

## NEGLIGENT "ACTS OR OMISSIONS" \*

The recent decision of Hilbery J. in *Haseldine v. Daw & Son, Ltd.*,<sup>1</sup> raises questions of serious import in the law of negligence. It is peculiar that these problems have not received the same attention of writers or courts in England that has been given them in the United States; and it is the writer's opinion that much of the controversy in England over the implications of Lord Atkin's judgment in *Donoghue v. Stevenson*<sup>2</sup> could be clarified, if not simplified, by a clearer enunciation of these problems.

In *Donoghue v. Stevenson*, it will be recalled, Lord Atkin endeavoured to state in the form of a broad generalization the principle governing the "duty of care" in negligence. His language is as follows:

The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

As Lord Atkin pointed out, his statement is similar in import to the generalization made in 1883 by Lord Esher in *Heaven v. Pender*<sup>3</sup> to the following effect:

Whenever one person is placed by circumstances in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such injury.

It is true that Lord Esher's statement failed to win general approval in the courts and there can be little doubt that Lord Atkin's statement will not suffice as an exhaustive statement of the law of negligence—nor was it ever intended as such. Amongst other writers Mr. P. A. Landon has been severely critical of Lord Atkin's generalization and in the last issue of

\* "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."—Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562 at p. 580.

<sup>1</sup> [1941] 1 All E.R. 525.

<sup>2</sup> [1932] A.C. 562.

<sup>3</sup> (1883), 11 Q.B.D. 503.

the *Law Quarterly Review* he again wrote a warning against extending the "doctrine" of Lord Atkin.<sup>4</sup> His thesis seems to be that there is no universal test by which to decide whether a duty to take care exists, and while one may agree with this, and at the same time admit that Lord Atkin's generalization furnishes no solution to the duty problem in *all* cases, yet to accept Mr. Landon's statement that "the duty to be careful only exists where the wisdom of our ancestors has decreed that it shall exist", seems to deny the ability of the profession to forecast in any new set of facts the probable decision of the courts.

Probably no one would quarrel with the statement that "negligence" is by far the most important subject matter in the vast topic of the law of torts. In spite of that, however, the general treatment of "negligence" in the English text-books is very meagre. Thus, for example, in the latest addition to the text book literature — *Winfield's Text Book of the Law of Tort* — "negligence", as a separate chapter, is dealt with in some 28 pages, and of these 14 deal with the defence of contributory negligence. Naturally, negligence looms large in the treatment of other topics, such as liability for dangerous premises, dangerous chattels, etc., but these are divorced from any general treatment of "negligence". One might conclude, therefore, that students are not encouraged to analyse deeply the "negligence" problem as such. As a consequence it is only natural that courts have not been very happy in their attempts to lay a firm foundation for the development of this branch of the law, and as a result the old — and meaningless — phrase, "It all depends on the facts," is a favourite of practitioner and law student alike.

Now, of course, facts are not only the most important matter with which lawyers and courts have to deal, but they are, as well, the most important element in understanding the "law" that has been laid down in past decisions, and which somehow must be applied to the facts in hand. Therefore, in one sense everything "depends on the facts", and broad generalizations are of little value unless related to the facts from which they developed. At the same time, to say that whether a court will make a man respond for damage resulting from "his failure to exercise the care of a reasonable man" depends on the facts, is merely to say there is no law of negligence at all.

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<sup>4</sup> (1941), 57 L.Q.R. 179.

Without bothering to consider the views of those persons who might gladly subscribe to this proposition, most lawyers of the "depend on the facts" school cover up their denial of law by calling in aid the word "duty"; a court will say a "negligent" defendant must pay for damage caused a person to whom he owed a "duty" to be careful. We are at once in a dilemma. Some writers do not think duty is of much significance at all in a negligence action. Others have tried to make broad generalizations as to when a duty will arise. Others, observing rightly that no generalization has yet been able to solve all problems of this nature, content themselves with a folding of the hands, and say, like Mr. Landon, we will find the duty in past decisions, or, apparently, not at all.

It is submitted that writers who seek to avoid all generalizations in negligence and attempt to say that every issue of "duty or no duty" depends on its own facts contribute nothing to an understanding of tortious liability. What seems to be needed, is an attempt to classify situations with a view to discovering whether we may not be talking of entirely different things when we speak of a "duty to take care" with respect to a manufacturer of a chattel, or, say, an occupier of land. Only in this way can we avoid the too-sweeping generalizations which fail to distinguish fundamentally different fact situations, on the one hand, and a negative attitude that does not attempt any working rule on the other.

There can be little doubt that since the attempt to evolve a broader basis for liability in negligence in *Donoghue v. Stevenson*, the English law of negligence has made more advance in eight years than in the previous fifty. Yet the "proximity" or "neighbour" principle enunciated in that case is open to attack even as was Lord Esher's previous attempt. Both disregard the distinction between acting carelessly to *create* another's harm, and failing to act to *prevent* harm to another. A man may, by doing some act, create a risk of harm to persons or property; and in cases of this kind it is submitted that the generalizations of *Heaven v. Pender* and *Donoghue v. Stevenson* do apply in the sense of basing duty to carry on activities carefully on grounds of "foreseeability" or "proximity". In other words, any person carrying on an ordinary activity which creates a positive risk of harm to a foreseeable class of persons or property owes a duty to such persons, or with respect to such property, to carry on his activities with reasonable care.<sup>5</sup> On

<sup>5</sup> In the present state of the law it would probably be wise to qualify such a statement by confining it to situations where both plaintiff and

the other hand there are many cases where a person may, in a sense, be said to cause harm to another, because he failed to take some affirmative action to protect that other either from a dangerous existing state of affairs,<sup>6</sup> or from some other conscious agency, such as, for example, a child with proclivities towards arson.<sup>7</sup> This distinction between active misfeasance in the sense of conduct which involves unreasonable risks of harm, and what has been styled "failure to take affirmative precaution—a non-feasance of a duty of care," is one which has played a great part in the development of thinking in the law of negligence in the United States, due considerably to the efforts of Professor Bohlen,<sup>8</sup> but it has apparently had little effect in England. While the writer realizes only too well that it is in many cases possible to twist non-feasance into active misfeasance by picking out a different point of time at which to look at the defendant's conduct,<sup>9</sup> nevertheless the thought involved still seems to be of fundamental importance and one which

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defendant are at the time the harm is caused in the exercise of some independent right. By so doing we would remove cases in which a plaintiff is wrongly within the zone of the defendant's activities, as in the case of a trespasser to land, or by the consent of the defendant, as in the case of a licensee on property. It seems clear, however, that in the latter case, as the defendant can foresee the presence of a licensee, the general rule applies and that "activities" must be carried on with reasonable care to avoid harm to those likely to be present. See *Smith J. in Tolhausen v. Davies* (1888), 57 L.J.Q.B. 392; *Gallagher v. Humphrey* (1862), 6 L.T.N.S. 684; *Hiatt v. Zien & Acme Towel & Linen Supply Co.*, [1939] 2 D.L.R. 530; [1940] 1 D.L.R. 736. And, even in the case of trespassers whose presence is known, or more doubtfully, of whose presence the defendant ought to know, the cases seem to be tending to adopt the general rule that "activities" must be carried on with care in order that such persons may not be exposed to newly created risks of harm. See *Excelsior Wire Rope v. Callan*, [1930] A.C. 404; *Mourton v. Poulter*, [1930] 2 K.B. 183 and the comment thereon in 46 L.Q.R. 393; *Hiatt v. Zien etc.*, *supra*, and the comment by the present writer in 17 Can. Bar Rev. 445. An appreciation of the distinctions between acts creating a risk of harm, and omissions to make premises safe is of considerable assistance in reconciling many seeming conflicts in the cases dealing with the liability of an occupier of premises to trespassers.

<sup>6</sup> For example, the liability of occupiers of premises for the dangerous condition of their premises to those entering by permission of the occupier. See *supra*, note 5.

<sup>7</sup> See Harper and Kime, *The Duty to Control the Conduct of Another* (1934), 43 Yale L.J. 886. Many cases dealing with a parent's liability for his children's torts cover the negligence problem by confusing terminology of "acquiescence", "consent" etc. See *Thibodeau v. Cheff* (1911), 24 O.L.R. 214; *Corby v. Foster* (1913), 29 O.L.R. 83.

<sup>8</sup> See Bohlen, *The Basis of Affirmative Obligations in the Law of Tort* (1905), 53 Univ. of Pa. L.R. 209, 237, 337; BOHLEN, *STUDIES IN THE LAW OF TORTS*, pp. 33 ff. The distinction between negligent "acts" and "duties of affirmative action" is now commonplace in the American legal literature and is adopted by the American Law Institute in the *RESTATEMENT OF TORTS*.

<sup>9</sup> See, for example, *East Suffolk Catchment Board v. Kent*, *infra*, and see note 15.

requires much more emphasis and study than is given to it in the English text books or in English judgments.

Mr. Landon in his recent comment does not seem willing to admit that a person who actively creates an unreasonable risk of harm should be liable for damages caused to persons whom he could foresee as likely to fall within the ambit of his careless conduct. Thus he again asserts that in his opinion *Earl v. Lubbock*<sup>10</sup> is "still a binding authority". It will be recalled that in that case, the plaintiff, a stranger to a contract of repair was held incapable of suing the negligent repairer whose careless acts of repair caused damage to the plaintiff. One would have thought that since *Donoghue v. Stevenson* this case was "gone with the wind", yet despite the impressive array of recent judicial dicta<sup>11</sup> maintaining that *Earl v. Lubbock* is not good law, and in spite of the fact that in the same issue of the *Law Quarterly Review* in which Mr. Landon wrote, the learned editor, Professor Goodhart, stated, (it is submitted with ample justification) that since *Buckner v. Ashby and Horner*,<sup>12</sup> *Earl v. Lubbock* would appear to be dead and buried, Mr. Landon seems to be one of that class referred to by Professor Goodhart as "some hopeful spirits who indulge in the vain belief that it can be restored to life".

Since the last issue of the *Law Quarterly Review* appeared, Hilbery J.'s judgment in *Haseldine v. Daw & Son* has added another firm nail in the coffin containing the remains of *Earl v. Lubbock*. In this judgment one of the points dealt with was the liability of a repairer to a stranger to the contract of repair for the negligent way in which the repairs were carried out: in other words the exact situation dealt with in *Earl v. Lubbock*. The court merely proceeded on what is now become—Mr. Landon to the contrary—well-accepted doctrine, that a repairer or manufacturer doing work in circumstances under which the results of his careless conduct will reach persons in the position of the plaintiff, is liable for harm caused to such persons; provided that such negligent actor could not reasonably anticipate the intervention of an inspection or correction of his errors by some intermediary.<sup>13</sup> At the same time, the generalization

<sup>10</sup> [1905] 1 K.B. 253.

<sup>11</sup> The authorities are collected in Mr. Landon's comment in 57 L.Q.R. at p. 182. The latest, and strongest statements are in *Buckner v. Ashby* (1940), 57 T.L.R. 238, and *Haseldine v. Daw & Son*, [1941] 1 All E.R. 525. See also, Goodhart in 54 L.Q.R. 59 and 57 L.Q.R. 162.

<sup>12</sup> *Supra*.

<sup>13</sup> This latter limitation is difficult to appreciate although it has the approval of the House of Lords in *Donoghue v. Stevenson*. The limitation has been criticized and is not followed in the United States. See Underhay,

of Lord Atkin is open to criticism, since, as pointed out above, it does include within it situations quite different factually from that of a defendant creating by active misfeasance a risk of harm, and if Mr. Landon's censure were directed to this point he would be on much safer ground.

As a matter of fact, the decision which he discusses as one which reduces, in his opinion, Lord Atkin's remarks to a state of impotency, is *East Suffolk Catchment Board v. Kent*,<sup>14</sup> and that decision turned squarely on the distinction between creating risks of harm by misfeasance, and failing to act to prevent harm from a state of affairs for which the defendant was not responsible. The facts were that the plaintiff owned a number of acres of marshland pasture which were protected from inundation by tides by a wall of earth. For some years the plaintiff had seen to the repair of this wall. In 1930, however, the defendant Board were empowered under the Land Drainage Act of that year to maintain existing watercourses. It will be observed that the Act did not compel the Board to do so, but left the matter optional. On December 1st, 1936 a high tide carried the wall away and the plaintiff's lands were flooded. The plaintiff reported the matter to the Board and on December 3rd, the Board said the matter had their attention. The Board then sent in inexperienced men with poor equipment, with the result that the work was not completed nor the plaintiff's land drained until May 28th. It was found at the trial that had the work been done properly the land could have been cleared in 14 days, whereas the Board actually took 178 days. The plaintiff claimed damages against the Board for causing the flooding of their lands for the difference between 178 and 14 days.

Assuming that the Board had not used "reasonable care" in the sense of failing to use reasonably efficient means to clear

*Manufacturers' Liability: Recent Developments of Donoghue v. Stevenson*. (1936), 14 Can. Bar Rev. 283; *Paine v. Colne Valley Electricity Supply Co.*, [1938] 4 All E.R. 803 at p. 809. While the test for exonerating a negligent defendant has now been settled as "probability" rather than "possibility" of intermediate inspection, (see Goodhart, 54 L.Q.R. 59; *Paine v. Colne Valley* etc., *supra*; *Haseldine v. Daw & Son, Ltd.*, [1941] 1 All E.R. 525) it is by no means clear whether this means that there must be some omission to inspect which creates liability of the intermediary to the injured person. For example A manufactures a garden bench negligently; B an occupier of land might "reasonably be anticipated" [1941] 1 All E.R. at p. 538 to make an examination of the chattel but does not; the bench is placed by B in his garden and is used by C, a licensee who is injured. Can C sue B? Apparently not unless B *knew* of the danger. Can C sue A? There is no reason why he should not, but in view of the fact that A could reasonably expect B to inspect, as the authorities stand, A would be exonerated from liability. In such case C is apparently without any remedy. Why?

<sup>14</sup> [1940] 4 All E.R. 527 (H.L.), reversing [1940] 1 K.B. 319.

the land, the basic problem centred on the question of "duty". Mr. Landon says, with justification, that Lord Atkin's test in *Donoghue v. Stevenson* would make the defendants liable. Indeed, a majority of the Court of Appeal did impose liability, but in so doing they stressed the fact that the plaintiff was not complaining of non-feasance, but misfeasance. It was admitted that if the Board had refused to do the work at all no liability could be imposed, but the majority felt that, having commenced to work, the Board had *acted* unreasonably and thus created the harm to the defendants. While such reasoning is found from time to time in the cases it is difficult to understand. If there was no obligation to begin to save the plaintiff harmless, where was the obligation to continue, having once begun? And if no obligation to continue, where the obligation to act quickly or with "reasonable" speed? True, if in *acting*, any *new* risk of harm not already in existence were created by the Board, liability should have, and on the reasoning of the dissenting judge in the Court of Appeal and the majority in the House of Lords would have, been imposed. The plaintiff, however, was subjected to no greater risk of harm by the Board beginning to work than if the Board had never started, or, having brought men to the field, decided not to go on. The plaintiff's fields were flooded and remained flooded for 178 days. His complaint was that the Board should have removed the water. The House of Lords held that there was no obligation to remove water, or build embankments imposed by statute on the Board, and therefore, in effect, the plaintiff was complaining that he had not received a benefit.

Such a situation is entirely different from that where a plaintiff complains that a defendant by acting in a careless manner has caused a loss. Here the loss was caused by the act of the tide, and the Board merely failed promptly to remove it. Admittedly the case was a hard one, for much can be said in favour of the view that the Board by *acting* in taking over the matter on December 3rd, had created a new risk of harm not previously existing, by preventing the plaintiff from taking steps for his own protection. In other words, this view would make the defendants' conduct a true misfeasance.<sup>14A</sup>

<sup>14A</sup> The fact that the plaintiff may have refrained from taking steps for his own protection, relying on the defendants' action in commencing the work was mentioned by du Parcq L.J., who dissented in the Court of Appeal, and by Lord Porter in the House of Lords. du Parcq L.J. ([1940] 1 K.B. at p. 339) stated: "I will assume that some cause of action could be based on the allegation that the plaintiffs were induced or compelled to abstain from helping themselves by the futile and misguided

attempts of the defendant board . . . . but no such cause of action was pleaded or investigated. . . . The measure of damages in such an action would be a matter for careful consideration." It is difficult to understand what kind of action the learned judge had in mind, when using this language. Lord Porter ([1940] 4 All E.R. at p. 546) spoke of much the same thing under the term "estoppel", saying that he was not dealing with a case where the defendants might be estopped from alleging they were under no obligation to do the work efficiently. He further stated that there was no evidence, and no plea, that the defendants by their action caused the plaintiff "to change his position in reliance upon anything which they had said or done".

It may be asked, to what action does "estoppel" give rise? It has always been the writer's opinion that it merely operated to prevent the denial of a statement of fact on which a person had acted to his detriment. (See *Greenwood v. Martin's Bank*, [1933] A.C. 51.) But what statement of fact could there possibly be in the *East Suffolk Case*? At the highest, the defendant's conduct amounted to a statement that it would carry on the work—in other words it sounded in promise, and on the orthodox English theory, "promissory estoppel" has been emphatically denied, (See *Jorden v. Money* (1854), 5 H.L.C. 185; *Maddison v. Alderson* (1838) 8 App. Cas. at p. 473) and it has been repeatedly held that to make a promise binding consideration must be requested by the promisor and given by the promisee. Whether or not, "injurious reliance" should be recognized as an alternative to consideration is another question. It had currency in some Canadian cases relating to "charitable subscriptions" prior to the decision of the Supreme Court of Canada in *Governors of Dalhousie College v. Boutilier*, [1934] S.C.R. 642, but that decision returned to the English doctrine that a statement to do something in the future could only be enforced if consideration were given.

At the same time gratuitous bailment cases, some cases of "waiver", and other situations discussed by the present writer in an article in (1935) 1 Univ. of Tor. L.J. 17 at pp. 38 ff. can only be supported on a doctrine akin to "promissory estoppel". Indeed, the AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONTRACTS, sec. 90, expressly recognizes as a binding promise—"contract"—"a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does not induce such action", provided that "injustice can be avoided only by enforcement of the promise". This section has been criticized by Sir Frederick Pollock (47 Harv. L. Rev. at p. 365).

It has been suggested that "promissory representations" are really tortious in nature and should be recognized as such, rather than strain the law of contracts by palpable fictions. See an admirable comment on *Liability in Tort for the Negligent Nonperformance of a Promise* (1931), 45 Harv. L.R. 164, where the making of a promise causing another party to rely on it to his detriment is treated as an act creating a risk of harm unless performed in accordance with the reasonable expectations engendered by the promise. The note admits that in some cases where money damages would be difficult to estimate unless the value of the promised benefit were given, a remedy in tort would be inadequate (e.g., a promise to give to a charity which induces, along with other promises, expenditures) and the promise should be held binding as indicated in sec. 90 of the RESTATEMENT.

It must be admitted that there is little to justify this reasoning in the English cases, although in *Loader v. London and India Docks Joint Committee* (1891), 8 T.L.R. 5, Fry L.J. used the following language with regard to a claim for damages by a plaintiff who was injured because the defendants failed to continue doing certain work which they had voluntarily undertaken, which they had done for some time, and which if continued would have prevented the plaintiff's injuries: "If this course of conduct had created an expectation in the mind of the plaintiff that it would be continued, and if on the faith of that expectation he . . . . [acted as he did] and the accident happened, he declined to say that an action would not lie." Presumably the action would be in tort. See also the cases mentioned in note 15 *infra*.



This is not the place to enter into a discussion of the difficult problem whether many cases commonly styled as "non-feasance" should not in reality have been brought under the heading of acts creating new risks of harm.<sup>15</sup> The important thing is to recognize that the problem exists and that cases of acts creating risks of positive injury must be separated from those where the plaintiff is complaining that the defendant did not act to save him from a peril which was not created by the latter. English courts have not made this distinction clear and therefore are open to criticism, but the difficulty is that many critics fail to make the distinction and thus tend to deny validity to propositions which, rightly understood, do not seem open to attack.

Probably the commonest illustration of so-called affirmative obligations in negligence is to be found in situations dealing with the liability of occupiers of real property towards persons

With respect, it is submitted that an action for damages based on "estoppel" is unknown to English law, and that if liability is to be imposed for damages sustained by an improper performance — or no performance — of a gratuitous undertaking, such as a bailment, it should be done by recognizing the doctrine of an act creating a risk of harm unless performed with reasonable care.

<sup>15</sup> Compare the attempt to describe the failure of an engineer driving a train to turn off the steam in time to prevent an accident as a non-feasance in *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q.B. 944. In that case the driving of the engine created risks of harm unless care was taken in the driving, and it is immaterial to the point here discussed whether that care required starting or stopping something. The risk was created when the engine began moving.

Compare *Soulsby v. City of Toronto* (1907), 15 O.L.R. 13, with *Mercer v. S.E. & C. Ry.*, [1922] 2 K.B. 549. Both cases involved the failure of a railway to operate crossing gates, there being no obligation imposed by statute so to do. The Ontario court relieved the defendant from liability on the ground of "non-feasance" while the English court imposed liability. It is submitted, with respect, that the Ontario court was wrong. Having installed the gates and having operated them for some time the defendants had created a risk of harm not previously existing by lulling users of the highway into a sense of security. A similar argument could, of course, be made in the *Suffolk Case*.

See the amazing diversity of opinion on "non-feasance" versus "misfeasance" in *Stevens-Willson v. City of Chatham*, [1933] O.R. 305 (affirmed [1934] S.C.R. 353) where a municipality empowered by statute, but not obliged, to establish a Fire Department, did so, and the firemen when called failed to act until it was too late to save the plaintiff's premises. Some members of the Court, held this a misfeasance, similar to the negligent driving of fire equipment, which would certainly result in liability. *Hesketh v. City of Toronto* (1898), 25 O.A.R. 449. In such case the risk of harm is clearly caused by positive action. Other members of the Court were emphatic in holding that no liability could be imposed for failing to act to prevent harm to the plaintiff. This latter view, followed in *Wing v. Moncton*, [1940] 2 D.L.R. 740 (N.B.C.A.) seems to be affirmed by the House of Lords' decision in the *Suffolk Case*. It is more difficult here to say that starting for the fire created any new risk of harm to the plaintiff. It is possible, of course, to argue that the establishment of a Fire Department caused citizens to take less fire precautions than they would otherwise have done, and it was this act of establishing the Department that created the risk of harm unless it was carried on properly.

entering the property. The problem is whether the occupier must do something to protect such persons from being injured by the dangerous state of the premises, and the distinctions between various classes of persons such as trespassers, licensees and invitees are well known, although the practical application of the classification is difficult. Running throughout these cases is the idea that persons who use another's property must take it as it stands, unless there is some benefit to the occupier in having them on his property; subject to the qualification that, excepting trespassers, the occupier must make known any "traps" of which he is aware.<sup>16</sup> In other words, he must not delude a person into believing that premises are safe when he knows that they are not—a situation which has several times been closely allied to fraud. Despite the fact that privity of contract has in recent years been clearly separated from the tortious liability, the notion still runs strong in the English case law, that unless the defendant is receiving some benefit (whether from the party injured or not is immaterial) he is under no obligation to take steps to protect another when that other is in as good a position to protect himself as the defendant.<sup>17</sup> At the same time no person, whether an occupier or not, should be permitted to act in such a manner as to

<sup>16</sup> Although liability to persons other than invitees, or persons who come on business for the mutual benefit of both occupier and plaintiff, has sometimes been stated to be one for traps of which the occupier knew or "ought to know", it is generally assumed now that such statements were made inadvertently. See SALMOND, TORTS, 9th ed., 522; *Hambourg v. T. Eaton Co.*, [1935] S.C.R. 430; *Power v. Hughes*, [1938] 2 D.L.R. 534, reversed in [1938] 4 D.L.R. 136 (B.C.). To impose an affirmative obligation of inspection on an occupier who obtains no benefit runs counter to the development of earlier English case law. See Bohlen, *op. cit.*

<sup>17</sup> See the interesting judgment of O'Halloran J.A. in *Kennedy v. Union Estates Ltd.*, [1940] 1 D.L.R. 662. The case involved injuries sustained by the plaintiff while at the defendant's amusement park, when a park bench on which plaintiff was sitting collapsed. It was found as a fact that the defendant might by inspection have discovered the defect in the bench. The Court held that plaintiff was an invitee and hence the defendants owed a duty to inspect which they had failed to perform and consequently were liable in damages. (Affirmed [1940] S.C.R. 625.) O'Halloran J.A. considered it immaterial how the plaintiff was categorized, whether as licensee or invitee. He felt that the sweeping principle of *Donoghue v. Stevenson* imposed a duty of care since the defendants' own action in placing this chair in a place to be used brought them "into direct relationship with the parties injured" and imposed a duty to take care to avoid injuring them.

With respect, this ignores the fact that in *Donoghue v. Stevenson* the defendants actually made the article which caused harm. In the present case the defendants did not make the bench. The distinction between actually creating a risk of harm and failing to take steps to prevent harm from a risk not actively created by the defendants would appear to make the *Donoghue v. Stevenson* principle inapplicable. A somewhat similar distinction between a manufacturer's liability and the liability of a retailer in tort for failure to inspect is discussed by Eldridge, *Vendor's Tort Liability* (1941), 89 Univ. of Pa. L.R. 306.

create unreasonable risks of harm to persons of whose presence he is aware or could reasonably anticipate, whether on the street or on his own premises.<sup>18</sup>

The facts in *Haseldine v. Daw & Sons, Ltd.*<sup>19</sup> were uniquely suited to point the distinction between the affirmative obligations of an occupier of land and the general principle of liability for activities involving potentiality of harm unless conducted with due care. In that case the defendant owned a block of flats, and retained control of the hydraulic lift which was used by tenants and visitors to the tenants in order to gain access to the various flats. The lift had been used for some thirty-five years and the defendant employed an independent firm of experts to make inspections and repairs to the lift. Apparently the defendant did not turn over the entire management of the lift to the experts and the latter had on various occasions suggested that the lift should be replaced, although they had reported that it was in good working order. The plaintiff, a solicitor's clerk, in the course of his professional duties, had to call on one of the tenants of the defendant, and in the course of so doing used the lift. While in the lift it fell abruptly and caused injury to the plaintiff. The plaintiff sued the defendant as well as the experts who had repaired the lift. As previously indicated the court held that the repairers were liable for their negligent repair. The question then was whether the defendant was liable as the person in control of the lift at the time of the accident.<sup>19A</sup> It was agreed on all hands that had the defendant's servant, who operated the lift, been negligent in his operation of the lift, liability would have followed. This would be merely another illustration of the basic principle above, that anyone who by negligent *conduct*—misfeasance—causes injury must respond. No such misfeasance could be found in the operation of the lift. The case then was whether the defendant as occupier should respond for the dangerous

<sup>18</sup> See the cases mentioned in note 4 *supra*.

<sup>19</sup> [1941] 1 All E.R. 525.

<sup>19A</sup> Note that the intervening negligence of the occupier did not exonerate the negligent repairer. See note 13 *supra*. If the writer's contention contained in the text is sound this liability should have been based on a negligent failure to inspect and repair. If this be so, it means that a reasonable man in the position of the occupier would have done these things, and as the expert repairers knew the position of the occupier, should they not also have foreseen that the occupier should have done these things? In other words should not the repairers have contemplated the probability of an intermediate inspection? Imposing liability on the repairer is, it is submitted, a further, and desirable, move away from exonerating a person from liability for his own negligence if some intermediary had an opportunity—which he did not take—of curing the effects of the original negligence.

condition of the lift. In other words, was the defendant under an affirmative obligation to inspect the lift and to make it as satisfactory as reasonable care could do for the benefit of persons such as the plaintiff? It was found as a fact that the defendant did not know that the lift was dangerous.

If the plaintiff be classified as a licensee only, then the defendant's argument, based on numerous cases, was that he owed no duty to the plaintiff other than to warn him of dangers of which he knew, and therefore, knowing of none, he was freed of liability.<sup>19b</sup> Hilbery J. found, on the basis of the House of Lords' rather unsatisfactory judgment in *Fairman v. Perpetual Building Society*,<sup>20</sup> that the plaintiff was a mere licensee on the premises which remained in the control of the defendant. In other words he took the view that there was no material advantage to the defendant in having business guests of tenants on his premises, and therefore as occupier he owed no affirmative obligation to inspect in order to discover whether the premises were reasonably safe for a visit of this kind. It is submitted, with respect, that while the *Fairman Case*, in many of the speeches delivered by the law lords, warrants this holding, the problem is not conclusively settled in English law, and to say that the proprietor of a large office building owes no obligation regarding unknown dangers of elevators, stairways, etc., to business guests of his tenants, is contrary to good business and common sense, since the tenants would not take the premises unless they could receive business visitors, and if that were so the occupier would receive no rent.<sup>21</sup> On this ground alone, therefore, the case is open to criticism and it is to be hoped

<sup>19b</sup> See note 16 *supra*.

<sup>20</sup> [1923] A.C. 74. Since the defect causing the plaintiff's injury in that case was held not to be a "trap" or a "concealed danger" it was really not necessary to categorize a visitor to a tenant as a licensee, since *semble*, even under *Indermaur v. Dames*, L.R. 1 C.P. 274, liability would have been denied to an invitee, unless the duty owed the latter is one to make the premises reasonably safe—a proposition which is, at the present time, doubtful. See Paton, *The Responsibility of an Occupier to Those Who Enter as of Right* (1941) 19 Can. Bar Rev. 1. In those provinces which allow apportionment between negligent plaintiff and defendant it would appear as though the courts have glossed over the fact that the "duty" in *Indermaur v. Dames* is only one to correct or warn of "unusual" or concealed dangers. See the present writer in (1939), 17 Can. Bar Rev. at pp. 213–215, and see Sloan J.A. in *Whitehead v. North Vancouver*, [1939] 1 W.W. R. 369.

<sup>21</sup> For a broader interpretation of invitee see *Gordon v. Can. Bank of Commerce*, [1931] 4 D.L.R. 635 (B.C. C.A.), which case also dealt with a defective elevator operated by a landlord for tenants and visitors to tenants. Liability was imposed on the landlord when a business guest of a tenant was injured due to a defect in the elevator. This conclusion was reached by classifying the plaintiff as an invitee. With respect, this approach seems sounder than the avenue adopted by Hilbery J. in imposing liability, discussed in the text, *infra*.

that the House of Lords will, in the near future, be afforded an opportunity of reconsidering the position of such persons as the plaintiff in the present case.

Assuming that the plaintiff was a licensee on the defendant's premises, he was in the position of a person to whom the defendant was making a gift of such premises.<sup>22</sup> The plaintiff, however, admitted that while there might be no liability for what could be called the static condition of the premises, such as a common stairway, the present case involved a situation in which the defendant was transporting the plaintiff gratuitously, and it was argued that in the case of gratuitous transportation, the same principles which applied to licensees of premises, or to donees of chattels, did not prevail, and that the defendant was under an obligation not only to act carefully in the carriage of passengers but to take affirmative steps to see that the means of transportation, in this case the lift, was reasonably satisfactory. It is submitted that this argument of the plaintiff should not succeed since, if there is any general principle to be drawn from the English cases, it is, as pointed out previously, that one is not obliged to take affirmative action to make things safe for another unless there is some material advantage to be derived by the person on whom this duty is sought to be imposed; and on the court's reasoning there was no such advantage in the present case. Hilbery J., however, stated that in case of gratuitous transportation the decision of *Harris v. Perry & Co.*<sup>23</sup> had held that there was an obligation not only to conduct and control the vehicle properly but "to use reasonable care to provide a vehicle reasonably safe for the carriage." With respect it seems to the writer that this opinion is without foundation. *Harris v. Perry* depended on rather peculiar facts and might be justified either on the grounds that the plaintiff was more than a licensee or gratuitous passenger, or on the grounds that the defendant had created through its servants a risk of harm by active misfeasance. It is true that *Salmond on Torts* contains the following passage:<sup>24</sup>

The position of a licensee must be distinguished from that of a person for whom the occupier has undertaken, even though gratuitously to perform some service: for example, a gratuitous contract of carriage.

<sup>22</sup> The liability of an occupier of land towards a licensee, and of the owner of a chattel to one to whom he makes a gift or gratuitous loan of a chattel are similar. Both must respond for failing to acquaint the licensee or donee of known defects. See *Gautret v. Egerton* (1866), L.R. 2 C.P. 371 and *Coughlin v. Gillison*, [1899] 1 Q.B. 145.

<sup>23</sup> [1903] 2 K.B. 219.

<sup>24</sup> 9th ed. p. 523.

Such a contract imposes a duty of reasonable care in the performance of it, and this duty will extend to ascertaining the safe condition of the premises on which the contract is to be performed. Thus in *Harris v. Perry*, [1903] 2 K.B. 219, the plaintiff recovered damages for injuries received due to the negligence of the defendant's servants in leaving an obstruction on the track, although he was being carried gratuitously on the defendant's railway.

It will be noticed that the author here speaks of a "gratuitous contract", which of course is a contradiction in terms and confuses again the contract principle with tortious liability. All the cases cited by the learned author are cases in which the defendant may have been said to have been guilty of active misfeasance. *Pollock on Torts*<sup>25</sup> takes a different point of view and it is submitted, one which is in harmony with the underlying principles of English law.

A man who offers another a seat in his carriage is not answerable for an accident due to any defect in the carriage of which he was not aware; but he is answerable for damage caused by the negligence of his servants.

The introduction of legislation in many provinces of Canada exonerating drivers and owners of motor cars from liability to gratuitous passengers, or making the drivers liable only for "gross negligence"<sup>26</sup> will doubtless tend to obscure the development of this subject in Canada, but it is believed that the authorities support the view of Pollock rather than that of Salmond and of Hilbery J. as expressed in the present case.

<sup>25</sup> 14th ed. p. 422. See also CHARLESWORTH, NEGLIGENCE, at p. 92 where the same view is taken of the cases, the author stating that "if a man gives a friend a ride in his motor car, the relationship between the parties would appear to be that of licensor and licensee, and therefore the carrier is only under a duty to warn the passenger of defects of which he has actual knowledge." The author cites *Moffatt v. Bateman* (1869), L.R. 3 P.C. 115 where a gratuitous passenger was injured when the kingbolt of a carriage broke. The Privy Council exonerated the owner for the carriage by stating that "gross negligence" had to be proved against him. As the carrier did not know of the defect Charlesworth submits (note 1, p. 92) that "the actual decision . . . was right, although the reason given . . . is wrong."

The English cases have denied the "gross negligence" doctrine and quoted *Harris v. Perry*, *supra*, as establishing a duty to use reasonable care. They have not distinguished active misfeasance from a duty to inspect as clearly as might have been done but the facts of each case should be examined carefully. Thus, for example, in *Karavias v. Callincos*, [1917] W.N. 323, where general language is used, the injury occurred to a gratuitous passenger because the owner carelessly took his hand off the steering wheel to assist the plaintiff in raising the hood. This was negligent driving—the creation of a new risk of harm not present when the plaintiff entered the car.

<sup>26</sup> For a survey of the statutes see MacDonald, *The Negligence Action and the Legislature* (1935), 13 Can. Bar Rev. 535 at pp. 546 ff. Relieving car drivers of liability for careless driving is open to serious criticism and can find little support on any rational basis.

The distinction is clearly made by an Ontario court in *Blackmore v. Toronto Street Railway Co.*,<sup>27</sup> where a gratuitous passenger on a street car was injured due to the fact that there was no step on the car where one should have been. The court imposed no liability on the defendant, saying that while the rights of passengers and licensees might be the same regarding misfeasance, where the question concerns the sufficiency of the vehicle the licensee must take the vehicle as it is and can not insist that the vehicle is not as safe as it would have been if the defendants had used reasonable care. In another well known Canadian case, *Nightingale v. Union Colliery*,<sup>28</sup> the Supreme Court of Canada used language of gross negligence in order to exonerate a railway company from liability to a gratuitous passenger due to the defective condition of a bridge over which one of their trains was passing. While this language is unfortunate,<sup>29</sup> the licensee analogy is clearly indicated by the lower court in British Columbia.<sup>30</sup> It is submitted that the distinction between creating new risks of harm after a person's presence is known or ought to be known, and taking steps to discover existing defects for the benefit of a person whose presence is merely tolerated is still of prime importance. In a later Supreme Court of Canada decision<sup>31</sup> the court indicated that the care required of an operator of a motor car towards his gratuitous passengers, was reasonable under all the circumstances, and the court rejected the suggestion that a lower standard of care was implied in the *Nightingale Case*. It is submitted that this language is confusing unless the facts are looked to. The later case was one in which the driver, in his operation of a motor car, was guilty of *acts* of negligence and therefore has no analogy to such a situation as that discussed by Hilbery J. in *Haseldine v. Daw*. It is submitted that the reasoning of an American court in *O'Shea v. Lavoy*<sup>32</sup> contains a statement of the principle which represents the orthodox theory of liability of the English cases.

We can see no difference between an invitation extended by a person to dine with him and an invitation extended to ride with him. It has been held by this court that in the former case the legal relation arising was that of licensor and licensee. It follows that the same relation arises in the latter case, which conclusion is supported by authorities

<sup>27</sup> (1876), 38 U.C.Q.B. 172.

<sup>28</sup> (1904), 35 S.C.R. 65.

<sup>29</sup> See the same approach in *Moffatt v. Bateman* (1869), L.R. 3 P.C. 115, and see note 25 *supra*.

<sup>30</sup> 9 B.C.R. 453.

<sup>31</sup> *Armand v. Carr*, [1926] S.C.R. 575.

<sup>32</sup> (1921), 175 Wis. 456, 185 N.W. 525 reprinted in BOHLEN, CASES ON TORTS, 3rd ed., 317, 450.

already cited. Whether or not the established rules of liability existing between licensor and licensee are applicable in the matter of the management of the automobile, they plainly are applicable so far as the condition of the automobile is concerned. According to those rules the guest accepts the premises of his host as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury. Here the accident happened, as said before, because of a broken spring, and the question is, did that constitute a trap within the meaning of the rule? That is the only basis upon which liability can be predicated. A trap, within the meaning of this rule as we understand it, is a hidden danger lurking upon the premises which may be avoided if known. Hence it is the duty of the host to advise his guest of its presence so that the guest may enjoy the premises in a security equal to that enjoyed by the host. The guest has no right to a greater security than that enjoyed by the host or other members of his family. The host simply places the premises which he has to offer at the disposal and enjoyment of his guest upon equal terms of security.

In the writer's opinion while it may have been proper to impose liability on a person in the position of the defendant in *Haseldine v. Daw*, it is submitted that to make a distinction between a moving elevator and an escalator on the one hand and a common stairway<sup>33</sup> or an opening door on the other hand,<sup>34</sup> leads to impossible refinements. On the other hand it would seem that the category of invitees might well have been extended to include persons in the position of the plaintiff. This seems to be the view taken in the American courts as indicated by the Restatement of the Law of Torts, where the exact situation presented to the English court is given and liability imposed, but on different grounds.<sup>35</sup>

In suggesting that English courts and writers might direct more attention to the distinction between affirmative obligations to act for the protection of others, and the obligation to carry on activities with reasonable care, having regard to those persons

<sup>33</sup> *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74.

<sup>34</sup> *Southcote v. Stanley* (1856), 1 H. & N. 247.

<sup>35</sup> RESTATEMENT OF TORTS, Vol. II, sec. 360 reads as follows: "A possessor of land, who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe."

The illustration given is as follows: "A leases an office in his office building to B, an attorney-at-law. C, a client of B, and D, a college classmate of B, who have seen B's address in the telephone book, are hurt by the bad condition of the elevator while on their way up to B's office. A is liable to C, B's business visitor, and to D, B's social guest and gratuitous licensee."



within the ambit of the risk of harm created by such activities, the writer is only too conscious that such distinction, even when made, will not solve the problem of discovering in what relationships the courts will impose an affirmative obligation. Many factors of policy based on various considerations must eventually decide these issues.<sup>36</sup> At the same time, by segregating such cases from negligent "acts", we can avoid much futile tilting at windmills. Let us accept the fact that a person must act in such a way as not to jeopardize the lives and property of others which can reasonably be foreseen as likely to be affected if due care is not used. Once that is accepted we can clear the field for the more difficult study of the factors to be considered in imposing an obligation to act to prevent *threatened* harm to another.

CECIL A. WRIGHT.

Osgoode Hall Law School.

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<sup>36</sup> See Leon Green, *The Duty Problem* in JUDGE AND JURY (Kansas City, 1930) at pp. 62 *ff.* These chapters appeared originally in 28 Col. L. Rev. 1014; 29 Col. L. Rev. 255.