# Negligence by Words

G. H. L. FRIDMAN*
*Adelaide, Australia*

I

Before and after the decision in *Candler* v. *Crane, Christmas & Co.*[1] the topic of liability for negligently made mis-statements of fact produced a number of learned articles.[2] In the Supreme Court of Canada in *Guay* v. *Sun Publishing Co.*[3] that decision helped to produce (but not entirely cause) judicial dissent. There the plaintiff suffered nervous shock as a result of reading a mis-statement of fact negligently inserted in the defendants' newspaper. She failed to recover damages, although a minority of the Supreme Court thought she should have done. But the reasons given by the majority for rejecting her claim did not coincide. Some thought that the tort of negligence could never be committed merely by word of mouth. Some were not so positive, but considered that in the instant case there was no duty of care owed to the plaintiff, or that damage by the plaintiff could not be traced back to the defendants' carelessness. The problem of negligence by words was considerably complicated by the issue of liability for causing nervous shock, which is, itself, still a subject of judicial and academic dispute.[4]

In view of this decision, it is submitted, there is some justification for reconsidering whether it is open to courts administering English law to recognize a duty of care not to make statements

*G. H. L. Fridman, M.A., B.C.L., Lecturer in Law in the University of Adelaide.

[1] [1951] 2 K.B. 164.

[2] Paton, Liability in Tort for Negligent Statements (1947), 25 Can. Bar Rev. 123; Fullagar J., Liability for Representations at Common Law (1951), 25 Aust. L. J. 278; Morison, Liability in Negligence for False Statements (1951), 67 L. Q. Rev. 212; Seavey, Candler v. Crane, Christmas & Co. Negligent Misrepresentation by Accountants, *ibid.*, p. 466; Wilson, Chattels and Certificates in the Law of Negligence (1952), 15 Mod. L. Rev. 160.

[3] [1953] D.L.R 577. Ross Parsons, Careless Misrepresentation and Nervous Shock (1954), 28 Aust. L. J. 12.

[4] *King* v. *Phillips*, [1953] 1 Q B. 429; Goodhart (1953), 16 Mod. L. Rev 14; (1953), 69 L Q.Rev. 347

that are untrue, that is, whether there can be such a tort as "negligence by words".

The advisability and ethics of providing for such liability have been discussed by Professor Seavey, who argued on grounds of policy that *Candler* v. *Crane, Christmas & Co.* was wrongly decided.[5] Mr. Wilson, who canvassed the possible scope of such a duty of care, was content to assume that it was open to the House of Lords to admit that some sort of liability could be imposed for carelessly made mis-statements.[6] Dr. Morison, writing before the decision of the Court of Appeal, came to the conclusion that on the then state of the authorities there might be liability for physical harm to the person or to chattels caused by negligent misrepresentation, but not for economic loss, unless there were some special circumstances leading to the expectation that the plaintiff would be indemnified for such a loss.[7]

The main purpose of the present writer in adding to the literature on the subject is to discuss *Candler*'s case in the light of previous authority, so as to attempt to show by analytical methods (and not by arguments from policy or social need) that the majority of the Court of Appeal were not right in concluding that they were bound to decide against liability; that the question was open for them to determine afresh; that Denning L.J. correctly interpreted the earlier cases in their spirit and their letter; and that consequently it is open to courts in Canada and Australia, as well as the House of Lords, and possibly the Court of Appeal itself, to conclude that liability for negligent mis-statements can be imposed at common law.

## II

The facts of *Candler*'s case should first be recapitulated. One Fraser a clerk in the employment of the defendants, a firm of accountants, was entrusted with the preparation of accounts for a particular company formed to work surface tin in Cornwall. The plaintiff was approached by the chairman and managing director (Ogilvie) of the company, and the plaintiff was told that if he invested £2,000 he would get a directorship of the company and a service agreement for two years at £10 a week. The plaintiff wanted to see the company's accounts, and, as a result of this request, Ogilvie told Fraser that he wanted the accounts to show to a potential investor called Candler. It appears from the evidence to be quite clear that Fraser knew that the accounts had some rela-

[5] 67 L.Q Rev. at pp. 472-481 [6] 15 Mod. L. Rev. at p. 161.
[7] His conclusions (i) to (viii), 67 L.Q.Rev. at pp. 227-228.

tion to the negotiations between Ogilvie and the plaintiff.[8] The accounts were drawn up, they were shown, with a certificate (not yet signed by the defendants, but in the usual terms as to correctness) to the plaintiff at a meeting with Fraser, and a copy was made by the plaintiff, who consulted with his own accountant. Eventually the plaintiff did invest the £2,000 in the company. The accounts were certified by the defendants in the form originally shown to the plaintiff and it subsequently turned out that they gave a false picture of the position of the company. As a result, the plaintiff suffered heavy personal loss and, obtaining no redress from the company (which on winding up had no assets), he sued the defendants.

Two questions arose: first, whether Fraser was in the employment of the company in making the accounts. Lloyd-Jacob J. and the Court of Appeal treated it as clear that Fraser was acting in the course of his employment and nothing, consequently, turns on that point. The second question was whether the defendants owed a duty of care to the plaintiff; it was here that the dissension came about Lloyd-Jacob J. and the majority of the Court of Appeal (Asquith and Cohen L.JJ.) dismissed the plaintiff's action, while Denning L J. was in favour of giving him his remedy in damages.

The judgments of the majority were founded upon the correctness and binding effect of *Le Lievre* v. *Gould*.[9] They were also based upon the classic case of *Derry* v. *Peek*.[10] The whole problem, in effect, is to determine the exact meaning and scope of these two cases; for the submission to be made by the present writer is that the effect of those decisions was misinterpreted in *Candler*'s case by the majority, who, it is respectfully suggested, failed to appreciate their place in the structure of a modern law of torts.

The facts of *Derry* v. *Peek* are sufficiently well known to make it unnecessary to rehearse the tale of the misleading prospectus with its fable about tramways. It is essential, however, to consider at length the judgments in that case and the discussions that have taken place subsequent to it on the issue: What did the case decide? No one will deny that *Derry* v. *Peek* decided that fraudulent or near fraudulent conduct is required to substantiate an action for deceit. But there are numerous statements by eminent judges (indeed they are so eminent that their names are thus lent to an opinion for which it is submitted there is no other real authority) that *Derry* v. *Peek* also decided by implication that an action for negligence

[8] See [1951] 2 K.B. 164, at p. 166.
[9] [1893] 1 Q.B. 491.
[10] (1889), 14 App. Cas. 337.

will never lie where words are carelessly spoken without fraud, or recklessness approximating to fraud, unless there is a contractual or fiduciary obligation existing between the parties, or unless the principle of estoppel can be applied.

The two main speeches in *Derry* v. *Peek* were those of Lord Herschell and Lord Bramwell. Throughout the whole of Lord Herschell's speech the issue was entirely whether an actual falsehood, that is, fraud, was necessary to found an action for deceit. After considering the authorities in detail (and his discussion of them constitutes the greater portion of his judgment), he came to the conclusion[11] that only a false representation knowingly made, or made without belief in its truth, or recklessly made, could amount to fraud. Nowhere did he discuss the question of an action for negligence, unless it be in the passage[12] where he spoke of the wideness of Cotton L.J.'s language in speaking of a right to hear the truth told, and this surely cannot be regarded as disposing of the whole problem. Where Lord Herschell did speak of lack of reasonable grounds of belief (that is, negligence), it was only because such conduct was material to the question whether in itself (without evidence or proof of actual fraud) it was sufficient to found an action for deceit.

Lord Bramwell's speech is more misleading. He used language, it must be confessed, that seems to close the door to an action. He frequently referred to the possibility of liability, making use of such phrases as "cause of action"[13] and[14] "actionable", "a ground of action", "actions should be maintainable". But it is not clear from the general nature of his speech whether, in coupling such phrases with denials of liability, he was referring to the particular kind of action before the house on that occasion (namely, deceit) or to any action in tort or contract. If he was referring to deceit only, he is patently correct; if to any action generally there is more room for doubt: his remarks are certainly obiter.

Lord FitzGerald explicitly stated: "The action is for deceit";[15] and it is difficult to see how any other question could have been involved with that of "fraud or no fraud", or could have been material to deciding that issue, in particular whether there can be brought an action for negligence when statements are carelessly made in the absence of any contractual obligation.

Despite the seeming obviousness of this, there have been judges

---

[11] (1889), 14 App. Cas. at p 374.
[12] *Ibid*, p. 362.
[13] *Ibid.*, p. 351.
[14] *Ibid.*, p. 352.
[15] *Ibid*, p. 353.

who thought differently Thus Romer J. in *Scholes* v. *Brook*[16] said that liability in tort for negligent statements could not exist, since, as he put it, "*Derry* v. *Peek* by implication negatives the existence of any such general rule".[17]

Similar expressions are to be found in two cases decided in 1891 by the Court of Appeal. But these expressions also, it is submitted, were obiter and inconclusive. For in one case the court was concerned with the liability of a trustee, which meant that special rules applied; and in the other the action was one for deceit (not negligence) and it was sufficient to dispose of the action to consider only the clear ratio decidendi in *Derry* v. *Peek*, that is, the nature of the fraud required for deceit. In the first, *Low* v. *Bouverie*,[18] Bowen L.J., after considering that *Derry* v. *Peek* decides the point about fraud, went on to say:[19]

> But *Derry* v *Peek* decides, secondly, that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made.

This might be interpreted to mean that an action cannot be brought in negligence for carelessly spoken words; yet it seems preferable to regard these words as meaning that in the special circumstances of *Derry* v. *Peek* no duty of care was owed. Such a reflection has nothing to do with the actual decision by the House of Lords in that case, for the sole problem for them to consider was whether negligently made statements gave rise to the same remedy as fraudulent ones.

But Bowen L.J. continued with the following passage, from which, it is submitted, may be gleaned some measure of support for the opinion that a duty to be careful in what you say does count in some circumstances:[20]

> Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry. In *Derry* v. *Peek*, the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognises, to be careful.

---

[16] (1890), 6 L.T. 837. His remark is obiter, it is submitted, because he held that in the circumstances of the case—a statement made to a mortgagee by a surveyor regarding a variation in the value of a security for the mortgage—there was a contractual relationship existing between the parties, so that an action clearly lay.

[17] *Ibid.*, p. 839.

[18] [1891] 3 Ch 82.

[19] *Ibid.*, p. 105.

[20] *Ibid*

With these remarks should be compared some passages in the second of the two cases decided by the Court of Appeal in 1891, *Angus* v. *Clifford*.[21] This was a case in which an action for deceit was brought upon negligent statements in a prospectus. The facts were reminiscent of the earlier House of Lords decision. In these circumstances, faced with the categorical statement by the House of Lords that mere negligence is insufficient to support a charge of fraud and therefore an action for deceit, the Court of Appeal could hardly conclude otherwise than against the plaintiff. But in discussing the effect of *Derry* v. *Peek* the members of the court used language that is capable of being misinterpreted. Thus Lindley L.J. said:[22]

> Speaking of *Peek* v. *Derry* broadly, I take it that it has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained. . . . and, as I understand *Peek* v. *Derry*, it settles that question in this way—that an action for a negligent, as distinguished from a fraudulent, misrepresentation in a company's prospectus cannot be supported;

Bowen L.J. was even more sweeping:[23]

> I am satisfied that what *Peek* v. *Derry* did was to decide that there was no legal duty cast upon persons in such cases to take reasonable care in forming their belief—that is to say that negligence in forming their belief did not give rise in such cases to a cause of action. *Peek* v. *Derry* certainly did not alter the old law about deceit. . . . I am not closing my eyes to the very great importance of *Peek* v. *Derry*, in deciding what I think *Sir Horace Davey*[24] is right in saying it did decide, that an action will not lie for negligence in forming the belief.

Similarly Kay L.J. must be taken to have felt that there was a second, if subsidiary, point decided in *Derry* v. *Peek*, since he referred to the question whether lack of reasonable grounds for believing that statements are true is to be treated as fraud as the "main question discussed by the noble Lords, in the speeches they made".[25] These quotations show that the court framed its comments misleadingly.

In *Le Lievre* v. *Gould*,[26] *H* sold land to *L* under a building agreement. In order to enable *L* to build the houses agreed upon, *H* arranged for the plaintiffs to advance money to *L*. He also agreed with the defendant, an architect and surveyor, that the defendant

[21] [1891] 2 Ch. 449. [22] At p. 463. [23] At p. 470.
[24] Counsel in *Angus* v. *Clifford*.
[25] At p. 476; and compare the same judge in *Low* v. *Bouverie*, [1891] 3 Ch. 82, at p. 112.
[26] [1893] 1 Q.B. 491.

should build the houses. In the mortgage with the plaintiffs it was agreed that the mortgage money should be advanced in instalments, each advance being made only when the surveyor certified in writing that the house or houses in respect of which the advances were to be made had been proceeded with. The defendant was unaware of the contents of the mortgage deed. But he did know that he had to give certificates from time to time that the work had reached the stage at which "the respective instalments were to be advanced as provided by the schedule of advances, a copy of which was given to the defendant".[27] The defendant was careless in making and delivering the certificates, as a result of which the plaintiffs advanced the mortgage money when they need not have done so, thereby losing it. The plaintiffs' claim failed. For it was held that the defendant owed no duty of care to the plaintiffs, to whom he was not contractually bound. Since he had not been guilty of fraud, they had no right of action against him.

To this case reference will be made again later. For the moment, the interest it has is in the way the Court of Appeal dealt with the effects of *Derry* v. *Peek*. Some very wide statements were made. Thus, Lord Esher M.R. said:[28]

> the House of Lords in *Derry* v. *Peek* . . . restated the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud.

Bowen L.J., after saying[29] that the first point decided in *Derry* v. *Peek* was that an action for deceit cannot succeed without proof that the defendant was fraudulent, went on to say:[30]

> Then *Derry* v. *Peek* decided this further point — viz., that in cases like the present (of which *Derry* v. *Peek* was itself an instance) there is no duty enforceable in law to be careful. Negligent misrepresentation does not amount to deceit, and negligent misrepresentation can give rise to a cause of action only if a duty lies upon the defendant not to be negligent, and in that class of cases, of which *Derry* v. *Peek* was one, the House of Lords considered that the circumstances raised no such duty

One feature of this passage calls for immediate comment. Bowen L.J. compared the circumstances in *Derry* v. *Peek* with those in the case he had decided ("cases like the present of which *Derry* v. *Peek* was itself an instance"). But this comparison was unjustified. The persons sued in *Derry* v. *Peek* were directors of a company, with which the plaintiff entered upon a contractual relationship by the purchase of shares. The directors, in issuing the prospectus, were

[27] *Ibid*, p. 492.
[28] *Ibid.*, pp. 497-498
[29] *Ibid.*, p. 499.
[30] *Ibid.*, p 501.

presumably agents of the company. There is thus an element of contract about the whole affair. In *Le Lievre* v. *Gould*, on the other hand, there is not the slightest scintilla of evidence of any contractual relationship existing between the plaintiff and the defendant. Deceit, though an action in tort, in many ways approximates to an action for recission of contract and damages for fraudulent misrepresentation. That is why in *Derry* v. *Peek*, in view of the contractual aspects of the case, fraud, not merely negligence, was a necessary element in the plaintiff's case. But why should this have been so in *Le Lievre* v. *Gould*, which was a case of pure tort? There is no juridical connection between the tort of negligence and an action for breach of contract, or a claim for recission and damages for fraudulent misrepresentation in respect of a contract. It was indeed only when judges got out of the legal cul-de-sac which led them to allow actions only to contracting parties for damage caused through the negligent performance of a contract that the tort of negligence was able to achieve its destiny.[31] Before 1932 there were difficulty and confusion.[32] But that confusion should now be dispelled. By affirming *Le Lievre* v. *Gould* the Court of Appeal in *Candler*'s case were returning to a stage in legal thought when confusion about the scope of the tort of negligence still abounded. They were, in fact, continuing to suppress the sensible view which had been put aside in the earlier case.

For *Le Lievre* v. *Gould* expressly overruled the only case in which the problem of liability for negligent statements was treated tortiously, without any confusion with contractual liability. This was the decision of Chitty J. in *Cann* v. *Willson*.[33] In *Cann* v. *Willson* money was advanced by a mortgagee on the strength of a valuer's report. That report was negligently made, as a result of which the mortgagee lost money. Chitty J. held that there was no contract between the valuer and the mortgagee. Nevertheless he was prepared to base (and did base) the valuer's liability on negligence;

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

[32] Compare, for example, *George* v. *Skivington* (1869), L.R. 5 Ex. 1, with *Earl* v *Lubbock*, [1905] 1 K.B. 253. In one an action lay and a remedy was given, in the other the insistence upon the strictness of the law of contract (as opposed to the flexibility of tort) meant the plaintiff's failure.

[33] (1888), 39 Ch. 39. There is also the case of *Dickson* v. *Reuter's Telegram Company* (1877), 3 C.P.D. 1. Here no liability in negligence ensued when the defendants delivered a telegraphic message wrongly to the plaintiff, who acted upon it and suffered damage. This seems on the face of it to be a case of pure tort; but was there not a contractual complication? The use of such terms as "misrepresentation" and "estoppel" seems to indicate that there was. Moreover, the case turned on special facts, which even today might give rise to no liability, and no authority was cited. The conclusion submitted is that this case is of doubtful authority on the point we are now considering.

and he cited[34] in support of his decision in the plaintiff's favour such cases of negligence as *Heaven* v. *Pender*[35] and *George* v. *Skivington*.[36]

This decision was overruled by the Court of Appeal in *Le Lievre* v. *Gould*, because the court held that it had been impliedly overruled by the House of Lords in *Derry* v. *Peek*. The basis of this conclusion was that the House of Lords decided that no action in negligence would lie for damage caused by mere words.

There are two reasons for rejecting this argument. In the first place, *Cann* v. *Willson* was not cited by counsel or referred to in any of the speeches in *Derry* v. *Peek*. Secondly, and this is more important since it shows that the problem raised in *Cann* v. *Willson* was not before the House of Lords and could not have been considered by their Lordships, *Derry* v. *Peek* did not depend upon the issue of negligence for its determination. The sole question—as seen previously—was one of fraud. Reference has already been made to the speeches in the House of Lords as proof of that contention. But there is confirmation for that point of view (which is consequently disastrous to the point of view taken in *Le Lievre* v. *Gould*) in certain remarks made in the House of Lords in *Nocton* v *Lord Ashburton*.[37]

This case concerned the liability of a solicitor for a negligently made statement whereby damage was caused to the plaintiff. The statement amounted to an improper valuation of a security on which a mortgage was made. The House of Lords held that the fiduciary relationship between the solicitor and the plaintiff was such that "fraud" in the common-law, *Derry* v. *Peek* sense did not enter into the question of liability. Mere negligence in making the statement was sufficient. In the course of his speech Viscount Haldane L.C. had this to say about *Derry* v. *Peek*:[38]

> My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. . . . I think that the authorities subsequent to the decision of the House of Lords shew a tendency to assume that it was intended to mean more than it did.

Some of these authorities have already been examined. Lord Haldane went on to speak in precise terms of liability for negligence.

> . . Although liability for negligence in word has in material respects

[34] 39 Ch. D at pp 42 ff
[35] (1883), 11 Q.B.D 503.
[36] (1869), L.R 5 Ex. 1.
[37] [1914] A.C. 932.
[38] *Ibid.*, pp. 947-8.

> been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. . . . Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.[39]

In the same case Lord Shaw of Dunfermline made what, it is submitted, was an accurate and forceful interpretation of *Derry* v. *Peek*. He said:[40]

> And it should not be forgotten that *Derry* v. *Peek* was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that—this being so—what was decided was that fraud must ex necessitate contain the element of moral delinquency. Certain expressions by learned Lords may seem to have made incursions into the region of negligence, but *Derry* v. *Peek* as a decision was directed to the single and specific point just set out.

When such statements are considered, and this point is taken in conjunction with the argument already advanced that the tincture of contract in *Derry* v. *Peek* was so strong that the tortious flavour of the case was almost excluded, then it is submitted that the point as to negligence was left open by the House of Lords, and the note in the Law Quarterly Review[41] is wrong. There it was said (commenting on *Le Lievre* v. *Gould*):

> There is nothing to be gained by further discussion of the law as laid down by the House of Lords in that case [that is, *Derry* v. *Peek*]. We have to take it as settled that there is no general duty to use any care whatever in making statements, in the way of business or otherwise, on which other persons are likely to act.

In these circumstances it is submitted: first, that there was no authority for the Court of Appeal in *Le Lievre* v. *Gould* to overrule *Cann* v. *Willson*, secondly, that the decision in that case is to this extent erroneous.

But, even apart from the correctness of the Court of Appeal in overruling the earlier decision of Chitty J., they should have allowed the action in *Le Lievre* v. *Gould*. Such arguments on principle as were advanced were not convincing. Lord Esher M.R. decided the case purely on the basis that *Cann* v. *Willson* was wrong, because

[39] This statement by Lord Haldane has been treated as referring to cases where a fiduciary relationship exists between the parties, giving rise to a need for complete honesty and truthfulness, making it imperative for a defendant to tell the truth, and, consequently, involving him in liability if he negligently misinforms the plaintiff. But it is submitted the wider view, unrestricted to such a limited class of cases, can be taken.

[40] *Ibid*, pp. 970-971.

[41] (1893), 9 L.Q. Rev. 202.

the principle of law laid down by Chitty J. was shown to be erroneous in *Derry* v. *Peek*. Bowen L.J. endorsed Lord Esher's view of *Derry* v *Peek* and the effect of that case on *Cann* v. *Willson*, but went on to consider whether the principle of *Heaven* v. *Pender*[42] was applicable. He held it was not because[43]

> the law of England does not go to that extent; it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.

For the first part of this proposition no authority was cited other than the decision in *Derry* v. *Peek* (which in no way supports it) and the judgment of Romer J. in *Scholes* v. *Brook*, in which that learned judge purported to follow and apply the House of Lords ruling. Very little reliance, it is submitted, can be placed on *Scholes* v. *Brook*. Firstly, Romer J.'s interpretation of *Derry* v. *Peek* was wrong; secondly, that interpretation was merely obiter.[44]

There is thus no justification to be found in any authority for Bowen L.J.'s statement; and it is submitted respectfully that the distinction he draws between writings, on the one hand, and guns and other dangerous instruments, on the other, is a feeble and sophistical one in these days, since another of the effects of *Donoghue* v. *Stevenson* has been virtually to eradicate from the law the distinction between dangerous things and other things.

Moreover Bowen L.J.'s differentiation in some instances has not been recognized in English law. Leaving out of consideration the law on defamation and injurious falsehood (which might be classed as special instances of liability), in *Wilkinson* v. *Downton*[45] and *Janvier* v. *Sweeney*[46] there was held to be liability for injuries through nervous shock caused by the making of untrue statements. These cases profess to be cases of deceit, but it is submitted that, certainly in the earlier of the two, where the statement about the plaintiff's husband's injuries was intended as a practical joke (as Wright J. found), there could not have been any intention that the plaintiff should act upon the statement in a manner comparable to the intention of the defendant in *Pasley* v. *Freeman*[47]. In *Janvier* v. *Sweeney* it might perhaps be said that the intention of the questioner investigating on behalf of the defendant was, by his utterance, to get the plaintiff to act to his detriment; but once again this is by no means as certain as in the ordinary case of deceit.

[42] (1883), 11 Q.B.D. 503.
[43] [1893] 1 Q.B. at p. 502.
[44] See footnote 16 *supra*.
[45] [1897] 2 Q.B. 57.
[46] [1919] 2 K.B. 316.
[47] (1789), 3 T.R. 51.

The statement was not an inducement to get the plaintiff to act; for what was said, according to the finding of the jury (which was not upset by the Court of Appeal), was:[48]

> I am a detective inspector from Scotland Yard, and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy.

That may be calculated to injure, but it is a considerable extension of the ordinary rule that to found an action for deceit there must be a false statement of fact made with the intention of getting the plaintiff to act upon it.

The better view would seem to be that these were cases where the courts thought that a remedy should be available, as there was obvious wrongdoing and physical harm had been suffered; whether they should properly have been classified as cases of deceit is another matter. It might be added that deceit is usually a remedy for *economic loss* produced by wrongdoing—not physical harm. For the latter some other form of liability is more customary: that is, trespass, where the harm was intentionally produced; negligence, where it was caused accidentally.[49] It is submitted that they were, in truth, cases of liability for negligently made statements, all the more negligently made for being consciously and knowingly untrue, since the carelessness consisted of failure to avoid harm which a reasonable man would expect to ensue.

Returning to *Le Lievre* v. *Gould*, the judgment of A. L. Smith L.J. must be mentioned. This is in similar terms to that of Bowen L.J. In A. L. Smith L.J.'s opinion, *Heaven* v. *Pender* did not apply; and *Cann* v. *Willson* was not good law and, in any event, had been overruled by *Derry* v. *Peek*. The validity of these conclusions has already been questioned.

## III

The argument that *Le Lievre* v. *Gould* decided the point at issue in *Candler*'s case therefore seems, it is submitted, to be ill-founded. *Le Lievre* v. *Gould* in fact decided nothing except that *Cann* v. *Willson* was wrong. But, the further submission is made that the Court of Appeal incorrectly applied *Derry* v. *Peek* when overruling the judgment of Chitty J. If by the arguments I have set out this charge is shown to be proved, the question that remains to be discussed is whether *Le Lievre* v. *Gould* was binding upon the Court

[48] [1919] 2 K B. at p. 317.

[49] In the United States the idea that statements causing nervous shock are actionable in trespass or negligence is widespread. See Prosser, Handbook of the Law of Torts (1941) pp. 59-65.

of Appeal in *Candler*'s case. It is obviously not binding upon the House of Lords, by whom the real effect of *Derry* v. *Peek* remains for consideration. But both Asquith L.J.[50] and Cohen L.J.[51] said that *Le Lievre* v. *Gould* was binding upon them. They also thought that the case was conclusive of the point before them. These determinations the present writer respectfully submits were unjustified and wrong.

Asquith L.J. said that in the absence of any express or implied overruling of *Le Lievre* v. *Gould*, or the possibility of distinguishing it, that case was binding. By this he was presumably referring to the judgment of the Court of Appeal in *Young* v. *Bristol Aeroplane Co., Ld.*,[52] where it was laid down that the Court of Appeal is bound to follow its own previous decisions unless (a) there are two conflicting decisions, in which event it can make a choice, or (b) its previous decisions, though not expressly overruled, cannot stand with a decision of the House of Lords, or (c) the previous decision was given *per incuriam*. This last exception to the general rule concerns us here. To what do the words "per incuriam" refer?[53]

In *Young*'s case Lord Greene M.R., delivering the judgment of the court, gave as an example of "per incuriam" a case where the court in coming to its conclusion had forgotten, or had not been referred to, a statute or rule having statutory force; he then continued:[54]

> We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.

It is therefore submitted that *Le Lievre* v. *Gould* could have been dealt with in that way. If the Court of Appeal misinterprets a judgment of the House of Lords, and applies it mistakenly where it should never have been applied, that, it is submitted, is a decision given *per incuriam*. Often it has been held that where a wrong decision has been acted on by the courts for years it will not be upset although recognized as incorrect, that in fact *communis error facit jus*.[55] But *Le Lievre* v. *Gould* was decided almost solely on the

[50] [1951] 2 K.B 164, at p. 187. [51] *Ibid.*, p 200.
[52] [1944] K.B. 718.
[53] Cf. on what follows a paper by Asquith L.J., Some Aspects of the Work of the Court of Appeal (1947-1951), 1 Journal of the Society of Public Teachers of Law (N.S) 350, at p. 362.
[54] [1944] K.B. at p. 729.
[55] Cf the treatment afforded to *Hyams* v. *Stuart King*, [1908] 2 K.B. 696.

ground that *Derry* v. *Peek* overruled by implication *Cann* v. *Willson*. If the present argument is accepted, this is wrong, and the ratio decidendi of the Court of Appeal must crumble away, leaving *Cann* v. *Willson* still valid and applicable. Here, if ever, was an obvious opportunity for the Court of Appeal in 1950 to overrule the Court of Appeal of 1892.

It was more or less inferred in *Candler*'s case[56] that the House of Lords in *Donoghue* v. *Stevenson*[57] had had the opportunity of overruling *Le Lievre* v. *Gould* but did not do so. Indeed it is true that Lord Atkin quoted from that case with approval, and did not express disapproval of the decision. Asquith L.J. went so far as to say that Lord Atkin, in laying down his famous principle, must have had *Le Lievre* v. *Gould* in mind and, as he did not say it was inconsistent with the principle he was laying down, he must have intended to exclude it. In Asquith L.J.'s words:[58]

> . . . it seems to me incredible that if he thought his formula was inconsistent with *Gould's* case he would not have said so. . . . He must have considered it closely. Yet his only reference to it is as annexing a valid and essential qualification to Lord Esher's [then Brett M.R.] formula in *Heaven* v. *Pender*. Not a word of disapproval of the decision on its merits. The inference seems to me to be that Lord Atkin continued to accept the distinction between liability in tort for careless (but non-fraudulent) misstatements and liability in tort for some other forms of carelessness, and that his formula defining 'who is my neighbour' must be read subject to his acceptance of this overriding distinction.

This is the reason why earlier on[59] Asquith L.J. had said:

> The notion that *Donoghue's* case was intended parenthetically or sub silentio to sweep away the substratum of *Derry* v *Peek* seems to me quite unconvincing

Of course *Donoghue* v. *Stevenson* was not intended to have any effect upon the rule in *Derry* v. *Peek*. How could it? The earlier case, on the arguments submitted already, had nothing to do with the tort of negligence. But the argument in relation to *Le Lievre* v. *Gould* is of greater importance. Was Lord Atkin really endorsing *Le Lievre* v. *Gould* when he did not say it was wrong? As Asquith L.J. pointed out, he only referred to the case in order to obtain support for his formula. It is surely not to be taken for granted from the absence of criticism or express approval that Lord Atkin

[56] See Asquith L.J., [1951] 2 K.B. at pp. 189-193, and Cohen L.J., *ibid.*, at p. 200.
[57] [1932] A.C. 562.
[58] [1951] 2 K.B. at p. 189. Cf. also Cohen L.J. at p. 200.
[59] At pp. 186-187.

was content with the judgments in the case. He, too, may have been misled by the facile way in which *Derry* v. *Peek* was utilized to decide that case. He may not have thought that the application of *Derry* v. *Peek* was due to a misinterpretation.

The inference drawn by Asquith L.J., it is submitted, is not as inviting as the learned lord justice might wish. If Lord Atkin took the view of *Derry* v. *Peek* that some judges have done, then his behaviour in regard to *Le Lievre* v. *Gould* is perfectly explicable. But that is simply because he perpetuated the delusion of the Court of Appeal; if he held the same opinion as they upon *Derry* v. *Peek*, he could not express disapproval of their judgment. But if, as is submitted, that opinion is erroneous, then Lord Atkin's judgment is no authority for saying that *Donoghue* v. *Stevenson* and *Le Lievre* v. *Gould* are inconsistent, unless negligence with words is carefully and sharply distinguished from other kinds of negligence. They are obviously consistent on the *Le Lievre* v. *Gould* view of *Derry* v. *Peek*, and if that view is wrong, then Lord Atkin's formula defining "who is my neighbour" no longer has to be read subject to the distinction mentioned by Asquith L.J. For these reasons, therefore, to say that *Donoghue* v. *Stevenson* did not overrule *Le Lievre* v. *Gould* is as pointless as to say that the later case sustained and confirmed the earlier. The point raised was never in fact dealt with in *Donoghue* v. *Stevenson*, either expressly or by implication.

There is one other ground left for saying that *Le Lievre* v. *Gould* is good law and conclusive. It was mentioned by Cohen L.J.[60] Speaking of *Derry* v. *Peek*, he said that it was

> implicit in the speeches that their Lordships would have reached the same conclusion had there been an alternative plea of negligence.

This point has already been discussed and does not require re-argument. Earlier in this article it was suggested, and explained, that there are no grounds (or at best the flimsiest, for they depend upon the particular facts of that case) for saying that the question of liability in negligence was ever discussed or determined in *Derry* v. *Peek*.

It is submitted, therefore, that the arguments put forward in *Candler*'s case to prove that *Le Lievre* v. *Gould* is good law are unsatisfactory, and do not prove the point which they were intended to prove.

There was some consideration by Asquith L.J. of the possibility that *Le Lievre* v. *Gould* could be distinguished (admitting that the case was wrong on principle but right on the facts, since there was

[60] [1951] 2 K.B. at p 200

insufficient proximity between the defendant and the plaintiff to found an action on the principle later enunciated by Lord Atkin, following *Heaven* v. *Pender* and its restatement in *Le Lievre* v. *Gould*—an argument that might explain why Lord Atkin did not overrule the case). It is submitted that, if the argument on the incorrectness of the decision is accepted, there is no need to distinguish the case, for it was wrong in principle and wrong in its treatment of the facts, having regard to the principle that ought properly to have been applied. There are some grounds, however, for drawing a distinction between *Candler*'s case and *Le Lievre* v. *Gould* (although Asquith L.J. did not think such a distinction possible).

In the former case the person making the accounts was expressly told they were to show to a potential investor called Candler; he knew also that the accounts had some relation to the negotiations in which the plaintiff Candler was involved. But in the latter case the agreement for the defendant to give certificates, proving that work on the houses had reached the respective stages at which instalments on a loan were to be advanced, was made *before* the execution of the mortgage deed under which the plaintiffs advanced the money. Furthermore, the contents of that deed (which provided among other things that the mortgagee should not be bound to make any advances unless and until certificates were produced by the surveyor) were unknown to the defendant, the surveyor, and the deed was made between people who were strangers to the first agreement made by the defendants.

On the view taken of "proximity" in 1892, no action would lie. But on the modern view of proximity (as recently developed) the facts would be regarded as providing sufficient proximity. In 1892 it would have been necessary for the plaintiff to show that the defendant had him actually or inferentially in mind, whereas now it is sufficient to show that as a reasonable man he could reasonably have foreseen that damage to the plaintiff would occur.[61] Even, therefore, if there had been a principle of liability for negligence in making mis-statements in 1892 (that is, if the decision on the law had been the opposite in *Le Lievre* v. *Gould*), on the general law of negligence as it then stood no liability could have been incurred on the facts of that case. But if a case with exactly *similar* facts came before the court today (and it should be noted that the facts in *Candler*'s case were, for the reasons given, not *exactly* similar),

[61] *Donoghue* v. *Stevenson*, [1932] A.C. 562, and *Bourhill* v. *Young*, [1943] A.C. 92.

if the principle of liability for negligent statements were adopted, on the present-day view of the law of negligence it is submitted that the plaintiffs would have a remedy.[62]

This therefore is the line of reasoning that leads to the conclusion that the majority of the Court of Appeal in *Candler*'s case incorrectly stated the law and arrived at the wrong decision.

## IV

Although the prime intention of the present article is to discuss the value of *Candler*'s case, in terms of its theoretical basis, in order to point out its weaknesses as a precedent in England and elsewhere, the dissenting and, it is submitted, more acceptable judgment of Denning L.J should not be forgotten. For it goes a long way towards laying down and explaining the general rules which should be applicable to liability in tort for negligently made statements Denning L.J. set out his opinion in three propositions. First, he asked which persons were under a duty to use care in making statements His answer was in these terms:[63]

> those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people — other than their clients — rely in the ordinary course of business

This definition, or enumeration, of people under a duty to take care what they say is a cautious one. It will be seen that it would not cover the facts in such a case as *Dickson* v. *Reuter's Telegram Co.*,[64] for telegraph companies do not carry on the business of making reports on which other people rely: they are in a peculiar category, and it is not everybody who can make himself liable for making a negligent or carelessly worded statement. As Denning L.J. went on to make clear, the reason why these particular persons should be made liable is that they have special knowledge or skill on which others depend. This is in fact a true and valid reason for making people liable in tort, where the law implies a duty through the special position of the defendant, as opposed to liability on contracts, where the defendant takes a duty upon himself. As Denning L.J. said of such people:

[62] It will be noted that in this view the present writer expresses dissent from the opinion of Denning L J. in *Candler*'s case (at p. 181). But the question of what the reasonable man should foresee is not easy. Precisely that issue caused a difference of opinion between Kerwin J. in the majority and Rinfret C.J. and Cartwright J. in the minority in *Guay* v. *Sun Publishing Co.*, *supra* footnote 3. Cp. also the difference of opinion in cases of nervous shock

[63] [1951] 2 K.B at p 179 [64] (1877), 2 C P D. 1

> Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports. Herein lies the difference between these professional men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements. . . . But it is very different with persons who engage in a calling which requires special knowledge and skill. From very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work, apart altogether from any contract or undertaking in that behalf.

Here is the crucial distinction. For the difference between professional men and others makes it much easier to stem any rush of actions for carelessly made statements. Only those cases which really deserve the intervention of the courts will be made actionable, not all cases irrespective of the position of the parties. As Jeremiah Smith put it fifty years ago:[65]

> The question is not whether a remedy shall be allowed for all negligent misstatements, but whether it shall be allowed in a class of cases where the negligence is especially deserving of censure

That question has now been answered in terms. Those people are made liable for their statements who should, because of the confidence the public places in them, exercise greater care than the ordinary man in the street. For them fraud ought not to be the only ground of liability; negligence, too, should render them under the obligation to give compensation.

Denning L.J. next considered the question: To whom were such specially skilled people liable?[66] It should be remembered that in *Donoghue* v. *Stevenson* the "ultimate user or consumer" was designated as the person entitled to be looked after with care. Those words raise delicate problems relating to borrowers, hirers and trespassers; with these precise questions we are not now concerned. But how far does the duty in regard to statements extend? On this point, the judgment of Denning L.J., it is submitted, is out of step with the law of negligence in regard to things. Elsewhere, the duty of care is owed to those who it is reasonably possible to foresee will be affected by one's negligent act or omission. Denning L.J. puts his rule for negligent statements thus:[67]

> Secondly, to whom do these professional people owe this duty?

[65] Liability for Negligent Language (1900-01), 14 Harv. L. Rev. 184, at p. 189.

[66] On what follows contrast Wilson in (1952), 15 Mod. L. Rev 160, at pp 166-176.

[67] [1951] 2 K.B. at pp. 180-181

> . . . They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts.

It is submitted that the learned lord justice's statement of the extent of the duty should have gone on after "take some other action on them" with the words, "or to any person who they can reasonably foresee will be shown the accounts so as to be induced to invest money, etc." This would enable the wider principle of tort liability to come into play, and would bring negligently made statements in the same category as negligently driven motor cars or cycles,[68] exploding once for all the fallacy of not treating such a statement as a thing as dangerous as a loaded gun or a rickety chair A little farther on in his judgment Denning L.J. summed up his contention by saying:

> The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?

With the suggested emendation, that passage would read: "Could the accountants reasonably foresee that the accounts were required for submission to the plaintiff and use by him?" Not to put the law in this way would be to perpetuate—even though in a modified way—the unreasonable distinction between words and chattels.

The third and last point discussed by Denning L.J. is closely connected. The learned lord justice said:[69]

> Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required.

He drew a distinction, therefore, between particular transactions actually in the mind of the person making the report at the time he did so, and other transactions not so in mind, for example. a special investigation by a scientist, as contrasted with the general published works of that scientist. This obviously followed from Denning L.J.'s previous point about the persons to whom a duty is owed. For if the accountant knows the person to whom the report is shown, he probably knows also the transaction in respect of which the report is shown. (If, of course, the accountant is told one thing and another happens, it would depend upon the differ-

[68] See *Bourhill* v *Young*, [1943] A.C. 92.
[69] [1951] 2 K B at p. 182.

ence. For example, *A* tells the accountant his account is to be shown to *B* to get *B* to buy shares. *A* shows it to *B* to get a loan on the security of the shares instead—liability; but if *A* shows it to *B* to persuade him that *A*'s daughter is assured of a good income and therefore gets *B* to marry her, there would be no liability.)

But what if the scope of the duty is wider, as suggested, that is, that the accountant owes a duty to persons who he can reasonably foresee will be shown the accounts? Surely then the transactions to which that duty of care extends become those which the accountant can reasonably foresee will arise out of his report. This becomes of major importance when considering the liability of scientists, map-makers, and the like, for papers, maps and so on that they draw up with the intention they should be made public. For if they do not know exactly who is using their documents and relying upon them, or for what purposes those documents are being used, on Denning L.J.'s view they would not be liable. But if they make available documents which are the sort that people in a certain category are accustomed to trust, and upon the faith of statements made in them are accustomed to act, then liability ought to ensue, if the persons acting upon the document are persons who would be expected to do so, and the purpose for which they act upon it is the customary and proper purpose, such as would be expected by the maker of the document. For example, take the marine hydrographer spoken of by Professor Winfield[70] and Asquith L.J.[71] They both suggested that there would be no liability. But why should that be so? If a sailor reasonably acts on a statement (that is, a representation of fact) in a map,[72] and suffers damage because of it, should not the mapmaker (and his employer if any) be held liable in damages? It is submitted that in such circumstances there should be liability. It is legally and socially desirable that there should. This follows logically from Denning L.J.'s proposition that the duty is really owed because those persons are in a profession that requires "special knowledge and skill". The liability is imposed because of their position, as explained; therefore there is no justification for differentiating between accountants, surveyors and the like, on the one hand, and mapmakers, meteorologists and similar people, on the other. Suppose, for example, that a meteorologist employed by the Air Ministry negligently gave a wrong forecast about the weather, due to his carelessly omitting a

[70] A Textbook of the Law of Tort, p. 392.
[71] [1951] 2 K.B. at pp. 194-195
[72] The question of his reasonableness would affect any issue of contributory negligence.

certain test, and on the strength of the forecast an air company sent out an aeroplane on their regular service, with the result that due to the misinformation about the weather the aeroplane got into difficulties, crashed and caused deaths, and the company has to pay damages: it seems only just and reasonable that the company should make the Air Ministry liable as a joint tort-feasor.

There is a second matter to be noted in this connection, the possibility of some intervening examination or independent investigation. In *Donoghue* v. *Stevenson* great stress was laid upon the absence of any reasonable opportunity for intervening examination, and there is no reason to exclude such a consideration from liability in negligence for statements made carelessly. Thus the duty of care in such cases will only extend to transactions where the person making the statement ought to have foreseen that no reasonable opportunity for examination would arise

It is submitted that if proper attention is paid to the application of the normal rules of negligence, such as those dealing with contributory negligence and the defence of *volenti non fit injuria*, as well as the questions of proximity and possibility of examination already dealt with, there is no reason why singular consequences which Asquith L.J. regarded with trepidation[73] should occur. Subject, therefore, to what has been said in the preceding few paragraphs, Denning L.J. really summed up the position when he said:[74]

> My conclusion is that a duty to use care in statements is recognized by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons by whom and to whom it is owed and the transactions to which it applies.

With this the present writer respectfully agrees; and adds that in this judgment Denning L.J. has in some measure (though apparently so far not with equal success) emulated the example of Blackburn J. in *Rylands* v. *Fletcher*,[75] by opening up a new field of activity for the law. We can only respectfully hope that the wider view that Denning L.J. expounded, and that has been supported in this article, will be acceptable to the House of Lords and other courts as yet unacquainted with the problem if, and when, they ever have to decide the issue.

---

[73] [1951] 2 K B at pp. 194-195
[74] *Ibid.*, p. 184.
[75] (1866), L R 1 Ex. 265.