Because of ambiguities in the reporting of *Mouse's Case*, however, this is not clearly the outcome of that case. It is also arguable that had the plaintiff's casket not been tossed over, it and the entire ship would have been lost, so that there was no loss "caused" by the tossing for which the plaintiff there should recover. And *Vincent* is clearly different on that ground. Yet, this "no cause in fact" argument is perhaps too clever because surely some other property could have been sacrificed instead, thereby saving the casket and the ship.

¹⁷ 26 T.L. R. 172 (Eng. K.B.D. Dec 15, 1909), [1912] 1K.B. 496.

could as easily have adopted Alford's position for the plaintiffs that it was the deliberate choice not to cut the Reynolds free that was crucial and which distinguished this case from those other examples that O'Brien gave in which he said the victim would have to bear the loss brought about by a storm (e.g., where the ship was blown loose from the dock). In short, the dissent failed to provide a thoughtful analysis of why there should not be liability without fault in circumstances like those at issue in *Vincent*.¹⁸

It is unlikely that either the majority or the dissent in *Vincent* had even the slightest expectation as to how famous a case this was to become. Indeed, at the outset it drew little attention. Although the Duluth newspapers covered the Mataafa storm for days in great detail, they barely noted the lawsuit against the owners of the Reynolds. The day the trial started, two local papers carried small stories to that effect, and during the trial brief mention of the case generally appeared in slight stories about the local court's calendar that day or the prior day. When the verdict was given, a short mention of that appeared, but there does not appear to be even the slightest mention of the Minnesota Supreme Court's decision in either the Duluth or Minneapolis papers.

Insurance

In thinking about the *Vincent* facts today, scholars are likely to ask about the role of insurance in this situation. In 1910, unsurprisingly, no mention was made of insurance in the briefs or in the opinions in *Vincent*. After all, the conventional view of tort law has long been that insurance should be irrelevant to the outcome of a case.

On the defense side, liability insurance has traditionally been understood simply as the vehicle by which the defendant has arranged in advance to satisfy its obligation after a decision to award damages has been made. Imposing liability *because* of the availability of liability insurance has conventionally seemed altogether unfair.

In more recent times, of course, there is a very different perspective on this matter. While insurance in the particular case is generally seen as irrelevant, the role that liability insurance generally can play in spreading losses for a category of injuries in question is viewed by many commentators and some courts as highly relevant to the decision to impose liability on the relevant defendants, and especially the decision to impose liability without fault. After all, strict liability, in effect, makes the defendant the insurer of the plaintiff, and it is through the purchase of liability insurance that the defendant typically fulfills that role.

So, too, the common law position on "collateral sources" – that they are to be ignored – has traditionally meant that the existence of first party casualty insurance on the

¹⁸ That the former torts professor Justice Jaggard joined Lewis in dissent is not surprising. In his 1895 treatise on torts, *supra* note 7, Jaggard offered two sections (numbers 50 and 51) that deal with issues of "necessity" and the use of self-help to protect one's property. Although he did not discuss cases that are precisely the same as *Vincent*, the general thrust of his analysis of many earlier cases was that no liability attaches to reasonable behavior carried out by "necessity."

plaintiff's side is also not to count in deciding the outcome of a plaintiff's tort case or the amount the victorious plaintiff should recover. Yet, here too, changes have been made and proposed. Now, many states require the jury to be told of collateral sources, presumably with the intention that juries will ordinarily reduce the tort awards they make accordingly. This view envisions tort's role as one of filling in the compensation gaps.

Even more radically, many have argued that, because the transactions costs of operating the tort system are so huge, liability insurance is a very expensive way to provide victims with insurance. From this outlook, some have proposed that attention should be given to whether there isn't a better way of making sure that victims have their own insurance.¹⁹

Hence, the availability of insurance in a situation like that which happened in *Vincent* might be viewed as far more pertinent today than it was then. Nonetheless, it is at least worth noting that by the time of *Vincent* the then fairly new market in liability insurance was reasonably well in place. So, too, of course, was the older market in first party casualty insurance, which was available to the owners of the Reynolds to provide coverage in case their ship was damaged or lost, and which was also available to the owners of the City Dock to provide coverage in case their dock was damaged for example by a fire or by a storm or, indeed, by the Reynolds in the way it was.

One caveat to these points is that many marine insurance policies in force in Duluth at the time had end dates, such as October 31. The idea seems to have been that, although the Duluth harbor wasn't generally closed until December, conditions in November were dangerous enough that insurers didn't want to cover the risk. It is not altogether clear whether this end date generally applied only to casualty insurance for ship owners, to all casualty insurance, or even, in some instances, to both casualty and liability insurance policies.

Another ambiguity as to liability insurance coverage is that these policies have long been written to cover liability arising from "accidental" harm so as not to provide insurance for those who engage in intentional wrongdoing. It is not entirely clear how this language would be read in circumstances such as *Vincent* where tort liability is seemingly based upon intentional conduct that is not wrongful.

Whatever the general practice, based upon the testimony of Mr. Vincent, it appears that the defendants indeed were insured in this instance and that there was no problem of coverage because of the deliberate conduct of Captain Herrick. On direct examination Alford asked Vincent "what is your business now?" and Vincent replied "Well, I have no particular business, particularly. I am plaintiff in this case, I might say, against the Liability Insurance Company. That is my business now at the present time."

Whether or not the plaintiffs had casualty insurance is uncertain. In any event, it is important to appreciate that this case, which for some is a matter of such moral moment, might well have been, at base, a fight between two insurance carriers. And

¹⁹ See generally, Stephen D. Sugarman, *Doing Away With Personal Injury Law* (1989).

surely today we would expect that both ship owners and dock owners ought to be able to obtain insurance to cover harm to the dock of the sort that occurred in *Vincent* (a point further elaborated below).

Scholarly Understandings of the Law Prior to *Vincent*

The Harvard Law Review noted and favorably commented on the *Ploof* decision right after it was decided in 1908, stating further that there was as yet no authority on the question of whether the dock owner might successfully sue for damages done to his property had he allowed the ship to remain there during the storm (i.e., the issue raised by *Vincent*).²⁰

For its proposition about the lack of precedent, the Harvard Law Review cited Professor Henry Terry's 1884 treatise, where Terry thoughtfully pointed to what he saw as two clashing principles.²¹ On the one hand "small violations of rights ... must in exceptional circumstances be allowed in order to prevent vastly greater evils, and people must be left free to do such acts when the occasion calls for them without being checked by fear of legal liability." On the other "a person who does such acts for his own sole benefit ought to make a compensation for any substantial damage done by him in so acting ... [in contrast to] ... the general policy of the law ... to let accidental damage lie where it falls." As to his preference, Terry came down in favor of the latter, by way of analogy to the principle governing "takings" of private property for public use. (As noted already, however, it turns out that destruction of private property by public officials in circumstances of public necessity has not been deemed a "taking" and has not attracted strict liability in tort in the way that what might be termed the private "taking" did in *Vincent*.)

Terry's treatise made an oblique reference to Oliver Wendell Holmes, and in fact Holmes broadly addressed the issue raised by *Vincent* in his famous lectures on The Common Law, published in 1881, to which Terry was referring.²² Holmes pointed out that in the 1648 English case of *Gilbert v. Stone*,²³ a man, who was in fear of his life

²⁰ 22 Harv. L. Rev. 298 (1908-09). The view that the law on the question raised in *Vincent* was unresolved at the time of the case was also embraced by a note in the *Lawyers Reports Annotated* (a forerunner of ALR) that accompanied its printing of the *Vincent* decision, 27 L.R.A. (N.S.) 312 (1910).

²¹ Henry Terry, *Some Leading Principles on Anglo-American Law* 423 (1884).

²² O.W. Holmes, *The Common Law* 147-49 (1881).

²³ Holmes at 148. Henry Weeks published *The Doctrine of Damnum Absque Injuria* Considered in its Relation to the Law of Torts in 1879. That Latin phrase refers to instances in which a person suffering a loss does not have an action for damages against the person causing it. Weeks restated the rule, later clearly embraced in *Ploof*, that one may enter another's land because of necessity and not be liable for trespass. As for liability for damage done while on the land of another, Weeks did not take a position directly countering *Cooley*, but instead referred, at p. 118, to dictum in a Pennsylvania Supreme Court case from 1841, *Chambers v. Bedell*, 1841 WL 4183 (Pa.), suggesting somewhat equivocally that while a person may be able to go onto another's property to retrieve his own chattel, he may be required to "repair" any damage done in the process.

because of threats by twelve armed men, entered another's property and took a horse. As Holmes put it, "In such a case, he actually contemplates and chooses harm to another as a consequence of his act. Yet the act is neither blameworthy nor punishable." (Here Holmes must mean "punishable" to refer to criminal law.) In the very next sentence, however, Holmes stated, "But it might be actionable, and Rolle, C.J. ruled that it was." Yet, a few paragraphs later, Holmes further stated, "It is doubtful, however, whether the ruling of Chief Justice Rolle would now be followed. [because more recent statements of the law suggest that] ... an act must in general not only be dangerous, but one which would be blameworthy on the part of the average man, in order to make the actor liable."

None of this scholarly authority was cited by either the lawyers or the two opinions in *Vincent*.

How the *Vincent* Decision was Received

Very soon after *Vincent* was decided, both the Harvard and Columbia Law Reviews came down in favor of the result in the case. The brief Harvard note first disparaged the contemporaneous English decision in *Cope v. Sharpe* as unfairly "allowing one man for his own benefit deliberately to thrust a burden upon another."²⁴ This time the Harvard editors endorsed Terry's preferred resolution to the effect, as they put it, "the owner should be compensated for the loss occasioned by his being forced by law to become the means of saving another from a greater loss." The Harvard editors further opined "The law should look on the matter as a judicial sale of the use of land and give the owner a remedy upon a theory analogous to quasi-contract" – by which they apparently meant to invoke Terry's analogy to public takings of land. The Columbia editors discussed and appeared to approve of *Mouse's Case* but somehow do not recognize its seeming conflict with *Vincent*, whose outcome they favored because of the "equities" in the case.²⁵

By contrast, writing on *Cope v. Sharpe* in Canadian journals supported that decision but failed to note its apparent inconsistency with *Vincent*.²⁶

Moreover, a small volume providing practical advice for captains whose ships are in collisions was published by The American Steamship Owners' Mutual Protection and Indemnity Association, Inc. in 1919. Seemingly oblivious to *Vincent*, the author stated "Damage done to docks or wharves should also be promptly reported. If the damage is

²⁴ Trespass to Realty, 23 Harv. L. Rev. 490 (1909-10).

²⁵ Trespass – Necessity, 10 Colum. L. Rev. 372 (1910). Professor John Henry Wigmore included *Vincent* in his 1912 casebook Selected Cases on the Law of Torts, without comment but with reference to the Harvard and Columbia notes.

²⁶ E.g., Emergency as a Justification for Trespass, 52 Canadian L. J. 101 (1915).

caused by fault in the handling or managing of the vessel, she is liable therefor. No liability, however, exists against the vessel unless the damage was caused by her fault.”²⁷ The author went on to tell the captain to file a Note of Protest in situations when bad weather occasions a loss.

In short, in the decade after it was decided, *Vincent* had gained attention at least in some quarters, but had been subjected to no serious analysis. This was soon to change because of the work of Professor Francis Bohlen.

Bohlen had only referred to *Vincent* in a footnote to *Ploof* in the 1915 edition of his torts casebook²⁸ but by the second edition, published in 1925, *Vincent* and *Ploof* were both fully included.²⁹ More importantly, Bohlen’s prominent article “Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality” appeared in the 1925-26 volume of the Harvard Law Review.³⁰ In addition, Bohlen, who had been named as the Reporter for the first Restatement of Torts in 1923, went on to give both *Ploof* and *Vincent* a prominent place in the Restatement.³¹ Whereas the Restatement and its comments make no real attempt to justify the *Vincent* outcome, Bohlen’s article does – about which more will be said below.

After Bohlen’s article appeared, the correctness of *Vincent* seems to have been taken for granted. It was favorably cited, for example, in several articles concerning airplane ground damage, and Professor Fowler Harper embraced Bohlen’s “incomplete privilege” analytical structure in the first edition of his treatise published in 1933,³² the forerunner of the current multi-volume torts treatise carrying the names of Fowler, James and Gray.³³

In short, Bohlen’s analysis was the first of what, in more recent years, has become a torrent of serious academic writing about *Vincent* and analogous problems by both legal scholars and moral philosophers. Like Bohlen, nearly all of these authors have defended *Vincent* as correctly decided, but for a remarkable variety of quite different reasons.

The Importance of *Vincent* Today

²⁷ W.H. LaBoyteaux’s Handbook for Masters 33 (1919).

²⁸ Francis H. Bohlen, Cases on the Law of Torts (Vol. II) 920 (1915)

²⁹ Francis H. Bohlen, Cases on the Law of Torts, Second Edition 104-110 (1925).

³⁰ Francis H. Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 Harv. L. Rev. 307 (1925-26).

³¹ The principles of *Ploof* and *Vincent* as Bohlen interpreted them now appear in section 197 in the Restatement (Second).

³² Fowler Vincent Harper, Treatise on the Law of Torts 138-39 (1933).

³³ Fowler V. Harper, Fleming James, Jr. and Oscar S. Gray, The Law of Torts (Second Ed.) 1986.

For nearly a century now, *Vincent* has been a mainstay among the cases included in leading torts casebooks. Its great importance, however, hardly stems from its role in anchoring one small corner of the law of intentional torts, and surely not as a special piece of the law of trespass to land. Reported cases that are factually very similar to *Vincent* are few in number, although it has been cited from time to time over the years, and surely American scholars would say it decidedly remains a good law.

For the torts instructor and torts student, *Vincent* presents a vivid example of liability imposed in the absence of fault -- to be compared with other islands of non-fault liability in what otherwise is a sea of liability based on negligence. The other major islands are strict liability for abnormally dangerous activities, strict liability for products containing manufacturing defects, and, some would argue, vicarious liability for the torts of one's employees.

The breadth of the moral principle that seems to underlie the majority's opinion is quite uncertain. The Blackstone maxim, for example, could easily be re-cast more sweepingly like this: if, for your own benefit, you expose another to a risk of harm, it is only fair that you should compensate the other if the foreseeable harm actually occurs, even if it was reasonable to act as you did. But, if this broad principle about risking another's interest to further your own were accepted, it would require overturning a great deal of established tort law. Many examples could be given, in which, under today's law, the defendant escapes liability because of the absence of negligence and because the danger from the risk taken is not sufficiently large or uncommon to invoke the law of abnormally dangerous activities.

Notice that the position of the Restatement of Torts (Second) that there should be strict liability for ground damage done by airplanes that crash without fault³⁴ well fits this more sweeping phrasing of the Blackstone maxim. Yet, many states today have rejected the Restatement position on airplane ground damage.³⁵ Reconciling that trend with *Vincent* may seem quite difficult.

On the other hand, as suggested earlier in passing when discussing the plaintiffs' reliance on the Blackstone maxim in their appellate brief, the *Vincent* principle could be cast far more narrowly: one is liable without fault if one intentionally uses another's property for one's own benefit and in the process damages that property (or even more narrowly, if one permissibly trespasses on another's land out of necessity and in the

³⁴ Restatement of Torts (Second) section 520A.

³⁵ See generally, Restatement of the Law Torts: Liability for Physical Harm (Basic Principles) Tentative Draft No. 1, March 28, 2001, at pp. 350-54, where then Reporter Professor Gary Schwartz suggests that it is difficult to reconcile the position of the Restatement (Second) with either the law on the books or the principles underlying strict liability for abnormally dangerous activities. Professor Schwartz recommended withdrawing the special section 520A and leaving the Restatement (Third) silent on this specific issue.

process damages the other's land or property on the land). But, of course, to justify only the narrower rule would require explaining why, for example, only intentional harm is covered and not merely knowingly exposing the other to a risk of harm. And, so too, one would have to explain why it is not sufficient that the victim's property was foreseeably harmed by the defendant's selfish act, but that the injurer must also actually benefit from the use of the victim's property.

For scholars, *Vincent* has become especially important because it, or another now-famous hypothetical in the same vein, has been featured by so many writers in recent years. That other example imagines a careful solo hiker whose life is threatened by an unexpectedly fierce storm and who happens onto an unoccupied cabin.³⁶ The hiker then forces her way in and eats sufficient food and burns sufficient wood to keep herself alive until the storm passes. It is assumed that breaking into the cabin and consuming the food and wood is altogether reasonable under the circumstances of necessity. Indeed, most would probably assume that had the owner of the cabin been there, she surely would have had a moral duty to welcome in the hiker and warm and feed her, and that any decent person would certainly have done that and never given a thought to charging for her charity. However, in the hypothetical the cabin owner was not there, and the hiker has not yet offered to pay for the cost of the food and wood. And so, as in *Vincent*, we are presented first with the question of whether there is a moral duty of the hiker to repay and second whether the hiker should be legally liable to pay if the cabin owner sues for that loss. Simply put, this is a replay of *Vincent*, but in an entirely non-commercial setting in which life is clearly at stake.

In this now vast literature, nearly all of the writers on this topic either take *Vincent* as obviously reflecting the proper result or else argue strenuously for why it is the proper result.³⁷ Liability of the hiker is similarly treated. Yet, the supporters of the *Vincent* result offer so many different justifications that one is entitled to be suspicious of this united front.

Bohlen provided a structural home for the problem by locating it in the world of intentional torts and specifically within the topic of trespass to land. Normally, when someone trespasses on your land, you have a self-help right to gently expel them; you need not tolerate them and sue them later in court. This is what the defendant in *Ploof* claimed as his right. But *Ploof* concluded that what would normally be an intentional trespass by the sloop owner was not a trespass after all because of the exigency of the storm. Necessity gave the sloop owner the privilege to enter the land so that he was not a trespasser. In that event, the land owner had no right to expel him. By doing so, the defendant improperly "trespassed" on the interests of the sloop owner.

³⁶ See Joel Feinberg, Voluntary Euthanasia and the Inalienable Right to Life, 7 Phil. & Pub. Aff. 93, 102 (1978). See also, Jules L. Coleman, Risks and Wrongs 282 (1992).

³⁷ But see, Guido Calabresi, Cost of Accidents, 169 n. 28 (1970), Phillip Montague, Rights, Permission, and Compensation, 13 Phil. & Pub. Aff. 79 (1984), and Howard Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 Cal. L. rev. 677, 705-10 (1985).

Deeming this right of the sloop owner to use the land of another as a “privilege” is consistent with intentional tort doctrine generally. For example, you may harm someone in a way that would otherwise be a battery if you are exercising the “privilege” of self-defense. “Consent” is also frequently said to give one the privilege to impose harm that otherwise would be tortious.

But if the sloop owner in *Ploof* had the privilege to trespass, what is the analytical move that imposes liability on him for harm he causes to the dock? Bohlen’s solution is to term his entry only an “incomplete privilege” – a privilege to dock but not a privilege to escape liability for the harm to the dock.

There is nothing wrong with this language. But it is worth noting that most of the law of intentional torts does not come in this form. If one looks beneath the labels, most of the time one is liable for an intentional tort because one has acted wrongfully, and where one has not acted in a socially unacceptable way, that is where one typically has a complete privilege and is not held liable. In short, the liability without fault that is created by the conditional or incomplete privilege approach embraced by Bohlen for the necessity setting is atypical.

In any event, Bohlen’s offered justification for granting only an “incomplete privilege” is largely the same sense of fairness that Justice O’Brien felt – because the party acting out of necessity benefited from his action, it is only fair that he pay for the harm he caused.³⁸

Notice that *Vincent* wasn’t actually the ideal case factually for embracing this “incomplete privilege” notion because, unlike the sloop owner in *Ploof*, the ship owner in *Vincent* clearly had a right to tie up in the dock quite apart from necessity. Simply put, the ship owner and dock owners in *Vincent* had a pre-existing contractual relationship with each other, and one wonders whether the case should somehow have been analyzed as a matter of contractual interpretation. While intriguing, this is not altogether promising, however.

Presumably, it is generally understood that once you unload your ship, you normally are to push off. Indeed, normally the ship operator is eager to push off to carry on with business. Recall that the Reynolds carried some remaining cargo to unload elsewhere. On the other hand, it is hard to imagine that it was understood that a ship was required by contract to set off in the face of a storm like the Mataffa Blow. But if we understand the Reynolds as remaining at the City Dock under implied terms of the contract instead of by the legal right of necessity, that hardly seems determinative as to who should pay for the damage to the dock. While the dock owner could have provided expressly by contract that the ship had to pay for damages to the dock, so too the ship owner could have sought a provision exempting it from liability in such circumstances. It seems clear, however, that no one thought to deal explicitly with this issue. While, for some, the failure of the parties in *Vincent* to provide for this contingency should be held

³⁸ For an early critique of the Bohlen argument, see Robert Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401 (1959).

against the plaintiff (who should be entitled to his regular “dock fees” and nothing more), others would not be convinced by an argument that hopes to stimulate better advance planning as to risks when neither of the two commercial actors had done so. Hence, a contracts approach probably leaves one pretty much in the same place as a torts approach – that is, trying to decide what would be the appropriate “implied term.”

Some scholars with an economics orientation have noted that it probably doesn't really matter who in *Vincent* is held liable.³⁹ This is because, in the end, regardless of the rule, the harm to the dock will eventually be paid for by buyers of the cargo. That is, under the *Vincent* result, ship owners will directly pass on this cost of doing business in what they charge to carry cargo. And under the opposite result, dock owners would increase their dock fees, which would then also be passed on in one way or another to those whose cargo is handled at the docks.

Under this view, it is helpful that everyone understands what the tort rule is so that insurance companies get their pricing right. If the damage to the dock is to be a cost of dock owning, then casualty insurers need to factor this risk into the premiums they charge. But if the damage to the dock is to be a cost of ship owning, then liability insurers need to factor this risk into the premiums they charge. For the benefit of both shipping companies and dock operators, it would be better not to overpay for insurance coverage. Of course, the parties could possibly contract around any uncertainty in the law, but a clear rule makes that unnecessary and probably cheaper.

Which way this cuts in terms of deciding how *Vincent* should be decided is not self-evident, however. If first party insurance is cheaper to administer than liability insurance, that cuts against the *Vincent* result. Yet, the *Vincent* result makes it unnecessary to determine whether the ship owner was actually at fault, as would be required if the rule were one of negligence liability instead of strict liability. If fault must be determined, then considerations of access to evidence might also be relevant. But in the end this might only justify shifting the burden of proof to the defendant rather than, in effect, conclusively presuming against the defendant via a rule of strict liability.

Economics oriented writers have offered other insights into the *Vincent* problem as well. A central concern of theirs is the incentive effects of law, and an early argument was that if *Vincent* had been decided the other way, then the dock owner would have an incentive to cut the ship loose. By being assured of compensation, the argument goes, the dock owner won't engage in this self-protection effort.⁴⁰

This argument is very delicate for “law and economics” devotees, however, because the *Ploof* rule itself is supposed to deter dock owners from cutting loose ships that are privileged to dock out of necessity. To argue that a further incentive is required to channel the dock owner's conduct in the proper way threatens to undermine the

³⁹ See, e.g. Dale Broeder, Torts and Just Compensation: Some Personal Reflections, 17 *Hast. L. J.* 229 (1965).

⁴⁰ For an early formulation of this idea, see Clarence Morris, Torts 42-46 (1953).

fundamental “law and economics” understanding of tort law. That is, the stick of liability is supposed to be enough, with a “carrot” of compensation not needed.

Others, less concerned with the niceties of economic models, might retort that absent the *Vincent* rule the dock owner might just take a chance, cutting the ship loose, in the hopes that it will not sink or damage other property. But such a dock owner might well also fear that the compensation legally promised by *Vincent* might never be forthcoming, given insolvency and other concerns, and might well cut the ship loose even after *Vincent*. The actual circumstances of the *Ploof* case are probably a good example of this. In sum, this sort of speculating isn’t altogether satisfying.

Those who think about economic incentives have another arrow in their quiver. Absent *Vincent*, they might argue, property owners may take steps to make it more difficult for others to exercise the privilege to trespass by necessity. They might invite us to imagine a cabin owner putting on locks and installing windows that the stranded hiker cannot break and an absent dock owner putting out spikes or other dangers that prevent someone else’s ship from docking. Abstractly, there may be something to this concern. But it seems quite far fetched in the setting of both *Vincent* and the cabin owner hypothetical. That is, the City Dock owners could hardly expect to carry on their business at all if they made it difficult for ships like the Reynolds to dock, even ships that suddenly appear at the dock in a storm. And cabin owners who would try to prevent break-ins surely are most worried about vandals who have no necessity to enter the cabin. To imagine a cabin owner who would make it more difficult for stranded innocent hikers to break in, having already protected the cabin to discourage vandals, is to imagine a person who is unlikely to exist in the real world. The same point goes for the *Ploof* setting. It is quite imaginable that absent dock owners at that time would have portable docks dismantled in the off-season in order to try to prevent “pirates” and other evil doers from gaining access to their property. But after whatever sort of prevention measures have been taken against that risk, it is hard to imagine the owners making it yet additionally more difficult for possible entrants out of necessity. This is not to argue that no property owners would ever respond in this way had *Vincent* been decided otherwise, but only that such perverse behavioral responses seem fanciful in the cases that have been given the main scholarly attention.

Rather than raising economics concerns, some scholars have asserted considerations of fairness. One way to put their point is that the ship owner in *Vincent* and the hiker in the cabin case are “unjustly enriched” if they are able to benefit from the use of the victim’s property without paying for the harm done.⁴¹ This is not the place to provide a substantial analysis of the law of “unjust enrichment.” However, one point can be made.

⁴¹ See e.g., Daniel Friedman, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504, 541 (1980), Howard Klepper, Torts of Necessity: A Moral theory of Compensation, 9 Law & Phil. 223 (1990), and Ernest Weinrib, The Idea of Private Law 196 (1995).

To be sure, those who exercised self-help to rescue themselves in these examples were enriched by their efforts (or at least avoided a loss), and this came at the expense of someone else. Yet, whether that enrichment was “unjust” is exactly the issue that these problems raise. Put differently, should these harms be understood to have been caused by unexpectedly large storms, in a world in which dock and cabin owners well understand that they are financially at risk in many ways when dangerous storms pass by? Or should these harms be seen as costs of hiking or ship owning for which those engaged in those activities should be responsible? If there is good reason to adopt the latter understanding of these events, then it would be “unjust” not to hold the hiker and ship owner liable. But absent a convincing reason, their enrichment does not yet seem “unjust.” In short, “unjust enrichment” might be the label one would want to put on the case if, for some other reason, it was concluded that the ship owner and/or hiker should bear the loss occasioned by the storm.

As just noted, these “necessity” cases involve self-rescue efforts. Some scholars, therefore, have thought about the problem in the wider context of the way that tort law treats rescues.⁴² This line of inquiry is also stimulating, but not ultimately satisfying. The cabin owner and the dock owner, had they been at their property at the moment of the storm, would generally have no duty to rescue those in need. That is, the common law imposes no duty to rescue strangers even when such an effort is virtually costless (a rule, it should be noted, that is much criticized by many scholars). At least in the *Ploof* and hiker example, then, the property owners could sit by and do nothing. (Notice again how the *Vincent* facts raise extra complications here.) But, of course, most people would view such property owners as despicable. In any event, the necessity doctrine provides that the parties at risk can at least help themselves.

What, then, does the lack of a duty to rescue imply when someone out of necessity reasonably damages the property? One view might be that since the property owner had no legal duty to come to the aid of another – no obligation to be a rescuer – then if that owner is involuntarily made a rescuer, that owner ought to be compensated. That is the result of the *Vincent* rule. But there is a different view. The morally right thing is to rescue, even if for certain historic, procedural, and/or other reasons tort law does not actually create a legal duty to do so. In that case, being forced to rescue, as it were, is being forced to do what you morally should have done. Hence, one could argue, there is no reason to provide a cause of action to vindicate someone’s callous selfishness. This would lead to a rejection of the *Vincent* rule and would mean that, on both sides of the rescue question, the law would keep out.

In the end, resolving this argument may come down to determining what sort of society we live in, or want to live in. Is ours a society in which property rights should be selfishly held and given strong legal protection, or do we want a society – as suggested in the writings of Aquinas – in which what is personally owned for most circumstances becomes common property to be taken and used by others in occasional and special

⁴² See generally, George Fletcher, *Corrective Justice for Moderns*, 106 Harv. L. Rev. 1658, 1670-71 (1993).

circumstances of necessity? Without resolving that broader question, it may not be possible to come to a satisfying determination of whether *Vincent* was rightly decided.⁴³ Moreover, in digging deeper into how property rights should be defined in our society, it might turn out that we would want different answers depending upon such matters as the commercial status of the parties, whether life or merely property is at stake, and/or whether a relatively modest or a large amount of damage was suffered by the plaintiff.

For now it perhaps suffices to insist that the *Vincent* result is not the only imaginable outcome of the case. Not only were there two dissenters, but also the Anglo-Canadian law appears to remain to the contrary. *Cope v. Sharpe* has not been overruled,⁴⁴ and the opinion in a much more recent Canadian case, with facts very much like those in *Vincent*, points to a result quite the opposite of *Vincent*.⁴⁵

The End of the Story

Although the Reynolds escaped harm in the Mataafa storm, her luck eventually ran out. She was sold by the Lake Erie Transportation Company in 1911 and then resold in 1912. In 1915 she was rebuilt for ocean service and sold once more. In 1917 ownership finally passed to the U.S. Steamship Company of New York, under whose proprietorship she was torpedoed and sunk by a German submarine off the coast of France on May 18, 1918.

⁴³ See, e.g., George C. Christie, The Defense of Necessity Considered from the Legal and Moral Points of View, 48 Duke L. J. 975 (1999).

⁴⁴ See, e.g., R.W.M. Dias and B.S. Markesinis, Tort Law (Second Ed.) 507-12 (1989) where *Cope v. Sharp* is shown to be the law, although the authors criticize the thinking behind the case. For a similar analysis, see John G. Fleming, The Law of Torts (Ninth Ed.) 104-07 (1998).

⁴⁵ *Munn v. "Sir J Crosbie"* [1967] 1 Ex. C.R. 94. See generally, Allen M. Linden, Canadian Tort Law (Fifth Ed.) 79-81 (1993).