

Scott v. Shepherd

96 Eng. Rep. 525 (K.B. 1773)

Trespass and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, & c. On Not Guilty pleaded, the cause came on to be tried before Nares, J., last Summer Assizes, at Bridgwater, when the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the Court on this case:— On the evening of the fair-day at Milborne Port, 28th October, 1770, the defendant threw a *lighted squib*, made of gun powder, &c. from the street into the market-house, which is a covered building, supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, & c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who

instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. *Qu.* If this action be maintainable? . . .

NARES, J., was of opinion, that trespass would well lie in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has by statute W.3, been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. 21 Hen. 7, 28, is express that *malus animus* is not necessary to constitute a trespass. . . .

BLACKSTONE, J., was of opinion, that an action of trespass did not lie for Scott against Shepherd upon this case. He took the settled distinction to be, that where the injury is *immediate*, an action of trespass will lie; where it is only *consequential*, it must be an action on the case: Reynolds and Clarke, Lord Raym. 1401, Stra. 634; . . . The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, . . . [L]awful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter. If this be so, the only question will be, whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal, or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who both were free agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates

may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act! nay, it may be extended in infinitum. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's windows; shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing [it] out of the open sides into the street, (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person — nothing but inevitable necessity; Weaver and Ward, Hob. 134; Gilbert and Stone, Al. 35, Styl. 72. . . . And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act. — But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis, is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. . . . It is said by Lord Raymond, and very justly, in Reynolds and Clarke, "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained), I am of opinion, that in this action judgment ought to be for the defendant.

DE GREY, C.J. This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. . . . [T]he true question is, whether the injury is the direct and immediate act of the defendant; and I am of opinion, that in this case it is. The throwing the squib was an act unlawful and tending to affright the

bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it; — *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter. So too a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay: and that it need not be *laid scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. . . . It has been urged, that the intervention of a free agent will make a difference: but I do not consider Willis ad Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares, that the present action is maintainable.