A Novel Assault on the Principle of No Liability for Innocent Misrepresentation

M. M. MacINTYRE*
Vancouver

I

The nine judges who participated in *Guay* v. *Sun Publishing Co.*[1] divided nearly evenly. If one looks at the result one might think that nothing very significant happened. A trial judge, following the custom of trial judges who see the plaintiff's damage and not unnaturally try to do something about it, enlarged considerably the field of liability in torts; but the British Columbia Court of Appeal reversed the decision imposing liability, and this reversal was sustained in the Supreme Court of Canada. For the plaintiff nothing less ambitious was attempted than

(1) the establishment of the principle that the Canadian common law awards compensation for emotional disturbance caused without conscious wrongful act and without bodily contact or the apprehension thereof, and

(2) the overthrow of the established principle that words (not defamatory in intent or result) may be used without the user being held liable in damages, should a judge or jury later decide that that mythical perfectionist, the ordinary prudent man, would have forseen a risk of harm to the plaintiff and refrained from using the words.

The plaintiff failed, but four of the nine judges—the trial judge, one justice of appeal and two members of the Supreme Court of Canada—wrote judgments which lifted her over both hurdles. An equal number of judges—two justices of appeal, and two mem-

*Malcolm M. MacIntyre, B.A. (Mt. A.), LL.B., LL.M., S.J.D. (Harv.); member of the New Brunswick Bar; Professor of Law, University of British Columbia.

[1] [1951] 4 D.L.R. 756 (B.C. trial); [1952] 2 D.L.R. 479 (B.C.C.A.); unreported as yet in the Supreme Court of Canada.

bers of the Supreme Court—directed their attention mainly to (2) and refused to accept the plaintiff's argument that somehow it is easier to make inroads on (2) where the harm complained of was emotional disturbance than where the harm complained of was a loss of money invested in reliance on the misrepresentation. The ninth judge, in the Supreme Court of Canada, offered support to both views, but denied recovery on the facts on the narrow ground that this plaintiff had failed to prove that she had suffered any harm at all. If we make a simple mathematical calculation permitting the opposed views to cancel each other, we are driven to the conclusion that the law in Canada on the problems raised by the *Guay* case is in a state of acute confusion. Actually, it is not as bad as that. The simple fact is that the problems raised by the *Guay* case are difficult because the law which might apply to them is undeveloped, and respectable reasons for determining the issues in favour of or against the plaintiff can be found. It is the intention of this article to bring some of the problems into clearer focus, as problems, than is done in the various judgments. These judgments were written, not to demonstrate that the case raised difficult problems, but to explain as nearly as the authoritative materials would permit how the author of each judgment felt that the conclusion at which he had arrived could be justified in terms of these materials.

The facts of the case which raised these problems were as follows. On or about February the 2nd, 1948, some person or persons unknown transmitted to the Vancouver Sun a news item which, as published by the Sun, stated that Mrs. R. C. Guay, 1972 West 6th Avenue, Vancouver, said that she and her husband had been notified that her husband's brother, Dick Guay, his daughter and his two sons had all been killed in a motor vehicle-train collision while motoring in Ontario from Timmins to North Bay. The report further stated that, according to Mrs. Guay of 1972 West 6th, the wife of the dead man was believed to be in Vancouver. There was in fact a Mrs. R. C. Guay, but she was not known at 1972 West 6th. It does not appear in the case as reported whether she even lived in British Columbia or whether or not her address was known or available to Mrs. Dick Guay, the plaintiff. Apparently Mrs. R. C. Guay had made none of the statements attributed to her. The other inaccuracy in the report was that no such accident had ever occurred and Mr. Ulderic, known as Dick, Guay and his three children were all alive and uninjured.

Mrs. Guay, the wife and mother of the uninjured husband and

children, was, by agreement, living apart from her husband, who, by agreement, had custody of the children. On the day the news item appeared, she purchased a copy of the Vancouver Sun, read the news item and was deeply shocked. She inquired at 1972 West 6th and drew a complete blank. She inquired by telephone of the Sun but was unable to trace the source of the story. She then wrote her husband's relatives in Ontario and also her mother in Saskatchewan. Mrs. Guay's mother wrote Mrs. Guay's brother in Quebec, who wired the chief of police in Timmins and then wired his mother advising her that the report was false. This telegram was forwarded to Mrs. Guay who, in the meantime, had received a letter from one of her children. This letter was, apparently, a normal letter not provoked by Mrs. Guay's inquiries, but its receipt and its failure to mention any accident would tell Mrs. Guay what she wanted to know.

As this recital shows, Mrs. Guay checked promptly but not too efficiently (of course one should not expect too much judgment from a person who was emotionally disturbed) and for three or four weeks failed to ascertain whether the report was true or false. She suffered distress and her emotional disturbance continued after its original cause had been removed. Several months later, on October 27th, 1948, Mrs. Guay consulted a doctor. On November 5th, 1948, Mrs. Guay's solicitor wrote the Sun newspaper claiming damages for "negligent editing". This was the first that anyone who held an executive position in the newspaper office knew about the news item or its inaccuracy. Not unnaturally, the newspaper was unable to trace the source of its information. News is ephemeral and newspapers cannot keep files to trace the source of news gathered locally.

II

It was found as a fact by the trial judge, and assumed by all the judges in the Supreme Court, that the newspaper was negligent, or perhaps I should say careless, because some of the judges reached their conclusion of no liability on the ground that the newspaper, though careless, was not negligent since it owed the plaintiff no duty to take care. This awkward phraseology is a result of one aspect of a lack of precision associated with the word "negligence", which as part of our historical and jurisprudential heritage hamstrings our reasoning processes. We define negligence as the breach of a duty to exercise care, that is of a duty not to be negligent. Our reasoning would improve if we avoided proceeding in circles

and thought of negligence simply as the creation of an undue or unreasonable risk of harm. This is all that our long and involved discussions of whether or not a duty exists really mean. The case did not raise the *Palsgraf*[2] problem in which *A*'s conduct in hustling *B* onto the train forseeably endangered only *B* (or his property), but unforseeably injured *C* in the explosion which ensued when an innocent looking parcel containing explosives was dislodged in the scuffle. In the *Palsgraf* case, *A*, though negligent *qua B*, was not negligent *qua C*, because though forseeably *A* created risk of harm to *B* (or *B*'s property) *A*'s misconduct created no forseeable risk of harm to *C*. In the *Guay* case, if any risk of harm was created to anyone, Mrs. Guay was that one. As this case shows, only confusion can come from labelling as negligent that conduct which by hypothesis creates such a very slight risk of harm that no liability for failure to avoid that risk is imposed. (Or, to phrase it from the other side of the competing interests which are always consciously or unconsciously balanced in any ruling, that imposing liability for that risk would unreasonably hamper ordinary human activity.)

Since the case involves an assumption of negligent conduct by the defendant and since the argument centres mainly around the problem of whether or not the case is distinguishable from *Derry* v. *Peek*[3] on the grounds that personal injury in the form of emotional disturbance should be compensable, although financial loss is not, some major problems failed to come to the surface in the reasons for judgment. These are: (1) Does the law award compensation for mere emotional disturbance caused by mere negligence? (2) If the law awards compensation for mere emotional disturbance caused by mere negligence, does it allow recovery for emotional disturbance caused by *grief* or does it allow compensation for emotional disturbance caused by *fright* alone? These will be discussed before returning to the *Derry* v. *Peek* problem.

Our law has not yet made up its mind to protect the emotional sensibility of mankind against merely negligent interference. Here we start with the much criticized case of *Victorian Railway Commissioners* v. *Coultas*,[4] decided by the Judicial Committee, and end with contrary dicta in the House of Lords in *Hay or Bourhill* v. *Young*.[5] In the *Coultas* case, the defendant negligently created a

[2] *Palsgraf* v. *Long Island Railway* (1928), 248 N.Y. 339, 162 N. E. 199.
[3] *Derry* v. *Peek* (1889), 14 App. Cas. 337 (H.L.).
[4] *Victorian Railway Commissioners* v. *Coultas* (1888), 13 App. Cas. 222 (P.C.).
[5] [1943] A.C. 92. The facts in the *Bourhill* case were that *A*, a motorcyclist driving at excessive speed, collided with a motor car. The plaintiff

risk of collision with the plaintiff. The plaintiff was not hit but was badly frightened and suffered harm (a miscarriage) from her fright. Recovery was denied on the ground that such harm was not the natural and probable consequence of the defendant's negligent conduct. This was some years before the Court of Appeal, wielding the crudest and most overworked materials in the judicial tool box (scissors and paste), transmuted an unnecessary and erroneous alternative ground of decision in *Smith* v. *The London and South Western Railway*[6] into one of the supposed eternal verities. The general acceptance of the language in the *Polemis*[7] case has made the reasoning in the *Coultas* case something most people would like to forget. We now realize, perhaps more clearly than in 1888, that fright can on occasion produce real and lasting harm. It has, therefore, been fashionable to say that the *Coultas* case is dead, although the point has never again come squarely before a court of last resort.

There are in England two cases, *Dulieu* v. *White and Sons*[8] and *Hambrook* v. *Stokes*,[9] which are not consistent with it. Both are decisions of the Court of Appeal. In both cases the court boldly refused to follow the *Coultas* case on the ground that the Judicial Committee did not make or declare law for the English courts. Both of them (as did the *Coultas* case itself) involve more than mere emotional disturbance. In *Dulieu* v. *White and Sons* the plaintiff's fright induced a miscarriage (premature birth—child born an idiot). The case arose on the pleadings and involved only the decision that the mother's allegations disclosed a cause of action. In *Hambrook* v. *Stokes* the emotional disturbance resulted in the death of the victim. The emotional disturbance was, in these cases, not the harm for which recovery was claimed; it was a stage in the development of the harm for which recovery was claimed. But if that stage was not a natural and probable consequence neither was the consequence of that stage; unless we wish to distinguish between mere emotional disturbance and obvious physical harm produced through emotional disturbance. This is a practical distinction. Whether it is a logical distinction or not depends entirely on how we phrase our reasoning. But we cannot hold fast to the

was a passenger disembarking from the leeward side of a large tram. The plaintiff did not see but *heard* the collision and suffered a miscarriage, after observing *A*, who was not a pretty sight. The plaintiff sued *A*'s estate and lost.

[6] (1870), L.R. 6 C.P.D. 14. Compare the case *infra* (1870), L.R. 5 C.P.D. 98.

[7] *In Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560 (C.A.).

[8] [1901] 2 K.B. 669 (C.A.).

[9] [1925] 1 K.B. 141. (C.A.).

Coultas reasoning or result and at the same time accept without difficulty these two decisions of the English courts. Since nobody thinks that we may follow the Court of Appeal in preference to the Judicial Committee, up to this point our duty to follow the *Coultas* case is clear.

There have been several cases which have escaped the *Coultas* result by making distinctions which are almost distinctions without a difference. *Negro* v. *Petros Bread Company*[10] may be taken as a sample. In this case the *Coultas* case was said to apply only to cases involving emotional harm without bodily impact and the court found impact in the trifling scratch the plaintiff received when he bit on a piece of glass in bread negligently manufactured by the defendant. The court also felt helped by the argument that the Judicial Committee in the *Coultas* case was declaring the law of New South Wales and not the law of the province of Ontario. This rebellion demonstrates more clearly than some of the more critical attacks that the *Coultas* case is not popular.

In order that we may keep our bearings, we should not lose sight of the fact that even the *Coultas* case itself involved more than mere emotional disturbance. It is all very well to say that the law should keep pace with modern psychology and modern psychiatry. People who say this are apt to forget that the administration of justice is a practical art which involves a great many policy considerations and value judgments which are outside the frame of reference of science. For decades now men of science have been criticizing the *M'Naghten* insanity rules. This criticism usually involves the naive assumption that the purposes of the criminal law are purely retributive. Mark Twain's suggestion that insanity and not murder ought to have been made the crime may have expressed the deeper wisdom.

Allowing recovery when the harm resulting from the fright is a miscarriage is not as risky (with respect to proof) or as provocative (with respect to increasing the very harm we compensate for) as is allowing recovery for mere emotional disturbance. In *Hay or Bourhill* v. *Young* (the only case in a court of last resort which raised the general problem of recovery for negligently caused emotional disturbance, but not in its pure form, because even in that case the plaintiff suffered a miscarriage) the House of Lords (1) delivered itself of dicta to the effect that the right to recover was now established (presumably by *Hambrook* v. *Stokes*), but distinguished *Hambrook* v. *Stokes*, about which it was not enthu-

[10] *Negro* v. *Petros Bread Company*, [1933] O.R. 112 (Ont. C.A.).

siastic, on the ground that in that case the issue of the defendant having created a forseeable risk of harm to the plaintiff had been admitted by the pleadings; (2) expressly said that *Owens* v. *The Liverpool Corporation*[11] was wrongly decided and denied recovery on the ground that the defendant's negligent driving created no risk of harm to the plaintiff. This is *Palsgraf* reasoning with the complication that the harm suffered was suffered through emotional disturbance. But even its dicta do not carry us very far into the *Guay* case. In the *Owens* case the English Court of Appeal had decided one branch of the *Guay* problem by allowing recovery for emotional disturbance caused to relatives when the corpse in a funeral procession was negligently nearly unhearsed. (In that case, counsel for the defendant tried to raise the problem of negligence *qua* whom, but the court did not want to see it.) *Bourhill* v. *Young* overruled *Owens* v. *Liverpool.* Some day a Canadian court will have to decide whether the law allows recovery for mere emotional disturbance caused by mere negligence. It is to be hoped that it will not blindly accept the dicta in *Hay or Bourhill* v. *Young*, or the general tenor of the *Guay* case in which this problem is not carefully isolated for consideration.

The problem should be isolated and should be seriously considered. Much can be said on both sides. Undoubtedly, emotional disturbance may be caused without impact, may exist without obvious physical voucher, and may produce very serious consequences in the victim. But there is danger that a settled policy of allowing compensation for such harm might increase considerably the incidence of compensation neurosis. At least until we take the fatal step and allow recovery, the mathematical probability that mere fright will create more than fleeting emotional disturbance is not high. It is still a very rare person who will be seriously damaged by having a close shave in traffic. But the human animal is adaptable and if such injury were compensable it could be trusted to increase. The courts might never know the extent of this increase, but the insurance adjusters who make over 90% of the final decisions in motor vehicle cases would. The Judicial Committee in the *Coultas* case was not talking nonsense when it said that serious emotional disturbance following a near miss is not the natural and probable consequence of negligently approaching a crossing. The old natural and probable consequence rule was not too neatly expressed because both natural and probable meant the same thing, but it expressed the feeling that liability ought to be confined to

[11] [1939] 1 K.B. 394 (C.A.).

liability for forseeable risks. The *Palsgraf* case has offered a cleaner technique for solving some of the problems which were formerly solved by that phrase. The language of the *Polemis* case solves another group by precluding inquiry into them. There are left the problems which involve intervening human activity. These are still solved by a technique which estimates the forseeability of the intervening human activity. No one has ever offered any reason for separating "direct" consequences, as the *Polemis* case did, and treating them differently from the other two classes of cases just mentioned, which are still solved by the old natural and probable consequences rule in modern dress.

Why should direct consequences receive different treatment from indirect consequences, and why should the defendant be liable for some unforseeable direct consequences, but not be liable for other direct consequences, as under the *Palsgraf* case he is not, unless the defendant's conduct created a forseeable risk of harm to the particular plaintiff? The present solutions are arbitrary. Either liability should be confined to reasonably forseeable harms (the old natural and probable consequences rule) or liability should be imposed for all harms caused by the defendant's wrongful act. This is the not too clearly expressed view of the dissent in the *Palsgraf* case. What we now have, if we accept the *Polemis* amendment to the old rule, is a confused pattern which imposes liability for some but not all "direct" consequences, whether forseeable or not, but otherwise still follows the old rule.

My uneasiness over the hodge-podge is not decreased by the recollection that the *Polemis* case was decided by a court which did not read carefully the case it purported to follow and on facts which are probably false. Notwithstanding an arbitrator's finding that reasonable men could not have forseen the harm, it is not asking too much to expect stevedores to understand that gasolene vapour ignites readily and with disastrous results and that dropping a heavy object down the hold of a ship, which in tropic heat reeks of gasolene, does create an unreasonable risk of what happened. The risk that a near miss on the highway will cause emotional disturbance, although mathematically possible, is a rare risk. That type of harm is not within the normal risks of negligent conduct and there may be countervailing considerations which make it unwise to apply *Polemis* dogma to it.

Leaving aside and undecided the problem of whether or not the law awards compensation for negligently created emotional disturbance resulting from fright, *Guay* v. *The Sun Publishing Com-*

pany raises additional difficulties. It asks for recovery, not merely for the victim of a near miss who suffers emotional disturbance through *fright*, but also for anyone who may suffer emotional disturbance through *grief*, including anyone whose grief is caused by mere innocent misrepresentation.

On the problem of negligently inflicted grief uncomplicated by innocent misrepresentation we have only a few cases. There is of course *Hambrook* v. *Stokes*, if the deceased's emotion may be so classified. There is also *Owens* v. *Liverpool Corporation* already mentioned. The law lords in the *Bourhill* case indicated that they thought that the *Owens* case was wrong in allowing recovery. A third is *Chester* v. *Waverly Corporation*.[12] The defendant dug a trench, which became filled with water, and was thereafter protected by a railing that was ineffective to keep children from danger. The plaintiff mother, whose seven-year old child was missing. conducted frantic search for her child, was present when his dead body was recovered from the trench and suffered severe emotional disturbance. By a two to one decision recovery was denied. Another case (too recent to be available in the *Guay* case) is *King* v. *Phillips*.[13] The defendant negligently backed a taxi into the plaintiff's child. The plaintiff was near enough to suffer fright for her child (which, if it may be put that way, is grief in an acute form, although the emotion is a mixed one and the word "fright" may be used to describe the mother's feelings while the injury to the child is still unascertained). The mother who was emotionally disturbed was in no physical danger herself. Counsel for the plaintiff not unreasonably assumed that he was within *Hambrook* v. *Stokes*, but the Court of Appeal, applying, and probably extending, the *Bourhill* case, decided otherwise. This case reduces *Hambrook* v. *Stokes* almost to the vanishing point, and almost but not quite imports the *Coultas* case into England. This latest case, in its own and different way, makes as significant a contribution to the uncertainty in the law as does the *Guay* case itself.

Fright can do dreadful things to the human psyche. So also can grief, but although damage from fright is rare, damage from grief is rarer still. Fright is, in human experience, more frequent than grief, but for most of us occasional grief is almost as certain as death itself. It nearly always causes emotional disturbance. But that disturbance seldom incapacitates its victim and usually fades with time. Would it be wise to add emotional disturbance from

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[12] (1939) 62 C.L.R. 1 (High Court of Australia).
[13] [1953] 2 W.L.R. 526 (C.A.).

grief to the harms for which we allow recovery in damages? In part IV of this article I will discuss some of the implications involved.

There may be no valid psychological or physiological distinction between emotional disturbance caused by fright and emotional disturbance caused by grief. But except for *Hambrook* v. *Stokes*, where it is far from clear whether the members of the court (who wrote emotional rather than rational judgments) were more impressed by the mother's fright or by her grief, no case of any consequence except *Owens* v. *Liverpool* (now definitely overruled) until the *Guay* case has suggested that emotional disturbance caused by grief caused by mere negligence is a basis of recovery, and even the dicta in *Bourhill* v. *Young* lean against there being a right of recovery for emotional disturbance caused by grief. If *King* v. *Phillips* leaves anything of *Hambrook* v. *Stokes* still standing, any suggestion in the case that the law allows recovery for emotional disturbance caused by mere grief has failed to survive.

III

We now come to what the court regarded as the main problem in *Guay* v. *Sun Publishing Co.* Assume that we accept the dicta in *Bourhill* v. *Young* as overruling the decision in the *Coultas* case (which is going further than we have any right to go). Assume that we extend these dicta beyond the imagined facts which provoked it and allow it to include grief as well as fright as the cause of the emotional disturbance for which we allow recovery. This is going still further and already the current of the dicta in *Bourhill* v. *Young* has turned against recovery. We come to the barrier created by *Derry* v. *Peek*. How did the judges who favoured recovery get over *Derry* v. *Peek*? This question is easy to ask but difficult to answer. They quoted from *Donoghue* v. *Stevenson*,[14] and also said that the cases in which a conscious liar has been held liable for causing more emotional disturbance than he intended to cause are analogous. With respect to the latter line of argument I can only say that in my opinion these cases are not analogous. The conscious wrongdoer has always aroused the punitive instincts of the courts and the disposition of his case offers no assistance in the case of the man who, *bona fide* believing it to be true, makes an innocent misrepresentation. Surely all the cases which regard the distinction as vital are unaffected by what was said inferentially in this case.

[14] *Donoghue* v. *Stevenson*, [1932] A.C. 562.

The quotations from *Donoghue* v. *Stevenson* raise a more complicated matter. *Donoghue* v. *Stevenson* was a great case, but it is not the only case in the reports, and if we are to understand it, we must look at it in connection with the problems to which it is relevant.

In 1842 arose the case of *Winterbottom* v. *Wright*.[15] This case came up on demurrer, so there is no dispute about the facts. The plaintiff alleged that the defendant had contracted with the Postmaster General to build and to keep in repair a coach. The plaintiff further alleged that the plaintiff had contracted with the Postmaster General to drive this coach. The plaintiff further alleged that one fine day when he, the plaintiff, was driving the coach, the coach, being *then* in disrepair, broke down and injured the plaintiff. The defendant demurred to the plaintiff's declaration. The decision was inevitable. There was no allegation that the coach was negligently constructed or that it was made dangerous by negligent repair. All that was alleged was that the defendant had failed to perform his contract to keep this coach in repair. That contract gave the plaintiff no rights. The defendant's demurrer was sustained. In the reasons for judgment there was talk about the necessity for privity of contract, and for a century the case has been misread and the coach *assumed* to have been negligently *built*.

As the result of the confusion created by misreading *Winterbottom* v. *Wright*, cases like *Blacker* v. *Lake and Elliott*[17] and *Bates* v. *Batey*[18] were decided, and it came to be thought that there is a rule of law which said that a manufacturer (of things not inherently dangerous) is under no obligation vis-à-vis a remote

[15] (1842) 10 M. & W. 109 (Ex.).

[16] The failure of *Donoghue* v. *Stevenson* to raise some of the problems of the *Guay* case resulted from the course taken by the argument. It will be remembered that the plaintiff claimed that she became ill from drinking ginger beer which contained a decomposed snail. The allegation was double-barrelled and charged her illness to what she saw as well as to the impurities she had imbibed. The problem of whether a cause of action would have been disclosed had the allegation been confined to an illness which had arisen through what she thought about what she had consumed was never raised, because counsel for the defendant felt safely entrenched behind *Winterbottom* v. *Wright*, *Bates* v. *Batey* and *Blacker* v. *Lake and Elliott*, and therefore failed to analyze the full possibilities available to him by way of defence. The *Stevenson* case is therefore silent on the *Guay* problems. What happened when the case went to trial the reports do not tell us.

In two American cases, *Herrick* v. *The Evening Express Publishing Co.* (1921), 113 Atl. 16 (Maine), and *Curry* v. *Journal Publishing Co.* (1939), 68 Pac. 2nd 168 (New Mexico), dead in point with the *Guay* case, recovery was denied. These cases the judgments in the *Guay* case which imposed liability refused to follow on the ground that neither of them considered the case of *Donoghue* v. *Stevenson*.

[17] *Blacker* v. *Lake and Elliott* (1906), 106 L.T.R. 533 (K.B.D.).

[18] [1913] 3 K.B. 351 (K.B.D.).

consumer of his products to manufacture them so that they are not sources of danger if defective. *Donoghue* v. *Stevenson* raised *that* problem (likewise on the pleadings) in the House of Lords. Lord Atkin and two other of the five law lords who sat on the case believed that the potentialities for avoidable harm to remote consumers were sufficiently high to make it desirable to attempt to reduce the risks created to them and therefore declared that a duty to manufacture carefully existed and it was nonsense to insist that there could not be a tort duty without a contractual obligation.

Suppose that the plaintiff in the *Guay* case had been a direct subscriber. She would have the magic privity of contract, but surely the contract would be to sell and deliver the paper as published. A contract may involve a promise to do something with consequent damage for failure to perform. Sometimes the court will (with or without reason) create what it is pleased to call an implied warranty. Conceivably the terms of a contract may be that one will exercise care in the doing of an act. But in a situation in which this is a fair implication the relationship of the parties would be sufficiently close, and the probabilities of harm sufficiently great, for the imposition of a tort duty not to act in a manner which would create unreasonable risk of harm.

Donoghue v. *Stevenson* rendered a service in demolishing the privity of contract explanation of the misunderstood facts of *Winterbottom* v. *Wright*. *Donoghue* v. *Stevenson* would be a necessary and proper case to cite in the *Guay* case if the plaintiff who had bought her paper from a newsstand, and so had no contract with the manufacturer, had suffered harm because the paper through negligence contained chemicals which damaged the plaintiff's skin or clothing. The *Stevenson* case really has nothing to do with any of the problems peculiar to the *Guay* case, and it is only because the series-of-quotation method of preparing factums and writing judgments is so popular that anyone could think that it had. The only assistance the *Stevenson* case offers is that it does free the courts from the peculiar confusion that grew out of misreading *Winterbottom* v. *Wright*, which involved the following proposition: If *A* has contractual obligations to *B* (only), and *B* has contractual obligations to *C* (only), *C*, because he has contractual rights against *B*, has no rights apart from contract (that is, tort) against *A*. This is so absurd that it is difficult to phrase, but it is what the law was thought to be, and was acted upon as being, between *Winterbottom* v. *Wright* (1842) and *Donoghue* v. *Stevenson* (1932).

One strange argument was accepted by some of the judges who favour recovery in the *Guay* case. Ever since *Derry* v. *Peek* it has been clear that innocent misrepresentation which induces the very harm it might be expected to induce (prejudicial activity in reliance on the misrepresentation) does not (except in exceptional circumstances) render the person who makes the innocent misrepresentation liable for that harm. For instance, when a stock broker[19] or banker[20] negligently innocently misrepresents the value of stock, or an accountant negligently prepares a balance sheet,[21] unless an express or implied contractual obligation is involved no liability is imposed in favour of a representee who does the very thing such a person might be expected to do in reliance on the innocent misrepresentation. The judges who favoured liability distinguished *Derry* v. *Peek* and the line of cases following it, and apparently looked with equanimity on a body of law which would preclude recovery for the very harm innocent misrepresentation might be expected to cause and allow recovery for a rare and unusual harm.

So long as the *Derry* v. *Peek* line of cases represents the law, it is difficult to see why an innocent misrepresentee who does the rare thing and suffers emotional disturbance from a false report should recover damages. It would be strange to exempt a defendant from liability for a harm which is within the normal risks created by his conduct and at the same time mulct him in damages for unusual harm which his conduct might rarely, but only *very* rarely, cause. Making such a distinction would create an inconsistency with the rationale of most of the cases found in the textbooks and digests under the heading of proximate cause.

An independent observer might question the wisdom of some of the *Derry* v. *Peek* cases. For instance, *Dickson* v. *Reuters Telegram Company*[20] is in my opinion a shocking decision. The telegram which caused the plaintiff to suffer loss was misdelivered directly to the plaintiff. The loss the plaintiff suffered was the very loss most plaintiffs would have suffered. In that case the risk to the plaintiff was sufficiently great to make the defendant's conduct negligent. So too with *Derry* v. *Peek* itself, with *Banbury* v. *The Bank of Montreal*,[21] *Le Lievre* v. *Gould*[22] and *Candler* v. *Crane*.[23] *Ultramares* v. *Touche*[24] is slightly different. The auditor's services were engaged by a few people. It is true that, by anticipatible re-

[19] *Olmstead* v. *Pierce & Co.*, [1937] O.R. 20 (Ont. trial).
[20] (1879), L.R. 3 C.P.D. 1.
[21] *Banbury* v. *Bank of Montreal*, [1918] A.C. 626.
[22] *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491.
[23] *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E.R. 426.
[24] *Ultramares* v. *Touche* (1931), 229 N.Y. 170, 174 N.E. 441.

circulation, his negligent statement of the results of his audit did cause misrepresentations to reach and harm other people—but perhaps antecedently too *many* people who in no way contribute to the auditor's fees to make it reasonable to impose on him an obligation to compensate them. The law cannot always choose between good and evil. It must choose the lesser of two evils. Opinions as to which is the lesser of two evils will differ.

In each case we must first decide whether or not the type of situation presents more than mere possibility of a risk of harm (and here our thoughts and our vocabulary are still undeveloped). This is what is involved in the preliminary question of whether or not a *duty* to exercise care exists. Then we must measure the defendant's actual conduct in the circumstances against our standard of the ordinary prudent man. (Separating these two problems is harmless and helpful if we know what we are doing. But it is often done woodenly by the technique of looking for an earlier formulation of a duty to exercise care and our text writers, in trying to rationalize the process, have debated at length the question whether there is a law of tort or only a law of torts.) Applying that standard at the second stage, we make our decision whether this particular defendant was negligent or not. This is in essence a jury question.

In determining the answer to the first question, a court may more readily find duty where physical damage is threatened by something startling—like poison or an explosion. This is the rationale of the pre-*Donoghue* v. *Stevenson* exception, which imposed a duty on the manufacturer of things "inherently" dangerous. But because (a) man is a talkative animal, and because (b) loose talk which is not defamatory ordinarily does relatively little harm, our law has hesitated to load on mankind the terrific burden of liability for every casual inaccuracy of speech which imposing liability for innocent misrepresentation would involve. But some innocent misrepresentation is more dangerous than others. Suppose *A* carelessly innocently misrepresents to *B* that a tin containing gasolene contains kerosene, and *B* in reliance makes a use of it which would be safe were it kerosene but which is explosively dangerous because it contains gasolene. *A*'s mere words in the circumstances create sufficient risk to *B* to transcend our general tolerance of careless words. Here we should impose liability. *Le Lievre* v. *Gould* and *Candler* v. *Crane* fall in this same category. In *Le Lievre* v. *Gould* the defendant surveyor made certificates of progress knowing that these certificates would be forwarded to the plaintiff mortgagee,

who would in reliance on them advance mortgage moneys. Here the risk is clear, close and undue. *Candler* v. *Crane* is in principle another *Le Lievre* v. *Gould*. The defendant prepared an audit knowing that the plaintiff was to advance money in reliance on it. Possibly the Court of Appeal was right in its unwillingness to reverse its earlier decision. Had the case gone to the House of Lords a golden opportunity for correcting earlier error would have been presented, and had the reasons for judgment been carefully written some rubbish would have been cleared away and lower courts left free to make such inroads on the *Derry* v. *Peek* rule as modern morality might dictate. The trouble with *Donoghue* v. *Stevenson* is largely that some of Lord Atkin's generalizations were too broad. These, taken out of their context and treated as inspired, have tended to cause some people to throw out the baby with the dirty water.

Probably the broad immunity for innocent misrepresentation, which *Derry* v. *Peek* proclaims and which *Candler* v. *Crane* reiterates, should be broken in upon, but to make the break in *Guay* v. *The Sun Publishing* is to go to the other extreme and overlook several serious intermediate problems. When the break in the innocent misrepresentation wall is made it should be made in favour of people (a) more likely to be hurt, (b) for harms more likely to be inflicted, (c) for damages more easily proven, and (d) less likely to be increased by the hope of compensation than emotional disturbance caused by grief caused by shocking news.

IV

The implications of the doctrine approved in the *Guay* case by the judges who would impose liability are extremely serious and would, when absorbed into the law, involve substantial change in other aspects of the law relating to damages. For instance, if it is negligence *qua* the wife or other close relative to publish a false report that *X* has been killed, because the belief induced by the news may cause *X*'s wife to suffer emotional disturbance, it is surely much more clearly negligent *qua* the wife (or other close relative) to cause (by killing *X*) the publication of a true report that *X* has been killed. True reports cause at least as much grief and emotional disturbance as false reports and the compensating relief and joy associated with the discovery that the report is false does not follow. Therefore, if the principle nearly accepted in this case is right, if *A* negligently runs his car into and kills *X*, and thereby inevitably causes *X*'s wife to be informed of the fact that *X* has been killed

in a motor vehicle accident, *A* commits a direct tort on *X*'s wife. *X*'s wife should have, if the thesis for liability in the *Guay* case is sound, in addition to her claim of loss of support under the Fatal Accidents Act, a separate claim of her own for the emotional disturbance *A* caused her by making inevitable the communication of *X*'s tragic death to her. This is not yet the law.

At present the law allows no compensation to the parent for the loss of a beloved child negligently killed by *A*, because, notwithstanding child allowances, a child is not regarded as an economic asset. If the thesis for liability in the *Guay* case is sound, a direct tort has been committed to the parent by *A* in causing the death of the child and thereby causing advice of the death to be communicated to the parents. The parents, therefore, if the argument for liability in the *Guay* case is sound, should recover for any emotional disturbance their friends and their psychiatrists could prove. This is not yet the law and legislation creating such a right of action is not likely to be consciously enacted. There is some agitation for the enactment of legislation giving the parents a right of action against *A* for burial expenses. If the courts are unable to work this out for themselves, the legislation is desirable, but it stops far short of the change which the implications of the thesis for liability in the *Guay* case would work.

Probably advocates of recovery in the *Guay* case would be reluctant to admit these analogies. One of the most remarkable things about the human mind is its capacity to accommodate inconsistencies. Nevertheless, an inconsistency in the law is subject to repeated challenge by counsel whose bias in favour of their clients sharpens their perception of it and, in time, the inconsistency yields. Unless we are prepared to allow recovery in the two hypothetical cases just mentioned, we should beware of the reasoning of those judgments in the *Guay* case which favour liability.

The Law is the true embodiment
Of everything that's excellent
It has no kind of fault or flaw,
And I, my Lords, embody the Law.
The constitutional guardian I
Of pretty young Wards in Chancery,
All very agreeable girls — and none
Are over the age of twenty-one.
A pleasant occupation for
A rather susceptible Chancellor!

(Sir W. S. Gilbert: Iolanthe. 1882)