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MANUFACTURERS' LIABILITY: RECENT DEVELOPMENTS OF *DONOGHUE v. STEVENSON*¹

Only recently," Lord Macmillan is reported to have said, "the House of Lords was much concerned with the question of a snail in a ginger-beer bottle, and the result of that case has been to rock the foundations of the common law of England to their very base. At least three professors at Oxford have been compelled to rewrite large portions of their treatises on tort."² The shock did not end with *Donoghue v. Stevenson*, for the Judicial Committee of the Privy Council has explained and extended that decision in *Grant v. Australian Knitting Mills, Ltd.*³ One of the learned writers to whom Lord Macmillan referred has stated that *Donoghue v. Stevenson* raised at least as many problems as it settled;⁴ some of these have been now answered by the Judicial Committee.

The plaintiff purchased from a retailer two suits of woollen underwear made by the Australian Knitting Mills, Ltd. The day after the plaintiff first wore the underwear a rash appeared, accompanied by irritation. At the end of two weeks, when the

¹ [1932] A. C. 562. The most important treatment of *Donoghue v. Stevenson* is Sir Frederick Pollock's article, *The Snail in the Bottle, and Thereafter* (1933), 49 L.Q.R. 22. See SALMOND, *LAW OF TORTS*, 8th ed., by Dr. W. T. S. STALLYBRASS, 19, 457-459, 542, 545, 548; V. C. MacDonald: *Comment* (1932), 10 Can. Bar Rev. 478; Underhay, *Tort Liability of Manufacturers* (1932), 10 Can. Bar Rev. 615, reprinted in (1933), 50 South African Law Journal 339; *Annual Survey of English Law 1932*, 148; Notes in 6 Aust. L.J. 176; 5 Camb. L.J. 116; 18 Cornell L.Q. 128; 3 Fortnightly L.J. 24; 46 Harv. L.R. 530; 21 Ill. Bar Journal 40; 74 L.J. 75; 173 L. T. 411; 174 L.T. 399; 48 Sc. L.R. 223; (1933) S.L.T. 54; 76 Sol. J. 387. Incidental discussion occurs in Stallybrass, *Landon v. Winfield: an Intervention* (1932), *The Bell Yard*, X, 18, 20, 22; Goodhart, *Restatement of the Law of Torts, II* (1935), 83 U. of Pa. L. R. 968, 984, 991-992; Winfield, *The Restatement of the Law of Torts—Negligence* (1935), 13 N.Y.U.L.Q.R. 1.

² Address at the Annual Reception of the Law Society's School of Law, reported in (1935), 11 N.Z.L.J. 189.

³ [1936] A.C. 85; (1935), 52 T.L.R. 38, with Lord Wright delivering the judgment of the Board. See Professor Winfield's note in (1936), 52 L.Q.R. 12.

⁴ Dr. Stallybrass in the preface to the eighth edition of SALMOND on TORTS, p. x.

plaintiff last wore the underwear, the inflammation had increased and later developed into acute dermatitis which kept the plaintiff in bed for seven months. The plaintiff recovered a joint judgment against the retailer for breach of warranty and against the manufacturer for negligence on the ground that the underwear contained a chemical irritant, sodium sulphite, which caused the disease. The case against the Knitting Mills turned largely on technical evidence with respect to the process of manufacture and the quantity of chemicals in the finished garments. So far as relevant the process was as follows : the fabric was first bleached with chlorine compounds, which were removed by passing the web through a tank containing sodium sulphite in solution; bicarbonate of soda was used to neutralize the sulphite; and the web was then washed and tested. If the test showed that more than a harmless trace of sulphite remained, the washing was repeated. There was no direct evidence that the underwear worn by the plaintiff contained sufficient sulphite to cause the disease, because the suits had been washed before being analyzed; the subsequent analysis showed a harmless amount of the chemical. The Privy Council, reversing the decision of the High Court of Australia,⁵ held that it was a reasonable inference that the garments contained a much greater quantity of sulphite when the plaintiff wore them than after the washing; and that the sulphites then present caused the plaintiff's illness. Under the rule in *Donoghue v. Stevenson* the defendants owed a duty to the plaintiff to take reasonable care to remove from the underwear any chemical residuum likely to cause injury. The fact that excess sulphites remained created an inference of negligence, which had not been rebutted, and the Knitting Mills were therefore liable.

This decision makes it difficult to maintain that the principle of *Donoghue v. Stevenson* can be limited to manufacturers of a particular type of commodity. Dr. Stallybrass, relying on the guarded language of Lord Thankerton's judgment, suggested that a good argument could be made that *Donoghue v. Stevenson* was confined to manufacturers of food and drink.⁶ This view now becomes untenable. *Farr v. Butters*,⁷ which had been held up

⁵ (1933), 50 C.L.R. 387. Dixon and McTiernan JJ. held that the plaintiff had failed to show that the sulphites caused his illness; Starke J. held that the sulphites caused the illness but that the defendant was not negligent; Evatt J. dissented, on grounds which are in agreement with those of the Board. For this reason the judgment of Evatt J. deserves careful attention.

⁶ SALMOND ON TORTS, 8th ed., 546.

⁷ [1932] 2 K.B. 606. See also *Procter and others v. Pauldens, Limited*; *W. T. Finch & Son, Third Party* (1934), 1 L.J.C.C.R. 263, where the

as a warning against exaggerated extensions of *Donoghue v. Stevenson*,⁸ did not, however, support the restriction; Greer L.J. in fact thought that under the decision of the House of Lords the maker of a machine could be liable to the ultimate purchaser.⁹

Grant's Case helps to clarify the circumstances in which a manufacturer will be liable to the ultimate consumer. A source of obscurity in *Donoghue v. Stevenson* was Lord Macmillan's remark that "it may be a good general rule to regard responsibility as ceasing when control ceases."¹⁰ This statement, especially when read with Lord Thankerton's judgment, tended to support the view that the defendant's liability turned on the fact that the sealed bottle excluded all possibility of the snail being introduced after it left the brewery; and that, for *Donoghue v. Stevenson* to apply, a manufacturer must put up his product in a closed container, which will preserve it from "vicissitudes which may render it defective or noxious" after it has passed into other hands. *Grant's Case* differed from *Donoghue v. Stevenson* in an important particular: the underwear was wrapped in paper packets, which the retailers opened, and it could conceivably have been interfered with after leaving the mills. This difference brought the correct interpretation of *Donoghue v. Stevenson* and of Lord Macmillan's test of control directly in issue. Mr. Wilfrid Greene (now Lord Justice Greene) urged that the Knitting Mills owed no duty to the plaintiff because they retained no control; "nothing was done by the manufacturers to exclude the possibility of any tampering with the goods while they were on the way to the user." For the rule in *Donoghue v. Stevenson* to apply a manufacturer must issue his product in such a form that it cannot be interfered with, and the mere possibility that the defective condition may have been caused by some intermediate agency prevented a duty from being created. The Privy Council rejected the argument, and held that *Donoghue v. Stevenson* did not depend upon the bottle being sealed and stoppered. The word "control" was employed in *Donoghue v. Stevenson*, not in the natural sense—for a maker parts with control when he sells an article and divests himself of possession—but in an artificial sense intended "to emphasize the essential

manufacturer of a kettle with a defective handle was held liable. Procter's wife and child were scalded when the handle broke. Procter recovered medical expenses against the retailer for breach of the implied warranty of fitness; Procter's wife and infant son recovered damages against the maker for negligence under *Donoghue v. Stevenson*.

⁸ Sir Frederick Pollock, *The Snail in the Bottle, and Thereafter* (1933), 49 L.Q.R. 22, 26.

⁹ *Farr v. Butters*, [1932] 2 K. B. 606 at p. 619.

¹⁰ [1932] A. C. 562, 622.

factor that the consumer must use the article exactly as it left the maker, that is, in all its material features, and use it as it was intended to be used. In that sense the maker may be said to control the thing until it is used."¹¹ *Grant's Case* shows conclusively that the "sealed package" doctrine has no place in the law.

Grant's Case also removes an ambiguity in Lord Atkin's statement that the manufacturer's duty of care comes into existence when he sells his products "in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him."¹² This could mean either of two things: that the container in which the goods are put up must remain intact — the original package doctrine; or that it is sufficient if the general quality and condition of the goods when used are the same as when they left the factory. The distinction is not merely verbal; it is particularly important with respect to fractional sales.¹³ If, for example, a refiner places on the market sugar which his employees have carelessly allowed to become mixed with poison, an injured consumer will recover, if he buys an unopened sack, under the first interpretation of *Donoghue v. Stevenson*, but he will fail if he buys a ten pound package from a retailer who opens the sack and sells the contents in small quantities. This construction of Lord Atkin's test of duty gives an unsatisfactory result. The fault of the maker and the likelihood of injury to the consumer are equal regardless of whether the consumer purchases the goods fractionally or in the original container; the only difference is that the increased possibility of the defect having arisen on the way to the consumer, may make it harder for the purchaser of the ten pound package to establish his case. To hold, however, that the careless manufacturer is under no duty is an uncandid way of saying that the consumer shall not have action because his claim may be difficult to prove — a course which a learned judge has said, "involves a denial of redress in meritorious cases, and shows a certain degree of distrust in the capacity of legal tribunals to get at the truth."¹⁴ Happily this narrow view is shown to be incorrect, for the Privy Council has placed the second interpretation upon Lord Atkin's statement. In explaining *Donoghue v. Stevenson*, the Board held: "The essential point was that the article should reach the consumer or user subject to the same defect as it had when

¹¹ *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85, 106.

¹² *Donoghue v. Stevenson*, [1932] A. C. 562, 599.

¹³ See V. C. MacDonald: Comment (1932), 10 Can. Bar Rev. 478, 485.

¹⁴ Kennedy J. in *Dulieu v. White*, [1901] 2 K.B. 669, 681.

it left the manufacturer. That this was true of the garment is in their Lordships' opinion beyond question. At most there might in other cases be a greater difficulty of proof of the fact."¹⁵ This makes it possible to restate the manufacturer's duty of care without including the qualification, which was necessary after *Donoghue v. Stevenson*, as to the form in which the goods are sold. *Grant's Case* seems to warrant the generalization: A manufacturer is under a duty to take reasonable care that the products which he issues to the world are free from defects which are likely to cause harm to the life or property of the ultimate user, and the failure to take such reasonable care is a breach of duty for which a person who uses them for the purposes for which they are intended to be used will, if injured, have an action. Fitzherbert put the matter more pithily: "it is the duty of every artificer to exercise his art rightly and truly as he ought."¹⁶

From the practical standpoint perhaps the most important aspect of *Grant's Case* relates to the proof of negligence. The points already mentioned did little more than confirm the generally received understanding of *Donoghue v. Stevenson*, but here the Judicial Committee broke new ground. The plaintiff could offer no affirmative evidence that the Knitting Mills had been negligent, and, had he been compelled to do so, he would inevitably have lost. All that the plaintiff could show was that certain other garments of the defendants' make contained a higher percentage of sulphites than the process contemplated should be in the finished product. The defendants, on the other hand, showed that their system of manufacture was the most up-to-date possible, and that they had sold over four million similar garments without receiving a complaint. In this state of the evidence the plaintiff's only hope of recovery lay in *res ipsa loquitur*, and that doctrine the Privy Council invoked. The Board held that, since the defendants' process was perfect, some of their servants must have been careless.

According to the evidence, the method of manufacture was correct: the danger of excess sulphites being left was recognized and was guarded against: the process was intended to be fool-proof. If excess sulphites were left in the garment, that could only be because some one was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances: even if the manufacturers could by apt evidence have rebutted that inference they have not done so.¹⁷

¹⁵ *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, 106-107.

¹⁶ *Natura Brevium*, 94, D. (*Trespass sur le case*).

¹⁷ [1936] A. C. 85, 101.

The application of *res ipsa loquitur* to cases where the plaintiff does not buy directly from the maker is necessarily new law. The question did not arise as long as the courts denied that a manufacturer owed a duty to a consumer with whom he had no contract, and it did not fall to be decided in *Donoghue v. Stevenson*, for the existence of the duty was the only issue before the House of Lords. The Privy Council's method of approach is, however, not altogether novel. In *Chaproniere v. Mason*,¹⁸ the Court of Appeal employed it in the analogous situation where the consumer bought directly from the maker. There the plaintiff bought a bath bun from a baker. The bun contained a stone on which the plaintiff broke a tooth. The trial judge directed the jury that the plaintiff must prove negligence. The Court of Appeal ordered a new trial for misdirection, and pointed out that the presence of the stone raised a presumption of negligence. The defendant had produced evidence that his process made it impossible for stones to get in the dough. Collins M.R. held that this testimony did not rebut the presumption; "on the contrary, it showed that the system was not properly carried out — that there was negligence. A stone did get into the dough, and that fact was evidence that the system followed by the defendant was not carried out with proper care and skill." *Grant v. Australian Knitting Mills, Ltd.* shows that in a proper case the reasoning of Collins M.R. is now applicable in tort actions by consumers against manufacturers where no privity of contract exists; previously the Court of Session,¹⁹ the British Columbia Court of Appeal,²⁰ and the High Court of Australia,²¹ refused to extend it to cases where there was no contract between the plaintiff and the manufacturer.

The question of the part which *res ipsa loquitur* will play in subsequent actions of this type is complicated by a statement of Lord Macmillan in *Donoghue v. Stevenson*²² which seems

¹⁸ (1905), 21 T.L.R. 633. American cases adopting the same view are *Coca-Cola Bottle Co. v. McBride* (1929), 20 S.W. (2d) 862 (Ark.): *Try-Me Beverage Co. v. Harris* (1928), 116 So. 147 (Ala.). A similar approach with respect to fire caused by locomotive sparks was taken in *Fremantle v. L. & N.W. Ry.* (1861), 10 C.B.N.S. 88, 93, discussed in *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Ry. Co.* (1893), 20 R. (H.L.) 35, 39.

¹⁹ *Mullen v. Barr*, [1929] S.C. 461 (mouse in ginger beer bottle). Lord Hunter (dissenting) held that *res ipsa loquitur* applied; the fact that the defendant's method of bottling was adequate showed that the presence of the mouse was due to the carelessness of the defendants' servants. Lord Alness (p. 468) and Lord Anderson (p. 480) criticized this view as "ingenious but fallacious."

²⁰ *Willis v. Coca-Cola Co.*, [1934] 2 D.L.R. 173. Martin J.A. discussed *Chaproniere v. Mason* at pp. 179, 182.

²¹ *Australian Knitting Mills, Ltd. v. Grant* (1933), 50 C.L.R. 387. Evatt J. (dissenting) held that *Chaproniere v. Mason* should be followed (p. 442).

²² [1932] A. C. 562, 622-23.

directly at variance with the decision of the Privy Council. At the conclusion of his judgment Lord Macmillan remarked that "the burden must always be upon the injured party to establish that the defect which caused the injury was occasioned by the negligence" of the manufacturer. "There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim *res ipsa loquitur*." This observation has already caused considerable embarrassment and three judges have declined to follow it.²³ Counsel for manufacturers, pressed on this point with *Grant's Case*, may be expected to distinguish it, and to rely on the more favourable authority of Lord Macmillan. Two grounds of distinction have been judicially suggested. (i) *Res ipsa loquitur* applies only where the substance which causes the plaintiff's injury is introduced as part of the process of manufacture.²⁴ The snail entered the bottle *ex proprio motu*, while the defendants in *Grant's Case* added the sulphites as a necessary feature of their method of fabrication, and knew that they had to be removed. The spectre of the manufacturer's knowledge of the defective condition of his

²³ Evatt J. (dissenting) in *Australian Knitting Mills, Ltd. v. Grant* (1933), 50 C.L.R. 387, 442; Macdonald C.J.B.C. and McPhillips J.A., in *Willis v. Coca Cola*, *supra*. In the latter case the plaintiff, who had bought coca-cola from a retailer, sued the manufacturers, alleging that it contained caustic soda used for cleansing the bottles. The judge directed the jury that the plaintiff must prove negligence and the jury returned a general verdict for the defendant without answering the questions left to them. The Court of Appeal dismissed the plaintiff's appeal on an equal division. Macdonald J.A., following Lord Macmillan, held that *res ipsa loquitur* did not apply and that the jury were justified in finding that the plaintiff had not proved negligence. Macdonald C.J.B.C. held that *res ipsa loquitur* applied but that the defendant had rebutted it by giving evidence that their system of manufacture was adequate. Macdonald C.J.B.C. thought that Lord Macmillan's statement meant merely that the maxim did not apply to the particular facts of the *Snail Case*. Martin and McPhillips J.J.A. held that there should be a new trial. Martin J.A., accepted Lord Macmillan's statement, at p. 179; and said, at p. 182, that it was at least a ponderable submission, "within *Chaproniere v. Mason* that the proof that the defendant had put caustic soda in the bottle established a *prima facie* case [which] threw on the defendant the onus of giving evidence to rebut it." Martin J.A. ordered a new trial on the ground that the direction was erroneous in other respects. McPhillips J.A. held that *res ipsa loquitur* applied, and that the judge's failure so to instruct the jury required a new trial. It would seem that *Grant's Case* would not require a new trial. In the United States it is generally held that *res ipsa loquitur* applies where a consumer is injured by drinking bottled beverages containing foreign substances. *Coca-Cola Bottling Co. v. Barksdale* (1920), 88 So. 36 (Ala.); *Coca-Cola Co. v. McBride* (1929), 20 S.W. (2d) 862 (Ark.); *Payne v. Rome Coca-Cola Co.* (1912), 73 S.E. 1087 (Ga.); *Gainsville Coca-Cola Co. v. Stewart* (1935), 179 S.E. 784 (Ga.); *Coca-Cola Bottling Works v. Shelton* (1926), 214 Ky. 118; *Rozumailski v. Phil. Coca-Cola Co.* (1929), 296 Pa. 114, 145 Atl. 700; *Rudolph v. Coca-Cola Co.* (1926), 132 Atl. 508 (N.J.); *Dunn v. Texas Coca-Cola Co.* (1935), 84 S.W. (2d) 545 (Texas); *Stolle v. Anheuser-Busch* (1924), 307 Mo. 520.

²⁴ *Australian Knitting Mills, Ltd. v. Grant* (1933), 50 C.L.R. 387, 441-42, per Evatt J.

product, exorcised from the law as regards the existence of a duty of care, returns to plague it in the proof of negligence. In *Chaproniere v. Mason*,²⁵ however, the stone was not put in the bun as a normal incident of manufacture, and the baker did not know of its presence; the Privy Council's decision contains nothing to indicate that these elements are irrelevant. (ii) Whether *res ipsa loquitur* applies depends upon whether or not the substance which causes the plaintiff's injury is dangerous *per se*. In *Willis v. Coca-Cola Co.*,²⁶ McPhillips J.A. thought that caustic soda could be regarded as dangerous *per se* while "the decomposed remains of the snail could not be in the same category." This difference enabled the learned judge to evade Lord Macmillan's dictum. On this view sodium sulphites could be classed with caustic soda. The old classification of chattels into those dangerous *per se* and those dangerous *sub modo*, though now subject to suspicion, is not entirely bereft of legal significance. In criticizing the distinction as unsatisfactory for determining the existence of a legal right, Lord Atkin recognized that a person who issues an article dangerous in itself may be required to exercise a higher degree of care.²⁷ While *res ipsa loquitur* may, as McPhillips J.A. held, be appropriately invoked where the consumer's injury is caused by an article which, owing to its defective manufacture, is inherently dangerous, it does not follow that the maxim should be excluded where the article is not of that character. A bun containing a pebble is not dangerous *per se*. Yet the Court of Appeal found no difficulty in giving the plaintiff in *Chaproniere v. Mason*²⁸ the benefit of the maxim. Other factual differences may be multiplied.²⁹ Efforts to reconcile Lord Macmillan's treatment of *res ipsa loquitur* with that of the Privy Council seem, however, undesirable and superfluous; they are bound to lead to unreal refinements, and, for Dominion courts, they are unnecessary even upon the theory of *stare decisis* expressed in *Robins v. National Trust*

²⁵ (1905), 21 T.L.R. 633.

²⁶ [1934] 2 D.L.R. 173, 193: "In my view the use of poison in the cleaning process was *per se* dangerous, and upon the facts of this case the maxim of *res ipsa loquitur* applies to this case".

²⁷ *Donoghue v. Stevenson*, [1932] A.C. 562, 595-96, approved in *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, 105.

²⁸ (1905), 21 T.L.R. 633.

²⁹ For example, it was proved in *Grant's Case* that the Knitting Mills had sold other garments containing more sulphites than should have been in the finished product if the process had been carried out strictly in accordance with instructions. While the Privy Council attached some significance to this circumstance, the judgment does not indicate that it was a necessary factor in bringing *res ipsa loquitur* into play. In *Chaproniere v. Mason*, *supra*, there was no evidence that the defendant had ever sold other defective buns.

Company.³⁰ Lord Macmillan's sweeping denial that *res ipsa loquitur* can apply in actions against manufacturers is *obiter dictum* which cannot pretend to have the support of the House of Lords. *Donoghue v. Stevenson* was decided on a Scottish form of pleading resembling a demurrer in which the single issue was whether the defendants owed a duty to the plaintiffs; the questions of negligence and the burden of proof were not before the House and they received no attention from either Lord Atkin or Lord Thankerton.³¹ However necessary it may have been for Canadian courts to give effect to Lord Macmillan's dictum before the Privy Council had spoken on the matter, the decision in *Grant's Case* releases them from the obligation for the future.

It is rash to assume that *Grant's Case* requires or even justifies the application of *res ipsa loquitur* in every action by a consumer against a manufacturer. The Privy Council made no attempt to lay down a general rule. It is unsafe, as Lord Dunedin has pointed out, to take the remarks upon the maxim in one case and transfer them indiscriminately to another.³² There may well be circumstances, for example, in fractional sales of goods, which would make the doctrine inappropriate. Where the doctrine is applied, it should, however, take the form prescribed in *Grant's Case* and in *Chaproniere v. Mason*.³³ Whatever the limits ultimately assigned to *res ipsa loquitur* in this class of cases, it will frequently be, when applied, the decisive factor in fixing the manufacturer with liability. Before observing its effect in actions by consumers against manufacturers, the general nature of the doctrine may be summarized.

Res ipsa loquitur means simply that the fact of the plaintiff's injury is sufficient evidence of the defendant's negligence to go to the jury.³⁴ Whether such evidence exists in an individual case is a matter of "right thinking" rather than of law,³⁵ and, as Lord Shaw

³⁰ [1927] A.C. 515; [1927] 2 D.L.R. 97. This case seems to have aroused less controversy in Australia than in Canada. In *Brown v. Holloway* (1909), 10 C.L.R. 89, 102, O'Connor J. said: "In matters not relating to the Constitution this court is, no doubt, bound in judicial courtesy by the decisions of the House of Lords." In *Hall v. Wilkins* (1933), 33 N.S.W. State Rep. 220 the Supreme Court of New South Wales held that the lower court rightly followed the decision of the High Court of Australia in *Brown v. Holloway*, *supra*, in preference to *Edwards v. Porter*, [1925] A.C. 1. The court did not refer to *Robins v. National Trust Co.* See Harrison, *Precedent in Australia* (1934), 7 Aust. L.J. 405, where *Robins v. National Trust Company*, is not cited.

³¹ [1932] A.C. 562, 578-79, 601. The pleadings are more fully reported in 1932, Scots Law Times 317.

³² *Ballard v. North British Ry. Co.*, [1923] S.C. (H.L.) 43, 53.

³³ (1905), 21 T.L.R. 633.

³⁴ *McGowan v. Stott* (1930), 99 L.J.K.B. 357 n., 360, per Atkin L.J.

³⁵ *Shawinigan Carbide Co. v. Doucet* (1909), 42 Can. S.C.R. 281, 304, 331, per Duff J.

said, if the expression had not been in Latin nobody would have called it a principle.³⁶ The most valuable discussion of *res ipsa loquitur* occurs in *Ballard v. North British Ry. Co.*,³⁷ a House of Lords decision which is not as well-known as it deserves to be. Lord Dunedin held that "whether the expression *res ipsa loquitur* is applicable or not depends upon whether, in the circumstance of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence."³⁸ In drawing or rejecting the inference the court is guided mainly by two considerations, one being: Is the damage such that it is unlikely to have happened without the defendant being in fault, or, as Greer L.J. said, are the odds decidedly in favour of the defendant's negligence?³⁹ A mere possibility that the accident happened owing to the defendant's negligence is not sufficient,⁴⁰ and it is going too far to say that the occurrence must be such that it could not happen without negligence.⁴¹ The other test which the courts commonly employ is whether the thing which caused the damage was under the control of the defendant at the time of the accident.⁴² If the

³⁶ *Ballard's Case*, *supra*, note 32, at p. 56.

³⁷ *Supra*, note 32. Lord Dunedin's judgment has been applied in *Langham v. Governors of Wellington School* (1932), 101 L.J.K. B. 513 by Scrutton L.J. (p. 516) and by Romer L.J. Lord Shaw's judgment was adopted by Roche L.J. in *Sterling Wharfage Co. v. Peck Bros. & Winch* (1935) L.J.N.C.C. App. 235. *Ballard's Case* is not cited in the eighth edition of SALMOND ON TORTS. It is discussed in 3 South African Law Times 163, 205. For a Privy Council decision see *Winnipeg Electric Co. v. Geel*, [1932] A. C. 690 (statutory presumption of fault).

³⁸ At pp. 53-55.

³⁹ *Langham's Case*, *supra*, note 37, at p. 518.

⁴⁰ *Ballard's Case*, *supra*, note 32, at p. 54.

⁴¹ *Langham's Case*, *supra*, note 37, at p. 519, per Greer L.J., and at p. 520, per Scrutton L.J. who corrected his statement in *Britannia Hygienic Laundry Co. v. Thornycroft* (1926), 95 L.J.K.B. 237, 241.

⁴² *Wing v. L. G. O. Co.*, [1909] 2 K.B. 652, 663, per Fletcher Moulton L.J., criticized in *McGowan v. Stott* (1930), 99 L.J.K.B. 357n., 358, 359, by Banks and Scrutton L.J.J. This test of control at the time of the accident, though perfectly appropriate where flour bags fall from a crane operated by the defendant's servants (*Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596) or where an automobile leaves the roadway and injures a pedestrian on a footpath (*McGowan v. Stott*, *supra*, note 34) cannot always be applied with literal accuracy. An unattended horse and van which bolts into a shop window; a parked automobile which the defendant has loaned to his friend who has left it outside his house, and which runs down a hill into the plaintiff's house; or a broken telegraph wire which falls on the road during a storm and injures a passer-by cannot strictly be said to be under the control of their respective owners at the time of the plaintiff's injury, but in each case *res ipsa loquitur* has been held to apply. *Gayler & Pope v. Davies*, [1924] 2 K.B. 75; *Parker v. Miller* (1926), 42 T.L.R. 408; *Ottawa Electric Co. v. Crepin*, [1931] S.C.R. 407. Similarly clothing impregnated with chemicals and worn by the plaintiff is not under the control of the maker. "Control" in cases where *res ipsa loquitur* is applied against manufacturers means control when the alleged negligence, not when the injury, occurred. See note, (1932), 30 Mich. L. R. 634. This point is well brought out in *Goldman & Freeman Bottling*

judge holds that negligence should be inferred from the fact of the accident, the onus of going forward with the evidence shifts to the defendant. This means, not that the defendant must prove that he was not negligent, but that he must offer a reasonable explanation of the injury. If the defendant can suggest a way in which the damage could have happened without his negligence, or even a way which is as consistent with due care as with negligence, the cogency of the fact of the accident disappears, and the plaintiff must adduce positive evidence of the defendant's negligence.⁴³ The force of the maxim is spent and the plaintiff is put in the same position as he would have been in if he had not enjoyed the initial advantage of *res ipsa loquitur*.

The operation of these notions in the trial of a consumer's action against a manufacturer may now be noticed. The plaintiff must first adduce sufficient evidence to go to the jury that the defective condition of the defendant's product caused his injury, and that this condition existed when the article left the factory; for this purpose evidence that the article was defective when the plaintiff used it will usually be sufficient.

Co. v. Sindell (1922), 140 Maryland 488, 502 (action against bottler of soft drinks) where the court said:

"There is nothing, however, in the reason for the rule (*res ipsa loquitur*) or in the principles upon which it is founded to support the contention that its application is limited to cases where the injurious agency is in the control of the defendant at the time of the injury, but it is sufficient if it appears that the agency was in his control at the time of the negligent act which caused the injury.

⁴³ *Ballard's Case*, *supra*, note 32 at pp. 54-55 per Lord Dunedin. The explanation must be reasonable. Three cases in which the defendant was able to offer a satisfactory explanation are *Imperial Tobacco Co. v. Hart* (1917), 51 N.S.R. 379, *Carruthers v. Macgregor*, [1927] S. C. 816 and *Henderson v. Mair*, [1928] S.C.1. In the last case an omnibus driven by the defendant's servant crashed into a wall, and injured the plaintiff, a passenger. The plaintiff could not prove negligence. A tire burst, but whether immediately before or after the impact the evidence did not show. The Court of Session held, assuming that *res ipsa loquitur* applied, that the defendant had given a satisfactory explanation. Lord Alness said at pp. 4-5: "In any event, if the doctrine does apply, the onus on the defender, as has been distinctly laid down by the House of Lords, is not to prove that the accident happened through no fault of his, but to offer a reasonable explanation of it. Now several explanations of this accident have been proffered by the defendant and his witnesses, for example, a pot-hole, or a stone in the road, or a bursting of a tire." For cases in which the defendant's explanation was held inadequate, see *McGowan v. Stott*, *supra*, note 34; *Ellor v. Selfridge* (1932), 46 T. L. R. 236. See also *Halliwel v. Venables* (1930), 99 L. J. K. B. 353. A writer in (1932), 76 Sol. J. 175 criticizes the view that the defendant's duty is to offer a reasonable explanation of the injury, and doubts whether the authorities support it. But Erle C.J. in *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, the *locus classicus* on the subject, stated that the fact that the accident afforded reasonable evidence "in the absence of explanation by the defendant, that the accident arose from want of care." In *Ballard's case*, *supra*, at p. 55 Lord Dunedin said: "I take notice of the word 'explanation'; it is not in absence of 'proof'".

When the foundation of causation is thus laid, the judge must decide whether the fact of the plaintiff's injury is relevant to infer negligence. If he so holds, *res ipsa loquitur* applies. The inference thus raised consists, as a result of *Grant's Case*, of two branches; that the injury either happened because of the defendant's negligence in using an improper system of manufacture, or because of the carelessness of the defendant's employees in failing to carry out the system as it ought to have been carried out. It is not sufficient for the manufacturer to show that his process was perfect, for that disposes only of the first branch, and leaves the second unanswered. There are two stiles, and both must be crossed. The defendant must offer a reasonable explanation of how the defect in the particular article which damaged the plaintiff could exist without his employees being negligent. Such an explanation is difficult to envisage, and the result is that the manufacturer finds himself in the same position as if he had to prove affirmatively that the individual employees who worked on the defective article which injured the plaintiff were not negligent, an impossible task, assuming even that those employees could be ascertained. Whenever *res ipsa loquitur* is applied in the form laid down in *Grant's Case*, it seems inevitable that the fact of the plaintiff's injury will be sufficient to take the issue of negligence to the jury and to support a verdict in his favour.⁴⁴

Academic lawyers may thank the Privy Council for a plain recognition of negligence as an independent tort. Here there is a schools' dispute among the writers. Salmond,⁴⁵ Jenks,⁴⁶ and

⁴⁴ The authorities do not permit a complete statement of the law as to the directions which should be given where *res ipsa loquitur* is applied against manufacturers. If in a case where the maxim applies the judge directs that the plaintiff must prove that the defendant was negligent, a new trial may be had for misdirection, *Chaproniere v. Mason* (1905), 21 T. L. R. 633. In the unlikely event of the manufacturer offering no evidence, it would seem that the judge may properly direct that if the jury think that the fact of the defective condition of the goods is evidence of negligence, they may find for the plaintiff, if they think otherwise, for the defendant. *Kearney v. London, Brighton v. South Coast Ry.* (1870), L.R. 5 Q. B. 411, L.R. 6 Q.B. 751; *Briggs v. Oliver* (1866), 35 L.J. Ex. 163, 164. A learned judge has, however, thought differently. See Russell J. in *Imperial Tobacco Co. v. Hart* (1917), 51 N.S.R. 379, 400. A direction that the manufacturer's evidence that his process is adequate rebuts the inference of negligence would seem wrong in view of *Grant's Case*. See *Willis v. Coca-Cola Co.*, [1934] 2 D.L.R. 173, 200, per McPhillips J. A. Macdonald C. J. B. C.'s, treatment of *res ipsa loquitur* in that decision seems inconsistent with *Grant's Case*. A direction that the jury, though satisfied that the method of manufacture was reasonable may find that the defective conditions of the product was due to the carelessness of the defendant's servants would appear to be correct. Such a direction ought to be given where the jury has visited and inspected the defendant's factory.

⁴⁵ SALMOND ON TORTS, 8th Ed., 453.

⁴⁶ Jenks, *Negligence and Deceit in the Law of Torts* (1910), 26 L.Q.R. 159.

Sir John Miles⁴⁷ regard negligence merely as an element in liability, a means of committing certain specific torts; negligence, they argue, is no more a tort than intention. Professor Winfield, on the other hand, contends that negligence means two distinct things: a method of committing certain torts, and a separate tort which developed from the action on the case.⁴⁸ On the first view *Donoghue v. Stevenson* is a puzzle, for it is difficult to see what tort other than negligence was committed. Professor Winfield's protégé has now been received into the family of nominate torts, for the Privy Council, referring to *Donoghue v. Stevenson*, said:

It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced.⁴⁹

The effect of knowledge and opportunity of discovering the defective condition of goods on the part of the user or intermediate handler is only partially worked-out. Three situations may be noted.

(1) *Where the plaintiff discovers the defect before using the article.* Here it is clear that the plaintiff cannot succeed, but the reason for his failure has been variously explained. In *Farr v. Butters*,⁵⁰ though the result was inevitable, the Court of Appeal showed considerable diversity of opinion as to the avenue by which it should be reached. Scrutton L.J. seems to have attached more importance to the circumstance that the deceased had a reasonable opportunity of discovering the fault in the crane than to the fact that he had actually found it. Lawrence L.J. stated that *Donoghue v. Stevenson* did not apply where the purchaser assembled the product. Greer L.J. suggested that the deceased had been contributorily negligent, a view expressly repudiated by Scrutton L.J., but he based his decision on the fact that the maker owed no duty to the deceased, because there was a reasonable opportunity of inspection. Neither of Greer L.J.'s grounds is entirely satisfactory; the former overlooks the fact that carelessness differs from knowledge of danger and gives rise

⁴⁷ DIGEST OF ENGLISH CIVIL LAW, Vol. I, 545-46.

⁴⁸ Winfield, *The History of Negligence in Torts* (1926), 42 L.Q.R. 184; Winfield and Goodhart, *Trespass and Negligence* (1933), 49 L.Q.R. 359; Winfield, *Duty in Tortious Negligence* (1934), 34 Col. L.R. 41; Winfield, *The Restatement of the Law of Torts—Negligence* (1935), 13 N.Y.U.L.Q.R. 1.

⁴⁹ *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, 103.

⁵⁰ [1932] 2 K.B. 606.

to a defence of a different nature, while the latter does not answer the problem. Why a ginger-beer manufacturer owes a duty to the consumer if the snail comes out in the second glass but none if it comes out in the first glass is not easy to explain. It is obvious that in the latter event the maker is not liable; the reason, however, is not that the general duty to use care in manufacture has been in some way subsequently divested with respect to this particular consumer, but that the consumer has chosen to run the risk of drinking an unwholesome beverage. The Privy Council has placed the plaintiff's inability to recover in this type of case on its proper basis, voluntary assumption of risk. "The man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows because it follows from his own conscious volition in choosing to run the risk or certainty of mischance."⁵¹

(2) *Where the plaintiff has a reasonable opportunity of inspection but does not know of the defect.* Lord Atkin stated that a manufacturer might not be liable where "inspection of the person using may reasonably be interposed."⁵² No decision explains what amounts to a reasonable opportunity of inspection, and the Privy Council did not discuss the effect of the user's ignorance of a defect when the means of knowledge are at hand. While the courts may, as Greer L.J. suggested, apply the rules of contributory negligence in consumers' actions against manufacturers, any extension of so technical and troublesome a doctrine is to be deplored. It would seem that emphasis should be shifted from the question whether the fault in the product is discoverable by reasonable inspection to the question whether the examination which is necessary to reveal it is likely to be made. A manufacturer should not be liable for a condition "which a mere casual looking over will disclose unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made."⁵³

(3) *Where an intermediate person has a reasonable opportunity of inspection but does not know of the defect.* This point is not covered by direct authority but certain dicta of the House of Lords, which have been repeated in the Court of Appeal,⁵⁴ indicate that a manufacturer will not be liable where a third

⁵¹ *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, 105.

⁵² *Donoghue v. Stevenson*, [1932] A.C. 562, 582.

⁵³ AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW OF TORTS, vol. II, p. 1047.

⁵⁴ *Farr v. Butters*, [1932] 2 K. B. 606.

person in the line of transmission has a reasonable opportunity to inspect the goods. Lord Atkin stated that in these circumstances a duty of care might not exist; Lord Macmillan, in putting forward the now discarded control theory, expressed a similar opinion.⁵⁵ Lord Atkin professed to derive this doctrine from a statement of Brett M.R. in *Heaven v. Pender*.⁵⁶ Brett M.R. stated that a supplier of chattels for the immediate use of particular persons is under a duty to take reasonable care that they are in proper condition "where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity of discovering any defect which might exist." The supplier would, on the other hand, be subject to no such duty if "it would be a question whether they would be used before there would probably be means of observing any defect." It would seem that Brett M.R. was referring to an opportunity of inspection by the actual user; whether he would have held that an opportunity of inspection by a third person relieves a supplier of chattels is doubtful in view of his decision in the later case of *Mowbray v. Merryweather*.⁵⁷ In *Donoghue v. Stevenson*, however, Lord Atkin transferred Brett M.R.'s remarks upon contractors to an intervening handler's opportunity of examining a product placed upon the market by a manufacturer, and used them for two purposes: as a method of distinguishing *Caledonian Ry. Co. v. Mulholland*,⁵⁸ a case which Lord Macmillan

⁵⁵ *Donoghue v. Stevenson*, [1932] A. C. 562, 622.

⁵⁶ (1883), 11 Q.B.D. 503, 510.

⁵⁷ [1895] 2 Q. B. 640. A supplied to B, a master stevedore, a defective chain. B's servant C was injured when the chain broke, and B settled C's claim. B sued A for breach of warranty and recovered the amount which he had paid C on the ground that A ought to have contemplated such a result. Lord Esher M.R. pointed out that though the flaw was not obvious to the eye, B might have discovered it by reasonable care (pp. 641-42). The court made it clear that C would have succeeded in an action against B for negligence in failing to examine the chain and against A on the principle of *Heaven v. Pender*. If the authority of Lord Esher is invoked in support of the proposition that a plaintiff cannot recover from the supplier of a defective chattel where a third person has the means of detecting its unfitness, it would seem that *Mowbray v. Merryweather* should not be overlooked. See also *Vogan & Co. v. Oulton* (1898), 79 L. T. 384, (1899), 81 L. T. 435.

⁵⁸ [1898] A.C. 216. Yet in *Elliott v. Hall* (1885), 15 Q.B.D. 315, a case which Lord Atkin approves and in which the plaintiff recovered, at least two intermediate persons had an opportunity to discover the defective catch: the lessor of the truck who was bound to keep it in repair, and the railway company, one of whose inspectors was under a duty to inspect at the siding at which this particular truck remained for six weeks. It would also seem that the plaintiff's employer had as reasonable an opportunity of inspecting the truck and discovering the defect as the pursuer's husband's employer had in the *Mulholland Case*. Referring to the argument that the railway could have discovered the defect, Grove J. stated that the question was whether the defendant, and not whether the railway, was negligent.

did not include in his review of the authorities; and as a test for determining whether the relationship between the maker and consumer was sufficiently "proximate" to impose a duty upon the former. How much remains of the theory that an intermediate opportunity of inspection destroys the necessary "proximity" between manufacturer and consumer, and therefore prevents a duty from arising is perhaps open to question. Sir Frederick Pollock has deprecated "this talk about proximity — a kind of poor fictitious relation of privity" as entirely out of place,⁵⁹ and the members of the Judicial Committee seem to have construed *Donoghue v. Stevenson* with Sir Frederick's article before them. The Privy Council dismissed the cautious reasoning that the sealed and opaque bottle established a special relationship between the parties,⁶⁰ with the statement that "there was no relation between pursuers and defenders except that arising from the fact that she consumed the ginger-beer they had made and bottled."⁶¹ After pointing out that privity is immaterial in this type of case, the Privy Council said :

The word "proximity" is open to the same objection; if the term proximity is to be employed at all, it can only be in the sense that the want of care and the injury are in essence directly and intimately connected; though there may be intervening transactions of sale and purchase, and intervening handling between these two events, the events are themselves unaffected by what happened between them: "proximity"

Lord Atkin also seems to have doubted whether the plaintiff would succeed if a case presenting the exact facts of *MacPherson v. Buick Motor Co.* (1916), 217 N.Y. 382 arose in England. "It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise prevented the relation between the manufacturer and the user from being so close as to create a duty." (*Donoghue v. Stevenson*, [1932] A.C. 562, 598-99). Reference to the reports of *MacPherson v. Buick Motor Co.* in the lower courts, where the facts appear more fully, shows, however, that the defective nature of the wood used in the wheel spokes was undiscoverable by either the intermediate dealer or by the plaintiff himself. The defendant bought the wheels from the Imperial Wheel Company, and "when received by the defendant the wheel was ironed and was primed with one coat of paint. . . . The priming coat upon the wheel covered the grain and made it more difficult to determine the quality of wood by the eye." The Appellate Division pointed out that "some of the paint could have been removed, the wheel could have been weighed, and an expert could have formed a judgment as to the quality of the wood used." There was also evidence that other automobile manufacturers used a hydraulic pressure test, which would probably have revealed the weakness. The defendant was negligent in failing to employ any of these tests. If they would not have disclosed the defect, the court stated that it was negligence to purchase a wheel in such a forward state of construction, that its fitness could not be ascertained. *MacPherson v. Buick Motor Co.* (1912), 153 App. Div. 474, 481; (1914), 160 App. Div. 55, 56, 59. It is obvious that an automobile dealer, and *a fortiori* the ultimate purchaser, cannot be expected to make such tests. As regards both the dealer and the plaintiff the defect in the wheel was latent in the fullest sense of the term.

⁵⁹ *The Snail in the Bottle, and Thereafter* (1933), 49 L.Q.R. 22.

⁶⁰ *Donoghue v. Stevenson*, [1932] A. C. 562, 582, 589-99, 603.

⁶¹ *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, 102.

can only be properly used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury, and like "privity" may mislead by introducing alien ideas.⁶²

Proximity, in other words, means simply that the article must "reach the consumer or other user subject to the same defect as it had when it left the maker."⁶³ This ghostly survival of privity of contract the Judicial Committee appears to have driven from the law. The rule that a reasonable opportunity of intermediate examination prevented the manufacturer from owing a duty to the injured consumer rested, it has been seen, upon the foundation that there must exist between them a special relationship deduced from the nature of the goods. Since the reason for the rule, the supposed necessity of "proximity", thus disappears, it would seem that the rule itself is now open to reconsideration.

Two recent decisions upon the related question of contractors' liability are in point. In a New Zealand case⁶⁴ the plaintiff's husband was killed while travelling as a passenger for hire in an aeroplane owned and operated by M. The machine crashed owing to an incorrectly fitted cotter-pin. Three months prior to the accident M had delivered the aeroplane to the defendant for repairs. The aviation authorities as required by law, thoroughly examined the machine before it was returned to the defendant, and they issued the necessary certificate of airworthiness. The cotter-pin could be readily inspected. After non-suiting the plaintiff because she failed to prove that the cotter-pin was defective when the aeroplane left the defendant's works, the learned judge, referring to *Farr v. Butters*,⁶⁵ went on to state that the inspection prevented the relation between the parties from being proximate, and that therefore the defendant owed no duty to the deceased. It would seem with respect that the plaintiff's claim could have been better disposed of on the simple ground that she had not connected the defendant with her husband's death without importing an unnecessary discussion of proximity. The decision is at best no more than a weak authority for the narrow proposition that a contractor is not liable to a passenger for the careless repair of a machine where an expert examination which is required by law and which is actually made before the machine is delivered to the user, fails to disclose a defect. That a mere opportunity for inter-

⁶² *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. at p. 104.

⁶³ *Ibid.*, pp. 106-107.

⁶⁴ *Mairdonald v. Marlborough Aero Club and New Zealand Airways, Limited*, [1935] N.Z.L.R. 371 (Supreme Court).

⁶⁵ [1932] 2 K. B. 606.

mediate inspection does not necessarily destroy a third person's right of action against a contractor appears from *Brown v. Cotterill*.⁶⁶ There the defendants, monumental masons, placed a tombstone in a churchyard in pursuance of a contract with X. The stone fell and injured the infant plaintiff when she and her mother were tending an adjacent grave. The court held that the defendants owed the plaintiff a duty to take care, and that they were negligent in failing to support the stone with metal dowels. The fact that X had looked at and approved the stone after it was put up did not affect the defendant's liability. A person who engages a contractor ordinarily possesses, as Lawrence J. pointed out, no special knowledge of the art, and he relies upon the latter to carry out the work properly; the employer's acceptance will not bar third persons from recovering against the contractor. Lawrence J. suggested, without holding, however, that the defendants might not have been liable if X had been "bound to examine and approve of the method of erection," that is, if X by the terms of the contract owed a duty to the defendants to inspect the stone.⁶⁷ Whether or not this is a good rule for contractors, it does not follow that a similar principle should apply to manufacturers. No English decision holds that a distributor is under a duty to inspect manufactured articles before reissuing them; such a duty, if existent, would be owed, not to the manufacturer, but to the subsequent transferee, and

⁶⁶ (1934), 51 T. L. R. 21, noted in (1935), 13 Can. Bar Rev. 112; (1935), 8 Aust. L. J. 333.

⁶⁷ This is an echo of Beven's theory (BEVEN, NEGLIGENCE, 4th ed., pp. 44 ff.) that a contractor or vendor is not liable to a stranger to the contract where a third person was under the duty to inspect the goods; if the third person has merely an opportunity without being under a duty to inspect the contractor may be liable. Beven, for example, explains *Heaven v. Pender* (1883), 11 Q.B.D. 503, on the ground that the shipowner was not under a duty to examine the staging; *George v. Skirvington* (1869), L.R. 5 Ex. 1, on the ground that the husband was not under a duty to examine the hair-wash; and *Earl v. Lubbock*, [1905] 1 K.B. 253, on the ground that the van owner was bound to inspect and approve the repairs. (Pollock placed *Earl v. Lubbock* on the ground that no negligence was proved, 49 L.Q.R. 25). In 1905, Professor Bohlen showed that the English cases contained nothing to justify Beven's rule and that it was in direct conflict with *Elliott v. Hall* (1885), 15 Q.B.D. 315, but the editors of Beven apparently remain unaware of the criticism. (See BOHLEN, STUDIES IN THE LAW OF TORTS, 116 ff.). Beven's reading of many of the cases, especially of *George v. Skirvington*, is entirely at variance with that of the House of Lords in *Donoghue v. Stevenson*, [1932] A.C. 562. In *Brown v. Cotterill*, *supra*, at p. 21, Lawrence J. states that Beven's cases are applications of a more general test, *viz.*: Are the terms of the contract such that an ordinarily prudent person would consider that his liability was at an end after the approval of the other party to the contract? After thus stating that the cases establish a proposition which is different from that for which Beven cites them it is a curious fact that on p. 22 Lawrence J. goes on to observe that the defendants might not have been liable if the employer had been bound to inspect the stone—an apparent recognition of Beven's theory.

the distributor's failure to discharge it would be irrelevant in an action by the consumer against the maker.⁶⁸ Factual differences between the positions of contractors and manufacturers may justify a different treatment of the rules governing the effect of intermediate opportunity of inspection upon their responsibility to third persons. A contractor who is exonerated under Lawrence J.'s test of duty knows that the employer has in fact examined and approved the work; the employer, it may be argued, is often the best judge of the use to which the chattel will be put, and if, after an intelligent inspection, he accepts it as satisfactory for the intended purpose, the contractor may reasonably assume that it is unlikely to endanger third persons. A dealer who distributes a standard manufactured product, on the other hand, normally makes no such particularized examination, or, if he does, it occurs without the manufacturer's knowledge after the goods have left the factory. Further, a contractor who furnishes a chattel usually expects it to be used by or to remain in the control of the employer while a manufacturer knows that his goods will pass through several hands before reaching the ultimate consumer. There is also the factor that a manufacturer should anticipate that a distributor or retailer is unlikely to be astute in finding defects which will prejudice a resale.⁶⁹

This problem has been fully considered in New York, and in view of the respect paid to *MacPherson v. Buick Motor Co.*⁷⁰ in the House of Lords considerable interest attaches to the law prevailing in that state. It will be recalled that another branch of the English law of torts has recently been liberalized by a wholesome infusion of New York authority.⁷¹ The Court of

⁶⁸ *Mowbray v. Merryweather*, [1895] 2 Q.B. 640.

⁶⁹ See Bohlen, *Liability of Manufacturers* (1929), 45 L.Q.R. 343, 369.

⁷⁰ (1916), 217 N.Y. 382, approved in *Donoghue v. Stevenson*, [1932] A.C. 562, 598, 617 and in *Australian Knitting Mills, Ltd. v. Grant* (1933), 50 C.L.R. 387, 441, per Evatt J.; cited in *Ross v. Dunstall* (1921), 62 Can. S.C.R. 393, 396, per Duff J. *Thomas v. Winchester* (1852), 6 N.Y. 397 was approved in *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640, 646, and in *Ross v. Dunstall*, *supra*, at p. 402, per Anglin J. Further evidence of the similarity between the English and the New York law on the liability of manufacturers is *Genesee County Patrons Fire Relief Assoc. v. Sonneborn* (1934), 263 N.Y. 463, where the Court of Appeals applied *Anglo-Celtic Shipping Co. v. Elliott & Jeffrey* (1926), 42 T.L.R. 297, in settling a long standing controversy as to whether a manufacturer is liable for damage to property or only for bodily injuries caused by the negligent fabrication of his products. See Notes in (1934), 19 Cornell L.Q. 648; (1934), 32 Mich. L.R. 1007; (1934), 11 N.Y.U.L.Q. Rev. 656.

⁷¹ *Haynes v. Harwood*, [1934] 2 K.B. 240, 247; [1935] 1 K.B. 146, 156, 107, where the Court of Appeal, affirming Finlay J., allowed the plaintiff to recover for injuries received in rescuing a child. Both courts applied *Wagner v. International Ry. Co.* (1921), 232 N.Y. 176. See *Brandon v. Osborne, Garrett*, [1924] 1 K.B. 548, 554, where Swift J. approved *Eckert v. Long Island R.R.* (1871), 43 N.Y. 502. See Goodhart, *Rescue and*

(Footnote continued on page 302)

Appeals has repeatedly held that a manufacturer of defective goods remains liable to the user even though an intermediate party who is under a duty to inspect them has a reasonable opportunity to discover the imperfection. This rule has received general acceptance in the United States,⁷² and the American Law Institute has adopted it in the *Restatement of the Law of Torts*.⁷³

The leading case is *Rosebrock v. General Electric Co.*⁷⁴ There the defendant manufactured and sold to the Niagara Falls Power Company electrical transformers which contained wooden packing blocks without giving notice to the buyer of the presence of the blocks or of the danger that would arise from using the transformers without using them. The employees of the Niagara Company installed the transformers in the ordinary way in the Company's power station. When the current was turned on the building blew up and thirteen men, including the plaintiff's intestate, an employee of the Niagara Company, were killed. The wooden blocks caused a short circuit which produced the explosion. The defendant contended that, even if it were negligent, the Niagara Company was also negligent in failing to make a reasonable inspection which would have revealed the danger; the insulating properties of the oil with which trans-

Voluntary Assumption of Risk (1934), 5 Camb. L.J. 192; ALLEN, *LEGAL DUTIES*, 217-220; Brown, *A Study in Negligence* (1932), 10 Can. Bar Rev. 557. An earlier case, *Gregory v. Miller*, *The Times*, February 9, 1933, (before Macnaghten J.) where the plaintiff recovered for injuries received in rescuing a child seems to have escaped notice in the discussion of *Haynes v. Harwood* in 8 Aust. L. J. 203, 417; 13 Can. Bar Rev. 248; 5 Camb. L.J. 410; 46 Jur. Rev. 294; 77 L.J. 337; 78 Sol J. 323, 50 Sc. L.R. 313.

⁷² HARPER, *THE LAW OF TORTS* (Indianapolis, 1933) p. 248, the most recent American text-book, states: "Although there is little direct authority it seems clear that a manufacturer is not relieved of liability for the negligent consideration of chattels which, in their defective condition menace the safety of others merely because his immediate vendee or some other person through whose hands the article passes has the opportunity or even is under a duty to inspect the chattel."

⁷³ Vol. II, sec. 396: "A manufacturer of a chattel is subject to liability under the rules stated in Section 394 and 395, although the dangerous character or condition of the chattel is discoverable by an inspection which the vendor or any other person is under a duty to the person injured to make." The same principle is applied to the supplier of chattels in Section 393.

⁷⁴ (1923), 236 N.Y. 227, 140 N.E. 571. An earlier case adopting but not developing this doctrine is *Wanamaker v. Otis Elevator Co.* (1920), 223 N.Y. 192. R, a customer in the plaintiff's department store was injured when the elevator in which she was a passenger fell owing to a flaw in the hoisting cable. The defendant was negligent in selling and installing a defective car and the plaintiff was negligent in failing to discover the defect which a reasonable examination would have disclosed. In an earlier action (*Rumetsch v. Wanamaker* (1915), 216 N.Y. 379) R recovered against the plaintiff who now sued the defendant for the amount of the judgment. The Court held that R could have elected to sue the maker in the first instance, and that the plaintiff was entitled to reimbursement. See *London Guarantee & Accident Co. v. Otis Elevator Co.* (1927), 155 N. E. 182 (Ind.).

formers must be filled before being connected are destroyed if the coils are not perfectly dry, and the Niagara Company, it was urged, ought to have taken the transformers apart in order to guard against the presence of any possible moisture. The trial judge in substance directed the jury that even if the Niagara Company were under a duty to inspect the transformers, the failure to do so would not absolve the defendant, provided the latter was negligent in selling the product without warning the buyer. The jury found for the plaintiff, and in sustaining the verdict the Court of Appeals, with Cardozo J. concurring, said:

If under the circumstances of this case the defendant were negligent it was not relieved from liability because the purchaser was negligent in not discovering the negligence or preventing its natural result. . . . In considering the charge we must start with the defendant's negligence. That being established, the fact that the negligence of others concurred in the result does not relieve the defendant.

The latest decision is *Smith v. Peerless Glass Co.*⁷⁶ The plaintiff, a waitress at a roadside stand, lost the sight of one eye when a pop bottle exploded owing to a flaw in the glass. The bottle was made by the Peerless Glass Co. which sold it to the other defendant, M. The latter filled it with soda water and put it

⁷⁵ 236 N.Y. 227 at pp. 240-41. Other cases to the same effect arising out of this disaster are *Sider v. General Electric Co.* (1922), 203 App. Div. 443; (1924), 238 N.Y. 64, 143 N.E. 792; *Shamrock v. General Electric Co.* (1923), 236 N.Y. 599; *Doel v. General Electric Co.* (1923), 142 N.E. 299. See note in (1922), 36 Harv. L.R. 762. In accord: *Krahn v. J. L. Owens Co.* (1914), 125 Minn. 33, 145 N.W. 626; *Flies v. Fox Bros. Buick Co.* (1928), 196 Wis. 196, 218 N.W. 855; *Ellis v. Lindmark* (1929), 225 N.W. 395 (Minn.), noted in 28 Mich. L.R. 92; *Maddox Coffee Co. v. Collins* (1932), 167 S.E. 306 (Ga.); *Crane Co. v. Sears* (1934), 35 Pac. (2d) 916, 168 Okla. 603. For an Australian case holding that a manufacturer is liable for damage caused by careless packing of goods see *Faulkner v. Wischer*, [1918] V.L.R. 513.

⁷⁶ (1932), 259 N.Y. 292, 181 N.E. 576, cited in *Australian Knitting Mills, Ltd. v. Grant* (1933), 50 C.L.R. 387, 441, per Evatt J.

The American authorities upon the effect of an intermediate handler's knowledge that goods which he resells are defective are scanty and inharmonious. See Bohlen, *Liability of Manufacturers* (1929), 45 L.Q.R. 343, 366. In *Waters-Pierce Oil Co. v. Deselms* (1908), 212 U.S. 159, the plaintiff ordered coal oil manufactured by the defendant from a retailer, and got a mixture containing gasoline. The retailer did not know that the oil contained gasoline. The United States Supreme Court said: "We must not be understood as holding . . . that a recovery against the oil company might not have been justified, even if the proof had established that Powers & Deselms (the retailers) had been informed by the oil company of the dangerous character of the mixture." In a recent case the manufacturer of a plank used in scaffolding was held liable to a workman injured when the plank broke despite the fact that an intervening supplier knew of the defect. *Stultz v. Benson Lumber Co.* (1935), 49 Pac. (2d) 848 (Cal.) noted in (1936), 49 Harv. L.R. 493. According to the RESTATEMENT OF THE LAW OF TORTS, Vol. II, Sections 388-90, a manufacturer or supplier of a defective chattel cannot always escape liability by warning his immediate transferee; there are circumstances in which the supplier ought to contemplate that the warning may not be passed on.

on the market. The plaintiff obtained a verdict against the Peerless Glass Co. for negligence in manufacture and against M for negligence in failing to make a proper inspection. The Court of Appeals sustained the judgment against the Peerless Glass Co., and ordered a new trial with respect to the claim against M. Whether M ought to have found the defect and rejected the bottle did not affect the manufacturer's liability. The fact that M "had bought its bottles from a reputable concern which presumably had made proper tests does not absolve it from its own duty of care any more than the probability of intervening tests absolved the maker of the bottles."

The basis of the New York rule is that the manufacturer of defective goods is bound to contemplate that an intermediate handler may pass them on without discovering their condition. The negligence of the manufacturer and the failure of the third person to discover the imperfection by reasonable examination are concurrent causes of the plaintiff's injury, and therefore the intervening opportunity of inspection does not destroy the causal connection between the original negligence and the damage. If the distributor is under a duty to inspect the product, and fails to do so, he is also negligent and an action lies against him as well as against the maker. This principle of concurrent negligence is as much a part of English as of American Law.⁷⁷ The contrary view requires the conclusion that a manufacturer is entitled to expect that a distributor will in fact find a defect which is reasonably discoverable, and that he will destroy the article, remedy the fault, or warn the next transferee. Anyone except a lawyer would unhesitatingly say that a careless manufacturer should not escape liability because the accident would not have happened if a third person who is more observant than the manufacturer himself had intervened and removed the danger. No direct decision places a manufacturer in this privileged position; there is, on the other hand, high authority for the proposition that a contractor or undertaker, cannot assume that third persons will not be careless, and then offer that assumption as an excuse for his own failure to exercise due care.⁷⁸ The New York cases provide a socially satisfactory solution of the problem, and they are at the same time fully consistent with

⁷⁷ *Burrows v. March Gas Co.* (1870), L.R. 5 Ex. 67; (1872), L.R. 7 Ex. 96, approved in *Weld-Blundell v. Stephens*, [1920] A.C. 956, 973, 984. The New York courts have cited *Burrows v. March Gas Co.* in support of the rule that a third party's opportunity of detecting the dangerous conditions of goods does not relieve the maker. *Sider v. General Electric Co.* (1922), 203 App. Div. 443, 453.

⁷⁸ For example, *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*, [1936] A.C. 108.

the recognized doctrines of causation in English law. When the rule in *MacPherson v. Buick Motor Co.* was first adopted, it is interesting to recall that the New York courts were uncertain whether a manufacturer would be liable where a person in the line of transmission had reasonable means of discovering a defect in the goods; the decisions which have been mentioned dispelled these doubts. A similar development may perhaps be hoped for in England and Canada.

It will be observed that *Smith v. Peerless Glass Co.*⁷⁹ also established that the manufacturer of a constituent part of an article may be subject to the same liability as the manufacturer of the complete product into which it is incorporated. The bottle maker was in the position of the maker of the wheel in *MacPherson v. Buick Motor Co.* This point seems to have been assumed rather than decided in a recent English case.⁸⁰ A passenger in an automobile was injured when the windscreen, made of "Triplex Toughened Safety Glass", broke for no apparent reason. The plaintiff with perhaps more courage than judgment, sued the manufacturers of the windscreen, and, though holding that the action failed because no evidence of negligence appeared, Porter J. said that he could "see many reasons why a claim should be made against them." Inasmuch as the court concluded that the fracture was due to the fact that the windscreen was improperly fitted, it would seem that an action against the maker of the automobile would have improved the plaintiff's chances of success.

An allied problem is that of the liability of a manufacturer who sells in a knocked-down condition a product which the ultimate purchaser or a third person assembles. As an alternative ground for his decision in *Farr v. Butters*,⁸¹ Lawrence L.J. stated that in these circumstances *Donoghue v. Stevenson* did not apply; Scrutton and Greer L.JJ. did not, however, discuss the point. Sir Frederick Pollock seems to approve, apparently for the reason that the manufacturer "does not know which indi-

⁷⁹ 259 N.Y. 292 (noted in 46 Harv. L.R. 163, 18 Cornell L.Q. 128), affirming 233 App. Div. 252 (noted in 11 Boston Univ. L.R. 578, 30 Mich. L. R. 314). Earlier cases held the bottler liable for defects in the glass but in no case does the maker of the bottle seem to have been held liable. *Torgesen v. Schultz* (1908) 192 N. Y. 156, *Taylor v. Berner* (1929) 146 Atl. (N.J.) 674 and cases cited in note 23, supra. A decision under the Civil Code is *Guinea v. Campbell* (1902) 22 Cour Supérieure (Quebec) 257. See *RESTATEMENT OF THE LAW OF TORTS*, Vol. II, p. 1078 and *Stultz v. Benson Lumber Co.* (1935) 49 Pac. (2d) 848 (Cal.).

⁸⁰ *Evans v. Triplex Safety Glass Co. Ltd.*, [1936] 1 All E.R. 233.

⁸¹ [1932] 2 K. B. 606, 617.

vidual parts will be fitted to which.”⁸² The manufacturer, however, knows “which parts ought to be fitted to which”, and if this is done as he intended, the fact that the product is sold unassembled is not a sound reason why he should be exonerated where some of the pieces contain hidden faults. Even where the purchaser or third person fits the parts together incorrectly, the question remains whether there may or not be circumstances in which the maker ought to contemplate such an error, and give directions as to how they should be united. A recent American case is instructive.⁸³ The plaintiff bought from X a steam heating plant which the defendants manufactured. X, an experienced heating contractor, assembled and installed it in the plaintiff’s house in accordance with blue prints and instructions furnished by the defendant. X attached the smoke hood to the top of the boiler but owing to improper construction and design it was not sufficiently strong to withstand the pressure of gas collected inside the furnace. Three months later the hood blew off and the plaintiff’s house was destroyed by fire. The jury found that the defendants were negligent, and the Circuit Court of Appeals, applying the principle of *MacPherson v. Buick*, held them liable. The defect in construction made the furnace dangerous when put to the use for which it was intended, and therefore the defendants owed a duty to take reasonable care in its manufacture. The United States Supreme Court, of which Cardozo J. became a member in 1932, refused leave to appeal.⁸⁴

⁸² *The Snail in the Bottle and Thereafter* (1933), 49 L.Q.R. 22, 26. Pollock states that Cardozo J. thought that the manufacturer of a machine is not the maker of the component parts, but the purchaser who assembles them and sells the finished product, the inference being that in Cardozo J.’s opinion the former would not be liable to the ultimate user. In *MacPherson v. Buick Motor Co.* (1916), 217 N.Y. 382, 390, Cardozo J., however, said: “We leave that question open. We shall have to deal with it when it arises.” Any doubt which the learned judge may have entertained as to the liability of the maker of the wheel arose from the fact that “the manufacturer of the finished product must also fail in his duty of inspection,” and that this failure might make the carelessness of the maker of the wheel “too remote to constitute, as to the ultimate user, an actionable wrong.” That Cardozo J.’s ultimate opinion was that such a failure to discharge the duty of intermediate inspection is irrelevant appears from his concurrence in *Rosebrock v. General Electric Co.*, *supra*, note 74. This destroys any possible ground for citing Cardozo J. in support of the proposition that the maker of an unassembled product is not liable to the ultimate user. See Bohlen, *Liability of Manufacturers* (1929), 45 L.Q.R. at p. 365.

⁸³ *United States Radiator Corporation v. Henderson* (1933), 68 Federal (2d) 87 (10th Circuit). See also *Clark v. Standard Sanitary Mfg. Co.* (1930), 149 Atl. (N.J.) 828 (plumbing). *Contra: Tipton v. Barnard & Leas* (1924), 302 Mo. 162, 257 S.W. 791, where the plaintiff, who was in charge of men installing an elevator, was injured in operating the elevator after he had discovered a defect.

⁸⁴ *Certiorari* denied in (1933), 292 U.S. 650.

The relation of *Donoghue v. Stevenson* to contractors has not yet been passed upon by an appellate tribunal. Three courts of first instance have assimilated their position to that of manufacturers. Two of these cases have been referred to,⁸⁵ and the third is *Malfrout v. Noxal, Ltd.*⁸⁶ There the defendant negligently fitted a side-car, whether of its own make or not does not appear, to S's motor-cycle. A few days later when S, with the plaintiff as his guest, was travelling at a moderate speed, the four attachments which held the side-car to the motor-cycle came apart, and the combination separated. The plaintiff was thrown out, the motor-cycle proceeded for some distance alone, and the side-car ended its career in the ditch. Lewis J. in a brief judgment held that the plaintiff could recover under *Donoghue v. Stevenson*. The New Zealand Supreme Court has taken an equally broad view of *Donoghue v. Stevenson*. In *Maindonald's Case*⁸⁷ Blair J. said :

The present case is not one of liability of the manufacturer of goods to the ultimate consumer of those goods, but one of the liability of a repairer of a machine to a person ultimately injured by reason of defective repair. In principle there does not seem to be any alleged difference in the two cases, and I shall so assume.

That *Malfrout v. Noxal, Ltd.* and *Maindonald's Case* foreshadow a wide extension of *Donoghue v. Stevenson* is scarcely open to doubt. A contractor who rebuilds or repairs an automobile becomes liable under these decisions to a passenger for injuries resulting from the careless execution of the contract. If this be admitted, the range of reasonable apprehension of danger should also include the servants whom the owner authorizes to operate the automobile, but in the present state of the law they seem to occupy a special niche of their own. The courts are, however, apparently prepared to disregard *Earl v. Lubbock*,⁸⁸ which narrowly escaped interment by the House of Lords, until a case presenting its particular facts reappears. It is difficult to justify the basis upon which recovery against the negligent repairer of a vehicle may be granted to a passenger, but denied to the servants of the owner or even to strangers whom the defendant should contemplate as being within the vicinity of its probable use. If, for example, in *Malfrout v. Noxal, Ltd.* the side-car, which crossed a foot-path before coming to rest, had

⁸⁵ *Brown v. Cotterill* (1934), 51 T.L.R. 21, and *Maindonald v. Marlborough Aero Club and New Zealand Airways, Ltd.*, [1935] N.Z.L.R. 371, *supra*.

⁸⁶ (1935), 51 T.L.R. 551, noted in 79 Sol. J. 724.

⁸⁷ [1935] N.Z.L.R. 371 at p. 382.

⁸⁸ [1905] 1 K. B. 253.

struck a pedestrian, the result ought not to have been different. In New York the negligent repairer of an automobile axle has been held liable for injuries caused by a vagrant wheel which came off and knocked down a child on the pavement.⁸⁹

It remains to notice the remarkable influence of Lord Atkin's generalization of the duty of care in *Donoghue v. Stevenson*.⁹⁰ This principle has already supplied a remedy in two situations where plaintiffs who were injured by the dangerous condition of the defendants' premises could not fit their cases to the technical requirements of the law of nuisance. In *Cunard v. Antifyre*,⁹¹ the plaintiffs, husband and wife, occupied rooms in the defendant's building under a tenancy granted by a sub-lessor. Mrs. Cunard received cuts when a projecting gutter fell through the glass roof of the kitchen. Like Mrs. Malone in an equally well-known case,⁹² Mrs. Cunard could not succeed in nuisance because she had no interest in the land, but, unlike Mrs. Malone, the court allowed her to recover for negligence. After quoting from Lord Atkin's speech, Talbot J. said: "Apply this to the present case. It seems clear that the persons having the control of this guttering, if they had directed themselves to the omission to take reasonable care that it should not fall, must have had the occupier of the kitchen, and any persons lawfully in the kitchen, on which if it did fall it must fall, reasonably in 'contemplation' as 'closely and directly affected' by the omission." In *Wilchick v. Marks and Silverstone*,⁹³ Goddard J. threaded his way through a maze of authorities going back to the time of Holt C.J., and emerged with the discovery that no direct decision exonerated a lessor, who had reserved a right of entry to repair, from responsibility to a passer-by for injuries caused by the disintegration of the premises. Goddard J. was thus enabled to distinguish a series of cases which had been assumed to conclude the question against the plaintiff. The learned judge held that the lessor's right of entry, coupled as it was with information that the shutter which fell on the plaintiff was insecure, raised a duty of care to persons using the adjacent highway. The text-writers who confidently

⁸⁹ *Kalinowski v. Truck Equipment Co.* (1933), 237 App. Div. (N.Y.) 472. THE RESTATEMENT OF THE LAW OF TORTS, Section 404, subjects a contractor who negligently makes, rebuilds or repairs a chattel to the same liability as a manufacturer. This liability extends to persons whom the contractor should expect to be in the vicinity of its probable use (Section 395).

⁹⁰ [1932] A. C. 562, 580.

⁹¹ [1933] 1 K. B. 551.

⁹² *Malone v. Laskey*, [1907] 2 K. B. 141.

⁹³ [1934] 2 K. B. 56, discussed in 50 L.Q.R. 459; 5 Camb. L. J. 411; 20 Conveyancer 48; 77 L.J. 151, 388, 460; 177 L.T. 196; 78 Sol. J. 182, 443, 464, 728; 1 Solicitor 65.

asserted that a landlord is liable to strangers for injuries resulting from the dangerous state of his property only if he let it in a ruinous condition or covenanted to repair must revise future editions of their books in the light of *Wilchick v. Marks and Silverstone*.⁹⁴ The principle is perhaps capable of extension to a case where a lessor, without reserving a right of entry, is accustomed to make repairs with the consent of the tenant. It seems safe to assume that the courts would have reached a different result had these questions arisen before 1932. That Lord Atkin's statement may be a weapon of offence for as well as against landlords appears from *Chamberlin v. Sperry*.⁹⁵ There a house which the plaintiff let to the defendant was destroyed by the explosion of gasoline which the defendant brought on the premises for the use of his wife in her business of dry cleaning. The court held that both *Rylands v. Fletcher*⁹⁶ and the general principle expressed by Lord Atkin required the defendant to make good the damage. Perhaps the most unexpected effect of *Donoghue v. Stevenson* will be to hasten the passing of the custom of college initiations, for in another Canadian case a freshman who became insane in consequence of initiation practices recovered \$15,000 from the Board of Governors of a provincial university.⁹⁷ The court held that the Board should have contemplated that some harm might come to first year students during the ceremonies, and that it was under a duty to take reasonable care to prevent it. While the Board could not anticipate that a student would be driven insane, there was a real likelihood that some appreciable injury might happen to the plaintiff or others of his class, and the fact that the Board could not foresee the full extent of the harm did not affect its responsibility. This decision shows how unpredictable are the types of liability which may be produced by a combination of *Donoghue v. Stevenson* and *In re Polemis*.⁹⁸ In *Haynes v. Harwood*,⁹⁹ the latest case, Lord Atkin's statement supplied a second string for the plaintiff's bow, but it is probable that he would have succeeded without its aid. Roche L.J. (as he then was) intimated, however, that a future argument that recovery for rescue is limited to policemen would be met with *Donoghue v. Stevenson*. This catalogue may end with a reference to an

⁹⁴ POLLOCK, TORTS, 13th ed., 448; CLERK AND LINDSELL, TORTS, 8th ed., 382, WOODFALL, LANDLORD AND TENANT, 22nd ed., 913-14.

⁹⁵ [1934] 1 D.L.R. 189 (Manitoba).

⁹⁶ (1868), L. R. 3 H. L. 330.

⁹⁷ *Powlett and Powlett v. University of Alberta*, [1934] 2 W.W.R. 209, varying [1933] 3 W.W.R. 322.

⁹⁸ [1921] 3 K.B. 560.

⁹⁹ [1935] 1 K.B. 146, affirming [1934] 2 K. B. 240.

interesting South African case in which the court analyzed Lord Atkin's generalization, and concluded that it was substantially in accord with the standard of care existing in the Roman Dutch law.¹⁰⁰ There are obviously many situations in which decisions that cannot be disturbed exclude the application of Lord Atkin's test of duty. Its operation is likely to be confined to the unoccupied territory of careless conduct in which the courts have not determined whether a duty to use care exists. The extent of that area may be judged from the preceding cases, and there Lord Atkin's statement of principle promises to be of decisive importance in expanding the frontiers of liability.

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¹⁰⁰ *Perlman v. Zoutendyk*, S. A. Law Reports, [1934] Cape Prov. Div. 151. The defendant, a professional appraiser, carelessly issued to X a certificate of appraisal in which certain lands were grossly overvalued. The defendant knew or ought to have known that X would use the certificate for the purpose of borrowing money on the security of the property. The plaintiff advanced money to X but owing to the worthlessness of the security he lost most of the investment. Held that the defendant as a reasonable man ought to have foreseen that a negligently made valuation is likely to mislead a prospective mortgagee, and therefore the defendant owed to the plaintiff the duty to use reasonable care in its preparation. While such a situation comes within the language of Lord Atkin's speech, *Le Lievre v. Gould*, [1893] 1 Q.B. 491 and similar cases would be an answer to the plaintiff's allegation that a duty of care exists in English law. Other cases in which this aspect of Lord Atkin's judgment has been discussed are *Brown v. Cotterill* (1934), 51 T.L.R. 21, *supra*, and *Dozois v. Pure Springs Co.*, [1935] 3 D.L.R. 384, 397, [1935] S.C.R. 319, 335. The concept of duty as an element in negligence has recently been attacked from the historical and comparative points of view. Winfield, *Duty in Tortious Negligence* (1934), 34 Col. L.R. 41; Buckland, *The Duty to Take Care* (1935), 51 L.Q.R. 637. Both writers agree that the idea of duty is an "unnecessary fifth wheel to a coach".