NEGLIGENCE IN LAW.

Actions based on negligence come before our Courts more frequently, perhaps, than any others and every lawyer should have a comprehensive knowledge of this branch of the law. But I fear that available literature to impart this knowledge is lacking. The text-books we have are rapidly becoming obsolete and are, moreover, mainly works of reference for the experienced practitioner who has acquired knowledge by experience and of little benefit to one seeking to become acquainted with the subject. The one most in use is that of the late Mr. Beven, whose last edition was issued twenty years ago. For a beginner this work, at the outset, is apt to be confusing and in some instances misleading. For example, in the first chapter, which is headed "preliminary matters" and would be presumed to present some elementary rules governing his subject, he states at the beginning that his treatise is primarily occupied with considering defaults in conduct and only in the second place with the adequate discharge of obligations. But negligence in law is doing or omitting to do something which should not, or should, have been done. That is default in conduct and such default is brought about by failure to discharge an obligation to exercise proper care. Therefore in discussing the defaults one must of necessity discuss the obligations also and they cannot be dealt with independently. And in the same connection it is said that the treatise deals with an aspect, not with a division, of law. What that means I do not know, and it is not material which it is called but for the fact that the student might attach importance to the distinction and, possibly regard it as belittling the subject matter. Then objection is taken to the definition of negligence by Baron Alderson in *Blyth* v. *Birmingham Waterworks Co.*[1] which is, doing or not doing something which a prudent and reasonable man would not, or would do. His objection is that the formula is too wide for a definition since its terms would include improvident business enterprises which cause great damage by omissions and commissions of which no reasonable man would be guilty but entail no legal consequences. But this is only saying that a definition of negligence is defective if its terms would cover something which is not negligence. It would be quite as apt to say

[1] 11 Ex. 784.

that they would include murder of which no reasonable man would be guilty.

Finally he objects also to the definition by Brett, M.R., in *Heaven* v. *Pender*,[2] "neglect of the use of ordinary care and skill," etc. This is said to be faulty for excluding cases where more than ordinary care and skill must be used. My answer is that there are no such cases. That ordinary care and skill is all that is required in any case of negligence as I shall endeavour to prove later.

My only object in citing these instances is to show that a beginner could get little, if any, benefit from this preliminary chapter of Mr. Beven's treatise and might form mistaken ideas of the nature of his subject. I will now advance some views of my own which I hope may be of use.

What is negligence in law? Every man is under an obligation so to act at all times that he will not, unnecessarily, cause injury to the person or property of another. In other words it is his duty to exercise proper care to avoid causing injury. To fail in this duty is negligence.

In discussing the law of negligence Mr. Beven adopts as a definition "absence of care according to the circumstances." Taking this as a sufficiently comprehensive definition, which I think it is, care is always the essential feature to be regarded and the circumstances indicate the requisite care.

Rules of conduct may be imposed by statute as well as by the conditions under which we live and transact our affairs. Both will be considered when dealing with the various divisions of our subject. It suffices to say at present that in dealing with a case of negligence arising out of a breach of a statutory obligation care is a vital element to be considered as it is in other cases. The statutory rule is one of the circumstances and not acting as it requires is itself "absence of care according to the circumstances" and if that lack of care causes injury the offender is responsible therefor.

As to care generally I have only to deal with one feature which I already mentioned, namely, that in the law of negligence the question in every case is:—Did the defendant exercise ordinary care? In no case is less than ordinary care sufficient and in none is more required. It was not so in England, in theory at all events, during the century and a half in which the Courts decided cases of negligence in conformity with the doctrine of the three degrees, slight, ordinary and gross negligence. The abandonment of this doctrine might itself be considered as establishing the rule I have formulated.

[2] (1883) 11 Q.B.D. 503, at p. 507.

The argument for the three degrees was that as different situations called for different degrees of care so the negligence resulting from the want of care varied accordingly. But I am not sure that, for legal purposes, the major premiss is correct. No doubt in ordinary parlance more care may be required in one situation than in another. For example, a surgeon performing an operation must exercise more than a man sawing wood. But what analogy can there be between the two performances or what can be deduced from comparing the one with the other? Mr. Beven says they are analogous and his deduction from a comparison is to that it shows the existence of degrees of negligence. Let us then follow his reasoning.

He takes three cases of accident in the use of wheeled vehicles. First, a driver carrying a passenger gratuitously; secondly, a railway train; and thirdly a jobmaster letting out vehicles for hire. In the first, failure to examine the bolts and fastenings of the carriage before taking up the passenger was held not to be negligence; in the second, examination of the wheels of a truck before using it was sufficient and the very minute examination which might have discovered a latent defect was not required; and in the last case the jobmaster's duty was "to supply a carriage as fit for the purpose for which it is hired as care and skill can render it." The words quoted are judicial but I do not think they give the proper standard and I believe that Mr. Beven was misled by them. All these, says our author, are instances of *culpa levis* (ordinary negligence) which signifies "the lack of such diligence as a good business man would show in a transaction similar to that investigated such transaction relating to his business," yet in the first case the defendant exercised sufficient care if he submitted his vehicle to a blacksmith once in three months; in the second if precautions usually taken by railway companies in such cases and found by experience to be generally sufficient were taken; while in the third nothing less than the minute examination held not necessary in the second case was required. From this position, a case requiring little care, another more care and a third the most care of all, the deduction is that if any one is the care of "the good man of business" the others must be different, either more or less.

This might be correct if one were merely stating facts and drawing deductions without reference to the law but when we are dealing with the legal consequences of these actions it must be borne in mind that it is always "care according to the circumstances" that is required and how can the care in one case be compared to that in

another in which the circumstances are different? Care cannot be measured. You cannot say so much is required under these conditions and so much more or less under those. Moreover, as the formula is "care according to circumstances" the degrees of care cannot be compared unless one can also compare the circumstances in some apposite way.

Another case is relied on by Mr. Beven, *Chadwick* v. *Trower*.[3] A wall was pulled down causing injury to a vault on the adjoining property. Parke, B., in giving judgment said:—"one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction." From this Mr. Beven concludes that the Court could have had no doubt as to how many degrees of negligence there are and how they could be discriminated.

I fear, however, that he either did not consider, or did not properly appreciate, the circumstances that called forth these remarks. The Exchequer Chamber was dealing with an appeal from a judgment on demurrer to the declaration and to the pleas. What Bar on Parke said was for the purpose of pointing out that the defendant was entitled to notice of the real condition of the plaintiff's property so that he could frame his pleadings to meet the position that existed in respect to the alleged trespass. The declaration did not so notify him. Hence it was set aside and a *venire de novo ordered*. There can be no connexion between the remarks so made and the three degrees of negligence.

Then let us take another aspect of this same question and one which, if correct, would render irresistible the argument against the possibility that there could be three, or any, grades of negligence. I have said that in the law of negligence there is no such thing as extraordinary care, in every case ordinary care only is to be considered. I took this position when referring to the exception taken to the definition by Brett, M.R., in *Heaven* v. *Pender* (supra), viz.: Actionable negligence consists in the neglect of the use of ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill, etc. Mr. Beven's objection is that the definition excludes cases in which more than ordinary care and skill are required and cites as an example the discrimination made by the law between children and adults in the amount of care

[3] (1839-40) 6 Bing. N.C. 1, at p. 10.

that must be exercised. He means, of course, that more care must be used in the case of a child but as a feature of the law of negligence I am inclined to differ. My view is that it is not more care that is required but a different kind of care, or more properly, perhaps, care must be exercised in a different way. Take the case of the driver of a motor-car who sees an adult in his way. He has a right to assume that the latter will exercise care on his own part and that a warning would be sufficient. In the case of a child no such assumption can be made and the car should be brought to a stop at once or, if that cannot be done, any means available must be used. That is not using more care but only being careful in a different way. The driver is not bound to avoid injury to a child at all hazards, he is not justified in causing injury to other persons or to property to do so. It is, therefore, only "care according to the circumstances" that is called for in either case. Mr. Beven also says as to the term "ordinary care and skill" in the definition "as if persons of more than an ordinary degree of care and skill were not bound to observe a rule of duty or a rule of duty was not laid down in law for those professing exceptional and peculiar skill." No doubt in the expression "ordinary degree of care and skill" the author means the degree possessed by the generality of those engaged in the same business or profession as the more gifted ones mentioned. That is the crucial point of the position which I advocate as I will demonstrate shortly. At present I will only point out that we are dealing with "care according to the circumstances" and that exceptional and peculiar skill is only a circumstance to be considered in respect to the obligation cast on those possessing it.

Then Mr. Beven, in discussing the three degrees, cites the case of *Gregory* v. *Piper*[4] in which a master ordered his servant to lay down a quantity of rubbish near his neighbour's wall but so as not to touch the wall. It did touch it and the master was held liable as a trespasser. The Judge presiding at the trial said:—"The servant by extraordinary care might have prevented the rubbish touching the plaintiff's wall. The servant used ordinary care," etc. We are given no intimation of what is extraordinary or ordinary care in the disposition of rubbish and I am unable to form any conception of it. But what is the situation? The servant is ordered to do a certain thing in such a way as to avoid an indicated result. His duty is to obey the order and he must use the care necessary to enable him to do so. Then how can it be said that this requisite care must be

[4] (1829) 9 B. & C. 591.

extraordinary? This case is an example of the loose way in which the terms "more" and "less" are used in regard to care. The servant did his work in an improper way. The judicial remark quoted, I respectfully submit, should not have spoken of extraordinary care but should have indicated the better and quite proper way in which the work could have been done.

Then to come to the real point of my position. In dealing with the three cases of defective vehicles compared by Mr. Beven I said that the requirement in the case of the jobmaster to supply a carriage as fit for the purpose for which it was hired "as human care and skill can make it" did not express, in the law of negligence, the proper standard and that the author was misled by this expression. He was misled in this way. He quotes Dr. Wharton as saying that the test is the good, not the perfect, man of business because no perfect business man exists. "But," says Beven, "the precise difference between the second and third cases (a railway company and a jobmaster) is the difference between the *good* and the *perfect* man of business." But the very expression he relies on "as far as human care and skill can make it" implies something less than perfection. Moreover, perfection cannot be graded and it cannot be allied with imperfection. A perfect jobmaster cannot furnish a defective carriage. And whenever injury is caused by a defect the jobmaster furnishing the carriage is necessarily guilty of negligence because he has not attained perfection if, as Mr. Beven contends, perfection is the standard for such cases.

But I deny not only perfection but even the requirement of the utmost possible care and skill to be the standard by which a breach of duty must be determined in an action founded on negligence.

Take the case of a surgeon performing an operation. In almost every community of any considerable size there is one surgeon who, in skill, judgment and physical capacity, is much the superior of his fellow practitioners. Is what he is able to do in saving life to be the standard for all the profession? If it is, then in every case of an unsuccessful operation which the pre-eminent surgeon could have performed with success, the operator is guilty of negligence. But that is not the law which does not punish a man because he is not endowed with the superior qualities of another.

What, then, is the standard? If a surgeon operating exercises all the skill which he possesses, takes all the precautions, uses all the means and exercises all the care which the experience of centuries has recommended to the medical profession as sufficient in such

case and has observed strictly the rules formulated by that profession for his guidance he has done all that the law of negligence demands. And to place his obligation in another form, if he does what any capable, careful and skilful member of his profession would do in the same situation no more is required. According to the definition of Brett, M.R., already referred to, he must use ordinary care and skill towards a person to whom he owes a duty of observing ordinary care and skill.

The jobmaster is in the same position. To furnish a carriage as fit "as human care and skill can make it" could only be done by a person of exceptional ability which could not be emulated by the generality of those in the business.

Then what did Brett, M.R., mean by "ordinary care and skill?" Whatever was in his mind I would give it this meaning. In every case of negligence the care and skill which any capable, careful and prudent man in the same class, business or profession would exercise in the same circumstances. And that in my opinion would be exercising ordinary care and skill.

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