that the rule has since become so established.

Finally, the question arose in the *Baccus Case* whether the defendants, by their acts, had waived their sovereign immunity. The majority held that they had not done so, and relied on the rinciples laid down in *The Jassy*[40] and *In re Republic of Bolivia Exploration Syndicate*[41] that immunity can only be waived by a person with a knowledge of the rights and the procedural effects involved, and with the authority of the foreign sovereign. They conceded that, on first sight, it seemed that the defendants had waived their immunity, but considered that the head of the defendants' directorate had not known of the sovereign immunity, nor that by entering an appearance the defendants might lose their immunity. Nor were his acts done with the authority of his superior, the person entitled to waive the immunity. Singleton, L.J. dissented from this view. He conceded that normally only persons authorised to waive immunity could do so, but thought that in the present case of a State going outside the normal practice by incorporating a department of State, the ordinary rule was not applicable. He thought that it could be assumed (there being no contrary evidence) that a body so created has the powers incidental to its business; and as the head of the corporation would normally have the authority to submit, the State ought not to be allowed to deny that he had the authority. While the majority view, he thought, reflected traditional principles, his own view was directed to the modern practice of States which established incorporated departments of State.

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THE DISTINCTION BETWEEN TRESPASS AND CASE

WILLIAMS v. *MILOTIN*

The High Court in *Williams* v. *Milotin*[1] was faced with a situation which compelled it to give at least some attention to the rules governing the limits of trespass and case as forms of action available for personal injuries. Had the High Court seized the opportunities thus presented it might have done something to clarify these rules as they emerge from the nineteenth-century cases.

The Court had to consider the construction of certain provisions of the South Australian Limitation of Actions Act, 1936-1948, which differentiated between those actions which would formerly have been brought as actions on the case and those which would formerly have been brought as actions of trespass. Section 35 of that Act provided:

> The following actions namely: . . . (c) actions which formerly might have been brought in the form of actions called actions on the case . . . (k) actions for libel, malicious prosecution, arrest or seduction and any other actions which would formerly[2] have been brought in the form of actions called trespass on the case shall, save as otherwise provided in this Act, be commenced within six years next after the cause of such action accrued but not after.

Section 36 provided:

> All actions for assault, trespass to the person, menace, battery, wounding or imprisonment shall be commenced within three years next after the cause of such accrued but not after.

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[40] *The Jassy* (1906) P. 270. [41] (1914) 1 Ch. 139.

[1] (1957) A.L.R. 1145. The Full Bench of Dixon, C.J., McTiernan, Williams, Webb and Kitto, JJ., delivered a unanimous judgment.

[2] 'Formerly' was defined by the Court as meaning prior to the passing of the Supreme Court Act, 1878, of South Australia, by which the Judicature Act system was adopted.

The problem before the Court was the application of these sections to a plaintiff's suit, arising out of a highway collision, brought more than three years, but less than six years, after his cause of action accrued. The facts were that the plaintiff, while riding his bicycle in the street, was struck and injured by a lorry driven by the defendant. It was found that the defendant had been driving negligently, and the plaintiff framed his action in negligence. Was this an action which would "formerly", within the meaning of the statute, have been one of trespass or one on the case? To decide this the Court had to examine the old rules relating to the bringing of these actions. From a brief examination of the principles it drew from the authorities, the Court concluded that the present action was one which formerly would have been maintainable either as one of trespass or as one on the case. Consequently it held that the appropriate period of limitation was six years, since the plaintiff had actually chosen to frame his action as one on the case. "Why," as it was pointed out, "should the plaintiff's action be limited by any other period of time than that appropriate to the cause of action on which he sues?"[3] Following on this line of reasoning, the Court went on to suggest that if the plaintiff had chosen to bring his action as one of trespass, the period of limitation would have been three years.[4] Where the plaintiff has a choice of actions, then, it is most important that the correct one be brought, since if he brings the wrong one he will not be allowed to switch over to the other so as to obtain the benefit of the longer period.

The result is that, at least in these circumstances involving the application of a Statute of Limitations, it is vital to analyse the rules governing the relationship of actions of trespass and actions on the case. The main defect of cases dealing with this subject, including the one under review, has been a reluctance on the part of the judges to undertake a full analysis. Such a reluctance is of course understandable in view of the confusion in which the law of trespass and case is enveloped, but the implications of the decision in *Williams* v. *Milotin*[5] make a comprehensive examination imperative. For instance, since there will be situations in which the plaintiff will not be able to choose his form of action but will be compelled to sue in trespass, and other situation obliging him to proceed in case, it is important to find what combinations of facts are covered exclusively by trespass and what by case.

In the previous Australian cases raising this issue, the problem has either been scantily treated or has thrown the judge into error.[6] Mr. Justice Cleland in *Hillier* v. *Leitch*[7] had to consider the effect of substantially the same provisions as were before the High Court in *Williams* v. *Milotin*.[8] He differed from the High Court interpretation, however, in holding that each of the sections had an exclusive operation — for example, none of the cases falling under s. 35 could also fall under s. 36. When the same set of facts could sustain an action of trespass or one on the case, he thought that the shorter period should necessarily prevail.[9] Apart from this, though, he seemed to think that on the facts before him, similar to those in *Williams* v. *Milotin*,[10] trespass would be the only proper action, for he said: "Where an act is done by the defendant negligently and which is in itself an immediate injury to another's person or property the action is 'trespass' and not 'case.'"[11] As will be seen below, this *dictum* is not in accordance with authority, doubt was thrown on its validity by Street, C.J., in *Elliott* v. *Barnes*,[12] and it must be taken to have been finally overruled by *Williams* v. *Milotin*. On the other hand, in *Elliott* v. *Barnes*,[13] Street, C.J., who delivered the leading judgment of the N.S.W. Full

[3] (1957) A.L.R. 1145 at 1149.
[4] *Ibid.*
[5] *Id.* at 1145.
[6] *Hutchins* v. *Maughan* (1947) V.L.R. 131.
[7] (1936) S.A.S.R. 490.
[8] (1957) A.L.R. 1145.
[9] (1936) S.A.S.R. 490 at 496.
[10] (1957) A.L.R. 1145.
[11] (1936) S.A.S.R. 490 at 494.
[12] (1951) 51 S.R. (N.S.W.) 179 at 180.
[13] *Ibid.*

Supreme Court, adduced authorities[14] to show that on the facts[15] trespass or case would lie at the plaintiff's option, but did not attempt an examination of the problem concerned in delimiting the boundary between the two actions. For the purpose of his decision these authorities and the fact that "the long course of practice in these courts is invariably to bring the action in negligence"[16] were sufficient to solve the immediate problem.

Really little more than this was attempted in *Williams* v. *Milotin*,[17] though the Court did give a concise statement of the rules it thought applicable. It began by pointing out[18] that the plaintiff had alleged that he was immediately or directly hit by the lorry driven by the defendant as a result of the defendant's own negligence, and continued:

> There is no suggestion that the defendant intended to strike him. If that had been the allegation this action could have been brought in trespass and not otherwise. But as only the negligence of the defendant is relied upon, while the cause of action might have been laid as trespass to the person, the action might also have been brought as an action on the case to recover special or particular damage caused by the defendant's own negligence. Had the damage been caused indirectly or mediately by the defendant or by his servant (a state of things which he distinguished from violence immediately caused by the defendant's own act) the action must have been brought as an action on the case and not otherwise.[19]

The judicial authorities expressly relied on by the High Court to establish these propositions were *Leame* v. *Bray*,[20] *Williams* v. *Holland* [20a] and *Sharrod* v. *London and N.W. Railway Co.*[20b] However, to appreciate the development of the difficulties concerning trespass and case, we have to go back to even earlier authorities. If we ignore, as an irrelevant digression, Lord Raymond's distinction between acts *prima facie* lawful supporting case and acts *prima facie* unlawful supporting trespass,[21] the distinction between trespass and case seems first to have turned on whether the injury complained of was immediate or consequential. This was simple enough, setting apart the difficulty of determining what an immediate or a consequential injury was, but the law relating to trespass and case was complicated by the introduction of a second distinction classifying acts as wilful or negligent.[22] When the nineteenth-century judges attempted to combine the two tests and classified acts as negligent and indirect, or wilful and direct, and so on, the result was confusion, not only because of a failure to work out clearly the implications of the equation but because the set of rules governing the direct-indirect injury distinction could not be harmonised with the set of rules governing the negligent-wilful act distinction.

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[14] In particular, he relied on the statement of the law by Tindal, C.J., in *Williams* v. *Holland* (1833) 10 Bing. 112 at 117.

[15] The facts were that the plaintiff so negligently controlled his motor vehicle on the highway that it collided with and injured the plaintiff.

[16] (1951) 51 S.R. (N.S.W.) 179 at 182.

[17] (1957) A.L.R. 1145. [18] *Id.* at 1146. [19] *Ibid.*

[20] The Court also referred to *Holmes* v. *Mather* (1875) L.R. 10 Ex. 267 and *Stanley* v. *Powell* (1891) A.C. 86, but these cases are not directly in point here as they are concerned with showing that direct acts alone are not actionable in trespass unless there is added an element of fault, whether wilfulness or negligence.

[20a] (1833) 10 Bing. 112. [20b] (1849) 4 Ex. 580.

[21] This criterion was laid down by Lord Raymond in *Reynolds* v. *Clarke* (1726) 1 Str. 634 at 635. It was adopted by two of the judges in *Scott* v. *Shepherd* (1773) 2 W.Bl. 892, Gould and Nares, JJ., but rejected by the other two, De Gray, C.J., and Blackstone, J., and subsequently disappeared from the law.

[22] In *Rogers* v. *Imbleton* (1806) 2 B. & P.N.R. 117, for instance, Sir Jas. Mansfield, C.J. at 119 suggested that negligence should be the chief guide in classifying acts. He was considering a direct injury suffered by the plaintiff who specifically alleged negligence, and held case was a good action. The significance of the decision, however, lies in his opinion that *Leame* v. *Bray* (1803) 3 East 593, which decided that on the same set of facts trespass could be brought, was wrong, although he expressly did not overrule *Leame* v. *Bray*.

Particular difficulties arose where, under the new classification, facts which, if one standard were applied, would have sustained an action of trespass only, fell within the exclusive province of case if the other standard was applied, and *vice versa*. The Courts, perhaps, found it easy not to deal with these problems, because the most common situation that came before them was the negligent act-direct damage situation, and there a satisfactory and consistently applied solution was found, that is, a choice between trespass and case was possible. Yet, on the other hand, the master and servant cases frequently and squarely raised, and still raise, these problems, but little was done to rid the law of obscurities.

A convenient starting-point for tracing judicial attitudes is *Scott* v. *Shepherd* decided in 1773.[23] There two of the judges clearly based the distinction between trespass and case on whether the injury was direct or indirect. Blackstone, J. "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."[24] De Gray, C.J. agreed with him.[25] Two later cases well illustrate the uncertainties of the law as the two differing standards were being evolved and fitted together. In *Day* v. *Edwards*[26] (1794), where it was alleged that the defendant by driving his car negligently along the highway directly hit the plaintiff's carriage, it was held that trespass was the proper action and case not available at all. Lord Kenyon said:[27]

> The distinction between the actions of trespass *vi et armis* and on the case is perfectly clear. If the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action upon the case is the proper remedy . . . . In the present case the plaintiff complains of the immediate act and therefore he should have brought trespass.

It is true that at this time the negligent as opposed to wilful act classification had not been seriously considered by the courts, but it is certainly strange that in *Hopper* v. *Reeve*,[28] decided in 1817 when the courts had canvassed the question of intention,[29] the verdict should have turned solely on the directness of the injury. It was held there that a direct injury suffered *vi et armis* sustained trespass. Whether the act itself was negligent or wilful was not even considered.

The first famous case dealing with the direct injury-negligent act situation was *Leame* v. *Bray*.[30] There counsel argued that since the injury, although direct, was the result of negligence and not wilfulness on the part of the defendant, the proper action was case. The court delivered its judgment after taking into account the question of intention, but held that trespass could still be maintained, although it did not say that case could not. Lord Ellenborough followed the traditional approach in emphasising the element of directness, unfortunately, in relation to both act and damage when he formulated the test as follows:

> The true criterion seems to be according to what Lord Chief Justice de Gray says in *Scott* v. *Shepherd*,[31] whether the plaintiff received an injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not . . . . If the injury were received from the personal act of another it was deemed sufficient to make it trespass.[32]

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[23] (1773) 2 W. Bl. 892.
[24] *Id.* at 894. [25] *Id.* at 899.
[26] (1794) 5 T.R. 648. [27] *Id.* at 649. [28] (1817) 7 Taunt. 699.
[29] *Cf. Leame* v. *Bray* (1803) 3 East 593, and *Rogers* v. *Imbleton* (1806) 2 B. & P.N.R. 117.
[30] (1803) 3 East 593. [31] (1773) 2 W. Bl. 892 at 899.
[32] (1803) 3 East 593 at 599.

Lord Ellenborough here was certainly allowing for the negligent-wilful act distinction since he did not go as far as the judge in *Day* v. *Edwards*[33] and hold that "case" was not applicable at all. He emphasised only that where the injury complained of was direct, trespass was maintainable even though the act was also negligent.

Williams v. *Holland*[34] (1833) is the leading case on this subject and rounded off the test laid down in *Leame* v. *Bray*[35] by emphasising the negligence of the act in the direct-damage-negligent-act situation, as well as the directness of the damage. In such a situation it was held that trespass and case were concurrent remedies. Tindal, C.J., deduced from the authorities the rule "that where the injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case notwithstanding the act is immediate so long as it is not a wilful act."[36]

It seems to be suggested here by Tindal, C.J., that where the act is immediate and wilful the only form of action possible is trespass. Street, C.J. and Maxwell, J. both adopt this view in *Elliott* v. *Barnes*,[37] although there is a certain ambiguity in the phraseology used. Street, C.J. simply says: "If, of course, the plaintiff were able to establish a wilful and deliberate act on the part of the defendant causing injury to the plaintiff then trespass would lie and the plaintiff should bring his action in that form."[38] And Maxwell, J. says: "It seems to me the effect is this, that in relation to a wilful act the plaintiff is confined to an action for trespass against the defendant for his own personal act."[39] It is by no means clear whether these judges, including Tindal, C.J., are referring only to acts as a result of which the injury can be classified as direct, or to both direct and indirect acts. Presumably they mean that a wilful act causing direct injury is only actionable in trespass. If so, the position of the wilful-act-indirect-damage situation is left obscure, and seems not to have been considered. The dilemma is that as the act is wilful, case will not lie. Is there any remedy? An argument could be made out for the availability of case. On the assumption that the test of negligence is the objective one of the reasonable man, a wilful act could also be a negligent act and therefore allow case. This interpretation, however, would appear quite contrary to the *dicta* cited, that a wilful act cannot sustain an action on the case. The indirect-damage-negligent-act type of situation presents no problem as on either standard only case is available.

Additional and still unresolved complications were introduced by the notion of vicarious liability in highway collisions. In dealing with master and servant cases the courts, as a condition precedent to deciding what remedy lay against the master, had to settle the initial question of the master's responsibility. Only if it could be shown that the master was responsible at all, could the question arise whether he was responsible in trespass or case. Treatments of this subject do not always clearly differentiate responsibility and remedy.

The classic statement of the law on master-servant liability in trespass and case is that of Baron Parke in *Sharrod* v. *London and N.W.R. Co.*[40] where he said:

> Now the law is well settled on the one hand that whenever the injury done to the plaintiff results from the immediate person of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass, on the other, that if the act be that of the servant, and he is negligent, not wilful, case is the only remedy against the master. The

[33] (1794) 5 T.R. 648.
[34] (1833) 10 Bing. 112.
[35] (1803) 3 East 593 at 599.
[36] (1833) 10 Bing. 112 at 117.
[37] (1951) 51 S.R. (N.S.W.) 179.
[38] *Id.* at 182.
[39] *Ibid.*
[40] (1849) 4 Ex. 580.

> maxim, "*qui facit per alium facit per se*" renders the master liable for all the negligent acts of the servant in the course of his employment, but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him, case will, in effect for employing a careless servant, but not trespass unless . . . the act was done by his command . . . . Our opinion is that in all cases where a master gives the direction and control over a carriage or animal or chattel to another rational agent the master is only responsible in an action on the case for want of skill or care of the agent.[41]

It follows from this, firstly, that a master can only be *vicariously* liable in case[42] since he is only liable in trespass as a principal, and secondly, that the extent of the master's liability is limited to negligence of the servant committed in the course of employment. The reason why Baron Parke thinks that a master will not be liable for the wilful act of the servant appears to be that a wilful act is not considered as one committed in the course of employment. In fact, confusion is always at its worst where the plaintiff seeks to make the master liable in either trespass or case for the wilful act of his servant. In *Savignac* v. *Roome*,[43] the plaintiff sued the defendant in case, alleging the wilful act of his servant in driving the defendant's chaise against the plaintiff's chaise. Instead of deciding whether the master was in any case liable, the court put the second question first by disallowing the action on the ground that it should have been brought in trespass because the injury was direct. Whether a master could be liable for the alleged wilful act of his servant was not even considered. Assuming the law as later laid down in *Sharrod's Case*[44] to be correct, the court should have admitted the action in case, since the act was not done by command of the master. Lord Kenyon, when faced with a similar situation in *McManus* v. *Crickett*,[45] not only decided that the master could not be liable in trespass, since the master was not a principal to the act, but went on to hold that because of the wilful nature of the act, the master could not be liable at all. He said: "Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him and according to the doctrine of Lord Holt, his master will not be liable for such an act."[46] Here commission of a wilful act by the servant is identified with acting outside the scope of his employment. This has not continued to be the view of the courts for later cases have held the master to be liable for the acts of his servant. Blackburn, J. in *Limpus* v. *London General Omnibus Co.*[47] said: "It is admitted that a master is responsible for the illegal act of his servant even if wilful provided it was within the scope of the servant's employment."[48] The same judge in *River Wear Commissioners* v. *Adamson*[49] thought generally that where liability is established against any person wilfully or negligently causing injury then, if the guilty person is a servant and the wrong is committed in the scope of his employment, liability is established against the master also.[50] This opinion was approved by Street, C.J. in *Elliott* v. *Barnes*.[51] The authors of a late American textbook[52] say: "There is now no doubt of the master's liability for deliberate or wilful wrong done in the scope of his

[41] *Id.* at 585, recently approved by Lord Barker in *Esso Petroleum Co. Ltd.* v. *Southport Corporation* (1955) 3 All E.R. 864 at 873.

[42] This also seems to be the view of H. Street when he says, "a master cannot be sued in trespass for the tort of his servant." *The Law of Torts* (1955) 11.

[43] (1794) 6 T.R. 125.

[44] (1849) 4 Ex. 580 at 585.

[45] (1800) 1 East 106.

[46] *Id.* at 108.

[47] (1862) 1 H.C. 526.

[48] *Id.* at 541.

[49] (1876) 2 App. Cas. 743.

[50] *Id.* at 767.

[51] (1951) S.R. (N.S.W.) 179 at 180.

[52] 2 Harper Jones, *Law of Torts* (1956) 1390. *Cf.* J. Fleming, *Law of Torts* (1957) 371: "Vicarious liability is not confined to negligently inflicted harm, but has also been applied to intentional or wilful wrongdoing on the part of the servant."

(or its) employment." *Limpus* v. *London General Omnibus Co.*,[53] quoted above, is cited as the English authority. The effect of these *dicta*, if accepted, is to replace the proposition that all wilful acts of a servant are acts committed outside the scope of his employment, by the proposition that all wilful acts if committed within the scope of employment are the responsibility of the master as well as of the servant. However, we are nowhere informed whether the appropriate form of action against the master is trespass or case.

If the High Court in *Williams* v. *Milotin*[54] had adopted a broader approach to these complications, it might have done something to remove the doubts surrounding this question. As it was, it confined itself to looking at the rules relating to the direct-damage-negligent-act situation, and consequently added little to the law. The decision tells plaintiffs that they are bound by the consequences of their choice of form of action but does not help them in those cases where they may be uncertain as to what form of action they should bring. This surely is the important question. Should there be further cases in the courts involving the period of limitation applicable to trespass or case, we might see a situation somewhat similar to the eighteenth and nineteenth-century state of affairs where plaintiffs could be non-suited for bringing the wrong form of action, and fail altogether. It is to be hoped that if the trespass-case distinction again comes directly before the courts, very close attention will be paid to its analysis. Such an analysis could perhaps not escape the further issue, uncanvassed here, how far the distinctions made by the courts in this context under the labels "direct" and "indirect" damage, or "wilful" and "negligent" acts, are analytically (as distinct from merely historically) meaningful.

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LEGAL AVOIDANCE OF TAXATION AND SECTION 260

NEWTON v. *FEDERAL COMMISSIONER OF TAXATION*

Arrangements under which a man seeks so to order his affairs that the tax attaching under the appropriate Acts is less than it otherwise would be are common enough modern phenomena. An arrangement of this nature was the subject of litigation in *Newton's Case*.[1]

It is submitted that the correct judicial approach to such arrangements is that the courts should not concern themselves with the desirability or morality of the course taken but only with its legal operation and legal consequences.[2] It is to the end of nullifying the tax-avoiding effects of such schemes in their application to income taxation liability that s. 260 of the Income Tax and Social Services Contribution Assessment Act 1936-1948 (Cwlth.)[3] is principally directed. But notwithstanding both the legal difficulties attaching to its interpretation and the obviously far-reaching practical consequences embraced by its application, it was not until the recent decision in *Newton's Case* that s. 260 or its predecessors[4] had ever been brought before the Privy Council for judicial consideration. Section 260 is in the following terms:

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[53] (1862) 1 H. & C. 526. [54] (1957) A.L.R. 1145.

[1] *Lauri Joseph Newton and Others* v. *Commissioner of Taxation of the Commonwealth of Australia* (1958) 2 All E.R. 759 (P.C.).

[2] This was the contention of Jordan, C.J. in *In the Estate of William Vicars (Dec'd.)* (1944) 45 S.R. (N.S.W.) 85, 93. This view was expressly endorsed by Taylor, J. in *Newton's Case* (1956) 96 C.L.R. 577, 679. However, there is a certain amount of conflict of high judicial authority on this question. See the various cases referred to by G. Nettheim, "Legal Avoidance of Taxation" (1954) 1 *Sydney L.R.* 236.

[3] No. 27, 1936—No. 44, 1948.

[4] The best known are s. 53 of the Income Tax Assessment Act 1915 (No. 34 of 1915); s. 93 in the Act of 1922 (No. 37 of 1922).