CHAPTER 6

PUBLIC NUISANCE IN RELATION TO TORT

1. THE NATURE OF A PUBLIC NUISANCE

A public nuisance is

> "Some unlawful act, or omission to discharge some legal duty, which act or omission endangers the lives, safety, health or comfort of the public (*a*) (or some section of it), or by which the public (or some section of it) are obstructed in the exercise of some common right" (*b*).

The varieties of public nuisances are thus even more manifold than the varieties of private nuisances; and these nuisances may be either the creation of statute (*c*) or subordinate legislation, or of the common law (*d*).

The essential thing to be noted at the start is that a public nuisance is a *crime* punishable by indictment (*e*), though it may also be restrained by injunction at the suit of the Attorney-General acting on behalf of the public (*f*). And since a public nuisance is

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(*a*) For example, keeping sewers in a dangerous condition—*A.-G.* v. *Luton Local Board* (1856) 27 L. T. O. S. 212; spreading infection—*Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; accumulating rubbish—*A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560; constantly ringing bells—*Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 132 (though parish churches are privileged: see *ibid.*, p. 161, *per* KINDERSLEY, V.-C.).

(*b*) For example, obstructions to the highway. The above definition is adapted from the Criminal Code (Indictable Offences) Bill, 1879 (as amended in Committee), s. 150. For full treatment of public nuisances see *Russell on Crime*.

(*c*) For an early example see 1 Ric. II c. 4 (offal thrown in ditches). For one of many modern examples, see Public Health Act, 1936, Part III (19 Halsbury's Statutes (2nd Edn.) 302) (as amended by Clean Air Act, 1956 (36 Halsbury's Statutes (2nd Edn.) 692)).

(*d*) For example, at common law public nuisances comprise such diverse things as keeping a common gaming-house, keeping a fierce dog unmuzzled and publicly exposing the naked person.

(*e*) But some statutory nuisances are triable summarily.

(*f*) Either *ex-officio* or upon the relation of a member of the public: see *Russell on Crime*.

a crime there can be no prescriptive right to commit one, for "no length of time will legitimate" it (*g*).

Beside the fact that it is a crime rather than a tort, public nuisance also differs from private nuisance in at least three respects. First, there is no doubt that an act that is committed once may constitute a public nuisance (*h*); continuity or repetition is not a necessary element in nuisances of this kind, though it may in some instances be a relevant consideration to be taken into account (*i*). Secondly, a public nuisance is not necessarily an infringement of rights over land or in respect of incorporeal hereditaments (*j*) consequently, where a claim in tort may properly arise upon the commission of a public nuisance, it has long (*k*) been settled that personal injuries alone will suffice to ground it. Thirdly, there can be no public nuisance unless at least a section of the public are prejudiced by the act complained of: thus for example noise which only inconveniences three complainants has been held not to be a public nuisance (*l*), though where it inconveniences the denizens of a locality, even if it be only a small locality, it may be one (*m*).

But despite these differences, public and private nuisances are very similar, and in many cases they are for all practical purposes almost identical conceptions. Thus in public nuisance, as in private, the law accepts the principle of "give and take".

For example, a reasonable (*n*) amount of obstruction must be tolerated upon the highway; vans must load and unload (*o*); vehicles skid despite all precautions (*p*); cars break down by accident, and if their lights then fail they may in all innocence become a source of danger by night (*q*); for the safety of the public, builders

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(*g*) *R.* v. *Cross* (1812), 3 Camp. 224, 227; *per* Lord ELLENBOROUGH.

(*h*) See, *e.g. R.* v. *Mutters* (1864), Le & Ca. 491, and *A.-G.* v. *P.Y.A. Quarries, Ltd.*, [1957] 1 All E. R. 894; [1957] 2 Q. B. 169, 192; *per* DENNING, L.J.

(*i*) See, *e.g. Castle* v. *St. Augustine's Links* (1922), 38 T. L. R. 615. Whether it will be so or not presumably depends upon the degree of danger to the public.

(*j*) Nor need it emanate from land: *The Wagon Mound* (No. 2), *Overseas Tankship (U.K.), Ltd.* v. *Miller Steamship Co., Pty., Ltd.*, [1966] 2 All E. R. 709; [1967] 1 A. C. 617.

(*k*) In reliance upon a *dictum* of FITZHERBERT, J. (1535), Y. B. 27 H. VIII, Mich. fl. 10.

(*l*) *R.* v. *Lloyd* (1802), 4 Esp. 200 (complaint by 3 attorneys of Clifford's Inn).

(*m*) See *P.Y.A. Quarries Case*, [1957] 1 All E. R. 894, 902; [1957] 2 Q. B. 169, 184; *per* ROMER, L.J.

(*n*) *R.* v. *Clark*, [1963] 3 All E. R. 884; *Nagy* v. *Weston*, [1965] 1 All E. R. 78.

(*o*) Sea *R.* v. *Jones* (1812), 3 Camp. 230, 231, and *Randall* v. *Tarrant*, [1955] 1 All E. R. 600.

(*p*) *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652; *Laurie* v. *Raglan Building Co., Ltd.*, [1941] 3 All E. R. 332; [1942] 1 K. B. 152.

(*q*) *Maitland* v. *Raisbeck and Hewitt*, [1944] 2 All E. R. 272; [1944] K. B. 689 (Illustration 55 (a)); *Moore* v. *Maxwells of Emsworth, Ltd.*, [1968] 2 All E. R. 779.

must often obstruct the pavement with hoardings (*r*). Such things are reasonable and necessary and though they may cause inconvenience or even injury, they are not public nuisances and no claim can arise in respect of them.

But, on the other hand, where similar things are done in a *careless* or *unreasonable* way, "give and take" ceases to prevail and they may be public nuisances. Thus it may be a nuisance to leave an unlighted vehicle upon the highway at night for an *unreasonable time* (*s*), or in an unreasonable manner (*t*), even though the failure of its lights was unavoidable; and it will be a nuisance to use the highway as a dumping place for *débris* during building operations (*u*). And it may also be a nuisance to assemble noisy vehicles upon the highway at night (*a*). Further, though it is often lawful and necessary to place structures, such as bollards, in the highway to make excavations in it, there will be a nuisance if such things are left improperly lighted at night (*b*).

Again, where a cause of action arises through the commission of a public nuisance, as in the case of private nuisance, liability falls upon the person who creates or "adopts" or continues (*c*) the nuisance, but there can be no liability unless the defendant is in some way responsible for it. For example, in *Dwyer* v. *Mansfield* (*d*), the defendant, a greengrocer, was held not liable for obstruction caused by queues forming outside his shop where it was shown that the reason for the forming of the queues was not to be attributed to any fault of his (*e*), but to the fact that rationing being then in force, large numbers of customers were attracted by his stock of potatoes.

(*r*) *Harper* v. *G. N. Haden & Sons, Ltd.*, [1933] Ch. 298, 320.

(*s*) *Ware* v. *Garston Haulage Co., Ltd.*, [1943] 2 All E. R. 558; [1944] K. B. 30 (see Illustration 55 (b)).

(*t*) *Henley* v. *Cameron* (1949), 65 T. L. R. 17, and see *Hill-Venning* v. *Beszant*, [1950] 2 All E. R. 1151.

(*u*) *Fowler* v. *Sanders* (1617), Cro. Jac. 446; *R.* v. *Jones* (1812), 3 Camp. 230; *Almeroth* v. *Chivers & Sons, Ltd.*, [1948] 1 All E. R. 53.

(*a*) *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145. And strike pickets may cause a nuisance: *Torquay Hotel Co., Ltd.* v. *Cousins*, [1968] 3 All E. R. 43.

(*b*) *Penny* v. *Wimbledon U.D.C.*, [1899] 2 Q. B. 72; *Morrison* v. *Sheffield Corporation*, [1917] 2 K. B. 866; *Fisher* v. *Ruislip and Northwood U.D.C.*, [1945] 2 All E. R. 458; [1945] K. B. 584; *Morris* v. *Luton Corporation*, [1945] 1 All E. R. 1; [1946] 1 K. B. 114.

(*c*) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560.

(*d*) [1946] 2 All E. R. 247; [1946] K. B. 437.

(*e*) Contrast *R.* v. *Carlile* (1834), 6 C. & P. 636; *Fabbri* v. *Morris*, [1947] 1 All E. R. 315 (shop door closed and ice cream sold through window).

ILLUSTRATION 55

Public nuisance, like private nuisance, is subject to the rule of "give and take".

(a) Maitland *v.* Raisbeck and R. T. and J. Hewitt, Ltd., [1944] K. B. 689.

Plaintiff was injured when an omnibus in which he was travelling collided with defendants' lorry. The cause of the collision was that the rear light of the lorry had gone out; this fact was unknown to the lorry driver and he was not at fault in allowing it to happen. *Held:* The plaintiff had no cause of action. The unlighted lorry was an obstruction, but if something happens "which in fact causes an obstruction to the highway, but is no way referable to (the defendant's) fault, it is wrong to suppose that *ipso facto* and immediately a nuisance is created" (*g*).

Contrast:—

(b) Ware *v.* Garston Haulage Co. Ltd., [1943] 2 All E. R. 558; [1944] 1 K. B. 30.

A motor cyclist was killed as the result of colliding with defendant's lorry which was standing unlighted at night by the roadside. The lorry had broken down on the previous *morning*. *Held:* Defendants were liable, for they should have seen that the obstruction was lighted. "There was ample time for the men to take all proper precautions to ensure that the earlier accident which occurred to them (*i.e.* the breakdown) and for which they were not responsible should not develop into a nuisance to the highway" (*h*).

2. THE RIGHT OF ACTION IN TORT

If a public nuisance causes *special and peculiar damage* to an individual, different in kind from the injury which it inflicts upon the public as a whole, a *civil right of action in tort* is available to the person so injured. And this claim in respect of the public nuisance, unlike a claim resting upon private nuisance, is not confined to injury which interferes with the enjoyment of occupation of land. Thus in *Halsey* v. *Esso Petroleum Co., Ltd,* (*i*), amongst other things (*k*), chimneys of the defendants' depot emitted dirty smoke and smuts soiled clothes hung out to dry on the plaintiff's land, and also spoilt the paintwork of his car which he parked in the road outside. In respect of the former injury the plaintiff had, of course, a claim

(*g*) [1944] K. B. 691–691; *per* Lord GREENE, M. R. See also *Trevett* v. *Lee*, [1955] 1 All E. R. 406; *Parish* v. *Judd*, [1960] 3 All E. R. 33.

(*h*) These are the words of Lord GREENE, M.R., in *Maitland's Case*, [1944] K. B. 689 at p. 692. *Ware's Case* must be interpreted in the light of them.

(*i*) [1961] 2 All E. R. 145.

(*k*) This case, which had many aspects, is instructive on both private and public nuisance.

in *private* nuisance; but though he had no such claim in respect of the latter injury—since his land was not affected—he nevertheless had a claim for it in *public* nuisance.

Such a claim may be based upon many different kinds of damage (*l*), but the important thing to understand is that the damage must be peculiar to the plaintiff; for if this were not so then all of the public (or such members of it as are affected) might be entitled to sue, and there would then be no end to the claims which might be brought (*m*). Thus in *Winterbottom* v. *Lord Derby* (*n*) the defendant's agent blocked a public footway, forcing the plaintiff either to use another route or to incur expense in removing the obstruction. He chose the latter course and then sought to recoup his loss in a civil action against the defendant. The claim failed because it was held that the expense was no more than any other member of the public would have incurred had he wished to challenge the defendant's right to block the way (*o*). On the other hand, had the plaintiff's expenditure been something peculiar to himself he would have succeeded (*p*). What is to be regarded as peculiar to the plaintiff is a question of nicety which was canvassed in *The Wagon Mound* (*No.* 2) (*q*). It was there pointed out that in the authorities it is sometimes stated that the damage must be "direct, and not a mere consequential injury" (*r*); and it was stressed that in this context the word *direct* bears no relationship to its use when remoteness of damage is under consideration. Whatever meaning it may have in the latter context (*s*) in the present one it seems to mean no more than that the damage must be a "*particular*, a direct, and a substantial damage". (*t*). This means that it must be something which the defendant ought to foresee that his conduct will probably produce, over and above the inconvenience caused to the public. Thus if a way is obstructed, but another one

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(*l*) Including personal injury, injury to corporeal property and injury to business interests—see *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486—as to loss of custom, see below.

(*m*) See *Iveson* v. *Moore*, *supra*, also reported Holt, K. B. 10, 11; *per* HOLT, C. J.

(*n*) (1867), L. R. 2 Exch. 316. See also *Hubert* v. *Groves* (1794), 1 Esp. 147. *Winterbottom's Case* seems rather extreme on the *facts*, since the plaintiff did incur special expense: see remarks of GREER, L. J., *Blundy, Clark & Co.* v. *London and North Eastern Rail. Co.*, [1931] 2 K. B. 334, 364.

(*o*) Contrast *Medcalf* v. *R. Strawbridge, Ltd.*, [1937] 2 All E. R. 393; [1937] 2 K. B. 102 (damage to unadopted road).

(*p*) See Illustration 56.

(*q*) *Overseas Tankership (U.K.), Ltd.* v. *Miller Steamship Co., Pty., Ltd.*, [1966] 2 All E. R. 709; [1967] 1 A. C. 617.

(*r*) *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400, 407; *per* BRETT, J.

(*s*) See below, p. 209.

(*t*) *Benjamin's Case* (above, n. (*r*)) at p. 407.

remained open for the plaintiff to use, the obstruction will give no right of action to the plaintiff whose right of access is thus only partially obstructed (*u*).

ILLUSTRATION 56

Proof of special and particular damage is essential in order to sustain a civil action in respect of a public nuisance.

Rose *v.* Miles (1815), 4 M. & S. 101.

Defendant moored a barge athwart a navigable creek. This blocked the way for plaintiff's barges, and he had to unload them and incur expense in having the freight carried overland. *Held:* This was special and peculiar damage sufficient to support the claim (*a*).

3. HIGHWAY NUISANCES

It is a public nuisance to obstruct the highway, or to create dangers upon it, or in close proximity to it; and since this is perhaps the commonest form of public nuisance to give rise to civil actions it should receive special attention.

To constitute an obstruction it is not essential that the obstacle should form an insuperable barrier (*b*), or that it should block the highway entirely or that any particular person has actually been obstructed (*c*); it may therefore be a nuisance to leave vehicles standing for an unreasonable time, even during the day (*d*), or to cause queues to form which obstruct, without completely preventing, the public right of passage (*e*).

There are as many forms of nuisances by the creation of dangers on the highway as there are imaginable kinds of dangers; random examples include the making of excavations (*f*), causing things to project (*g*) over the highway so as to endanger vehicles or

(*u*) BRETT, J.'s illustration in *Benjamin's Case* (above, n. (*u*)) at p. 407.

(*a*) See also *Maynell* v. *Saltmarsh* (1664), 1 Keb. 847; *Hart* v. *Basset* (1681), T. Jo. 156; *Iveson* v. *Moore* (*supra*, note (*l*)).

(*b*) *James* v. *Hayward* (1630), Cro. Car. 184 (gate across highway a nuisance, though *not locked*).

(*c*) *Wolverton Urban District Council* v. *Willis*, [1962] 1 All E. R. 243.

(*d*) *R.* v. *Cross* (1812), 3 Camp. 224.

(*e*) *R.* v. *Carlile* (1834), 6 C. & P. 636 (crowd attracted by effigies in shop window); *Barber* v. *Penley*, [1893] 2 Ch. 447 (Illustration 57). *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631 (music hall queue); *Fabbri* v. *Morris*, [1947] 1 All E. R. 315 (queue outside shop). Though to be actionable the obstruction must be unreasonable: *R.* v. *Clark*, [1963] 3 All E. R. 884; *Nagy* v. *Weston*, [1965] 1 All E. R. 78.

(*f*) *Gray* v. *Pullen* (1864), 5 B. & S. 970.

(*g*) Such as branches of trees or lamps: see *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314. But the mere fact of *projection* without causing danger or obstruction is not a nuisance. The clock which projects from the Law Courts is not, therefore, a public nuisance, unless, as it is believed is not the case, it is in danger of falling! See *Noble* v. *Harrison*, [1926] 2 K. B. 332, 337; *per* WRIGHT, J.

pedestrians, leaving slippery or dangerous substances upon the highway (*h*), and many other instances might be given (*i*). But it must be noted that in order to constitute a nuisance the danger need not necessarily be actually on or over the highway; it may also be in close proximity to it. For it would clearly be wrong to permit a person to create a danger abutting upon the highway, though not actually on it, and then allow him to escape liability upon the ground that, as a matter of mathematical precision, the source of danger was actually sited on private property (*k*). People may easily overstep the actual bounds of the highway without realizing that they have done so, and frontagers must appreciate the possibility of this and guard against it (*l*). But once a person purposely leaves the highway (*m*) or even strays by accident (*n*) some distance onto private land he cannot, if he is injured by some dangerous thing, claim in nuisance; though of course he may have some other remedy (*o*).

In one instance some doubt has been raised as to the nature of the special damage required to give rise to an action in the case of highway nuisances. It is clear that a direct interference with the plaintiff's right of access to his premises (as by placing an obstruction immediately outside them (*p*)), may be treated as an actionable nuisance, and if he loses custom thereby this may be taken into account as a head of damages. But it may be that mere loss of custom alone, without direct interference (as where an

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(*h*) *Pope* v. *Fraser and Southern Rolling and Wire Mills, Ltd.* (1938), 55 T. L. R. 324 (acid); *Dollman* v. *A. & S. Hillman, Ltd.*, [1941] 1 All E. R. 355 (piece of fat).

(*i*) *E.g.* dangerous cellar-flaps, *Heap* v. *Ind Coope and Allsopp, Ltd.*, [1940] 3 All E. R. 634; [1940] 2 K. B. 476; smoke endangering motorists—*Holling* v. *Yorkshire Traction Co.*, [1948] 2 All E. R. 662; adjoining property in dangerous state of disrepair—*R.* v. *Watts* (1703), 1 Salk. 357. And there are a number of statutory nuisances under the Highways Act, 1959, ss. 117–150 (39 Halsbury's Statutes (2nd Edn.) 537): see *Myers* v. *Harrow Corporation*, [1962] 1 All E. R. 876; [1962] 2 Q. B. 442; *R.* v. *Ogden, Ex parte Long Ashton Rural District Council*, [1963] 1 All E. R. 574.

(*k*) *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199 (child stumbles against spikes on private land immediately abutting on highway). See also *Barnes* v. *Ward* (1850), 9 C. B. 392; *Harrold* v. *Watney*, [1898] 2 Q. B. 320.

(*l*) *Hardcastle* v. *South Yorkshire Ry.* (1859), 4 H. & N. 67.

(*m*) *Bromley* v. *Mercer*, [1922] K. B. 126; *Howard* v. *Walker*, [1947] 2 All E. R. 197; [1947] K. B. 860; *Jacobs* v. *L.C.C.*, [1950] 1 All E. R. 737; [1950] A. C. 361.

(*n*) *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731.

(*o*) Conversely, the fact that the plaintiff has deviated slightly on to private land will not debar him from claiming for injury caused by a nuisance on the highway: *Crane* v. *South Suburban Gas Co.*, [1916] 1 K. B. 33.

(*p*) *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *Campbell* v. *Paddington Corporation*, [1911] 1 K. B. 869.

obstruction some way off impedes customers and makes them cease to patronize the plaintiff's shop), will not suffice to sustain an action (*q*); it is not however easy to see why such a distinction should be made, except upon the ground that in cases of the latter kind it may often be difficult to establish a direct connection between the customers' defection and the obstruction.

Finally, it should be noted that when a highway is dedicated to the public it is assumed to be dedicated subject to all existing obstructions or defects which might ordinarily be treated as nuisances, and therefore the person whose land is dedicated will not be liable for them (*r*).

ILLUSTRATION 57

Nuisance by obstruction: causing the formation of a queue.

Barber *v.* Penley, [1893] 2 Ch. 447.

Plaintiff kept a boarding house close to the pit entrance of the Globe Theatre. The first performances of "*Charley's Aunt*" caused considerable queues, and access to plaintiff's premises became extremely difficult at certain hours. *Held:* The obstruction was a nuisance for which the management of the theatre could be held responsible.

Formerly (*s*) highway authorities were only liable in respect of nuisances upon the highway which were due to their misfeasance, as opposed to their nonfeasance, But, as from August 3rd, 1964, this immunity has been abrogated (*t*); and the liability of highway authorities is governed by the Highways (Miscellaneous Provisions) Act, 1961, s. 1. This provides that

> "in an action *against a highway authority* in respect of damage resulting *from their failure to maintain a highway . . . it shall be a defence* (without prejudice to any other defence or the application of

(*q*) The effect of *Ricket* v. *Metropolitan Rail. Co.* (1865), 5 B. & S. 156; (1867), L. R. 2 H. L. 175, upon the earlier decision in *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. (N. C.) 281 (where such damage was held to be actionable) is still uncertain. But see *Blundy Clark & Co.* v. *London & North Eastern Rail. Co.*, [1931] 2 K. B. 334, 362; *Harper* v. *Haden*, [1933] Ch. 298, 303.

(*r*) *Fisher* v. *Prowse* (1862), 2 B. & S. 770; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, 242. But see *Macfarlane* v. *Gwalter*, [1958] 1 All E. R. 181; [1959] 2 Q. B. 322 (adjoining occupiers will usually be liable for defective gratings, cellar-flaps, etc., even after dedication under provisions of Public Health Acts Amendment Act, 1890, s. 35 (1) (19 Halsbury's Statutes (2nd Edn.) 136)).

(*s*) For the old law, (which still applies in cases in which damage has arisen before the coming into operation of the Act—see s. 1 (8)), and for the reasons for the anomalous immunity, see the previous edition of this book.

(*t*) Highways (Miscellaneous Provisions) Act 1961, s. 1 (1) (41 Halsbury's Statutes (2nd Edn.) 453).

the law relating to contributory negligence) *to prove that the authority had taken such care as in all the circumstances was reasonably required* to secure that the part of the highway to which the action relates was (*u*) not dangerous for traffic."

And it is further provided that, for the purposes of this defence, the court shall have particular regard to the following matters (*a*):—

"(a) The character of the highway, and the traffic which was reasonably to be expected to use it; (b) the standard of maintenance appropriate for a highway of that character and used by such traffic; (c) the state of repair in which a reasonable person would have expected to find the highway; (d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway; (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed."

All these factors are relevant to the issue of "nuisance" or "no nuisance" in these particular circumstances.

The sub-section (*b*) also adds that

"for the purposes of such a defence it shall *not* be relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates *unless it is also proved* that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions."

(*u*) S. 1 (2). Italics ours.
(*a*) S. 1 (3).
(*b*) *Ibid.* Italics ours. For the interpretation of this section see *Griffiths* v. *Liverpool Corporation*, [1967] 2 All E. R. 1015; [1967] 1 Q. B. 374; *Meggs* v. *Liverpool Corporation*, [1968] 1 All E. R. 1137; *Littler* v. *Liverpool Corporation*, [1968] 2 All E. R. 343.

CHAPTER 7

ABATEMENT OF NUISANCES

Besides granting a person injured by a nuisance the ordinary legal remedies of damages or injunction the law also permits him to exercise a certain degree of self-help. It allows him to *abate* the nuisance (*i.e.* to remove the cause of it) without recourse to the courts. But if he does choose to exercise this right, since his exercise of it removes the cause of complaint, he will not also be permitted to seek the ordinary remedies (*a*).

Thus where a person is obstructed in the exercise of a common right, such as the use of the highway (*b*), or of a public footway (*c*), he may remove the obstruction; and the same rule applies to private nuisances if they are of such a nature that their cause can be removed, extinguished, or destroyed (*d*).

The abatement of a nuisance is, however, "a remedy the law does not favour and is usually not advisable" (*e*). Thus whether the nuisance concerned be public or private, the law watches the acts of an abator with an eye no less zealous to detect excesses than Portia watching Shylock, and the abator's rights are hedged about with restrictions.

Thus the right of abatement is a right to remove the cause of the nuisance and no more; it is not a licence to inflict unnecessary damage upon the person responsible (*f*), nor is it a right of retribution.

Further there is no right to abate where the nuisance is something only remotely apprehended; for instance a man is not entitled to pull down scaffolding on his neighbour's land simply because he fears that the house to be built thereon may, when built, infringe

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(*a*) *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing and Finishing Co.*, [1927] A. C. 226, 244.

(*b*) *Winterbottom* v. *Lord Derby* (1867), L. R. 2 Ex. 316, 322. Repairing bridges or highways is not, however, a permissible form of abatement: *Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518.

(*c*) *Webber* v. *Sparkes* (1842), 10 M. & W. 485.

(*d*) *Mason* v. *Caesar* (1676), 2 Mod. Rep. 65 (pulling down bridges): *R.* v. *Rosewell* (1699), 2 Salk. 459; *Lane* v. *Capsey*, [1891] 3 Ch. 411 (pulling down houses); *Lemmon* v. *Webb*, [1895] A. C. 1 (cutting encroaching branches).

(*e*) *Lagan Case*, [1927] A. C. 226, 244; *per* Lord ATKINSON.

(*f*) See *Dimes* v. *Petley* (1850), 15 Q. B. 276, 283; *per* Lord CAMPBELL, C.J. And see Illustration 58.

his ancient lights (*g*). But on the other hand the fact that a mandatory injunction to restrain a nuisance has been refused will not necessarily form a bar to the right to abate it (*h*).

Moreover, it has been said that

> "in abating the nuisance, if there are two ways of doing it (the abator) must choose *the least mischievous of the two*. We also think that if, by one of these alternative methods *some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all*" (*i*).

Finally, although an abator may enter upon the land which harbours the nuisance and will not, provided that he keeps within his rights, thereby become liable in trespass, he must nevertheless usually first give *notice* (*k*) to the occupier requesting him to abate the nuisance; it is only if the occupier fails to do this that entry can be justified. Notice need not however be given in the following circumstances (*l*). (1) Where instant action has to be taken for the security of life, health or property—as in the case of fire. (2) Where the occupier is *himself actively* responsible for the creation of the nuisance. (3) Where the nuisance arises by reason of the occupier's default in failing to perform some obligation which is incumbent upon him. There is also no need to give notice before cutting boughs which overhang one's land (*m*), provided of course that no entry is made upon one's neighbour's land to do it.

It is not surprising in view of all these restrictions upon the right to exercise it that the remedy of abatement is now seldom resorted to.

ILLUSTRATION 58

The right to abate is a right to remove the cause of the nuisance and nothing more.

Mills *v.* Brooker, [1919] 1 K. B. 555.

(*g*) *Norris* v. *Baker* (1616), 1 Roll. Rep. 393.

(*h*) *Lane* v. *Capsey*, [1891] 3 Ch. 411.

(*i*) *Roberts* v. *Rose* (1865), L. R. 1 Exch. 82, 89; *per* BLACKBURN, J. (italics ours). Thus entry upon land of a *third party* can only be justified, if justifiable at all, by a plea of necessity.

(*k*) He must certainly do so where the abatement contemplated takes the form of demolishing an inhabited house: *Perry* v. *Fitzhowe* (1846), 8 Q. B. 757; *Davies* v. *Williams* (1851), 16 Q. B. 546. He must also do so where the nuisance arises from omission rather than commission: *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302, 311. And also where the occupier is not himself the original creator of the nuisance: *Penruddock's Case* (1598), 5 Co. Rep. 100b.

(*l*) See *Jones* v. *Williams* (1843), 11 M. & W. 176.

(*m*) *Lemmon* v. *Webb*, [1895] A. C. 1.

Plaintiff owned ten Bramley Seedling apple trees, and some of their branches overhung defendant's land. Defendant cut these branches and appropriated and sold several barrels of the fruit upon them. Sued for conversion defendant pleaded that since he was entitled to lop the branches he was entitled to take the apples too. *Held:* No defence. "The right of lopping does not carry with it the right to appropriate the severed branches or the fruit growing on them" (*n*).

(*n*) [1919] 1 K. B. at p. 557; *per* AVORY, J. See also *Hope* v. *Osborne*, [1913] 2 Ch. 349.

CHAPTER 8

NEGLIGENCE: GENERAL PRINCIPLES

Although, as will be seen, this is a tort of comparatively recent origin it is now by far the most important and commonest of torts; and by the very breadth of its scope it bids fair to eclipse its neighbours, such as trespass, nuisance, and many others.

1. THE TORT OF NEGLIGENCE

It has already been remarked that lack of care is a factor which is taken into account in determining liability in many torts. We are not however now concerned with lack of care in that context, but with the tort of negligence itself; and liability in this tort is not based upon the performance of some particular *kind* of conduct in a careless way (*a*), but more broadly, upon the *infliction of injury upon another person by failure to take such care as the law requires*: here, apart from the important fact that there are many circumstances (*b*) in which for various reasons injury caused by such failure will not be remedied, the sole criterion of responsibility is whether the injury was caused by lack of the requisite degree of care, whatever the circumstances or the nature of the defendant's conduct (*c*). Here there is no need for the plaintiff to establish facts which constitute the commission of some other tort, but only facts which constitute negligence in the sense above defined.

It should first be stressed that in this connexion negligence does not necessarily denote mental inadvertence (*d*); for though in most

(*a*) As for instance, in the case of conduct which amounts to a nuisance in respect of which lack of care is relevant.

(*b*) These circumstances will be discussed below.

(*c*) "Negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life": *Bourhill* v. *Young*, [1942] 2 All E. R. 396, 404; [1943] A. C. 92, 107; *per* Lord WRIGHT.

(*d*) See *Pollock on Torts* (15th Edn.), p. 377, note 66.

actions for negligence this is in fact the state of the defendant's mind, yet, if he has failed to take such care as the law requires him to take, and has thereby caused injury, he will be judged according to his conduct, and the actual state of his mind is legally irrelevant (*e*). Thus where a man who bore a grudge against his neighbour ordered workmen engaged in dismantling his house to "work anyhow", intending that they should throw the dismantled material onto the neighbour's stables, and the workmen did this with the result that the stables were damaged, it was held that he was liable for "wilful" *negligence*, even though it was clear that the damage was in fact intentionally caused (*f*).

Negligence is thus in essence no more than the causing of injury through lack of proper care, but it is for the law itself to define the meaning of "injury" and "care" for this particular purpose; and here, as in other branches of the law, moral responsibility and legal liability by no means necessarily coincide, for "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured to demand relief" (*g*).

It might be thought that in approaching this problem of legal definition the common law would start with the premise that all damage (*h*) caused through failure to take reasonable care is actionable (*i*), leaving it to the defendant, once such damage and such failure are established, to exempt himself where he can by proving that the circumstances are such as to entitle him to legal exemption. Indeed, theoretically it might be simpler for the law to adopt this method of approach. But for historical reasons (*k*) it has not done this; it has started with the assumption (*l*) that there is no obligation to refrain from every kind of injurious conduct and has required the plaintiff, as a preliminary to success in his action, to establish that the defendant was so circumstanced in relation to him (the plaintiff) that he owed him a legal obligation (duty) to take care to avoid injuring him.

For an action of negligence to succeed it must therefore be estab-

(*e*) Legal negligence, in this context, is thus sometimes described as "objective" (as opposed to "subjective").

(*f*) *Emblen* v. *Myers* (1860), 6 H. & N. 54.

(*g*) *Donoghue* v. *Stevenson*, [1932] All E. R. Rep. 1, 11; [1932] A. C. 562, 580; *per* Lord ATKIN.

(*h*) Negligence, being in origin an action on the case, proof of special damage is essential to liability.

(*i*) This appears to be the basic assumption of French Law. Code Civil, arts. 1382, 1383. See Amos and Walton, *Introduction to French Law*, pp. 213–14.

(*k*) See below, p. 161.

(*l*) See *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A. C. 85, 103; *per* Lord WRIGHT.

lished that the defendant owed the plaintiff a duty of care (*m*) and that that duty has been broken to the plaintiff's loss. So it is necessary to examine first the *scope of the duty* and then the nature of the kinds of acts and omissions which constitute *a breach of it.* But it must not be forgotten that the factor of causation may also operate as a determinant (*n*); for there can be no tort at all if the plaintiff's injury was caused by something other than the defendant's conduct. This factor has been considered (*o*), but it must be remembered that it plays a particularly prominent part in negligence cases.

A. The Scope of the Duty of Care

It is now well established that the law of torts imposes upon people a general duty to avoid causing injury to others by one's own carelessness; but it is also established that the scope of this obligation though ample is by no means universal and that there are circumstances in which no duty exists. We will therefore first consider the ambit of the general duty and then examine the limits of its application.

The Extent of the Duty Stated.

It has already been explained that English law has always taken the view (and still does) that unless it can be established (or assumed) that the situation in question is a "duty" situation, there can be no liability; for the common law makes no *primâ facie* assumption that all injury carelessly caused is actionable. How then may "duty" situations be distinguished from "non-duty" situations? The idea that careless conduct *may* give rise to legal liability is not new; for even the mediaeval law recognized that in certain situations (*p*) negligence (*q*) might be treated as an essential *element* in liability: but the injury of which the plaintiff complained was regarded as arising rather from the particular relationship of the parties and the particular situation in which they were placed, than from the incidental factor that the defendant had been guilty of careless conduct. In the course of time, the number of situations

(*m*) Though, in practice, of course, there is usually no doubt about the existence of the duty and it is then assumed to exist.

(*n*) See *Donoghue* v. *Stevenson*, [1932] All E. R. Rep. 1, 25; [R. 420; [1946] 618; *per* Lord Macmillan; *Woods* v. *Duncan*, [1946] 1 All E. R. 420 [1946]. A. C. 401, 419, 421; *per* Viscount Simon.

(*o*) Part I, Chapter I, section 4.

(*p*) As in the case of farriers or surgeons who caused injury in the course of their work. See Fifoot, *History and Sources of the Common Law*, pp. 154–6.

(*q*) The word "*negligenter*" occurs in declarations at least as early as the latter part of the fourteenth century.

in which lack of care was thus treated as a relevant factor in liability increased; and it is, therefore, not surprising that, at any rate, by the early nineteenth century, it came to be realized that the real gravamen of the plaintiff's claim in such cases lay in his *failure to avoid causing the injury through lack of care.* Thus, though comparatively late in time, negligence acquired the status of an independent tort (*r*); and if, at that stage, one had asked the question, "when does a duty of care arise?" the answer would have been, "whenever the situation, or relationship between the parties is such that the law recognizes that if the defendant fails to exercise due care, and thereby damages the plaintiff, the defendant will be liable" (*s*). The law of negligence was thus built up in "disconnected slabs" (*t*), and though there was no general "duty of care", there was a series of situations (which were constantly being added to and expanded (*u*)) in which *duties of care* were recognized.

From the point-of-view of the jurist this was a most undesirable state of affairs because it meant that the field of negligence was indefinable: from the point-of-view of the moralist it was unsatisfactory because it countenanced the notion (odious to Victorians) that in *general* our law imposed no duty to take care to avoid injury to others. An attempt was therefore made by Lord ESHER, M.R. (*a*), to borrow words later used by Lord ATKIN, to formulate a "general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances" (*b*). This

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(*r*) Fifoot, *op cit.*, pp. 164–5, places the change of stress somewhere in the closing years of the eighteenth century, and also (pp. 181–2) cites a passage from the judgment of Lord ELLENBOROUGH, C.J., in *Govett* v. *Radnidge, Pulman and Gimblett* (1802), 3 East, 62, 69, in which specific reference is made to a "duty" of care.

(*s*) Examples of such situations were liability for things dangerous *"per se"* and the liability of occupiers for dangerous premises.

(*t*) *Candler* v. *Crane, Christmas & Co.*, [1951] All E. R. 426, 438; [1951] 2 K. B. 164, 188; *per* ASQUITH, L.J. Indeed even to-day much of it still exhibits "no organic unity of structure".

(*u*) In *Donoghue* v. *Stevenson*, [1932] All E. R. Rep. 1, 30; [1932] A. C. 562, 619, Lord MACMILLAN expressed the opinion that this is still the true position, even in the modern law; and contented himself with saying that "the categories of negligence are never closed", for "the conception of legal responsibility may develop in adaptation to altering social conditions and standards", and "there is room for diversity of view . . . in determining what circumstances will establish such a relationship between the parties as to give rise . . . to a duty to take care". But in *Bourhill* v. *Young*, [1942] 2 All E. R. 396, 403; [1943] A. C. 92, 104, he substantially adopted Lord ATKIN's less conservative approach; a change of view which he repeated in *Glasgow Corporation* v. *Muir*, [1943] 2 All E. R. 44; [1943] A. C. 448, 457.

(*a*) *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, 509; and again in *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 497.

(*b*) [1932] A. C. 562 at p. 580; *per* Lord ATKIN.

attempt was severely criticized, and did not gain acceptance; but a substantially similar attempt, made in 1932, by Lord ATKIN in *Donoghue (or McAlister)* v. *Stevenson* (*c*) has gained acceptance and is now regularly acted upon by the courts. This formulation must now therefore be considered.

Lord ATKIN propounded his "general conception" in the following words:—

> "You must take reasonable care to avoid acts or omissions which you can *reasonably foresee* (*d*) would be *likely* to injure your neighbour" (*e*).

And he then defined "neighbours" as:—

> "Persons so closely and directly affected by my act that I ought *reasonably to have them in contemplation* (*f*) as being so affected when I am directing my mind to the acts or omissions which are called in question".

It will be seen that the second part of this *dictum* defines the scope of the duty of care; it tells us, in effect, that there will be a "duty" situation wherever the relationship of the parties is such that the *likelihood that the plaintiff would be affected by the defendant's conduct ought reasonably to have been contemplated* (or foreseen) by the defendant (*g*).

It is too late now to challenge the authority of this proposition. But it is susceptible of criticism which is logically irrefutable (*h*). In the first place, as has already been explained, it is *simply not true* that the law imposes a duty of care wherever the likelihood of injury can be foreseen: there are, as has been seen, plenty of situations in which injury may be carelessly inflicted without fear of subjecting the actor to tortious liability. Indeed, if the *first* part of the *dictum* really represented the law injury carelessly inflicted would *primâ facie* become actionable, and the need for the establishment of a duty of care would altogether disappear. In the second place, although as the law now stands (*i*), it is logically

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(*c*) The facts of this case will be considered in the next Chapter.

(*d*) Italics ours.

(*e*) [1932] A. C. at p. 580.

(*f*) Italics ours.

(*g*) This test for determining the scope of the duty has sometimes been called the "proximity" test. Lord ATKIN himself did not object to the term "proximity", provided that it is properly understood ([1932] A. C. at p. 581); but in *Grant's Case*, Lord WRIGHT expressed the opinion that it is misleading and that it should therefore be avoided, [1936] A. C. at p. 104. The test is also now often referred to as Lord ATKIN's "neighbour" test.

(*h*) See, *e.g.*, Landon in *Pollock on Torts* (15th Edn.), Excursus D.

(*i*) *I.e.*, upon the principle that there is no *general* presumption that damage carelessly caused is actionable.

permissible to require proof of a duty of care, the "foresight" test selected (*k*) is not only so vague as to be almost meaningless, but also suffers in logic from the fatal defect that the establishment of the fact that the *particular* injury caused ought reasonably to have been foreseen is an essential element in the establishment of the existence of carelessness (and therefore of legal negligence) itself. Thus the same question, "ought the defendant to have foreseen injury?" in strict logic falls to be determined twice over (*l*); first, in order to establish the existence of the duty in relation to the situation in general, then in relation to the particular injury caused. This being so, the ATKIN test is, strictly speaking, redundant. Part of the ultimate issue to be decided being "ought the defendant to have foreseen the particular injury caused?", clearly if he ought to have done that, then the *situation must have been* such that he ought to have foreseen the likelihood of injury in general (*m*). Indeed the adoption of the test has cast an air of mystery over many appellate decisions on negligence; for it is often difficult to determine whether the court is considering whether the defendant owed a duty, *i.e.* whether the *situation* was such that the likelihood of injury ought to have been foreseen, or whether it is considering whether the particular injury *in fact* caused ought to have been foreseen. In practice, logically enough—though most confusingly—the two questions often seem to be merged into one (*n*).

However this may be, the ATKIN test has been adopted and the effect of this adoption is that wherever the existence of a duty of care

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(*k*) It is not suggested that any better test could be devised, but only that it is impossible to devise a general and infallible test: that "duty situations" cannot, in fact, be shepherded within any single fold.

(*l*) This is admitted by Lord WRIGHT in *Glasgow Corporation* v. *Muir*, [1943] 2 All E. R. 44, 50; [1943] A. C. 440, 460. And indeed if there is a jury it seems that substantially the same question may, theoretically at least, have to be canvassed at no less than *three* stages: see *Bolton* v. *Stone*, [1951] 1 All E. R. 1078, 1081; [1951] A. C. 850, 858–9; *per* Lord PORTER. The likelihood of confusion becomes even worse when it is appreciated that the question of "reasonable foresight" may also be relevant in considering the issue of remoteness of damage.

(*m*) Unless it is carefully remembered that Lord ATKIN's test goes to the "relationship" of the parties, or the "situation" in general, its application becomes simply question-begging; because if it is applied to the *particular* injury caused it immediately becomes simply a test of whether the defendant has in *fact* been negligent; and in that case it is only logically possible to determine that there *is* a duty if it is decided that the defendant *was in fact* negligent.

(*n*) See, *e.g. Bourhill* v. *Young*, [1942] 2 All E. R. 396; [1943] A. C. 92, and *Woods* v. *Duncan*, [1946] 1 All E. R. 420; [1946] A. C. 401, *passim*. The word "duty" is also misleadingly used in a double sense: (a) to denote the duty of care, and *also* (b) to denote the *standard* of care to which the defendant must conform if he is to avoid liability for the *particular* injury in fact caused.

cannot be assumed, as in many circumstances it can, before any question of negligence can arise, it must be established that the situation was such that the likelihood of injury to the plaintiff ought reasonably to have been foreseen: if it ought *not*, then there *can be no* duty, and *ex hypothesi* no negligence; if it *ought*, then there *may* (*o*) be a duty, and if there is, there *may* be negligence. The duty thus serves as a useful negative test by which the possibility of establishing negligence can be excluded.

It must be added that it is now clear that the ambit of the duty is not restricted by reference to the kind of injury caused (*p*); it may thus be injury to person, or to property or injury of a purely economic nature (*q*). Moreover it seems also to be established that its ambit is not limited by reference to the instrumentality which effects the injury; the source of danger may result from behaviour, or from defectiveness in the state of goods, land (*r*) or anything else. The injury may also consist in the causing of nervous shock (without any physical impact). Claims of this kind have a curious history. There is no doubt that the intentional causing of it is actionable (*r*). *Wilkinson* v. *Downton* (*s*) serves as a warning to practical jokers: the defendant was held liable for a practical joke of doubtful taste when he made the plaintiff, a married women, ill by telling her—and intending her to believe it—that her husband (though this was untrue) had broken both legs in an accident. But where the act causing the shock is merely negligent the courts have been more cautious in imposing liability. At one time no recovery was allowed in the absence of physical impact (*t*). In the early years of this century, however, with *Dulieu* v. *White & Sons* (*u*) a change set in; this was

(*o*) Only "*may*", not "*must*" (see *Winfield on Tort*), because as has been explained, there are in fact many situations in which there is no duty, however forseeable the injury. The duty, however, extends to making allowance for the probability that others may be careless: *Lang* v. *London Transport Executive*, [1959] 3 All E. R. 609 (driver on main road must guard against danger from vehicles entering from side road) or that they may be given to altruistic acts (*Ward* v. *T. E. Hopkins & Son, Ltd.*, [1959] 3 All E. R. 225).

(*p*) *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, [1963] 2 All E. R. 575; [1964] A. C. 465: see especially 595–598, 504–509 *per* Lord HODSON (at 598, 509): "It is difficult to see why liability as such should depend upon the nature of the damage".

(*q*) *Brown* v. *Cotterill* (1934), 51 T. L. R. 21: *Haseldine* v. *C. A. Daw & Son, Ltd.*, [1941] 3 All E. R. 156; [1941] 2 K. B. 343: *A. C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240: *Gallagher* v. *N. McDowell, Ltd.*, [1961] N. I. 26.

(*r*) Though liability for the intentional causing of harm is not, of course, limited to the causing of shock.

(*s*) [1897] 2 Q. B. 57. See also *Janvier* v. *Sweeny*, [1919] 2 K. B. 316—a more serious case of intentional threats.

(*t*) *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222.

(*u*) [1901] 2 K. B. 669.

a case in which the wife of a Bethnal Green licensee was most understandably shocked (with resulting miscarriage) when the defendants' van was backed through the wall of her bar. The court allowed recovery but restricted the ambit of the claim to people who as the result of the defendants' negligence received shock from being put in immediate fear of personal injury to themselves (*a*) (an analogy clearly keeping close to assault). *Dulieu* v. *White* (*b*), however, where due to the negligent driving of a van, a mother was put in fear for the safety of her children who were out of sight up the road extended this rule to include fear of physical injury to oneself or one's near relations. In keeping with current thought, which seems to be biased in favour of plaintiffs, this proposition was carried further by Lord PORTER (*c*) who (though *obiter*) expressed the view that recovery will be allowed under this head either where the effect of the negligence was such that the plaintiff might reasonably anticipate *direct physical injury to relations or friends* or where the defendant ought reasonably to have foreseen that the result of his act or omission would be to *cause shock to the plaintiff himself*. This *dictum* was exploited in *Dooley* v. *Cammell Laird & Co. Ltd., and Mersey Insulation Company, Ltd.* (*d*) to the extent of allowing a claim where fear to *friends* was involved and in *Chadwick* v. *British Transport Commission* (*e*) WALLER, J., allowed recovery solely on the ground that the defendants ought to have foreseen the shock to the plaintiff which their negligence produced, though there was no reason for him to fear physical injury to himself. Thus it can now be said that recovery in respect of nervous shock negligently caused is permitted; but there are debatable questions yet to be decided by the higher courts. If such claims are restricted, for example, within the limits of Lord PORTER'S *dictum*, shock caused by fear of *nervous shock* to friends or relations may lie beyond the pale: so may (*f*) the case of

(*a*) *Ibid.* at p. 675 *per* KENNEDY, J. The learned judge also added that it was requisite to the claim that physical injury should ensue (as the miscarriage in the case in question). It is clear that this limitation no longer applies: *Behrens* v. *Bertram Mills Circus, Ltd.*, [1957] 1 All E. R. 583, 596; [1957] 2 Q. B. 1, 27–28; *per* DEVLIN, J.

(*b*) [1925] 1 K. B. 141. The authority of this decision is, however, not entirely clear: see *Hay (or Bourhill)* v. *Young*, [1942] 2 All E. R. 396, 400, 402; [1943] A. C. 92, 100, 103–105; *King* v. *Phillips*, [1953] 1 All E. R. 617; [1953] 1 Q. B. 429, 444.

(*c*) In *Hay's Case* (above, last note) at pp. 409 and 117 respectively.

(*d*) [1951] 1 Lloyd's Rep. 271 (DONOVAN, J.)—craneman fearing injury to worker in hold.

(*e*) [1967] 2 All E. R. 945—shock sustained by rescuer after railway accident.

(*f*) "May" not "will" because the issue would be likely to turn on the question of "proximity": "Were the circumstances such that the defendant ought to anticipate the shock to the plaintiff?" (See ensuing text.)

the bystander who is shocked by an accident to a stranger (*g*). So may *Owens* v. *Liverpool Corporation* (*h*) in which the Court of Appeal permitted mourners to recover for shock occasioned by a tram's overturning the hearse. Moreover, there are in this area, as it were, two other frayed ends: first, even where fear for relations is involved there must be "proximity" between plaintiff and defendant in the sense that the former's presence near the scene of the accident ought to have been anticipated by the defendant (*i*); second, in accordance with general principle the courts will not succour the supersensitive plaintiff, at least as long as his peculiar disposition is unknown to the defendant (*k*). This is an area of the law which thus remains open to future development but it is one which should be approached with caution for, outmoded though such a view be, there is something to be said for the erstwhile opinion of the Judicial Committee that its overenlargement might leave "a wide field opened for imaginary claims'. (*l*).

It remains to explain that what has to be foreseeable is in general the *likelihood*, or probability, of injury, not the mere possibility of it (*m*); though much depends upon the whole nature of the situation under review since

> "This general concept of reasonable foresight as the criterion of negligence . . . may be criticised as too vague, but negligence is a principle, which has to be applied to the most diverse conditions and problems of human life. It is a concerete, not an abstract, idea. It has to be fitted to the facts of the particular case (*n*)."

Consequently, as will appear below when the nature, as opposed to the scope of the duty of care is examined (*o*), in some circum-

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(*g*) See *Smith* v. *Johnson & Co.* (unreported), referred to in *Dulieu's Case* (above, n. (*u*)) where such a claim was denied. Policy would suggest that perhaps it ought still to be since its acceptance, given the proximity engendered by the occurrence of an accident in a crowded street, might multiply claims unduly.

(*h*) [1938] 4 All E. R. 727; [1939] 1 K. B. 394; severely (and rightly) criticized in *Hay's Case*.

(*i*) What is "near" is a question of degree: contrast *King* v. *Phillips*, [1953] 1 All E. R. 617; [1953] 1 Q. B. 429 and *Hay's Case* with *Boardman* v. *Sanderson*, [1964] 1 W. L. R. 1317.

(*k*) See *Cook* v. *S.*, [1967] 1 All E. R. 299; *sub. nom. Cook* v. *Swinfen*, [1967] 1 W. L. R. 457.

(*l*) See *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222.

(*m*) See *Hay* (*or Bourhill*) v. *Young*, [1942] 2 All E. R. 396, 401–402; [1943] A. C. 92, 101–102; *Glasgow Corporation* v. *Muir*, [1943] 2 All E. R. 44, 50; [1943] A. C. 448, 460; *Bolton* v. *Stone*, [1951] 1 All E. R. 1078, 1080; [1951] A. C. 850, 858.

(*n*) *Hay's Case* (last note) at pp. 404 and 107 respectively.

(*o*) Below, pp. 188–199.

stances—as where what he does is something essentially dangerous —the defendant may find that he is expected to guard against things which might be described rather as "on the cards" (*p*) than as things very likely to happen (*q*).

ILLUSTRATION 59

(a) *A duty of care will only be owed where at the time of the act or omission called in question the defendant ought reasonably to have contemplated the likelihood of injury to the plaintiff.*

Booker *v.* Wenborn, [1962] 1 All E. R. 431.

The plaintiff, a railway porter, was standing close to a train which was about to leave and was in the course of giving the guard and the engine-driver the signal for the train's departure. The defendant, a passenger, being late, rushed for a carriage and left the door open so that it struck the plaintiff. *Held:* Defendant liable, he ought to have foreseen that a person in plaintiff's position might be likely to be injured by his omission to close the door (*r*). Similarly pedestrians using the pavement may expect not to be struck by protruding parts of vehicles on the highway (*s*).

(b) *No duty where the likelihood of injury is not reasonably foreseeable.*

Hay (or Bourhill) *v.* Young, [1942] 2 All E. R. 396; [1943] A. C. 92.

Respondent was personal representative of one J.Y. who was killed in a street collision caused by his own negligence. Appellant, a fishwife, was at the time of the collision descending from a tram 45 yards from the spot where the collision took place, and could not see what occurred, but only heard the noise of the collision. This noise however so affected her nerves (she being pregnant at the time) that she became ill, gave birth to an idiot and was for a while disabled from carrying on her trade. *Held:* Although the deceased might reasonably have

(*p*) Though things like these would not attract liability in contract: *The Heron II, Koufos* v. *C. Czarnikow, Ltd.*, [1967] 3 All E. R. 686.

(*q*) See *Carmarthenshire C.C.* v. *Lewis*, [1955] 1 All E. R. 565; [1955] A. C. 549 and *Overseas Tankship (U.K.), Ltd.* v. *Miller Steamship Co., Ltd.: The Wagon Mound (No. 2)*, [1966] 2 All E. R. 709; [1967] 1 A. C. 617 (Illustration 60 (b).

(*r*) See also *Buckland* v. *Guildford Gas, Light and Coke Co.*, [1948] 2 All E. R. 1086; [1949] 1 K. B. 140; *Carmarthenshire County Council* v. *Lewis*, [1955] 1 All E. R. 565; [1955] A. C. 549; *Creed* v. *John McGeoch & Sons, Ltd.*, [1955] 3 All E. R. 123; *Simmonds* v. *Bovis, Ltd.*, [1956] 1 All E. R. 736: *Clay* v. *A. J. Crump & Sons, Ltd.*, [1963] 3 All E. R. 687; *Boardman* v. *Sanderson*, [1964] 1 W. L. R. 1317; *Slatter* v. *British Railways Board*, [1966] 2 Lloyd's Rep. 395; *Lee Cooper* v. *Jeakins (C. H.) & Sons*, [1965] 1 All E. R. 280; [1967] 2 Q. B. 1.

(*s*) *Watson* v. *Thomas S. Whitney & Co., Ltd.*, [1966] 1 All E. R. 122.

been expected to have foreseen injury to persons in the immediate vicinity of the place of impact, he could not have been expected to foresee injury to a person so far from this spot as the appellant: respondent was therefore not liable, since the deceased owed no duty to appellant (*t*).

ILLUSTRATION 60

(a) *The duty is in general based upon probabilities; not upon bare possibilities.*

Fardon *v.* Harcourt-Rivington (1932), 146 L. T. 391.

Defendant parked his car by the roadside, leaving his dog inside. The dog jumped about and broke the glass of one of the windows; a splinter from this glass injured plaintiff, a passing pedestrian. *Held:* No liability. "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities" (*u*).

(b) *But where the risk involved is great and the means of prevention easy reasonable possibilities may have to be taken into account.*

Overseas Tankship (U.K.), Ltd. *v.* Miller Steamship Co., Pty., Ltd.: The Wagon Mound (No. 2), [1966] 2 All E. R. 709; [1967] 1 A. C. 617.

Appellants' ship's engineer carelessly allowed furnace oil to overflow from their vessel *Wagon Mound* while she was bunkering in Sydney Harbour. This oil drifted to Sheerlegs Wharf where two of respondents' vessels were undergoing repairs and oxyacetylene welding was being done; the oil caught fire and the fire damaged the vessels. Respondents claimed in negligence. The evidence was that the risk of furnace oil igniting on water was a "possibility . . . which could become an actuality only in very exceptional circumstances": it was thus neither a probability nor a "fantastic possibility". *Held:* Assuming that the ship's engineer ought to have been aware of the nature of the risk he was not justified in disregarding it, for it was a real risk which could not be brushed aside as far-fetched. Moreover, the danger was one easy to avoid by stopping the spillage of oil, which was anyhow illegal as a nuisance and also constituted an economic loss to respondents themselves (*a*).

(*t*) See also *King* v. *Phillips*, [1953] 1 All E. R. 617; [1953] 1 Q. B. 429: *Hindustan S. S. Co.* v. *Siemens, Brothers & Co., Ltd.*, [1955] 1 Lloyd's Rep. 167, 168: *Brown* v. *Scruttons, Ltd.*, [1958] 2 Lloyd's Rep. 440: *Prince* v. *Gregory*, [1959] 1 All E. R. 133.

(*u*) (1932), 146 L. T. 391, 392; *per* Lord DUNEDIN. See also *The Wagon Mound* (*No.* 1), [1961] 1 All E. R. 404; [1961] A. C. 388.

(*a*) See also *Carmarthenshire C.C.* v. *Lewis*, [1955] 1 All E. R. 565; [1955] A. C. 549. For the relationship of *Wagon Mound* (*No.* 2) to *Wagon Mound* (*No.* 1) see below, p. 209, n. (*g*), and for the relevance of the power to prevent the occurrence, p. 196.

The Scope of the Duty Qualified

If the "foresight" test is a useful one by which the existence of a duty of care may be negatived where the requisite foreseeability be not present it is by no means a universally valid guide for determining when the duty *will* be imposed. For the fact must be faced that when legal precepts are reduced to simple formulae they become too general to be reliable guides to decision in particular cases (*b*). For this we have the authority of Lord ATKIN himself, who warned against the danger

> " . . . of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in a wider survey and the inherent adaptability of English law be unduly restricted" (*c*).

If indeed the courts were really to deliver the question of "duty" or "no duty" into the hands of the reasonable juryman they would be abandoning to a mythical abstraction what it is their own business to determine—namely to mark out the bounds of civil obligation in terms of rights and duties. In practice of course they do nothing of the kind for the question of what "I *ought reasonably* to have in contemplation" (*d*) really imports more than "What would a reasonable man in fact foresee?" It contains a vital element of social judgment concealed in the words "ought" and "reasonable". The issue is thus not simply one of "foresight", but one of *policy* as well (*e*).

In fact policy, both old and new, takes a hand in the compounding of the duty of care; thus qualifying the element of foresight (*f*). Indeed when in 1932 Lord ATKIN posed and answered his celebrated question it was not by any means universally true (*g*) that "foresight" of harm would involve liability, and the propounding of the

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(*b*) Thus Justinian's aphorism *"Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere"* (Ins. I, 1, 3), had little practical significance.

(*c*) *Donoghue (or M'Alister)* v. *Stevenson*, [1932] All E. R. Rep. at p. 13; [1932] A. C. at p. 599. Cited by Lord DEVLIN in *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, [1963] 2 All E. R. at p. 607; [1964] A. C. 465, 524.

(*d*) See *Gallagher* v. *McDowell*, [1961] N. I. 26, 31; *per* Lord MACDERMOTT, L.C.J.—"While *Donoghue (or M'Alister)* v. *Stevenson* was meant to lay down a broad principle, its test of legal duty is linked to what is reasonable, and I doubt if Lord ATKIN was prepared to adopt, as a matter of law, a standard of reasonableness in this connection which would open the door that had just been unlocked to its fullest extent".

(*e*) See the discussion of the "rescue" cases, above p. 36.

(*f*) Nor must the causal element be overlooked. See above, pp. 17–23.

(*g*) As that unregenerate realist SCRUTTON, L.J., was quick to point out: *Farr* v. *Butters Brothers & Co.*, [1932] All E. R. Rep. 339, 342–343; [1932] 2 K. B. 606, 613–614.

test could not alter policies already adopted at the highest level; nor indeed is it necessarily desirable that all kinds of foreseeable harm should be actionable. For instance it is a fact that a farmer who fails to fence his land effectively can foresee that his cattle may escape and do damage on the highway; but long, long, before 1932 there was and there still is to-day (*h*) no duty upon the farmer to fence against this contingency. And again there was, and still is, no *general* duty to refrain from careless (*i*) misstatement causing damage (*k*). There was and still is a rule of law which accorded and accords owners of land and landlords special immunities in relation to the state of their property even where they are in a position to foresee that its condition is such that it may give rise to injury. There was and still is a rule that in the case of injury to property at least no action may be brought "against the wrongdoer except . . . on the part of one who had some property in, or possession of, the chattel injured" (*l*). Further the consequences of some wrongdoing are so manifold that common sense dictates that no one should be held responsible for all of them. These form exceptions to the *Donoghue* v. *Stevenson* doctrine which require special consideration.

(i) *"In general, an innocent but negligent misrepresentation gives no cause of action"* (*m*).

To this general statement there are now two exceptions, the one turning upon the decision of the House of Lords in *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.* (*n*), the other upon a provision of the Misrepresentation Act, 1967. These two exceptions must be considered separately.

(a) *The decision in Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*

Before this decision there was much authority for the proposition that outside the sphere of contractual and fiduciary relationships, there was no liability for careless misstatements, at any

(*h*) *Searle* v. *Wallbank*, [1947] 1 All E. R. 12; [1947] A. C. 341. And see *Brackenborough* v. *Spalding Urban District Council*, [1942] 1 All E. R. 34; [1942] A. C. 310 (market authority under no duty to pen cattle so as to prevent them from endangering the public).

(*i*) As opposed of course to fraudulent, defamatory or other unlawful forms of misstatement.

(*k*) As to the special immunities of barristers and the like see above, pp. 32–33.

(*l*) *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, 289; *per* Lord PENZANCE.

(*m*) *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, [1963] 2 All E. R. 575, 581; [1964] A. C. 465, 483; *per* Lord REID. This case will now be referred to in the footnotes as *"Hedley"*.

(*n*) See last note. Further references in the text will be to *"Hedley Byrne"*.

rate though it caused purely economic—as opposed to physical (*o*)—damage; and that this was so even though the defendant could foresee that his misstatement would be likely to cause the injury complained of (*p*). The whys and wherefores of this apparent denial of justice are complex and we cannot pause to consider them here (*q*). What we do need to do is to examine this branch of the law as it now is; but first let us set out *Hedley Byrne* by way of Illustration.

ILLUSTRATION 61

An action for negligence may now lie in respect of careless misstatement, even though purely economic loss is occasioned.

Hedley Byrne and Co., Ltd. *v.* Heller & Partners, Ltd., [1963] 2 All E. R 575; [1964] A. C. 465.

The plaintiffs were a firm of advertising agents. They had placed on credit terms substantial orders on behalf of E. & Co., Ltd. for advertising time on television and for certain other things. Through their own bankers they enquired of the defendant bankers about the credit-worthiness of E. & Co. The enquiry was made "in confidence" and "without responsibility" on the part of the defendants and the defendants replied "without responsibility" that E. & Co. was "good for its ordinary business engagements". / E. & Co. in fact went into liquidation and the plaintiffs as a result lost the large sum of £17,000 which they had expended on the orders. The plaintiffs alleged that (though this was never substantiated) the defendants had been careless in failing to make a proper check as to E. & Co.'s credit-worthiness and that their loss was therefore caused by this negligence in respect of which they claimed. *Held*: That the action failed. The defendants were amply protected by the clear understanding that the reference was given "without responsibility". But the House of Lords made it plain that *negligent misstatement may in proper cases give rise to liability.*

It must be stressed straight away that this decision to allow actions in negligence for careless misstatement causing economic damage does *not* rest *solely* upon the "foresight" test of *Donoghue* v. *Stevenson* (*r*). To allow a *general* right of recovery in respect of foreseeable injury caused by careless (as opposed to fraudulent) misstatement

(*o*) At least as regards injuries to the person: see *Sharp* v. *Avery and Kerwood*, [1938] 4 All E. R. 85, 90; *Clayton* v. *Woodman & Son (Builders), Ltd.*, [1961] 3 All E. R. 249, reversed on the facts, [1962] 2 All E. R. 33.

(*p*) See, *e.g. Dickson* v. *Reuter's Telegram Co.* (1877), 3 C. P. D. 1, 5; *per* BRAMWELL, L.J.: *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491: *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E. R. 426; [1951] 2 K. B. 164.

(*q*) They are fully explained in *Hedley*. For the pre-existing state of the law see the former edition of this book.

(*r*) See *Hedley*, [1963] 2 All E. R. at p. 580; [1964] A. C. 465; 482: *per* Lord REID. But *contra* at pp. 611, 530–531; *per* Lord DEVLIN. If the latter is right it must be conceded that it is a duty with a difference.

would be to go too far; just as all legal systems recognize that it would be going too far to hold men liable for every promise, however informally made (*s*). And this policy aspect of *Hedley Byrne* is fully faced by the House of Lords, as the following quotations will show; for though *Donoghue's Case* permits wide liability for *deeds* (*t*) causing foreseeable harm, *words* are different.

> "The most obvious difference between negligent words and negligent acts is this. Quite careful people often *express definite opinions* on social or informal occasions (*u*), even when they see that others are likely to be influenced by them; and they often do that *without taking that care which they would take if asked for their opinion professionally*, or in a business connexion. But it is at least *unusual casually to put into circulation negligently-made articles* which are dangerous" (*a*).

This accords with everyday experience. If you give a party your guests will take it ill if you give them poison to drink, but you would hardly expect them to take you to law if, during the party, you offer them a tip for the Derby, but by inadvertence get the name of the horse wrong—though they may lose heavily if they rely upon your advice. And there is another aspect of the matter:—

> "The reason for some divergence between the law of negligence in word and that of negligence in act is clear. *Negligence in words creates problems different from those of negligence in act. Words are more volatile than deeds.* They travel far and fast afield. They are used without being expended and take effect with innumerable facts

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(*s*) The question of policy which now faces the courts as to *what* careless misstatements are to be actionable bears marked simililarity to the question it took the mediaeval lawyers nearly two hundred years to solve, namely, "What kinds of *promises* are to be actionable?"

(*t*) After the rise of *assumpsit* the common law seemed to have confined liability for misstatement to the sanctions of the law of contract; though in respect of deceit *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, marked a fresh start in the field of tort. But, as is pointed out in *Hedley* (with ample mediaeval foundation) tort law never lost interest in careless *acts* even though performed voluntarily and independent of contract. For this the following authorities are referred to in *Hedley*:—*Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909: *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 158: *Wilkinson* v. *Coverdale* (1793), 1 Esp. 74: *Dartnall* v. *Howard and Gibbs* (1825), 4 B. & C. 345: *Gladwell* v. *Steegall* (1839), 5 Bing. N. C. 733; "if a person undertakes to perform a voluntary act, he is liable if he performs it improperly" *Skelton* v. *London and North Western Rail. Co.* (1867), L. R. 2 C. P. 631, 636, *per* WILLES, J.

(*u*) Just as we all make casual *promises* (*e.g.* to invite people to dinner) which we often fail to honour, and the law will not enforce.

(*a*) *Hedley*, [1963] 2 All E. R. at p. 580; [1964] A. C. 465, 482: *per* Lord REID (Italics ours). To similar effect at pp. 588, 494: *per* Lord MORRIS. But like all statements bearing upon policy this one is not, perhaps, quite so axiomatic as it may at first appear to be; for there is truth in Lord BLACKBURN'S assertion that words may sometimes be likened to "firebrands and death": *Capital and Counties Bank, Ltd.* v. *Henty* (1882), 7 App. Cas. 741, 772. Think of the power of words under the moustache of Adolf Hitler!

and other words. . . . If the mere hearing or reading of words *were held to create proximity*, there might be no limit to the persons to whom the speaker or writer could be liable. *Damage by negligent acts to persons or property on the other hand is more visible and obvious; its limits are more easily defined* and it is with this damage that the earlier cases were more concerned" (*b*).

It was indeed no accident that Trespass, direct and forcible physical injury, was the first and the parent of torts; indirect loss and harm occasioned by the use of words are things of a more refined nature. So, as the House of Lords made clear (*c*), "proximity", reasonable foresight that a misstatement is likely to injure the plaintiff, is essential to liability whether harm be produced by word or deed; but as far as words are concerned it is not of itself enough. What that something is we must now seek to extract from the *dicta* (*d*).

It is thought that the most helpful description of the nature of the duty is to be found in the speech of Lord MORRIS; his Lordship said

> "My lords, I consider that it follows that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore, if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise" (*e*).

This means in short that the duty arises where persons possessed of *special skill* make statements which they know or ought to know will be relied upon by others; provided of course that the statement is made in respect of something which appertains to the special skill. If such a statement is carelessly made and the plaintiff is one

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(*b*) *Hedley*, [1963] 2 All E. R. at p. 613; [1964] A. C. at p. 534: *per* Lord PEARCE. (Italics ours.) To similar effect *per* Lord REID at pp. 581, 483.

(*c*) See, *e.g.* the *dictum* of Lord PEARCE just quoted.

(*d*) *Hedley*, like *Donoghue* v. *Stevenson*, represents no more than a series of *obiter dicta* since as appears from the summary in Illustration 61, the claim was barred *in limine* by the fact that the reference was given and accepted "without responsibility". Strictly, therefore, no question as to the nature of the duty of care arose.

(*e*) *Hedley*, [1963] 2 All E. R. at p. 594; [1964] A. C. at pp. 502–3. See to similar effect the other speeches, [1963] 2 All E. R. at pp. 583, 598, 611 and 617; [1964] A. C. at pp. 486, 510, 529, 539. One notes the marked similarity between this principle and the principle which underlies the implied term imposed by the Sale of Goods Act 1893, s. 14 (1).

of the people likely to rely upon it he will have an action if he suffers damage as the result of such reliance. Examples—and no more—of the kinds of person envisaged are "accountants, surveyors (*f*), valuers (*g*) and analysts" (*h*); to whom could of course be added medical practitioners (*i*), solicitors and many others. Hence for example, if a man were seeking to invest in a company which was nearly insolvent, and he were to ask the directors for a report upon the state of its affairs—and they in turn were to commission their accountants to produce a balance sheet for the purpose of assuring the would-be investor—the accountants might be liable in negligence if the balance sheet were so carelessly prepared that they made the financial position of the company seem sound, with the result that, in reliance upon it, the investment were made to the investor's loss (*k*). And it must be noted that this duty is independent of contract; though of course vis-à-vis his *client* the skilled man owes a *contractual* duty to be careful.

It must be added, however, that in *Hedley Byrne* the House of Lords decided on the actual facts that the *banker* would not owe a duty any greater than a duty to be honest (*l*) in giving a reference as to the credit-worthiness of one of his own customers (*m*). Lord REID (*n*) in particular pointed out that it would be harsh to impose a duty to take care since in such a transaction the inquirer could hardly expect a full and detailed answer in view of the banker's obligations to his own client. Similar considerations apply where an inquiry is made of a trustee as to the state of the trust funds (*o*); no more than a duty of honesty should be expected.

Thus far it has been suggested that the effect of *Hedley Byrne* is to

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(*f*) As the effect of the reversal by *Hedley* of *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491. It is, however, pointed out both in *Hedley* and by DENNING, L.J., in *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E. R. 426, 434; [1951] 2 K. B. 164, 181, that the actual decision in *Le Lievre's Case* may be sustainable on the facts.

(*g*) *Cann* v. *Willson*—Illustration 62.

(*h*) *Candler's Case* (n. (*p*), above) at p. 433; *per* DENNING, L.J. This dissenting judgment was much relied upon in *Hedley*.

(*i*) See *Everett* v. *Griffiths*, [1920] 3 K. B. 163.

(*k*) These were the facts of *Candler's Case* (n. (*f*), above). And this is the effect of its reversal by *Hedley*.

(*l*) See *Robinson* v. *National Bank of Scotland* 1916 S. C. (H.L.) 154; and the majority in *Hedley*, where only Lord DEVLIN's position on this point does not seem quite clear.

(*m*) But the situation would be different as between the banker and a potential customer who sought advice about investments: *Woods* v. *Martins Bank, Ltd.*, [1958] 3 All E. R. 166; [1959] 1 Q. B. 55, as explained in *Hedley*.

(*n*) *Hedley*, [1963] 2 All E. R. at p. 584; [1964] A. C. at p. 489.

(*o*) *Low* v. *Bouverie*, [1891—1894] All E. R. Rep. 348; [1891] 3 Ch. 82.

sanctify the principle that those possessed of special skills owe a special duty of care in respect of their statements. But full weight must now be given to the final sentence of Lord MORRIS's *dictum*: it will be remembered that he said,

> "Furthermore, if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise" (*p*).

Superficially this might seem to add little to the first part of the *dictum*, but it is believed that in fact it was, and was intended to be, the major proposition of which the first part disclosed only a partial consequence. The first part imposes a duty upon those possessed of special skills (*q*), the second part goes further and imposes the duty upon the broad principle that where an undertaking is made to use care in statement in any circumstances in which another may reasonably be expected to rely upon it, that other will have a duty owed to him. This interpretation clearly has the full sanction of Lord DEVLIN who, having remarked that he had had the advantage of reading all the opinions of the other law lords, expressed the view that he "did not understand (their) lordships to hold that (the duty is to be imposed) by law *on certain types of persons* or in certain sorts of situations" (*r*). It is therefore conceived that the duty may arise quite independently of any special categories of trade or calling. This view certainly seems now to be confirmed by the decision of CAIRNS, J. in *W. B. Anderson & Sons, Ltd.* v. *Rhodes (Liverpool), Ltd.* (*s*), where a firm were held liable for a misstatement as to the credit-worthiness of another firm, made in the ordinary course of business by one of their salesmen to people known to be considering giving credit to the other firm.

So here is the duty in respect of misstatement broadly outlined. But as this description of it stands it is still too broad to represent the precise nature of the law. *Hedley Byrne* further makes it plain that it is not simply a duty resting upon reliance, undertaking and

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(*p*) *Hedley*, [1963] 2 All E. R. at p. 594; [1964] A. C. at p. 503. This part of the *dictum* is adopted *verbatim* by Lord HODSON at pp. 601, 514, and seems to be accepted in all the speeches with the possible exception of that of Lord PEARCE.

(*q*) It would seem that DENNING, L.J., in *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E. R. 426, 433; [1951] 2 K. B. 164, 180, would have so limited the duty. Possibly Lord PEARCE (*Hedley*, [1963] 2 All E. R. at p. 617; [1964] A. C. at p. 539) would also do so.

(*r*) *Hedley*, [1963] 2 All E. R. at p. 611; [1964] A. C. at p. 529. (Italics ours.)

(*s*) [1967] 2 All E. R. 850.

reasonable foresight of injury. It has further limitations resting upon considerations of social policy. It is certain that it will not apply to merely casual statements (*t*), though it may be going too far to assert that it will apply only to business transactions (*u*). The House of Lords plainly recognized that practical limitations must be placed upon the scope of its incidence. In *Candler* v. *Crane, Christmas & Co.* (*a*) DENNING, L.J., had already pointed out that stated too widely the rule that reliance upon misstatement may give rise to an action could lead to the *reductio ad absurdum* (*b*) that carelessness in the making of a chart might expose a marine hydrographer to countless actions at the suit of people thereby subjected to shipwreck; and both American (*c*) and South African (*d*) experience have already suggested that limits must be imposed upon the ambit of the duty, over and above the general rule of reasonable foresight.

What this limitation will ultimately prove to be is at present conjectural: DENNING, L.J. (*e*), suggested that it should only arise where the defendant has a particular transaction in view—the particular transaction which gives rise to the duty—thus on the facts of *Candler's Case* (*f*) the investor could not charge the accountant in respect of an investment subsequently made, after the initial investment made in reliance upon the careless balance sheet. And similarly the hydrographer would not be chargeable to the shipwrecked since his charts are published to give information and not with any particular persons in mind who may rely upon his work (*g*). Lord DEVLIN (*h*) propounded a rather different, and perhaps more

(*t*) *Fish* v. *Kelly* (1864), 17 C. B. N. S. 194 (approved in *Hedley*).

(*u*) Lord PEARCE may have intended this: *Hedley*, [1963] 2 All E. R. at p. 617; [1964] A. C. at p. 539.

(*a*) Above, n. (*q*) at p. 435. And see *per* ASQUITH, L.J., at pp. 442, 194.

(*b*) The marine hydrographer was originally Sir Percy Winfield's idea: *Torts*, 4th Edn. 387.

(*c*) In *Glanzer* v. *Shepard* (1922), 233 N. Y. 236 (liability imposed upon public weigher employed by seller for negligently overstating weight on goods to loss of buyer). But in *Ultramares Corpn.* v. *Touche* (1931), 255 N. Y. 170 the limits appeared—auditors not liable to person who lent money on strength of carelessly prepared accounts; since asked by borrower to supply thirty copies, and were not informed of reason for request.

(*d*) *Perlman* v. *Zoutendyk* 1934 C. P. D. 151: *Herschel* v. *Mrupe* (1954) (3) S. A. 464.

(*e*) *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E. R. 426, 435; [1951] 2 K. B. 164, 183.

(*f*) Last note. The facts have already been set out in the text.

(*g*) And yet one hesitates. The making of marine charts is surely an occupation fraught with a high degree of risk; just like the placing of a buoy.

(*h*) *Hedley*, [1963] 2 All E. R. at pp. 610–611; [1964] A. C. at pp. 528–530: basing his argument upon a *dictum* of Lord SHAW OF DUNFERMLINE in *Nocton* v. *Lord Ashburton*, [1914–1915] All E. R. Rep. at p. 62; [1914] A. C. at p. 972.

interesting, thesis: he suggested that for liability to be imposed the situation between the parties must be one "equivalent to contract" (*i*): that is, like contract, but without the need for contractual intent, consideration or deed.

This is as much as can at present be said: and it is a matter of "What's come is still unsure". If Lord DEVLIN's suggestion is to be followed he himself was under no illusion that it will lead to certainty of prediction for he said.

> "I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking, any more than it is possible to formulate those in which the law will imply a contract" (*k*).

We must conclude as we began, that the test of proximity in relation to careless misstatement must depend upon considerations of policy, and although Lord ATKIN's foresight test enters into the determination of it, it can never be the sole delineating factor.

ILLUSTRATION 62

A duty of care in respect of misstatement will arise "where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him" (*l*).

Cann *v.* Willson (1888), 39 Ch. D. 39 (*m*).

The owner of some property wished to raise money by way of mortgage. For this purpose he obtained a valuation from defendants (valuers) who grossly over-valued the property and sent this valuation to the owner's solicitors. The latter pointed out the purpose for which the valuation was required and warned defendants of the responsibility they were undertaking. The solicitors then forwarded this document to the plaintiff (lender and mortgagee) who, on the strength of it advanced money to the owner. Upon the latter defaulting, the true value of the property proved insufficient to satisfy the mortgage debt. *Held:* Defendants were liable upon the ground that they had "knowingly placed themselves" in the position of sending their valuation "direct

(*i*) . . . "that is", said Lord DEVLIN, "where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract" (pp. 610, 529). It is difficult to believe that he really intended to narrow the concept down to quite such a technical degree: see text.

(*k*) *Hedley*, [1963] 2 All E. R. at p. 611; [1964] A. C. at pp. 529–530.

(*l*) *Hedley*, [1963] 2 All E. R. at p. 583; [1964] A. C. at p. 486: *per* Lord REID.

(*m*) Overruled in *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491: now reinstated by *Hedley*.

to the agents of the plaintiff for the purpose of inducing the plaintiff" to advance the money: and it followed that they "*incurred a duty towards him to use reasonable care in the preparation of the document*" (*n*).

(b) *The Misrepresentation Act, 1967* (*o*).

Strictly speaking the liability imposed under this Act is, as will appear, a special form of liability falling outside the common law of negligence; it is thought, however, that a place should be found for it here.

Formerly the law was that although a claim for damages would lie in respect of the breach of a *term* of a contract there could be no such claim—though there might be a right to compensation in equity—in respect of an innocent *misrepresentation* inducing the contract and causing loss to one of the contracting parties, however careless that misrepresentation might be. And this was in accord with the more general rule believed to prevail before *Hedley Byrne* that in general fraud alone, would give rise to a claim based upon misstatement. In the strict sphere of contractual liability this was particularly inequitable since a mere breach of warranty would ground a claim for damages, but a misrepresentation, however damaging, left the complainant with only an inadequate remedy. Hence, as far as *contract* is concerned the Misrepresentation Act, 1967, s. 2 (1) now provides that:—

> "Where a person has entered into a *contract* after a misrepresentation has been made to him *by another party thereto* and as a result thereof he has suffered loss, then, if the person making the misrepresentation would have been liable to damages *had the representation been made fraudulently*, that person shall be so liable . . . unless he proves that he had *reasonable ground to believe and did believe up to the time when the contract was made* that the facts represented were true" (*p*).

It will be noticed that the situation here is a *contractual one*, and that it is not similar to the kind of circumstances envisaged in *Hedley Byrne* where, however akin to contract, the situation is not a contractual one. The statutory provision is confined to *contractual* misrepresentation, where the parties are actually entering upon a contract. Further, the statutory claim will only be maintainable where there would have been liability "had the misrepresentation been made fraudulently". The elements of Fraud will be considered

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(*n*) (1888), 39 Ch. D. at p. 43; *per* CHITTY, J. (Italics ours).

(*o*) 47 Halsbury's Statutes (2nd Edn.) 1076.

(*p*) (Italics ours) s. 2 (2) of the Act gives the court power also to award damages in lieu of an order for rescission of the contract, though such damages (s. 2 (3)) must be taken into account in making an award under s. 2 (1).

below (*q*); presumably this provision conveys no more than that the careless misrepresentation relied upon must have been acted upon by the plaintiff to his detriment. It will also be noticed that—unlike an ordinary claim in negligence where the onus lies upon the plaintiff to establish the negligence—once, under the subsection, the plaintiff has proved the contract, the representation and his reliance thereupon, the onus lies upon the *defendant* to establish that "he had reasonable ground to believe and did believe up to the time when the contract was made that the facts represented were true". The effect of this is that far from having to *establish negligence* the plaintiff could succeed where the representation was neither fraudulent nor negligent, for it is up to the defendant to establish facts which would seem in effect to negative the latter. The likely effect of this enactment is that in future where contract is concerned there will be a tendency for plaintiffs to eschew claims in fraud, which are difficult to establish, and to take the easier path of relying upon the subsection.

(ii) *Immunity of Landlords and Vendors.*

> "it is . . . well established . . . law that in the absence of . . . contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, *even if he has constructed the defects himself or is aware of their existence*" (*r*).

"Fraud apart, there is no law against letting a tumble-down house" (*s*); and this applies to selling as well as to letting. The rule appears to rest upon the notion of "*caveat emptor*" (*t*); he who leases or buys a house must safeguard himself by agreement against dangers arising from defects in its condition. And of course the rule applies *a fortiori* where it is not the tenant or purchaser himself, but his family or guests who receive injury as the result of such defects. Further, this immunity exists not only in respect of physical (*e.g.* structural) defects in the premises but also to cases where they are "so to speak, legally unfit" (*u*) for use: as where unknown to a prospective tenant, who wishes to use them for business purposes, there is in existence a covenant which restricts them to use as a private dwelling (*v*).

(*q*) Chapter 21.

(*r*) *Bottomley* v. *Bannister*, [1932] 1 K. B. 458, 468; *per* SCRUTTON, L.J. italics ours).

(*s*) *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, 240; *per* ERLE, C.J.

(*t*) See *Chappell* v. *Gregory* (1863), 34 Beav. 250, 252–3.

(*u*) *Edler* v. *Averbach*, [1949] 2 All E. R. 692, 699; [1950] 1 K. B. 359, 374; *per* DEVLIN, J.

(*v*) See *Hill* v. *Harris*, [1965] 2 All E. R. 358; [1965] 2 Q. B. 601.

But the scope of the landlord's or vendor's immunity is not in fact as wide as may at first appear. And this for three reasons. First, it only applies "in the absence of contract"; this statement will shortly be elaborated. Secondly, the immunity only extends to the state of the premises *at the commencement* of the lease or at the time of sale; if, therefore, apart from any contractual obligation to do so, a landlord, *after* the commencement of a lease, does something upon the premises (such as effecting repairs) which is done negligently and injury is thereby caused, either to the tenant himself or to anyone lawfully upon the premises (*a*) (such as a member of the tenant's family or a guest) then the landlord will be held responsible. But on the other hand he will not be liable for injury arising merely from disrepair (*b*). In the third place the immunity is only applicable where the strict relationship of landlord/tenant, vendor/purchaser, subsists; it does not, for instance, apply where the parties are licensor and licensee (*c*) of the premises in question.

The words "in the absence of contract" are important. Where a landlord is under an obligation to maintain or repair the demised premises and the tenant has carried out his own obligations, such as his obligation to give notice of disrepair (*d*), and the tenant is injured by reason of some defect in the premises which arises from the landlord's breach of his obligation, the tenant may recover from the landlord. And it is now enacted (*e*) that where injury is inflicted by reason of such default on the part of the landlord upon people, or upon the property of people, other than the tenant who are lawfully on the premises, such people may also recover

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(*a*) This appears to be the effect of *A. C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240; over-ruling *Malone* v. *Laskey*, [1907] 2 K. B. 141; *Ball* v. *L.C.C.*, [1949] 1 All E. R. 1056; [1949] 2 K. B. 159, in so far as these cases established that in such circumstances the landlord's sole liability in negligence would be to the tenant alone. Even before *Billing's Case* it was already established that the landlord would be liable, even to third parties lawfully in the house, where the injury was caused by something in his own occupation or control: *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K. B. 551.

(*b*) *Sleafer* v. *Lambeth Metropolitan Borough Council*, [1959] 3 All E. R. 378; [1960] 1 Q. B. 43.

(*c*) See *Wheat* v. *E. Lacon & Co., Ltd.*, [1965] 2 All E. R. 700, 713; [1966] 1 Q. B. 335, 371.

(*d*) *Torrens* v. *Walker*, [1906] 2 Ch. 166.

(*e*) Occupiers' Liability Act, 1957, s. 4 (37 Halsbury's Statutes (2nd Edn.) 837), which applies to statutory as well as to contractual tenancies and also to sub-tenancies. And presumably to obligations imposed upon the landlord by law—as under the Housing Acts (below)—as well as by covenant. *Cavalier* v. *Pope*, [1906] A. C. 428, and cases, such as *Ryall* v. *Kidwell & Son*, [1913] 3 K. B. 123, which followed it therefore no longer represent the law.

from the landlord, whose liability will be gauged by reference to the "common duty of care" owed by an occupier to lawful visitors (*f*).

Moreover, certain *implied* terms attach to some classes of leases and sales. First, there is an implied condition in a lease of *furnished* premises that they are reasonably fit for immediate occupation (*g*). Secondly, in the case of houses let for human habitation *below certain rentals* there is a term implied by statute (*h*) that they shall be at the commencement of the letting, and remain throughout the duration of the lease, "reasonably fit for human habitation" (*i*). Thirdly, there is an implied term in a contract for the *building* of a house (as opposed to a contract for the sale of a completed house) that it shall be built in a workmanlike manner, that good and proper materials shall be supplied, and that it shall also be reasonably fit for human habitation (*k*).

It must also be added that the peculiar immunity granted by the common law (*l*) to landlords and vendors before the formulation of a general duty of care in *Donoghue* v. *Stevenson* extends only to them; and that therefore injury caused to occupiers by the state of the land which is brought about by other people, such as builders (*m*), comes within the scope of the general duty.

ILLUSTRATION 63

(a) *"There is no law against letting a tumble-down house".*

Davis *v.* Foots, [1940] 1 K. B. 116.

Appellant took a lease of a flat from respondents; before the commencement of the lease respondents had a gas fire removed from a bedroom, leaving the pipe open and tapless. When appellant and her husband came into occupation they had the gas turned on at the main and slept in the bedroom. The gas escaping, the husband died

(*f*) See next Chapter.

(*g*) *Smith* v. *Marrable* (1843), 11 M. & W. 5 (bugs); *Collins* v. *Hopkins*, [1923] 2 K. B. 617. But see *Sarson* v. *Roberts*, [1895] 2 Q. B. 395.

(*h*) The Housing Act, 1957, s. 6 (37 Halsbury's Statutes (2nd Edn.) 323). See also the Housing Act, 1961, ss. 32 and 33 (41 Halsbury's Statutes (2nd Edn.) 503)—landlord's implied covenants in respect of leases of less than seven years to keep exterior structures and internal installations in repair.

(*i*) See *Morgan* v. *Liverpool Corporation*, [1927] 2 K. B. 131, 145, and *Summers* v. *Salford Corporation*, [1943] 1 All E. R. 68; [1943] A. C. 283.

(*k*) *Lawrence* v. *Cassel*, [1930] All E. R. Rep. 733; [1930] 2 K. B. 83; *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] All E. R. Rep. 93; [1931] 2 K. B. 113; *Perry* v. *Sharon Development Co., Ltd.*, [1937] 4 All E. R. 390; *Jennings* v. *Tavener*, [1955] 2 All E. R. 769; *Hancock* v. *B. W. Brazier (Averley), Ltd.*, [1966] 2 All E. R. 901. But the term may be excluded by contract: *Lynch* v. *Thorne*, [1956] 1 All E. R. 744.

(*l*) Upon no very clear principle except possibly *capeat emptor*: let the tenant or vendor look after himself by making contractual safeguards.

(*m*) *Sharpe* v. *E. T. Sweeting & Son., Ltd.*, [1963] 2 All E. R. 455 (Illustration 63 (b)): *Gallagher* v. *McDowell, Ltd.*, [1961] N. I. 26 (Illustration 77).

and appellant became very ill. *Held:* Respondents were not liable; the house being unfurnished, they were not responsible for its dangerous condition, even though they ought clearly to have been aware of it (*n*).

(b) *But people other than landlords and vendors fall within the general duty.*

Sharpe *v.* E. T. Sweeting & Son, Ltd., [1963] 2 All E. R. 455.

Defendants were building contractors who constructed a house for a local authority. Due to faulty construction a canopy over the door of the house fell upon and injured plaintiff, the wife of a tenant who rented the house from the local authority. *Held:* Defendants liable under *Donoghue* v. *Stevenson*. They were independent contractors, not agents of the local authority—so the landlords' immunity did not extend to them.

(iii) *Rights of action in respect of damage to property are confined to those who have a proprietary or possessory right to the property.*

This means that those who have no such rights can make no claim however foreseeable the injury to them might have been: a dogma which cuts across the rule in *Donoghue* v. *Stevenson*. This dogma is, moreover, often stated broadly, so as to cover cases of injuries to the person as well as to property, in the juristic gibberish that "A person who suffers *damnum* cannot recover compensation on the basis of *injuria* suffered by another" (*o*). It will be noted that the use of the word "*damnum*" is "loaded"; it suggests that the plaintiff has received no legally redressable injury; but of course the injured plaintiff is asking the court to give him redress and if it does his "*damnum sine injuria*" will become "*damnum cum injuriam*" (to repay this kind of linguistic nonsense in kind). The assumption that where B suffers injury A can suffer none is not more than question-begging, and as regards injuries to the *person*, though the dogma is constantly stated to apply, it simply does *not*: one need only instance the principles underlying the "nervous shock" (*p*) cases and, of course, the entire policy of the Fatal Accidents Acts (*q*).

(*n*) See also *Bottomley* v. *Bannister*, [1932] 1 K. B. 468; *Otto* v. *Bolton and Norris*, [1936] 1 All E. R. 960; [1936] 2 K. B. 46; *Travers* v. *Gloucester Corpn.*, [1946] 2 All E. R. 506; [1947] K. B. 90.

(*o*) Salmond, *Torts* (14th Edn.), p. 702. Similar statements bespatter the Reports. See *e.g. Societé Anonyme de Remorquage à Hélice* v. *Bennetts*, [1911] 1 K. B. 243; *Electrochrome, Ltd.* v. *Welsh Plastics, Ltd.*, [1968] 2 All E. R. 205.

(*p*) Above, p. 164. *Hambrook* v. *Stokes and Hay* (*or Bourhill*) v. *Young*, for example, obviously assume that injury to B may give rise to a claim in A. The action for loss of services (see p. 339) forms another obvious instance.

(*q*) Part III, chapter 4.

Nevertheless, the rule as stated in the rubric above undoubtedly applies in the case of injuries to property, at any rate to chattles. It stems from the speech of Lord PENZANCE in *Simpson* v. *Thomson* (*r*) and has now become so deeply encrusted in the law that without the aid of the Legislature or of the House of Lords it cannot be departed from. In its classic form, as pronounced by Lord PENZANCE, it amounts to this, that where there is injury to a chattel

> "... no precedent or authority has been found ... for an action against a wrongdoer ... except—on the part of one who had either some property in, or possession of, the chattel injured'. (*s*).

The facts of the case were that one X insured two ships of Y's (ship A and ship B); the ships collided in the North Sea off Lowestoft and, due to the negligence of the master of B, ship A was sunk. X paid Y under the policy for the loss of A, but thereupon (in effect) sought by action to recoup his loss by suing Y as owner of the negligent ship B. It was held, that the claim failed (*t*) and Lord PENZANCE maintained that this was because X had no proprietary interest in ship A, his sole interest being such as any insurer has "in her welfare and protection". His Lordship then enlarged upon the dangers of permitting such claims where the plaintiff has no such proprietary interest in the chattel damaged: he foresaw that such departure would open the door to all kinds of actions: for instance claims by people to whom the owner has contracted to sell goods, and in the matter of personal injuries claims by theatre managers for loss of box office in respect of injured actors (*u*). This part of the speech, however, ends with a broader proposition than the narrow rule above referred to, which we shall see, was not without significance. Having given his instances his Lordship added "... such instances might be indefinitely multiplied, giving rise to rights of

(*r*) (1877), 3 App. Cas. 279, 287–292. This speech which strays from the point at issue has caused quite unnecessary trouble, and illustrates the dangers of wide propositions. The issue was purely one of insurance law and so treated by all the other noble and learned Lords (Lord CAIRNS, L.C., Lord BLACKBURN, Lord GORDON). The real point was summed up by Lord GORDON, at p. 295: "The underwriters cannot complain that they have to meet the risk against which they insured".

(*s*) *Ibid.* at p. 289.

(*t*) By the majority of the House purely upon the peculiarities of insurance law (see n. (*r*) above) though, strangely in view of his own decision in *Cattle's Case*—next note, Lord BLACKBURN expressed agreement with Lord PENZANCE's speech.

(*u*) The effect which *Lumley* v. *Gye* (1853), 2 E. & B. 216 (see Chapter 16) was to have in circumstances such as these could not then have been forecast. In *Cattle* v. *Stockton Waterworks Co.* (1875), L. R. Q. B. 453, 458 even BLACKBURN, J., supposes the scope of *Lumley* v. *Gye* to be restricted by the need for "malice".

action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel" (*a*).

It will have been noted that *Simpson's Case* was in fact a "freak"; the reason X suffered loss was that Y owned *both ships*: had the circumstances been normal and the ships the property of different owners X, as insurer of ship A, would have suffered no loss since Y would have recovered from Z, the owner of B. It was therefore only the peculiar circumstances which occasioned X's loss and there would have been no harm and perhaps some justice in allowing him to recover (*b*) in respect of a loss which the master of B must clearly have foreseen: no door would have been opened to claims by all insurers since in ordinary circumstances no loss would have been sustained by them. It is believed that what underlay Lord PENZANCE's opinion was the premise current at the time that contractual interests are different in kind from "property" (*c*) interests, and as such not within the general protection of the law of torts. In fact the protection of contractual interests which *Lumley* v. *Gye* (*d*) had even then already begun to afford and the protection of all pecuniary interests now afforded by *Donoghue* v. *Stevenson* and *Hedley Byrne* disposes of the premise.

Whatever the rights or wrongs of the *Simpson* decision, the rule, as narrowly stated, that an attack upon the interests of A cannot ground an action in B, persists to the present day and limits the scope of the duty of care; at least in respect of injuries to chattels. And it is now hallowed by a mountain of authority (*e*)—*communis error facit jus*. It is believed to work grave injustice, as it may be agreed that the following example shows. In *Société Anonyme de Remorquage à Hélice* v. *Bennetts* (*f*) the plaintiff's steam tug *John Bull* was engaged in towing the ship *Kate Thomas* from Antwerp to

(*a*) (1877), 3 App. Cas. at p. 289.

(*b*) Subject to the general view of the House expressed by Lord GORDON, see n. (*r*) above.

(*c*) A notion not shared by the Romans, who treated contractual obligations as part of the law of property. The dichotomy embraced in this respect by the common law (due to separate development of the appropriate forms of action) has done much to bedevil English legal thinking.

(*d*) (1853), 2 E. & B. 216.

(*e*) To cite only a few cases beside the two given in Illustration 64—*The Okehampton*, [1913] P. 173; *Chargeurs Réunis, Compagnie Française de Navigation à Vapeur (Ceylon)* v. *English and American Steamship Co. (Merida)* (1921), 9 Ll. L. Rep. 90; *Elliott Steam Tug Co., Ltd.* v. *Shipping Controller*, [1922] 1 K. B. 127 and see the wealth of authority relied upon by ROSKILL, J., in *Margarine Union G.m.b H.* v. *Cambay Prince Steamship Co., Ltd.*, [1967] 3 All E. R. 775 (Illustration 64).

(*f*) [1911] 1 K. B. 243.

Port Talbot when defendants' steamship *India* negligently collided with and sank *Kate Thomas*. The amount payable by way of towage in such a venture is, of course considerable; moreover any landlubber, and certainly the skipper of *India*, would know that loss of *Kate Thomas* would involve the plaintiffs in loss of profit on their contract. Yet HAMILTON, J., held (following *Simpson's Case*) that since the plaintiffs had incurred no injury to *John Bull* they could not recover their loss: yet had the latter been damaged it would have made all the difference, for then they would have suffered not *damnum* alone, but also *injuria*. In other words their right to towage was not protected unless their tug was damaged (*g*). Fine jurisprudence no doubt, but, one may venture to suggest, scant justice.

This then, is the principle of *Simpson's Case* and it only remains to add a recent illustration to rub its authenticity home.

ILLUSTRATION 64

"... the law of this country is and always has been that an action for negligence in respect of loss or of damage to goods cannot succeed unless the plaintiff is at the time of the tort complained of the owner of the goods or the person entitled to possession of them (h)".

Margarine Union G.m.b.H. *v.* Cambay Prince Steamship Co., Ltd., [1967] 3 All E. R. 775.

Plaintiffs were purchasers of copra carried in defendant's ship from Indonesia to Hamburg. Plaintiff's claim to the copra rested upon c.i.f. contracts in peculiar form under which property in the copra did not pass before delivery at Hamburg (like *Simpson* v. *Thomson* the case, as ROSKILL, J., put it, was therefore something of a "freak"). Before leaving Indonesia defendant's carriers had failed to fumigate the hold as a careful carrier should: the copra thus reached Hamburg riddled with American cockroaches, which had damaged it badly. *Held:* (ROSKILL, J.) Under *Simpson* v. *Thomson* plaintiff's claim in negligence failed since at the time of the wrong they had no property in the copra. *Simpson's Case* was similarly applied in *Electrochrome, Ltd.* v. *Welsh Plastics Ltd.*, [1968] 2 All E. R. 205—an extreme decision—in which water supply was cut off to plaintiff's factory, causing loss of a day's work, when defendants' van driver broke a water hydrant on an industrial corporation's property. In view of the fact that the water to plaintiff's factory was here directly interfered with it seems that this decision is even less supportable than most of the decisions arising under *Simpson's Case*.

(*g*) See *ibid.*, at p. 248; *per* HAMILTON, J.
(*h*) [1967] 3 All E. R. at p. 793; *per* ROSKILL, J.

(iv) *Although foreseeable, the injury complained of may not be sufficiently proximate to the act or omission complained of to form the foundation of a claim.*

This proposition, unlike the last, would seem to be both just and inevitable; it really reverts to Winfield's example of the marine hydrographer (*i*). It seems to be the rootstock from which Lord PENZANCE's narrow proposition sprang, for it will be recalled that he ended with the wider statement that the instances he had given "might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel" (*k*). Had this reason alone been given in *Simpson* v. *Thomson* for denying the plaintiff's claim no one could quarrel with the result, since at what point a claim is denied upon the ground that, though foreseeable, the damage complained of is too indirectly connected with the tort is a question of fact and degree; though, for our part, we would have ruled both in *Simpson's Case* and in *Bennett's Case* (*l*) that the damage complained of was both foreseeable and sufficiently direct to ground a claim. But the question is "At what point does one stop in tracing the rings which the defendant's stone makes in the infinite pond of cause and effect?" The choice within limits, can only be left to the court's discretion.

Now let us reinforce this view by reference to *Cattle* v. *Stockton Waterworks Co., Ltd.* (*m*) a judgment of BLACKBURN, J., one of the great masters of common law. The facts were simple: K owned some land, this land was bisected by an embankment (belonging to K) which carried a turnpike road. Under the road ran the S.W. Co.'s water pipes. K, wishing to join up his land, employed C to tunnel through the embankment. When C started on the job he found that due to a leak in S.W. Co.'s pipes at a higher point water had seeped into the soil of the embankment, and this increased the cost of the work to him and diminished his profits on his contract. C sued S.W. Co. (who were admittedly at fault). The court refused the claim, and it is to be noted that though the decision has constantly been cited with and confused, with the *Simpson* v. *Thomson* proposition that injury to B cannot be injury to A, *no mention whatsoever* is made of that (untenable) proposition in the judgment of the court, delivered by BLACKBURN, J. Instead, he grounds his

(*i*) See above, p. 176.
(*k*) *Simpson* v. *Thomson* (1877), 3 App. Cas. at p. 289.
(*l*) *Société Anonyme de Rémorquage à Hélice* v. *Bennetts*, [1911] 1 K. B. 243.
(*m*) (1875), L. R. 10 Q. B. 453.

decision upon a *dictum* of COLERIDGE, J.'s, that courts of justice should not

> "... allow themselves in the pursuit of perfectly complete remedies for all wrongful acts to trangress the bounds, which our law, in a wise consciousness, as I conceive of its limited powers, has imposed on itself, of redressing only the *proximate* and *direct* consequences of wrongful acts (*n*)."

As we have suggested above, the words "proximate and direct" are the key. Though BLACKBURN, J., accepted for the purposes of argument that K might have had a claim against S.W. Co. he denied one to C because, though his loss was foreseeable, it was not a sufficiently direct consequence of S.W.'s wrong to form the basis of legal redress. Again, on the facts one might venture to quarrel with this decision, however august the judge: but it may help if we carry the matter further. Suppose in *Cattle's Case* that a workman of C's had had to be laid off work on account of the extra cost to C, and suppose the anxiety thus caused to have made the workman seriously ill: this consequence might be regarded as well within S.W.'s "foresight"—yet would anyone imagine that the courts could countenance such a claim? Or again, suppose in *Cambay Prince* (*o*) that the copra be sold in England and that it reach a merchant in some country town (*p*) and that his warehouse become infested with American cockroaches. Could the courts permit recovery by the merchant? One would think not (though it would be open for others to disagree)—the question is where does one draw the line (*q*)? For ourselves, disregarding entirely the narrow doctrine of *Simpson's Case* as fallacious, we would have decided in favour of the plaintiffs both in *Cattle's Case* and in *Cambay Prince*; but we would have decided against the two "remoter" plaintiffs in the two hypothetical examples just supposed.

Having thus described a factor which seems to qualify the scope of the *Donoghue* v. *Stevenson* duty of care, we should perhaps interpose a caution. This qualification could be looked at in another way: it could be maintained that it is only something inherent in the "foresight" concept; for that concept, as has been pointed out (*r*), and will be seen below, is, as Lord WRIGHT explained, "fluid" (*s*)—

(*n*) (1853), 2 E. & B. 216, 252 (italics ours).
(*o*) *Margarine Union G.m.b.H.* v. *Cambay Prince Steamship Co., Ltd.*, [1967] 3 All E. R. 775.
(*p*) See *ibid.* at p. 782.
(*q*) See BLACKBURN, J.'s, oft-cited reference to *Fletcher* v. *Rylands* (1866), L. R. 1 Ex. 265 in *Cattle's Case* (above, p. 183, n. (*u*) at p. 457.
(*r*) Above, p. 161.
(*s*) See *Hay (or Bourhill)* v. *Young*, [1942] 2 All E. R. 396, 404; [1943] A. C. 92, 107; and above, p. 166.

some may think to the extent of casting doubt upon its usefulness—and in circumstances such as have just been considered it could be said that the extent of "foresight" postulated is something comparatively myopic, whereas, as has been seen, in other circumstances it becomes not far removed from prophecy (*t*). This way of looking at the qualification thus placed upon the scope of the duty of care is logical yet, by admitting that the "remoter" consequences could have been foreseen (as obviously they could) and still denying recovery on the ground of lack of "proximity", the courts have not treated the matter in this way.

ILLUSTRATION 65

"An ability to foresee indirect or economic loss to another as a result of one's conduct" does not "automatically impose" a duty to take care to avoid that loss (*u*).

Weller & Co. *v.* Foot and Mouth Disease Research Institute, [1965] 3 All E. R. 560; [1965] 1 Q. B. 569.

In the course of their researches defendants permitted virus to escape: local cattle became infected with the disease. Local markets had to be closed by statutory order and plaintiffs, auctioneers doing business in those markets, thereby lost profit. It being agreed that the loss was consequential upon the escape and that it was something which defendants could have foreseen.—*Held:* (WIDGERY, J.) The plaintiffs could not succeed since their injury was not sufficiently closely connected with defendant's wrong. The learned judge pointed out that if he were to allow the claim it would only be fair that claims would lie at the suit of all sorts of other interested parties: *e.g.* farmers whose cattle could not be moved to market, transport contractors whose transport would be idle, dairymen, sellers of cattle food. And so the circle of events expands: a line has to be drawn.

B. THE NATURE OF THE OBLIGATION (BREACH OF DUTY)

To say that conduct is "careless" or "negligent" is not to define it, but to *evaluate* it; and conduct can only be evaluated in the light of some norm, or standard, which the person making the evaluation has in mind. The courts have therefore been forced to adopt a legal measuring-rod, or standard of care, to which the defendant's conduct must conform if he is to escape liability in negligence. This standard is not the highest possible standard to which a person might conceivably be expected to conform—the

(*t*) *The Wagon Mound* (*No.* 2) (Illustration 60 (b)).
(*u*) [1965] All E. R. 560, 570; [1960] 1 Q. B. 569, 587, *per* WIDGERY, J.

standard of the insurer, or even of the expert (*a*)—nor yet the actual standard to which the defendant, possessed of the actual physical and mental qualities with which nature has endowed him, might be expected to conform (*b*), but the standard of the ordinary, average, reasonable man if he were placed in the defendant's circumstances (*c*). And the circumstances include the trade, calling or condition of the defendant; thus a seafaring man will be judged by the standard of an ordinary average seafaring man (*d*), or a factory worker by the standards of a factory worker. The care that must be taken is "reasonable care in *all* the circumstances" (*e*). Moreover, if an amateur undertakes an expert job he must do it according to expert (*f*) (though no more than average expert) standards (*g*); and if the task thus assumed be one—such as the performance of a surgical operation—beyond an amateur's skill he may be treated as negligent in having assumed to do it at all (*h*).

(*a*) For instance, a landowner is expected to behave as a reasonable and prudent landowner; he is not himself expected to act as an expert in land-management might act: *Caminer* v. *Northern & London Investment Trust, Ltd.*, [1950] 2 All E. R. 486, 493; [1951] A. C. 88, 99; *per* Lord NORMAND. And see *Quinn* v. *Scott*, [1965 2 All E. R. 588.

(*b*) If liability for negligence were "co-extensive with the judgment of each individual", it would "be as variable as the length of the foot of each individual": see *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468, 475; *per* TINDAL, C.J.

(*c*) Evidence that the defendant's conduct conformed with a *general practice* normally followed in similar circumstances is clearly relevant to support the proposition that he has conformed with the requisite standard of care. But though the effect of its production is to cast a heavy burden upon the plaintiff against whom it is established it is not conclusive; each case has to be judged on its merits. See *Paris* v. *Stepney B. C.*, [1951] 1 All E. R. 42; [1951] A. C. 367: *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.*, [1956] 1 All E. R. 385; [1956] A. C. 552, especially at pp. 402 and 579, *per* Lord COHEN: *Cavanagh* v. *Ulster Weaving Co., Ltd.*, [1959] 2 All E. R. 745; [1960] A. C. 145. Nor is failure to conform with a general practice conclusive evidence against a defendant: *Brown* v. *Rolls Royce, Ltd.*, [1960] 1 All E. R. 577.

(*d*) Or a doctor by that of an average doctor: *Roe* v. *Minister of Health*, [1954] 2 All E. R. 131; [1954] 2 Q. B. 66; *Bolam* v. *Friern Hospital Management Committee*, [1957] 2 All E. R. 118; *Chin Keow* v. *Government of Malaysia*, [1967] 1 W. L. R. 813.

(*e*) *Cavanagh's Case* (n. (*c*), above), [1959] 2 All E. R. at p. 752; [1960] A. C. at p. 167: *per* Lord SOMERVELL (Italics ours). And see *Hilder* v. *Associated Portland Cement Manufacturers, Ltd.*, [1961] 3 All E. R. 709.

(*f*) Thus in English, as in Roman, law *imperitia culpae adnumeratur*.

(*g*) See *Wells* v. *Cooper* (Illustration 66) and *The Lady Gwendolen: Arthur Guinness, Son & Co. (Dublin), Ltd.* v. *Owners of Motor Vessel Freshfield*, [1965] 2 All E. R. 283; [1965] P. 294; *Griffiths* v. *Arch Engineering Co. (Newport), Ltd.*, [1968] 3 All E. R. 217.

(*h*) See *Haseldine* v. *Daw & Son, Ltd.*, [1941] 3 All E. R. 156, 168, 169; [1941] 2 K. B. 343, 356; *per* SCOTT, L.J.

ILLUSTRATION 66

Where an amateur undertakes the work of an expert he will be judged by expert standards.

Well v. *Cooper* [1958] 2 All E. R. 527; [1958] 2 All E. R. 527; [1958] 2 Q. B. 265.

By way of "do it yourself" defendant householder affixed a handle to a door. He did the job as well as an ordinary carpenter would do it. Nevertheless the handle came off in plaintiff's hand and he was injured. *Held:* Defendant had exercised such care as was required of him and was not liable. "... the degree of care and skill required must be measured not by the competence ... which he (defendant) personally happened to possess, but by reference to the degree of care and skill which a reasonably competent carpenter might be expected to apply to the work in question" (*i*).

The general nature of the obligation thus consists in:—

> "The omission to do something which a *reasonable man*, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a *prudent and reasonable man* would not do" (*k*).

One of the things that a reasonably prudent man will not do is to inflict, or permit the infliction of, injury in circumstances in which he can reasonably foresee that such injury will result directly from his conduct. Hence the element of *reasonable foresight* has to be taken into account in determining whether the defendant has in *fact* been negligent, just as much as it is taken into account in determining whether the relationship of the parties is such as to give rise to any duty of care at all. Thus for example, in *Glasgow Corporation* v. *Muir* (*l*), the manageress of a tea room belonging to the appellant corporation permitted members of a picnic party to carry an urn of boiling tea through a small shop, which formed part of the tea room. For some unexplained reason one of the people carrying the urn lost his grip, and the tea scalded some children who were buying sweets at the shop. In an action against the corporation, on behalf of the children, it was held by the House of Lords that although the relationship between the manageress (as the servant of the corporation) and the children was clearly such as to give rise to a duty of care on her part towards the children, yet the further question had to be considered, whether the event which had actually occurred was one which she should have foreseen and

(*i*) [1958] 2 All E. R. 527, 530; [1958] 2 Q. B. 265, 271; *per* JENKINS, L.J.
(*k*) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781, 784; *per* ALDERSON, B. (italics ours).
(*l*) [1943] 2 All E. R. 44; [1943] A. C. 448.

prevented. It was held that it was not, for "legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation" (*m*), and the particular accident which in fact occurred was not one which the manageress ought reasonably to have contemplated. But on the other hand where injury is caused in a manner which might have been foreseen and guarded against the defendant will not be excused by proof that the exact way in which it came about was unpredictable. So in *Hughes* v. *Lord Advocate* (*n*) where a child was injured by burning caused by fire after the *explosion* of a paraffin lamp left by post office employees beside an open and unguarded manhole, the post office were held responsible: for if a lamp be so left it may be foreseen that a child will tamper with it, and that he may get burnt. The fact that an *unpredictable* explosion occurred rather than that the lamp got broken and caused a burn could not absolve the defendants; for the accident was of a type that might have been foreseen.

Nevertheless, as in determining the scope of the duty of care so in determining whether the defendant has *in fact* been negligent other matters have to be taken into account, as well as the factor of "reasonable foresight". For "the degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances" (*o*); and all the circumstances of every situation have to be considered before it can be said, in law as in life, that a person has failed to conduct himself as he "ought".

Some of the factors which the courts take into account in determining the degree of diligence to be observed in particular circumstances must accordingly be considered.

(i) *The risk involved.*

The precautions that the defendant will be called upon to take must be measured against the seriousness of the risk involved. Abnormal precautions may have to be taken where the likelihood of injury is obvious.

(*m*) *Ibid.* at pp. 48 and 457 respectively; *per* Lord MACMILLAN.

(*n*) [1963] 1 All E. R. 705; [1963] A. C. 837. See also *Bradford* v. *Robinson Rentals Ltd.*, [1967] 1 All E. R. 267.

(*o*) *Glasgow Corporation* v. *Muir*, [1943] 2 All E. R. at p. 48; [1943] A. C. at p. 456. Thus, for example, the defendant will only be expected to guard against such dangers as he ought reasonably to apprehend in the light of *existing* knowledge: *Graham* v. *Co-operative Wholesale Society, Ltd.*, [1957] 1 All E. R. 654; *Richards* v. *Highway Ironfounders (West Bromwich), Ltd.*, [1957] 2 All E. R. 162; *Overseas Tankship (U.K.), Ltd.* v. *Morts' Dock & Engineering Co., Ltd.: The Wagon Mound (No. 1)*, [1961] 1 All E. R. 404; [1961] A. C. 388.

" . . . those who engage in conduct inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life" (*p*).

Thus custodians of atom bombs have many keys (*q*) while pin cushions may reasonably be left unguarded in the house. This element of special risk has long been recognized by our law and until quite recently it led to an artificial distinction between things inherently dangerous (dangerous "*per se*") and things which, though not inherently dangerous (*e.g.* a pin cushion), may become dangerous in special circumstances (dangerous "*sub modo*"). The distinction was not founded upon logic since on the one hand a "wolf in sheep's clothing" may well be more dangerous than an "obvious wolf" (*r*), and on the other hand there is nothing in the world that is not dangerous in some circumstances and harmless in others. But it was a distinction that served a purpose, though this purpose has now departed (*s*). For well before the decision in *Donoghue* v. *Stevenson* (*t*) brought into being the rule that you must not cause foreseeable harm to your neighbour, thereby shifting the emphasis from the nature of the article involved to a broad principle of al-

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(*p*) *Glasgow Corporation* v. *Muir*, [1943] 2 All E. R. 44, 48; [1943] A. C. 448, 456; *per* Lord MACMILLAN. To similar effect in *Read* v. *J. Lyons & Co., Ltd.* [1946] 2 All E. R. 471, 476–477; [1947] A. C. 156, 172–173.

(*q*) "Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take care to see that no one is injured by it:" *Videan* v. *British Transport Commision*, [1963] 2 All E. R. 860, 866; [1963] 2 Q. B. 650, 666; *per* Lord DENNING, M.R. And see *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.*, [1956] 1 All E. R. 385; [1956] A. C. 552 (unguarded hatch obvious danger to crew): *Kilgollan* v. *William Cooke & Co., Ltd.*, [1956] 2 All E. R. 294 (extra precautions where accidents frequently occur).

(*r*) *Hodge & Sons* v. *Anglo-American Oil Co.* (1922), 12 Ll. L. Rep. 183, 187; *per* SCRUTTON, L.J. The following things have been held to be dangerous "*per se*":—*Loaded guns: Dixon* v. *Bell* (1816), 5 M. & S. 198: *Burfitt* v. *A. & E. Kille*, [1939] 2 All E. R. 372; [1939] 2 K. B. 743: *Newton* v. *Edgerley*, [1959] 3 All E. R. 337—but *semble* air guns are not; *Donaldson* v. *McNiven*, [1952] 2 All E. R. 691. And a child's bow and arrows are certainly not; *Ricketts* v. *Erith Borough Council*, [1943] 2 All E. R. 629. *Poisons: Thomas* v. *Winchester* (1852), 6 N. Y. 397—approved in *Donoghue* v. *Stevenson*. *Explosives: Farrant* v. *Barnes* (1862), 11 C. B. (N. S.) 553 (nitric acid); *Williams* v. *Eady* (1893), 10 T. L. R. 41 (phosphorus). *Hair-dyes: Parker* v. *Oloxo, Ltd.*, [1937] 3 All E. R. 524; *Watson* v. *Buckley, Osborne, Garrett & Co., Ltd. and Wyrovoys Products, Ltd.*, [1940] 1 All E. R. 174; *Holmes* v. *Ashford*, [1950] 2 All E. R. 76. *Gas: Parry* v. *Smith* (1879), 4 C. P. D. 325; *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1908–1910] All E. R. Rep. 61; [1909] A. C. 640. And many other examples could be given.

(*s*) Though we differ here from CHAPMAN, J.—see *Griffiths* v. *Arch Engineering Co. (Newport)*, Ltd. [1968] 3 All E. R. 217, this does not mean that "dangerous things" in general do not require special consideration; they will receive separate treatment below, Chapter 9.

(*t*) [1932] All E. R. Rep. 1; [1932] A. C. 562.

most universal application, liability was imposed—as of course it still is though upon the basis of the broad test of "foreseeability" rather than by reference to "inherent danger"—independent of contract upon people who dealt with "dangerous things".

Indeed if we go back to *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins* (*u*) we find Lord DUNEDIN using words in relation to "dangerous things" mighty prophetic of what Lord ATKIN was later to say in a more general context:—

> "in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things *ejusdem generis*, there is a peculiar duty to take precaution, imposed upon those who send them forth (*a*) or install such articles when it is necessarily the case that other parties will come within their proximity".

So here, well before *Donoghue* v. *Stevenson*, people were enjoined to take peculiar care in respect of things likely to involve a special risk. As always, the actual degree of diligence that the reasonable man is required to employ in relation to such things must vary according to the degree of danger reasonably to be apprehended, but in extreme cases it may be "*so stringent as to amount to a guarantee of safety*" (*b*). The old case of *Dixon* v. *Bell* (*c*) affords an excellent example. In that case the defendant was held liable in the following circumstances. Because there had been robberies in the district, he kept a loaded gun at the house of one L where he lodged. Being away from the house, he sent his servant, a mulatto girl aged thirteen, to fetch the gun for him, instructing her to ask L to remove the priming before handing it to her. L in fact complied with these instructions and told the girl that he had done so. In play the girl then pointed the gun at the plaintiff's son and it went off, injuring the boy seriously. Although it was clear that in the opinion of the court the defendant might reasonably have thought that the removal of the priming would render the gun harmless, in the event this had not proved to be a sufficient precaution. Lord ELLENBOROUGH, C.J., while admitting that it was a hard case, ruled that it was the duty of the defendant to render the gun "safe and innoxious", which he had failed to do.

In dealing with things of a dangerous nature it is probably not (*d*)

(*u*) [1908–1910] All E. R. Rep. 61, 64; [1909] A. C. 640, 646 (Illustration 67).

(*a*) As for example by selling them (*Burfitt* v. *A. & E. Kille*, [1939] 2 All E. R. 372; [1939] 2 K. B. 743), or by ordering an incompetent servant to handle them (*Dixon* v. *Bell* (1816), 5 M. & S. 198).

(*b*) *Donoghue* (*or M'Alister*) v. *Stevenson*, [1932] All E. R. Rep. 1, 26; [1932] A. C. 562, 611–612, *per* Lord MACMILLAN.

(*c*) See n. (*d*), above. (*d*) *Burfitt's Case* (n. (*a*), above).

essential to establish that the defendant actually knew of the danger; but of course if it is obvious and is one which the plaintiff is in a position to avoid, or if the defendant gives warning (*e*) of it which is sufficient in all the circumstances, there will be no liability.

ILLUSTRATION 67

Those who send forth or install things which are especially dangerous must exercise a high degree of care towards others who are likely to be endangered by them.

Dominion Natural Gas Co., Ltd. *v.* Collins and Perkins, [1908–1910] All E. R. Rep. 61; [1909] A. C. 640.

Appellants installed a gas regulator upon premises where respondents were employed. This regulator was fitted with a safety-valve which, instead of discharging into the open air, discharged into a room where respondents had to work. Due to gas from the valve becoming ignited by contact with boiler jets in the same room, there was an explosion which injured one of the respondents and killed the husband of the other. *Held:* Since appellants were unable to establish that the cause of the escape of the gas was attributable to interference by third parties, rather than to the careless installation of the safety-valve, they were liable.

(ii) *The known characteristics of the party exposed to the risk.*

Although it is true that the defendant will not be expected to conform his conduct to any peculiar susceptibilities or infirmities of the plaintiff which he has no reason to suspect (*f*), yet he must adapt it so as to allow for any such peculiarities which he does have reason to know about. Thus for instance, in *Paris* v. *Stepney B.C.* (*g*) the appellant, who was employed by the respondents as a garage hand, had to their knowledge only one sound eye: while he was working underneath a vehicle a piece of metal flew off and entered this eye, seriously injuring it. It was held that the respondents were liable because, knowing of the appellant's particular disability, they ought to have provided *him* with goggles (which they had failed to do) although, in accordance with long established practice in the trade (*h*), they would not necessarily have been

(*e*) *Shepherd* v. *Essex County Council* (1913), 29 T. L. R. 303; *Hodge & Sons* v. *Anglo-American Oil Co.* (1922), 12 Ll. L. Rep. 183; *Holmes* v. *Ashford*, [1950] 2 All E. R. 76.

(*f*) Thus a "bleeder" takes the risk of fatal injury from the jostling of a crowd: *Hay (or Bourhill)* v. *Young*, [1942] 2 All E. R. 396, 405; [1943] A. C. 92, 109; *per* Lord WRIGHT. Though (as the "thin skull" cases—see below, p. 212, show) once a wrong, *e.g.* trespass, is committed the wrongdoer must take his victim as he finds him.

(*g*) [1951] 1 All E. R. 42; [1951] A. C. 367.

(*h*) See above, p. 189, n. (*c*).

bound to do this in the case of a man with two sound eyes. So too, greater care must be taken in dealings with children than in dealings with adults (*i*). Yet even in the case of known peculiarities the employer's duty is not absolute, but only a duty to take such care as reasonably can be taken. So in *Withers* v. *Perry Chain Co., Ltd.* (*k*), where the plaintiff was known to suffer from dermatitis, and her employers gave her the kind of work least likely to produce it, they were held not liable when she did in fact contract it: they were not bound to dismiss her or to retain her services and suffer the consequences in the form of damages. Moreover one does not have to adapt one's conduct so as to guard against dangers to the blind in circumstances in which there is no special reason to suppose that blind people will be present but where their presence unaccompanied is to be expected, as in a public street, reasonable precautions must be taken against dangers peculiar to them which with reasonable skill on their part they cannot avoid (*l*). And again, dealings with children demand a high degree of care (*m*).

ILLUSTRATION 68

Dealings with children demand a high degree of care.

Yachuk *v.* Oliver Blais Co., Ltd., [1949] 2 All E. R. 150; [1949] A. C. 386.

An employee of respondents (proprietors of a filling station) supplied petrol to appellant, a boy of nine. Though appellant told the employee that he wanted the petrol for his mother's car which was "stuck down the road" he really wanted it for a game of Red Indians. In the course of this game appellant(presumably as "Redskin" intent upon immolation of a "Paleface") ignited the petrol and was injured. *Held:* Respondents liable. To put petrol into the hands of a small boy is to subject him to temptation and risk of injury, and this is no less true if "the boy had resorted to deceit to overcome the supplier's scruples."

(iii) *Necessity.*

Under compulsion of necessity exceptional risks may legitimately be taken. Thus in *Watt* v. *Hertfordshire County Council* (*n*), the defendant Council were held not liable for injuries caused to a fireman in their employment by the sudden movement of a heavy jack which had been insecurely fixed in a lorry in which he was

(*i*) See Illustration 68 and next Chapter.

(*k*) [1961] 3 All E. R. 676.

(*l*) *Haley* v. *London Electricity Board*, [1964] 3 All E. R. 185; [1965] A. C. 778.

(*m*) See *Carmarthenshire C. C.* v. *Lewis*, [1955] 1 All E. R. 565; [1955] A. C. 549; *Gough* v. *Thorne*, [1966] 3 All E. R. 398, and illustration 68. "Allurement" cases also afford an example of this principle: below, p. 236.

(*n*) [1954] 1 All E. R. 141: affirmed [1954] 2 All E. R. 368.

travelling. For although the lorry was admittedly not properly adapted to carry such a jack, that particular lorry had had to be used in a sudden emergency, to answer an urgent call.

Further, although if an unskilled person undertakes work requiring special knowledge he normally does it at the risk of exposing himself at least to civil liability if he thereby causes injury, yet necessity may excuse him. Thus an unqualified person who performs a surgical operation must usually answer the consequences if he fails to exercise the skill of a surgeon; but he cannot be held accountable if, using such care as an unskilled person might be expected to use, he is compelled to operate by pressure of circumstances—as where a climber who is isolated upon a mountain attempts to save the life of a fellow-climber by amputating his leg.

(iv) *The public interest.*

The demands of private convenience or even of safety must to some extent give way to public interest. For example merely to drive a motor car upon the road at all is an operation fraught with inherent danger, but the general interests of the community demand that there shall be motor traffic; it is therefore necessary in order to render a motorist liable in negligence, to prove something more against him than that he was at the time of the accident indulging in the pursuit of driving (*o*). Again, it is true that "if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents" (*p*); but the fact that a train is being driven at eighty miles an hour is not in itself evidence of negligence, for if the 5 mile rule were adopted "our national life would be intolerably slowed down".

(v) *The cost of prevention.*

This heading must be amplified, for the idea or ideas involved cover a multitude of things and are hard to embrace within a single rubric. The concept of carelessness carries within itself not only the idea that one cannot be careless about things which one cannot foresee, but also the notion that, in doing or failing to do the thing complained of, one has an obligation to take steps to guard against the danger of its doing damage. Thus in relation to every act or omission causing harm it is relevant to ask "Would a prudent person thus placed refrain from it?" Sometimes one may be forced to

(*o*) "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid". *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261, 267; *per* BRAMWELL, B.

(*p*) *Daborn* v. *Bath Tramways Motor Co., Ltd., and Trevor Smithey*, [1946] 2 All E. R. 333, 336; *per* ASQUITH, L.J.

answer that he would not, not because if he does it and causes harm he will be within the law (as in the case of a constable effecting a lawful arrest) but because the cost of refraining from doing it may be disproportionately great. And by "cost" is here meant not only (yet including (*q*)) economic cost but also cost in the sense of effort disproportionate to risk and of right or privilege which, balanced in the social scale, outweighs the harm to be anticipated. Clearly this broad formula may cover a multitude of things; but reference to the cases may make our general meaning clear.

Let us take first cases where the "cost" would be low. In *Haley* v. *London Electricity Board* (*r*) it was held that a blind man walking unaccompanied in a public street, and using such care as a blind man could, was entitled to recover in respect of injuries received when he stumbled over a hammer left lying low across the pavement to warn people of an adjacent excavation. The cost of prevention was low since all the respondents had to do, anticipating as they should, the presence of such people in the public street (*s*), was to surround the excavation with a light fence. Yet the House of Lords indicated that a higher "cost" than the use of such a fence might not be expected. Highway authorities cannot, for example, be made to go to extremes in protecting even the blind: thus it would be too much to demand that they can only be protected against such claims if they place padding around every lamp post. Again in *The Wagon Mound* (*No.* 2) (*t*) it will be recalled (*u*) that the appellants' "foresight" was stretched to the extreme. One reason for this stretching was that it would have been very simple to stop the flow of oil (*a*); and it was also remarked that since its escape constituted a loss to the appellants themselves this should have given the peccant engineer a special incentive to do so. In both these cases, therefore, the court having weighed with other factors the low "cost" of prevention, the claimants were successful.

(*q*) See *General Cleaning Contractors, Ltd.* v. *Christmas*, [1952] 2 All E. R. 1110; [1953] A. C. 180, 192–198; *McDonald* v. *British Transport Commission*, [1955] 3 All E. R. 789. And see Illustration 69. Similar considerations may apply in cases of breach of statutory duty.

(*r*) [1964] 3 All E. R. 185; [1965] A. C. 778. And see *Goldman* v. *Hargrave*, [1966] 2 All E. R. 989; [1967] 1 A. C. 645; *A.M.F. International, Ltd.* v. *Magnet Bowling, Ltd.*, [1968] 2 All E. R. 789.

(*s*) For the purposes of the case evidence was given that one in five hundred people are blind.

(*t*) *Overseas Tankship (U.K.), Ltd.* v. *Miller Steamship Co., Pty., Ltd.*, (*The Wagon Mound* (*No.* 2)) [1966] 2 All E. R. 709; [1967] 1 A. C. 617.

(*u*) See above, p. 168.

(*a*) The Judicial Committee also took into account the fact that the escape of the oil was illegal as constituting a public nuisance. The illegality of the act or omission may therefore be another factor to consider.

Now let us consider a case where the "cost" was high. In *Bolton* v. *Stone* (*b*) a member of a visiting team drove a cricket ball out of the ground on which he was playing and the ball hit a lady in an unfrequented road outside. Balls had in fact only been hit out of that ground six times in twenty-eight years, so the "risk" was small, though—the feat having been performed before—was yet foreseeable. Weighing risk against "cost" of prevention (*c*) (here enlarging the ground or refraining from the game—a thing which would clearly be a serious matter, say, at the Oval) the House of Lords held that the injured lady had no claim. The next Illustration forms a similar example.

Thus in determining whether the defendant has exercised appropriate care in the circumstances not only must the likelihood of injury and the gravity of risk be taken into consideration, but also the "cost" of eliminating the risk must be weighed against the danger of running it.

ILLUSTRATION 69

The "cost" of eliminating the risk must be weighed against the danger of running it.

Latimer *v.* A. E. C. Ltd., [1953] 2 All E. R. 449; [1953] A. C. 643.

An exceptionally heavy rainstorm caused the floors of respondents' factory to become flooded and this flooding caused oil, normally contained within artificial channels, to be washed over the whole of the floors, where it remained in patches. Respondents immediately used all available supplies of sawdust to cover the floors, but through lack of further supplies, left some areas uncovered. Appellant who was employed in the factory, slipped on an uncovered patch and sustained injury. *Held:* Since respondents had done all that could reasonably be expected of them to make the floors safe they were not liable. Although had they closed the factory this must have prevented the accident, *reasonable prudence did not demand the taking of so drastic a step.*

Examples of the factors that determine liability in negligence might be multiplied (*n*); but the point that must be borne in mind is that "lack of care" can only acquire concrete meaning when all the circumstances of each case are taken into account (*d*). Though there is only one standard of care (that of the reasonable man), the actual *degree* of care required is infinitely variable. So true

(*b*) [1951] 1 All E. R. 1078; [1951] A. C. 850.

(*c*) This is the aspect of the decision stressed in *The Wagon Mound* (*No.* 2) —above, n. (*t*). The interpretation is a valid one, though the *ratio decidendi of Bolton's Case* taken as a whole is far from clear.

(*d*) For "what is negligence is . . . a question of fact to be decided by the tribunal of fact", *Latimer* v. *A.E.C., Ltd.*, [1953] 2 All E. R. 449, 452; [1953] A. C. 643, 655; *per* Lord OAKSEY.

indeed is this proposition that the views of the "reasonable man" (*e*) as to what care *is* required alter with the times (*f*).

2. CONTRIBUTORY NEGLIGENCE

It has so far been assumed that in all cases it must either be the plaintiff or the defendant who is *solely* to blame for the injury inflicted, and that therefore either the plaintiff must recover in full or the defence must succeed entirely. But of course in practice circumstances constantly arise in which, to a greater or lesser degree, *both* parties are at fault. For example, in a collision at a cross-roads it is often difficult to apportion blame entirely to one party (*g*). The obvious course for the law to take in such circumstances is to assess the degree of responsibility of each party, and to reduce the damages recoverable by the plaintiff by taking into account the extent to which *he* is to blame.

For various reasons, however, the common law did not take this course and the rule used to be, in the words of Lord BLACKBURN, that

> "If there is blame causing the accident on both sides, however small the blame may be on one side, the loss lies where it falls" (*h*).

Thus *at common law* if the plaintiff was in any degree, however slight, responsible for the injury he sustained, being guilty of "contributory negligence", his claim failed and he could recover nothing.

This state of the law has, however, now been altered and the just and obvious solution to the problem posed by contributory negligence adopted; for it is enacted by the Law Reform (Contributory Negligence) Act, 1945, s. 1, that

> "Where any person suffers damage as the result partly of his own fault (*i*) and partly of the fault of any other person, a claim in respect of that damage *shall not be defeated* by reason of the fault of the person suffering the damage, *but the damages recoverable* in respect thereof shall be reduced to such an extent as the court

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(*e*) Or should it, now that juries are comparatively rare, be the "reasonable judge"?

(*f*) "The criterion of judgment must adjust and adapt itself to the changing circumstances of life". *Donoghue* v. *Stevenson*, [1932] All E. R. Rep. 1, 30; [1932] A. C. 562, 619; *per* Lord MACMILLAN. See *Re Thomas Gerrard & Son, Ltd.*, [1967] 2 All E. R. 525; [1968]1 Ch. 455—greater skill expected of an auditor than when *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279 was decided.

(*g*) Under the old common law rules good examples are *British Columbia Electric Rail. Co.* v. *Loach*, [1916] 1 A. C. 719; *Swadling* v. *Cooper*, [1931] A. C. 1.

(*h*) *Cayzer, Irvine & Co.* v. *Carron Co.* (1884), 9 App. Cas. 873, 881.

(*i*) "Fault" is defined in the Act (s. 4) as "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would,

thinks just and equitable having regard to the claimant's share in the responsibility for the damage" (*k*).

Where, therefore, to-day, it is found that both parties are to some degree at fault, the amount of damages will be apportioned according to the share of responsibility (*kk*) of either party; the total amount of the damages which the plaintiff would have recovered had he not been to blame at all being reduced according to his share of responsibility. But even this does not mean that necessarily wherever there is in the broadest sense *some* "fault" on both sides, there must *always* be apportionment (*l*); for only such fault as effectively contributes to the injury can be taken into account.

Thus if there be in a factory a piece of dangerous machinery upon which a pigeon has lighted, and if a workman in utter neglect of his duties seeks to catch the bird and falls foul of the machine, it may be that the employer may, despite his own fault in not making the machinery safe, escape all liability on account of the stupidity of the man himself (*ll*).

Much will depend on the facts, and all of the facts. The crux of the matter lies in the issue of "responsibility" and this is a complex thing since

> "the investigation is concerned with 'fault' which includes *blameworthiness* as well as *causation*; and no apportionment can be reached unless *both* those factors are borne in mind (*m*)."

To take an example similar to, though varying from, the last. Suppose that a "dangerous machine is unfenced" and that a "workman . . . by a pardonable but foolish reaction . . . put his hand within the danger area. Suppose further that the factory owner had known that the machine was dangerous . . . but through dilatoriness

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apart from this Act, give rise to the defence of contributory negligence." The provisions of the Act are not therefore confined to negligence cases: see *Trevett* v. *Lee*, [1955] 1 All E. R. 406, 412, and Glanville Williams, *Joint Torts and Contributory Negligence*, pp. 55–60, 76–80.

(*k*) Italics ours. The Act, in effect, adopts for the land, the rules previously applied in the case of collisions at sea under the Maritime Conventions Act, 1911 (23 Halsbury's Statutes (2nd Edn.) 830).

(*kk*) For the meaning of the words of the section "share in the responsibility", see *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.*, [1949] 1 All E. R. 620, 632; [1949] 2 K. B. 291, 326; *per* DENNING, L.J.

(*l*) Indeed, the Act would probably not affect the actual result of such decisions as *Butterfield* v. *Forrester* (1809), 11 East, 60, or *Farr* v. *Butters Bros.*, 217; [1965] 2 Q. B. 582, 594; *per* Lord PEARCE.

(*ll*) See *Uddin* v. *Associated Portland Cement, Ltd.*, [1965] 2 All E. R. 213, [1932] 2 K. B. 606.

(*m*) *The Miraflores and the Abadesa*, [1967] 1 All E. R. 672, 677–678; [1967] 1 A. C. 826, 845; *per* Lord PEARCE (italics ours). See also *Brown* v. *Thompson*, [1968] 2 All E. R. 708.

. . . failed to rectify the fault. . . . In such a case the judge . . . would not assess the workman's fault at anything approaching the proposition which mere causation alone would indicate (*n*)." For indeed if one were to view the matter in a practical way, without seeking out the "cause of causes" one would find the sole cause in the man's reaction, and yet as a question of "fault" one could reasonably treat the blame as twofold.

Although the Act has thus freed the law of unnecessary hardship, it should not be thought that even to-day its practical application is a simple matter in cases where contributory negligence is involved: for, apart from the obvious difficulty of assessing (*o*) the degree of fault and arriving at a "just and equitable" apportionment, there are at least two complicating factors.

In the first place, the word "negligence" when used in relation to contributory negligence has a wider meaning than when it is used in relation to the *tort* of negligence; for though, in relation to contributory negligence it signifies that the plaintiff must, in some relevant way, have contributed to the *causing* of the injury, and that the injury must have been one which he ought reasonably to have foreseen (*p*), it does not necessarily mean that he must have owed the defendant a duty of care in the strict legal sense. For "all that is necessary to establish (contributory negligence) is to prove to the satisfaction of the jury that the injured party did not in *his own interest take reasonable care of himself* and contributed, by his want of care, to his own injury" (*q*).

In the second place, since *contributory* negligence, like negligence, involves problems of causation, it must inevitably raise perplexing questions of fact (*r*). For example if a man sits on a wall which he knows to be unsafe, and the wall is then made to collapse not because of its condition but because a motorist carelessly runs into it, and the man is thereby injured (*s*), the fact of the man's sitting

(*n*) *The Miraflores* (last note) at pp. 678 and 845 respectively; *per* Lord PEARCE.

(*o*) This difficulty is well illustrated by *Lavender* v. *Diamints, Ltd.*, [1949] 1 All E. R. 532, C. A.; [1949] 1 K. B. 585, where the trial judge found the plaintiff, and the C. A. the defendant *solely* at fault. As a general rule, however, appellate courts will not interfere with the apportionment of the trial judge: *British Fame (Owners)* v. *MacGregor (Owners)*, [1943] 1 All E. R. 33; [1943] A. C. 197; *Brown* v. *Thompson*, [1968] 2 All E. R. 708.

(*p*) *Jones* v. *Livox Quarries, Ltd.*, [1952] 2 Q. B. 608, 615; *per* DENNING, L.J.

(*q*) *Nance* v. *British Columbia Electric Rail. Co.*, [1951] 2 All E. R. 448, 450; [1951] A. C. 601, 611; *per* Viscount SIMON (italics ours).

(*r*) See *Marvin Sigurdson* v. *British Columbia Electric Rail. Co.*, [1953] A. C. 291, 298.

(*s*) See *Jones* v. *Livox Quarries*, [1952] 2 Q. B., at p. 612; *per* SINGLETON, L.J.

on the wall bears no direct relation to the manner in which the injury is inflicted, and his lack of care for himself is not a cause of it. But if on the other hand a dustman, having been warned of the dangers of the practice, stands upon the steps on the off-side of a dustcart, and then receives injuries as the result of a collision caused by the negligence of his own, or of some other, driver, it is reasonably clear as a matter of common-sense that he has to some extent contributed to his own injury (*t*). The solution of the causal problem in these two instances is comparatively simple but facts must always present themselves somewhere between the two, thus giving rise to difficulties (*u*).

Although contributory negligence is not therefore quite the same thing as negligence in the strictly technical sense, the two concepts are nevertheless similar in most respects; and in particular the test for the standard of care in contributory negligence is the same test as in negligence, namely the standard of the ordinary reasonable one. Thus for instance where contributory negligence is in question only ordinary, not exceptional, care will be demanded; for example it *may* not be contributory negligence for a passenger in a train to lean upon a carriage door which appears to be fastened (*a*), nor for a person standing upon a platform to refrain from drawing away from a train (*b*) which is about to start (*c*).

ILLUSTRATION 70

Where injury is caused by the fault of both parties, both may be held at fault, and damages will be apportioned accordingly.

Boy Andrew (Owners) *v.* St. Rognvald (Owners), [1948] A. C. 140.

Two ships, "St. Rognvald" and "Boy Andrew", were steaming on parallel courses in a narrow channel. When the former was about to overtake the latter at a lateral distance of one hundred feet on the starboard side, and the stem of the one vessel was about level with

(*t*) *Davies* v. *Swan Motor Co. (Swansea), Ltd.*, [1949] 1 All E. R. 620; [1949] 2 K. B. 291; and see *Jones* v. *Livox Quarries, Ltd.*, *supra*.

(*u*) See, for instance, *Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E. R. 478; [1953] A. C. 663, where it was held that where miner X and miner Y wrongfully agree to neglect a certain safety precaution and miner X is thereby injured, miner Y's acquiescence in the neglect is, for legal purposes, a contributory cause of miner X's injury. And see *Williams* v. *Port of Liverpool Stevedoring Co., Ltd.*, [1956] 2 All E. R. 69.

(*a*) *Gee* v. *Metropolitan Rail. Co.* (1873), L. R. 8 Q. B. 161.

(*b*) *Hare* v. *British Transport Commission*, [1956] 1 All E. R. 578. Compare *Booker* v. *Wenborn*, [1962] 1 All E. R. 431 (Illustration 59) and see *Staveley Iron & Chemical Co., Ltd.* v. *Jones*, [1956] 1 All E. R. 403; [1956] A. C. 627 (care required of factory-hand in adjusting crane load).

(*c*) Children are judged not by the standard of the reasonable adult, but by that of the reasonable child: *Harrold* v. *Watney*, [1898] 2 Q. B. 320 (child climbs upon rotten fence); *Gough* v. *Thorne*, [1966] 3 All E. R. 398.

the stern of the other, "Boy Andrew", for no reason that was ever known, suddenly swerved hard-to-starboard, with the result that there was a collision and "Boy Andrew" was lost with all hands. It was held in the First Division of the Court of Session that "Boy Andrew" was solely at fault because, although "St. Rognvald" was attempting to pass her when she was dangerously close, "Boy Andrew" had the last opportunity of avoiding collision and, by her erratic behaviour, failed to take it. On appeal to the House of Lords. *Held:* Both ships were at fault and damages must be apportioned (*d*).

3. PROOF OF NEGLIGENCE: *RES IPSA LOQUITUR*

It has already been explained that the question whether a duty of care is owed in particular circumstances is a question of *law* for the judge to determine. The questions whether the defendant was in breach of the duty and whether his conduct caused the injury are essentially questions of *fact* (*e*); but they too are also questions of *law* to this extent, that the evidence must be sufficiently cogent to satisfy the judge that they are *capable* of being answered in the plaintiff's favour. If the judge considers that they are not so capable, he *must* rule in favour of the defendant, and if he is sitting with a jury (*f*) he must withdraw the case from their consideration. The dividing-line between law and fact in this respect was well expressed by Lord CAIRNS, L.C.:—

> "The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred" (*g*).

It follows that before any question of whether in fact the defendant has committed actionable negligence can arise, the court must be satisfied that the established facts create at least a reason-

(*d*) See also *A.C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240.

(*e*) The courts now do their best to avoid the temptation of treating them as questions of law. See *Easson* v. *London and North Eastern Rail. Co.*, [1944] 2 All E. R. 425, 430; [1944] K. B. 421, 426; *per* DU PARCQ, L.J.; *Morris* v. *Luton Corporation*, [1946] 1 All E. R. 1, 3–4; [1946] K. B. 114, 115–16; *per* Lord GREENE, M.R. (The unfortunate tendency in the opposite direction apparent in *Tart* v. *Chitty (G. W.) & Co., Ltd.*, [1933] 2 K. B. 453, and *Baker* v. *Longhurst (E.) & Sons, Ltd.*, [1933] 2 K. B. 461, may now, happily, be forgotten).

(*f*) Juries are now rare in negligence cases. But it must be borne in mind that the original purpose of the rule that the *court* must determine whether a *primâ facie* case has been established was to protect the defendant against the vagaries of jurors (see *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193, 197; *per* Lord CAIRNS, L.C.). As to the practical effect of a submission by the defendant of "no case" to answer see *Storey* v. *Storey*, [1960] 3 All E. R. 279; [1961] P. 63; *Payne* v. *Harrison*, [1961] 2 All E. R. 873; [1961] 2 Q. B. 403.

(*g*) *Jackson's Case*, *supra*, at p. 197. And see *Bolton* v. *Stone*, [1951] 1 All E. R. 1078, 1081; [1951] A. C. 850, 858–9; *per* Lord PORTER.

able inference (*h*) (*i*) that he has done so. And as a matter of proof *the burden of thus establishing a primâ facie* case lies upon the plaintiff (*k*). But once this burden has been satisfactorily undertaken the onus of displacing it lies upon the defendant. Thus in *Houghland* v. *R. R. Low* (*Luxury Coaches*), *Ltd.* (*l*), the plaintiff, a passenger in a luxury coach, claimed damages in respect of the loss of a suitcase. The facts were that the defendants (coach proprietors) had stowed the plaintiff's suitcase in the boot of a coach upon its departure from Southampton, and that upon arrival of the party at Hoylake the case was missing: these facts constituted a *primâ facie* case for the plaintiff. The evidence also showed that, due to a breakdown, the case had been removed in the course of the journey from the original coach to another and that the changeover had been supervised by the defendants as to the stowing in the new coach, but that there had been no supervision of the removal from the old one. In these circumstances the defendants were liable since—the changeover having been in the dark—they had not shown that they had taken such reasonable care of the whole operation as to displace the initial inference of negligence.

Two decisions of the House of Lords may serve to illustrate what may be held to amount to a "reasonable inference". In *Wakelin* v. *London and South Western Rail. Co.* (*m*) the relevant facts

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(*h*) The theory that a mere "*scintilla*" of evidence in favour of the plaintiff will suffice has been discarded: *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, 38; *per* WILLES, J. "Reasonable inference" means that the matter must be beyond the realm of "pure conjecture" (*Jones* v. *Great Western Rail. Co.* (1930), 47 T. L. R. 39, 41; *per* Lord BUCKMASTER), but it is by no means essential that the evidence should always point unequivocally to the *exact cause* of the injury (*McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72).

(*i*) Where facts are established which give rise to a reasonable inference that one of two or more parties has been negligent, but it is impossible to specify which of them caused the injury, the establishment of such facts may suffice to provide a *primâ facie* case against each of them: see, *per* DENNING, L.J., *Baker* v. *Market Harborough Industrial Co-operative Society, Ltd.*, [1953] 1 W. L. R. 1472, 1476, and *Roe* v. *Minister of Health*, [1954] 2 All E. R. 131, 137; [1954] 2 Q. B. 66, 82. But the problem is an old one, and it seems that ALDERSON, B., at any rate would not have acceded to this proposition (*Skinner* v. *London, Brighton and South Coast Rail. Co.* (1850), 5 Exch. 787, 789).

(*k*) See *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E. R. 615; [1956] A. C. 613: *Brown* v. *Rolls Royce, Ltd.*, [1960] 1 All E. R. 577; 1960 S. C. (H. L.) 22. And as to the difference between the "legal" and "provisional" burden of proof see the speech of Lord DENNING in the latter case.

(*l*) [1962] 2 All E. R. 159; [1962] 1 Q. B. 694. It was also held that the plaintiff could succeed in detinue. *Res ipsa loquitur* was not raised. But it might have been. Contrast *Parish* v. *Judd*, [1960] 3 All E. R. 33.

(*m*) (1886), 12 App. Cas. 41. See also *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193 (Illustration 71); *McKenzie* v. *Chilliwack Corporation*, [1912] A. C. 888 (P. C.); *Mersey Docks and Harbour Board* v. *Proctor*, [1923]

were that the body of a man (in respect of whose death the action arose) was found upon the respondents' line on a level crossing at a point from which trains coming either way could be seen approaching for a considerable distance; that he had been killed by a train which (it being night-time) carried a headlight; that the driver had not sounded his whistle as he approached the crossing. It was held that this evidence disclosed nothing from which it could reasonably be inferred that the cause of the death was attributable to the respondents' negligence: there was nothing "to show that the train ran over the man rather than that the man ran against the train" (*n*). On the other hand, in *Jones* v. *Great Western Rail. Co.* (*o*), it was held by a majority that there was sufficient evidence to justify a finding in the appellant's favour where, the body of the deceased also being found upon the respondents' line crushed between two trucks, there was evidence that at the time of the accident, shunting being in progress, one of the respondents' employees who was posted to warn people against crossing the line had failed to see the deceased and had therefore failed to give him warning. This failure was held to be enough to justify the inference that the accident was brought about by the respondents' negligence: though it was no more than an inference, and perhaps it is excusable to doubt whether it was really a reasonable one (*p*).

Thus the general rule is that it lies upon the plaintiff to establish facts from which it may reasonably be inferred that the defendant's negligence has caused his injury. But this rule is subject to an important qualification (*q*) introduced by what is called the "*res ipsa loquitur*" principle. This is no more than a common-sense rule of evidence which takes account of the fact that injury is often occasioned by events which obviously argue lack of proper care on the part of someone (or of those for whose actions he is legally responsible) under circumstances which make it difficult or impossible for the plaintiff to provide evidence of the precise form

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A. C. 253; *Barnett* v. *Chelsea & Kensington Hospital Management Committee*, [1968] 1 All E. R. 1068.

(*n*) (1886), 12 App. Cas. at p. 45; *per* Lord HALSBURY, L.C.; Compare *Wheat* v. *E. Lacon & Co., Ltd.*, [1966] 1 All E. R. 582; [1966] A. C. 552.

(*o*) (1930), 47 T. L. R. 39. See also *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155: *Smith* v. *South Eastern Rail. Co.*, [1896] 1 Q. B. 178: *Craig* v. *Glasgow Corporation* (1919), 35 T. L. R. 214.

(*p*) See the dissenting opinion of Lord MACMILLAN; (1930), 47 T. L. R. at pp. 44–6.

(*q*) The "*res ipsa*" principle is often treated as though it formed an *exception* to the general rule; but it is thought that it is more proper to treat it as being merely a qualification of it. Where the principle is applied the plaintiff has in fact *ex hypothesi*, established all the evidence that he can reasonably be expected to adduce.

which the alleged carelessness has taken. Thus in *Scott* v. *London and St. Katherine Docks Co.* (*r*) the plaintiff was injured, while lawfully passing beneath the defendants' warehouse, by the fall of six bags of sugar from a crane in the upper floor of the warehouse which was being manipulated by the defendants' servants. The plaintiff could prove no more than that the bags had fallen and that he had been injured; but the Court of Exchequer Chamber ruled that the proof of these facts gave rise to a legitimate inference of negligence upon the part of the defendants or their servants; and the principle which underlies "*res ipsa loquitur*" was explained in these words:—

> "*There must be reasonable evidence of negligence.* But where the thing is shewn to be under the *management of defendant or his servants*, and *the accident is such as in the ordinary course of things does not happen if those who have the management use proper care*, it affords reasonable evidence, *in the absence of explanation by the defendants*, that the accident arose from want of care" (*s*).

It is to be noted that according to this statement two conditions have to be satisfied for "*res ipsa loquitur*" to come into play: first the event which caused the accident must have rested within the control of the defendant; secondly, the mere occurrence of the event must raise of itself a reasonable inference that the defendant or his servants or agents have been negligent. The reason for the former of these conditions is that where the defendant has control of the thing which causes the injury he is in a better position than the plaintiff to explain how the accident occurred (*t*).

As with the principal rule that it is for the plaintiff to establish a *primâ facie* case, so with the "*res ipsa loquitur*" qualification, the question whether particular facts give rise to its application is technically a question of *law* for the court to determine. But here again the court's decision must depend upon all the circumstances (*u*).

(*r*) (1865), 3 H. & C. 596. See also *Kearney* v. *London, Brighton and South Coast Rail Co.* (1871), L. R. 6 Q. B. 759.

(*s*) (1865), 3 H. & C. at p. 601; *per* ERLE, C.J. (italics ours).

(*t*) But query whether the element of "control" is really essential. It is often said that it is (see *e.g. Mahon* v. *Osborne*, [1939] 1 All E. R. 535, 540–1; [1939] 2 K. B. 14, 21–2; *Easson* v. *London and North Eastern Rail. Co.*, [1944] 2 All E. R. 425, 428; [1944] K. B. 421, 422); but *contra Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E. R. 392, 403; [1950] A. C. 185, where Lord RADCLIFFE states the essence of *res ipsa loquitur* more broadly as being based upon the principle that "an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence".

(*u*) See *Roe* v. *Minister of Health*, [1954] 2 All E. R. 131, 139; [1954] 2 Q. B., 66, 88; *per* MORRIS, L.J. Indeed, in many cases in which the principle has

It must be remembered that one of the factors upon which "*res ipsa loquitur*" is based is the fact that the circumstances are such that the plaintiff is debarred by the very nature of the accident from explaining the true cause of his injury, and it therefore follows that the principle cannot apply where this is in fact known (*v*). Thus if all that is known is that the plaintiff has been injured while a passenger in the defendants' omnibus by the vehicle mounting a pavement (*a*) and falling over an embankment, then "*res ipsa loquitur*"; but if it is also known as occurred in *Barkway* v. *South Wales Transport Co. Ltd.* (*b*) that the reason that the bus mounted the pavement was that it burst a tyre and that this burst was the result of an impact fracture, which is not easy to discover upon inspection, then the doctrine ceases to apply.

Further, it is to be noted that the principle as laid down in *Scott's Case* only applies "*in the absence of explanation by the defendants*". If therefore the defendant, either by argument upon the evidence adduced by the plaintiff (*c*) or by calling evidence upon his own behalf, satisfies the court or jury that upon such facts as are disclosed there is no reason why negligence should be inferred, he *may* escape liability And he certainly will if he can show either that he did take all reasonable care (*d*) or that the evidence points to some cause of the accident other than his negligence.

Such being the nature of the burden of proof which lies upon the *plaintiff* (with or without the assistance of the *res ipsa* principle), it only remains to explain that where the *defendant* wishes to set up contributory negligence or to escape liability upon the ground that the true cause of the injury is attributable not to his act or omission

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been applied, a minority of the court have dissented. This was so in *Scott's Case* itself.

(*v*) See *Bolton* v. *Stone*, [1951] 1 All E. R. 1078, 1081–2; [1951] A. C. 850, 859–60; *per* Lord PORTER.

(*a*) See *Laurie* v. *Raglan Building Co., Ltd.*, [1941] 3 All E. R. 332; [1942] 1 K. B. 152 where Lord GREENE, M.R., described a *skid* as a "neutral" event, arguing neither negligence nor the lack of it. In *Richley* v. *Faull*, [1965] 3 All E. R. 109, however, MCKENNA, J., disagreed, regarding a skid as *prima facie* evidence of negligence. It is thought that this is the better view.

(*b*) [1950] 1 All E. R. 392; [1950] A. C. 185. See also *Moore* v. *R. Fox & Sons*, [1956] 1 All E. R. 182; [1956] 1 Q. B. 596; *Pearson* v. *North Western Gas Board*, [1968] 2 All E. R. 669.

(*c*) See *Graham* v. *Grayson, Rollo and Clover Docks, Ltd.*, [1959] 2 Lloyd's Rep. 359.

(*d*) *Woods* v. *Duncan*, [1946] 1 All E. R. 420; [1946] A. C. 401, 439; *per* Lord SIMONDS. And see *Turner* v. *N. C. B.* (1949), 65 T. L. R. 580; *Walsh* v. *Holst & Co., Ltd.*, [1958] 3 All E. R. 33; *Swan* v. *Salisbury Construction Co., Ltd.*, [1966] 2 All E. R. 138; *Moore* v. *Maxwells of Emsworth, Ltd.*, [1968] 2 All E. R. 779—presence of unlighted vehicle on highway explained. See also above, p. 148.

but to that of another person, the burden of doing so lies upon him (*e*).

ILLUSTRATION 71

If the plaintiff can establish facts which lead to a reasonable inference that the defendant has been negligent he may succeed: if no such inference can be drawn he must fail.

Metropolitan Rail. Co. *v.* Jackson (1877), 3 App. Cas. 193.

Appellant was a passenger in one of respondents' trains. At Portland Road Station, the seating accommodation being full and there being three standing passengers, appellant half rose from his seat and put up his hand to prevent more people from getting in. As the train moved a porter on the platform succeeded in keeping these people back, but also slammed the carriage door (the train being about to enter a tunnel). The jerk caused by the starting of the train threw the appellant forward so that his thumb was caught in the hinge of the slamming door. *Held:* No inference could reasonably be drawn from these facts that the respondents had been negligent.

ILLUSTRATION 72

Res Ipsa Loquitur

Where injury is caused by something which is in the defendant's control, in circumstances from which it can reasonably be inferred that the accident would not have occurred if the defendant had used proper care, then, in the absence of explanation by the defendant, "res ipsa loquitur"; and the plaintiff may succeed without adducing further evidence.

Byrne *v.* Boadle (1863), 2 H. & C. 722.

Plaintiff was passing defendant's shop when a barrel of flour fell upon him from a window above the shop and injured him. *Held:* These facts disclosed sufficient *primâ facie* evidence of negligence to entitle the jury, in absence of explanation by the defendant, to find in favour of the plaintiff (*f*).

(*e*) *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A. C. 640; *Philco Radio and Television Co., Ltd.* v. *J. Spurling, Ltd.*, [1949] 2 All E. R. 882; *A. Prosser & Son, Ltd.* v. *Levy*, [1955] 3 All E. R. 577. Contrast *Birchall* v. *J. Bibby & Sons, Ltd.*, [1953] 1 All E. R. 163.

(*f*) See also, *e.g. Skinner* v. *London, Brighton and South Coast Rail. Co.* (1850), 5 Exch. 787 (two trains belonging to same company collide on that company's system); *Laurie* v. *Raglan Building Co., Ltd.*, [1941] 3 All E. R. 332; [1942] 1 K. B. 152 (motor car driven on to pavement); *Cassidy* v. *Ministry of Health*, [1951] 1 All E. R. 574; [1951] 2 K. B. 343 (paralysis of fingers after operation); *Richley* v. *Faull*, [1965] 3 All E. R. 109 (skid); *Swan* v. *Salisbury Construction Co., Ltd.*, [1966] 2 All E. R. 138 (crane collapses). But contrast *Sochacki* v. *Sas*, [1947] 1 All E. R. 344 (fire starting in room); *Fish* v. *Kapur*, [1948] 2 All E. R. 176 (fractured jaw after tooth extraction); *Graham* v. *Grayson, Rollo and Clover Docks, Ltd.*, [1959] 2 Lloyd's Rep. 359.

4. REMOTENESS OF DAMAGE

The *Wagon Mound* litigation (*g*) not so long ago concentrated attention upon this problem, particularly insofar as it relates to Negligence, so it is convenient to discuss it here though it must also be mentioned later in relation to Damages in general (*h*). The problem is "suppose defendant's conduct to have been negligent and plaintiff to have been injured, for what *consequences* of his act or omission will defendant be held responsible" (*i*).

Bearing in mind that it is for the court to rule whether a particular consequence may be considered sufficiently connected with the wrong to ground liability (*k*) the issue of remoteness is essentially one of fact, and it is therefore not surprising that the formulation of general rules for the guidance of courts and juries in this respect has proved an intractable problem. In the main there have been two competing theories. The first which seemed until *The Wagon Mound No.* 1) (*l*) to hold the field was the rule in *Re Polemis and Furness Withy & Co., Ltd.* (*m*) that once liability in negligence, as in any other tort, is established the defendant will be held responsible for all *direct* consequences, however unforeseeable, not the product of some extraneous cause; the effect of this theory was summarized by Lord SUMNER in well-known words—"What the defendant ought to have anticipated (foreseen) as a reasonable man is material when the question is whether or not he was guilty of negligence . . . This, however, *goes to* culpability, not to compensation" (*n*). The second theory, which now governs at any rate in

(*g*) The "case history" of this litigation (*Overseas Tankership (U.K.), Ltd.* v. *Morts Docks & Engineering Co., Ltd.: The Wagon Mound* (*No.* 1 (*h*), [1961] 1 All E. R. 404; [1961] A. C. 388; *Overseas Tankship (U.K.), Ltd.* v. *Miller Steamship Co., Pty., Ltd.: The Wagon Mound* (*No.* 2), [1966] 2 All E. R. 709; [1967] 1 A. C. 617) must be understood. Both cases were appeals from Australia to the Judicial Committee. Both concerned the same series of events, but the evidence was different. In No, 1 the evidence was that the fire was *not* foreseeable, hence there could be no liability. In No. 2, for reasons which need not concern us, the evidence was that the fire, though something *exceptional*, could be foreseen: hence, for the reasons discussed above (p. 197), defendants were liable.

(*h*) Below, pp. 418–420.

(*i*) The causal element in the problem must also never be overlooked.

(*k*) See *Mehmet Dogan Bey* v. *G. G. Abdeni & Co., Ltd.*, [1951] 2 All E. R. 162; [1951] 2 K. B. 405.

(*l*) Above, n. (*g*).

(*m*) [1921] 3 K. B. 560. As to the present status of this rule see below, p. 419.

(*n*) *Weld-Blundell* v. *Stephens*, [1920] All E. R. Rep. 32; [1920] A. C. 956, 419. Now disapproved at any rate as regards remoteness of damage in negligence: see *The Wagon Mound* (*No.* 1), [1961] 1 All E. R. at p. 414; [1961] A. C. at p. 425. And in Nuisance: see *The Wagon Mound* (*No.* 2).

respect of remoteness of damage in *negligence* and in nuisance amounts to an assertion that the "duty" problem and the damage problem in that tort are identical—what has to be considered is whether any specific item of damage in respect of which the plaintiff claims is such that at the time of the act or omission called in question the defendant ought to have foreseen it (*o*).

Whatever may be the rival merits of these two tests there is, as a matter of simple logic, a great deal to be said for the adoption of the second one as far as the tort of negligence is concerned, for negligence is the causing of damage negligently; and to hold, as the first test does, that a man may be liable in negligence for an unforeseeable consequence following upon one which was, or might had it actually occurred (*p*) have been foreseeable looks very much like imposing liability for a hypothetical act of negligence; and it has often been remarked that there is no such thing as hypothetical negligence, for it is "negligence in the air" (*q*)—negligence *means* the causing of foreseeable damage and nothing less. On the other hand, there is something to be said for the first test since even though the defendant could not *ex hypothesi* help inflicting the loss complained of he is equally surely more to blame than the innocent plaintiff.

However this may be, the second test is the one which the courts are now disposed to apply (*r*)—with the result that in negligence a defendant will be liable only for such consequences of his conduct as he *ought reasonably to have anticipated at the time of the wrong:* and not for other consequences. It need only be remarked that since in ninety-nine cases out of a hundred what does follow upon a wrong is in fact foreseeable, the preference for this test rather than the other makes little practical difference in the actual administration of the law. But, of course odd things do occur, and fact is

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(*o*) *The Wagon Mound.* Though curiously out of keeping with the rules that the Court of Appeal is bound by its own previous decisions (in this case *Re Polemis*) and that Judicial Committee decisions are merely persuasive, the Court of Appeal has clearly accepted *The Wagon Mound* rule in *Doughty* v. *Turner Manufacturing Co., Ltd.*, [1964] 1 All E. R. 98 (Illustration 74 (*b*)), and it had previously been accepted by Lord PARKER, C.J., in *Smith* v. *Leech, Brain & Co., Ltd.*, [1961] 3 All E. R. 1159; [1962] 2 Q. B. 405 (Illustration 74 (*a*). The whole matter remains to be considered by the House of Lords; though in *Hughes* v. *Lord Advocate*, [1963] 1 All E. R. 705; [1963] A. C. 837 *The Wagon Mound* rule was referred to without disapproval though *obiter*.

(*p*) For the facts of *Re Polemis* see p. 419, n (*n*) below. Did the falling plank ever really cause any harm or was there some other unidentified factor which gave rise to the explosion? And see *Doughty's Case* (No. 1).

(*q*) See *The Wagon Mound* (*No.* 1), [1961] 1 All E. R. at p. 415; [1961] A. C. at p. 425.

(*r*) See above n. (*i*).

sometimes stranger than fiction as the following Illustration (*s*) will show.

ILLUSTRATION 73

In negligence liability for the consequences of the wrong is limited by the bounds of reasonable foresight.

Overseas Tankship (U.K.), Ltd. *v.* Morts Dock and Engineering Co., Ltd. (The Wagon Mound (No. 1)), [1961] 1 All E. R. 404; [1961] A. C. 388 (*t*).

Defendants were charterers of the ship *Wagon Mound* and she was being bunkered in Sydney harbour. Due to carelessness on the part of defendants' servants fuel oil was permitted to overflow from one of her tanks and it spilt upon the waters of the harbour. Upon these waters it floated and was in due course wafted by wind and tide across to the far side. Once there it reached plaintiffs' wharf where they were refitting the ship *Corrimal* and oxy-acetylene equipment was in use. The oil engulfed *Corrimal* and oozed around the wooden piers of the wharf; it also fouled plaintiff's slipways. After hesitation plaintiffs carried on with their work and eventually molten metal produced by the oxy-acetylene operations fell from the wharf and chanced to set on fire a piece of waste material floating beneath. The fire thus started, somehow set the oily surface of the sea alight and in this fire both wharf and *Corrimal* were damaged. Plaintiffs sued defendants in respect of this loss. *Held:* That, upon the basis that both expert and seafaring opinion at the time regarded it as impossible to set fuel oil on water alight, though defendants could have foreseen some damage to their plant by fouling of oil (as did happen to the slipways (*u*)) they could *not reasonably have foreseen the fire*. Consequently they were not liable for the fire damage . . . "there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air" (*a*).

In negligence and nuisance, therefore, culpability and compensation are now both governed by the rule of "reasonable foresight". But this statement requires elaboration.

In the first place an act or event which would, considered *in vacuo*, on the face of it appear to be causally unconnected with the defendant's conduct, may sometimes in the particular circumstances be one which the defendant ought in fact to have foreseen. This is a matter that has already been examined when the element of causation was discussed; for example the appearance upon the scene of a "rescuer" is treated as a foreseeable event (*b*). Thus for instance

(*s*) And see *Re Polemis*, p. 419, n. (*n*).
(*t*) See also *Bradford* v. *Robinson Rentals, Ltd.*, [1967] 1 All E. R. 267.
(*u*) This part of the claim was not in fact pursued.
(*a*) See p. 210, n. (*a*), above.
(*b*) See above, pp. 36–37.

in *Ward* v. *T. E. Hopkins & Son, Ltd.* (*c*) defendants who, through their servants, permitted a well the latter were repairing to become dangerous by reason of the escape of fumes from a petrol pump were held liable to the plaintiff whose deceased husband (a doctor) was killed by the fumes when in the well seeking to rescue one of the defendants' employees who had been overcome. The doctor's heroism, being foreseeable, did not constitute a "*novus actus interveniens*". And this principle will apply to all foreseeable consequences, however causally indirect. For ". . . . it would be wrong that (a person) should escape liability, however, "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done" (*d*).

In the second place it has been held that where the damage which in fact results from the negligence, although not foreseeable, is similar in *type* (as the damage in *The Wagon Mound* was not) to the damage which could have been foreseen then recovery will be allowed despite the lack of foreseeability. This is in keeping with the broad rule of policy that a tortfeasor must take his victim as he finds him (*e*); thus if I assault a man who, unknown to me, has an egg-shell skull and serious injury results from a minor blow I am held liable for the consequences. This rider to the *Wagon Mound* rule may have the result of imposing considerable limitations (which would clearly seem to be right) upon its application. But it will also introduce logical difficulties; since the supposed distinction between "types" of injuries must be arbitrary. Is damage to clothing, for example, different in "type" from injury to the wearer?

In the third place, as has been seen already (*f*), where prevention is easy and the possible consequences of the defendant's conduct are serious, liability may sometimes be imposed in respect of possible rather than probable consequences. In such circumstances, as in the sort of circumstances just considered, the *Wagon Mound* rule is not very different in practical consequence from the *Polemis* rule.

ILLUSTRATION 74

(a) *Where damage follows directly upon the wrong recovery may be had in respect of it if, though unforeseeable, it was similar in type to damage actually and foreseeably caused.*

(*c*) [1959] 3 All E. R. 225.
(*d*) *The Wagon Mound*, (*No.*1), [1961] 1 All E. R. at p. 416; [1961] A. C. at p. 426.
(*e*) See *Smith* v. *Leech, Brain & Co., Ltd.*, [1961] 3 All E. R. 1159, 1161; [1962] 2 Q. B. 405, 414.
(*f*) Above, p. 197.

Smith *v.* Leech, Brain & Co., Ltd., [1961] 3 All E. R. 1159; [1962] 2 Q. B. 405.

The plaintiff's widow claimed in respect of the death of her husband, an employee of defendant company. At the time of the misfortune upon which the claim was based the husband was engaged in dipping certain material into a tank of molten metal Through the admitted negligence of the defendants a piece of metal flew out of the tank and caused a burn on his lip. To all appearances this was a trivial burn, but in the event it was the direct cause of the man's death, because it so chanced that he was at the time, unknown to anyone, suffering from pre-malignant cancer and the burn activated the cancer. *Held:* As far as the assessment of damages goes the defendant must take his victim as he finds him. *The Wagon Mound* principle did not override this rule. Hence defendants were liable, the ultimate injury being similar in type (*g*) to the initial injury (*h*).

(b) *But where the source of injury is something both unforeseeable and different in type from any foreseeable injury actually inflicted there can be no recovery.*

Doughty *v.* Turner Manufacturing Co., Ltd., [1964] 1 All E. R. 98.

Plaintiff who was employed by defendants went to give a message to a foreman who was at the time in a part of defendants' premises where there was a cauldron of molten metal. Somehow other employees of defendants had let slip into this cauldron an asbestos cement cover. At the time it was unknown that asbestos cement let slip into the metal in question at that heat would have an explosive effect. But an explosion did in fact result and plaintiff was injured. *Held:* Defendants not liable. Though it was true that had the cover on impact with the metal caused a splash which had injured plaintiff and had further injury then been caused by the explosion, the further injury might have been recoverable (upon the principle of the last Illustration); no such splash was proved. The sole and the whole injury was therefore unforeseeable—unlike the injury in *Hughes* v. *Lord Advocate* (*i*) and on the principle of *The Wagon Mound* there could be no recovery.

Perhaps we may add that this is all new law, and it is thought that *The Wagon Mound* rule may prove to be every bit as unsatisfactory, unjust (*k*), and unpredictable in its application as the *Polemis* rule which it seems to have replaced.

(*g*) Though cancer sufferers, their friends and relations may have some doubt about this? A reflexion which makes one think that future courts may need to reconsider the distinction by reference to "type". But *Smith's Case* was followed in *Warren* v. *Scruttons, Ltd.*, [1962] 1 Lloyd's Rep. 497.

(*h*) A similar sort of argument is to be found in *Hughes* v. *Lord Advocate*, [1963] 1 All E. R. 705; [1963] A. C. 837—though there no "initial" injury was in fact suffered. And see *Stewart* v. *West African Terminals, Ltd.*, [1964] 2 Lloyd's Rep. 371.

(*i*) Last note. And see p. 191, above.

(*k*) General appeals to "justice" occur in the advice of the Judicial Committee in *The Wagon Mound*: such appeals are usually question-begging. Was the decision necessarily "just"?

CHAPTER 9

PARTICULAR ASPECTS OF NEGLIGENCE

Circumstances are infinitely various, and the actual degree of diligence that the law requires of the reasonable man necessarily varies according to the circumstances. Obviously for example, as has already been pointed out, the greater the risk of injury, the greater the care required. Thus particular rules have been established—albeit illustrative merely of the same general principles —to meet particular situations. A list of these rules could never be exhaustive, since new situations are always arising and new rules have accordingly to be established to meet them. It is therefore proposed to discuss only four of these particular aspects of negligence: liability for dangerous things, liability for fire, the special liability of occupiers of premises or structures for dangers arising upon them, and the liabilities of master to servant (*a*).

It should be stressed that the following discussion in no way detracts from the proposition that Negligence is a single entity (*aa*) which has already been described, depending upon the "foresight" rule. All that we are about to examine is its functioning in particular sets of circumstances.

1. DANGEROUS THINGS

Although there was formerly some doubt in the matter it is now clear that the rules which govern dangerous things (*b*) apply not merely to chattels, but to dangerous things of all kinds, including land in a dangerous condition (*c*); though the leading case of *Donoghue* (*or M'Alister*) v. *Stevenson* (*d*) concerned a dangerous chattel and most of the decisions concerning dangerous things have in fact dealt with chattels. It has already been noticed (*e*) that even

(*a*) For more exhaustive examination of particular aspects of negligence, see the larger works on torts, such as Clerk and Lindsell, *Law of Torts*.

(*aa*) in *Griffiths* v. *Arch Engineering Co. (Newport), Ltd.*, [1968] 3 All E. R. 712. CHAPMAN, J. underlines this truism and suggests that the special categories about to be dicussed could usefully be dispensed with, but it is thought that for the purposes of exposition and illustration a discussion of them remains essential.

(*b*) Special rules determine liability for dangerous animals, fire and things dangerous within the rule in *Rylands* v. *Fletcher* and these will be considered separately.

(*c*) *A. C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240: *Gallagher* v. *N. McDowell, Ltd.*, [1961] N. I. 26 (Illustration 77): *Sharpe* v. *E. T. Sweeting & Son, Ltd.*, [1963] 2 All E. R. 455 (Illustration 63 (b)): *Clay* v. *A. J. Crump & Sons, Ltd.*, [1963] 3 All E. R. 687 (Illustration 78).

(*d*) [1932] All E. R. Rep. 1; [1932] A. C. 562. (*e*) Above, p. 192.

before *Donoghue's Case* liability was imposed in negligence for things, such as gas (*f*), which were considered dangerous "*per se*"; but as far as things dangerous only "*sub modo*" were concerned liability was gravely restricted.

It is true that one who transferred a chattel to another either by way of contract (*g*) or by way of gift or loan (*h*) might be liable to the *immediate recipient* if it injured him, provided that the defect which gave rise to the injury was not obvious, provided that he actually *knew* (*i*) of it, and provided that he gave no warning. And the same principle extended to land in a dangerous condition which an occupier of it permitted others to use gratuitously (*k*). But in the absence of fraud (*l*), liability probably (*m*) did not extend beyond the immediate recipient.

In particular the law seems (*n*) to have been stunted by acceptance of the fallacy that where A makes a contract with B involving a defective article (not dangerous "*per se*") and C (not a party to the contract) is injured by reason of the defect, all rights and duties being determined by the contract (*o*), C can have no right of action against A (*p*).

(*f*) *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1908-1910] All E. R. Rep. 61; [1909] A. C. 640 (Illustration 67). And see p. 192, n. (*r*).

(*g*) In which case there might of course be concurrent liability under the terms of the contract, express or implied: see, *e.g. Hyman* v. *Nye* (1881), 6 Q. B. D. 685. As regards the concurrent liability in negligence, see *Clarke* v. *Army and Navy Co-operative Society, Ltd.*, [1903] 1 K. B. 155.

(*h*) *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

(*i*) It is more than likely that at any rate where the transfer is otherwise than by way of gift or loan, the duty is now, since *Donoghue's Case*, a duty in respect of dangers of which the defendant knows or *ought to know*; indeed *Herschtal* v. *Stewart and Ardern, Ltd.*, [1939] 4 All E. R. 123; [1940] 1 K. B. 155, seems to be an authority directly in point, though the question was not there squarely faced. In *Hawkins* v. *Coulsdon and Purley U.D.C.*, [1954] 1 All E. R. 97, 104; [1954] 1 Q. B. 319, 333, DENNING, L.J., even ventured the suggestion that the law relating to gifts has been affected: *sed quaere*.

(*k*) *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371.

(*l*) *Langridge* v. *Levy* (1837), 2 M. & W. 519.

(*m*) "Probably" because there was some authority to the contrary: *George* v. *Skivington* (1869), L. R. 5 Exch. 1; and see authorities cited in *Riden* v. *A. C. Billings & Sons, Ltd.*, [1956] 3 All E. R. 357, 361; [1957] 1 Q. B. 46, 56, by DENNING, L.J. (this case went on appeal, [1957] 3 All E. R. 1; [1958] A. C. 240). *White* v. *Steadman*, [1913] 3 K. B. 340, which is also sometimes cited, was a case of a dangerous animal, to which special principles apply.

(*n*) Lord ATKIN, however, himself thought that the authorities upon which this proposition rests (*Winterbottom* v. *Wright* (1842), 10 M. & W. 109, and *Earl* v. *Lubbock*, [1905] 1 K. B. 253) can be distinguished upon the ground that they were concerned purely with matters of pleading. See, [1932] All E. R. Rep. at pp. 16–17; [1932] A. C. at pp. 588–92.

(*o*) Though strangely enough this argument never seems to have been used so as to debar the *immediate recipient* from his alternative rights in tort.

(*p*) See *Blacker* v. *Lake and Elliott, Ltd.* (1912), 106 L. T. 533, 536; *per* HAMILTON, J.

Whatever may be thought of the usefulness of Lord ATKIN's attempt to generalize the duty of care (*q*), the House of Lords in *Donoghue's Case* exploded this fallacy and thereby made possible an extension of the scope of liability in respect of things dangerous "*sub modo*", assimilating it in most respects to liability for things dangerous "*per se*"—save that, as has been seen (*r*), the degree of diligence demanded in respect of things of the latter kind must necessarily be greater than that demanded in respect of things of the former kind. In this most celebrated of modern decisions the appellant went with a friend to a café at Paisley. The friend there purchased for the appellant a dark, opaque, bottle of ginger-beer. The café proprietor then poured some of the contents of this bottle into a glass, and the appellant drank therefrom. When the friend emptied the rest of the bottle into the glass out floated the decomposed remains of a snail. This mishap caused the appellant to suffer from shock and gastroenteritis (*s*) in respect of which she (not being a party to any contract even with the café proprietor), sued the respondent, the manufacturer of the ginger-beer. The House of Lords held (*t*) (without being possessed of sufficient evidence to determine whether the respondent had in fact been negligent in permitting the snail to select this unusual grave) that upon these facts the respondent owed the appellant a duty of care; and the scope of this duty was summarized by Lord ATKIN in the following words:—

> "a *manufacturer* of *products*, which he sells in such a form as to show that he intends them to reach the *ultimate consumer* in the form in which they left him with *no reasonable possibility of intermediate examination*, and with the *knowledge that the absence of reasonable care in the preparation or putting up of the products will result* in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care" (*a*).

The ancient fallacy thus exploded, a new rule was brought into being which was clearly intended by Lord ATKIN to be interpreted, and in fact does seem to have been interpreted in the light of, and as a particular application of, the wider "neighbour" principle which he had propounded earlier in his speech. We must now,

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(*q*) See last Chapter.

(*r*) Above, p. 192.

(*s*) It might have been suggested that this was partly due to the peculiar concoction that the appellant had chosen to consume; for it appears that the glass also contained ice-cream! ([1932] All E. R. Rep. at p. 21; [1932] A. C. at p. 601).

(*t*) By a majority, Lords ATKIN, THANKERTON and MACMILLAN; Lords BUCKMASTER and TOMLIN dissenting.

(*a*) [1932] All E. R. Rep. at p. 20; [1932] A. C., at p. 599 (italics ours).

therefore, consider how this rule has in fact been interpreted, and how far it has at present been extended.

In the first place, there was clearly no significance in the fact that the respondent in *Donoghue's Case* was a *manufacturer*. It is to be assumed that the reason for holding the manufacturer liable was not simply that he was a *manufacturer*, but that a manufacturer is a person who *produces* goods; and therefore if by so doing he creates a source of danger he must be held responsible for the consequences. This assumption has been borne out by subsequent decisions: for liability has been imposed not only upon "*manufacturers*" of "*products*" in the strict commercial sense (*b*), but also upon people who repair (*c*), erect (*d*), assemble (*e*) or supply (*f*) articles of any sort, or even leave such articles in places where they are likely to be a source of danger (*g*). On the other hand, if the defendant is to be liable, it is essential that he should have done or omitted to do something in respect of the dangerous article that fixes *him* with responsibility; thus the mere fact that he has at some stage circulated or been in control of the dangerous thing is not in itself sufficient to make him liable (*h*).

ILLUSTRATION 75

Liability extends to articles other than "manufactured" "products" in the commercial sense.

Brown *v.* T. & E. C. Cotterill (1934), 51 T. L. R. 21.

(*b*) As in *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A. C. 85 (manufactured underpants), or, in *Hindustan S.S. Co., Ltd.* v. *Siemens Brothers & Co., Ltd.*, [1955] 1 Lloyd's Rep. 167 (faulty electrical equipment) where, however, there was ample opportunity of inspection by the plaintiff.

(*c*) *Malfroot* v. *Noxal, Ltd.* (1935), 51 T. L. R. 551 (repairer of motor-cycle combination); *Haseldine* v. *Daw*, [1941] 2 K. B. 343 (repairer of lift).

(*d*) *Brown* v. *T. & E. C. Cotterill* (Illustration 75). See also *Watson* v. *Buckley, Osborne, Garrett and Co., Ltd., and Wyrovoys Products, Ltd.*, [1940] 1 All E. R. 174 (distributors).

(*e*) *Howard* v. *Furness Houlder Argentine Lines, Ltd., and Brown, Ltd.*, [1936] 2 All E. R. 781 (safety-valve).

(*f*) *Read* v. *Croydon Corporation*, [1938] 4 All E. R. 631; *Barnes* v. *Irwell Valley Water Board*, [1938] 2 All E. R. 650; [1939] 1 K. B. 21 (water suppliers).

(*g*) *Creed* v. *John McGeoch & Sons, Ltd.*, [1955] 3 All E. R. 123. (Though this was a case of children and an "allurement".)

(*h*) *Stennett* v. *Hancock and Peters*, [1939] 2 All E. R. 578 (lorry *owner* not responsible for defective workmanship of repairer): see also *Mason* v. *Williams* (Illustration 76). The same principle probably applies to retailers; at least as long as they do nothing to *create* the danger: *Kubach* v. *Hollands*, [1937] 3 All E. R. 907 (point not however directly in issue). But of course retailer may be liable to *buyer* under Sale of Goods Act, 1893, s. 14 (22 Halsbury's Statutes (2nd Edn.) 993).

While infant plaintiff was helping to arrange flowers on her grandmother's grave, a nearby tombstone carelessly erected by the defendant firm fell upon and injured her. *Held:* Defendants were liable under the principle of *Donoghue's Case*.

Further, the rule was clearly not intended to be limited so as to confer rights only upon "*consumers*" in the narrow sense; it has been broadly applied so as to include users (*i*) of offending articles, a pedestrian struck by a part that fell off a lorry which had been improperly repaired (*j*), and indeed anyone whom the defendant ought reasonably to have in mind as likely to be injured by the result of his want of care.

ILLUSTRATION 76

Liability extends not only to "consumers", but also to anyone whom the defendant ought reasonably to foresee as likely to be injured.

Mason *v.* Williams and Williams, Ltd., and Thomas Turton & Sons, Ltd., [1955] 1 All E. R. 808.

A chisel being used by plaintiff, an employee of first defendants, splintered and injured his eye. The chisel, which was a new one, was manufactured by second defendants. In the absence of any lack of care on the part of plaintiff. *Held:* Though first defendants were not liable, upon the principle already explained that they had done nothing in respect of the chisel which could fix *them* with responsibility, and were under no obligation to make periodical examinations of it, second defendants were liable because plaintiff was in a position to say "it was a breach of duty towards me, a person whom you contemplated would use this article which you made, in the way you intended it to be used" (*k*). *Taylor* v. *Rover Co., Ltd.*, [1966] 2 All E. R. 181 forms a useful contrast. In a similar incident concerning a faulty chisel first defendants (employers) were held liable because their foreman had reason to know that the chisel was dangerous. Second defendants (manufacturers) were exempted because (i) there had actually been knowledge of the defect by the foreman and the chisel had not been withdrawn, and (ii) the dangerous condition of the tool was due to the negligence of a third party to whom second defendants had sent it for hardening; and the third party were independent contractors.

And, as has already been remarked, there is now no doubt (*mutatis mutandis*) that the *Donoghue* rule applies as much to land which is in a dangerous condition as it does to chattels (*l*).

(*i*) *Grant's Case* (*supra*, note (*b*)); *Barnett* v. *H. & J. Packer & Co., Ltd.*, [1940] 3 All E. R. 575.

(*j*) *Stennett* v. *Hancock and Peters*, [1939] 2 All E. R. 578.

(*k*) [1955] 1 All E. R. at p. 810; *per* FINNEMORE, J. And see *Davie* v. *New Merton Board Mills, Ltd.*, [1959] 1 All E. R. 346; [1959] A. C. 604.

(*l*) See above, p. 214, n. (*c*).

ILLUSTRATION 77

The rule applies (mutatis mutandis) to land as well as to chattels.

Gallagher *v.* N. McDowell, Ltd., [1961] N.I. 26.

Defendants were building contractors who built a house on behalf of building owners. Plaintiff was the wife of the first tenant of this house. Eighteen months after plaintiff and her husband took occupation the heel of plaintiff's shoe (*m*) went through one of the floors and she was thereby injured. It was established that defendants' employees had filled a hole in the floor boarding at that spot with a wooden plug and that it had been carelessly and improperly inserted. *Held:* Defendants were liable . . . "the doctrine of *Donoghue* v. *Stevenson* is capable *of applying to defects in house property* other than those defects in respect of which landowners, entitled to enjoy the immunities (*n*) I have already described, are sued as such" (*o*).

Moreover, and most important, Lord ATKIN'S reservation that liability ceases where there is a *possibility of intermediate examination* (remembering of course that the famous bottle was itself opaque) has been modified. Provided that the defect is not obvious a mere *possibility* (*p*) of intermediate examination will not exonerate the defendant. Only the *likelihood* of it will do so; and that in the sense that the circumstances must be such that (if he is to be exonerated) the defendant has reasonable grounds for anticipating that examination will take place either by the plaintiff himself (*q*) or by some intermediate party (*r*). Further, even this likelihood will not excuse the defendant if the kind of examination to be expected is one which would not ordinarily reveal the defect. Thus in *Gallagher's Case* the building owners did in fact employ a clerk of works to inspect the house before they took it over from the defendants (the building contractors); but it was held that this fact did not exonerate the latter because the erring plug—intended indeed to conceal the hole

(*m*) The heel was high but not "*stiletto*": had it been one of these precarious articles perhaps justice might have decreed that she should have been debarred by "*volenti*".

(*n*) As to these immunities see above, pp. 168–170.

(*o*) [1961] N. I. at p. 41; *per* Lord MACDERMOTT, L.C.J. (Italics ours).

(*p*) *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382, is clearly bad law: see *Haseldine* v. *Daw & Son, Ltd.*, [1941] 3 All E. R. 156, 184; [1941] 2 K. B. 343, 377: *per* GODDARD, L.J.; *Griffiths* v. *Arch Engineering, Co., Ltd.* [968] 3 All E. 217. *Actual* examination by a competent person of course excludes liability; see *Taylor's Case* (Illustration 76).

(*q*) See *Hindustan S.S. Co., Ltd.* v. *Siemens Brothers & Co., Ltd.*, [1955] 1 Lloyds Rep. 167.

(*r*) *Kubach* v. *Hollands*, [1937] 3 All E. R. 907. And the defendant's position becomes stronger if a third party actually does make an inspection which *may* suffice to fix that party with sole liability: *Buckner* v. *Ashby and Horner, Ltd.*, [1941] 1 K. B. 321.

in the floor—was something which the defendants' workmen could hardly have anticipated would be discovered by such an inspection (*s*). Nor will likelihood of inspection exculpate where the circumstances are such that it ought to have been assumed by the defendant that if there were such an examination it would be cursory and unlikely to reveal the defect, as the following Illustration shows.

ILLUSTRATION 78

The probability of intermediate examination may excuse the defendant; but it will only do so if the examination reasonably to be anticipated is likely to be such that it will be of a kind which would be expected to reveal the defect.

Clay *v.* A. J. Crump & Sons, Ltd., [1963] 3 All E. R. 687.

Plaintiff was a workman employed by building contractors (first defendants) who was injured by the falling of a wall upon a hut on a building site where he was working. This wall had been left on the site by demolition contractors (second defendants) in a condition which would have appeared obviously dangerous to any competent person making an examination of it. An architect (fourth defendant) who was employed by building owners (third defendants) had carelessly permitted the wall to be left standing after the demolition of the site upon the advice (equally careless) of second defendants. First defendants, upon taking over the site from second defendants, had made, if any at all, at most a casual inspection of the wall. *Held:* First (*t*), second and fourth defendants proportionately liable. Second (demolition contractors) and fourth (architect) defendants could not have anticipated that first defendants would make more than a cursory inspection of the wall, since the latter would naturally expect the site to have been made

(*s*) A *dictum* of TUCKER, J. in *Herschtal* v. *Stewart and Arden, Ltd.*, [1939] 4 All E. R. 123, 136; [1940] 1 K. B. 155, 172, is much relied on in this respect "the defendants . . . were supplying a dangerous article for (the plaintiff's) user in circumstances in which they did not, and could not, have *reasonably anticipated* that there would be any *such intermediate examination as would be likely to reveal* a defect such as existed in the article". In that case defendants were held responsible for injury to the plaintiff from the wheel of a car which came off due to their careless fitting. See also *Andrews* v. *Hopkinson*, [1956] 3 All E. R. 422; [1957] 1 Q. B. 229 (dealer similarly liable for delivering *unrepaired* car in dangerous condition).

(*t*) The position of first defendants (building contractors) was a little curious because from the point-of-view of the other defendants the Court of Appeal held that their inspection could only have been expected to be cursory. It was, and in the event they were liable for doing what others would have expected of them. But the decision against *them* seems to turn on three factors: (i) there was some hint that they made no inspection at all; (ii) even though others might expect them to have been casual in reliance upon those others perhaps for their own part they had no right to impose such trust; (iii) this last was especially true since the plaintiff was their employee for whose safety they owed a peculiar duty of care.

safe before they took over. The probablility was therefore that no examination by first defendants would be likely to reveal the defect (*u*).

Finally, the defendant's liability is subject to the qualification that he must be possessed of "*the knowledge that the absence of reasonable care in the preparation or putting up* (*a*) *of the products will result*" in injury to the plaintiff. Where he cannot be expected to know this he will not be liable. Thus for instance in *Kubach* v. *Hollands* (*b*) a schoolgirl was injured when an explosion occurred in the chemistry laboratory. The cause of the explosion was that the defendants (manufacturers) had carelessly supplied the wrong chemical. In an action by the plaintiff (a retail chemist who, having sold the chemical to the school knowing of the use to which it was to be put, had previously been held liable to the girl) claiming indemnity from the defendants; it was held that since the chemical might have been resold by the plaintiff "for a variety of purposes or in innocuous compounds or mixtures" and the "use of it for school experiments was only one of the many possible uses" (*c*) (and one of which the defendants had no notice), the claim failed.

In this branch of negligence, the ordinary rules as to burden of proof (*d*) apply; and unless the established facts give rise to a reasonable inference that the damage was caused by the defendant's lack of care, the defendant *cannot* be liable (*e*).

Finally, if the danger is known (*f*) to the plaintiff, or if the circumstances are such that the defendant ought reasonably to be

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(*u*) *Clay's Case* was followed in *McArdle* v. *Andmac Roofing Co.*, [1967] 1 All E. R. 583, and in *A.M.F. International, Ltd.* v. *Magnet Bowling, Ltd.*, [1968] 2 All E. R. 789. As far as the architect's liability was concerned, contrast *Clayton* v. *Woodman & Son (Builders), Ltd.*, [1962] 2 All E. R. 33; [1962] 2 Q. B. 533; there, under rather similar circumstances, the Court of Appeal held an architect not liable because in giving certain instructions to a workman he was entitled to assume that the latter's employers would see that these instructions were safely carried out—which in the event they failed to do.

(*a*) See *Watson* v. *Buckley, Osborne, Garrett and Co., Ltd., and Wyrovoys Products, Ltd.*, [1940] 1 All E. R. 174.

(*b*) [1937] 3 All E. R. 907.

(*c*) [1937] 3 All E. R. at p. 911; *per* Lord HEWART, C.J.

(*d*) There are *dicta* to the effect that "*res ipsa loquitur*" cannot apply as between consumer and manufacturer (*Donoghue* v. *Stevenson*, [1932] All E. R. Rep. 1, 31; [1932] A. C. 562, 622; *per* Lord MACMILLAN: *Mason* v. *Williams and Williams, Ltd., and Turton & Sons, Ltd.*, [1955] 1 All E. R. 808, 810; *per* FINNEMORE, J.), but this seems inconsistent with the actual decision in *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A. C. 85.

(*e*) *Evans* v. *Triplex Safety Glass Co., Ltd.*, [1936] 1 All E. R. 283 (sudden fragmentation of motor's windscreen. *Manufacturers* not liable; a year had elapsed since purchase and screen had been fitted by makers of car).

(*f*) *Farr* v. *Butters Brothers & Co.*, [1932] 2 K. B. 606.

entitled to assume (*g*) that it is, the defendant will not be liable. But this must be understood subject to the qualification that if the defendant creates a danger knowing that the plaintiff has no practical means of avoiding it, then the plaintiff's knowledge of it will not be a bar to his claim (*h*). An act which is dictated by circumstances is not such an act of free volition as will form a "*novus actus interveniens*".

2. LIABILITY FOR FIRE

Fire has always at the least been regarded as dangerous "*per se*", and the standard of care required of those who deal in it is at the least necessarily a high one.

> "there is no need to cite authority for the proposition that anyone using such a dangerous element as fire is under an obligation to take special care" (*i*).

Indeed, it may be that at common law liability for damage caused by fire was "strict" in the sense that it was imposed whether negligence could be established or not (*k*); and there is certainly authority for the proposition that, outside the limited scope of the provisions of the Firès Prevention (Metropolis) Act, 1774, s. 86 (*l*), this common law rule still prevails (*m*).

But most of the cases that now come before the courts do fall within this section, which is general in its application and is not confined to London (*n*). Its provisions have been interpreted in effect to mean that no one shall be liable for a fire which *begins on his*

(*g*) *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E. R. 1, 7; [1951] A. C. 737, 750; *per* Lord PORTER.

(*h*) *Denny* v. *Supplies and Transport Co., Ltd.*, [1950] 2 K. B. 374 (docker injured by badly stacked timber); *A. C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240; *Johnson* v. *Rea, Ltd.*, [1961] 3 All E. R. 816; [1962] 1 Q. B. 373.

(*i*) *Ellerman Lines, Ltd.* v. *H. & G. Grayson, Ltd.*, [1919] 2 K. B. 514, 534; *per* ATKIN, L.J.

(*k*) This is controversial. See Holdsworth, *History of English Law*, Vol. II, pp. 608–9: *contrast* Winfield, *Torts* (7th Edn.), pp. 467–469, and authorities there cited.

(*l*) 13 Halsbury's Statutes (2nd Edn.) 10.

(*m*) See, *e.g.* Clerk and Lindsell, *Law of Torts* (12th Edn.) p. 1334. But the proposition is open to grave doubt. (i) In both *Grayson's Case* (*supra*, note (*i*)) and the unsatisfactory decision in *Sochaki* v. *Sas*, [1947] 1 All E. R. 344, the establishment of negligence was treated as essential. (ii) Most of the decisions commonly cited in favour of the proposition are either cases in which the exceptional principle of *Rylands* v. *Fletcher* is rightly (*Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733) or wrongly (*Mansel* v. *Webb* (1918), 88 L. J. K. B. 323) applied, or else are highway cases (*Powell* v. *Fall* (1880), 5 Q. B. D. 597; *Gunter* v. *James* (1908), 24 T. L. R. 868) which as a general rule (as in *e.g. Tarry* v. *Ashton* (1876), 1 Q. B. D. 314) attract "strict" liability.

(*n*) *Filliter* v. *Phippard* (1847), 11 Q. B. 347.

premises unless it can be affirmatively established that he (or those for whom he is in law responsible) has been negligent in respect of it (*o*). But this statement needs amplification.

In the first place, even if a fire does *arise* by accident, the occupier upon whose premises this happens will not be immune from liability if he is negligent in permitting it to *spread*. Thus in *Musgrove* v. *Pandelis* (*p*) the defendant was held liable when the plaintiff's property was destroyed by a fire which started in the carburettor of the defendant's car while his servant was cleaning it. The fire started purely accidentally; but the servant was negligent in allowing it to *spread* because he stupidly failed to turn off the petrol tap, a simple operation which would effectually have stifled the initial outbreak. Further, at common law, fire liability attached (and possibly strictly, independent of negligence) to the *occupier* of premises as such. Hence in *Sturge* v. *Hackett* (*q*) an insurance company which had insured the defendant both in respect of contingent liability as occupier (for a larger sum) and in respect of personal liability (for a less sum) were held liable within the larger amount where the defendant started a fire on his premises which spread, causing considerable damage to other property. For in law the defendant was not only personally liable for starting the fire—with a paraffin rag attached to a stick in order to rid himself of a bird's nest (*r*)—but also liable *quâ* occupier for letting it spread once it had started.

In the second place, the immunity afforded by s. 86 of the Act does not extend to circumstances in which fire, or things which give rise to it, come within the restricted scope of the rule in *Rylands* v. *Fletcher* (*s*). Insofar (*t*) as the particular circumstances bring a case within the operation of this rule liability will be strict and independent of negligence. For example a man who brings and keeps on his land a highly explosive article, such as a drum of

(*o*) *Collingwood* v. *Home and Colonial Stores*, [1936] 3 All E. R. 200 (Illustration 79 (a)); *J. Doltis, Ltd.* v. *Isaac Braithwaite & Sons (Engineers), Ltd.*, [1957] 1 Lloyd's Rep. 522; *Mason* v. *Levy Autoparts of England, Ltd.*, [1967] 2 All E. R. 62; [1967] 2 Q. B. 530.

(*p*) [1919] 2 K. B. 43. See also *Goldman* v. *Hargrave* (Illustration 79 (b)).

(*q*) [1962] 3 All E. R. 166. See also *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K. B. 341, 361.

(*r*) Bird-lovers may think the defendant deserved what he got—or rather what the insurance company got.

(*s*) See *Musgrove's Case* (*supra*); *Mulholland and Tedd, Ltd.* v. *Baker*, [1939] 3 All E. R. 253. Although the Court of Appeal, in *Collingwood's Case* (*supra*, note (*o*)) cast doubt upon the validity of the decision in *Musgrove's Case* on this point, upon the facts, it implicitly upheld the *principle*.

(*t*) But all the elements requisite to liability under *Rylands* v. *Fletcher* must be present, *e.g.* "non-natural" user; see *Collingwood's Case*.

paraffin, will be liable, without proof of negligence if it explodes and causes a fire which damages neighbouring premises (*u*). Further, except inasmuch as the element of negligence may be relevant to the establishment of liability in nuisance, the statutory immunity does not extend to fires which result from nuisances (*v*).

It must however be noted that, despite the Act, liability for fire is in all circumstances "strict" in the sense that it attaches to those who employ "independent contractors" to deal in fire, or the means of causing it, as well as to those whose "servants" deal in it in the course of their employment (*a*).

Of course where a statute authorizes the use of fire (as in the case of steam engines on railways) statutory remedies apart (*b*), any liability that might otherwise have arisen at common law (*c*) is excluded (*d*), though *only in the absence of negligence* (*e*).

ILLUSTRATION 79

(a) *By the Fires Prevention (Metropolis) Act*, 1774, *s.* 86, *those upon whose premises fires "accidentally begin" will not* (*f*) *be liable for resulting damage.*

Collingwood *v.* Home and Colonial Stores, [1936] 3 All E. R. 200.

Due to some cause which was never satisfactorily ascertained, though probably connected with the state of the electric wiring in respondents' premises, a fire started in these premises and spread to appellant's, causing damage. *Held:* Since appellant was unable to establish that respondents had been negligent in respect of the state of the wiring, respondents were not liable, since they were protected by the provisions of the Statute. (*Further*, respondents were not liable under the rule in *Rylands* v. *Fletcher* since the domestic use of electrical installations is an ordinary and natural user of land.)

(*u*) *Mulholland and Tedd, Ltd.* v. *Baker*, [1939] 3 All E. R. 253; *Mason* v. *Levy Autoparts of England, Ltd.*, [1967] 2 All E. R. 62; [1967] 2 Q. B. 530.

(*v*) *Spicer* v. *Smee*, [1946] 1 All E. R. 489 (obviously defective electric wiring: contrast *Collingwood's Case*, where the defect if any was not reasonably ascertainable).

(*a*) *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48: *Balfour* v. *Barty-King*, [1957] 1 All E. R. 156; [1957] 1 Q. B. 496.

(*b*) *E.g.* by the Railway Fires Acts, 1905 and 1923, statutory authority is no defence to a claim not exceeding £200 in respect of damage to agricultural land or crops caused by sparks emitted from an engine.

(*c*) *I.e.* outside the provisions of the Fires Prevention (Metropolis) Act, 1774 (13 Halsbury's Statutes (2nd Edn.) 9).

(*d*) *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; *Hammersmith and City Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171.

(*e*) *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14; *Parker* v. *London and North Eastern Rail. Co.*, [1946] W. N. 63.

(*f*) But see qualifications referred to in the text above.

(b) *But, where fire having accidently begun, the occupier—having power to prevent the spread of it—who fails to check it will be liable.*

Goldman *v.* Hargrave, [1966] 2 All E. R. 989; [1967] A. C. 645.

Appellant owned land adjacent to respondent's land. A red gum tree on appellant's land was struck by lightning and caught fire; with reasonable promptitude appellant informed the fire officer (the appeal was from Australia) and the tree was felled. However, it continued to burn. Appellant could have extinguished it easily; but he left it alone. Later the wind got up, the fire revived and spread and damaged respondent's land. *Held:* Appellant liable. Though the original cause of the fire was accidental the subsequent spreading was due to appellant's failure to keep it in (*Musgrove* v. *Pandelis*, [1918–1919] All E. R. Rep. 589; [1919] 2 K. B. 43, approved) and this was something he could easily have done (*g*).

3. OCCUPIERS OF PREMISES AND STRUCTURES

An *occupier* of premises or of fixed or moveable structures such as vessels, vehicles or aircraft (*h*) necessarily owes an obligation in respect of the safety of people who enter or come upon such things and in respect of the property of such people. For he is the person in control of them, and has, or ought to have, greater knowledge than others of their condition; it is for him to make them reasonably safe, and being in control of them, it is also for him to see that others are not endangered by anything that is done upon them.

Until fairly recently these obligations of occupiers were governed by common law rules which were extremely complicated. But the subject has now been clarified by the Occupiers' Liability Act, 1957.

The law may most conveniently be treated under the following heads:—

(i) The occupier; (ii) The persons to whom the occupier owes a special obligation; (iii) The nature of this obligation; (iv) Persons who enter premises by way of contract; (v) Trespassers; (vi) Children.

(i) The Occupier

"Occupier", "possessor", "owner"—these are words in common use and as part of the stuff of everyday life, we all know what they mean when we hear them. But in law one has to be exact, and in order to be exact we can only define a word in relation to a particular context. Thus every law student knows, or ought to know that "possession" in law expands or contracts according to context.

(*g*) As to the element of ease of prevention see above, p. 196.

(*h*) See Occupiers' Liability Act, 1957, s. 1 (3) (a). The Act (37 Halsbury's Statutes (2nd Edn.) 832) binds the Crown: see s. 6.

This is also the case with "occupation" and "occupier" (*i*). For rating purposes (*k*) an "occupier" may be one person, for present purposes he may be another, since here we seek to look at him as someone potentially liable for injury to others who come upon "his" premises, and the clue to deciding who "he" is lies in the fact (already referred to) that "with occupation goes control". And the importance of control is that it affords the opportunity to know that the plaintiff is coming on to the premises, and to become aware of dangers whether concealed or not and to remedy them, or at least to warn those that are invited on to the premises (*l*)". So the question is "Who has control?" and whoever has it is at least likely to be the person upon whose shoulders the Act casts its special obligations. For he is the person who is entitled to say "Come in" (*m*). Thus for example in *Wheat* v. *E. Lacon & Co., Ltd.* (*n*) the House of Lords held that a firm of brewers who, without a demise, *permitted* their manager to enjoy the amenities of the private quarters of an inn, and *permitted* him to take in summer lodgers, might (*o*) be liable to such people for dangers in the structure of the premises; whereas, in normal circumstances at least they could not be liable for lodgers invited by a tenant as opposed to a licensee. For, usually at least, the landlord parts with control of the premises, whereas the licensor does not (*p*). Yet because B has control it will not necessarily follow that A has not; hence there may be more than one occupier (*q*): more than one person entitled to say "Come in"; as where a club obtains the services of a restaurateur to maintain a restaurant on its own premises, both the club and the restaurateur have the right of "say" so both may be responsible for the state of

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(*i*) The Act is unhelpful: in s. 1 (2) it forgoes all attempt at definition and throws the matter back on the pre-existing case law.

(*k*) Or for the purposes of franchise: see *Wheat's Case* (below, n. (*n*) and pp. 596 and 583 respectively, *per* Lord MORRISS; pp. 601 and 589, *per* Lord PEARSON.

(*l*) *Duncan* v. *Cammell Laird & Co., Ltd.*, [1943] 2 All E. R. 621, 627; *per* WROTTESLEY, J.

(*m*) See *Wheat's Case* at pp. 594 and 579: *per* Lord DENNING, though it must be noted that his Lordship is careful to say that liability is not *limited* to the person so entitled.

(*n*) [1966] 1 All E. R. 582; [1966] A. C. 522: contrast *Kearney* v. *Eric Waller, Ltd.*, [1965] 3 All E. R. 352; [1967] 1 Q. B. 29.

(*o*) In fact there was no liability since the respondents' duty was held not to have been broken.

(*p*) See Lord DENNING's speech in *Wheat's Case*.

(*q*) Illustrations given by Lord WRIGHT in *Glasgow Corpn.* v. *Muir*, [1943] A. C. 448 include a theatre proprietor permitting an independent contractor to give performances and a person who permits others to run side shows at a fair.

the restaurant (*r*). Further, control does not necessarily imply ultimate and exclusive control; so that contractors and others who erect works on premises which are not their own may undoubtedly be liable for the creation of dangers arising upon the land or structures within the area of their operations (*s*).

(ii) The Persons to whom the Occupier owes a Special Obligation

The Occupiers' Liability Act, 1957, provides that occupiers shall owe a special duty (*t*) of care to persons and towards the property (*u*) of persons who lawfully come upon their premises. The Act terms such people "visitors", and the category of visitors includes people who come upon the premises or structure for some material interest (*a*) of the occupier himself (*e.g.* visiting plumbers or gas fitters), people, such as guests for dinner, who come for their own advantage (*b*), and those who come upon the premises "in the exercise of a right conferred by law" (*c*). This class will include, for example, police entering premises under the authority of a search warrant and members of the public who frequent public parks (*d*) or conveniences and such like things.

Further, the duty is also owed to people who come upon the

(*r*) *Fisher* v. *C.H.T., Ltd.*, [1966] 1 All E. R. 88; [1966] 2 Q. B. 475.

(*s*) See, *e.g. Hartwell* v. *Grayson Rollo and Glover Docks*, [1947] K. B. 901; *A.M.F. International, Ltd.* v. *Magnet Bowling, Ltd.*, [1968] 2 All E. R. 789.

(*t*) "Standard" would in fact have been a better word than "duty".

(*u*) Occupiers' Liability Act, 1957, s. 1 (3) (b). Before the Act there was room for doubt whether a special obligation extended to property as well as to the person. Damages in respect of injury to property may include reparation for consequential financial loss: *A.M.F. International, Ltd.* v. *Magnet Bowling, Ltd.*, [1968] 2 All E. R. 789.

(*a*) At common law such people are "invitees"; and the obligation owed to them before the passing of the Act was defined in *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274: for the nature of this obligation, see Salmond, *Torts* (14th Edn.) pp. 383–391. The above definition of an "invitee" is adopted from (1954) Cmd. at p. 7.

(*b*) At common law such people are "licensees"; for the nature of the obligation owed to them before the passing of the Act, see Salmond (14th Edn.), pp. 391–396. Since the Act (s. 1 (2)) now includes both invitees and licensees in the category of "lawful visitors" the need to distinguish between the two categories has now disappeared: but the distinction between a lawful visitor of either class and a trespasser remains important.

(*c*) Section 2 (6).

(*d*) People who enter premises in exercise of rights conferred by an access agreement or under the National Parks and Access to the Countryside Act, 1949 (28 Halsbury's Statutes (2nd Edn.) 566), are not, however, "visitors" within the purview of the Occupiers' Liability Act, 1957 (37 Halsbury's Statutes (2nd Edn.) 832); and the "common duty of care" is not, therefore, owed to them. See Occupiers' Liability Act, 1957, s. 1 (4).

occupier's premises as the result of a contract made between him and some third party (*e*); as for example where a landlord lets a flat but retains a common staircase in his own control, covenanting to permit not only the tenant but also the tenant's visitors to use it.

(iii) The Nature of the Obligation

Except insofar as the occupier is free to, and does modify or exclude his obligations by agreement or otherwise (*f*), the standard of care which he owes to such people in respect of "*dangers due to the state of the premises or structures or to things done or omitted to be done on them*" (*g*) is what the Act terms the "*common duty of care*" (*h*), and this is

> "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises *for the purposes for which he is permitted by the occupier to be there*" (*i*).

The last words, which we have italicized, are important. For if a police officer, for instance, who enters premises under the lawful authority of a search warrant then proceeds, once there, to do things unconnected with the authority conferred upon him by the warrant, he will then cease to be a "visitor" and become a trespasser.

Subject to this limitation, the exact nature of the reasonable care which the occupier must take depends, in the words of the section, upon "all the circumstances of the case". Thus special care must be taken for the safety of *child* (*k*) visitors, who cannot be expected to take as much care of themselves as adults do (*l*). But by way of contrast, adults who enter the premises in the exercise of a *particular calling* can be relied upon by the occupier themselves to appreciate and guard against any special risk ordinarily incident to their calling (*m*). So if a visiting window

(*e*) Section 3. This section also provides that the duty towards such visitors cannot be restricted or excluded by the contract, though it may be *enlarged* by the terms of it (s. 3 (1), (5)).

(*f*) Section 2 (1).

(*g*) Section 1 (1).

(*h*) Section 2 (1).

(*i*) Section 2 (2) (Italics ours). See *Lowther* v. *H. Hogarth & Sons, Ltd.*, [1959] 1 Lloyd's Rep. 171; *Savory* v. *Holland, Hannen and Cubitts (Southern, Ltd.*, [1964] 3 All E. R. 18 (occupier not liable) and contrast *Reffell* v. *Surrey County Council*, [1964] 1 All E. R. 743 and *Gaffney* v. *Aviation & Council*, [1964] 1 All E. R. 743 and *Gaffney* v. *Aviation & Shipping Co., Ltd.*, [1966] 1 Lloyd's Rep. 249.

(*k*) See below, sub-section (v) of this section of this Chapter.

(*l*) Section 2 (3) (a).

(*m*) Section 2 (3) (b). See *Davies* v. *Port of London Authority*, [1964] 1 Lloyd's Rep. 342.

cleaner sustains injury through the insecurity of some part of the outside of the premises which he elects to use as a foothold, this is a matter within his expert knowledge; and in the absence of special circumstances the occupier will not be held responsible for the injury. On the other hand if the same man were injured as the result of an accident caused by some defect in an inside staircase, while going upstairs to get to a window, this principle would not apply; for then his expert knowledge would not be involved (*n*).

Further, since the "common duty of care" is not "strict" or "absolute", but depends upon some element of negligence or fault on the part of the occupier, the latter is not answerable *without more* for injury incurred as the result of faulty execution of any work done upon the premises or structure by an *independent contractor* employed by him; provided that he has taken all steps that may be reasonable and necessary to satisfy himself that the contractor is competent and the work properly done (*o*). Thus though a householder will not, under the relevant subsection, be held responsible for faulty work done by a competent firm of electrical contractors (*p*)—for he cannot be expected to check their work—yet a building owner is expected to ensure the general safety of a building site even though he employs independent contractors for the work (*q*).

Of course it sometimes happens that occupiers know of the existence of dangers—such as a low beam, or a broken board—and warn their visitors of them. Where such warning has been given the Act provides that if injury occurs the fact that the warning has been given may absolve the occupier; but this will only be so if it was, *in all the circumstances, a sufficiently effective* one to enable the visitor, taking reasonable care of himself, to be reasonably safe (*r*).

Finally, the Act provides that the "common duty of care" does not impose upon an occupier any obligation to a visitor in respect of "risks willingly accepted as his by the visitor" (*s*); and goes on to provide in effect that the ordinary general principles which

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(*n*) See the Third Report of the Law Reform Committee (1954) Cmnd. 9305, p. 33; and *Bates* v. *Parker*, [1953] 1 All E. R. 768; [1953] 2 Q. B. 231.

(*o*) Sections 2 (4) (b), 3 (2) (37 Halsbury's Statutes (2nd Edn.) 834, 836). Contrast the pre-existing rule at common law established by *Thomson* v. *Cremin*, [1953] 2 All E. R. 1185.

(*p*) *Green* v. *Fibreglass, Ltd.*, [1958] 2 All E. R. 521; [1958] 2 Q. B. 245.

(*q*) *A.M.F. International, Ltd.* v. *Magnet Bowling, Ltd.* [1968] 2 All E. R. 789.

(*r*) Section 2 (4) (a). Contrast pre-existing law: *London Graving Dock* v. *Horton*, [1951] 2 All E. R. 1; [1951] A. C. 737.

(*s*) Section 2 (5).

govern the application of the maxim "*volenti non fit injuria*" are to apply as between visitor and occupier (*t*).

ILLUSTRATION 80

Where the risk is a special one ordinarily incident to the visitor's calling and where adequate warning of the risk is given these two factors may jointly or separately be relevant in determining whether there has been a breach of the occupier's duty.

Roles *v.* Nathan, [1963] 2 All E. R. 908.

Defendant was occupier of a large building centrally heated by a coke boiler. Plaintiffs were widows of two chimney sweeps who were asphyxiated by carbon monoxide fumes emitted from the ventilation system of the boiler while they were engaged in sealing a flue. The deceased had been warned of the danger by an expert, and told not to work while the boiler was alight; but they had disregarded the warnings, asserting that they knew best. *Held:* (By a majority (*u*)) that (i) the provisions of s. 2 (3) (b) (*a*) were satisfied (*b*) by the fact that the sweeps ought to have appreciated the risk—it being one which was ordinarily incident to their calling (*c*); (ii) the provisions of s. 2 (4) (a) (*d*) were satisfied since adequate warning had been given (*e*). Accordingly defendant, not being in breach of duty, was not liable.

(iv) The Occupier's Obligation to Persons Entering the Premises under Contract

Some of the visitors mentioned in the last section were people who come upon premises as the result of a contract—gas fitters or electricians for example. But in cases like these the main object of the contract is the job to be done, and not the use of the premises. The kind of people now to be considered are people who use the premises under a contract which envisages the use of the premises themselves as its principal aim—patrons of an hotel or of a theatre, racegoers using a stand, and suchlike.

The Act treats of the rights of these people in a separate section (*f*); and this is fitting because here the actual terms of the contract are of paramount importance, for they must govern

(*t*) The exact application of the "*volenti*" principle here had previously been rendered uncertain by the decision in *Horton's Case* (*supra*, note (*r*)).
(*u*) Pearson, L.J. dissenting on the evidence.
(*a*) Above, n. (*m*).
(*b*) So held by Lord Denning, M.R., Harman, L.J. *dubitante*.
(*c*) Compare *Christmas* v. *General Cleaning Contractors, Ltd.*, [1952] 1 All E. R. 39; [1952] 1 K. B. 141 *affirmed* sub nom. *General Cleaning Contractors, Ltd.* v. *Christmas*, [1952] 2 All E. R. 1110; [1953] A. C. 180.
(*d*) Above, n. (*r*).
(*e*) So held by Lord Denning, M.R. and Harman, L.J.
(*f*) Section 5 (1) (37 Halsbury's Statutes (2nd Edn.) 838).

the principal rights and duties of the parties in respect of the use of the premises; and such liability as may arise is *contractual* rather than tortious. Nevertheless, it is provided (*g*) that where injury is sustained by such people in circumstances unprovided for by the contract, and a term governing the occupier's liability has therefore to be implied, this liability shall be governed by the aforementioned "common duty of care" (*h*).

Certain important contracts are, however, excepted from this provision; and consequently their incidents continue to be governed by the common law. These include bailments (*i*) and "*any contract for the hire of, or the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport*" (*k*). The owner's or occupier's liability in respect of injuries arising to passengers or others in pursuance of contracts of this latter class is in consequence, where the contract itself is silent, somewhat different from and in fact more onerous than the occupier's duty in respect of other "contractees"; and it is governed by an implied duty to ensure that the thing concerned shall be "as fit for the purpose as reasonable care and skill on the part of any one" (*l*) can make it. This means that, amongst other things, though it is not a duty of insurance against injury, it is nevertheless a duty to see that all reasonable care and skill has been taken *on the part of anyone* to make the thing safe; and the owner or occupier may therefore be held responsible in such cases even for the negligence of an independent contractor if he has failed to exercise due care (*m*).

ILLUSTRATION 81

Although it is not a duty of insurance, the common law obligation of the hirer of transport or carrier for reward is more stringent than the "common duty of care".

Hyman *v.* Nye & Sons (1881), 6 Q. B. D. 685.

Plaintiff hired a carriage and horses from defendant. Due to breaking of a bolt in the carriage, it was upset and plaintiff injured. The

(*g*) *Ibid.*

(*h*) Including its incidents; such as the limited rule of liability in respect of independent contractors.

(*i*) As to which, see specialized works, such as Paton, *Bailment in the Common Law.*

(*k*) Section 5 (3).

(*l*) *Maclenan* v. *Segar*, [1917] 2 K. B. 325, 333; *per* McCardie, J. As will be seen from that case, the same principle then applied to other kinds of contractees as well.

(*m*) Compare the strict duty of a carrier by sea under art. III, r. 1 of the Hague Rules to use due diligence to make the ship seaworthy. See *Riverstone Meat Co., Pty.* v. *Lancashire Shipping Co., Ltd.*, [1961] 1 All E. R. 495; [1961] A. C. 807.

jury found for defendant on the judge's direction that if the defect in the bolt could not have been discovered by defendant by the use of ordinary care he ought not to be held liable. On appeal. *Held:* The direction was wrong; defendant's duty was "to supply a carriage as fit for the purpose for which it is hired as care and skill can render it . . . and if it breaks down, it becomes incumbent on the person who has let it out and to show that the breakdown was in the proper sense of the word an accident (*n*) not preventible by any care or skill" (*o*).

(v) Trespassers

The Act does not apply to trespassers, but only concerns itself with *lawful* visitors. The occupier's obligations to trespassers, such as they are, therefore continue to be governed by the common law.

A trespasser has been defined as

> "One who goes upon land without invitation of any sort and whose presence is either unknown to the proprietor, or, if known, is practically objected to" (*p*).

In most cases it is easy to distinguish between a person who thus comes upon premises without the consent of the occupier, express or implied, and a person who has the occupier's consent. But difficulties sometimes arise (*q*) where, for example, a person who has permission to enter one part of the premises strays into another part (*r*). And a person who enters premises as a trespasser may sometimes become a lawful visitor by receiving the occupier's consent to his presence (*s*). Indeed, although the issue must always turn upon all the facts involved, long-continued trespassing which the occupier has done nothing to prevent may (*t*) give rise to a legitimate inference that the occupier has acquiesced in the presence of the trespasser, who thus becomes a lawful visitor (*u*).

(*n*) See *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379 (tyre-burst on railway coach a complete accident).

(*o*) (1881), 6 Q. B. D. pp. 687–8; *per* Lindley, J. See also *Reed* v. *Dean*, [1949] 1 K. B. 188.

(*p*) *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck*, [1929] A. C. 358, 371; *per* Lord Dunedin.

(*q*) See, *e.g. Great Central Rail. Co.* v. *Bates*, [1921] 3 K. B. 578; *Nabarro* v. *Frederick Cope & Co., Ltd.*, [1938] 4 All E. R. 565.

(*r*) *Pearson* v. *Colman Bros.*, [1948] 2 All E. R. 274; [1948] 2 K. B. 359 (child at circus straying from authorized enclosure).

(*s*) A canvasser, for example, is a trespasser; but becomes a lawful visitor when he receives the occupier's consent to enter: *Dunster* v. *Abbott*, [1953] 2 All E. R. 1572, 1574; *per* Denning, L.J.

(*t*) It lies upon the plaintiff, however, to establish this inference and the onus is a heavy one: (1954). Cmd. 9305; *Edwards* v. *Railway Executive*, [1952] 2 All E. R. 430; [1952] A. C. 737.

(*u*) See Illustration 82.

The obligations which the occupier owes to a trespasser are naturally less stringent than those he owes to a lawful visitor. But he has some obligations.

First, the occupier must not purposely set dangerous traps for trespassers. Thus, apart from the fact that their employment has long since been made illegal (*a*), a landowner would be liable at the suit of a trespasser if he were to injure him by the use of a spring gun or a man-trap (*b*). On the other hand the occupier may use reasonable means, such as the use of spikes or broken glass attached to the top of fences or walls, to deter unlawful entrants and a trespasser injured by such things will have no cause of complaint.

In the second place, where the presence of a trespasser is *known or reasonably to be expected* the occupier is bound to adopt "ordinary civilized behaviour" (*c*) towards him. The law on this matter probably is that to render the occupier liable there must be found

> "injury due to some wilful act involving *more than the absence of reasonable care*. There must be some act done with the deliberate intention of doing harm, or *at least some act done with reckless disregard for the presence of the trespasser* (*d*)."

This statement probably represents the present law since it has twice been approved by the Judicial Committee in recent years (*e*). Though the subject is bedevilled by the decision of the Court of Appeal in *Videan* v. *British Transport Commission* (*f*) where, following *Donoghue* v. *Stevenson* (*g*), the view was taken that where the occupier knows of or foresees the presence of a trespasser he must

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(*a*) Offences Against the Person Act, 1861, s. 31 (5 Halsbury's Statutes (2nd Edn.) 798). This section should be consulted: its scope is not universal: see *R.* v. *Munks*, [1963] 3 All E. R. 757; [1964] 1 Q. B. 304.

(*b*) *Bird* v. *Holbrook* (1828), 4 Bing. 628; *Illot* v. *Wilkes* (1820), 3 B. & Ald. 304.

(*c*) (1954) Cmnd. 9305, p. 15.

(*d*) *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck*, [1929] All E. R. Rep. 1, 4; [1929] A. C. 358, 365: *per* Lord HAILSHAM, L.C. (Italics ours.) To similar effect *Hillen and Pettigrew* v. *I.C.I. (Alkali), Ltd.*, [1935] All E. R. Rep. 555, 558; [1936] A. C. 65, 70: *per* Lord ATKIN, as explained in *Quinlan's Case* at pp. 908 and 1078.

(*e*) *Commissioner for Railways* v. *Quinlan*, [1964] 1 All E. R. 897; [1964] A. C. 1054; *Commissioner for Railways* v. *McDermott*, [1966] 2 All E. R. 162; [1967] A. C. 169.

(*f*) [1963] 2 All E. R. 860; [1963] 2 Q. B. 650.

(*g*) [1932] All E. R. Rep. 1; [1932] A. C. 562. According to *Quinlan's Case* (above, n. (*e*)) *Donoghue* v. *Stevenson* does *not* govern this aspect of the law and this is underlined in *McDermott's Case*. Though in the latter it was held that the conducting of a *dangerous activity*, such as running a railway, does give rise to a special duty of care owed to lawful visitors this duty is also independent of the *Donoghue* rule. This sort of distinction is hardly satisfactory.

take reasonable care to avoid injuring him (*h*) or, at any rate act with "common humanity" towards him (*i*).

In view of the existing state of judicial practice respecting the binding authority of precedents (*k*) it is difficult to assert which of these two conflicting views represents the law. But it is thought that the former view, hallowed as it is by the House of Lords (*l*), is likely to prove to be the correct one; especially when it is borne in mind that

> "The formula (*m*) may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and in the case of children (*n*), it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity (*o*)".

By either path a similar result may be reached on the facts of a particular case: for instance by either test a man in the position of the defendant in *Mourton* v. *Poulter* (*p*) who cut down a tree knowing of the presence of trespassers and without warning, would be liable, while a man in the position of the defendant in *Videan's Case*, where the defendant's servant ran down a child trespassing upon a railway line whose presence he had no reason to suspect would not be liable.

But there is also much to be said against the view expressed by the Court of Appeal in *Videan's Case*. For one thing, if it had been intended to extend the "common duty of care" to trespassers the

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(*h*) See *Videan's Case* (above, n. (*f*)) at pp. 865–866 and 665–666 respectively *per* Lord DENNING, M.R., who also distinguished between the conduct of *activities* by the occupier and the state of the land in its *static condition*. This over-subtle distinction has not, however, received acceptance: see *Videan's Case* at pp. 873–874 and 678; *per* PEARSON, L.J., and *Quinlan's* and *McDermott's Cases*.

(*i*) *Videan's Case* at pp. 875; and 681: *per* PEARSON, L.J.

(*k*) The Court of Appeal appears at times to regard itself as bound by Judicial Committee decisions and at other times as free to disregard them.

(*l*) *Addie's Case* (above, n. (*d*); *Edwards* v. *Railway Executive*, [1952] 2 All E. R. 430; [1952] A. C. 737. The rule was alternatively formulated by Lord SUMNER in *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K. B. 398, 410: "The owner of property is under a duty not to injure the trespasser wilfully: 'not to do a wilful act in reckless disregard of ordinary humanity towards him': but otherwise a man trespasses at his own risk." And it has been constantly accepted by the highest judicial authorities: see references in *Quinlan's Case*. Lord DENNING, M.R., however, in *Videan's Case* (at pp. 666 and 869), remarked that he did not understand the meaning of treating trespassers "with common humanity".

(*m*) *I.e.* the formula in *Addie's Case*.

(*n*) As to this qualification see the following Section.

(*o*) *Commissioner for Railways* v. *Quinlan*, [1964], 1 All E. R. 897, 912; [1964] A. C. 1054, 1084.

(*p*) [1930] All E. R. Rep. 6; [1930] 2 K. B. 183. In this case the defendant was not in fact the occupier of the land; but see *Excelsior Wire Rope Co., Ltd.* v.

Legislature would, which it did not, have so extended it in the Occupiers' Liability Act, 1957. Further, unless, as indeed might ultimately be desirable, all negligence cases are to be decided as matters of fact dependent upon all the equities on either side, the "foresight" test of *Donoghue* v. *Stevenson* expressed as it is as a principle of law is, as has already been noted (*q*), a cunning instrument by which policy decisions are often concealed beneath a cloak of "reasonable expectation". Even Lord DENNING, M.R., in *Videan's Case* admitted that the occupier's duty, under the foresight test, to a "poacher or a burglar" (*r*) might be different from his duty to trespassers of other kinds. Why? Because—though Lord DENNING did not say so—the position of poachers and burglars gives rise to policy (*s*) considerations quite unconnected with the rule of foresight. To profess to decide by means of "foresight" and reasonable care while in fact deciding upon extraneous considerations of policy seems to be dangerous as concealing within a portmanteau formula the true ground of decision, and it might even be stigmatized as intellectually dishonest. The fact of the matter is that there is something to be said for the rule accepted in *Quinlan's Case* that "the law does not admit . . . that a trespasser, while incapable of being described otherwise than as a trespasser (*t*) should be elevated to the status of an ordinary member of the public to whom, if rightfully present, the occupier owes duties of foresight and reasonable care (*u*)".

ILLUSTRATION 82

Long acquiescence in acts of trespass may amount to an implied consent to the presence of the trespasser.

Lowery *v.* Walker, [1911] A. C. 10.

The respondent, a farmer, placed a savage horse in a field which he knew members of the public had crossed for over thirty years on their

Callan, [1930] All E. R. Rep. 1; [1930] A. C. 404: *Hillen* v. *I.C.I. Alkali, Ltd.*, [1934] 1 K. B. 455, 472, affirmed, [1936] A. C. 65: *Videan* v. *British Transport Commission*, [1963] 2 All E. R. 860, 865; [1963] 2 Q. B. 650, 665.

(*q*) Above, pp. 37, 172.

(*r*) [1963] 2 All E. R. at p. 866 and [1963] 2 Q. B. at p. 666.

(*s*) Perhaps, for example, "*volenti non fit injuria*" (which, as has been maintained, turns much on policy considerations) or "*ex turpi causa non oritur actio*" might be invoked.

(*t*) Of course as the cases concerning children (see next Section) show that invitation or allurement may make an apparent trespasser into a lawful visitor: and see *Lowery* v. *Walker* (Illustration 82).

(*u*) *Quinlan's Case*, [1964] 1 All E. R. 897, 912; [1964] A. C. 1054, 1084. (This was of course if the "foresight" test were to be adopted. But the Judicial Committee in *Quinlan's Case* at p. 905 saw no reason to distinguish under their test between a burglar or a lost traveller if either were *known* to be present.)

way to the station. Since some of these people were customers for milk, he had taken no effective steps to keep them out. While crossing the field appellant was attacked by the horse. *Held:* In these circumstances appellant was not a trespasser, and his claim against respondent succeeded (*a*).

(vi) CHILDREN

The fact that a visitor happens to be a child is one of the factors that the Act exemplifies as relevant for determining the standard of the "common duty of care". It provides that

> "An occupier must be prepared for children to be less careful than adults" (*b*).

This provision can only be understood in the light of the pre-existing law. It was well established by numerous decisions that occupiers must be especially careful in their dealings with visiting *children*. In particular, it has long been recognized that some things, such as poisonous berries (*c*), trains (*d*), turntables (*e*), railways generally, and vehicles (*f*), are "allurements" to children in the sense that they both attract them and at the same time possess inherent dangers which they will not usually appreciate (*g*). Thus a chute in a public park with a high platform is not an "allurement" for it normally, at least, has no concealed dangers not obvious to a child (*h*). The tale of the Pied Piper, like all good tales, is not without its counterparts in reality. The occupier must therefore be on his guard against the danger of such things to youthful visitors; and if he fails in this respect he will be liable to a child in circumstances in which he would not usually be liable to an adult who chose to meddle with things upon his property. This may be illustrated by *Glasgow Corporation* v. *Taylor* (*i*). A boy aged seven picked and ate some attractive-looking berries growing on a shrub in a public park controlled by the appellants; these berries being poisonous, the boy died. Although the appellants were aware of the poisonous

(*a*) Contrast *Robert Addie & Sons* (Collieries) *Ltd.* v. *Dumbreck*, [1929] A. C. 358, where *Lowery's Case* is explained and distinguished.
(*b*) Occupiers' Liability Act, 1957, s. 2 (3) (a) (37 Halsbury's Statutes (2nd Edn.) 834). And see *Reffell* v. *Surrey County Council*, [1964] 1 All E. R. 743.
(*c*) *Glasgow Corporation* v. *Taylor*, [1922] 1 A. C. 44.
(*d*) *Gough* v. *National Coal Board*, [1953] 2 All E. R. 1283; [1954] 1 Q. B. 191.
(*e*) *Cooke* v. *Midland Great Western Rail. Co. of Ireland*, [1909] A. C. 229.
(*f*) *Creed* v. *John McGeogh & Sons, Ltd.*, [1955] 3 All E. R. 123.
(*g*) Some things, without necessarily being "allurements", may also be hidden dangers or "traps" to children though not to adults: *Williams* v. *Cardiff Corporation*, [1950] 1 All E. R. 250; [1950] 1 K. B. 514 (bank with broken glass).
(*h*) *Dyer* v. *Ilfracombe Urban District Council*, [1956] 1 All E. R. 581.
(*i*) [1922] 1 A. C. 44.

nature of the berries (*k*) and also knew that children frequented the part of the park where the shrub was, they had done nothing to fence it off or give effective warning intelligible to children of its inherent dangers. The appellants were accordingly held liable in an action by the father of the deceased child.

What does or does not constitute an allurement or a trap to children is essentially a question of fact (*l*), and so is the question whether the occupier has taken reasonable steps to prevent injury to the child in all the circumstances. Indeed, a balance has to be struck between the duties of the occupier towards the child and the duties of the parent or guardian; the former may assume that the latter will not permit the child to wander unaccompanied into danger (*m*): as Lord SHAW OF DUNFERMLINE said in *Taylor's Case* (*n*)

> "... the (occupier) is entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship. The parent or guardian of the child must act reasonably; the (occupier) must act reasonably. This duty rests upon both and each; but each is entitled to assume it of the other."

Child visitors also often give rise to a further difficulty. It has been seen that the occupier's acquiescence in the presence of trespassers may, in proper cases, promote the trespasser to the status of a visitor, and consequently the burden of the occupier's obligation to such entrants is increased. This applies with particular force in the case of child-entrants. Although it is well established that if, in particular circumstances, a child is a *trespasser* (*o*) his rights are no different from those of a trespassing adult (*p*); yet the law recognizes that in all innocence children do in fact often

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(*k*) Before the Act it was probably essential to liability that the inherent dangers of the attractive object should be known to the occupier, or at least be dangers of which he ought to know (see *Sutton* v. *Bootle Corporation*, [1947] 1 All E. R. 92, 97; [1947] 1 K. B. 359, 369). This is presumably still the case.

(*l*) Although it is one for the *court* to determine: *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398, 416; *per* HAMILTON, L.J.

(*m*) *Phipps* v. *Rochester Corporation*, [1955] 1 All E. R. 129; [1955] 1 Q. B. 450.

(*n*) [1922] 1 A. C. 44, 61.

(*o*) See (1954) Cmd. 9305, p. 16. And *Latham's Case* (above, n. (*l*)); *Hardy* v. *Central London Rail. Co.*, [1920] 3 K. B. 459; *Robert Addie & Sons* v. *Dumbreck*, [1929] A. C. 358; *Walder* v. *Hammersmith Borough Council*, [1944] 1 All E. R. 490.

(*p*) For the defendant's liabilities to child trespassers where he is *not* an occupier, see *Buckland* v. *Guildford Gas, Light & Coke Co.*, [1948] 2 All E. R. 1086; [1949] 1 K. B. 410; *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.*, [1954] 1 All E. R. 578; *Creed* v. *John McGeogh & Sons, Ltd.*, [1955] 3 All E. R. 123; *Videan* v. *British Transport Commission*, [1963] 2 All E. R. 860; [1963] 2 Q. B. 650.

trespass—especially in places where allurements are to be found. And consequently acquiescence in the presence of a child entrant will be more readily inferred than will acquiescence in the presence of an adult (*q*). But this does not mean that wherever there is an allurement upon his land the occupier will necessarily be taken to have given implied consent to children to come and meddle with it (*r*); everything depends upon whether he has taken reasonable steps by warning, fencing, or otherwise to keep children away (*s*). The occupier is not bound at his risk so to arrange things that even a child trespasser *cannot* enter his land; and it is as much for a child as it is for an adult to establish that the occupier's behaviour has amounted to a tacit consent to enter (*t*), (*u*).

ILLUSTRATION 83

"An occupier must be prepared for children to be less careful than adults" (*a*).

Cooke *v.* Midland Great Western Railway of Ireland, [1909] A. C. 229.

Respondents kept an unlocked turntable on their land close to a public road. Their servants knew that children were in the habit of passing through a gap in a fence between the road and the turntable, and playing with the latter. Appellant, a child of four, was injured while so doing. *Held:* There was sufficient evidence for the jury to find respondents liable. The trespass being acquiesced in, the child was in the position of a visitor; and to *him* the unlocked turntable constituted an allurement. "The duty the owner of premises owes to persons to whom he gives permission to enter upon them must . . . be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons" (*b*).

4. THE OBLIGATION OF MASTER TO SERVANT (*c*)

In many if not in most respects, under the growing influence of the idea of the welfare state, the obligations owed by employers to their employees are governed by statutes (such as the Factories Act, 1961) and regulations made under statutory authority. These

(*q*) (1954) Cmd. 9305, p. 16.
(*r*) *Jenkins* v. *Great Western Rail. Co.*, [1912] 1 K. B. 525.
(*s*) *Bird* v. *Lewisham Borough Council* (1946), 62 T. L. R. 238.
(*t*) *Edwards* v. *Railway Executive*, [1952] 2 All E. R. 430; [1952] A. C. 737.
(*u*) It should be noted that no attempt has been made to deal seriously with the vast case law on this subject prior to the Act. For this larger works must be consulted.
(*a*) Occupiers' Liability Act, 1957, s. 2 (3) (a) (37 Halsbury's Statutes (2nd Edn.) 834).
(*b*) [1909] A. C. at p. 238; *per* Lord ATKINSON.
(*c*) On this topic generally see Munkman, *Employer's Liability at Common Law*.

obligations are usually strict, in the sense that they are imposed upon the employer whether or no he has been guilty of lack of reasonable care to refrain from breach of the duties imposed upon him (*d*). And further, the injured employee had, under the Workmen's Compensation Acts, 1897–1925, and now has, under the National Insurance Acts, 1946–63, special statutory rights of insurance in respect of industrial and other injuries.

But at common law the employer always also owed (*e*), and still does owe, a special duty of care towards his servant, and may be liable to him in negligence if he fails to perform it (*f*). Broadly speaking this is simply the ordinary obligation to take care, applied to the particular relationship of master and servant; the employer must "take reasonable care for his servant's safety in all the circumstances of the case" (*g*), or to put the matter in another way the duty is "to take care in the way that a prudent employer would to see that his workmen are not exposed to unnecessary risks" (*h*).

Thus of course if the employer is *himself* negligent and injures his servant, as by dropping a piece of metal upon him (*i*), he will be liable. But in modern industrial conditions cases of this kind are necessarily rare; and the employer's obligation extends further than this: for it covers all mishaps arising from the conduct of his business as far as it may affect the employee's safety. Its scope has been defined as

> "three-fold—the provision of a competent staff of men, adequate material, and a proper system and effective supervision" (*k*).

(*d*) See next Chapter.

(*e*) Breach of a statutory duty does not however necessarily also connote breach of the common law duty; *Davies* v. *Goole Shipbuilding and Repairing Co., Ltd. and F. T. Everard & Sons, Ltd.*, [1960] 1 Lloyd's Rep. 59, 71: nor does breach of a common law duty necessarily connote breach of a similar statutory duty; *Kimpton* v. *The Steel Co. of Wales, Ltd.*, [1960] 2 All E. R. 274.

(*f*) The master's breach of duty may be treated either as tortious or as failure to implement an implied term of the contract of service: see *Matthews* v. *Kuwait Bechtel Corporation*, [1959] 2 All E. R. 345; [1959] 2 Q. B. 57 (Illustration 1). But in either case the liability is based upon *negligence*: the master is *not* at common law an insurer of his servant's safety (*Rands* v. *McNeill*, [1954] 3 All E. R. 593; [1955] 1 Q. B. 253; *Cusack* v. *T. & J. Harrison, Ltd.*, [1956] 1 Lloyd's Rep. 101).

(*g*) *Paris* v. *Stepney Borough Council*, [1951] 1 All E. R. 42, 56; [1951] A. C. 367, 384; *per* Lord OAKSEY.

(*h*) *Latimer* v. *A.E.C., Ltd.*, [1952] 1 All E. R. 1302, 1304; [1952] 2 Q. B. 701, 708: *per* SINGLETON, L.J. (affirmed, [1953] 2 All E. R. 449; [1953] A. C. 643). See also *Smith* v. *Charles Baker & Sons*, [1891–1894] All E. R. Rep. 69, 88; [1891] A. C. 325, 362; *per* Lord HERSCHELL. In this branch of the law the facts of each case are all-important and decision turns rather upon fact than upon authority: see the warning given by the House of Lords in *Qualcast (Wolverhampton), Ltd.* v. *Haynes*, [1959] 2 All E. R. 38; [1959] A. C. 743.

(*i*) *Ashworth* v. *Stanwix* (1861), 3 E. & E. 701.

(*k*) *Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E. R. 628, 642;

Competent Staff

Before the abolition (*l*) of the doctrine of common employment (*m*) this obligation was most important, because where the employer was in breach of it, since, like the rest of the master's obligations, it is *personal* to him (*n*), the fact that the plaintiff was in common employment with the incompetent fellow-servant who caused the injury (by way of exception to what was then the general rule) afforded the master no defence. But it is not now an obligation that will usually (*o*) need to be relied upon, since the master is now vicariously responsible in the ordinary way for injury caused by one fellow-servant to another.

Plant, etc.

The employer's obligation in respect of equipment (*p*), working materials, or machinery supplied, and in respect of the condition of the place of employment (*q*) appears to be to take

> "reasonable care to provide proper appliances, and to maintain them in proper condition" (*r*).

What will amount to "reasonable care" is a question of degree, to be determined only in the light of particular facts; but the important thing to note is that there must be some element of lack of care on the part of the employer or of his servants or agents if liability is to be imposed. Thus for example, the employer's conduct will be judged only in the light of existing knowledge,

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[1938] A. C. 57, 78; *per* Lord WRIGHT. These three aspects of the master's duty should not be thought of as independent heads of liability: "all three are ultimately only manifestations of the duty of the master to take reasonable care"—*Wilson* v. *Tyneside Window Cleaning Co.*, [1958] 2 All E. R. 265, 271; [1958] 2 Q. B. 110, 121; *per* PEARCE, L.J.; and as to the danger of treating them as separate categories for purposes other than exposition, see pp. 273; 123–124, respectively; *per* PARKER, L.J. And see *Cavanagh* v. *Ulster Weaving Co., Ltd.*, [1959] 2 All E. R. 745, 751; [1960] A. C. 145, 166; *per* Lord SOMERVELL.

(*l*) By the Law Reform (Personal Injuries) Act, 1948 (25 Halsbury's Statutes (2nd Edn.) 364).

(*m*) The doctrine (which may still sometimes need to be examined—see Law Reform (Personal Injuries) Act, 1948, s. 1 (3)—was well explained in Clerk and Lindsell, *Law of Torts* (10th Edn.), pp. 124–38. See also Holdsworth, *History of English Law*, Vol. VIII, pp. 480–2.

(*n*) See *Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E. R. 628, 640; [1938] A. C. 57, 83–4; *per* Lord WRIGHT.

(*o*) But see Munkman, *op. cit.* (6th Edn.), p. 116, and *Hudson* v. *Ridge Manufacturing Co., Ltd.*, [1957] 2 All E. R. 229; [1957] 2 Q. B. 348.

(*p*) See *Naismith* v. *London Film Productions, Ltd.*, [1939] 1 All E. R. 794 (inflammable clothing for film extra).

(*q*) *Quintas* v. *National Smelting Co., Ltd.*, [1961] 1 All E. R. 630.

(*r*) *Smith* v. *Charles Baker & Sons*, [1891] A. C. 325, 362; *per* Lord HERSCHELL; *Kilgollan* v. *William Cooke & Co., Ltd.*, [1956] 2 All E. R. 294, 300; *per Singleton*, L.J.

reasonably available at the time, and not in the light of knowledge only acquired after the event (*s*); and it has been held to be a defence, in a case where a man was injured by a fall of earth in a tunnel, that the employer reasonably relied upon the advice of an expert third party as to the best method of supporting the roof (*t*).

It should, however, be noted that the employer's obligations do not necessarily (*u*) cease beyond the confines of his own premises (*a*). Although it is true that where he sends his men to work upon other people's premises, he is in the nature of things entitled to expect that such other people will keep them reasonably safe, and therefore his duty in respect of such premises is not as high as his duty in respect of his own; yet he must still use *reasonable* care to prevent injuries to his servants. Whether he has done this or not depends upon all the circumstances of the case (*b*).

Safe System, etc.

The employer must now also devise for his employees a *system of working* that is reasonably safe. This does not mean that he or his agents must stand beside each worker in order to ensure that he is not running the risk of injury, for the duty is not one of insurance (*c*): but it does mean that where a particular operation is of such a nature that it is likely to give rise to injury unless it is

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(*s*) *Ebbs* v. *James Whitson & Co., Ltd.*, [1952] 2 All E. R. 192; [1952] 2 Q. B. 877; *Graham* v. *Co-operative Wholesale Society, Ltd.*, [1957] 1 All E. R. 654; *Richards* v. *Highway Ironfounders (West Bromwich), Ltd.*, [1957] 2 All E. R. 162.

(*t*) *Szumczyk* v. *Associated Tunnelling Co., Ltd.*, [1956] 1 All E. R. 126. Moreover, where an *experienced* worker brings injury upon himself by using inappropriate equipment, the employer will not be liable: *Johnson* v. *Croggan & Co., Ltd.*, [1954] 1 All E. R. 121.

(*u*) Though they *may* do so; as where the servant is lent to another employer, who will then owe him the same obligations as his own employer; *Garrard* v. *Southey & Co., and Standard Telephones*, [1952] 2 Q. B. 174, contrast *Johnson* v. *A. H. Beaumont, Ltd., and Ford Motor Co.*, [1953] 2 All E. R. 106; [1953] 2 Q. B. 184.

(*a*) *General Cleaning Contractors* v. *Christmas*, [1952] 2 All E. R. 1110; [1953] A. C. 180: *Smith* v. *Austin Lifts, Ltd.*, [1959] 1 All E. R. 81. The master's obligation may also, probably, sometimes extend to cover the servant on his way to work: *Ashdown* v. *Samuel Williams & Sons, Ltd.*, [1957] 1 All E. R. 35, 48.

(*b*) See *Wilson* v. *Tyneside Window Cleaning Co.*, [1958] 2 All E. R. 265; [1958] 2 Q. B. 120; *Mace* v. *R. H. Green and Silley Weir, Ltd.*, [1959] 1 All E. R. 655; [1959] 2 Q. B. 14.

(*c*) *Winter* v. *Cardiff R.D.C.*, [1950] 1 All E. R. 819, 822; *per* Lord PORTER. Thus a theatrical producer is not bound to devise a system which will ensure that an actor's coat is not stolen from his dressing-room during a rehearsal: *Deyong* v. *Shenburn*, [1946] 1 All E. R. 226; [1946] K. B. 227. See also *Edwards* v. *West Herts Group Hospital Management Committee*, [1957] 1 All E. R. 541.

carefully performed, the employer must ensure that his *organization* is such as to minimize the risk of it, or that reasonably adequate supervision is supplied; and the standard of care which the law exacts from him in this respect is high (*d*).

Every case must depend upon its special circumstances, and no general rule can be propounded for determining the conditions under which an employer will be called upon to devise a "system"; though the likelihood of danger must play a leading part in determining when he will (*e*). Nor is it easy to decide whether a particular injury is due to lack of "system", or to some casual mishap arising in the course of the day's routine (*f*). But two contrasting examples may serve as a guide to the way in which the courts approach the solution of the problem. In the leading case, *Wilsons and Clyde Coal Co.* v. *English* (*g*), it was held that it was *unsafe*, in a coal mine, to adopt a system by which haulage plant was permitted to operate in a confined tunnel while men were passing along this tunnel on their way to the pithead after leaving a shift. In *Winter* v. *Cardiff R.D.C.* (*h*), the respondent Council employed certain men (of whom the appellant was one) under a competent foreman, to transport a heavy electricity regulator on a lorry. A rope was provided to secure this regulator, but neither the men nor the foreman saw fit to use it: in consequence the regulator slipped from the lorry while the appellant was travelling on it and he was crushed. It was held that these facts disclosed no lack of proper system: a rope *had* been provided and competent supervision had in fact been supplied (*i*).

When the employer does provide a safe system he may thus escape liability; but even then he may not do so if he fails to take

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(*d*) See *Winter* v. *Cardiff R.D.C.*, [1950] 1 All E. R. 819. Where there is an allegation of unsafe system it is not essential for the plaintiff to particularize an alternative system that would be safe: *Dixon* v. *Cementation Co., Ltd.*, [1960] 3 All E. R. 417.

(*e*) The vital question is, "Does the operation *require* proper organisation and supervision?" (*Ibid.*, at p. 825; *per* Lord REID.)

(*f*) "What is system and what falls short of system . . . is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand": *English* v. *Wilsons and Clyde Coal Co.*, 1936 S. C. 883, 904; *per* Lord Justice Clerk AITCHISON.

(*g*) [1937] 3 All E. R. 628; [1938] A. C. 57. Compare *Rees* v. *Cambrian Wagon Works, Ltd.* (1946), 175 L. T. 220.

(*h*) [1950] 1 All E. R. 819.

(*i*) For further authorities, see Munkman, *op. cit.*, pp. 118–138. Among the most important are *Speed* v. *Thomas Swift & Co., Ltd.*, [1943] 1 All E. R. 539; [1943] 1 K. B. 557 (unsafe system); *Colfar* v. *Coggins and Griffith (Liverpool), Ltd.*, [1945] 1 All E. R. 326; [1945] A. C. 197 (safe system). And see Illustration 84.

reasonable care to see that it is enforced (*k*). But though it was at one time thought (*l*) to be the case there is no presumption of negligence as a matter of law if the employer having provided some safety device fails to bring pressure to bear upon the employee to use it; there may or may not be negligence in such a situation depending upon all the circumstances (*m*). Where, however, the plant is especially dangerous there is likely to be a duty to warn of the danger (*n*). On the other hand, though there are *dicta* which appear to argue the contrary (*o*), as in the case of plant, so in the case of "system", an experienced man may in some circumstances reasonably be left to organize his own work, and if he then chooses to adopt a dangerous method his employer will not be held responsible (*p*). Whether this will be so or not must depend upon all the facts, including the dangers inherent in the work and the experience and capacity of the man concerned (*q*); and it is well to remember the *dictum* of Viscount SIMONDS, "I deprecate any tendency to treat the relationship of employer and skilled workman as equivalent to that of a nurse and an imbecile child" (*r*).

ILLUSTRATION 84

"The common law demands that employers should take reasonable care to lay down a reasonably safe system of work" (*s*).

(*k*) Thus where an employer provided a protective cream to be used by his men for prevention of dermatitis but kept it locked in a store, and the foreman did nothing to encourage the men to use it, the employer had failed in his duty: *Clifford* v. *Charles H. Challen & Son, Ltd.*, [1951] 1 All E. R. 72; [1951] 1 K. B. 495. Compare *Nolan* v. *Dental Manufacturing Co., Ltd.*, [1958] 2 All E. R. 449. Contrast *Woods* v. *Durable Suites, Ltd.*, [1953] 2 All E. R. 391; *Qualcast (Wolverhampton), Ltd.* v. *Haynes*, [1959] 2 All E. R. 38; [1959] A. C. 743; *James* v. *Hepworth & Grandage, Ltd.*, [1967] 2 All E. R. 829; [1968] 1 Q. B. 94.

(*l*) *Roberts* v. *Dorman Long & Co., Ltd.*, [1953] 2 All E. R. 428, 432.

(*m*) *Haynes' Case* (above, n. (*k*)): "though there may be cases in which an employer does not discharge his duty of care towards his workmen by merely providing an article of safety equipment, the courts should be circumspect in filling out that duty with the much vaguer obligation of encouraging, exhorting or instructing his workmen . . . to make regular use of what is provided". [1959] 2 All E. R. at p. 40; [1959] A. C. at p. 753, *per* Lord RADCLIFFE. See also *Cummings* (or *McWilliams*) v. *Sir William Arrol & Co., Ltd.*, [1962] 1 All E. R. 623.

(*n*) *Ward* v. *T. E. Hopkins & Son, Ltd.*, [1959] 3 All E. R. 225.

(*o*) *E.g.*, *General Cleaning Contractors, Ltd.* v. *Christmas*, [1952] 2 All E. R. 1110, 1114; [1953] A. C. 180, 189; *per* Lord OAKSEY.

(*p*) *Martin* v. *A. B. Dalzell & Co., Ltd.*, [1956] 1 Lloyd's Rep. 94; *Winstanley* v. *Athel Line, Ltd.*, [1956] 2 Lloyd's Rep. 424.

(*q*) *Haynes' Case* (above, n. (*k*)).

(*r*) *Smith* v. *Austin Lifts, Ltd.* [1959] 1 All E. R. 81, 85. See also *Withers* v. *Perry Chain Co. Ltd.*, [1961] 3 All E. R. 676, 680; *per* DEVLIN L.J.

(*s*) [1952] 2 All E. R. 1110, 1114–15; [1953] A. C. 180, 189–90; *per* Lord OAKSEY.

General Cleaning Contractors, Ltd. *v.* Christmas, [1952] 2 All E. R. 1110; [1953] A. C. 180.

Respondent was an employee of the appellants, a window cleaning firm. The method of cleaning the outside of windows which appellants generally instructed their employees to adopt was the "sill" method; that is to say the men were instructed to stand on the sill, supporting themselves by holding on to the window sash. Respondent sued appellants in respect of injuries sustained from a fall while he was cleaning a window of the Caledonian Club using this method. The fall was occasioned by the sudden closing of the lower sash of the window, which caused his fingers to be entrapped between it and the upper sash. There was evidence that the lower sash was loose. *Held:* Although the "sill" method was not necessarily an unsafe system of working, respondents had failed to arrange a reasonably safe system in this particular case, because they had failed to instruct appellant to test sashes for looseness before starting work on each window, and they had also failed to provide wedges which, if inserted beneath the lower sash, would have made the accident impossible (*t*).

It is most important to bear in mind that, as has already been noted, all the employer's obligations are "personal" to him; if they are broken, he cannot therefore escape liability by establishing that he delegated the duty of performing them to another person, however competent that person may be. And this applies equally whether that person be technically a "servant" or an "independent contractor" (*u*). But the employer will only be liable to the extent that he does delegate the duty to take care for his employee's safety; thus if he buys standard equipment he must see that it is inspected and he is responsible (whether he delegates or not) for any defects in its installation (*a*), but he will not be liable for the negligence of the manufacturer in the manufacturing process since in making the purchase he cannot be said to delegate any duty to him (*b*). It should be added that it has recently been stressed, both in relation to the employer's common law obligation and in relation to his statutory obligations, that it is not to the point that at the time of a mishap the employee—provided that he was on

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(*t*) See also *Drummond* v. *British Building Cleaners, Ltd.*, [1954] 3 All E. R. 507 (where windows have a transom men must be instructed to use safety belts).

(*u*) *Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E. R. 628, 643; [1938] A. C. 57, 83–84; *per* Lord WRIGHT.

(*a*) *Paine* v. *Colne Valley Electricity Supply Co., Ltd.*, and *British Insulated Cables, Ltd.*, [1938] 4 All E. R. 803: *Riverstone Meat Co. Pty., Ltd.* v. *Lancashire Shipping Co., Ltd.*, [1961] 1 All E. R. 495; [1961] A. C. 807: *Sumner* v. *William Henderson & Sons, Ltd.*, [1963] 1 All E. R. 408; [1964] 1 Q. B. 540.

(*b*) *Davie* v. *New Merton Board Mills, Ltd.*, [1959] 1 All E. R. 346; [1959] A. C. 604; *Sumner's Case* (last note); *Taylor* v. *Rover Co., Ltd.*, [1966] 2 All E. R. 181.

the employer's premises—was not acting in the course of his duties: "I do not think that . . . the expression "a frolic of his own" (*c*), which is relevant for the purpose of making a master vicariously liable for the torts of his servant, has any relevance to the question whether a master is liable to the servant, either for breach of statutory duty or at common law (*d*)."

Subject to certain important exceptions (*e*), the Crown now owes to its servants the same obligations as those owed by any other employer (*f*).

The maxim "*volenti non fit injuria*" applies to actions between servant and master, just as it does to other kinds of actions. But in this field its application is carefully restricted (*g*). In particular, since a servant is often constrained to undertake unusual risk by fear that he may lose his job if he refuses, the mere fact that he continues at his work knowing of a danger that is incident to it, and even appreciating the risk he is running (*h*), will not necessarily (*i*) be treated as an implied acceptance of it so as to bar his claim if he is injured. Thus in *Smith* v. *Charles Baker & Sons* (*k*) the appellant was employed by the respondents to drill holes in some rock in a railway cutting. He was injured by a stone which fell from a crane operated by fellow-servants immediately above the place where he was working. There was evidence that the crane had been used to shift stones in this dangerous position for two months before the accident, that it was operated without warning, and that the appellant had appreciated the dangers of the situation. It was held that the fact that the appellant had continued at his work with full knowledge of the danger arising from the respondents'

(*c*) See below, p. 386.

(*d*) *Allen* v. *Aeroplane and Motor Castings, Ltd.*, [1966] 3 All E. R. 377, 379; *per* DIPLOCK, L.J. See also *Uddin* v. *Associated Portland Cement Manufacturers, Ltd.*, [1965] 2 All E. R. 213. The principle seems somewhat hard upon the employer, but its application is mitigated by the fact that contributory negligence may be called in aid.

(*e*) Crown Proceedings Act, 1947, s. 10 (6 Halsbury's Statutes (2nd Edn.) 55).

(*f*) *Ibid.*, s. 2 (1) (b).

(*g*) *Bowater* v. *Rowley Regis Corporation*, [1944] 1 All E. R. 465, 467; [1944] K. B. 476, 480–1; *per* GODDARD, L.J.

(*h*) *Smith* v. *Charles Baker & Sons*, [1891] A. C. 325, 362; *per* Lord HERSCHELL.

(*i*) Though sometimes it may be: *ibid.*, pp. 361–2; *Taylor* v. *Sims*, [1942] 2 All E. R. 375; *Imperial Chemical Industries, Ltd.* v. *Shatwell*, [1964] 2 All E. R. 999; [1965] A. C. 656 (Illustration 10). *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, probably no longer represents the law.

(*k*) *Supra*, note (*h*).

systematic neglect to give warning, did not preclude him from recovering (*l*).

It should finally be noted that the servant, for his part, also owes a common law duty to his master to exercise reasonable care and skill in the performance of his work (*m*), and he may therefore himself be liable to indemnify *his master* if he causes him injury in breach of this duty (*n*).

ILLUSTRATION 85

A servant owes an obligation to his master to use reasonable care and skill in the performance of his work (*o*).

Lister *v.* Romford Ice and Cold Storage Co. Ltd., [1957] 1 All E. R. 125; [1957] A. C. 555.

Appellant, who was employed by respondents to drive a motor lorry, reversed it carelessly and injured his father (who was also employed by respondents). The father recovered damages from respondents whose insurers, having paid, sought indemnity, in the name of respondents, against appellant. *Held:* (*inter alia*) the claim succeeded; appellant having broken his duty to respondents to take reasonable care in the performance of his work.

(*l*) See also *Yarmouth* v. *France* (1887), 19 Q. B. D. 647; *Bowater* v. *Rowley Regis Corporation*, [1944] 1 All E. R. 465; [1944] K. B. 476; *Merrington* v. *Ironbridge Metal Works, Ltd.*, [1952] 2 All E. R. 1101.

(*m*) *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236, 246; *per* WILLES, J.

(*n*) *Lister* v. *Romford Ice and Cold Storage Co.* (Illustration 85). But the servant will not be liable if the master has debarred himself from asserting his right of indemnity by contract, express or implied: see *Gregory* v. *Ford*, [1951] 1 All E. R. 121—Road Traffic Act, 1930, s. 35 (24 Halsbury's Statutes (2nd Edn.) 602). Further it *may* be (contract apart) that where the master is himself also at fault, his claim to indemnity will be proportionately abated in so far as the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 Halsbury's Statutes (2nd Edn.) 359), apply: see *Jones* v. *Manchester Corporation*, [1952] 2 All E. R. 125; [1952] 2 Q. B. 852.

(*o*) The servant also has an obligation to conduct his master's business with due fidelity: *Robb* v. *Green*, [1895] 2 Q. B. 315; *Hivac, Ltd.* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 2 All E. R. 350; [1946] Ch. 169; *Reading* v. *A.-G.*, [1951] A. C. 507