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CASE  
ANALYSIS  
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INTERPRETATION

*Second Edition*

Cases and Materials

by

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## **CHAPTER THREE**

# **COMMON LAW DEVELOPMENT AND REASONING**

### **SECTION 1. INTRODUCTION**

#### **A. How Appellate Courts Examine Cases**

IN performing its role in the case law process an appellate court is required to consider the case from three different perspectives – the present, the past and the future.

First, the court must consider the present. It must decide the case before it in favour of one of the parties. It must concern itself with what is a fair method of resolving the dispute before it, not in terms of what would be a fair compromise between the two parties, but in terms of whether it is more just or fair that judgment be for one party or the other party. In deciding which of the parties should win the case, it of course must do so by applying the rule of law which it has determined is applicable.

Second, the court must concern itself with the past. It must consider prior cases with similar fact situations. If there is a case with similar facts which is binding on the court under the rules of *stare decisis*, and that case cannot be adequately distinguished, the court must apply the *ratio decidendi* of that prior case to the facts of the case at hand, even if it believes the result will be unfair or unjust. If any other cases with similar facts exist, the doctrine of precedent dictates that they should also be considered, even though they are not binding under the rules of *stare decisis*.

Third, the court must concern itself with the future. The judgment it delivers in the case at hand will be considered a

precedent or authority in future cases. The court will therefore have the future impact of its decision in mind when it decides the case and gives the reasons for its decision. This third consideration applies especially to the highest judicial tribunal in a legal system. The final court of appeal is often more concerned with the proper development of the law than with fairness to the parties in the case before it.

## B. Types of Reasoning and Argument

A number of different types of legal reasoning and argument are employed by lawyers and judges in common law cases. The most common are briefly described below. As you begin to read and analyse cases you should attempt to identify the various types of reasoning and argument which are employed by the judges in the cases.

### 1. Deductive Reasoning

Sometimes a well-established and clear proposition of law is identified in a precedent case which is applicable to the issue before the court in the case at hand. In such a situation the court will examine the facts of the two cases. If the court finds no material differences in the facts, it will apply the proposition of law in the precedent case to the case at hand. In this situation the court is reasoning from the general to the particular, from the established general rule of law to the particular facts of the case before him.

Subsequent courts sometimes use this reasoning process to expand the proposition of law in the precedent case to cover different fact situations. For example, in the landmark case of *Donoghue v. Stevenson* (which will be studied in this chapter) the House of Lords held that manufacturers of certain types of products owed a duty of care to the ultimate consumers of such products. Subsequent courts expanded the proposition of law of *Donoghue v. Stevenson* by ruling that it covered repairers and suppliers as well as manufacturers, that it covered goods other than articles of food and drink, etc. On the other hand, subsequent courts sometimes use this reasoning process to narrow or limit the proposition of law in the precedent case.

### 2. Inductive Reasoning

This method of reasoning is used when there is no clear rule of law in a similar case which governs the case at hand. Existing

precedents may establish rules of law which govern only narrow categories of fact situations, and the case at hand may not fit into those narrow categories, or the existing precedents may have been decided on very narrow grounds which are not applicable in the present case.

In such circumstances the lawyers will examine the existing cases to determine whether they have common characteristics, and to determine whether there is implicit in them a general rule of law which governs a broader category of fact situations. If so, they may argue that when the cases are considered together a general rule of law can be derived from them which is wide enough to include the facts of existing precedents and of the case at hand.

This type of reasoning is from the particular to the general, from the rules or decisions in the prior cases within narrow categories, to a general rule which covers a new broader category of fact situations. Examples of this type of reasoning are found in two of the cases discussed in section 2 below – the reasoning of Brett M.R. in *Heaven v. Pender*, and the reasoning of Lord Atkin in *Donoghue v. Stevenson*.

### 3. Reasoning by Analogy

This type of reasoning is employed when the precedent cases which are in the same category of fact situations as the present case are examined, and no rule of law is found to exist on the legal question before the court. Lawyers may then determine what rules of law exist to govern the same question in other categories of fact situations, and argue that the rule of law in the other categories of fact situations should be applied to this category because the policy considerations underlying the rule are the same.

This form of reasoning involves the extension of a rule of law to a fact situation not covered by its express words, when such fact situation is within the policy underlying the rule.

### 4. Arguments on General Principles

It is very common to find reasoning and arguments in cases which are based upon general principles of law. When used in this sense, a principle of law must be distinguished from a rule of law or proposition of law. A principle of law is broader and more inclusive in scope, and has a more fundamental status in the legal system than a rule of law or proposition of law.

A general principle of law is sometimes used by judges as a basis for creating new legal rules or in selecting which legal rule should be applied in a particular case. When a court is using the term principle in the broader sense it will often identify it by referring to it as a "fundamental principle" or a "general conception."

An example of an argument based upon a general principle of law is the "neighbour principle" enunciated by Lord Atkin in *Donoghue v. Stevenson*, the leading case which will be the focus of our study in this chapter. This principle was used as the starting point for determining the existence of a duty of care in two of the subsequent cases which we will study in this chapter – *Hedley Byrne v. Heller* and *Dorset Yacht Co. Ltd. v. Home Office*.

When reading cases, however, you should bear in mind that not all judges and lawyers make such a clear distinction between principles of law and propositions of law or rules of law. Some judges use the terms to mean the same thing, and this can be a source of confusion.

##### 5. Policy Arguments

The term policy is used to describe the interests or values underlying a legal rule or legal principle, or the ends or interests or values which are served by a legal rule or legal principle. The terms policy objective and public policy are used to describe the same thing.

In arguing for or against the application of a given rule, lawyers will often attempt to support their case by arguing that the application of the rule in the case at hand will either hurt or enhance certain interests or values within the society which are referred to as public policy. For example, an argument might be made that a certain rule will further the interests of the community because it will safeguard the health and safety of the general public, or promote economic development, or promote economic efficiency. On the other hand, arguments might be made that a certain rule would endanger the health and safety of the general public, stifle individual initiative, inhibit industrial growth, etc.

In certain areas of the law some judges are willing to admit that the rule of law which they apply in a given case is sometimes, essentially, a question of public policy. An example is the recognition of a duty of care in tort. Other judges, however, will be extremely reluctant to admit that their decisions are based upon policy, because in their minds policy is a matter to be left to the

legislature rather than the courts. Because of this, many judges are reluctant to include in their judgments a discussion of the policy reasons underlying their decision. Policy arguments are thus more likely to be framed as arguments based upon fairness or justice.

#### *6. Common Sense, Fairness and Justice Arguments*

Lawyers will often try to support their other arguments in a case by claiming that the rule they are advocating should be adopted because it is either fair or just or because it is based upon common sense. Although such arguments may be very influential in the court's decision, they are usually not explained in great depth in the judgment of the court.

#### *7. Practical Consequences Arguments*

Another technique used to attack an argument is to argue that it will have consequences which are highly impractical or undesirable. For example, it is sometimes argued that the rule of law contended for by one of the parties will defeat the legitimate expectations of a large number of litigants in pending cases or potential litigants in future cases. These arguments are similar to the fairness or justice arguments except that they are directed at the impact on other persons or even institutions, rather than the parties in the case at hand.

A common example of a practical consequences argument is the so-called "floodgates argument". In tort cases where the court must decide whether to expand an existing category recognizing a duty of care or to create a new category recognizing a duty of care, one of the arguments that is invariably made is that such recognition would lead to a proliferation of claims, or a flood of litigation.

#### *8. Balancing of Interests Arguments*

In some modern cases arguments can be made that the legal rule to be applied requires that the court balance the interests of the two sides to the dispute. In such a case the question is often what factors the court can consider when applying the balancing of interests test, and how much weight should be given to the various factors.

#### *9. A Fortiori Arguments*

The Latin phrase *a fortiori*, meaning "much more; with stronger reason" is often employed in legal argument. When using it a

lawyer draws on the inference that if a certain fact or conclusion is true, then a second fact or conclusion must also be true. For example, if by his acts a person could not be said to be guilty of voluntarily causing hurt, then *a fortiori*, he could not be said to be guilty of voluntarily causing grievous hurt.

#### 10. Arguments Ad Absurdum

Lawyers use this technique when they want to attack a certain argument. They will argue that if you take the argument to its logical conclusion it leads to absurdity.

### C. Techniques and Arguments Used with Case Authorities

A large percentage of the reasoning in common law cases revolves around case authorities. Even in landmark cases such as *Donoghue v. Stevenson* where the court changed the law to keep pace with the social and economic conditions of a modern society, the judges set out detailed arguments attempting to demonstrate that their decision was based upon existing case authority, and was not a complete departure from existing precedents. It is therefore essential that law students learn to recognize the various techniques employed by lawyers and judges when dealing with case authorities. These techniques of reasoning were analysed in detail in Llewellyn, *The Common Law Tradition* (1960) at 75-97. Lists similar to those set out below on dealing with adverse authorities can also be found in Twining and Miers, *How to Do Things with Rules* (4th ed., 1999) at 326.

#### 1. Distinguishing Adverse Authorities

Among the arguments which can sometimes be made that the *ratio decidendi* of an existing precedent should not be applied in the present case are the following:

- (a) that the precedent case is distinguishable because there is a material fact in the case at hand which was not present in the precedent case (or *vice versa*), and this makes it inappropriate for the *ratio decidendi* of the precedent case to be applied in the case at hand;
- (b) that the precedent case is distinguishable because the issue in the case at hand is not the same as that in the precedent

- case, and therefore the *ratio decidendi* of the precedent case is not applicable to the issue in the case at hand;
- (c) that one of the necessary conditions or elements in the *ratio decidendi* of the precedent case is not present in the facts of the present case;
  - (d) that the *ratio decidendi* of the precedent case is too broadly stated, and as a consequence, the decision in that case should be strictly confined to its material facts;
  - (e) that policy and justice require that additional exceptions or qualifications be made to the *ratio decidendi* of the precedent case; and
  - (f) that the statement from the precedent case which is relied upon is *obiter dictum*, and is therefore not binding in the case at hand.

These arguments sometimes overlap. Also, they often must be supported by other arguments based upon policy or on fairness and justice.

## 2. Discrediting Adverse Authorities

Lawyers and judges also use a variety of arguments to discredit or cast doubt on the authority of precedents which are against them, especially if the precedents are older cases from lower courts. Among them are:

- (a) that the case is of low authority because it was decided by a lower court;
- (b) that the case is inconsistent with other cases of equal or higher authority;
- (c) that the case has been criticised in subsequent cases or by academic writers;
- (d) that doubt has been cast on the case by the decision in a subsequent case;
- (e) that the case has not been followed in subsequent cases;
- (f) that the reasoning in the case is not clear or comprehensible;
- (g) that the report of the case may not be reliable;
- (h) that the reasoning and decision in the case were not supported by any prior authorities;

- (i) that the case was decided upon a *demurrer* or other pre-trial motion;
- (j) that social conditions have changed, and the reasons for the case no longer exist;
- (k) that the case is inconsistent with another judgment of the same judge in a subsequent case;
- (l) that the case is from another jurisdiction, and is not binding;
- (m) that the statement or judgment relied upon did not receive the support of the majority of the court in that case; and
- (n) that the statement or reasoning relied upon was *obiter dictum* which was not necessary for the decision in the case.

### 3. Using Favourable Authorities

Lawyers also use a variety of arguments and techniques when arguing that a statement or proposition from a precedent case should be applied in the case at hand. Among them are:

- (a) that there are no material factual differences in the precedent case and the present case, and that the *ratio decidendi* of the precedent case should be applied;
- (b) that although the facts in the case at hand are not exactly the same as in the precedent case, the *ratio decidendi* should be expanded to cover the facts of the case at hand;
- (c) that although the facts in the case at hand are not exactly the same as in the precedent case, the principles and policies underlying the decision in the precedent case are equally applicable in the case at hand, and therefore its decision should be applied in the case at hand; and
- (d) that because the *ratio decidendi* of the precedent case was framed very narrowly in light of the particular facts in that case, the *ratio decidendi* should be broadly interpreted to cover similar factual situations such as that in the case at hand.

### 4. Making Favourable Authorities Credible

In the same manner that lawyers and judges use various techniques to cast doubt on adverse authorities, they use similar

techniques to try to make favourable authorities appear more credible. Among the techniques employed are the following:

- (a) that the precedent case has been followed in subsequent cases;
- (b) that the precedent case has received favourable comments from academic writers;
- (c) that the precedent case was decided by an eminent court or that the judgment cited was written by an eminent judge;
- (d) that although the statement cited did not receive the concurrence of the other judges in the precedent case because they chose to decide the case on narrower grounds, it has been cited with approval by subsequent courts;
- (e) that the case was exceptionally well reasoned;
- (f) that the facts of the case are very similar to those in the case at hand;
- (g) that the principles and policy discussed in that case are similar to those in the case at hand; and
- (h) that the issue in the precedent case was the same as that in the case at hand.

The above lists are by no means exhaustive, but they should give you an idea as to what to look for when analysing how the court has treated the authorities it relies on in support of its decision, and how it deals with the authorities which are against its decision.

## SECTION 2. PRE-DONOOGHUE CASES

### Introduction

THE general issue raised in this line of cases is whether a person who is physically injured by a defective product can recover from the person who supplied the defective product (the seller, manufacturer or supplier). When the line of cases began, liability was recognised in two circumstances. First, if there was privity of contract between the supplier and the person injured. Second, if the supplier committed fraud or misrepresentation. This line of cases shows the gradual development of the law leading up to the landmark case of *Donoghue v. Stevenson*, which established the general principle that the manufacturer or supplier of products owes

a duty of care to anyone who he should foresee might be injured if he supplies a defective product.

This line of cases illustrates how common law gradually develops on a case by case basis. It illustrates the types of legal reasoning used by judges and lawyers when attempting to develop the common law to meet the needs of society. The cases in this section should be studied in several ways. First, you should analyse them to try to determine what they decided, that is, to determine the *ratio decidendi* of each case. As you study the older cases it will become immediately apparent that it is sometimes very difficult to determine exactly what was decided in a given case, or to assess its value as a precedent. Nevertheless, it is a valuable learning experience to attempt to analyse each case and determine its *ratio decidendi*. Second, you should attempt to determine how the cases relate to one another. Pay particular attention to how the earlier cases are treated by the courts in the subsequent cases. You may find in some cases that the subsequent courts' reading of a prior case may differ from your own. Try to identify the cases in which the judges are attempting to expand the number of categories in which recovery is allowed for persons injured by the careless acts of another. When examining how the earlier cases are used by subsequent courts, you should attempt to identify the techniques employed by judges to distinguish or cast doubt on the authority of prior cases which do not support their decision. Also attempt to identify the techniques used by the same judges with respect to authorities which support their conclusion. Whenever both majority and minority opinions are given, carefully compare how judges in the majority and minority treat the same prior precedents. Third, when analysing the judgment in a given case, identify the various techniques of legal argument and reasoning which were employed by the judges. If you think that certain judgments are better reasoned or certain arguments are more persuasive, examine them carefully.

These older cases are difficult to understand without some background as to the state of the existing law in 1816. There was no general tort of negligence as we know it today. If a person was injured by a defective chattel provided by another, there were generally two causes of action under which he could sue for money damages. The first cause of action under which the seller or maker of a defective product might be sued was for breach of contract. An action for breach of contract could be brought if an agreement or contract existed between the person injured and the person causing the injury, and the injured party suffered damages because the other

party failed to fulfill his obligations under the contract. The major limitation under this cause of action was the requirement that "privity of contract" existed before an action for breach of contract could be brought. This means that the person injured could not bring an action for breach of contract unless he was a party to the contract. For example, the purchaser of a defective product could sue the seller of the product if the defective product caused injury to him. Third persons injured by the defective product could not sue the seller for breach of contract because no privity of contract existed between them and the seller.

The second cause of action under which a person injured by a defective product could sue was under the common law action of fraud. The leading case authority on the tort of fraud or deceit was the 1789 case of *Pasley v. Freeman*. The cases in this section represent attempts by advocates to develop new causes of action in order to allow recovery to persons injured by defective products or chattels in cases where there was no privity of contract and no fraud.

One final point should be noted which might assist the understanding of these older cases. At this period of time in England a married woman did not have the legal capacity to enter into a contract in her own name or to sue in her own name. The husband therefore entered into contracts on behalf of his wife. Suits were also brought by the husband on behalf of his wife.

In studying these cases it is important to note that most of the English authorities are decisions from the courts on the level of the High Court. None of the prior authorities were decisions of the House of Lords. One case, *Heaven v. Pender*, is from the Court of Appeal. In that case Brett M.R. attempted to establish a general principle governing the duty of care in tort, but his general principle was not accepted by his fellow judges in that case or by other judges in subsequent cases. However, our study of the New York case of *MacPherson v. Buick* will demonstrate that Brett M.R.'s general principle did influence the development of the law in the United States.

### LANGRIDGE v. LEVY

(1837) 2 M. & W. 519, 150 E.R. 863 (Court of Exchequer)

[1] Case. The declaration stated, that whereas one George Langridge, the father of the plaintiff, on the 1st of June, 1833, at the request of the defendant, bargained with him to buy of him a certain

gun, to wit, for the use of himself and his sons, at and for a certain price, to wit, the sum of 24 pounds, and the defendant then, by falsely and fraudulently warranting the said gun to have been made by Nock, and to be a good, safe, and secure gun, then sold the said gun to the said George Langridge, for the use of himself and his sons, for the said sum of 24 pounds then paid by George Langridge to the defendant for the same: whereas in truth and in fact the defendant was guilty of a great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the said gun, at the time of the said warranty and sale, was not made by Nock, nor was it a good, safe, and secure gun, but, on the contrary thereof, was made and constructed by a maker very inferior as a gun-maker to Nock, and was then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials; of all which promises the defendant, at the time of the making of the said warranty, and of the said sale, had full knowledge and notice. And the plaintiff in fact says, that he, knowing and confiding in the said warranty, did use and employ the said gun, which but for the said warranty he would not have done: and that afterwards, to wit, on the 10th December, 1835, the said gun being then in the hands and use of the plaintiff, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, then and whilst the said gun was so in use by the plaintiff, burst and exploded, became shattered, and went to pieces; whereby and by reason whereof the plaintiff was greatly cut, wounded, maimed, *etc.*, *etc.*, and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost, and is for ever deprived of the use of his hand, *etc.*, *etc.* . . .

[2] At the trial before Alderson B. at the Somersetshire Summer Assizes, 1836, it appeared that in June, 1833, the plaintiff's father saw in the shop of the defendant, a gun-maker in Bristol, a double-barrelled gun, to which was attached a ticket in these terms: — "Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty George IV; cost 60 guineas: only 25 guineas." He went into the shop, and saw the defendant, and examined the gun. The defendant (according to Langridge's statement) said he would warrant the gun to have been made by Nock for King George IV, and that he could produce Nock's invoice. Langridge told the defendant he wanted the gun for the use of himself and his sons and desired him to send it to his house at Knowle, about two miles from Bristol, that they might see it tried. On the next day, accordingly, the defendant sent the gun to

Langridge's house by his shopman, who also on that occasion warranted it to be made by Nock, and charged and fired it off several times. Langridge ultimately bought it of him for 24 pounds, and paid the price down. Langridge the father and his three sons used the gun occasionally; and in the month of December following, the plaintiff, his second son, having taken the gun into a field near his father's house to shoot some birds, putting in an ordinary charge, on firing off the second barrel, it exploded, and mutilated his left hand so severely as to render it necessary that it should be amputated. There was conflicting evidence as to the fact of the gun's being an insecure one, or of inferior workmanship. Mr. Nock, however, proved that it was not manufactured by him. The defendant also denied that any warranty had been given. The learned Judge left the jury to say, first, whether the defendant had warranted the gun to be made by Nock and to be a safe and secure one; secondly, whether it was in fact unsafe or of inferior materials or workmanship, and exploded in consequence of being so; and thirdly, whether the defendant warranted it to be a safe gun, knowing that it was not so. The jury found a general verdict for the plaintiff, damages 400 pounds.

[3] In Michaelmas Term, Erle moved in pursuance of leave reserved by the learned Judge, and obtained a rule *nisi* for arresting the judgment on the ground that no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise; and that the injury did not arise so immediately from the defendant's acts, as that it could form the subject of an action on the case by the plaintiff, between whom and the defendant there was no privity of contract. . . .

[4] In the present term the judgment of the Court was delivered by

#### PARKE B.

[5] In this case a motion was made to arrest the judgment, after a verdict for the plaintiff. [His Lordship stated the declaration, and proceeded:] – It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it.

[6] The question then is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are

of opinion that there is, and that the present action may be supported.

[7] We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground.

[8] If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been simply delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used by him, with an accompanying representation to him that he might safely so use it, and that representation had been false to the defendant's knowledge, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman* (1789) 3 T.R. 51, which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person also was intended by the defendant to be deceived; nor does there seem

to be any substantial distinction if the instrument be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.

[9] If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have been found by the jury bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, for the purpose of being used by the plaintiff by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true (for this is the meaning of the term confiding), used the gun, and thereby sustained the damage which is the subject of his complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the gun to the father is not, indeed, averred, but it is stated that, by the act of the defendant, the property was transferred to the father, in order that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear.

[10] We therefore think, that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of fraud is responsible to the party injured.

[11] We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated and for whose use he knew it was purchased.

*Rule discharged*

### Notes and Questions

1. *The facts.* In this case, was the plaintiff injured by a defective product made or manufactured by the defendant? Was the product defective because of the carelessness or negligence of the defendant? Did the defendant sell a defective product which injured the plaintiff when he used it? If so, why did the plaintiff not sue for breach of contract? What is the relationship between the plaintiff, the defendant, and the defective product?
2. *Rejected ground.* In paragraph 7 the court states that it is not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action. What was this ground, and why was it rejected by the court?
3. *The authority of Pasley v. Freeman.* In this case the court relies on the 1789 case of *Pasley v. Freeman* as authority for its decision. That case involves fraud – making a false statement which you know is false, with the intention that it be acted upon. What was the rule in that case, as stated by the court? What were its elements? In *Pasley v. Freeman*, the plaintiff was the person to whom the defendant made the false statement. Was that true in this case also? Did the court have to extend the rule in *Pasley v. Freeman* to cover the facts of this case?
4. *The material facts and the decision.* What was the holding of this case? What facts did the court consider to be the most important? In this case, how did the defendant communicate a false statement to the plaintiff? What was the statement which the defendant knew was false? Did the defendant intend the son to use the gun? Did he know that the son would use the gun? Did the son use the gun because he knew that the defendant had stated that it was a good and safe gun made by Nock? Which of these facts were material to the decision? If a neighbour had used the gun and suffered injury, would the result have been the same? Formulate the *ratio decidendi* of this case in your own words.
5. *Court of Exchequer Chamber.* The judgment of Parke B. was appealed to the Court of Exchequer Chamber, where the defendant argued that *Pasley v. Freeman* and the other authorities relied upon by the plaintiff were distinguishable on the ground that in all of them the defendant made the false representation to the plaintiff. In delivering a very brief judgment, Lord Denman C.J. merely stated:

“We agree with the Court of Exchequer, and affirm the judgment on the ground stated by Parke B.: ‘That as there is fraud, and damage, the result of that fraud not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of fraud is responsible to the party injured.’ ”

This judgment is reported as *Levy v. Langridge* (1838) 4 M. & W. 337, 150 E.R. 1458. Of what relevance is it in determining the *ratio decidendi* of the case?

**WINTERBOTTOM v. WRIGHT**

(1842) 10 M. & W. 109, 152 E.R. 402 (Court of Exchequer)

[1] Case. The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of the said contract, to keep and maintain the said mail-coach in a fit, proper, safe and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also, not on any pretence whatever to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on 8 August 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract and having the means of knowing

and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and in consequence of injuries then received, had become lamed for life.

[2] To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but as the Court gave no opinion as to their validity, it is not necessary to state them . . .

**LORD ABINGER C.B.**

[3] I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions.

[4] This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of *Levy v. Langridge* (1838) 4 M. & W. 337, 150 E.R. 1458 to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action wholly fails as an authority in its favour; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting.

[5] Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to everybody who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against inn-keepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is however contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could be maintained against him and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence – he may be remediless altogether. There is no privity of contract between these parties and if the plaintiff can sue, every passenger or even any person passing along the road, who was injured by the

upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

[6] Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action.

[7] The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? That would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

**ALDERSON B.**

[8] I am of the same opinion. The contract in this case was made with the Postmaster-General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.

[9] The only real argument in favour of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract.

[10] Then it is urged that it falls within the principle of the case of *Levy v. Langridge*. But the principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud in this declaration? It shows nothing of the kind.

[11] Our judgment must therefore be for the defendant.

#### ROLFE B.

[12] The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of the said contract, to keep and maintain the said mail-coach in a fit, proper, safe and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract, and the fallacy consists in the use of that word "duty". If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none.

[13] This is one of those unfortunate cases in which there certainly had been *damnum*, but it is *damnum absque injuria*; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to produce bad law.

[14] Judgment for the defendant.

#### Notes and Questions

1. *The facts of the case.* Was the plaintiff injured by a defective product? Was the product defective due to the negligence of the defendant? What was the defendant's relationship to the product? What was the plaintiff's relationship to the defective product, and to the defendant?

2. *Defendant's duty.* Did the defendant in this case owe a duty to keep the coaches in good repair? If so, to whom did he owe that duty? What did the counsel for the plaintiff allege in the declaration with respect to the duty? What link did the plaintiff's counsel try to make between the plaintiff and the defendant's duty to keep the coaches in good repair?
3. *Authority of Langridge v. Levy.* Note that the court cited the Court of Exchequer Chamber judgment where the case is referred to as *Levy v. Langridge*, even though that judgment merely affirmed the judgment of Parke B. in the Court of Exchequer. Could counsel for the plaintiff have put forward any arguments that *Langridge v. Levy* was an authority which supported recovery of damages from the defendant in this case? If the court in *Langridge v. Levy* had accepted the proposition of law proposed by plaintiff's counsel in paragraph 7 of Parke B.'s judgment in that case, would this case have come within the proposed rule?
4. *Reasoning of Lord Abinger C.B.* What does Lord Abinger C.B. mean in paragraph 4 when he states that "this is an action of the first impression"? Can his treatment of *Langridge v. Levy* be criticised? What techniques of argument and reasoning does he employ in his judgment? What are "the absurd and outrageous consequences" he is concerned about? Are his statements concerning no duty in the absence of privity wider than were necessary to decide the case?
5. *Reasoning of Alderson B.* What type of argument is he using in paragraph 8? Is it similar to that employed by Lord Abinger? How does he deal with *Langridge v. Levy*? Is his treatment of the case more satisfactory than that of Lord Abinger? Are his statements about "one step, why not fifty" wider than were necessary to decide the facts of this case?
6. *Reasoning of Rolfe B.* Explain what he means when he states that "[h]ard cases, it has been frequently observed, are apt to introduce bad law." What does he mean when he says that this is one of those unfortunate cases, in which there certainly has been *damnum*, but it is *damnum absque injuria*? Do you agree with his assertion that the court ought not be influenced by the fact that it is a hardship upon the plaintiff to be without a remedy?
7. *Ratio decidendi.* Is there any statement by any of the judges which could be used as the *ratio decidendi* of the case? How would you formulate the *ratio decidendi* of the case?
8. *Reasoning by analogy.* Could *Langridge v. Levy* have been used as an authority by analogy in this case? In *Langridge v. Levy* the duty of a seller not to make a fraudulent misrepresentation was extended to persons to whom the misrepresentation was communicated, and whom used the product in reliance on the misrepresentation and were injured as a result. Similarly, in this case, the contractual duty of the defendant to provide safe coaches could be extended to persons who have

knowledge of the contractual obligations of the defendant to provide safe coaches, and who use the coaches in reliance on the contract and are injured as a result. Were there any important facts or elements present in *Langridge v. Levy* which were not present in this case?

### **LONGMEID v. HOLLIDAY**

(1851) 6 Ex. 761, 155 E.R. 752 (Court of Exchequer)

[1] Case. The declaration stated, that the defendant, before and at the time of the committing of the grievances, *etc.*, was the maker and seller of certain lamps, called "The Holliday Lamp," to be used for the purpose of burning in and giving light to houses, shops, and rooms; and thereupon heretofore, to wit, on *etc.*, the plaintiff Frederick Longmeid, at the request of the defendant, bargained with him to buy of him one of the said "Holliday Lamps," to be burnt and used by the plaintiff Frederick Longmeid and his wife, in the shop and rooms of the plaintiff Frederick Longmeid, at and for a certain price, to wit, 10*s.*; and the defendant then, during such bargain, falsely, fraudulently, and deceitfully warranted to the plaintiff Frederick Longmeid, that the said lamp then was reasonably fit and proper to be used for the purpose last aforesaid; and the defendant thereby induced the plaintiff Frederick Longmeid to buy the said lamp; and accordingly, by the means aforesaid, then sold the same to the plaintiff Frederick Longmeid for the said sum of money, which the plaintiff Frederick Longmeid then paid to the defendant; Whereas in fact the said lamp was not, at the time of the sale and warranty aforesaid, nor afterwards hitherto, reasonably fit and proper to be used for the purpose of being burnt and used by the plaintiffs, but was then made of weak and insufficient materials, and then was cracked and leaky, dangerous, unsafe, and wholly unfit and improper for use by the plaintiffs or either of them: Whereby, and by reason and wholly in consequence of the said lamp being so cracked, leaky and unsafe as aforesaid, the said lamp afterwards, to wit, on *etc.*, when the plaintiff Eliza Longmeid, knowing and confiding in the said warranty, lighted the said lamp, and attempted to use and burn the same in a certain shop of the plaintiff Frederick Longmeid, and whilst she was holding the same in her hand, burst, exploded, and flew to pieces; and the spirit and naphtha then contained therein, for the purpose of burning and lighting the same, then ignited and ran upon and over the plaintiff Eliza Longmeid, whereby the plaintiff Eliza Longmeid, then and still being the wife

of the plaintiff Frederick Longmeid, became and was greatly burned, scorched, and wounded, etc.

[2] At the trial, before Martin B. at the Middlesex Sittings in last Michaelmas Term it appeared that the defendant, who kept a shop in London for the sale of lamps (but who was not himself a manufacturer), sold a lamp, called "Holliday's Patent Lamp", to the plaintiff's wife, for the purpose of being used by him and his wife. There was evidence that the lamp was defectively constructed, but no proof that the defendant (who did not personally construct it himself, but had it put together by others in parts purchased from third parties), knew of the defect; and the jury found that he was not guilty of any fraudulent or deceitful representation, but sold the lamp in good faith. In using the lamp with naphtha it exploded, and the plaintiff's wife met with considerable personal injury, for which the two plaintiffs brought this action, the plaintiff Frederick Longmeid having previously recovered damages in another action for the defendant's breach of implied warranty of sale. The jury found all the facts for the plaintiffs, except the allegation of fraud, they being not satisfied that the defendant knew of the defects. The defendant's counsel thereupon objected, that, as fraud was not proved, the action would not lie. The learned Judge inclined to that opinion, but declined to stop the case, and directed a verdict to be entered for the plaintiffs, reserving to the defendant liberty to move to enter the verdict for him, or for a nonsuit . . .

#### PARKE B.

[3] (His Lordship stated the pleadings and facts as above set forth, and proceeded) – The case was fully argued before my Lord Chief Baron, my Brother Martin, and myself, and we took time to consider. The result of that consideration has been, that we think the rule ought to be made absolute.

[4] There is no doubt, that if the defendant had been guilty of a fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife or any particular individual, the wife (joining her husband for conformity) or that individual would have had an action for the deceit, upon the principle on which all actions for deceitful representations are founded, and which was strongly illustrated in the case of *Langridge v. Levy* (1837) 2 M. & W. 519 in error, (1838) 4 M. & W. 337, *viz.*, that if any one knowingly tells a falsehood, with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit. But the fraud being

negatived in this case, the action cannot be maintained on that ground by the party who sustained damage.

[5] There are other cases, no doubt, besides those of fraud, in which a third person, though not a party to the contract, may sue for the damage sustained if it be broken. These cases occur where there has been a wrong done to that person, for which he would have had a right of action, though no such contract had been made. As for example, if an apothecary administered improper medicines to his patient, or a surgeon unskilfully treated him, and thereby injured his health, he would be liable to the patient, even where the father or friend of the patient may have been the contracting party with the apothecary or surgeon; for though no such contract had been made, the apothecary, if he gave improper medicines or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a misfeasance: *Pippin v. Sheppard* (1822) 11 Price 40; *Gladwell v. Steggall* (1839) 8 Scott 60, 5 Bing. N.C. 733.

[6] A stage-coach proprietor, who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustains personal damage, is liable to him; for it is a misfeasance towards him, if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards any one travelling on the road. So, if a mason contract [sic] to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person, who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act, in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it.

[7] And it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon v. Bell* (1816) 5 M. & Slew. 198. But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous, — a carriage for instance, — but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another,

the former should be answerable to the latter for a subsequent damage accruing by the use of it.

[8] Could it be contended with justice in the present case, that if the lamp had been lent or given by the defendant to the plaintiff's wife, and used by her, he would have been answerable for the personal damage which she sustained, the defendant not knowing or having any reason to believe it was not perfectly safe, although liable to the party to whom he contracted to sell it, upon an implied warranty that it was fit for use, so far as reasonable care could make it, for the breach of that contract as to all damage sustained by him.

[9] We are of the opinion, therefore, that if there had been in this case a breach of contract with the plaintiffs, the husband might have sued for it; but there being no misfeasance towards the wife independently of the contract, she cannot sue and join herself with her husband. Therefore a nonsuit must be entered.

#### *Notes and Questions*

1. *Nature of the case.* Identify the relationship between the parties, the facts which gave rise to the bringing of the action, and the cause of action. Note in particular the relationship of the two plaintiffs (the husband and the wife) to the defendant and to the defective object. Could the plaintiff have brought an action in contract? What is the basis of the wife's case against the defendant? Was it alleged that the defendant's actions caused the lamp to be defective? Was it alleged that the defendant knew that the wife was going to use the lamp? Was it alleged that the wife knew of the defendant's representation that the lamp was safe? Was it alleged that she relied on this representation when she used the lamp? Which of these facts are important?
2. *Authority of Langridge v. Levy.* Does the plaintiff appear to have relied on *Langridge v. Levy*? If so, why could the plaintiff not recover in this case? Why did the jury findings preclude recovery under *Langridge v. Levy*? Do you agree with the court's treatment of *Langridge v. Levy*?
3. *Reasoning of Parke B.* In what situations does Parke B. acknowledge that there can be recovery by third persons outside privity of contract and fraud? For what purpose does he cite *Dixon v. Bell*? Explain the distinction he draws in paragraph 7 between an "instrument in its nature dangerous" and a "machine not in its nature dangerous". What types of things do you think would fall within the former category? What is the significance of something falling within one category or the other? Is this statement in paragraph 7 necessary for a decision in the case, or is it *obiter dictum*? What reasoning technique is he employing in paragraph 8?

4. *Ratio decidendi of the case.* Is there a statement by Parke B. which could be said to be the *ratio decidendi* of this case? If not, formulate the *ratio decidendi* in your own words.

### **GEORGE v. SKIVINGTON**

(1869) L.R. 5 Ex. Rep. 1 (Court of Exchequer)

#### **KELLY C.B.**

[1] I am of opinion that our judgment should be for the plaintiffs. The facts alleged by the declaration are shortly these; – that the plaintiff Joseph George, purchased a chemical compound of the defendant as a hair wash for the use of his wife, which was made up of ingredients known only to the defendant, and by him represented to be “fit and proper to be used for washing the hair;” and there is also an express statement that the defendant knew the purpose for which the article was bought. The declaration further alleges that the defendant “so unskilfully, negligently, and improperly conducted himself in and about selling and making the said compound” as to cause the damage complained of to the female plaintiff.

[2] Now, under these circumstances, the question is whether an action at the suit of the plaintiff, Emma George, her husband being joined for conformity, will lie. It has been contended that it will not. There was no warranty, it is said, either expressed or implied, towards the purchaser himself. But it is not necessary to enter into that question, because the contract of sale is only alleged by way of inducement, the cause of action being, not upon that contract, but for an injury caused to the wife of the purchaser by reason of an article being sold to him for the use of his wife, and sold to the defendant's knowledge, turning out to be unfit for the purpose for which it was bought. There is, therefore, no question of warranty to be considered, but whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskillfulness and negligence in the manufacture of it whereby the person who used it was injured.

[3] And I think that, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it

extends, in my judgment, to the person for whose use the vendor knew the compound was purchased.

[4] In *Langridge v. Levy* (1837) 2 M. & W. 519, in Ex.Ch. (1838) 4 M. & W. 337, the defendant sold a gun to the plaintiff's father for the use, to his knowledge, of the plaintiff, and it was held that a duty arose towards the plaintiff that the gun should be safe; and here a similar duty arose towards the person who was known to the defendant to be about to use this wash; namely, a duty that the article sold should be reasonably fit for the purpose it was bought for and compounded with reasonable care. Under these circumstances, there being in the declaration a direct allegation of negligence and unskilfulness, our judgment ought to be for the plaintiffs.

[5] With regard to the case of *Longmeid v. Holliday* (1851) 6 Ex. 761, that case is entirely distinguishable, for there the jury found *bona fides* and no negligence on the part of the vendor. My Brother Channell wishes me to add that he concurs in this judgment.

#### PIGOTT B.

[6] I am of the same opinion. The action is, in effect, against a tradesman for negligence and unskilfulness in his business. Such an action by the purchaser himself is clearly maintainable. Then, where the thing purchased is for the use not of the purchaser himself but, to the defendant's knowledge, of his wife, does the defendant's duty extend to her? I can see no reason why it should not. She cannot contract for herself alone, but that is no reason why the defendant's duty should stop short of her.

[7] The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable.

[8] That, however, is widely different from this case; for here, there is an express allegation that the defendant knew the purpose for which, and the person for whom, this compound was bought.

#### CLEASBY B.

[9] I also think this declaration shows a good cause of action in the female plaintiff. No person can sue on a contract but the person with whom the contract is made; and this undoubted proposition was

attempted to be taken advantage of in *Langridge v. Levy*. The answer was that, admitting the proposition to be true, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vendor. It was therefore held in that case that the boy who used the defective gun, and for whose use the defendant knew it was destined, had a good cause of action. Substitute the word "negligence" for "fraud," and the analogy between *Langridge v. Levy* and this case is complete.

[10] The real question is whether the allegations in the declaration are sufficient to raise a duty towards the female plaintiff. Now it is alleged that the defendant himself manufactured this wash of ingredients known only to him, and that he held it out and professed it to be of a certain quality, and it was not of that quality; and that he knew it was purchased for the purpose of being used by the female plaintiff. Under the circumstances I think there was a duty imposed upon him to use due and ordinary care, and of the breach of that duty I am of the opinion the female plaintiff, who was injured, can take advantage. The two things concur here; negligence and injury flowing therefrom. There was, therefore, a good cause of action in the person injured similar to that which was held to be good in *Langridge v. Levy*.

*Judgment for the plaintiffs*

*Notes and Questions*

1. *Nature of the case.* Identify the relationship between the parties, the facts which gave rise to the bringing of the action, and the cause of action. Note in particular the relationship of the plaintiff and the defendant to the defective object, and their relationship to each other. What is the basis of the wife's case against the defendant? Was it alleged that the defendant's actions caused the hairwash to be defective? Was it alleged that the defendant knew that the wife was going to use the hairwash? Was it alleged that the wife knew of the defendant's representation that the hairwash was safe? Was it alleged that she relied on this representation when she used the hairwash? Which of these facts are the most important?
2. *Prior authorities.* After studying the facts, consider the previous cases in this section. Which in your opinion might support recovery for the plaintiff? If you were counsel for the defendant, which cases would you rely on?

3. *Reasoning of Kelly C.B.* What is the basis of his decision that the defendant owed a duty to the plaintiff? What are the material facts which led to the existence of a duty of care in this case? Was it important that the defendant mixed the hairwash? Was it important that his negligence made the hairwash defective? Was the fact that he warranted the hairwash to be safe important? Was the fact that he knew the wife was going to use the hairwash important? What was the defendant's duty, and to whom did he owe the duty? What cases are relied on in support of his decision? Can his treatment of *Langridge v. Levy* and *Longmeid v. Holliday* be criticised?
4. *Reasoning of Pigott B.* What is the most important fact supporting his decision?
5. *Reasoning of Cleasby B.* Are the facts which he considers critical the same as those which the other two judges considered critical? Can his treatment of the case of *Langridge v. Levy* be criticised?
6. *Ratio decidendi of the case.* What is the common ground of the three judges in this case? Try to formulate the *ratio decidendi* in your own words.
7. *Treatment of adverse authorities.* The reasoning of the judges in this case can be criticised for not dealing adequately with *Longmeid v. Holliday*, and for not even mentioning *Winterbottom v. Wright*. If this case had been appealed, how could counsel for the plaintiff have argued that neither of those cases is inconsistent with the decision in this case? Are there important factual differences between this case and those cases?
8. *Reasoning by analogy.* Cleasby B. states that he is using *Langridge v. Levy* as an authority by analogy. It is interesting to consider how counsel for the plaintiff could have argued that *Langridge v. Levy* was applicable by analogy. He could have admitted that the case was not a direct authority because one of the necessary elements, fraud, was not present in the case at hand. He could have argued that an analogy could nevertheless be made to that case. In *Langridge v Levy*, the defendant seller made the false representation about the gun to the father, but he was held liable to the son because he knew (or should have contemplated) that the son would use the gun. Similarly, in this case, the defendant made the false representation about the hairwash to the husband, but he knew (or should have contemplated) that it would be used by the wife. Therefore, in the same way that liability was extended from the father to the son in *Langridge v. Levy*, it should be extended from the husband to the wife in this case.

Counsel for the plaintiff could also have developed his analogy argument in another way. First, he could have pointed out that the following elements were present in the case of *Langridge v. Levy*:

- (1) False Representation. The defendant seller made representations to the purchaser about a product, and these representations were not true.
- (2) Fraud. The defendant knew that the representations he made about the product were false.
- (3) Knowledge of user. The defendant knew (or should have contemplated) that a person other than the purchaser would use the product.
- (4) Reliance. The person whom he knew (or should contemplate) would use the product did use it.
- (5) Injury. That person suffered injury as a result of using the defective product.

He could then argue that elements (1), (3), (4) and (5) are also present in the case at hand. He would admit that (2) is not present in the case at hand, but that an additional element, which was not present in *Langridge v. Levy*, is present in the case at hand:

- (6) Negligence. The defendant's negligent act caused the product to be defective.

It would then be argued that when elements (1), (3), (4) and (5) are present, and that either (2) or (6) is present, there should be liability.

This could have been what Cleasby B. was referring to when he stated that if you substitute negligence for fraud [element (6) for element (2)], the analogy is complete.

## HEAVEN v. PENDER

(1883) 11 Q.B.D. 503 (Court of Appeal)

### BRETT M.R.

[1] In this case the plaintiff was a workman in the employ of Gray, a ship painter. Gray entered into a contract with a shipowner whose ship was in the defendant's dock to paint the outside of his ship. The defendant, the dock owner, supplied, under a contract with the shipowner, an ordinary stage to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use, that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter. The ropes by which the stage was slung, and which were supplied as a part of the instrument by the defendant, had been scorched and were unfit for use and were supplied without a reasonably careful attention to their

condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed.

[2] The action is in form and substance an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention amounting to a want of ordinary care is not a good cause of action, although the injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff.

[3] If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such persons or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made and to which it applies an exactly similar but a contract duty.

[4] We have not in this case to consider the circumstances in which an implied contract may arise to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation express or implied, which is a well recognized head of law.

[5] The questions which we have to solve in this case are: — what is the proper definition of the relation between two persons

other than the relation established by contract, or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property; and whether the present case falls within such definition.

[6] When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be such danger. And everyone ought by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury.

[7] In the case of a railway company carrying a passenger with whom it has not entered into a contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used, which it is necessary to consider . . .

[8] It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premisses there must be a more remote and larger premiss which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage.

[9] The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone 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 danger.

[10] Without displacing the other propositions to which allusion has been made as applicable to the particular circumstance in respect of which they have been enunciated, this proposition includes, I think, all the recognized cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case.

[11] Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence.

[12] This includes the case of goods, *etc.*, supplied to be used immediately by a particular person or persons or one of a class of persons, 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 for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it.

[13] It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of

supplying them would not probably produce danger of injury to person or property.

[14] The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty.

[15] Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably *Langridge v. Levy*. It is not an easy case to act upon. It is not, it cannot be, accurately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated. And then it is said that a motion was made to enter a nonsuit in pursuance of leave reserved on particular grounds. Those grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration and the effect on it of a verdict, in respect of which it is assumed that all questions were left to the jury. If this was the point taken the report of the evidence and of the questions left to the jury is idle!

[16] The case was decided on the ground of a fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention in fact, it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son.

[17] I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory case to act on as an authority. But taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a

decision upon such a ground in no way negatives the proposition that the action might have been supported on the grounds of negligence without fraud. It seems to be a case which is within the proposition enunciated in this judgment, and in which the action might have been supported without proof of actual fraud.

[18] And this seems to be the meaning of Cleasby B. in the observations he made on *Langridge v. Levy* in the case of *George v. Skivington* (1869) L.R. 5 Ex. Rep. 1. In that case the proposition laid down in this judgment is clearly adopted. The ground of the decision is that the article was, to the knowledge of the defendant, supplied for the use of his wife and for her immediate use. And certainly, if he or anyone in his position had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the prescription sold, would endanger the personal safety of the wife

...

[19] In *Winterbottom v. Wright* (1842) 10 M. & W. 109, 152 E.R. 402 it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general *demurrer* to the declaration. And the declaration does not seem to show that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the plaintiff, or by any class of which he could be one, or that it would so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plaintiff. The facts alleged did not bring the case within the proposition herein enunciated. It was an attempt to establish a duty towards all the world. The case was decided on the ground of remoteness. And it is at too great a remoteness that the observation of Lord Abinger is pointed, when he says that the doctrine of *Langridge v. Levy* is not to be extended . . .

[20] There is an American case: *Thomas v. Winchester* (1852) 6 N.Y. 397, cited in Mr. Horace Smith's Treatise on the Law of Negligence, p. 88, note (t), which goes a very long way. I doubt whether it does not go too far.

[21] In *Longmeid v. Holliday* (1851) 6 Ex. 761, 155 E.R. 752 a lamp was sold to the plaintiff to be used by the wife. The jury was not satisfied that the defendant knew of the defect in the lamp; if he did, there was fraud, if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule; if there was no fraud, the case was brought by other circumstances within the rule . . .

[22] There seems to be no case in conflict with the rule above deduced from well-admitted cases. I am, therefore, of the opinion that it is a good, safe and just rule.

[23] I cannot conceive that if the facts were proved which would make out the proposition I have enunciated, the law can be that there would be no liability. Unless that be true, the proposition must be true. If it be the rule the present case is clearly within it.

[24] This case is also, I agree, within that which seems to me to be a minor proposition – namely, the proposition which has often been acted upon, that there was, in a sense, an invitation of the plaintiff by the defendant to use the stage.

[25] The appeal must, in my opinion, be allowed, and judgment must be entered for the plaintiff.

#### COTTON L.J.

[26] BOWEN L.J. concurs in the judgment I am about to read . . .

[27] This decides this appeal in favour of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.

[28] Take for instance the case of *Langridge v. Levy*, to which the principle if it existed would have applied. But the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In other cases where the decision has been referred to judges have treated fraud as the ground of the decision, as was done by Coleridge J. in *Blackmore v. Bristol and Exeter Ry. Co.* (1858) 8 E. & B. 1035, 120 E.R. 385 and in *Collis v. Selden* (1868) Law Rep. 3 C.P. 495. Willes J. says that the judgment in *Langridge v. Levy* was based on the fraud of the defendant. This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis v. Selden* and in *Longmeid v. Holliday* (in each of which the plaintiff failed), are in my opinion at variance with the principle contended for.

[29] The case of *George v. Skivington*, and especially what is said by Cleasby B. in giving judgment in that case seem to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by Cleasby B. on the ground that the negligence of the defendant which was his own personal negligence was equivalent, for the purposes of

that action, to fraud on which (as he said) the decision in *Langridge v. Levy* was based.

[30] In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

[31] For the reasons stated I agree that the plaintiff is entitled to judgment, though I do not entirely concur with the reasoning of the Master of the Rolls.

#### *Notes and Questions*

1. *Nature of the case.* Identify the relationship between the parties, the facts which gave rise to the bringing of the action, and the cause of action. Which of the previous cases is most similar to the facts of this case?
2. *Outline of reasoning of Brett M.R.* The following is an outline of the structure of the most important parts of the opinion of Brett M.R. It should be useful as a guide when analysing his reasoning.
  - facts (paragraph 1)
  - statement of general issue (paragraph 5)
  - two situations when duty outside of contract and fraud - collision cases and carriage cases (paragraphs 6-7)
  - inductive reasoning - must be a larger proposition which involves and covers both situations (paragraph 8)
  - general principle governs duty of care outside of contract and fraud (paragraph 9)
  - general principle governs duty of care concerning supply of goods (paragraph 11)
  - qualifications on proposition regarding the duty of care in supply of goods (paragraphs 12-13)
  - examination of prior cases concerning supply of goods to determine if they are consistent with the general proposition (paragraphs 15-21)
  - conclusion - since no case is in conflict with the proposition, it is a good, safe and just rule, and the present case is within it (paragraphs 22-23)

3. *Reasoning of Brett M.R.* The minority judgment of Brett M.R. is reported first. How does he define the legal question before the court? Explain what he means in paragraph 8 when he refers to "some larger proposition which involves and covers both sets of circumstances"? What does he mean by the "logic of inductive reasoning" and how does he use it? What is the larger proposition or general principle which he states, and where does it come from? What is the relationship of paragraphs 11-14 to the general principle in paragraph 9? How is the general principle qualified when it is applied to the supply of goods? How is his examination of the prior cases related to the general principle in paragraph 9? What rule is he referring to in paragraph 22 when he states that "it is a good, safe and just rule"? How and why did he reach that conclusion? What does he mean in paragraph 24 when he refers to the "minor proposition"?
4. *Treatment of prior cases by Brett M.R.* Examine his treatment of *Langridge v. Levy* (paragraphs 15-18), *George v. Skivington* (paragraph 18), *Winterbottom v. Wright* (paragraph 19), and *Longmeid v. Holliday* (paragraph 21). Does he argue that *Langridge v. Levy* is for him or against him? What techniques does he employ to discredit and distinguish *Langridge v. Levy*, *Winterbottom v. Wright* and *Longmeid v. Holliday*? How does he use *George v. Skivington*? Can his reasoning on any of these cases be criticised? Is he accurate when he concludes in paragraph 22 that there seems to be no case in conflict with the rule? How can the decisions of *Winterbottom v. Wright* and *Longmeid v. Holliday* be reconciled with the general principle relating to the supply of goods which he sets out in paragraph 11?
5. *Reasoning of Cotton L.J.* Why were the judges in the majority unwilling to agree with Brett M.R.'s general principle? Do you agree with their reasoning? Can Cotton L.J.'s treatment of *Langridge v. Levy* and *George v. Skivington* be criticised? What possible exception is Cotton L.J. referring to in paragraph 30?

## MACPHERSON v. BUICK MOTOR CO.

(1916) 111 N.E. 1050, 217 N.Y. 382 (Court of Appeals of New York)

### CARDOZO J.

[1] The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer.

There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and willfully concealed it. The case, in other words, is not brought within the rule of *Kuelling v. Lean Mfg. Co.* (1905) 183 N.Y. 78, 75 N.E. 1098. The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.

[2] The foundations of this branch of the law, at least in this state, were laid in *Thomas v. Winchester* (1852) 6 N.Y. 397. A poison was falsely labeled. The sale was made to a druggist, who in turn sold to a customer. The customer recovered damages from the seller who affixed the label. "The defendant's negligence," it was said, "put human life in imminent danger." A poison falsely labeled, is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury. Cases were cited by way of illustration in which manufacturers were not subject to any duty irrespective of contract. The distinction was said to be that their conduct, though negligent, was not likely to result in injury to any one except the purchaser. We are not required to say whether the chance of injury was always as remote as the distinction assumes. Some of the illustrations might be rejected today. The principle of the distinction is for present purposes the important thing. *Thomas v. Winchester* became quickly a landmark of the law. In the application of its principle there may at times have been uncertainty or even error. There has never in this state been doubt or disavowal of the principle itself. The chief cases are well known, yet to recall some of them will be helpful . . .

[3] These early cases suggest a narrow construction of the rule. Later cases, however, evince a more liberal spirit. First in importance is *Devlin v. Smith* (1882) 89 N.Y. 470. The defendant, a contractor, built a scaffold for a painter. The painter's servants were injured. The contractor was held liable. He knew that the scaffold, if improperly constructed, was a most dangerous trap. He knew that it was to be used by the workmen. He was building it for that very purpose. Building it for their use, he owed them a duty, irrespective of his contract with their master, to build it with care.

[4] From *Devlin v. Smith* we pass over intermediate cases and turn to the latest case in this court in which *Thomas v. Winchester* was followed. That case is *Statler v. Ray Mfg. Co.* (1909) 195 N.Y. 478, 88 N.E. 1063. The defendant manufactured a large coffee urn. It was installed in a restaurant. When heated, the urn exploded and

injured the plaintiff. We held that the manufacturer was liable. We said that the urn "was of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source of great danger to many people if not carefully and properly constructed."

[5] It may be that *Devlin v. Smith* and *Statler v. Ray Mfg. Co.* have extended the rule of *Thomas v. Winchester*. If so, this court is committed to the extension. The defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons – things whose normal function it is to injure or destroy. But whatever the rule in *Thomas v. Winchester* may once have been, it has no longer that restricted meaning. A scaffold (*Devlin v. Smith, supra.*) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (*Statler v. Ray Mfg. Co., supra.*) may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water. *Torgesen v. Schultz* (1908) 192 N.Y. 156, 84 N.E. 956. We have mentioned only cases in this court. But the rule has received a like extension in our courts of intermediate appeal. In *Burke v. Ireland* (1898) 26 App. Div. 487, 50 N.Y. Supp. 369, in an opinion by Cullen J., it was applied to a builder who constructed a defective building; in *Kahner v. Otis Elevator Co.* (1904) 96 App. Div. 169, 89 N.Y. Supp. 185 to the manufacturer of an elevator; in *Davies v. Pelham Hod Elevating Co.* (1892) 65 Hun. 573, 20 N.Y. Supp. 523, affirmed in this court without opinion, 146 N.Y. 363, 41 N.E. 88, to a contractor who furnished a defective rope with knowledge of the purpose for which the rope was to be used. We are not required at this time either to approve or to disapprove the application of the rule that was made in these cases. It is enough that they help to characterize the trend of judicial thought.

[6] *Devlin v. Smith* was decided in 1882. A year later a very similar case came before the Court of Appeal in England (*Heaven v. Pender* (1883) 11 Q.B.D. 503). We find in the opinion of Brett M.R., afterwards Lord Esher, the same conception of a duty, irrespective of contract, imposed upon the manufacturer by the law itself:

"Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and

skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing."

[7] He then points out that for a neglect of such ordinary care or skill whereby injury happens, the appropriate remedy is an action for negligence. The right to enforce this liability is not to be confined to the immediate buyer. The right, he says, extends to the persons or class of persons for whose use the thing is supplied. It is enough that the goods "would in all probability be used at once . . . before a reasonable opportunity for discovering any defect which might exist," and that the thing supplied is of such a nature "that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it." On the other hand, he would exclude a case "in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect," or where the goods are of such a nature that "a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property."

[8] What was said by Lord Esher in that case did not command the full assent of his associates. His opinion has been criticised "as requiring every man to take affirmative precautions to protect his neighbours, as well as to refrain from injuring them" (Bohlen, *Affirmative Obligations in the Law of Torts*, 44 Am. Law Reg. N.S. 341). It may not be an accurate exposition of the law of England. Perhaps it may need some qualification even in our own state. Like most attempts at comprehensive definition, it may involve errors of inclusion and of exclusion. But its tests and standards, at least in their underlying principles, with whatever qualification may be called for as they are applied to varying conditions, are the tests and standards of our law.

[9] We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences

to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.

[10] We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong. Beven on Negligence (3rd ed.) 50, 51, 54; Wharton on Negligence (2nd ed.) § 134; *Leeds v. N.Y. Tel. Co.* (1904) 178 N.Y. 118, 70 N.E. 219; *Sweet v. Perkins* (1909) 196 N.Y. 482, 90 N.E. 50; *Hayes v. Hyde Park* (1891) 153 Mass. 514, 516, 27 N.E. 522. We leave that question open. We shall have to deal with it when it arises. The difficulty which it suggests is not present in this case. There is here no break in the chain of cause and effect. In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

[11] From this survey of the decisions, there thus emerges a definition of the duty of a manufacturer which enables us to measure

this defendant's liability. Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go fifty miles an hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent also from the fact that the buyer was a dealer in cars, who bought to resell. The maker of this car supplied it for the use of purchasers from the dealer just as plainly as the contractor in *Devlii v. Smith* supplied the scaffold for use by the servants of the owner. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

[12] In reaching this conclusion, we do not ignore the decisions to the contrary in other jurisdictions . . .

[13] In England the limits of the rule are still unsettled. *Winterbottom v. Wright* (1842) 10 M. & W. 109 is often cited. The defendant undertook to provide a mail coach to carry the mail bags. The coach broke down from latent defects in its construction. The defendant, however, was not the manufacturer. The court held that he was not liable for injuries to a passenger. The case was decided on a demurrer to the declaration. Lord Esher points out in *Heaven v. Pender, supra.*, at page 513, that the form of the declaration was subject to criticism. It did not fairly suggest the existence of a duty aside from the special contract which was the plaintiff's main reliance. See the criticism of *Winterbottom v. Wright* in Bohlen, *supra.*, at pages 281, 283. At all events, in *Heaven v. Pender, supra.*, the defendant, a dock owner, who put up a staging outside a ship, was held liable to the servants of the shipowner. In *Elliott v. Hall* (1885) 15 Q.B.D. 315 the defendant sent out a defective truck laden with goods which he had sold. The buyer's servants unloaded it, and were injured because of the defects. It was held that the defendant was under a duty "not to be guilty of negligence with regard to the state and condition of the truck." There seems to have been a return to the doctrine of *Winterbottom v. Wright* in *Earl v.*

*Lubbock* [1905] 1 K.B. 253. In that case, however, as in the earlier one, the defendant was not the manufacturer. He had merely made a contract to keep the van in repair. A later case (*White v. Steadman* [1913] 3 K.B. 340, 348) emphasizes that element. A livery stable keeper who sent out a vicious horse was held liable not merely to his customer but also to another occupant of the carriage, and *Thomas v. Winchester* was cited and followed, *White v. Steadman, supra.*, at pages 348, 349. It was again cited and followed in *Dominion Natural Gas Co. v. Collins* [1909] A.C. 640, 646. From these cases a consistent principle is with difficulty extracted. The English courts, however, agree with ours in holding that one who invites another to make use of an appliance is bound to the exercise of reasonable care (*Caledonian Ry. Co. v. Mulholland* [1898] A.C. 216, 227; *Indermaur v. Dames* (1866) L.R. 1 C.P. 274). That at bottom is the underlying principle of *Devlin v. Smith*. The contractor who builds the scaffold invites the owner's workmen to use it. The manufacturer who sells the automobile to the retail dealer invites the dealer's customers to use it. The invitation is addressed in the one case to determinate persons and in the other to an indeterminate class, but in each case it is equally plain, and in each its consequences must be the same...

[14] In this view of the defendant's liability there is nothing inconsistent with the theory of liability on which the case was tried. It is true that the court told the jury that "an automobile is not an inherently dangerous vehicle." The meaning, however, is made plain by the context. The meaning is that danger is not to be expected when the vehicle is well constructed. The court left it to the jury to say whether the defendant ought to have foreseen that the car, if negligently constructed, would become "imminently dangerous." Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent. In varying forms that thought was put before the jury. We do not say that the court would not have been justified in ruling as a matter of law that the car was a dangerous thing. If there was any error, it was none of which the defendant can complain.

[15] We think the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the

market without subjecting the component parts to ordinary and simple tests (*Richmond & Danville R. R. Co. v. Elliott* (1893) 149 U.S. 266, 272). Under the charge of the trial judge nothing more was required of it. The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger, the greater the need of caution . . .

#### *Notes and Questions*

1. *Nature of the case.* Identify the relationship between the parties, the facts which gave rise to the bringing of the action, and the cause of action. Note in particular the relationship of the plaintiff and the defendant to the defective object.
2. *General reasoning of Cardozo J.* After examining the facts in paragraph 1, study paragraphs 9-11 of Cardozo J.'s judgment. What is the ground of the decision in this case? What is the extent of the duty of a manufacturer of a product? To whom does he owe a duty? When? What knowledge is required? What does he mean at the end of paragraph 10 when he says we have put the source of obligation in the law? What does he mean in paragraph 11 when he says that "[p]recedents drawn from the days of travel by stage coach do not fit the conditions of travel today."?
3. *Use of authorities by Cardozo J.* In paragraphs 2-5 he deals with the American cases which he claims support his decision. They are the cases of "things imminently dangerous to life", beginning with the case of *Thomas v. Winchester*, in which a poison was falsely mislabelled. This category may have started out as narrow as the category referred to in *Longmeid v. Holliday* as an "instrument in its nature dangerous". However, the category was extended by the American courts by emphasizing not the nature of the article, but whether the act of negligence made the article dangerous. Note what Cardozo says in paragraph 5 about the extension of the rule in *Thomas v. Winchester*. In paragraphs 6 and 7 Cardozo J. discusses *Heaven v. Pender*. How does he use it to support his decision? Cardozo J. returns to the English cases in paragraph 13. How does he deal with the cases? What does he conclude about them? Of what importance to his reasoning is the idea that the manufacturer who sells the automobile to the retail dealer "invites" the dealer's customers to use it?

#### *Discussion Problems*

1. John Brown went to a local chemist, Mixit, and purchased a cough medicine for his six-year old son and a dandruff shampoo for his mother. When John Brown asked Mixit for the shampoo, Mixit informed him that he had a new dandruff shampoo which he himself had mixed which was guaranteed to cure dandruff within thirty days. Mixit was not informed who was going to use the shampoo. When

Mixit made the shampoo he added an acid compound by mistake. As a result, when Brown's mother used the shampoo it burned her scalp and caused patches of her hair to fall out.

Before purchasing the cough mixture, Brown told Mixit that he needed a cough medicine which was safe for a six-year-old boy. Mixit checked the list of ingredients on the label and assured Brown that the medicine was perfectly safe for children. The cough mixture had been purchased by Mixit from another chemist, Careless. Mixit then placed it in smaller bottles with his own label on it. Careless had neglected to include one of the ingredients on the label, so it was not on Mixit's label either. This ingredient made it very dangerous for children. As a result, Brown's child became gravely ill, and lost his sight.

*Directions:* Assume that the dispute arose in England in 1915, and that the only relevant judicial precedents are the cases you have studied in this section. Prepare arguments for both sides of the dispute.

2. The defendant is a company which manufactures automobiles. It sold an automobile to a retail dealer. The retail dealer resold it to the plaintiff. While the plaintiff was in the car, it suddenly collapsed. He was thrown out and was injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and wilfully concealed it.

The plaintiff sued the manufacturer in negligence. The question to be determined is whether the defendant manufacturer owed a duty of care to the plaintiff purchaser.

*Directions:* Assume that the events occurred in England in 1915, and that the only relevant precedents are the cases studied in this section. Prepare arguments for both sides of the dispute.

## SECTION 3. DONOGHUE v. STEVENSON

### Introduction

*Donoghue v. Stevenson* is one of the landmark decisions in the law of tort in England. We will be analysing the speeches of three of the five members of the House of Lords with several objectives in mind.

First, we will examine the judgments of Lord Atkin from the majority and Lord Buckmaster from the minority in order to compare their techniques of legal reasoning and argument. We will

be particularly interested in the techniques they employed when dealing with the prior authorities in section 2 of this chapter. It should be enlightening to examine the subtle techniques employed by the two Law Lords in using the authorities which favored them and in casting doubt on the authorities which were against them. The techniques employed by Lord Atkin and Lord Buckmaster have been analysed and discussed.<sup>1</sup>

Second, we will use the case to illustrate the difficulties involved in trying to ascertain the *ratio decidendi* or rule in a case. This case is often used by writers to illustrate the point that determining the *ratio decidendi* of a case involves a process of abstraction.<sup>2</sup> We will look not only at the narrow *ratio decidendi* of the case at the time it was decided, but also at what issues subsequent courts would have to consider in order to determine the precise limits of the rule as later cases came before them. On this point we will compare the speeches of Lord Atkin and Lord Macmillan.

Third, we will examine the Law Lords' use of general principles to support their reasoning. We will examine Lord Atkin's general comments on the use of general principles or general conceptions in the law of torts, as well as the neighbour principle he enunciated in this case. We will compare Lord Atkin's neighbour principle to the general principle enunciated by Brett M.R. in *Heaven v. Pender*. We will also examine Lord Macmillan's comments on general principles.

Finally, we will examine the policy arguments and other techniques of argument and reasoning which were employed by the two Law Lords to support their reasoning. We will continue our examination of the role of the courts as law-makers, and consider whether the case is a classic example of judicial law-making. We will also examine the policy reasons supporting a change in the law, and consider the extent to which the members of the House of Lords were willing to articulate in their speeches the policy reasons for their decision.

<sup>1</sup> Twining and Miers, *How to Do Things with Rules* (4th ed., 1999) at 325-333.

<sup>2</sup> See J. Stone, "The Ratio of the Ratio Decidendi" (1959) Mod. L. Rev. 597; for a summary of Professor Stone's view, see Farrar and Dugdale, *Introduction to Legal Method* (3rd ed. 1990) at 93-95. Also see Twining and Miers, *How to Do Things with Rules* (4th ed., 1999) at 325-326.

**M'ALISTER (OR DONOGHUE) v. STEVENSON**

[1932] A.C. 562 (House of Lords)

**LORD BUCKMASTER (DISSENTING)**

[1] My Lords, the facts of this case are simple. On August 26, 1928, the appellant drank a bottle of ginger-beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not, and could not be, detected until the greater part of the contents of the bottle had been consumed. As a result she alleged, and at this stage her allegations must be accepted as true, that she suffered "from shock and severe gastro-enteritis. She accordingly instituted the proceedings against the manufacturer which have given rise to this appeal.

[2] The foundation of her case is that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty and is consequently liable for any damage caused by such neglect. After certain amendments, which are now immaterial, the case came before the Lord Ordinary, who rejected the plea in law of the respondent and allowed a proof. His interlocutor was recalled by the Second Division of the Court of Session, from whose judgment this appeal has been brought.

[3] Before examining the merits two comments are desirable: (1) that the appellant's case rests solely on the ground of a tort based not on fraud but on negligence; and (2) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the appellant or by any of your Lordships, that the English and the Scots law on the subject are identical. It is therefore upon the English law alone that I have considered the matter, and in my opinion it is on the English law alone that in the circumstances we ought to proceed.

[4] The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

[5] Now the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration. The law books give no assistance, because the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention; and the ancient books do not assist. I turn, therefore, to the decided cases to see if they can be construed so as to support the appellant's case. One of the earliest is the case of *Langridge v. Levy* (1837) 2 M. & W. 519; 4 M. & W. 337. It is a case often quoted and variously explained. There a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the son's hands, and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Parke B., who, in delivering the judgment of the Court, used these words:

"We should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whosoever into whose hands they might happen to pass, and who should be injured thereby";

and in *Longmeid v. Holliday* (1851) 6 Ex. 761 155 E.R. 752 the same eminent judge points out that the earlier case was based on a fraudulent misstatement, and he expressly repudiates the view that it has any wider application. *Langridge v. Levy* therefore, can be dismissed from consideration with the comment that it is rather surprising it has so often been cited for a proposition it cannot support.

[6] The case of *Winterbottom v. Wright* (1842) 10 M. & W. 109, 152 E.R. 402 is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleges were due to negligence in the work, and it was held that he had no cause of action. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category. It may be noted, also, that in this case Alderson B. said:

"The only safe rule is to confine the right to recover to those who enter into contract; if we go one step beyond that, there is no reason why we should not go fifty."

[7] *Longmeid v. Holliday* was the case of a defective lamp sold to a man whose wife was injured by its explosion. The vendor of the lamp, against whom the action was brought, was not the manufacturer, so that the case is not parallel to the present, but the statement of Parke B. in his judgment covers the case of the manufacturer, for he said:

“It would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous... but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it.”

It is true that he uses the words “lent or given” and omits the word “sold,” but if the duty be entirely independent of contract and is a duty owed to a third person, it seems to me the same whether the article be originally given or sold. The fact that in the present case that the ginger-beer originally left the premises of the manufacturer on a purchase, as was probably the case, cannot add to his duty, if such existed, to take care in its preparation. It has been suggested that the statement of Parke B. does not cover the case of negligent construction, but the omission to exercise reasonable care in the discovery of a defect in the manufacture of an article where the duty of examination exists is just as negligent as the negligent construction itself.

[8] The general principle of these cases is stated by Lord Sumner in the case of *Blacker v. Lake & Elliot Ltd.* (1912) 106 L.T. 533, 536, in these terms:

“The breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving to be defective.”

[9] From this general rule there are two well known exceptions: (1) In the case of an article dangerous in itself; and (2) where the article not in itself dangerous is in fact dangerous, by reason of some defect or for any other reason, and this is known to the manufacturer. Until the case of *George v. Skivington* (1869) L.R. 5 Ex. 1, I know of no further modification of the general rule . . .

[10] Of the remaining cases, *George v. Skivington* is the one nearest to the present, and without that case, and the statement of Cleasby B. in *Francis v. Cockrell* (1870) L.R. 5Q.B. 501, 515 and the *dicta* of Brett M.R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509 *et seq.*, the appellant would be destitute of authority. *George v. Skivington* related to the sale of a noxious hawthorn, and a claim made by a person who had not bought it but who had suffered from its use, based on its having been negligently compounded, was allowed. It is remarkable that *Langridge v. Levy* was used in support of the claim and influenced the judgment of all the parties to the decision. Both Kelly C.B. and Pigott B. stressed the fact that the article had been purchased to the knowledge of the defendant for the use of the plaintiff, as in *Langridge v. Levy*, and Cleasby B., who, realizing that *Langridge v. Levy* was decided on the ground of fraud, said:

“Substitute the word ‘negligence’ for ‘fraud,’ and the analogy between *Langridge v. Levy* and this case is complete.”

It is unnecessary to point out too emphatically that such a substitution cannot possibly be made. No action based on fraud can be supported by mere proof of negligence.

[11] I do not propose to follow the fortunes of *George v. Skivington*; few cases can have lived so dangerously and lived so long. Lord Sumner, in the case of *Blacker v. Lake & Elliot Ltd.*, closely examines its history, and I agree with his analysis. He said that he could not presume to say that it was wrong, but he declined to follow it on the ground which is, I think, firm, that it was in conflict with *Winterbottom v. Wright* . . .

[12] The *dicta* of Brett M.R. in *Heaven v. Pender* are rightly relied on by the appellant. The material passage is as follows [quotes paragraphs 9-14 from *Heaven v. Pender, supra.*] . . .

[13] “The recognized cases” to which the Master of the Rolls refers are not definitely quoted, but they appear to refer to cases of collision and carriage and the cases of visitation to premises on which there is some hidden danger, cases far removed from the doctrine he enunciates. None the less this passage has been used as a *tabula in naufragio* for many litigants struggling in the seas of adverse authority. It cannot, however, be divorced from the fact that the case had nothing whatever to do with the question of manufacture and sale. An unsound staging had been erected on premises to which there had been an invitation to the plaintiffs to enter, and the case really depended on the duty of the owner of the

premises to persons so invited. None the less it is clear that Brett M.R. considered the cases of manufactured articles, for he examined *Langridge v. Levy*, and says that it does not negative the proposition that the case might have been supported on the ground of negligence.

[14] In the same case, however, Cotton L.J., in whose judgment Bowen L.J. concurred, said that he was unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertained, inasmuch as there were many cases in which the principle was impliedly negatived . . . With the views expressed by Cotton L.J. I agree . . .

[15] So far, therefore, as the case of *George v. Skivington* and the *dicta* in *Heaven v. Pender* are concerned, it is in my opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

[16] One further case mentioned in argument may be referred to, certainly not by way of authority, but to gain assistance by considering how similar cases are dealt with by eminent judges of the United States. That such cases can have no close application and no authority is clear, for though the source of the law in the two countries may be the same, its current may well flow in different channels. The case referred to is that of *Thomas v. Winchester* (1852) 6 N.Y. 397. There a chemist issued poison in answer to a request for a harmless drug, and he was held responsible to a third party injured by his neglect. It appears to me that the decision might well rest on the principle that he, in fact, sold a drug dangerous in itself, none the less so because he was asked to sell something else, and on this view the case does not advance the matter.

[17] In another case of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, where a manufacturer of a defective motor-car was held liable for damages at the instance of a third party, the learned judge appears to base his judgment on the view that a motor-car might reasonably be regarded as a dangerous article.

[18] In my view, therefore, the authorities are against the appellant's contention, and, apart from authority, it is difficult to see how any common law proposition can be formulated to support her claim.

[19] The principle contended for must be this — that the manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights

in contract must be excluded from consideration of this principle; such contractual rights as may exist in successive steps from the original manufacturer down to the ultimate purchaser are *ex hypothesi* immaterial. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrine applicable to sale and purchase.

[20] The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon. Were such a principle known and recognized, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that with the exception of *George v. Skivington*, no case directly involving the principle has ever succeeded in the Courts, and, were it well known and accepted, much of the discussion of the earlier cases would have been waste of time, and the distinction as to articles dangerous in themselves or known to be dangerous to the vendor would be meaningless.

[21] In *Mullen v. Barr & Co.* [1929] S.C. 46, a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this (at p. 479):

"In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."

[22] In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion

that this appeal should be dismissed, and I beg to move your Lordships accordingly.

**LORD ATKIN**

[23] My Lordss, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises . . .

[24] The law . . . appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

[25] It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is

established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in *Heaven v. Pender*, in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

[26] At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "*culpa*," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

[27] 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.

[28] This appears to me to be the doctrine of *Heaven v. Pender*, as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould*. Lord Esher says ([1893] 1 Q.B. at p. 497):

"That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

So A. L. Smith L.J. ([1893] 1 Q.B. at p. 504):

"The decision of *Heaven v. Pender* was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other."

[29] I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness of "proximity" was intended by Lord Esher is obvious from his own illustration in *Heaven v. Pender* (11 Q.B.D. at p. 510) of the application of his doctrine to the sale of goods.

"This (*i.e.*, the rule he has just formulated) includes the case of goods, *etc.*, supplied to be used immediately by a particular person or persons, or one of a class of persons, 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 for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude, a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property."

[30] I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed.

[31] With this necessary qualification of proximate relationship as explained in *Le Lievre v. Gould*, I think the judgment of Lord

Esher expresses the law of England; without the qualification, I think the majority of the Court in *Heaven v. Pender* were justified in thinking the principle was expressed in too general terms.

[32] There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House.

[33] I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer.

[34] There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser — namely, by members of his family and his servants, and in some cases his guests.

[35] I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized

society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

[36] It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also *dicta* in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the *dicta* of the judges.

[37] In my opinion several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful. A direct authority is *George v. Skivington*. That was a decision on a *demurrer* to a declaration which averred that the defendant professed to sell a hairwash made by himself, and that the plaintiff Joseph George bought a bottle, to be used by his wife, the plaintiff Emma George, as the defendant then knew, and that the defendant had so negligently conducted himself in preparing and selling the hairwash that it was unfit for use, whereby the female plaintiff was injured. Kelly C.B. said that there was no question of warranty, but whether the chemist was liable in an action on the case for unskilfulness and negligence in the manufacture of it.

“Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased.”

Pigott and Cleasby BB. put their judgments on the same ground.

[38] I venture to think that Cotton L.J. in *Heaven v. Pender* (11 Q.B.D. 517), misinterprets Cleasby B.'s judgment in the reference to *Langridge v. Levy*. Cleasby B. appears to me to make it plain that in his opinion the duty to take reasonable care can be substituted for the duty which existed in *Langridge v. Levy* not to defraud. It is worth noticing that *George v. Skivington* was referred to by Cleasby

B. himself, sitting as a member of the Court of Exchequer Chamber in *Francis v. Cockrell*, (L.R. 5 Q.B. 501, 515) and was recognized by him as based on an ordinary duty to take care . . .

[39] It now becomes necessary to consider the cases which have been referred to in the Courts below as laying down the proposition that no duty to take care is owed to the consumer in such a case as this . . .

[40] In *Langridge v. Levy* the action was in case, and the declaration alleged that the defendant, by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe, and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons, confiding in the warranty, used the gun, which burst and injured him. Plea not guilty and no warranty as alleged. The report is not very satisfactory. No evidence is reported of any warranty or statement except that the gun was an elegant twist gun by Nock. The judge left to the jury whether the defendant had warranted the gun to be by Nock and to be safe; whether it was in fact unsafe; and whether the defendant warranted it to be safe knowing that it was not so. The jury returned a general verdict for the plaintiff. It appears to have been argued that the plaintiff could recover wherever there is a breach of duty imposed on the defendant by contract or otherwise, and the plaintiff is injured by reason of its breach; by this is meant apparently that the duty need not be owed to the plaintiff, but that he can take advantage of the breach of a duty owed to a third party. This contention was negatived by the Court, who held, however, that the plaintiff could recover if a representation known to be false was made to a third person with the intention that a chattel should be used by the plaintiff, even though it does not appear that the defendant intended the false representation to be communicated to him; see *per* Parke B. (2 M. & W. 531). The same view was adopted by the Exchequer Chamber, the user by the plaintiff being treated by the Court as one of the acts contemplated by the fraudulent defendant. It is unnecessary to consider whether the proposition can be supported in its widest form. It is sufficient to say that the case was based, as I think, in the pleading, and certainly in the judgment, on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion.

[41] *Winterbottom v. Wright* was a case decided on a *demurrer*. The plaintiff had demurred to two of the pleas, as to which there was no decision by the Court; but on the hearing of the plaintiff's *demurrer* the Court, in accordance with the practice of the day, were

entitled to consider the whole record, including the declaration, and, coming to the conclusion that this declaration disclosed no cause of action, gave judgment for the defendant: see Sutton's Personal Actions at Common Law, p. 113. The advantage of the procedure is that we are in a position to know the precise issue at law which arose for determination. The declaration was in case, and alleged that the defendant had contracted with the Postmaster-General to provide the mail-coach to convey mails from Hartford to Holyhead and to keep the mails in safe condition; that Atkinson and others, with notice of the said contract, had contracted with the Postmaster-General to convey the road mail-coach from Hartford to Holyhead; and that the plaintiff, relying on the said first contract, hired himself to Atkinson to drive the mail-coach; but that the defendant so negligently conducted himself and so utterly disregarded his aforesaid contract that the defendant, having the means of knowing, and well knowing, all the aforesaid premises, the mail-coach, being in a dangerous condition, owing to certain latent defects and to no other cause, gave way, whereby the plaintiff was thrown from his seat and injured. It is to be observed that no negligence apart from breach of contract was alleged – in other words, no duty was alleged other than the duty arising out of the contract; it is not stated that the defendant knew, or ought to have known, of the latent defect. The argument of the defendant was that, on the face of the declaration, the wrong arose merely out of the breach of a contract, and that only a party to the contract could sue. The Court of Exchequer adopted that view, as clearly appears from the judgments of Alderson and Rolfe BB. There are *dicta* by Lord Abinger which are too wide as to an action of negligence being confined to cases of breach of a public duty. The actual decision appears to have been manifestly right; no duty to the plaintiff arose out of the contract; and the duty of the defendant under the contract with the Postmaster-General to put the coach in good repair could not have involved such direct relations with the servant of the persons whom the Postmaster-General employed to drive the coach as would give rise to a duty of care owed to such servant.

[42] We now come to *Longmeid v. Holliday*, the *dicta* in which have had considerable effect in subsequent decisions. In that case the declaration in case alleged that the plaintiff, Frederick Longmeid, had bought from the defendant, the maker and seller of "the Holliday lamp," a lamp to be used by himself and his wife Eliza in the plaintiff's shop; that the defendant induced the sale by the false and fraudulent warranty that the lamp was reasonably fit for the purpose; and that the plaintiff Eliza, confiding in the said

warranty, lighted the lamp, which exploded, whereby she was injured. It is perhaps not an extravagant guess to suppose that the plaintiffs' pleader had read the case of *Langridge v. Levy*. The jury found all the facts for the plaintiffs except the allegation of fraud; they were not satisfied that the defendant knew of the defects. The plaintiff Frederick had already recovered damages on the contract of sale for breach of the implied warranty of fitness. The declaration made no averment of negligence. Verdict was entered at the trial by Martin B. for the plaintiff, but with liberty to the defendant to move to enter the verdict for him. A rule having been obtained, plaintiff's counsel sought to support the verdict on the ground that this was not an action for a breach of duty arising solely from contract, but for an injury resulting from conduct amounting to fraud. Parke B., who delivered the judgment of the Court, held that, fraud having been negatived, the action could not be maintained on that ground. He then went on to discuss cases in which a third person not a party to a contract may sue for damages sustained if it is broken. After dealing with the negligence of a surgeon, or of a carrier, or of a firm in breach of contract committing a nuisance on a highway, he deals with the case where any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun, and refers to *Dixon v. Bell*, though what this case has to do with contract it is difficult to see. He then goes on:

"But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous — a carriage for instance — but which might become so by a latent defect entirely unknown although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

It is worth noticing how guarded this *dictum* is. The case put is a machine such as a carriage, not in its nature dangerous, which might become dangerous by a latent defect entirely unknown. Then there is the saving, "although discoverable by the exercise of ordinary care," discoverable by whom is not said; it may include the person to whom the innocent machine is "lent or given." Then the *dictum* is confined to machines "lent or given" (a later sentence makes it clear that a distinction is intended between these words and "delivered to the purchaser under the contract of sale"), and the manufacturer is introduced for the first time — "even by the person who

manufactured it." I do not for a moment believe that Parke B. had in his mind such a case as a loaf negligently mixed with poison by the baker which poisoned a purchaser's family. He is, in my opinion, confining his remarks primarily to cases where a person is seeking to rely upon a duty of care which arises out of a contract with a third party, and has never even discussed the case of a manufacturer negligently causing an article to be dangerous and selling it in that condition whether with immediate or mediate effect upon the consumer. It is noteworthy that he only refers to "letting or giving" chattels, operations known to the law, where the special relations thereby created have a particular bearing on the existence or non-existence of a duty to take care.

[43] Next in this chain of authority come *George v. Skivington* and *Heaven v. Pender*, which I have already discussed . . .

[44] I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or nonexistence of a legal right. In this respect I agree with what was said by Scrutton L.J. in *Hope & Sons v. Anglo-American Oil Co.* (1922) 12 Ll. L. Rep. 183, 187, a case which was ultimately decided on a question of fact.

"Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf."

The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended . . .

[45] It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the

manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in *MacPerson v. Buick Motor Co.* in the New York Court of Appeals, in which he states the principles of the law as I should desire to state them, and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of the case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise prevented the relation between manufacturer and the user of the car being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

[46] My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

[47] It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

#### LORD MACMILLAN

[48] . . . It humbly appears to me that the diversity of view which is exhibited in such cases as *George v. Skivington* on the one hand and *Blacker v. Lake & Elliot Ltd.*, on the other hand – to take two extreme instances – is explained by the fact that in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence – and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a

contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract . . .

[49] With these preliminary observations I turn to the series of English cases which is said to compose the consistent body of authority on which we are asked to nonsuit the appellant. It will be found that in most of them the facts were very different from the facts of the present case, and did not give rise to the special relationship, and consequent duty, which in my opinion is the deciding factor here . . .

[50] The prolonged discussion of English and American cases into which I have been led might well dispose your Lordships to think that I had forgotten that the present is a Scottish appeal which must be decided according to Scots law. But this discussion has been rendered inevitable by the course of the argument at your Lordships' Bar, which, as I have said, proceeded on the footing that the law applicable to the case was the same in England and Scotland. Having regard to the inconclusive state of the authorities in the Courts below and to the fact that the important question involved is now before your Lordships for the first time, I think it desirable to consider the matter from the point of view of the principles applicable to this branch of law which are admittedly common to both English and Scottish jurisprudence.

[51] The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party

complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

[52] To descend from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant establishes her allegations, the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterized as carelessness without applying too exacting a standard.

[53] But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health.

[54] It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he

might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it.

[55] Suppose that a baker, through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that, those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness," and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequence of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them . . .

[56] I am anxious to emphasize that the principle of judgment which commends itself to me does not give rise to the sort of objection stated by Parke B. in *Longmeid v. Holliday*, where he said (6 Exch. 761, 768):

"But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous – a carriage, for instance – but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

I read this passage rather as a note of warning that the standard of care exacted in human dealings must not be pitched too high than as giving any countenance to the view that negligence may be exhibited with impunity.

[57] It must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is not

too remote from the carelessness. I can readily conceive that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer could not in any view be held to be to blame. It may be a good general rule to regard responsibility as ceasing when control ceases. So, also where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user.

[58] But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded. It is doubtful whether in such a case there is any redress against the retailer: *Gordon v. M'Hardy* (1903) 6 F. (Ct. of Sess) 210.

[59] The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. 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*. Negligence must be both averred and proved. The appellant accepts this burden of proof, and in my opinion she is entitled to have an opportunity of discharging it if she can. I am accordingly of opinion that this appeal should be allowed, the judgment of the Second Division of the Court of Session reversed, and the judgment of the Lord Ordinary restored.

*Appeal allowed*

#### *Notes and Questions*

1. *Objectives of our study.* We will analyse the judgments of one of the minority judges, Lord Buckmaster (paragraphs 1-22) and two of the majority judges, Lord Atkin (paragraphs 23-47) and Lord Macmillan (paragraphs 48-58). There are three objectives we want to achieve in studying this case. First, to illustrate the difficulties involved in trying to ascertain the *ratio decidendi* of a case. Second, to compare the

techniques of legal reasoning and argument, including their use of general principles. Third, to examine the techniques employed by the members of the House of Lords in dealing with the prior cases which we have studied.

2. *Organization of Lord Buckmaster's judgment.* Before you begin analysing Lord Buckmaster's judgment, note that it is organised as follows:
  - facts and history of pleadings (paragraphs 1-2)
  - governed by English law (paragraph 3)
  - general comments on common law (paragraphs 4-5)
  - favourable authorities (paragraphs 5-9)
  - adverse English authorities (paragraphs 10-15)
  - adverse American authorities (paragraphs 16-17)
  - conclusion on prior authorities (paragraph 18)
  - principle contended for and its consequences (paragraphs 19-20)
  - policy considerations and conclusion (paragraphs 21-22)
3. *Lord Buckmaster's judgment.* What is the purpose of his general comments on the common law in paragraphs 4 and 5? What techniques of argument and reasoning is he using in paragraphs 19 and 20? For what purpose is he citing *Mullen v. Barr* in paragraphs 21 and 22?
4. *Organization of Lord Atkin's judgment.* Before you begin analysing Lord Atkin's judgment, note that it is organised as follows:
  - statement of the issue (paragraphs 23-24)
  - comments on general principles (paragraphs 25-26)
  - neighbour principle (paragraph 27)
  - authority for neighbour principle (paragraphs 28-31)
  - application of general principle to manufacturers of products; policy arguments (paragraphs 32-34)
  - existing cases and the general principle; warning about stating propositions of law too widely (paragraph 36)
  - supporting English authorities (paragraphs 37-38)
  - adverse English authorities (paragraphs 39-44)
  - supporting American authorities (paragraph 45)
  - proposition of law (paragraph 46)
  - common sense justification (paragraph 47)
5. *Lord Atkin's judgment.* Does Lord Atkin accept Brett M.R.'s principle as an accurate statement of English law? How does his neighbour principle in paragraph 27 differ from that stated by Brett M.R. in *Heaven v. Pender*? Under the neighbour principle, who owes a duty to

whom? Carefully study his statement in paragraph 36. Is his "warning" consistent with the general principle he has enunciated in paragraph 27? Does his warning apply to "general principles", or only to "propositions of law"? Explain how his warning in paragraph 30 is related to his statement of the general principle, his treatment of the prior authorities and his statement of the proposition of law in paragraph 46. Compare his formulation of the issue in paragraph 23 with his proposition of law in paragraph 46. Are there any differences? When Lord Atkin formulated his proposition of law in paragraph 46, did he heed his warning in paragraph 36? Is his proposition of law limited by his comments in paragraph 34 that it applies to only certain types of products? What type of argument is he using in paragraphs 32, 33 and 47?

6. *Lord Macmillan's judgment.* What does he mean in paragraph 48 when he states that there are "two rival principles of law" contending for supremacy? Is he using the term "principle" in the same general sense as Lord Atkin? What does he mean in paragraph 51 when he states that "the conception of legal responsibility may develop in adaptation to altering social conditions and standards" and that "the categories of negligence are never closed"? Is this similar to the comments of Cardozo J. in paragraph 12 of *MacPherson v. Buick*? Is he stating a proposition of law in paragraph 53? If so, how does it differ from that stated by Lord Atkin in paragraph 46? What does he mean by the concept of foreseeability which he discusses in paragraph 54? Is this concept consistent with the reasoning of Lord Atkin? What technique of argument is he using in paragraph 55? For what purpose does he quote *Longmeid v. Holliday* in paragraph 56? Is he recognizing possible limits on the rule of law in paragraph 57? What does he mean when he says that it may be a good general rule to regard responsibility as ceasing when control ceases? Was that concept applicable in the case at hand?
7. *The ratio decidendi of the case.* For a summary of the concept of *ratio decidendi* which includes a discussion of this case, see Farrar and Dugdale, *Introduction to Legal Method* (3rd ed. 1990) at 90-95. Which of the quotations below do you believe is the most accurate statement of the *ratio decidendi* of this case?
  - (a) By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health (Headnote [1932] A.C. 562).
  - (b) Both by English and Scots law a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of those articles.

He owes the members of the public a duty not to convert by his own carelessness an article which he issues to them as wholesale and innocent into an article which is dangerous to life and health (Headnote (1932) 147 L.T. 281).

(c) A manufacturer of products which he sells in such form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer, owes a duty to the consumer to take reasonable care, although the manufacturer does not know the product to be dangerous and no contractual relation exists between him and the consumer (Headnote [1932] All E.R. Rep. 1).

8. *Techniques used in dealing with adverse authorities.* For an excellent discussion of the various techniques, including an analysis of the techniques used by Lord Atkin and Lord Buckmaster in *Donoghue v. Stevenson*, see Twining and Miers, *How To Do Things with Rules* (4th ed., 1999) at 325-333. In this case Lord Atkin and Lord Buckmaster used various techniques of legal reasoning or argument when dealing with the prior authorities. Compare their treatment of the following authorities:

*Langridge v. Levy* (paragraphs 5; 40)

*Winterbottom v. Wright* (paragraphs 6; 41)

*Longmeid v. Holliday* (paragraphs 7; 42)

*George v. Skivington* (paragraphs 10-11; 37-38)

*Heaven v. Pender* (paragraphs 12-15; 25, 28-31, 38)

*MacPherson v. Buick* (paragraphs 17; 45).

9. *The case as judicial law-making.* Consider the following statement from *Street on Torts* (10th ed., 1999) at 173 on the importance of *Donoghue v. Stevenson*:

"The importance of *Donoghue v Stevenson* is two-fold: (1) It firmly established a new category of duties, that of manufacturers of goods to eventual users, a category which ... has since developed far beyond the limits of the facts of that case. (2) It finally set at rest any possible doubts whether the tort of negligence was capable of further expansion or was to be rigidly tied down by existing precedents. It was a clear instance of the courts' taking account of the new conditions of mass production and complex marketing of goods wherein there are many intermediaries between manufacturer and consumer, and, by a conscious work of judicial legislation, imposing on manufacturers certain minimum standards of care in favour of the consumer."

Are there any passages in the judgments which support this statement? If this was indeed a conscious work of judicial legislation, should the

court not have explained that this was its intention, and given its reasons for the new direction it was taking the law of negligence?

#### *Discussion Problems*

1. Assume that *Donoghue v. Stevenson* was not a decision of the House of Lords but was a 2-1 decision of the Court of Appeal. Assume that the case has just been decided and that the defendants have decided to appeal to the House of Lords. Outline the arguments you would make on behalf of the appellant and on behalf of the respondent. Consider for each side what would be your strongest arguments, what authorities you would rely upon, and how you would attempt to distinguish the authorities against you.
2. Gullible, on one of his travels, comes across a quaint little shop on Arab Street with a sign-board proclaiming "Alladin's Best Lamps - Guaranteed Quality". Irresistibly attracted, he enters the shop and spies a portable spirit lamp. The proprietor of the shop, Alladin, assures Gullible that the lamp is of the highest quality. The lamp, he says, was personally assembled by him from quality components imported from Japan. In fact the components were imported by him from Taiwan. After being told that Gullible's principal avocation is camping, Alladin gives an assurance that the lamp is eminently fit for that purpose. Acting on these assurances, Gullible purchases the lamp without inspecting it or checking it to see if it is in proper working order. On returning home, Gullible gives the unopened box containing the lamp to Jeannie, a friend of his, who is going camping that afternoon with Florence, a friend of hers. Jeannie delivers the unopened box to Florence, who packs it away with the camping gear without opening it. When they reach the campsite that night, Florence - the lady with the lamp - is put in charge of setting up the camp. She opens the box and takes out the lamp. While she is pumping the lamp to build up pressure it bursts, cutting her badly. The resulting fire destroys \$5000 worth of camping equipment belonging to Jeannie. The reason the lamp burst was due to a crack in the glass body of the lamp which resulted from Alladin's want of care in assembling it. The crack was very thin but it could have been discovered by a careful inspection.

*Directions:* Assume that it is 1934. Jeannie and Florence sue Alladin for negligence under the authority of *Donoghue v. Stevenson*. Prepare arguments on behalf of the two plaintiffs and on behalf of the defendant.

3. Car enthusiast Monty Carlo recently purchased an antique Bentley. He sent the car to MacAnix's garage for a complete overhaul. MacAnix did a good job on the car, but he negligently forgot to reconnect the brake cables. Monty and his friend Jonah collected the car from MacAnix and went for a drive. The brakes failed at the first bend. The Bentley struck a parked car belonging to Kent, went over the curb and ended up in a monsoon drain. Jonah suffered a concussion and a fractured arm; his medical bills came up to \$2000. The Bentley, though repairable, lost

most of its value as an antique; the cost of repairing the car was \$500, and the diminution in value \$5000. The damage to Kent's vehicle was \$1000.

*Directions:* Discuss the liability of MacAnix under the authority of *Donoghue v. Stevenson*.

4. Discuss the following hypothetical statement:

"The *ratio decidendi* of *Donoghue v. Stevenson* is clearly not the same today as it was when it was decided in 1932. Today it could be argued that the neighbour principle is in fact the *ratio decidendi* of the case."

5. Discuss the following statement from Lord Atkin's judgment in *Donoghue v. Stevenson*. Include in your discussion the significance of the statement in the context of his judgment as well as the significance of the statement to the development of the common law.

"I venture to say that in the branch of the law which deals with civil wrongs, dependent in England, at any rate, entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary, in considering reported cases in the law of torts, that the actual decision alone should carry authority, proper weight, of course, being given to the *dicta* of the judges."

6. Discuss the following statement. Illustrate your points with examples from the materials.

"If people still believed in the declaratory theory of the common law in 1930, such beliefs should have been shattered after the decision in *Donoghue v. Stevenson*, for it is a classic case of judicial law-making."

## SECTION 4. POST-DONOOGHUE CASES

### Introduction

In *Donoghue v. Stevenson* the House of Lords finally recognized that manufacturers of products owed a duty of care to ultimate consumers to ensure that the products were made safely. Since the decision was from the House of Lords all lower courts in England were bound by it. However, what the exact scope of the rule in the case would be was not clear in 1932. Would the duty of care recognized in the case be confined to manufacturers of products, or would it be extended to cover persons who supplied or dealt with

products, such as repairers? Would subsequent courts insist that the goods must reach the ultimate consumer in the form in which they left him, with no possibility of intermediate examination? Lord Buckmaster warned in *Donoghue v. Stevenson* (*supra*, paragraphs 19-20) that the principle contended for in *Donoghue v. Stevenson* would cover the repairers as well as manufacturers, that it would cover every article, that it could not be confined to cases where inspection is difficult or impossible to introduce, that it would extend to all persons who lawfully use the article, and that it would even cover the construction of houses. He warned: "If one step, why not fifty?" It was up to subsequent courts to determine the precise scope and limits of the rule.

It was also not clear what impact, if any, the general statements of principle made by Lord Atkin and Lord Macmillan would have on the further development of the law of negligence. Would Lord Atkin's neighbour principle be ignored in the same way as the similar statement of Brett M.R. in *Heaven v. Pender*? Or would the reasoning of Lord Atkin and Lord Macmillan be used by subsequent courts to recognize new situations where persons would owe a duty of care to others who were injured as a result of their carelessness? If so, would the courts nevertheless find it necessary to place some limits or restrictions on the situations where persons could recover for reasonably foreseeable injuries caused by the negligence of others?

The cases in this section have been selected to provide some understanding of how subsequent courts addressed these problems. In the early case of *Grant v. Australian Knitting Mills* you will see the court considering the scope of the "narrow rule" of *Donoghue v. Stevenson* concerning the duty of care of manufacturers to consumers. In the later cases you will see the impact of the neighbour principle on the development of the law in areas far removed from the liability of manufacturers for defective products.

In addition to illustrating the impact of the landmark decision of *Donoghue v. Stevenson*, the cases in this section are also selected for other reasons. As examples of legal reasoning, you will discover that modern English judges are more willing to acknowledge that their decision in a case is determined not only by the existing legal authorities, but also by considerations of public policy. At the same time you will see in the cases illustrations of the differing attitudes of judges toward their function as law-makers in changing and adapting the common law to meet modern needs and conditions.

**GRANT v. AUSTRALIAN KNITTING MILLS LTD.**

[1936] A.C. 85 (Privy Council on appeal from Australia)

*Introductory note*

In this case the plaintiff appellant contracted a severe case of dermatitis from wearing underwear which was defective because excess sulphites were left in it in the process of manufacture. The plaintiff appellant sued both the retailer and the manufacturer. For our purposes, the issue is whether the defendant manufacturer owed the plaintiff a duty of care under the authority of *Donoghue v. Stevenson*.

**LORD WRIGHT**

[1] . . . The retailers, accordingly, in their Lordships' judgment are liable in contract: so far as they are concerned, no question of negligence is relevant to the liability in contract. But when the position of the manufacturers is considered, different questions arise: there is no privity of contract between the appellant and the manufacturers; between them the liability, if any, must be in tort, and the gist of the cause of action is negligence . . .

[2] . . . It was said there could be no legal relationships in the matter save those under the two contracts between the respective parties to those contracts, the one between the manufacturers and the retailers and the other between the retailers and the appellant. These contractual relationships (it might be said) covered the whole field and excluded any question of tort liability: there was no duty other than the contractual duties.

[3] This argument was based on the contention that the present case fell outside the decision of the House of Lords in *Donoghue's* case [1932] A.C. 562. Their Lordships, like the judges in the Courts in Australia, will follow that decision, and the only question here can be what that authority decides and whether this case comes within its principles. In *Donoghue's* case the defendants were manufacturers of ginger-beer, which they bottled; the pursuer had been given one of their bottles by a friend who had purchased it from a retailer who in turn had purchased from the defendants. There was no relationship between pursuer and defenders except that arising from the fact that she consumed the ginger-beer they had made and bottled. The bottle was opaque, so that it was impossible to see that it contained the decomposed remains of a snail; it was sealed and stoppered so that it could not be tampered with until it was opened in order that the contents should be drunk. The House of Lords held these facts established in law a duty to take care as between the defenders and the pursuer.

[4] Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin (*ibid.* 599):

"A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

[5] This statement is in accord with the opinions expressed by Lord Thankerton and Lord Macmillan, who in principle agreed with Lord Atkin.

[6] In order to ascertain whether the principle applies to the present case, it is necessary to define what the decision involves, and consider the points of distinction relied upon before their Lordships.

[7] 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 . . . In *Donoghue's* case the duty was deduced simply from the facts relied on – namely, that the injured party was one of a class for whose use, in the contemplation and intention of the makers the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting, the hidden danger: . . .

[8] One further point may be noted. The principle of *Donoghue's* case can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: 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 incur the risk or certainty of mischance.

[9] If the foregoing are the essential features of *Donoghue's* case, they are also to be found, in their Lordships' judgment, in the present case. The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect, just as much as were the remains of the snail in the opaque bottle: it

could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and their being worn to change their condition. The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant: it was not contemplated that they should be first washed. It is immaterial that the appellant has a claim in contract against the retailers, because that is a quite independent cause of action, based on different considerations, even though the damage may be the same. Equally irrelevant is any question of liability between the retailers and the manufacturers on the contract of sale between them. The tort liability is independent of any question of contract.

[10] It was argued, but not perhaps very strongly, that *Donoghue's* case was a case of food or drink to be consumed internally, whereas the pants here were to be worn externally. No distinction, however, can be logically drawn for this purpose between a noxious thing taken internally and a noxious thing applied externally: the garments were made to be worn next the skin: indeed Lord Atkin ([1932] A.C. 562, 583) specifically puts as examples of what is covered by the principle he is enunciating things operating externally, such as "an ointment, a soap, a cleaning fluid or cleaning powder."

[11] Mr. Greene [counsel for the respondents], however, sought to distinguish *Donoghue's* case from the present on the ground that in the former the makers of the ginger-beer had retained "control" over it in the sense that they had placed it in stoppered and sealed bottles, so that it would not be tampered with until it was opened to be drunk, whereas the garments in question were merely put into paper packets, each containing six sets, which in ordinary course would be taken down by the shopkeeper and opened, and the contents handled and disposed of separately, so that they would be exposed to the air. He contended that though there was no reason to think that the garments when sold to the appellant were in any other condition, least of all as regards sulphur contents, than when sold to the retailers by the manufacturers, still the mere possibility and not the fact of their condition having been changed was sufficient to distinguish *Donoghue's* case: there was no "control" because nothing was done by the manufacturers to exclude the possibility of any tampering while the goods were on their way to the user. Their Lordships do not accept that contention. The decision in *Donoghue's* case did not depend on the bottle being stoppered and sealed: the essential point in this regard was that the article should reach the consumer or user subject to the same defect as it had when

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.

[12] Mr. Greene further contended on behalf of the manufacturers that if the decision in *Donoghue's* case were extended even a hair's-breadth, no line could be drawn, and a manufacturer's liability would be extended indefinitely. He put as an illustration the case of a foundry which had cast a rudder to be fitted on a liner: he assumed that it was fitted and the steamer sailed the seas for some years: but the rudder had a latent defect due to faulty and negligent casting, and one day it broke, with the result that the vessel was wrecked, with great loss of life and damage to property. He argued that if *Donoghue's* case were extended beyond its precise facts, the maker of the rudder would be held liable for damages of an indefinite amount, after an indefinite time, and to claimants indeterminate until the event. But it is clear that such a state of things would involve many considerations far removed from the simple facts of this case. So many contingencies must have intervened between the lack of care on the part of the makers and the casualty that it may be that the law would apply, as it does in proper cases, not always according to strict logic, the rule that cause and effect must not be too remote: in any case the element of directness would obviously be lacking. Lord Atkin deals with that sort of question in *Donoghue's* case [1932] A.C. 562, 591 where he refers to *Earl v. Lubbock* [1905] 1 K.B. 253, 259: he quotes the common-sense opinion of Mathew L.J.: "It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on."

[13] In their Lordships' opinion it is enough for them to decide this case on its actual facts.

[14] No doubt many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision. It is enough now to say that their Lordships hold the present case to come within the principle of *Donoghue's* case, and they think that the judgment of the Chief Justice was right in the result and should be restored as against both respondents, and that the appeal should be allowed . . .

*Appeal allowed*

*Notes and Questions*

1. *Purpose of study.* This case illustrates how the proposition of law in *Donoghue v. Stevenson* was applied to the manufacturers of products other than food and drink. It also illustrates how the courts interpreted the language in Lord Atkin's proposition of law which indicated that a duty existed only if there was "no reasonable possibility of intermediate examination".
2. *The position of the defendant.* Before examining the reasoning of Lord Wright, look at the summary of facts in the introductory note. Then assume that you were counsel for the defendant in this case. How could you argue that this case did not come within the rule in *Donoghue v. Stevenson*? Can you distinguish the facts? What would you maintain was the *ratio decidendi* of *Donoghue v. Stevenson*? Would you concede that it was Atkin's proposition of law in paragraph 46, or would you try to argue that it should be stated at a lower level of generality? If so, how would you state the *ratio*? Are there any passages in the judgments of Lord Atkin and Lord Macmillan which you could cite in support of your argument? Can you think of any reasons of policy you could put forward in support of your argument that the rule in *Donoghue v. Stevenson* should not be applied in this case?
3. *The position of the plaintiff.* Next put yourself in the shoes of the counsel for the plaintiff. What would you argue is the *ratio decidendi* of *Donoghue v. Stevenson*? How would you use the neighbour principle in your argument? What arguments would you anticipate the defendant to make concerning the applicability of *Donoghue v. Stevenson*, and how would you refute them? What about Lord Macmillan's reasoning regarding responsibility ceasing when control ceases? Are there any policy arguments you could advance in support of your case? If the court asked you for guidance on what limits or qualifying conditions there should be on the rule in *Donoghue v. Stevenson*, how would you respond?
4. *Lord Wright's reasoning.* Can you identify the arguments which were used by counsel for the defendants? What do you think was his strongest argument? Has Lord Wright dealt convincingly with each of the arguments put forward by counsel for the defendant? Why does Lord Wright state in paragraph 13 that it is enough for them to decide the case on its actual facts? Is it not the function of the court to decide according to a general rule so as to give guidance to lower courts in subsequent cases? What is the *ratio decidendi* of this case? Has this case extended the *ratio decidendi* of *Donoghue v. Stevenson* through its interpretation of the issue of intermediate examination?

**CANDLER v. CRANE, CHRISTMAS & CO.**

[1951] 2 K.B. 164 (Court of Appeal)

*Introductory Note*

This case is important because it demonstrates how Lord Denning attempted to use the decision of the House of Lords in *Donoghue v. Stevenson* as a vehicle for reconsidering and changing the law of negligent misstatement. The question here was whether the neighbour principle enunciated in *Donoghue v. Stevenson*, which applied to negligent acts causing physical injury, would have any impact on the law regarding negligent misstatements which caused economic loss. This case was important because it raised the issue of whether professional persons owed a duty of care in giving advice or making statements to persons other than those who were in a contractual or fiduciary relationship with them.

The plaintiff was a potential investor in a company. He desired to see the accounts of a company he was interested in investing in. The accounts of the company were being prepared by the defendants, the accountants of the company. The managing director of the company instructed the defendants to show the accounts to the plaintiff as he was a potential investor in the company. The defendants prepared the accounts and showed them to the plaintiff. Relying on the accounts, the plaintiff invested money in the company. The accounts had been carelessly prepared and gave a misleading statement of the financial position of the company. The company went into liquidation and the plaintiff lost the money he had invested. The plaintiff sued the defendants for negligence in preparing the accounts.

The court held, with Lord Denning dissenting, that the defendants owed no duty of care to the plaintiff as there was no contractual or fiduciary relationship between them.

**DENNING L.J. (DISSENTING)**

[1] ... Now I come now to the great question in the case: did the accountants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. They were professional accountants who prepared and put before him these accounts, knowing that he was going, to be guided by them in making an investment in the company. On the faith of those accounts he did make the investment, whereas if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money. In the circumstances, had he not every right to rely on the accounts being prepared with proper care; and is he not entitled to redress from the accountants on whom he relied? I say

that he is, and I would apply to this case the words of Knight Bruce L.J. in an analogous case ninety years ago: "A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization." *Slim v. Croucher* (1860) 1 De G.F. & J. 518, 527.

[2] Turning now to authority, I can point to many general statements of principle which cover the case made by some of the great names in the law: Lord Eldon L.C. in *Evans v. Bicknell* (1801) 6 Ves. 174, 183, Lord Campbell L.C. in *Slim v. Croucher* (1860) 1 De G.F. & J. 518, 523, Lord Selborne L.C. in *Brownlie v. Campbell* (1880) 5 App. Cas. 925, 935-6, Lord Herschell in *Derry v. Peek* (1889) 14 App. Cas. 337, 360, Lord Shaw in *Nocton v. Ashburton* [1914] A.C. 932, 972 and Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580-1. It is said that effect cannot be given to these statements of principle, because there is an actual decision of this court in 1893 which is to the contrary, namely *Le Lievre v. Gould* [1893] 1 Q.B. 491.

[3] Before I consider the decision in *Le Lievre v. Gould* itself, I wish to say that, in my opinion, at the time it was decided current legal thought was infected by two cardinal errors. The first error was one which appears time and time again in nineteenth century thought, namely, that no one who is not a party to a contract can sue on it or on anything arising out of it. This error has had unfortunate consequences both in the law of contract and in the law of tort. So far as contract is concerned, I have said something about it in *Smith v. River Douglas Catchment Board* [1949] 2 K.B. 500, 514-17. So far as tort is concerned, it led the lawyers of that day to suppose that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on account of it: see *Winterbottom v. Wright* (1842) 10 M. & W. 109, *Alton v. Midland Ry.* (1865) 19 C.B.N.S. 213, and the notes to *Pasley v. Freeman* (1789) 3 Term Rep. 51 (2 Smith's Leading Cases 13th ed. 1929, at 103-110); except in the case of things dangerous in themselves, like guns: see *Dixon v. Bell* (1816) 5 M. & S. 198, 105 E.R. 1023. This error lies at the root of the reasoning of Bowen L.J. in *Le Lievre v. Gould* [1893] 1 Q.B. 491, 502 when he said that the law of England ". . . does not consider that what a man writes on paper is like a gun or other dangerous instrument . . .", meaning thereby that, unless it was a thing which was dangerous in itself, no action lay. This error was exploded by the great case of *Donoghue v. Stevenson*, which decided that the presence of a contract did not defeat an action for negligence by a

third person, provided that the circumstances disclosed a duty by the contracting party to him.

[4] The second error was an error as to the effect of *Derry v. Peek* (1889) 14 App. Cas. 337, an error which persisted for thirty-five years at least after the decision, namely, that no action ever lies for a negligent statement even though it is intended to be acted on by the plaintiff and is in fact acted on by him to his loss. This error led the Court of Appeal in *Low v. Bouverie* [1891] 3 Ch. 82 to deny the correctness of *Slim v. Croucher*; and in *Le Lievre v. Gould* to deny the correctness of *Cann v. Willson* (1888) 39 Ch.D. 39. The cases thus denied were so plainly just that the very denial of them was itself an error. The error was, however, exposed by the important case of *Nocton v. Ashburton* [1914] A.C. 932, which decided that an action did lie for a negligent statement where the circumstances disclosed a duty to be careful; and that all that is to be deduced from (though not decided by) *Derry v. Peek* is that *in the particular circumstances of that case* there was no duty to be careful. Lord Haldane observed significantly [1914] A.C. 932, 947 that the authorities subsequent to *Derry v. Peek* had shown "a tendency to assume that it was intended to mean more than it did".

[5] In my opinion these decisions of the House of Lords in *Donoghue v. Stevenson* and *Nocton v. Ashburton* are sufficient to entitle this court to examine afresh the law as to negligent statements, and that is what I propose to do.

[6] Let me first be destructive and destroy the submissions put forward by Mr. Foster [counsel for the defendants]. His first submission was that a duty to be careful in making statements arose only out of a contractual duty to the plaintiff or a fiduciary relationship to him. Apart from such cases, no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being allowed now. This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White* (1703) 2 Ld. Raym 938, *Pasley v. Freeman* (1789) 3 Term Rep. 51 and *Donoghue v. Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is

put forward I call to mind the emphatic answer given by Pratt C.J. nearly two hundred years ago in *Chapman v. Pickersgill* (1762) 2 Wilson 145, 146 when he said: "I wish never to hear this is objection again. This action is for a tort: torts are infinitely various; not limited or confined, for there is nothing in nature but may be an instrument of mischief". The same answer was given by Lord Macmillan in *Donoghue v. Stevenson* [1932] A.C. 562, 619 when he said: "The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed". It needs only a little imagination to see how much the common law would have suffered if those decisions had gone the other way.

[7] The second submission of Mr. Foster was that a duty to take care only arose where the result of a failure to take care will cause physical damage to persons or property. It was for this reason that he did not dispute two illustrations of negligent statements which I put in the course of the argument, the case of an analyst who negligently certifies to a manufacturer of food that a particular ingredient is harmless, whereas it is in fact poisonous, or the case of an inspector of lifts who negligently reports that a particular lift is safe, whereas it is in fact dangerous. The analyst and the lift inspector would, I should have thought, be liable to any person who was injured by consuming the food, or using the lift, at any rate if there was no likelihood of intermediate inspection: . . .

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

[9] One final word: I think that the law would fail to serve the best interests of the community if it should hold that accountants and auditors owe a duty to no one but their client. Its influence would be most marked in cases where their client is a company or firm controlled by one man. It would encourage accountants to accept the information which the one man gives them, without verifying it; and to prepare and present the accounts rather as a lawyer prepares and presents a case, putting the best appearance on the accounts they can, without expressing their personal opinion of them. This is, to my way of thinking, an entirely wrong approach. There is a great difference between the lawyer and the accountant. The lawyer is never called on to express his personal belief in the truth of his client's case; whereas the accountant, who certifies the accounts of

his client, is always called on to express his personal opinion as to whether the accounts exhibit a true and correct view of his client's affairs; and he is required to do this, not so much for the satisfaction of his own client, but more for the guidance of shareholders, investors, revenue authorities, and others who may have to rely on the accounts in serious matters of business. If we should decide this case in favour of the accountants there will be no reason why accountants should ever verify the word of the one man in a one man company, because there will be no one to complain about it. The one man who gives them wrong information will not complain if they do not verify it. He wants their backing for the misleading information he gives them, and he can only get it if they accept his word without verification. It is just what he wants so as to gain his own ends. And the persons who are misled cannot complain because the accountants owe no duty to them. If such be the law, I think it is to be regretted, for it means that the accountants' certificate, which should be a safeguard, becomes a snare for those who rely on it. I do not myself think that it is the law. In my opinion accountants owe a duty of care not only to their own clients, but also to all those whom they know will rely on their accounts in the transactions for which those accounts are prepared.

[10] I would therefore be in favour of allowing the appeal and entering judgment for the plaintiff for damages in the sum of 2,000 pounds.

#### ASQUITH L.J.

[11] . . . Their [the defendant's] proposition is that, under the conditions assumed in this case, the defendants were under no duty, sounding in tort, to the plaintiff to take care that their representations of fact should be true. They rely in support of this contention on *Le Lievre v. Gould*, a decision binding on this court. I agree with the trial judge in considering that authority to be conclusive in their favour, unless it can be shown to have been overruled or to be distinguishable.

[12] The plaintiff's case is that whatever may have been the position before *Donoghue v. Stevenson*, the rule applied by the majority of the House of Lords in that case necessarily involves the consequence that (even where fraud, contract and fiduciary relationship are absent) A will be liable to B for any negligent misrepresentations on which B acts to his detriment, provided always that there exists between A and B the necessary degree of so-

called "proximity". It is argued for the plaintiff that there was sufficient proximity on the facts of this case.

[13] It may make for clearness first to consider some of the authorities preceding *Donoghue's* case (as for short I will call it); and, secondly, to inquire what difference, if any, that case has made

[14] This being so, the first question is whether the principle laid down in *Gould's* case has been modified or overruled, either expressly or by necessary implication, by the decision in any other case of superior authority. It has been qualified by *Nocton v. Ashburton* to this extent, that in the passage cited above, after the words "in the absence of contract with the plaintiff" the further words "or in the absence of some circumstances is connoting a fiduciary relationship between the defendant and the plaintiff", ought to be written in. Subject to this loss has it been overruled? It has certainly not been overruled expressly. Has it then been overruled by necessary implication?

[15] Lord Atkin in *Donoghue's* case refers pointedly to *Gould's* case in his speech, without a hint or a suggestion that it was wrongly decided, or that the memorable formula which he himself was announcing was inconsistent with it. As regards the two minority judgments, one of them, that of Lord Buckmaster, also mentions the case, and without disapproval.

[16] On the other hand it is arguable (though the argument does not carry conviction to my mind) that, whether or not Lord Atkin realized the fact or directed his mind to the question, the formula which he laid down does in fact logically invalidate the principle laid down and acted on in *Gould's* case. This contention must be squarely faced. Lord Atkin pointed out that the law governing the duty owed by A to B in the absence of fraud, contract or fiduciary relationship has been built up piecemeal – built up, if one may pursue the metaphor, in disconnected slabs exhibiting no organic unity of structure. Certain classes owed duties of care to certain other classes – road users to other road users; bailees to persons entrusting property to them, doctors and surgeons (and originally barbers) to persons entrusting their bodies to them, occupiers of premises to persons whom they invite or permit to come on the premises, and so on. These categories attracting the duty had been added to and subtracted from time to time. No attempt, however, had been made in the past to rationalize them, to find a common denominator between road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of

care and some other classes who might be expected equally to be so bound should be exempt – no attempt, that is, save that of Lord Esher M.R. (from which his colleagues dissociated themselves) in *Heaven v. Pender* (1883) 11 Q.B.D. 503. Yet, says Lord Atkin, there must be such a common denominator, some general conception of relations present in the cases in which a duty arises, and absent in cases in which it does not.

[17] Very tentatively (and prefacing his observation with a warning that it might go beyond the province of a judge to make such an attempt), he suggested the formula which has now become classic but which nevertheless it is desirable here to quote afresh ([1932] A.C. 562, 580-1):

“ 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. This appears to me to be the doctrine of *Heaven v. Pender*, as laid down by Lord Esher (then Brett M.R.), when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould*. ”

[18] This passage, if read literally and without regard to the qualifying effect of its context or of the “*subjecta materies*”, might be taken to comprehend not only conduct causing physical injury to person or property through setting a certain kind of chattel in motion or in circulation (the case immediately under review); but also conduct of any kind, through any means (including negligent misstatement) causing *damnum* of any kind recognized by the law, whether physical or not, to anyone who could bring himself within Lord Atkin’s definition of a “neighbour”. I cannot believe so broad an application was intended by Lord Atkin himself. The case may not decide quite so little as is contained in its somewhat conservative headnote, which purports to confine it to the act of a manufacturer launching into circulation a negligently manufactured chattel which is calculated to injure and in fact injures the ultimate consumer or user in circumstances in which neither he nor any intermediate party has a reasonable opportunity of examining it. In fact it has since been applied somewhat outside this limited ambit; for instance, to physical injury caused by negligent failure to repair a lift (*Haseldine v. C. A. Daws & Son Ltd.* [1941] 2 K.B. 343) and a motor car (*Denny*

v. *Supplies and Transport Co. Ltd.* [1950] 2 K.B. 374), or by the negligent adoption of a system of working. It has, however, I think, never been applied where the damage complained of was not physical. Wrottesley J. in *Old Gate Estates Ltd. v. Toplis* (1939) 161 L.T. 227 held its application was limited to cases where the injury was to life or limb. I think this is too narrow a view and that physical injury to property may suffice, but it has never been applied to injury other than physical.

[19] Apart, however, from any limitation which should be read into Lord Atkin's language by reference to the facts of the case before him – the “*subjecta materies*” – it seems to me incredible that if he thought his formula was inconsistent with *Gould's* case he would not have said so. This case, now nearly sixty years old, had at that time stood for nearly forty years. He must have considered it closely. Yet his only reference to it is as annexing a valid and essential qualification to Lord Esher's formula in *Heaven v. Pender*. Not a word of disapproval of the decision on its merits. The inference seems to me to be that Lord Atkin continued to accept the distinction between liability in tort for careless (but non-fraudulent) misstatements and liability in tort for some other forms of carelessness, and that his formula defining “who is my neighbour” must be read subject to his acceptance of this overriding distinction.

[20] Counsel for the plaintiff was unable to point to any clear decided case, standing unreversed, either before or after *Donoghue's* case, in which (always apart from fraud, contract and fiduciary relationship) A had ever been held liable to B in damages for a careless misrepresentation . . .

[21] In what has gone before it has been assumed that the two Law Lords who agreed with Lord Atkin's opinion or result accepted the broad formula about “my duty to my neighbour” which he laid down, as well as in the narrow proposition limited to the liability of the negligent manufacturer of a chattel which reaches the consumer, without an opportunity of intermediate examination, and injures him. This assumption seems to me more than questionable. Lord Thankerton, though he says ([1932] A.C. 562, 604) that he entirely agreed with Lord Atkin's discussion of the authorities, is clearly considering the authorities in their application to the narrow ambit of a manufacturer's liability, chattels and physical injury. His judgment does not travel outside these limits. Nor do I read Lord Macmillan's judgment as endorsing the wider proposition. There is a passage in which he lays down certain general propositions [1932] A.C. 562, 619. It would have been easy for him to have adopted

Lord Atkin's formula in terms if he had thought so broad a proposition justified. When he says, however, in an oft-quoted phrase, "the categories of negligence are never closed" he is not, in my view, accepting an acid test of liability valid in all circumstances. He does not mention the word "neighbour". He is merely saying that in accordance with changing social needs and standards new classes of persons legally bound or entitled to the exercise of care may from time to time emerge – in this case by the addition of a careless manufacturer or circulator of a chattel, as parties bound, *vis-a-vis* consumers or users, as parties entitled. In other words, what Lord Macmillan envisaged was the addition of another slab to the existing edifice, not a systematic reconstruction of the edifice on a single logical plan.

[22] For these reasons I am of opinion that *Donoghue's* case neither reverses nor qualifies the principle laid down in *Gould's* case

...

[23] In the present state of our law different rules still seem to apply to the negligent misstatement on the one hand and to the negligent circulation or repair of chattels on the other; and *Donoghue's* case does not seem to me to have abolished these differences. I am not concerned with defending the existing state of the law, or contending that it is strictly logical – it clearly is not. I am merely recording what I think it is.

[24] If this relegates me to the company of "timorous souls", I must face that consequence with such fortitude as I can command. I am of opinion that the appeal should be dismissed.

*Appeal dismissed*

#### *Notes and Questions*

1. *The facts of the case.* Before examining the reasoning of the case, consider the facts set out in the introductory note. Who is the plaintiff, who are the defendants, and what is their relationship? Is there a contractual obligation between them? What did the defendants do or say which was alleged to be negligent? What type of damage did the plaintiff suffer? Did the defendants intend the plaintiff to act on their statement or advice? Did the plaintiff in fact act on their statement or advice? Was the statement or advice true? Was there fraud? In your opinion, do you believe that the defendants should owe a duty of care to the plaintiff in such circumstances? Are the policy considerations in this area of law different from that in the products liability area?
2. *Prior authorities.* The principles of *stare decisis* influenced the decision of the majority in this case. The leading authorities favouring the

defendant were *Derry v. Peek*, an 1889 decision of the House of Lords, and *Le Lievre v. Gould*, an 1893 decision of the Court of Appeal. *Derry v. Peek* was binding on the Court of Appeal unless it could be adequately distinguished. *Le Lievre v. Gould* was also binding unless it could either be brought within one of the exceptions in *Young v. Bristol Aeroplane*, or distinguished. Can an argument be made that it came within any of the exceptions in *Young v. Bristol Aeroplane*? The major difficulty with the decision in *Le Lievre v. Gould* was that it was generally cited as authority for the following rather broad statement of Lord Esher (formerly Brett M.R.): "such negligence, in the absence of a contract with the plaintiff, can give no right of action at law or in equity."

3. *The reasoning of Denning L.J.* Can you outline his process of reasoning? What are the two errors he is talking about? How does he use *Donoghue v. Stevenson*? How does he deal with *Derry v. Peek*? For what reasons does he cite *Slim v. Croucher*? How does he attempt to get around *Le Lievre v. Gould*? What does he mean by the "novelty of the action" argument (paragraph 6), and how does he deal with it? What does he mean by "bold spirits" and "timorous souls"? Is he concerned that his decision will create a "dangerous precedent"? What technique of reasoning is he using in paragraph 9?
4. *The judgment of Asquith L.J.* How does he deal with *Le Lievre v. Gould*? In his opinion, what is *Donoghue v. Stevenson* authority for? How does he argue that the neighbour principle should not be applied? What does he conclude was the effect of *Donoghue v. Stevenson* on the law concerning negligent misstatements? How does he deal with the "bold spirits, timorous souls" point made by Lord Denning?

### **HEDLEY BYRNE & CO. LTD. v. HELLER & PARTNERS LTD.**

[1964] A.C. 465 (House of Lords)

#### *Introductory Note*

Our major purpose in studying this case is to examine the impact of *Donoghue v. Stevenson* on the development of the law of negligent misstatement. Slightly more than a decade after the decision in *Candler v. Crane Christmas*, the question of the liability of professional persons for negligent misstatements was considered by the House of Lords. This case is considered a landmark decision in the law of torts. In it the House of Lords disapproved of *Le Lievre v. Gould* and *Candler v. Crane Christmas*, and adopted Denning L.J.'s dissent in *Candler v. Crane Christmas*.

The respondents (defendants) were merchant bankers. The appellants (plaintiffs) were advertising agents. The appellants asked their bankers to inquire about the financial credit-worthiness of a

company. The appellant's bankers made inquiries of the respondents, who were the company's bankers, about the credit-worthiness of the company. The respondents gave the company a favourable reference, but stated that their reference was given without liability. The favourable reference was communicated to the appellants. Relying on the reference, the appellants placed advertising orders for the company. The company went into liquidation and the appellants lost over 17,000 pounds. The appellants sued the respondents, claiming that the respondent's credit reference was given negligently and gave a false impression of the financial position of the company, and that as a result, the appellants suffered a financial loss.

The House of Lords held that but for the respondent's disclaimer, the respondent would have owed the appellants a duty of care under the circumstances. No clear rule was agreed to by all the judges but they emphasized that a duty would exist when the advice was given in the ordinary course of business, by a party possessed of special skill, under circumstances when the party giving the advice knew or should have known that persons were relying on his advice. In this case, since there was a disclaimer, it was held that no duty existed.

#### LORD REID

[1] . . . The appellants' first argument was based on *Donoghue v. Stevenson* [1932] A.C. 562. That is a very important decision, but I do not think that it has any direct bearing on this case. That decision may encourage us to develop existing lines of authority, but it cannot entitle us to disregard them. Apart altogether from authority, I would think that the law must treat negligent words differently from negligent acts. The law ought so far as possible to reflect the standards of the reasonable man, and that is what *Donoghue v. Stevenson* sets out to do. The most obvious difference between negligent words and negligent acts is this. Quite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally or in a business connection. The appellant agrees that there can be no duty of care on such occasions, and we were referred to American and South African authorities where that is recognized, although their law appears to have gone much further than ours has yet done. But it is at least unusual casually to put into circulation negligently made articles which are dangerous. A man might give a friend a negligently-prepared bottle of home-made wine and his friend's guests might drink it with dire results. But it is by no means clear that those guests would have no action against the negligent manufacturer.

[2] Another obvious difference is that a negligently made article will only cause one accident, and so it is not very difficult to find the necessary degreee of proximity or neighbourhood between the negligent manufacturer and the person injured. But words can be broadcast with or without the consent or the foresight of the speaker or writer. It would be one thing to say that the speaker owes a duty to a limited classs, but it would be going very far to say that he owes a duty to every ultimate "consumer" who acts on those words to his detriment. It would be no use to say that a speaker or writer owes a duty but can disclaim responsibility if he wants to. He, like the manufacturer, could make it part of a contract that he is not to be liable for his negligence: but that contract would not protect him in a question with a third party, at least if the third party was unaware of it.

[3] So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than the mere misstatement. I therefore turn to the authorities to see what more is required. The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility, and that appears to me not to conflict with any authority which is binding on this House. Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty. The refusal of English law to recognize any *jus quaesitum tertio* causes some difficulties, but they are not relevant here. Then there are cases where a person does not merely make a statement but performs a gratuitous service. I do not intend to examine the cases about that, but at least they show that in some cases that person owes a duty of care apart from any contract, and to that extent they pave the way to holding that there can be a duty of care in making a statement of fact or opinion which is independent of contract.

[4] Much of the difficulty in this field has been caused by *Derry v. Peek* (1889) 14 App. Cas. 337. The action was brought against the directors of a company in respect of false statements in a prospectus. It was an action of deceit based on fraud and nothing else. But it was held that the directors had believed that their statements were true although they had no reasonable grounds for their belief. The Court of Appeal held that this amounted to fraud in law, but naturally enough this House held that there can be no fraud without dishonesty and that credulity is not dishonesty. The question was never really considered whether the facts had imposed on the directors a duty to exercise care. It must be implied that on

the facts of that case there was no such duty. But that was immediately remedied by the Directors' Liability Act 1890, which provided that a director is liable for untrue statements in a prospectus unless he proves that he had reasonable ground to believe and did believe that they were true.

[5] It must now be taken that *Derry v. Peek* did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action. It is true Lord Bramwell said (1889) 14 App. Cas. 337, 37: "To found an action for damages there must be a contract and breach, or fraud." And for the next 20 years it was generally assumed that *Derry v. Peek* decided that. But it was shown in this House in *Nocton v. Lord Ashburton* that that is much too widely stated. We cannot, therefore, now accept as accurate the numerous statement to that effect in cases between 1889 and 1914, and we must now determine the extent of the exceptions to that rule . . .

[6] A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require; or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

[7] If that is right, then it must follow that *Candler v. Crane, Christmas & Co.* was wrongly decided . . . This seems to me to be a typical case of agreeing to assume a responsibility: they knew why the plaintiff wanted to see the accounts and why their employers, the company, wanted them to be shown to him, and agreed to show them to him without even a suggestion that he should not rely on them.

[8] The majority of the Court of Appeal held that they were bound by *Le Lievre v. Gould* [1893] 1 Q.B. 491 and that *Donoghue v. Stevenson* had no application. In so holding I think that they were right. The Court of Appeal have bound themselves to follow all *rationes decidendi* of previous Court of Appeal decisions, and, in face of that rule, it would have been very difficult to say that the *ratio* in *Le Lievre v. Gould* did not cover *Candler's* case. Denning

L.J. who dissented, distinguished *Le Lievre v. Gould*, on its facts, but, as I understand the rule which the Court of Appeal have adopted, that is not sufficient if the *ratio* applies; and this is not an appropriate occasion to consider whether the Court of Appeal's rule is a good one. So the question which we now have to consider is whether the *ratio* in *Le Lievre v. Gould* can be supported . . .

[9] In *Le Lievre v. Gould*, a surveyor, Gould, gave certificates to a builder who employed him. The plaintiffs were mortgagees of the builder's interest and Gould knew nothing about them or the terms of their mortgage; but the builder, without Gould's authority, chose to show them Gould's report. I have said that I do not intend to decide anything about the degree of proximity necessary to establish a relationship giving rise to a duty of care, but it would seem difficult to find such proximity in this case, and the actual decision in *Le Lievre v. Gould* may therefore be correct. But the decision was not put on that ground: if it had been *Cann v. Willson* (1888) 39 Ch.D. 39 would not have been overruled.

[10] Lord Esher M.R. held that there was no contract between the plaintiffs and the defendant and that this House in *Derry v. Peek* had "restated the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud." [1893] 1 Q.B. 491, 498. Bowen L.J. gave a similar reason; he said (*ibid.* 501):

"Then *Derry v. Peek* decided this further point – *viz.*, that in cases like the present (of which *Derry v. Peek* was itself an instance) there is no duty enforceable in law to be careful",

and he added that the law of England (*ibid.* 502)

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

So both he and Lord Esher held that *Cann v. Willson* was wrong in deciding that there was a duty to take care. We now know on the authority of *Donoghue v. Stevenson* that Bowen L.J. was wrong in limiting duty of care to guns or other dangerous instruments, and I think that, for reasons which I have already given, he was also wrong in limiting the duty of care with regard to statements to cases where there is a contract. On both points Bowen L.J. was expressing what was then generally believed to be the law, but later statements in this House have gone far to remove those limitations. I would

therefore hold that the *ratio* in *Le Lievre v. Gould* was wrong and that *Cann v. Willson* ought not to have been overruled . . .

**LORD DEVLIN**

[11] . . . I come next to *Donoghue v. Stevenson*. In his celebrated speech in that case Lord Atkin did two things. He stated what he described as a "general conception" and from that conception he formulated a specific proposition of law. In between he gave a warning "against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted."

[12] What Lord Atkin called a "general conception of relations giving rise to a duty of care" is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

[13] The specific proposition arising out of this conception is that

"a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

[14] Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a judge to be invited on the facts of any particular case to say whether or not there was "proximity" between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognized the existence of such a duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way.

An existing category grows as instances of its application multiply until the time comes when the cell divides.

[15] Lord Thankerton and Lord Macmillan approached the problem fundamentally in the same way, though they left any general conception on which they were acting to be implied. They inquired directly – Lord Thankerton ([1932] A.C. 562, 603) and Lord Macmillan (*ibid.* 619-620) whether the relationship between the plaintiff and the defendant was such as to give rise to a duty to take care. It is significant, whether it is a coincidence or not, that the term “special relationship” used by Lord Thankerton (*ibid.* 603) is also the one used by Lord Haldane in *Nocton v. Lord Ashburton* [1914] A.C. 932, 956. The field is very different but the object of the search is the same.

[16] In my opinion, the appellants in their argument tried to press *Donoghue v. Stevenson* too hard. They asked whether the principle of proximity should not apply as well to words as to deeds. I think it should, but as it is only a general conception it does not get them very far. Then they take the specific proposition laid down by *Donoghue v. Stevenson* and try to apply it literally to a certificate or a banker's reference. That will not do, for a general conception cannot be applied to pieces of paper in the same way as to articles of commerce or to writers in the same way as to manufacturers. An inquiry into the possibilities of intermediate examination of a certificate will not be fruitful. The real value of *Donoghue v. Stevenson* to the argument in this case is that it shows how the law can be developed to solve particular problems. Is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight . . .

[17] My Lords, it is true that this principle of law has not yet been clearly applied to a case where the service which the defendant undertakes to perform is or includes the obtaining and imparting of information. But I cannot see why it should not be: and if it had not been thought erroneously that *Derry v. Peek* negatived any liability for negligent statements, I think that by now it probably would have been. It cannot matter whether the information consists of fact or of opinion or is a mixture of both, nor whether it was obtained as a result of special inquiries or comes direct from facts already in the defendant's possession or from his general store of professional knowledge. One cannot, as I have already endeavoured to show,

distinguish in this respect between a duty to inquire and a duty to state.

[18] I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v. Lord Ashburton* are "equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. . . .

[19] I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in *Woods v. Martins Bank Ltd.* [1959] 1 Q.B. 55, the customers or potential customers of the bank. Responsibility can attach only to the single act, that is, the waiving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility. This is a point of great importance because it is, as I understand it, the foundation for the ground on which in the end the House dismisses the appeal. I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract. But in so far as your Lordships describe the circumstances in which an implication will ordinarily be drawn, I am prepared to adopt any one of your Lordships' statements as showing the general rule; and I pay the same respect to the statement by Denning L.J. in his dissenting judgment in *Candler v. Crane, Christmas & Co.* about the circumstances in which he says a duty to use care in making a statement exists.

[20] I do not go further than this for two reasons. The first is that I have found in the speech of Lord Shaw in *Nocton v. Lord*

*Ashburton* and in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case . . .

[21] I regard this proposition as an application of the general conception of proximity. Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person, any more than in *Donoghue v. Stevenson* the ginger beer was supplied for consumption by any particular person; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue v. Stevenson*, a specific proposition to fit the case. When that has to be done, the speeches of your Lordships today as well as the judgment of Denning L.J. to which I have referred – and also, I may add, the proposition in the American Restatement of the Law of Torts, Vol. III, p. 122, para. 552, and the cases which exemplify it – will afford good guidance as to what ought to be said. I prefer to see what shape such cases take before committing myself to any formulation, for I bear in mind Lord Atkin's warning, which I have quoted, against placing unnecessary restrictions on the adaptability of English law. I have, I hope, made it clear that I take quite literally the *dictum* of Lord Macmillan ([1932] A.C. 562, 639) so often quoted from the same case, that "the categories of negligence are never closed." English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity

...  
[22] Your Lordships' attention was called to a number of cases of first instance or of appeal which it was said would have been decided differently if the appellant's main contention was correct. I do not propose to go through them in order to consider whether on the facts of each it should or should not be upheld. I shall be content myself with saying that, in my opinion, *Le Lievre v. Gould* and all decisions based on its reasoning (in which I specifically include, lest otherwise it might be thought that *generalia specialibus non derogant*, the decision of Devlin J. in *Heskell v. Continental Express Ltd.* [1950] 1 All E.R. 1033, 1044) can no longer be regarded as authoritative; and when similar facts arise in the future, the case will have to be judged afresh in the light of the principles which the House has laid down. . . .

**LORD PEARCE**

[23] . . . The range of negligence in act was greatly extended in *Donoghue v. Stevenson* on the wide principle of the good neighbour; *sic utere tuo ut alienum non laedas*. It is argued that the principles enunciated in *Donoghue v. Stevenson* apply fully to negligence in word. It may well be that Wrottesley J. in *Old Gates Estates Ltd.* (1939) 161 L.T. 227 put the matter too narrowly when he confined the applicability of the principles laid down in *Donoghue v. Stevenson* to negligence which caused damage to life, limb or health. But they were certainly not purporting to deal with such issues as, for instance, how far economic loss alone, without some physical or material damage to support it, can afford a cause of action in negligence by act. See *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265, where it was held that it could do so. The House in *Donoghue v. Stevenson* was, in fact, dealing with negligent acts causing physical damage, and the opinions cannot be read as if they were dealing with negligence in word causing economic damage. Had it been otherwise some consideration would have been given to problems peculiar to negligence in words. That case, therefore, can give no more help in this sphere than by affording some analogy from the broad outlook which it imposed on the law relating to physical negligence.

[24] How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property. It may be that the size and the width of the range of possible claims has acted as a deterrent to extension of economic protection . . .

*Appeal dismissed*

*Notes and Questions*

1. *Reasoning of Lord Reid.* What does he mean in paragraph 1 when he states that he does not think that *Donoghue v. Stevenson* has any direct bearing on this case? Why does he believe that the law should treat negligent statements differently from negligent acts? Explain what he means when he states in paragraph 4 that "much of the difficulty in this field has been caused by *Derry v. Peek*," an 1889 decision of the House of Lords. Is he of the opinion that *Derry v. Peek* was wrongly decided? In this case, could the House of Lords have overruled *Derry v. Peek*? What is his position on the Court of Appeal decisions in *Le Lievre v. Gould* and *Candler v. Crane, Christmas*? Explain what he means in

paragraph 8 when he states that the majority of the Court of Appeal were right when they held that they were bound by *Le Lievre v. Gould*?

2. *Reasoning of Lord Devlin.* Examine his reasoning on the case of *Donoghue v. Stevenson* and its relevance to the case before him. When he refers to the "general conception", the "specific proposition of law" and the "warning", which paragraphs of *Donoghue v. Stevenson* is he referring to? How does he describe the significance of *Donoghue v. Stevenson*? Explain what he means in paragraph 16 by his comment that "In my opinion the appellants in their argument tried to press *Donoghue v. Stevenson* too hard"? Does he agree with Lord Reid that *Donoghue v. Stevenson* has no direct bearing on this case? Explain what Lord Devlin means in paragraph 19 when he says that "I do not think it is possible to formulate with exactitude all the conditions under which the law will imply a voluntary undertaking". Why is Lord Devlin reluctant to attempt to state a general proposition of law to govern all future cases which may arise? What does he mean by the statement in paragraph 22 that *Le Lievre v. Gould* and all decisions based on its reasoning "can no longer be regarded as authoritative"? If there were a Court of Appeal decision prior to *Hedley Byrne* which followed *Le Lievre v. Gould*, would it still be binding on the Court of Appeal, or would it come within one of the three exceptions in *Young v. Bristol Aeroplane*?
3. *Reasoning of Lord Pearce.* What does Lord Pearce believe is the relevance of *Donoghue v. Stevenson* to cases involving economic loss caused by negligent misstatements? Consider the statement by Lord Pearce in paragraph 24 that "How wide the sphere of duty of care in negligence is to be laid depends ultimately on the court's assessment of the demands of society for protection from the carelessness of others." What does he mean by this? Have we seen any similar statements by other judges in previous cases? Can such statements be reconciled with the doctrine of precedent?

## HOME OFFICE v. DORSET YACHT CO. LTD.

[1970] A.C. 1004 (House of Lords)

### *Introductory Note*

This case is important in our study for three reasons. First, it is another case in which the court considered the relevance of the neighbour principle to a completely different area of the law. Second, it is one of the first cases in which the House of Lords openly acknowledged the significance of "policy" in determining liability in negligence. Third, it contains some interesting discussion on the judicial development of the law, including a statement by Lord Diplock on the process of inductive reasoning.

The appellant defendant in this case is the Home Office. Borstal trainees working on an island under the custody and control of borstal officers escaped due to the negligence of the officers. In attempting to escape the trainees boarded a yacht, which collided with and damaged a yacht belonging to the plaintiff respondent. The plaintiff respondent brought an action in negligence against the Home Office, alleging that they suffered loss due to the negligence of the Borstal officers.

In the trial court the preliminary issue was raised as to whether the Home Office owed the respondents a duty of care under the circumstances. The trial judge ruled in favour of the plaintiffs, and his decision was affirmed by the Court of Appeal. The defendants appealed to the House of Lords.

#### LORD REID

[1] ...The case for the Home Office is that under no circumstances can Borstal officers owe any duty to any member of the public to take care to prevent trainees under their control or supervision from injuring him or his property. If that is the law, then inquiry into the facts of this case would be a waste of time and money because whatever the facts may be the respondents must lose. That case is based on three main arguments. First it is said that there is virtually no authority for imposing a duty of this kind. Secondly it is said that no person can be liable for a wrong done by another who is of full age and capacity and who is not the servant or acting on behalf of that person. And thirdly it is said that public policy (or the policy of the relevant legislation) requires that these officers should be immune from any such liability.

[2] The first would at one time have been a strong argument. About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence, each with its own rules, and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the courts had from time to time recognized new duties and new grounds of action. But the heroic age was over; it was time to cultivate certainty and security in the law; the categories of negligence were virtually closed. The Attorney-General invited us to return to those halcyon days, but, attractive though it may be, I cannot accede to his invitation.

[3] In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognized principles apply to it. *Donoghue v. Stevenson* [1932] A.C. 562 may be regarded as a milestone, and the well-known passage in Lord Atkin's speech

should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion. For example, causing economic loss is a different matter; for one thing, it is often caused by deliberate action. Competition involves traders being entitled to damage their rivals' interests by promoting their own, and there is a long chapter of the law determining in what circumstances owners of land can and in what circumstances they may not use their proprietary rights so as to injure their neighbours. But where negligence is involved the tendency has been to apply principles analogous to those stated by Lord Atkin: *cf. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465. And when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty. And then there are cases, e.g., with regard to landlord and tenant, where the law was settled long ago and neither Parliament nor this House sitting judicially has made any move to alter it. But I can see nothing to prevent our approaching the present case with Lord Atkin's principles in mind . . .

#### VISCOUNT DILHORNE (DISSENTING)

[4] . . . Apart from one decision in the Ipswich County Court in 1951 [*Greenwell v. Prison Commissioners* (1951) 101 L.J. 486] to which I will refer later, among the thousands of reported cases not a single case can be found where a claim similar to that in this case has been put forward. No case in this country has been found to support the contention that such a duty of care exists under the common law . . .

[5] Apart from that case in which *Donoghue v. Stevenson* was applied, no shred of authority can be found to support the view that a duty of care, breach of which gives rise to liability in damages, is under the common law owed by the custodians of persons lawfully in custody to anyone who suffers damage or loss at the hands of persons who have escaped from custody.

[6] Lord Denning M.R. in the course of his judgment in this case [1969] 2 Q.B. 412, 424, said that he thought that the absence of authority was "because, until recently, no lawyer ever thought such an action would lie" on one of two grounds, first, that the damage

was far too remote, the chain of causation being broken by the act of the person who had escaped; and, secondly, that the only duty owed was to the Crown.

[7] Whatever be the reasons for the absence of authority, the significant fact is its absence and this leads me to the conclusion, despite the disclaimer of Mr. Fox-Andrews for the respondents of any such intention, that we are being asked to create in reliance on Lord Atkin's words an entirely new and novel duty and one which does not arise out of any novel situation.

[8] I, of course, recognize that the common law develops by the application of well-established principles to new circumstances but I cannot accept that the application of Lord Atkin's words, which, though they applied in *Deyong v. Shenburn* [1946] K.B. 227, and might have applied in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054, were not held to impose a new duty on a master to his servant or on an occupier to a trespasser, suffices to impose a new duty on the Home Office and on others in charge of persons in lawful custody of the kind suggested.

[9] No doubt very powerful arguments can be advanced that there should be such a duty. It can be argued that it is wrong that those who suffer loss or damage at the hands of those who have escaped from custody as a result of negligence on the part of the custodians should have no redress save against the persons who inflicted the loss or damage who are unlikely to be able to pay; that they should not have to bear the loss themselves, whereas, if there is such a duty, liability might fall on the Home Office and the burden on the general body of taxpayers.

[10] However this may be, we are concerned not with what the law should be but with what it is. The absence of authority shows that no such duty now exists. If there should be one, that is, in my view, a matter for the legislature and not for the courts . . .

[11] . . . It is this third essential factor which, in my opinion, is absent in this case. There is no authority for the existence of such a duty under the common law. Lord Denning M.R. in his judgment in the Court of Appeal I think recognized this, for he said [1969] 2 Q.B. 412, 426: "It is, I think, at bottom a matter of public policy which we, as judges, must resolve" and "What is the right policy for the judges to adopt?" He went on to say, at p. 426:

"Many, many a time has a prisoner escaped – or been, let out on parole – and done damage. But there is never a case in our law books when the prison authorities have been liable for it. No

householder who has been burgled, no person who has been wounded by a criminal, has ever recovered damages from the prison authorities such as to find a place in the reports. The householder has claimed on his insurance company. The injured man can now claim on the compensation fund. None has claimed against the prison authorities. Should we alter all this? I should be reluctant to do so if, by so doing, we should hamper all the good work being done by our prison authorities."

[12] Where I differ is in thinking that it is not part of the judicial function "to alter all this." The facts of a particular case may be a wholly inadequate basis for a far-reaching change of the law. We have not to decide what the law should be and then alter the existing law. That is the function of Parliament.

[13] As in my opinion no such duty under the common law now exists my answer to the question raised in this preliminary issue is in the negative and I would allow the appeal.

#### LORD PEARSON

[14] . . . Can such a duty be held to exist on the facts alleged here? On this question there is no judicial authority except the one decision in the Ipswich County Court in *Greenwell v. Prison Commissioners* (1951) 101 L.J. 486. In this situation it seems permissible, indeed almost inevitable, that one should revert to the statement of basic principle by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580 . . .

[15] It seems to me that *prima facie*, in the situation which arose in this case according to the allegations, the plaintiffs as boatowners were in law "neighbours" of the defendants and so there was a duty of care owing by the defendants to the plaintiffs. It is true that the *Donoghue v. Stevenson* principle as stated in the passage which has been cited is a basic and general but not universal principle and does not in law apply to all the situations which are covered by the wide words of the passage. To some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just. It seems to me that this case ought to, and does, come within the *Donoghue v. Stevenson* principle unless there is some sufficient reason for not applying the principle to it. Therefore, one has to consider the suggested reasons for not applying the principle here . . .

**LORD DIPLOCK**

[16] . . . The specific question of law raised in this appeal may therefore be stated as: Is any duty of care to prevent the escape of a Borstal trainee from custody owed by the Home Office to persons whose property would be likely to be damaged by the tortious acts of the Borstal trainee if he escaped?

[17] This is the first time that this specific question has been posed at a higher judicial level than that of a county court. Your Lordships in answering it will be performing a judicial function similar to that performed in *Donoghue v. Stevenson* [1932] A.C. 562 and more recently in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 of deciding whether the English law of civil wrongs should be extended to impose legal liability and make reparation for the loss caused to another by conduct of a kind which has not hitherto been recognized by the courts as entailing any such liability.

[18] This function, which judges hesitate to acknowledge as law-making, plays at most a minor role in the decision of the great majority of cases, and little conscious thought has been given to analysing its methodology. Outstanding exceptions are to be found in the speeches of Lord Atkin in *Donoghue v. Stevenson* and of Lord Devlin in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* It was because the former was the first authoritative attempt at such an analysis that it has had so seminal an effect upon the modern development of the law of negligence.

[19] It will be apparent that I agree with the Master of the Rolls that what we are concerned with in this appeal "is . . . at bottom a matter of public policy which we, as judges, must resolve." He cited in support Lord Pearce's *dictum* in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, 536:

"How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others."

The reference in this passage to "the courts" in the plural is significant, for

"As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight" (*per* Lord Devlin, at p. 525).

[20] The justification of the courts' role in giving the effect of law to the judges' conception of the public interest in the field of negligence is based upon the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances. And the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

[21] The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases. But the analyst must know what he is looking for, and this involves his approaching his analysis with some general conception of conduct and relationships which ought to give rise to a duty of care. This analysis leads to a proposition which can be stated in the form:

"In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc., and has not so far been found to exist when any of these characteristics were absent."

[22] For the second stage, which is deductive and analytical, that proposition is converted to: "In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc., a duty of care arises." The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does rise in the case for decision.

[23] But since *ex hypothesi* the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the

former definition which are considered to be essential. The cases which are landmarks in the common law, such as *Lickbarrow v. Mason* (1787) 2 Term Rep. 63, *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, *Indermaur v. Dames* (1866) L.R. 1 C.P. 274, *Donoghue v. Stevenson* [1932] A.C. 562, to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability.

[24] Inherent in this methodology, however, is a practical limitation which is imposed by the sheer volume of reported cases. The initial selection of previous cases to be analysed will itself eliminate from the analysis those in which the conduct or relationship involved possessed characteristics which are obviously absent in the case for decision. The proposition used in the deductive stage is not a true universal. It needs to be qualified so as to read:

“In all cases where the conduct and relationship possess each of the characteristics A, B, C and D, etc. but do not possess any of the characteristics Z, Y or X etc. which were present in the cases eliminated from the analysis, a duty of care arises.”

But this qualification, being irrelevant to the decision of the particular case, is generally left unexpressed.

[25] This was the reason for the warning by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, himself when he said, at pp. 583-584:

“ . . . in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the *dicta* of the judges.”

The plaintiff's argument in the present appeal disregards this warning. It seeks to treat as a universal not the specific proposition of law in *Donoghue v. Stevenson* which was about a manufacturer's liability for damage caused by his dangerous products but the well-known aphorism used by Lord Atkin to describe a “general

conception of relations giving rise to a duty of care" [1932] A.C. 562, 580:

" 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."

Used as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care this aphorism marks a milestone in the modern development of the law of negligence. But misused as a universal it is manifestly false.

[26] The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to no legal liability in the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated. The very parable of the good Samaritan (Luke 10, v. 30) which was evoked by Lord Atkin in *Donoghue v. Stevenson* illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law. Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbours goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.

[27] In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, which marked a fresh development in the law of negligence, the conduct in question was careless words, not careless deeds. Lord Atkin's aphorism, if it were of universal application, would have sufficed to dispose of that case, apart from the express

disclaimer of liability. But your Lordships were unanimous in holding that the difference in the characteristics of the conduct in the two cases prevented the propositions of law in *Donoghue v. Stevenson* from being directly applicable. Your Lordships accordingly proceeded to analyse the previous decisions in which the conduct complained of had been careless words, from which you induce a proposition of law about liability for damage caused by careless word; which differs from the proposition of law in *Donoghue v. Stevenson* about liability for damage caused by careless deeds.

[28] In the present appeal, too, the conduct of the defendant which is called in question differs from the kind of conduct discussed in *Donoghue v. Stevenson* in at least two special characteristics. First, the actual damage sustained by the plaintiff was the direct consequence of a tortious act done with conscious volition by a third party responsible in law for his own acts and this act was interposed between the act of the defendant complained of and the sustention of damage by the plaintiff. Secondly, there are two separate neighbour relationships of the defendant involved, a relationship with the plaintiff and a relationship with the third party. These are capable of giving rise to conflicting duties of care.

[29] This appeal, therefore, also raises the lawyer's question: "Am I my brother's keeper?" A question which may also receive a restricted reply.

[30] I start, therefore, with an examination of the previous cases in which both or one of these special characteristics are present . . .

[31] From the previous decisions of the English courts, in particular those in *Ellis v. Home Office* [1953] 2 All E.R. 149 and *D'Arcy v. Prison Commissioners*, The Times November 17, 1955, which I accept as correct, it is possible to arrive by induction at an established proposition of law as respects one of those special relations, *viz.*:

"A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics (1) that A has the legal right to detain C in penal custody and to control his acts while in custody; (2) that A is actually exercising his legal right of custody of C at the time of C's tortious act and (3) that A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or

property of B; and where also the relationship between A and B has the characteristics (4) that at the time of C's tortious act A has the legal right to control the situation of B or his property as respects physical proximity to C and (5) that A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did."

[32] Upon the facts which your Lordships are required to assume for the purposes of the present appeal the relationship between the defendant, A, and the Borstal trainee, C, did possess characteristics (1) and (3) but did not possess characteristic (2), while the relationship between the defendant, A, and the plaintiff, B, did possess characteristic (5) but did not possess characteristic (4).

[33] What your Lordships have to decide as respects each of the relationships is whether the missing characteristic is essential to the existence of the duty or whether the facts assumed for the purposes of this appeal disclose some other characteristic which if substituted for that which is missing would produce a new proposition of law which *ought* to be true.

[34] As any proposition which relates to the duty of controlling another man to prevent his doing damage to a third deals with a category of civil wrongs of which the English courts have hitherto had little experience it would not be consistent with the methodology of the development of the law by judicial decision that any new proposition should be stated in wider terms than are necessary for the determination of the present appeal. Public policy may call for the immediate recognition of a new sub-category of relations which are the source of a duty of this nature additional to the sub-category described in the established proposition, but further experience of actual cases would be needed before the time became ripe for the coalescence of sub-categories into a broader category of relations giving rise to the duty, such as was effected with respect to the duty of care of a manufacturer of products in *Donoghue v. Stevenson* [1932] A.C. 562. Nevertheless, any new sub-category will form part of the English law of civil wrongs and must be consistent with its general principles . . .

[35] *Ellis v. Home Office* and *D'Arcy v. Prison Commissioners* are decisions which are consistent with this principle as respects the initial inquiry. In neither of them was it sought to justify the alleged acts or omissions of the prison officers concerned as having been done in compliance with instructions given to them by the appropriate authority (at that date the Prison Commissioners) or as

being in the interests of the prisoner whose tortious act caused the damage or any other inmates of the prison. If the test suggested were applied to acts and omissions alleged in those two cases they would in public law be *ultra vires*.

[36] If this analogy with the principle of *ultra vires* in public law is applied as the relevant condition precedent to the liability of a custodian for damages caused by the tortious act of a person (the detainee) over whom he has a statutory right of custody, the characteristic of the relationship between the custodian and the detainee which was present in those two cases, *viz.*, that the custodian was actually exercising his right of custody at the time of the tortious act of the detainee, would not be essential. A cause of action is capable of arising from failure by the custodian to take reasonable care to prevent the detainee from escaping, if his escape was the consequence of an act or omission of the custodian falling outside the limits of the discretion delegated to him under the statute

...

[37] So long as Parliament is content to leave the general risk of damage from criminal acts to lie where it falls without any remedy except against the criminal himself the courts would be exceeding their limited function in developing the common law to meet changing conditions if they were to recognize a duty of care to prevent criminals escaping from penal custody owed to a wider category of members of the public than those whose property was exposed to an exceptional added risk by the adoption of a custodial system for young offenders which increased the likelihood of their escape unless due care was taken by those responsible for their custody.

[38] I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situated in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped.

[39] So to hold would be a rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in *Ellis v. Home Office* and *D'Arcy v. Prison Commissioners* as giving rise to a duty of care on the part of the

custodian to exercise reasonable care in controlling his detainee. In those two cases the custodian had a legal right to control the physical proximity of the person or property sustaining the damage to the detainee who caused it. The extended relationship substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.

[40] In the present appeal the place from which the trainees escaped was an island from which the only means of escape would presumably be a boat accessible from the shore of the island. There is thus material fit for consideration at the trial for holding that the plaintiff, as the owner of a boat moored off the island, fell within the category of persons to whom a duty of care to prevent the escape of the trainees was owed by the officers responsible for their custody.

[41] If, therefore, it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in bona fide exercise of a discretion delegated to them by the Home Office as to the degree of control to be adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the negligence of the Borstal Officers.

[42] I would therefore dismiss the appeal upon the preliminary issue of law and allow the case to go for trial on those issues of fact.

*Appeal dismissed with costs*

#### *Notes and Questions*

1. *The facts.* Examine the facts of the case as set out in the introductory note. Who are the plaintiffs, who are the defendants and what is their relationship? What act of negligence was alleged to have been committed? Whose acts caused injury to the plaintiff's property? What did the court hold?
2. *Policy considerations.* Two policy concerns were generated by the novelty of the plaintiff's case. First, whether tort law should impose a duty of care on a statutory body, the Home Office, for acts done in the exercise of its statutory duties. Second, whether the Home Office should be liable in negligence for damage caused by third parties. Do

you think that either of these factors should have prevented a finding of liability? Explain your reasons.

3. *The reasoning of Lord Reid.* What is Lord Reid saying in paragraphs 2 and 3? What does he mean when he says that "In later years there has been a steady trend towards regarding the law of negligence as depending on principle"? What in his opinion is the relevance of *Donoghue v. Stevenson* in this case? How does he use *Hedley Byrne v. Heller* to support his argument?
4. *The reasoning of Viscount Dilhorne.* What is his position on the relevance of *Donoghue v. Stevenson*? What does he mean when he says in paragraph 10 that "we are concerned not with what the law should be but what it is?" Why does he quote from the judgment of Lord Denning M.R.? Does he agree with Lord Denning's view of the function of the judiciary and the role of policy?
5. *The reasoning of Lord Pearson.* What is his view of the relevance of *Donoghue v. Stevenson* in this case?
6. *The reasoning of Lord Diplock.* Why does he cite *Hedley Byrne v. Heller* in paragraphs 17 and 18? What in his view is the judicial function the members of the House of Lords are performing in this case? What is his view on the role of public policy in resolving the issue in this case? In his opinion, what is the relevance of *Donoghue v. Stevenson* in this case? Carefully study his analysis of the method or process by which the judicial development of the law proceeds. Does it accurately describe the process by which we have seen the law of negligence develop? Why does he cite *Hedley Byrne v. Heller* in paragraph 27? What is the relevance of *Ellis v. Home Office* and *D'Arcy v. Prison Commissioners* to his reasoning process? What is the relevance in this process of Lord Atkin's "warning"? Can you summarize his reasoning in paragraphs 30 to 41? Carefully examine the proposition of law he states in paragraph 31, and its five elements. Where does this proposition come from? Which of the elements are satisfied on the facts of this case, and which are not? What does he say the Court must decide with respect to the two missing elements? What in fact does he decide with respect to the two missing elements? How is his conclusion in paragraph 41 linked to his reasoning in paragraphs 30 to 33? What is the new proposition of law enunciated by Lord Diplock? Has he heeded or ignored Lord Atkin's "warning" in stating his proposition of law?

**McLOUGHLIN v. O'BRIAN AND OTHERS**

[1983] 1 A.C. 410 (House of Lords)

*Introductory Note*

This case concerns damages for nervous shock. It raises the issue of whether a line can or should be drawn limiting liability for damages for nervous shock for reasons of policy even when the foreseeability test has been satisfied. It is important because it contains a discussion of two issues. First, the role of policy in relation to liability for negligence. Second, the proper function of the judiciary in the development of the law. In particular, it raises the question of whether policy questions are properly within the domain of the judiciary.

The plaintiff's husband and children were injured in a road accident due to the negligence of the defendants. At the time of the accident the plaintiff was in her home, two miles from the scene of the accident. The plaintiff was told of the accident and taken to the hospital two hours after the accident to see her family. At the hospital she learned that her youngest child had been killed. She also saw her husband and other children and the nature and extent of their injuries. She alleged that what she saw and heard at the hospital caused her severe shock. She brought an action against the defendants for nervous shock.

The trial judge held that her suffering nervous shock was not reasonably foreseeable in the circumstances and gave judgment for the defendants. The Court of Appeal dismissed the plaintiff's appeal. The plaintiff then appealed to the House of Lords, which allowed the appeal.

**LORD WILBERFORCE**

[1] . . . To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind. But the lawyer still has to inquire whether, in so doing, he has crossed some critical line behind which he ought to stop. That is said to be the present case. The reasoning by which the Lords Justices decided not to grant relief to the plaintiff is instructive. Both Stephenson L.J. and Griffiths L.J. accepted that the "shock" to the plaintiff was foreseeable; but from this, at least in presentation, they diverge. Stephenson L.J. considered that the defendants owed a duty of care to the plaintiff, but that for reasons of policy the law should stop short of giving her damages: it should limit relief to those on or near the highway at or near the time of the accident caused by the defendants' negligence. He was influenced by the fact that the courts of this country, and of other common law jurisdictions, had stopped at this point: it was indicated by the barrier of commercial sense and practical convenience. Griffiths L.J. took the view that although the injury to the plaintiff was

foreseeable, there was no duty of care. The duty of care of drivers of motor vehicles was, according to decided cases, limited to persons and owners of property on the road or near to it who might be directly affected. The line should be drawn at this point. It was not even in the interest of those suffering from shock as a class to extend the scope of the defendants' liability: to do so would quite likely delay their recovery by immersing them in the anxiety of litigation.

[2] I am impressed by both of these arguments, which I have only briefly summarized. Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J., that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J., one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary. This is an approach which one can see very clearly from the way in which Lord Atkin stated the neighbour principle in *Donoghue v. Stevenson* [1932] A.C. 562, 580: ". . . persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected." This is saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such. When it is said to result in a duty of care being owed to a person or a class, the statement that there is a "duty of care" denotes a conclusion into the forming of which considerations of policy have entered. That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear. I gave some examples in *Anns v. Merton London Borough Council* [1978] A.C. 728, 752, *Anns* itself being one. I may add what Lord Reid said in *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, 1623:

"A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee."

[3] We must then consider the policy arguments. In doing so we must bear in mind that cases of "nervous shock" and the possibility of claiming damages for it, are not necessarily confined to those arising out of accidents on public roads. To state, therefore, a rule that recoverable damages must be confined to persons on or near the highway is to state not a principle in itself, but only an example of a more general rule that recoverable damages must be confined to those within sight and sound of an event caused by negligence or, at least, to those in close, or very close, proximity to such a situation.

[4] The policy arguments against a wider extension can be stated under four heads.

[5] First, it may be said that such extension may lead to a proliferation of claims, and possibly fraudulent claims, to the establishment of an industry of lawyers and psychiatrists who will formulate a claim for nervous shock damages, including what in America is called the customary miscarriage, for all, or many, road accidents and industrial accidents.

[6] Secondly, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. In so far as such defendants are insured, a large additional burden will be placed on insurers, and ultimately upon the class of persons insured – road users or employers.

[7] Thirdly, to extend liability beyond the most direct and plain cases would greatly increase evidentiary difficulties and tend to lengthen litigation.

[8] Fourthly, it may be said – and the Court of Appeal agreed with this – that an extension of the scope of liability ought only to be made by the legislature, after careful research. This is the course which has been taken in New South Wales and the Australian Capital Territory.

[9] The whole argument has been well summed up by Dean Prosser (*Prosser, Torts*, 4th ed. (1971), p. 256):

"The reluctance of the courts to enter this field even where the mental injury is clearly foreseeable, and the frequent mention of the difficulties of proof, the facility of fraud, and the problem of

finding a place to stop and draw the line, suggest that here it is the nature of the interest invaded and the type of damage which is the real obstacle."

[10] Since he wrote, the type of damage has, in this country at least, become more familiar and less deterrent to recovery. And some of his arguments are susceptible of answer. Fraudulent claims can be contained by the courts, who, also, can cope with evidentiary difficulties. The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a flood of litigation may be exaggerated – experience in other fields suggests that such fears usually are. If some increase does occur, that may only reveal the existence of a genuine social need: that legislation has been found necessary in Australia may indicate the same thing.

[11] But, these discounts accepted, there remains, in my opinion, just because nervous "shock" in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognized; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognizes the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinized. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.

[12] As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the "nervous shock." Experience has shown that to insist on direct and immediate sight or hearing would be impractical

and unjust and that under what may be called the "aftermath" doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in *Benson v. Lee* [1972] V.R. 879 was correct and indeed inescapable. It was based, soundly, upon

"a direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath . . ." (p. 880)

The High Court's majority decision in *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1, where a child's body was found floating in a trench after a prolonged search, may perhaps be placed on the other side of a recognisable line (Evatt J. in a powerful dissent placed it on the same side), but, in addition, I find the conclusion of Lush J. to reflect developments in the law.

[13] Finally, and by way of reinforcement of "aftermath" cases, I would accept, by analogy with rescue situations, that a person of whom it could be said that one could not expect nothing else than that he or she would come immediately to the scene – normally a parent or a spouse – could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which defendants should not be responsible.

[14] Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

[15] Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in *Abramzik v. Brenner* (1967) 65 D.L.R. (2d) 651. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g., through simultaneous television, would suffice may have to be considered.

[16] My Lords, I believe that these indications, imperfectly sketched, and certainly to be applied with common sense to individual situations in their entirety, represent either the existing law, or the existing law with only such circumstantial extension as the common law process may legitimately make. They do not introduce a new principle. Nor do I see any reason why the law should retreat behind the lines already drawn. I find on this appeal

that the appellant's case falls within the boundaries of the law so drawn. I would allow her appeal.

**LORD SCARMAN**

[17] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bridge of Harwich. It cannot be strengthened or improved by any words of mine. I accept his approach to the law and the conclusion he reaches. But I also share the anxieties of the Court of Appeal. I differ, however, from the Court of Appeal in that I am persuaded that in this branch of the law it is not for the courts but for the legislature to set limits, if any be needed, to the law's development.

[18] The appeal raises directly a question as to the balance in our law between the functions of judge and legislature. The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps: there can be no "*casus omissus*." The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case. But, whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognized.

[19] The distinguishing feature of the common law is this judicial development and formation of principle. Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.

[20] The real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach. If that should happen, and since the 1966 practice direction of the House [*Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234] it has become

less likely, there would be a danger of the law becoming irrelevant to the consideration, and inept in its treatment, of modern social problems. Justice would be defeated. The common law has, however, avoided this catastrophe by the flexibility given it by generations of judges. Flexibility carries with it, of course, certain risks, notably a degree of uncertainty in the law and the "floodgates" risk which so impressed the Court of Appeal in the present case.

[21] The importance to be attached to certainty and the size of the "floodgates" risk vary from one branch of the law to another. What is required of the law in its approach to a commercial transaction will be very different from the approach appropriate to problems of tortious liability for personal injuries. In some branches of the law, notably that now under consideration, the search for certainty can obstruct the law's pursuit of justice, and can become the enemy of the good.

[22] The present case is a good illustration. Certainty could have been achieved by leaving the law as it was left by *Victorian Railways Commissioners v. Coultas* (1888) 13 App.Cas. 222, or again, by holding the line drawn in 1901 by *Dulieu v. White & Sons* [1901] 2 K.B. 669, or today by confining the law to what was regarded by Lord Denning M.R. in *Hinz v. Berry* [1970] 2 Q.B. 40, 42, as "settled law," namely that "damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative."

[23] But at each landmark stage common law principle, when considered in the context of developing medical science, has beckoned the judges on. And now, as has been made clear by Evatt J., dissenting, in *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1 in the High Court of Australia, by Tobriner J. giving the majority judgment in the Californian case of *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316, and by my noble and learned friend in this case, common law principle requires the judges to follow the logic of the "reasonably foreseeable test" so as, in circumstances where it is appropriate, to apply it untrammelled by spatial, physical, or temporal limits. Space, time, distance, the nature of the injuries sustained, and the relationship of the plaintiff to the immediate victim of the accident, are factors to be weighed, but not legal limitations, when the test of reasonable foreseeability is to be applied.

[24] But I am by no means sure that the result is socially desirable. The "floodgates" argument may be exaggerated. Time alone will tell: but I foresee social and financial problems if

damages for "nervous shock" should be made available to persons other than parents and children who without seeing or hearing the accident, or being present in the immediate aftermath, suffer nervous shock in consequence of it. There is, I think, a powerful case for legislation such as has been enacted in New South Wales and the Australian Capital Territories.

[25] Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue as to where to draw the line is not justiciable. The problem is one of social, economic, and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.

[26] My Lords, I would allow the appeal for the reasons developed by my noble and learned friend, Lord Bridge of Harwich, while putting on record my view that there is here a case for legislation.

**LORD EDMUND-DAVIES**

[27] . . . I finally turn to consider the following passage in the speech of my noble and learned friend, Lord Scarman:

"Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament . . . If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path."

And at a later stage my noble and learned friend adds:

"Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue as to where to draw the line is not justiciable."

[28] My understanding of these words is that my noble and learned friend shares (though for a different reason) the conclusion of my noble and learned friend, Lord Bridge of Harwich, that, in adverting to public policy, the Court of Appeal here embarked upon a sleeveless errand, for public policy has no relevance to liability at law. In my judgment, the proposition that "the policy issue . . . is not justiciable" is as novel as it is startling. So novel is it in relation to this appeal that it was never mentioned during the hearing before your Lordships. And it is startling because in my respectful

judgment it runs counter to well-established and wholly acceptable law.

[29] I restrict myself to recent decisions of your Lordships' House. In *Rondel v. Worsley* [1969] 1 A.C. 191, their Lordships unanimously held that public policy required that a barrister should be immune from an action for negligence in respect of his conduct and management of a case in court and the work preliminary thereto, Lord Reid saying, at p. 228:

“ Is it in the public interest that barristers and advocates should be protected against such actions? Like so many questions which raise the public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest . . . So the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable.”

In *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 your Lordships' House was called upon to decide whether the English law of civil wrongs should be extended to impose legal liability for loss caused by conduct of a kind of which had not hitherto been recognized by the courts as entailing liability. In expressing the view that it did, Lord Diplock said, at p. 1058:

“ . . . I agree with [Lord Denning M.R.] that what we are concerned with in this appeal ‘is . . . at bottom a matter of public policy which we, as judges, must resolve’.”

And in *Herrington v. British Railways Board* [1972] A.C. 877, dealing with an occupier's duty to trespassing children, Lord Reid said, at p. 897:

“ Legal principles cannot solve the problem. How far occupiers are to be required by law to take steps to safeguard such children must be a matter of public policy.”

[30] My Lords, in accordance with such a line of authorities, I hold that public policy issues are “justiciable”. Their invocation calls for close scrutiny, and the conclusion may be that its nature and existence have not been established with the clarity and cogency required before recognition can be granted to any legal doctrine, and before any litigant can properly be deprived of what would otherwise be his manifest legal rights. Or the conclusion may be that adoption of the public policy relied upon would involve the introduction of new legal principles so fundamental that they are

best left to the legislature: see, for example, *Launchbury v. Morgans* [1973] A.C. 127, and especially *per* Lord Pearson, at p. 142G. And "public policy is not immutable" *per* Lord Reid in *Rondel v. Worsley* [1969] 1 A.C. 191, 227. Indeed, Winfield, "Public Policy in the English Common Law" (1928) 42 Harvard L.R. 76, described it as "necessarily variable," (p. 93) and wisely added, at pp. 95, 96, 97:

" This variability . . . is a stone in the edifice of the doctrine, and not a missile to be flung at it. Public policy would be almost useless without it. The march of civilization and the difficulty of ascertaining public policy at any given time make it essential . . . How is public policy evidenced? If it is so variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? Some judges have thought this difficulty so great, that they have urged that it would be solved much better by the legislature and have considered it to be the main reason why the courts should leave public policy alone . . . This admonition is a wise one and judges are not likely to forget it. But the better view seems to be that the difficulty of discovering what public policy is at any given moment certainly does not absolve the bench from the duty of doing so. The judges are bound to take notice of it and of the changes which it undergoes, and it is immaterial that the question may be one of ethics rather than of law."

[31] In the present case the Court of Appeal did just that, and in my judgment they were right in doing so. But they concluded that public policy required them to dismiss what they clearly regarded as an otherwise irrefragable claim. In so concluding, I respectfully hold that they were wrong, and I would accordingly allow the appeal  
...

#### LORD BRIDGE OF HARWICH

[32] . . . The question, then, for your Lordships' decision is whether the law, as a matter of policy, draws a line which exempts from liability a defendant whose negligent act or omission was actually and foreseeably the cause of the plaintiff's psychiatric illness and, if so, where that line is to be drawn. In thus formulating the question, I do not, of course, use the word "negligent" as prejudging the question whether the defendant owes the plaintiff a duty, but I do use the word "foreseeably" as connoting the normally accepted criterion of such a duty.

[33] Before attempting to answer the question, it is instructive to consider the historical development of the subject as illustrated by the authorities, and to note, in particular, three features of that development. First, it will be seen that successive attempts have been made to draw a line beyond which liability should not extend, each of which has in due course had to be abandoned. Secondly, the ostensible justification for drawing the line has been related to the current criterion of a defendant's duty of care, which, however expressed in earlier judgments, we should now describe as that of reasonable foreseeability. But, thirdly, in so far as policy considerations can be seen to have influenced any of the decisions, they appear to have sprung from the fear that to cross the chosen line would be to open the floodgates to claims without limit and largely without merit . . .

[34] In approaching the question whether the law should, as a matter of policy, define the criterion of liability in negligence for causing psychiatric illness by reference to some test other than that of reasonable foreseeability it is well to remember that we are concerned only with the question of liability of a defendant who is, *ex hypothesi*, guilty of fault in causing the death, injury or danger which has in turn triggered the psychiatric illness. A policy which is to be relied on to narrow the scope of the negligent tortfeasor's duty must be justified by cogent and readily intelligible considerations, and must be capable of defining the appropriate limits of liability by reference to factors which are not purely arbitrary. A number of policy considerations which have been suggested as satisfying these requirements appear to me, with respect, to be wholly insufficient. I can see no grounds whatever for suggesting that to make the defendant liable for reasonably foreseeable psychiatric illness caused by his negligence would be to impose a crushing burden on him out of proportion to his moral responsibility. However liberally the criterion of reasonable foreseeability is interpreted, both the number of successful claims in this field and the quantum of damages they will attract are likely to be moderate. I cannot accept as relevant the well-known phenomenon that litigation may delay recovery from a psychiatric illness. If this were a valid policy consideration, it would lead to the conclusion that psychiatric illness should be excluded altogether from the heads of damage which the law will recognize. It cannot justify limiting the cases in which damages will be awarded for psychiatric illness by reference to the circumstances of its causation.

[35] To attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the

legislature, not the courts, to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court's function of developing and adapting principles of the common law to changing conditions, in a particular corner of the common law which exemplifies, *par excellence*, the important and indeed necessary part which that function has to play. In the end I believe that the policy question depends on weighing against each other two conflicting considerations. On the one hand, if the criterion of liability is to be reasonable foreseeability simpliciter, this must, precisely because questions of causation in psychiatric medicine give rise to difficulty and uncertainty, introduce an element of uncertainty into the law and open the way to a number of arguable claims which a more precisely fixed criterion of liability would exclude. I accept that the element of uncertainty is an important factor. I believe that the "floodgates" argument, however, is, as it always has been, greatly exaggerated. On the other hand, it seems to me inescapable that any attempt to define the limit of liability by requiring, in addition to reasonable foreseeability, that the plaintiff claiming damages for psychiatric illness should have witnessed the relevant accident, should have been present at or near the place where it happened, should have come upon its aftermath and thus have had some direct perception of it, as opposed to merely learning of it after the event, should be related in some particular degree to the accident victim – to draw a line by reference to any of these criteria must impose a largely arbitrary limit of liability. I accept, of course, the importance of the factors indicated in the guidelines suggested by Tobriner J. in *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316 as bearing upon the degree of foreseeability of the plaintiff's psychiatric illness.

[36] But let me give two examples to illustrate what injustice would be wrought by any such hard and fast lines of policy as have been suggested. First, consider the plaintiff who learned after the event of the relevant accident. Take the case of a mother who knows that her husband and children are staying in a certain hotel. She reads in her morning newspaper that it has been the scene of a disastrous fire. She sees in the paper a photograph of unidentifiable victims trapped on the top floor waving for help from the windows. She learns shortly afterwards that all her family have perished. She suffers an acute psychiatric illness. That her illness in these circumstances was a reasonably foreseeable consequence of the events resulting from the fire is undeniable. Yet, is the law to deny her damages as against a defendant whose negligence was responsible for the fire simply on the ground that an important link

in the chain of causation of her psychiatric illness was supplied by her imagination of agonies of mind and body in which her family died, rather than by direct perception of the event? Secondly, consider the plaintiff who is unrelated to the victims of the relevant accident. If rigidly applied, an exclusion of liability to him would have defeated the plaintiff's claim in *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912. The Court of Appeal treated that case as in a special category because Mr. Chadwick was a rescuer. Now, the special duty owed to a rescuer who voluntarily places himself in physical danger to save others is well understood, and is illustrated by *Haynes v. Harwood* [1935] 1 K.B. 146, the case of the constable injured in stopping a runaway horse in a crowded street. But in relation to the psychiatric consequences of witnessing such terrible carnage as must have resulted from the Lewisham train disaster, I would find it difficult to distinguish in principle the position of a rescuer, like Mr. Chadwick, from a mere spectator as, for example, an uninjured or only slightly injured passenger in the train, who took no part in the rescue operations but was present at the scene after the accident for some time, perforce observing the rescue operations while he waited for transport to take him home.

[37] My Lords, I have no doubt that this is an area of the law of negligence where we should resist the temptation to try yet once more to freeze the law in a rigid posture which would deny justice to some who, in the application of the classic principles of negligence derived from *Donoghue v. Stevenson* [1932] A.C. 562, ought to succeed, in the interests of certainty, where the very subject matter is uncertain and continuously developing, or in the interests of saving defendants and their insurers from the burden of having sometimes to resist doubtful claims. I find myself in complete agreement with Tobriner J. in *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316, 1326 that the defendant's duty must depend on reasonable foreseeability and

“must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future.”

[38] To put the matter in another way, if asked where the thing is to stop, I should answer, in an adaptation of the language of Lord Wright (in *Bourhill v. Young* [1943] A.C. 92, 110) and Stephenson L.J. [1981] Q.B. 599, 612, “Where in the particular case the good sense of the judge, enlightened by progressive awareness of mental illness, decides.”

[39] I regret that my noble and learned friend, Lord Edmund-Davies, who criticises my conclusion that in this area of the law there are no policy considerations sufficient to justify limiting the liability of negligent tortfeasors by reference to some narrower criterion than that of reasonable foreseeability, stops short of indicating his view as to where the limit of liability should be drawn or as to the nature of the policy considerations (other than the "floodgates" argument, which I understand he rejects) which he would invoke to justify such a limit.

[40] My Lords, I would accordingly allow the appeal.

*Appeal allowed with costs*

#### *Notes and Questions*

1. *The reasoning of Lord Wilberforce.* To what extent does he agree with the judgments of Stephenson and Griffiths L.J.J. in the Court of Appeal? What does he say are the policy arguments against a wider extension? Does he believe that judges should draw the line and not permit recovery for damages or nervous shock in certain situations? If so, what policy reasons justify the setting of such a limit? Can you define what Lord Wilberforce means by policy? Why does he believe it is necessary for the law to set some limitation on the extent of admissible claims in nervous shock cases? What are the three elements or factors which he says must be considered in nervous shock cases?
2. *The reasoning of Lord Scarman.* What does he mean when he states in paragraph 18 that this case raises a question as to the balance in our law between the functions of a judge and the legislature? Is it clear what Lord Scarman means by "policy" and what he means by "principle"? Explain what he means at the end of paragraph 21 when he states:

"In some branches of the law, notably that now under consideration, the search for certainty can obstruct the law's pursuit of justice, and can become the enemy of the good."

How does he think that the need for certainty and the need for flexibility in the law should be achieved in the present case? Why does he feel that the courts should not attempt to draw the line in the instant case? What does he mean at the end of paragraph 23 when he says that space, time, distance, the nature of the injuries sustained, etc., are "factors to be weighed" but not "legal limitations"?
3. *The reasoning of Lord Edmund-Davies.* Which statements of Lord Scarman does he disagree with? Why does he cite *Rondel v. Worsley* and *Dorset Yacht v. Home Office*? What does he mean when he says the public policy issues are justiciable?
4. *The reasoning of Lord Bridge of Harwich.* How does his approach compare to that of Lord Wilberforce and Lord Scarman? How does

Lord Bridge approach the question of policy considerations? Would he attempt to define the limit of liability? Would he leave it to the Legislature to draw the line? Would he consider the factors which Lord Wilberforce discusses in paragraphs 11 to 16? If so, would he regard them as legal limitations? Why does he cite the Californian case of *Dillon v. Legg*? Why does he give the two examples in paragraph 36? Is he saying that in this area of the law it is not possible for the courts to draw any clear, certain and predictable rule as to the limits of liability? If so, why?

## CAPARO INDUSTRIES PLC V DICKMAN AND OTHERS

[1990] All ER 567 (House of Lords)

### *Introductory Note*

Like *Candler v. Crane* and *Hedley Byrne*, this case concerns liability for negligent misstatements. It is useful for our study because the House of Lords makes several important limiting qualifications about the development of the law of negligence since *Donoghue*. In discussing the effect of previous decisions, their Lordships consider whether a general duty of care exists for all negligent actions, or whether the formula for determining negligence should vary depending on the nature of the case.

The respondent Caparo Industries brought an action in the trial court against the appellants Dickman et al, the auditors of a public limited company, Fidelity plc. After the price of Fidelity shares dropped significantly, Caparo added to its ownership of some shares of Fidelity, eventually buying up all the shares in a takeover bid. In doing so, it claimed to rely on the auditor's statements of Fidelity's accounts. Caparo alleged that the auditors had negligently overstated the financial strength of the company, causing Caparo to pay an artificially high price for Fidelity's shares in its takeover.

In the trial court the judge ruled in favor of the appellants (defendants below), holding that the auditors did not owe a duty of care to Caparo either as potential investors or as shareholders in the company. The Court of Appeal partially reversed and partially upheld the trial court ruling, holding that the auditors owed a duty to Caparo as shareholders but not as potential investors in the company. The House of Lords disagreed with the Court of Appeal's partial decision in favor of Caparo, and ruled that no duty of care was owed by the auditors to Caparo, either as shareholders or as potential investors. In so doing, the House of Lords replaced the 2-stage test of *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728, with a 3-part test for determining duty of care in negligence actions.

**LORD BRIDGE**

[1] In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence, but sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognised. Commenting on the outcome of this traditional approach, Lord Atkin, in his seminal speech in *Donoghue v Stevenson* [1932] AC 562 at 579–580, [1932] All ER Rep 1 at 11, observed:

‘The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.’

It is this last sentence which signifies the introduction of the more modern approach of seeking a single general principle which may be applied in all circumstances to determine the existence of a duty of care. Yet Lord Atkin himself sounds the appropriate note of caution by adding:

‘To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.’

Lord Reid gave a large impetus to the modern approach in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 at 297, [1970] AC 1004 at 1026–1027, where he said:

‘In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by

authority but whether recognised principles apply to it. *Donoghue v Stevenson* may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.'

[2] The most comprehensive attempt to articulate a single general principle is reached in the well-known passage from the speech of Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER 492 at 498, [1978] AC 728 at 751–752:

'Through the trilogy of cases in this House, *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, and *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise (see the *Dorset Yacht* case [1970] 2 All ER 294 at 297–298, [1970] AC 1004 at 1027 per Lord Reid).'

But since *Anns*'s case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 533–534, [1985] AC 210 at 239–241, *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705 at 709–712, [1988] AC 175 at 190–194, *Rowling v Takaro*

*Properties Ltd* [1988] 1 All ER 163 at 172, [1988] AC 473 at 501 and *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 at 241, [1989] AC 53 at 60. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, where he said:

‘It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable “considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed ”,

[3] One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss.

[4] . . . The damage which may be caused by the negligently spoken or written word will normally be confined to economic loss

sustained by those who rely on the accuracy of the information or advice they receive as a basis for action. The question what, if any, duty is owed by the maker of a statement to exercise due care to ensure its accuracy arises typically in relation to statements made by a person in the exercise of his calling or profession. In advising the client who employs him the professional man owes a duty to exercise that standard of skill and care appropriate to his professional status and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty. But the possibility of any duty of care being owed to third parties with whom the professional man was in no contractual relationship was for long denied because of the wrong turning taken by the law in *Le Lievre v Gould* [1893] 1 QB 491 in overruling *Cann v Willson* (1888) 39 Ch D 39. In *Candler v Crane Christmas & Co* [1951] 1 All ER 426, [1951] 2 KB 164 Denning LJ, in his dissenting judgment, made a valiant attempt to correct the error. But it was not until the decision of this House in *Hedley Byrne & Co Ltd v Heller Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 that the law was once more set on the right path.

[5] Consistently with the traditional approach it is to these authorities and to subsequent decisions directly relevant to this relatively narrow corner of the field that we should look to determine the essential characteristics of a situation giving rise, independently of any contractual or fiduciary relationship, to a duty of care owed by one party to another to ensure that the accuracy of any statement which the one party makes and on which the other party may foreseeably rely to his economic detriment.

[6] . . . The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and

may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo CJ, to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (see *Ultramare Corp v Touche* (1931) 255 NY 170 at 179), it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the 'limit or control mechanism ... imposed on the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence' (see the *Candlewood* case [1985] 2 All ER 935 at 945, [1986] AC 1 at 25) rested on the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the 'proximity' between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (eg in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter on that transaction or on a transaction of that kind.

[7] I find this expectation fully supported by the dissenting judgment of Denning LJ in *Candler v Crane Christmas & Co* [1951] 1 All ER 426 at 433–436, [1951] 2 KB 164 at 179–184 in the following passages:

'Let me now be constructive and suggest the circumstances in which I say that a duty to use care in making a statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business ... Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or

client; and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer, they are not, as a rule, responsible for what he does with them without their knowledge or consent ... The test of proximity in these cases is: Did the accountants know that the accounts were required for submission to the plaintiff and use by him? ... Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in the present case it extends to the original investment of £2,000 which the plaintiff made in reliance on the accounts, because [the accountants] knew that the accounts were required for his guidance in making that investment but it does not extend to the subsequent £200 which he invested after he had been two months with the company. This distinction, that the duty only extends to the very transaction in mind at the time, is implicit in the decided cases ... It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him, in the words of CARDOZO, C.J., in *Ultramare Corp. v. Touche* ((1931) 255 NY 170 at 179), to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier. It is, perhaps, worth mentioning that Parliament has intervened to make the professional man liable for negligent reports given for the purposes of a prospectus: see s. 40 and s. 43 of the Companies Act, 1948. That is an instance of liability for reports made for the guidance of a specific class of persons—investors in a specific class of transactions—applying for shares. That enactment does not help one way or the other to show what

result the common law would have reached in the absence of such provisions, but it does show what result it ought to reach. My conclusion is that a duty to use care in statement is recognised by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons by whom and to whom it is owed and the transactions to which it applies.'

[8] It seems to me that this masterly analysis, if I may say so with respect, requires little, if any, amplification or modification in the light of later authority and is particularly apt to point the way to the right conclusion in the present appeal . . .

#### LORD ROSKILL.

[9] My Lords, I have had the advantage of reading in draft the speeches prepared by three of your Lordships. I agree with them and would allow the appeal and dismiss the cross-appeal for the reasons there given. I only add some observations of my own out of respect for the two Lords Justices from whom your Lordships are differing and because of the importance of this case in relation to the vexed question of the extent of liability of professional men, especially accountants, for putting into circulation allegedly incorrect statements whether oral or in writing which are claimed to have been negligently made or prepared and which have been acted on by a third party to that party's detriment.

[10] That liability for such negligence if established can exist has been made clear ever since the decision of this House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 in which the well-known dissenting judgment of Denning LJ in *Candler v Crane Christmas & Co* [1951] 1 All ER 426, [1951] 2 KB 164 was held to have stated the law correctly. Thenceforth it was clear that such a duty of care could be owed by a professional man to third parties in cases where there was no contractual relationship between them, a view of the law long denied as the result of a succession of late nineteenth century cases of which this House then took the opportunity of disapproving.

[11] But subsequent attempts to define both the duty and its scope have created more problems than the decisions have solved. My noble and learned friends have traced the evolution of the decisions from *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728 until and including the most recent decisions of your Lordships' House in *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, [1989] 2 WLR 790. I agree

with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable', 'fairness', 'voluntary acceptance of risk' or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge, suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty . . .

### LORD OLIVER

[12] . . . The question is, I think, one of some importance when one comes to consider the existence of that essential relationship between the auditors and Caparo to which, in any discussion of the ingredients of the tort of negligence, there is accorded the description 'proximity', for it is now clear from a series of decisions in this House that, at least so far as concerns the law of the United Kingdom, the duty of care in tort depends not solely on the existence of the essential ingredient of the foreseeability of damage to the plaintiff but on its coincidence with a further ingredient to which has been attached the label 'proximity' and which was described by Lord Atkin in the course of his speech in *Donoghue v Stevenson* [1932] AC 562 at 581, [1932] All ER Rep 1 at 12 as—

‘such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.’

It must be remembered, however, that Lord Atkin was using these words in the context of loss caused by physical damage where the existence of the nexus between the careless defendant and the injured plaintiff can rarely give rise to any difficulty. To adopt the

words of Bingham LJ in the instant case ([1989] 1 All ER 798 at 808, [1989] QB 653 at 686):

'It is enough that the plaintiff chances to be (out of the whole world) the person with whom the defendant collided or who purchased the offending ginger beer.'

[13] The extension of the concept of negligence since the decision of this House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 to cover cases of pure economic loss not resulting from physical damage has given rise to a considerable and as yet unsolved difficulty of definition. The opportunities for the infliction of pecuniary loss from the imperfect performance of everyday tasks on the proper performance of which people rely for regulating their affairs are illimitable and the effects are far reaching. A defective bottle of ginger beer may injure a single consumer but the damage stops there. A single statement may be repeated endlessly with or without the permission of its author and may be relied on in a different way by many different people. Thus the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of what has been called a 'relationship of proximity' between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be 'just and reasonable'. But, although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed, it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. 'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.

[14] There are, of course, cases where, in any ordinary meaning of the words, a relationship of proximity (in the literal sense of 'closeness') exists but where the law, whilst recognising the fact of the relationship, nevertheless denies a remedy to the injured party on the ground of public policy. *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191 was such a case, as was *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 53, so far as concerns the alternative ground of that decision. But such cases do nothing to assist in the identification of those features from which the law will deduce the essential relationship on which liability depends and, for my part, I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp. The fact is that once one discards, as it is now clear that one must, the concept of foreseeability of harm as the single exclusive test, even a *prima facie* test, of the existence of the duty of care, the attempt to state some general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense . . .

[15] Perhaps, therefore, the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy. Thus, for instance, cases can be classified according to whether what is complained of is the failure to prevent the infliction of damage by the act of the third party (such as *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, *P Perl (Exporters) Ltd v Camden London BC* [1983] 3 All ER 161, [1984] QB 342, *Smith v Littlewoods Organisation Ltd (Chief Constable, Fife Constabulary, third party)* [1987] 1 All ER 710, [1987] AC 241 and, indeed, *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728 itself), in failure to perform properly a statutory duty claimed to have been imposed for the protection of the plaintiff either as a member of a class or as a member of the public (such as *Anns's* case, *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 233, *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705, [1988] AC 175) or in the making by the defendant of some statement or advice which has been communicated, directly or indirectly, to the plaintiff and on which he has relied. Such categories are not, of course, exhaustive. Sometimes they overlap as in the *Anns* case, and there are cases which do not readily fit into easily definable categories (such as *Ross v Caunters (a firm)* [1979] 3 All ER 580, [1980] Ch

297). Nevertheless, it is, I think, permissible to regard negligent statements or advice as a separate category displaying common features from which it is possible to find at least guidelines by which a test for the existence of the relationship which is essential to ground liability can be deduced.

[16] The damage which may be occasioned by the spoken or written word is not inherent. It lies always in the reliance by somebody on the accuracy of that which the word communicates and the loss or damage consequential on that person having adopted a course of action on the faith of it. In general, it may be said that when any serious statement, whether it takes the form of a statement of fact or of advice, is published or communicated, it is foreseeable that the person who reads or receives it is likely to accept it as accurate and to act accordingly. It is equally foreseeable that if it is inaccurate in a material particular the recipient who acts on it may suffer a detriment which, if the statement had been accurate, he would not have undergone. But it is now clear that mere foreseeability is not of itself sufficient to ground liability unless by reason of the circumstances it itself constitutes also the element of proximity (as in the case of direct physical damage) or unless it is accompanied by other circumstances from which that element may be deduced. One must, however, be careful about seeking to find any general principle which will serve as a touchstone for all cases, for even within the limited category of what, for the sake of convenience, I may refer to as 'the negligent statement cases', circumstances may differ infinitely and, in a swiftly developing field of law, there can be no necessary assumption that those features which have served in one case to create the relationship between the plaintiff and the defendant on which liability depends will necessarily be determinative of liability in the different circumstances of another case. There are, for instance, at least four and possibly more situations in which damage or loss may arise from reliance on the spoken or written word and it must not be assumed that because they display common features of reliance and foreseeability they are necessarily in all respects analogous. To begin with, reliance on a careless statement may give rise to direct physical injury which may be caused either to the person who acts on the faith of the statement or to a third person. One has only to consider, for instance, the chemist's assistant who mislabels a dangerous medicine, a medical man who gives negligent telephonic advice to a parent with regard the treatment of a sick child or an architect who negligently instructs a bricklayer to remove the keystone of an archway (as in *Clayton v Woodman & Son (Builders)*)

*Ltd* [1962] 2 All ER 33, [1962] 2 QB 533). In such cases it is not easy to divorce foreseeability simpliciter and the proximity which flows from the virtual inevitability of damage if the advice is followed. Again, economic loss may be inflicted on a third party as a result of the act of the recipient of the advice or information carried out in reliance on it (as, for instance, the testator in *Ross v Caunters (a firm)* [1979] 3 All ER 580, [1980] Ch 297 or the purchaser in *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223, both cases which give rise to certain difficulties of analysis). For present purposes, however, it is necessary to consider only those cases of economic damage suffered directly by a recipient of the statement or advice as a result of his personally having acted in reliance on it.

*Appeal allowed; cross-appeal dismissed.*

#### *Notes and Questions*

1. *Reasoning of Lord Bridge.* How would Lord Bridge define the “traditional approach” and the “modern approach”? Which approach does he prefer? Why? What is his view of *Anns v Merton London Borough*? What policy reasons might there be to support drawing a distinction between pure economic loss and personal or property damage? Do you agree with Lord Bridge that “the damage which may be caused by the negligently spoken or written word will normally be confined to economic loss sustained by those who rely on the accuracy of the information or advice they receive as a basis for action.”? Can you give examples of personal or property damage that may result from negligent spoken or written advice? Lord Bridge refers in his opinion to both Lord Denning (“masterly analysis”) and Justice Cardozo, (“classic words”) who were arguably the two greatest judges of the twentieth century, from the two major common law countries of the world. Although both men served in his country’s respective highest courts (the House of Lords and the US Supreme Court), they are known more for their decisions rendered from courts lower in the judicial hierarchy – indeed, as cited herein – which both judges apparently preferred (England’s Court of Appeal and New York State’s highest court, the NY Court of Appeal). (See Coleman, B., “Justice Cardozo and Lord Denning: The Judge as Poet-Philosopher” Rutgers LJ Vol. 32, No.2 [2001]) After serving on the House of Lords, in 1962 Denning actually *returned* to the Court of Appeals for the final two decades of his career; this shift down the hierarchy may explain some of Denning’s views about *stare decisis* expressed from the Court of Appeals. For what purpose does Lord Bridge cite Cardozo and Denning?
2. *Reasoning of Lord Roskill.* Why does Lord Roskill say that attempts to define the duty of care with respect to negligent misstatements have

"created more problems than the decisions have solved."? Does Lord Roskill prefer the traditional or modern approach? Why? What is the problem with labels such as "foreseeability" or "proximity" according to Lord Roskill?

3. *Reasoning of Lord Oliver.* Why does Lord Oliver compare the possible damage done by a defective bottle of ginger beer and that done by an erroneous statement? Do you agree with his analysis? Why or why not? What are the differences between foreseeability, proximity, and the "just and reasonable" elements, according to Lord Oliver? Does Lord Oliver believe that a general principle of law in this area is useful? Why or why not? What sort of categorisation does Lord Oliver support? Why? How would Lord Oliver define the rule of law with respect to negligent misstatements?
4. *Development of the common law.* How does *Caparo* develop the law of negligence? What are the elements of establishing a duty of care under *Caparo*? In deciding what duty of care "formula" to apply to a given case, what preliminary analysis should be taken, based on *Caparo*? Is this preliminary analysis required in the other cases in this chapter that follow *Donoghue*? Does *Caparo* narrow or broaden the rule in *Donoghue*? If so, how?

#### *Discussion Problems*

1. Discuss the following statement:

"How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for the protection from the carelessness of others."

2. Discuss the following statement:

"*Donoghue v. Stevenson* may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."

3. Discuss the following statement:

"The distinguishing feature of the common law is this judicial development and formulation of principle. Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament."

## **SECTION 5. SECONDARY MATERIALS ON COMMON LAW REASONING AND DEVELOPMENT**

### **Introduction**

This final section on common law reasoning and development includes excerpts from secondary writings. These materials should assist you in understanding the nature of precedent, stare decisis, judicial process and legal reasoning. Some of the analyses in these excerpts are equally applicable to Chapter 2 on "Principles of Stare Decisis." It should be apparent that in some ways there are no sharp analytical divisions between the concerns of Chapters 2 and 3. The principles of stare decisis necessarily overlap in places with the nature of common law development and reasoning, and vice versa.

### **A RETURN TO STARE DECISIS**

By Herman Oliphant (1928) 14 ABA Journal 71

#### *Introduction*

Herman Oliphant was a law professor before becoming General Counsel to the US Treasury Department. Oliphant, like several other prominent American law professors and lawyers of the 1920s and 1930s, e.g., Felix Cohen, William O. Douglas, Jerome Frank, Felix Frankfurter, Max Lerner, Karl Llewellyn, and others, was a member of the "legal realist" school of jurisprudence, which attacked the formalistic idea that law is a set of fixed and contextually independent doctrinal principles. In this excerpt, Oliphant discusses the meaning of stare decisis, and claims that for historical reasons the operation of stare decisis has changed.

#### *Thesis Stated*

[1] Our part in shaping the future of legal scholarship thus recognized makes this an appropriate time and gathering to consider what seems to be a most profound change which has been slowly and imperceptibly creeping into our treatment of problems in Anglo-American law, a fundamental change which merits careful study in order that we may recognize its presence, measure its extent, and judge its consequences. Let me anticipate my conclusions by asserting that we are well on our way toward a shift from following

decisions to following so-called principles, from *stare decisis* to what I shall call *stare dictis*; by saying that this shift has far-reaching and unfortunate consequence for both the art of judicial government and the science of law and by proposing a return toward the ancient doctrine of *stare decisis*.

#### *Stare Decisis Analyzed*

[2] Support for this position will be found by examining that doctrine. It asserts not one thing, but two. For one thing, it asserts that prior decisions are to be followed, not disregarded. But it also asserts that we are to follow the prior decisions and not something else.

#### *The First Meaning of the Doctrine*

[3] Most discussions of the doctrine of *stare decisis* have emphasized the first of these two assertions. In those we are told of the advantages and disadvantages of the doctrine. It has been pointed out how, on the one hand, it makes the law applicable to future transactions certain and the future decisions of judges predictable; and again, how it gives us justice according to law and not according to the whims of men. On the other hand, it has been shown that to follow it gives us a measure of inflexibility in our law resisting changes needed to meet changing conditions. We are all familiar with these and other broad implications of this branch of the doctrine and have considered the necessary choice between conflicting advantages which its acceptance or rejection involves. The vigor of this branch of the ancient doctrine has been weakened but little. Something in the cases is being followed. This whole aspect of the matter is mentioned here only to be set to one side.

#### *The Second Meaning of the Doctrine*

[4] The drift in our methods of dealing with legal problems which is upon us and is the subject of this discussion, concerns more intimately the second branch of the rule dealing with what it is in prior decisions which is to be followed. It is to be carefully noted that, when *stare decisis* is hereinafter mentioned, only this branch of the doctrine is referred to. It is in this quarter that innovation has been at work and is carrying us farther and farther toward treating this ancient doctrine as if it were *stare dictis* instead of *stare decisis*.

[5] There seems to have been little critical study of this phase of the doctrine - of just what it is in prior decisions which is to be

followed. General statements that the decision is to be looked for, that dicta are of slight weight and offer no certain guide can be turned to at many places in the books and are familiar to all. Students beginning their law study are told these things in a general way and then are left to an apprenticeship among the cases to discover largely for themselves their fuller meaning. Yet this matter is the one most vital and difficult factor conditioning the soundness of their scholarship. It is because the word *decision* may mean any one of many things that it is perilous to leave the matter thus unarticulated.

#### *What Does a Case Decide?*

[6] In the first place, a court, in deciding a case, may throw out a statement as to how it would decide some other case. Now if that statement is a statement of another case which is as narrow and specific as the actual case before the court, it is easily recognized as dictum and given its proper weight as such. In the second place the court may throw out a broader statement, covering a whole group of cases. But so long as that statement does not cover the case before the court, it is readily recognized as being not a decision, much less the decision of the case. It is dictum, so labeled and appraised. But in the third place, a court may make a statement broad enough to dispose of the case in hand as well as to cover also a few or many other states of fact. Statements of this third sort may cover a number of fact situations ranging from one other to legion. Such a statement is sometimes called the *decision* of the case. Thereby the whole ambiguity of that word is introduced and the whole difficulty presented.

[7] If a more careful usage limits the word *decision* to the *action* taken by the court in the specific case before it, i.e. to the naked judgment or order entered, the difficulty is not met; it is merely shifted. *Stare decisis* thus understood becomes useless for no decision in that limited sense can ever be followed. No identical case can arise. All other cases will differ in some circumstances – in time, if in no other, and most of them will have differences which are not trivial. *Decision* in the sense meant in *stare decisis* must, therefore, refer to a proposition of law covering a group of fact situations of a group as a minimum, the fact situation of the instant case and at least one other.

[8] To bring together into one class even this minimum of two fact situations however similar they may be always has required and always will require an abstraction. If Paul and Peter are to be

thought of together at all, they must both be apostles or be thought of as having some other attribute in common. Classification is abstraction. An element or elements common to the two fact situations put into one class must be drawn out from each to become the content of the category and the subject of the proposition of law which is thus applied to the two cases.

[9] But such a grouping may include multitudes of fact situations so long as a single attribute common to them all can be found. Between these two extremes lies a gradation of groups of fact situations each with its corresponding proposition of law, ranging from a grouping subtending but two situations to those covering hosts of them. This series of groupings of fact situations gives us a parallel series of corresponding propositions of law, each more and more generalized, as we recede farther and farther from the instant state of facts and include more and more fact situations in the successive groupings. It is a mounting and widening structure, each proposition including all that has gone before and becoming more general by embracing new states of fact. For example, A's father induces her not to marry B as she promised to do. On a holding that the father is not liable to B for so doing, a gradation of widening propositions can be built, a very few of which are:

Fathers are privileged to induce daughters to break promises to marry.

Parents are so privileged.

Parents are so privileged as both daughters and sons.

All persons are so privileged as to promises to marry.

Parents are so privileged as to all promises made by their children.

All persons are so privileged as to all promises made by anyone.

There can be erected upon the action taken by a court in any case such a gradation of generalizations and this is commonly done in the opinion. Sometimes it is built up to dizzy heights by the court itself and at times, by law teacher and writers, it is reared to those lofty summits of the absolute and the infinite.

[10] Where on that gradation of propositions are we to take our stand and say "This proposition is the decision of this case within the meaning of the doctrine of *stare decisis*?" Can a proposition of law of this third type ever become so broad that, as to any of the cases it would cover, it is mere dictum?

*A Question of Double Difficulty*

[11] That would be difficult enough if it ended there. But just as one and the same apple can be thrown into any one of many groups of barrels according to its size, color, shape, etc., so also there stretches up and away from every single case in the books, not one possible gradation of widening generalizations, but many. Multitudes of radii shoot out from it, each pair enclosing one of an indefinite number of these gradations of broader and broader generalizations. For example, a contract for wages contains a stipulation that it shall be non-assignable by the employee. A court holds that the laborer can assign anyway and that his assignee can sue the employer for the wages regardless of the stipulation. This holding can serve as the apex of many triangles of generalizations. At the base of one will be a broad generalization treating the claim as property and asserting the alienability of property; at the base of another will be an equally broad generalization having to do with contractual stipulations opposed to public policy and the base of a third will be a similarly wide generalization concerning the liquidation of claims in the labor market. Others could be enumerated and other cases similarly analyzed. That is not needed, for we all know of at least one case appearing in the casebooks of more than one subject upon which securely rests more than one inverted pyramid of favorite theory.

[12] A student is told to seek the "doctrine" or "principle" of a case, but which of its welter of stairs should he ascend and how high up shall he go? Is there some one step on some one stair which is *the* decision of the case within the meaning of the mandate *stare decisis*? That is the whole difficulty. Each precedent considered by a judge and each case studied by a student rests at a center of a vast and empty stadium. The angle and distance from which that case is to be viewed involves the choice of a seat. Which shall be chosen? Neither judge nor student can escape the fact that he can and must choose. To realize how wide the possibilities and significant the consequences of that choice are elementary to an understanding of *stare decisis*. To ask whether there exists a coercion of some logic to make that choice either inevitable or beneficent, searches the significance of *stare decisis* in judicial government and the soundness of scholarship in law. This question is real and insistent. It is one which should be asked explicitly and faced squarely.

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*What Stare Decisis Once Meant*

[13] But to support the assertion that there is a drift both marked and unfortunate away from the ancient doctrine of *stare decisis*, it is not needed at this time to attempt a full answer to the question as to the angle and distance of the view of a precedent. It is enough to find out from what angles and at what distances courts and students formerly viewed a precedent as compared with the angle and remoteness of our present points of view.

[14] In earlier English law there were many writs, each writ having many forms and each form being quite specific. Each would cover only a relatively few human situations and those so covered were relatively well defined. Recall such random examples as *de homine replegiando*, *rationabilibus estoveriis*, and *parco fracto* out of scores which could be mentioned. Contrast such actions as these with that of trover in its later stages. The old actions divided and minutely subdivided the transaction of life for legal treatment. Speaking of the place occupied by trespass in a Registrar of Writs belonging to the 14th century when the scheme of writs was about fully developed and required some hundreds of large pages when later printed, Maitland says: "There has been (up to this time) no generalization; the imaginary defendant is charged in different precedents with every kind of unlawful force, with the breach of every imaginable boundary, with the asportation of all that is aportable, while the new well-known writs against the shoeing smith who lames the horse, the hirer who rides the horse to death, the unskilled surgeon, the careless innkeeper creep in slowly amid the writs which describe wilful and malicious mischief, how a cat was put into a dove-cote, how a rural dean was made to ride face to tail, and other ingenious sports."

[15] Then, too, pleading was more discriminating. In earlier law there was a wealth of well differentiated pleas. Pleas to the jurisdiction, to the person, to the court, to the writ, to the action of the writ, and pleas in bar, were each divided into many kinds, each kind covering some specific set of facts or question of law. As to pleas in bar, there was, for example, no omnibus general issue such as that which later developed in assumpsit, for example. The general issue in each action covered a limited number of fact situations enumerated in the old books. Special traverses were numerous and the learning as to special issues, i.e. pleas in confession and avoidance, constituted the largest part of ancient books on pleading.

[16] The result of both this great multitude of writs and this greater definiteness of pleading was much greater particularity and

minuteness in the classification of human transactions for legal treatment than prevailed later. The judges were, by the particularity of the actions and the pleadings, brought and held closer to the actual transactions before them, whatever they may have said in their opinions. The result was that *stare decisis* meant something decidedly different at that time, being more specific and definite. It was operated in terms of abstractions no wider than the propositions of law covering the several classes of this more specific classification of human transactions. The abstractions were, therefore, relatively narrower. When principles were enunciated, though stated too broadly, they related, and were applied, only to these narrow categories of fact situations.

[17] Then too *stare decisis* in actual operation meant something different at that time for the further reason that the phases of human life regulated in the King's Courts were those of a simpler life and time. Judges and lawyers could then more nearly acquire an adequate understanding of those phases of life by merely growing up and living in the society of the time. Transactions were simpler and more nearly homogeneous. Then, again, the courts of Westminster did not have cognizance of all phases of English life. Other tribunals and agencies were then operating.

[18] For yet another and most important reason, *stare decisis* operated in earlier times with greater effectiveness. The abstractions made to correspond to the categories into which the more definite procedure of the time had grouped the human transactions of that simpler economy were quite contemporary. Considered absolutely many of them were old, but relatively they were recent. For great stretches of time there were few fundamental changes in the structure and operation of English domestic, industrial, and political life. Abstractions once made fitted longer. Corresponding rules of law asserting this or that about them, however abstract in phrasing, related, in actual operation, to fact situations to which they had not become alien. The resulting social control better fitted current needs. We in the field of law are far from having finished drawing all the implication of the fact that the last two hundred years have brought more changes in the circumstances of men living together than the previous two thousand years had done.

[19] For these reasons and others no doubt, the empiricism of *stare decisis* proved a most effective and secure way of handling legal problems. What courts then did, as opposed to what they said, shaped itself to the life affected because the problems treated were less numerous and complex, their treatment of these legal problems

was more particularistic, and their closer view of them was from the side on which men in life worked and worried with them. The method of *stare decisis* was preeminently empiric and so close and contemporary was the point of view that it might well be called a radical empiricism.

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### Notes and Questions

- 1 Does Oliphant prefer an approach that defers to *stare dictis* or to *stare decisis*? Why?
- 2 What is the difference between the two meanings Oliphant gives to the doctrine of *stare decisis*?
- 3 What are the different ways in which a court "may throw out a statement as to how it would decide some other case"? (paragraph 6) Can you find examples illustrating these different ways from the cases in this chapter?
- 4 The writ of *homine replegiando* was used to restore a man to liberty, upon providing bail, when he was held unlawfully in custody. The writ of *parco fractorum* was used in a cause of action against a defendant who (1) violently, (2) broke into a pound where animals were being kept, (3) took such animals from the pound, although (4) the animals had been lawfully impounded, for (5) trespass or some other just cause. So you can see how specific some of these early writs were. Use your law dictionary and other legal research tools to determine the meaning of the other early English writs and procedures cited by Oliphant. What historical changes have made *stare decisis* operate differently over time?
- 5 What does Oliphant mean by "empiricism" in paragraph 19 of the excerpt?

### THE BRAMBLE BUSH – ON OUR LAW AND ITS STUDY

By K. N. Llewellyn

#### *Introduction*

The excerpt below is from Karl Llewellyn's classic work, *The Bramble Bush*. Although the book is over 70 years old, it still today continues to make it near the top of recommended reading lists for pre-law or first-year law students in common law countries around the

world. The book is a collection from a series of introductory lectures given by Llewellyn to first-year students at the Columbia University School of Law. In the excerpt, Llewellyn discusses the meaning of precedent.

#### *THIS CASE SYSTEM: PRECEDENT*

[1] I think we are now ready to lock horns with the problem of *precedent* and make something out of it. I fear that I am going to have to be as unorthodox in what I say about this as in what I said about law. The one vagary is indeed a corollary of the other. For, whereas much or most of what is commonly written about precedent takes as its raw material what judges have said about precedent, I propose to take as mine, not so much what they have said as what they have *done* about it.

[2] First, what is precedent? In the large, disregarding for the moment peculiarities of our law and of legal doctrine – in the large, precedent consists in an official doing over again under similar circumstances substantially what has been done by him or his predecessor before. The foundation, then, of precedent is the official analogue of what, in society at large, we know as folkways, or as institutions, and of what, in the individual, we know as habit. And the things which make for precedent in this broad sense are the same which make for habit and for institutions. It takes time and effort to solve problems. Once you have solved one it seems foolish to reopen it. Indeed, you are likely to be quite impatient with the notion of reopening it. Both inertia and convenience speak for building further on what you have already built; for incorporating the decision once made, *the solution once worked out*, into your operating technique *without reexamination* of what *earlier went into* reaching your solution. From this side you will observe that the urge to precedent will be present in the action of any official, irrespective of whether he wants it, or not; irrespective likewise of whether he thinks it is there, or not. From this angle precedent is but a somewhat dignified name for the *practice* of the officer or of the office. And it should be clear that unless there were such practices it would be hard to know there was an office or an officer. It is further clear that with the institution of written records the background range of the practice of officers is likely to be considerably extended; and even more so is the possible outward range, the possibility of outside imitation. Finally, it is clear that if the written records both exist and are somewhat carefully and continuously consulted, the possibility of change creeping into the practice,

unannounced is greatly lessened. At this place on the law side the institution of the bar rises into significance. For whereas the courts might make records and keep them, but yet pay small attention to them; or might pay desultory attention; or might even deliberately neglect an inconvenient record if they should later change their minds about that type of case, the lawyer searches the records for convenient cases to support his point, presses upon the court what it has already done before, capitalizes the human drive toward repetition by finding, by making explicit, by urging, the prior cases.

[3] At this point there enters into the picture an ethical element, the argument that courts (and other officials) not only do, but also *should* continue what they have been doing. Here, again, the first analogue is in the folkway or the individual habit. I do not know why, nor do I know how, but I observe the fact that what one has been doing acquires in due course another flavor, another level of value than mere practice; a flavor on the level of policy, or ethics, or morality. What one has been doing becomes the "right" thing to do; not only the expected thing but the thing whose happening will be welcomed and whose failure to happen will be resented. This is true in individuals whose habits are interrupted; this is true in social intercourse when the expected event, when the expectation based upon the knowledge of other people's habits, materializes or fails to materialize. Indeed, in social matters in the large, there develops distinct group pressure to *force conformity* with the existing and expected social ways.

[4] All of this, now, the lawyer brings to bear upon law itself. Here speaks the judicial conscience.

[5] And apart from the unreasoned and unreasoning fact that oughtness attaches to practice, there are, particularly in the case of officials, and most particularly in the case of judges, reasons of policy to buttress this ethical element. To continue past practices is to provide a new official in his inexperience with the accumulated experience of his predecessors. If he is ignorant, he can learn from them and profit by the knowledge of those who have gone before him. If he is idle he can have their action brought to his attention and profit by their industry. If he is foolish he can profit by their wisdom. If he is biased or corrupt the existence of past practices to compare his action with gives a public check upon his biases and his corruption, limits the frame in which he can indulge them unchallenged. Finally, even though his predecessors may themselves, as they set up the practice, have been idle, ignorant, foolish and biased, yet the knowledge that he will continue what

they have done gives a basis from which men may predict the action of the courts; a basis to which they can adjust their expectations and their affairs in advance. To know the law is helpful, even when the law is bad. Hence it is readily understandable that in our system there has grown up first the habit of following precedent, and then the legal norm that precedent is to be followed. The main form that this principle takes we have seen. It is essentially the canon that each case must be decided as one instance under a general rule. This much is common to almost all systems of law. The other canons are to be regarded rather as subsidiary canons that have been built to facilitate working with and reasoning from our past decisions.

[6] But it will have occurred to you that despite all that I have said in favor of precedent, there are objections. It may be the ignorance or folly, or idleness, or bias of the predecessor which chains a new strong judge. It may be, too, that conditions have changed, and that the precedent, good when it was made, has since become outworn. The rule laid down the first time that a case came up may have been badly phrased, may have failed to foresee the types of dispute which later came to plague the court. Our society is changing, and law, if it is to fit society, must also change. Our society is stable, else it would not be a society, and law which is to fit it must stay fixed. Both truths are true at once. Perhaps some reconciliation lies along this line; that the stability is needed most greatly in large things, that the change is needed most in matters of detail. At any rate, it now becomes our task to inquire into how the system of precedent which we actually have works out in fact, accomplishing at once stability and change.

[7] We turn first to what I may call the orthodox doctrine of precedents with which, in its essence, you are already familiar. Every case lays down a rule, the rule of the case. The express ratio decidendi is *prima facie* the rule of the case, since it is the ground upon which the court chose to rest its decision. But a later court can reexamine the case and can invoke the canon that no judge has power to decide what is not before him, can, through examination of the facts or of the procedural issue, narrow the picture of what was actually before the court and can hold that the ruling made requires to be understood as thus restricted. In the extreme form this results in what is known as expressly "confining the case to its particular facts." This rule holds only of redheaded Walpoles in pale magenta Buick cars. And when you find this said of a past case you know that in effect it has been overruled. Only a convention, a somewhat absurd convention, prevents flat overruling in such instances. It seems to be felt as definitely improper to state that the court in a

prior case was wrong, peculiarly so if that case was in the same court which is speaking now. It seems to be felt that this would undermine the dogma of the infallibility of courts. So lip service is done to that dogma, while the rule which the prior court laid down is disembowelled. The execution proceeds with due respect, with mandarin courtesy.

[8] Now this orthodox view of the authority of precedent – which I shall call the *strict* view – is but *one of two views* which seem to me wholly contradictory to each other. It is in practice the dogma which is applied to *unwelcome* precedents. It is the recognized, legitimate, honorable technique for whittling precedents away, for making the lawyer, in his argument, and the court, in its decision, free of them. It is a surgeon's knife.

[9] It is orthodox, I think, because it has been more discussed than is the other. Consider the situation. It is not easy thus to carve a case to pieces. It takes thought, it takes conscious thought, it takes analysis. There is no great art and no great difficulty in merely looking at a case, reading its language, and then applying some sentence which is there expressly stated. But there is difficulty in going underneath what is said, in making a keen reexamination of the case that stood before the court, in showing that the language used was quite beside the point, as the point is revealed under the lens of leisured microscopic refinement. Hence the technique of distinguishing cases has given rise to the closest of scrutiny. The technique of arguing for a distinction has become systematized. And when men start talking of authority, or of the doctrine of precedent, they turn naturally to that part of their minds which has been *consciously* devoted to the problem; they call up the cases, the analyses, the arguments, which have been made under such conditions. They put this together, and call this "*the doctrine*". I suspect there is still another reason for the orthodoxy. That is that only finer minds, minds with sharp mental scalpels, can do this work, and that it is the finer minds – the minds with sharp cutting edge – which write about it and which thus set up the tradition of the books. To them it must seem that what blunt minds can do as well as they is poor; but that which they alone can do is good. They hit in this on a truth in part: you can pass with ease from this strict doctrine of precedent to the other. If you can handle this, then you can handle both. Not vice versa. The strict doctrine, then, is the technique to be learned. *But not to be mistaken for the whole.*

[10] For when you turn to the actual operations of the courts, or, indeed, to the arguments of lawyers, you will find a totally different

view of precedent at work beside this first one. That I shall call, to give it a name, the *loose view* of precedent. That is the view that a court has decided, and decided authoritatively, *any* point or all points on which it chose to rest a case, or on which it chose, after due argument, to pass. No matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the rule the court laid down, then that the court has held. Indeed, this view carries over often into dicta, and even into dicta which are grandly obiter. In its extreme form this results in thinking and arguing exclusively from language that is found in past opinions, and in citing and working with that language wholly without reference to the facts of the case which called the language forth.

[11] Now it is obvious that this is a device not for cutting past opinions away from judges' feet, but for using them as a springboard when they are found convenient. This is a device for *capitalizing welcome precedents*. And both the lawyers and the judges use it so. And judged by the *practice* of the most respected courts, as of the courts of ordinary stature, this doctrine of precedent is like the other, recognized, legitimate, honorable.

[12] What I wish to sink deep into your minds about the doctrine of precedent, therefore, is that it is two-headed. It is Janus-faced. That it is not one doctrine, nor one line of doctrine, but two, and two which, *applied at the same time to the same precedent, are contradictory of each other*. That there is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful. That these two doctrines exist side by side. That the same lawyer in the same brief, the same judge in the same opinion, may be using the one doctrine, the technically strict one, to cut down half the older cases that he deals with, and using the other doctrine, the loose one, for building with the other half. Until you realize this you do not see how it is possible for law to change and to develop, and yet to stand on the past. You do not see how it is possible to avoid the past mistakes of courts, and yet to make use of every happy insight for which a judge in writing may have found expression. Indeed it seems to me that here we may have part of the answer to the problem as to whether precedent is not as bad as good – supporting a weak judge with the labors of strong predecessors, but binding a strong judge by the errors of the weak. For look again at this matter of the *difficulty* of the doctrine. The strict view – that view that cuts the past away – is hard to use. An ignorant, an unskilful judge will find it hard to use: the past will bind him. But the skilful judge – he whom we would make free – is thus made free. He has the knife in hand; and he can free himself.

[13] Nor, until you see this double aspect of the doctrine-in-action, do you appreciate how little, in detail, you can predict *out of the rules alone*; how much you must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them. Think again in this connection of an English court, all the judges unanimous upon the conclusion, all the judges in disagreement as to what rule the outcome should be rested on.

[14] Applying this two-faced doctrine of precedent to your work in a case class you get, it seems to me, some such result as this: You read each case from the angle of its *maximum* value as a precedent, at least from the angle of its maximum value as a precedent of *the first water*. You will recall that I recommended taking down the ratio decidendi in substantially the court's own words. You see now what I had in mind. Contrariwise, you will also read each case for its *minimum* value as a precedent, to set against the maximum. In doing this you have your eyes out for the narrow issue in the case, the narrower the better. The first question is, how much can this case fairly be made to stand for by a later court to whom the precedent is welcome? You may well add – though this will be slightly flawed authority – the dicta which appear to have been well considered. The second question is, how much is there in this case that cannot be got around, even by a later court that wishes to avoid it?

[15] You have now the tools for arguing from that case as counsel on *either* side of a new case. You turn them to the problem of prediction. Which view will this same court, on a later case on slightly different facts, take: will it choose the narrow or the loose? Which use will be made of this case by one of the other courts whose opinions are before you? Here you will call to your aid the matter of attitude that I have been discussing. Here you will use all that you know of individual judges, or of the trends in specific courts, or, indeed, of the trend in the line of business, or in the situation, or in the times at large – in anything which you may expect to become apparent and important to the court in later cases. But always and always, you will bear in mind that each precedent has not one value, but two, and that the two are wide apart, and that whichever value a later court assigns to it, such assignment will be respectable, traditionally sound, dogmatically correct. Above all, as you turn this information to your own training you will, I hope, come to see that in most doubtful cases the precedents *must* speak ambiguously until the court has made up its mind whether each one of them is welcome or unwelcome. And that the job of persuasion which falls upon you will call, therefore, not only for providing a technical ladder to reach on authority the result that you contend for,

but even more, if you are to have *your* use of the precedents made as *you* propose it, the job calls for you, on the facts, to persuade the court your case is sound.

[16] People – and they are curiously many – who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion, or who think that what I have described involves improper equivocation by the courts or departure from the court-ways of some golden age – such people simply do not know our system of precedent in which they live.

### **Notes and Questions**

1. In common law jurisdictions, trial court judges typically do not render published opinions with their decisions. Instead, published judicial opinions (i.e., discussions of the legal result) generally come only from intermediate courts or final courts of appeal. Consider Llewellyn's statements in paragraph 2. Why might trial court decisions normally be considered to hold no precedential authority, apart from their low position in the judicial hierarchy?
2. Why does Llewellyn use the example of "redheaded Walpoles in pale magenta Buick cars" in paragraph 7? From this chapter, can you find any cases where this example is illustrated?
3. What is the difference between the "strict" and the "loose" view of precedent, according to Llewellyn?
4. Compare Llewellyn's view of deriving the *ratio decidendi* of a decision, with the view of Oliphant in the previous excerpt. How do we determine what part of a decision is binding on a later judge, according to Llewellyn? According to Oliphant?

## **THE NATURE OF THE JUDICIAL PROCESS**

By Benjamin Nathan Cardozo

### *Introduction*

Justice Benjamin Nathan Cardozo was one of the greatest American judges of the 20<sup>th</sup> century. Although he served for a time on the US Supreme Court, his more well-known opinions were issued while he was on the highest court in the state of New York, the New York Court of Appeals. Cardozo lectured and wrote widely about the law, not limiting himself to his reported decisions, and his candid remarks led to controversy. His jurisprudence was known for its greater willingness to

sacrifice precedent to broader social changes or to perceived individual justice. He confessed to the role of judge as an inevitable lawmaker, and he did so at a time when such confessions were not considered a statement of the obvious. The excerpt below is from a collection of lectures titled *The Nature of the Judicial Process*, which is available for reading or downloading from several Internet sources.

*Lecture 1. Introduction. The method of philosophy.*

[1] The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing is further from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur and press for a solution. What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what propositions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis.

[2] There is in each of us (judges) a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos' which when reasons are nicely balanced, must determine where choice shall fall. In this mental background, every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought – a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

[3] Before we can determine the proportions of a blend, we must know the ingredients to be blended. Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. 'The fact is', says Gray in his lectures on the 'Nature and Sources of the Law', 'that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present'. So Brütt: 'One weighty task of the system of the application of law consists

then in this, to make more profound the discovery of the latent meaning of positive law. Much more important, however, is the second task which the system serves, namely the filling of the gaps which are found in every positive law in greater or less measure'. ... The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties and harmonize results with justice through a method of free decision – 'libre recherche scientifique'. That is the view of Gény and Ehrlich and Gmelin and others. Courts are to 'search for light among the social elements of every kind that are the living force behind the facts they deal with'. The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. In the long run 'there is no guaranty of justice', says Ehrlich, 'except the personality of the judge'. The same problems of method, the same contrasts between the letter and the spirit, are the living problems in our own land and law.

[4] The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase, 'in the legal smithy'. Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn. Nonetheless, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The same nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling,

there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. ... The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition. In the life of the mind as in life elsewhere, there is a tendency toward the reproduction of kind. Every judgment has a generative power. It begets in its own image. Every precedent, in the words of Redlich, has a "directive force for future cases of the same or similar nature". Until the sentence was pronounced, it was as yet in equilibrium. Its form and content were uncertain. Anyone of many principles might lay hold over it and shape it. Once declared, it is in a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter. If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit. Whatever its psychological basis it is one of the living forces of our law. Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the void. The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars. The process has been admirably stated by Munroe Smith: 'In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined. ...

[5] In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.

[6] The first branch of the problem is the one to which we are accustomed to address ourselves more consciously than to the other. Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside. Judges differ greatly in their reverence for the illustrations and comments and side-remarks of their predecessors, to make no mention of their own. ... I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others. But dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and non-essential from the essential and inherent. ...

[7] The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology. ...

[8] In law, ... the truths given by induction tend to form the premises for new deductions. ... A stock of juridical conceptions and formulas is developed, and we take them, so to speak, ready-made. ... These fundamental conceptions once attained form the starting point from which are derived new consequences, which at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic. So it is with the growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the

essence. At last there emerges a rule or principle from which new lines will be run, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed. Sometimes it is accepted as a postulate of later reasoning, its origins are forgotten, it becomes a new stock of descent, its issue unites with other strains, and persisting permeate the law. . . .

*Lecture IV. Adherence to Precedent. The subconscious element in the judicial process. Conclusion.*

[9] In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. . . . the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. . . . But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly, when in its origin it was a new significance or development with the progress of the years. In such circumstances, the words of Wheeler, J., in *Dwy v Connecticut Co.*, 89 Conn. 74, 99, express the tone and temper in which problems should be met: 'That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature'. If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors. . . .

[10] Our survey of judicial methods teaches us, I think, the lesson that the whole subject-matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe. We like to picture to ourselves the field of the law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them. As in time and space, so here. Divisions are working hypotheses, adopted for convenience. We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees. It is a question of degree whether I have been negligent. It is a question of degree whether in the use of my own land, I have created a nuisance which may be abated by my neighbor. It is a question of degree whether the law which takes my property and limits my conduct, impairs my liberty unduly. So also the duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely. He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall up the scales. . . .

[11] The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew. The process, with all its silent yet inevitable power, has been described by Mr. Henderson with singular felicity: 'When an adherent of a systematic faith is brought continuously in touch with influences and exposed to desires inconsistent with that faith, a process of unconscious cerebration may take place, by which a growing store of hostile mental inclinations may accumulate, strongly motivating action and decision, but seldom emerging clearly into consciousness. In the meantime the formulas of the old faith are retained and repeated by force of habit, until one day the realization comes that conduct and sympathies and fundamental desires have become so inconsistent with the logical framework that it must be discarded. Then begins the task of building up and rationalizing a new faith.'

[12] Ever in the making, as law develops through the centuries, is this new faith which silently and steadily effaces our mistakes and eccentricities. I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.

### **Notes and Questions**

1. In paragraph 3, Cardozo cites the French law professor Francois Gény, who, like Cardozo, stressed the element of judicial discretion in the law. *Libre recherche scientifique* was the jurisprudential movement initiated by Gény, and it translates as “free scientific research.” Gény believed that the French civil code had not solved all the problems of judicial decision-making, i.e., that judges necessarily had a legislative function, and that they had to conduct an inquiry into community values to provide a decision.
2. Consider the elements that Cardozo claims go into the “brew” of judicial decision-making. Do you agree with Cardozo? Consider decision-making in your own life. What happens psychologically when you make personal decisions of value or principle? Are they similar or different from what Cardozo asserts about judicial decision-making?
3. Cardozo states in paragraph 4: “The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.” Is there any support for this view from the cases in this chapter?
4. What is Cardozo’s philosophy about the development of the common law? Where is this philosophy stated in the excerpt?

## **LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING**

By Ruggero J. Aldisert

### *Introduction*

Judge Ruggero J Aldisert, formerly Chief Judge of the US Court of Appeals for the Third Circuit, is currently a Senior US Circuit Judge.

Judge Aldisert has written widely about the judicial process and the nature of legal reasoning. In this excerpt he provides a good analysis of some of the issues related to common law reasoning and development.

### *Reasoning and the Common-law Tradition*

[1] What is the common law, the basis of the Anglo-American system of justice? Popularly, it is known for its case law, its jurisprudence, for a system of legal precepts that emerge from court decisions. In the common-law countries today it is an important source of the substantive law that governs society. Law emanates primarily from statutes enacted by legislatures and from clauses in written constitutions in those countries that have them, as does the United States and its constituent states; but equally important, law takes the form of rules of law distilled from judicial decisions in cases and controversies in courts of record.

[2] This judge-made law is what is familiarly referred to as the common law. It materializes as the by-product of a judicial opinion and has an existence traceable to either the Battle of Hastings in 1066 or the signing of the Magna Carta by King John at the Runnymede in 1215. Aside from its longevity, its universal acceptance derives from two characteristics of our tradition: first, the judicial opinion is published, eventually bound in permanent books and given a caption containing both a volume and page number and a name (indicating the parties) so that it may be readily retrieved and cited as authority; second, the rule of law emerging from the opinion is the conclusion reached by a publicly expressed reasoning process. It is the reasoning process – the fealty to the rules of logic – that gives legitimacy to judge-made law.

[3] Even when the original source of the law is statute or constitution text, the method of interpreting these legislatively-enacted precepts follows the same methodology. The interpretations appear in publicly recorded volumes of court decisions containing a rational process supporting the conclusion reached in the decision.

[4] At work then are two concepts: judge-made law which we know as “the common law” and a method of deciding cases which is known as “the common law tradition.” In our discussion of legal reasoning, we shall address common law in the sense of the common-law tradition.

[5] Common-law countries differ from the civil-law countries of Europe and Latin America where, in theory, the source of law is limited to Codes and written constitutions. In theory, on the

Continent and in those jurisdictions that follow the civil-law tradition, the judge does not refer to a previous decision of a court, but uses the text of the Code as the starting point for legal analysis. The body of court decisions that we common-law countries know as precedents does not exist in the civil-law tradition, because the authoritative source for each decision (in theory) is the Code enacted by the legislative branch. Unlike the common-law tradition, inferior courts are not bound by decisions of courts superior in the judicial hierarchy. And it is only in recent years that some of the courts on the Continent are beginning to publish computerized abstracts and some bound volumes of their opinions. The civil-law tradition is traced to the experience of France. Forged in the French Revolution that overthrew an absolute monarchy and subsequently copied by other jurisdictions on the Continent and in Latin America, the civil-law model reflects an antipathy to a strong court system. It is an historical French reaction to the abuses of the royal courts that they overthrew. The civil-law countries have not vested in their courts the power conferred in common-law courts. These countries do not accord to their judges the profound respect of our tradition. "Your honor" is an expression foreign to the civil-law jurisdictions.

[6] The heart of the common-law tradition is adjudication of specific cases. Case-by-case development allows experimentation because each rule is reevaluated in subsequent cases to determine if the rule did or does produce a fair result. If the rule operates unfairly, it can be modified. The modification does not occur at once, "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated." The genius of the common law is that it proceeds empirically and gradually, testing the ground at every step, and refusing, or at any rate evincing an extreme reluctance, to embrace broad theoretical principles.

[7] The common-law method has been described as one of "Byzantine beauty," a method of "reaching what instinctively seem[s] the right result in a series of cases, and only later (if at all) enunciating the principle that explains the patterns – a sort of connect-the-dots exercise". Adherence to the rules of formal logic and legal reasoning are absolutes in this exercise. "Connecting the dots" is but a shorthand way of describing inductive reasoning. The "dots" represent holdings of individual cases, each announcing a specific consequence for a specific set of facts. They are "connected" by techniques of induction for the purpose of fashioning broader precepts. Those techniques, which we will study

in depth, include the use of enumeration of specific instances of like situations, and the use of analogy, where resemblances and differences in the cases are meticulously compared.

[8] Precepts that are broader than narrow rules are called legal principles. These principles – precepts covering more generalized factual scenarios – are assembled from publicly stated reasons justifying rules formulated in previously decided cases. Formulation of a principle is a gradual process, shaped from actual incidents in social, economic and political experience. It is a process in which countervailing rights are challenged, evaluated, synthesized and adjudicated on a case-by-case basis, in the context of an adversary proceeding before a fact-finder in a court of law. For every rule at common-law there is a publicly stated reason, the *ratio decidendi*. And for each principle that slowly emerges, there is a solid base of individual rules from particular cases and from the reasons given to support the conclusions in those cases. The formation of a principle in case law emerges in that process of legal reasoning known as inductive generalization.

[9] Logical reasoning lies at the heart of the common-law tradition. For the common-law methodology to have been accepted in the first instance and later developed into the most respected legal system in the world, there had to be consent and endorsement by the people and institutions affected by judicial decisions. Without this acceptance, the tradition would not have endured. And without a logical explanation for its decisions, there would never have been the initial and continuing acceptance of our tradition. Without a reasoning process adhering to rules of logic to support conclusions, judicial decisions would have been nothing more than decrees, orders and judicial fiat. This would have been anathematic to the spirit of our democracy. With the reasoning process driving the engine, the common-law tradition was able to develop unity of law throughout a jurisdiction and yet a flexibility to incorporate developing legal precepts. But our tradition is more than unity and the capacity to assimilate. Also at work is gradualness. Holmes noted that the great growth of the common law came about incrementally. The common law, like progress, “creeps from point to point, testing each step,” and is, most characteristically, a system built by gradual accretion from the resolution of specific problems. The sources of decision are rules of law in the narrow sense – rules of specific cases, “precepts attaching a definite detailed legal consequence to a definite, detailed state of facts.” These precepts provide “fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct.”

The courts fashion principles from a number of rules of decision, in a process characterized by experimentation. At common law rules of case law are treated not as final truths, "but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice."

[10] Common-law reasoning should not be characterized as merely inductive. It is more than a congeries of fact patterns converging to compel an induced conclusion either by analogy or inductive generalization. Rather, the reasoning process is both inductive and deductive. It resembles the ebb and flow of the tide. A principle is induced from a line of specific, reasoned decisions and, once identified, becomes the major premise from which a conclusion may be deduced in the cause at hand. The problem of common-law adjudication, in John Dewey's formulation, is that of finding "statements of general principle and of particular fact that are worthy to serve as premises." By means of a value judgment, the common-law judge makes a choice from competing legal precepts or interprets or applies them, and then structures the premises that lead to conclusions in the case at hand. To do this, he uses "a logic relative to consequences rather than to antecedents." Use of this logic in the common-law tradition facilitates the gradual development of legal principles.

[11] Another important characteristic of the common-law tradition is that it is fashioned by lawyers and judges from actual events that have raised issues for decision. It emerges as a by-product of the major function of the courts – dispute settling, the adjustment of a specific conflict among the parties. Harlan Fiske Stone emphasized that a "[d]ecision [draws] its inspiration and its strength from the very facts which frame the issues for decision." By contrast, legislative lawmaking is not a subordinate effort. To a legislator, the law is not a by-product; it is the primary endeavor. Statutes are enacted as general rules to control future conduct, not to settle a specific dispute from past experience.

[12] The common-law decisional process starts with the finding of facts in a dispute by a fact-finder, be it a jury or a judge in a bench trial or an administrative agency. Once the facts are ascertained, the court compares them with fact patterns from previous cases and decides whether there is sufficient similarity to warrant applying the rule of an earlier case to the facts of the present one. The judicial process culminates in a narrow decision confined to the facts before the court. Any portion of a judicial opinion that

concerns an issue beyond the precise facts of the case is *obiter dictum*.

[13] Although the common law is judge-made, we are reminded by Harlan Fiske Stone that it is "the law of the practitioner rather than the philosopher." The judge deciding the individual case is the centerpiece of the common-law tradition. As Stone emphasizes, the judge, "not the legislator or the scholar, creates the common law."

[14] The difference between the common-law tradition and the civil-law tradition of the European continent and Latin America must be repeated for emphasis. We must be aware of the distinctive methodology and hierarchical disciplines of the two systems. In the civil-law countries, the legislative Codes (and written constitutions) are the sole sources of decision; theoretically, in every case, recourse must be made to the language of the Code. And in every civil-law jurisdiction the relevant provision of the Code becomes the major premise in the categorical deductive syllogism. In common-law countries, however, the concept of *stare decisis* governs. *Stare decisis* commands that lower courts follow decisions of higher courts in the same judicial hierarchy. The tradition also demands that the most recent higher court decision be followed, whether the original precept stems from statutory or case law. In the United States, unity of judicial action within a given jurisdiction is ensured by the rule that a court may not deviate from precedents established by its hierarchical superior.

[15] Cardozo's 1921 observations in *The Nature of the Judicial Process* described the fundamental characteristics of the common-law tradition. They remain true today and provide an excellent summary of what we have been discussing. First, the tradition seeks and generally produces uniformity of law throughout the jurisdiction. Second, it produces decisions announcing a narrow rule of law covering a detailed and real fact situation. Third, principles develop gradually as the courts reconcile a series of narrow rules emanating from prior decisions. Fourth, the common-law tradition produces judge-made law for the practitioner, not for the philosopher or academician. Fifth, lower courts operating in the tradition are bound by decisions of hierarchically superior courts.

[16] Common law is case law of the specific instance. It is law created by a process of both inductive and deductive reasoning. It is an exercise that combines legal philosophy, a constantly expanding body of case law, statutes comprising the jurisprudence of a given state or the federal government and a profound respect for logical form and critical analysis.

*Precedent*

[17] Precedent is the basic ingredient of the common-law tradition. It is a narrow rule that emerges from a specific fact situation. One court has defined a precedent as follows:

The essence of the common-law doctrine of precedent or *stare decisis* is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned let alone discussed at length. A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

[18] A legal rule forms the basis of a precedent. Precedent, therefore, is a normative legal precept containing both specific facts and a specific result. In contrast, a principle emerges from a line of legal rules as a broad statement of reasons for those decisions. It is important to understand that a single court decision cannot give birth to an all-inclusive principle.

[19] Formulation of a broad principle from a single case decision exemplifies the material fallacy of hasty generalization, as we will discuss later in detail. Dean Pound warned of the danger of hasty generalization:

You cannot frame a principle with any assurance on the basis of a single case. It takes a long process of what Mr. Justice Miller used to call judicial inclusion and exclusion to justify you in being certain that you have hold of something so general, so universal, so capable of dealing with questions of that type that you can say here is an authoritative starting point for legal reasoning in all analogous cases.

A single decision as an analogy, as a starting point to develop a principle, is a very different thing from the decision on a particular state of facts which announces a rule. When the court has that same state of facts before it, unless there is some very controlling reason, it is expected to adhere to the former decision. But when it [goes] further and endeavors to formulate a principle, *stare decisis* does not mean that the first tentative gropings for the principle . . . by this process of judicial inclusion and exclusion, are of binding authority.

[20] Much difficulty results from a confusion between "principled decision-making" and decision-making that purports to prescribe law for circumstances far beyond the facts before the court. When a specific holding of a case is suddenly anointed with the chrism of "principle," it has a very real effect on the doctrine of *stare decisis*. There is always the danger that a commentator or a subsequent opinion writer, either in the same court or another, will elevate the decision's naked holding to the dignity of a legal "principle," and attribute to that single decision a precedential breadth never intended. Such an act may confuse the court's dispute-settling role with its responsibility for institutionalizing the law. The common-law tradition, as stated before, is preeminently a system built up by the gradual accretion of special instances. The accretion is not gradual if an improper dimension is given to a specific instance.

[21] Every holding of every decision does not deserve the black-letter law treatment that some judges or commentators wish to give it. If case law is to develop properly in the common-law tradition, the effect of specific instances, the rules of law in the narrow, Poundian sense, must be given proper weight – but only proper weight. Describing a rule of law as a principle or a doctrine interferes with that proper weight. It puts a jural butcher's thumb on the scale. Thus, the expression, "It is settled that," in a treatise, brief or court opinion, should indicate a line of decisions supporting the statement, not simply a single decision from a favorite jurist.

#### *The Role of Logic*

[22] It is essential to understand the sophisticated nuances of logic in the law employed in this tradition. Rules of logic are only a means to the end in the law. They are implements. They are techniques to encourage, if not guarantee, acceptable supporting reasons for the final conclusion in a case, a decision that constitutes a legal rule. Putting aside constitutional law, in our tradition legal precepts spring from two sources: legislative statutes and court decisions. These precepts are currency of equal value, but there is an important distinction. The legislature may promulgate a statute without offering one word of explanation or reason for it, and the statute will be respected until it is repealed. The same is not true of case law. Case law stands or falls solely on the reasons articulated to justify it. There can be legislative fiat, but not judicial fiat. Reason justifies the legal rule emanating from a court decision. Where stops the reason, there stops the rule.

[23] Certainly, Holmes was correct when he told us that "The life of law has not been logic; it has been experience." Although formal logic is one of the important means to the ends of law, formal logic is not the end itself. Professor Harry W. Jones has observed: "[T]he durability of a legal principle, its reliability as a source of guidance for the future, is determined far more by the principle's social utility, or lack of it, than by its verbal elegance or formal consistence with other legal precepts." But the statements of Holmes and Jones must not be taken out of context. They were stated as appeals that the law adjust to changing social conditions – that we should not be bound by rigid legal precepts that were once justified by good reasons but are no longer viable in a changing society. The appeals did not go unheeded. From what was once a rigid jurisprudence of conceptions fixed in a kind of jural cement has emerged a relatively new phenomenon in the American legal tradition.

[24] As the last century came to a close, Roscoe Pound decried excessive rigidity in American decision-making processes. He described our system at the time as one of conceptual jurisprudence, a slavish adherence to *elegantia juris*, the symmetry of law, and suggested that it too closely resembled the rigid German *Begriffssjurisprudenz*, which Rudolph Von Jhering styled as a jurisprudence of concepts. In his classic lecture, "The Causes of Popular Dissatisfaction with the Administration of Justice," Pound sounded a call for the end of mechanical jurisprudence: "The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules." He attacked blind adherence to precedents – and to the rules and principles derived therefrom – as "mechanical jurisprudence" and "slot machine justice." Pound advocated "pragmatism as a philosophy of law." He vigorously stated: "The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words."

[25] Pound was trumpeting a theme more softly played by Oliver Wendell Holmes a decade earlier – that the social consequences of a court's decision are legitimate considerations in decision-making. This is precisely what Professor Jones meant in 1974.

[26] If Roscoe Pound's 1908 warning against mechanical jurisprudence did not create a new American school of jurisprudence, at least it spawned widespread respectability for social utilitarianism. It added a new dimension to law's traditional

objectives of consistency, certainty and predictability – namely, a concern for society's welfare. A few years after Pound's warning, Cardozo delivered his classic 1921 Storrs lectures at Yale. He stated his theme: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence." A half century later, in many legal disciplines, the once desired objective of *elegantia juris* in legal precepts, institutions and procedures had become subordinated to the objective of social utility.

[27] In 1974, Professor Jones eloquently stated the new spirit of legal purpose: "A legal rule or a legal institution is a *good* rule or institution when – that is, to the extent that – it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."

[28] Typical of judicial utterances that had disturbed Holmes, Pound and Cardozo was one by the Maryland Court of Appeals in 1895: "Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results." In contrast, in the same year he delivered the Storrs Lecture at Yale, Cardozo seized the opportunity to put his theory into practice by publicly rejecting blind conceptual jurisprudence in *Hynes v. New York Central Railway Co.* A sixteen-year-old boy had been injured while using a crude springboard to dive into the Harlem River. The trial court had stated that if the youth had climbed on the springboard from the river before beginning his dive, the defendant landowner would have been held to the test of ordinary care, but because the boy had mounted the board from land owned by the defendant railroad company, the court held the defendant to the lower standard of care owed to a trespasser. Cardozo rejected this analysis, describing it as an "extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' The approximate and relative become the definite and absolute."

[29] Cardozo's opinion in *Hynes* is a prototype, and his classic lecture, "The Nature of the Judicial Process," an apologia, for decision-making based on sociologically-oriented judicial concepts of public policy. The philosophical underpinnings of what Cardozo described as the sociological method of jurisprudence ran counter to the widely held notion that public policy should be formulated and promulgated only by the legislative branch of government. When judges utilize this organon, laymen and lawyers label them "activists," "liberals," "loose constructionists" and a host of other epithets, gentle and otherwise. The debate continues today and will probably continue well into the future.

[30] But to recognize that formal logic is not an end in itself does not mean that logical form and logical reasoning have ever been subordinated in the judicial process. Certainly, in all but a few areas of static law, mechanical jurisprudence is more historical than operational. Yet the common-law tradition demands, indeed requires, respect for logical form in our reasoning. Without it we are denied justification for our court decisions. Adhering to logical form and avoiding fallacies, we repeat for emphasis, is only a means to the ends of justice, but logical form and avoiding fallacies are nonetheless critical tools of argument. They are the implements of persuasion. They form the imprimatur that gives legitimacy and respect to judicial decisions. They are the acid that washes away obfuscation and obscurity.

[31] Professor Edward H. Levi has offered a thoughtful analysis of our subject. He has outlined a basic pattern of legal reasoning and suggested the following characteristics:

The basic pattern is reasoning by example.

It is reasoning from case to case.

The process involves the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and applied to a similar situation.

The process involves three steps:

Similarity is seen between cases.

A rule of law is announced in the first case.

This rule of law is then made applicable to the second case.

[32] These three steps describe only one phase of legal reasoning – the process of analogy, which we will study in depth later.

[33] But there is more to logic in the law than analogy. Logic in the law involves the processes of both induction and deduction. To be sure, legal reasoning has some resemblance to the logic of mathematics, but in the common-law tradition, major premises are constantly undergoing change, or are susceptible to change, sometimes in minor detail and at other times as dramatic as a sea change. This is because judge-made law, in the sense of either creating precepts or interpreting statutes and regulations, is affected by the facts of particular cases, as well as by social and philosophical considerations. Professor Levi says that “this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning,

depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.”

[34] Although the applicability of a rule of law to a given case may often depend on the degree of analogy that can be drawn, the “dynamic quality” of law is affected by more than the presence of novel facts in new cases. Often more than one rule suggests itself as precedent; more than one principle arguably applies. Here, value judgments play a major part in the development of the common law.

### Notes and Questions.

1. Compare and contrast this excerpt from Judge Aldisert with the previous three excerpts. What do the three excerpts assert about legal reasoning, the role of the common-law judge, the process of common law development, *stare decisis*, and the difference between *ratio* and *obiter dicta*?
2. According to Judge Aldisert, what are the differences between the civil and common law traditions?
3. Do you agree with Judge Aldisert that “Logical reasoning lies at the heart of the common-law tradition” (paragraph 9). Why or why not?
4. Can you find any evidence from the cases in this chapter that contradict any of the claims made by Judge Aldisert? Is there any evidence that supports his claims?
5. Coincidentally, all four of the excerpts in this section are from American sources. Many students fail to realise that the United States, like Singapore, was a colony of Britain throughout much of the 17<sup>th</sup> and 18<sup>th</sup> centuries. Hence, like other former British colonies, the United States inherited the common law system, rather than that of the civil law. (See paragraph 5 in the Aldisert excerpt above) Although there are (unsurprisingly) differences in the legal systems of the various common law countries of the world, the general method of common law reasoning and development is not fundamentally dissimilar. America has a great tradition of robust and critical thinking about judicial process and legal reasoning. But you may want to consider whether the positions taken in any of the four excerpts apply perfectly to the Singapore context. Is there something about the nature of Singaporean case law that makes Singaporean “legal reasoning” or Singaporean “case law development” unique? If so, what? In considering this issue, you may want to review Professor Andrew Phang’s article in the Introduction, and particularly paragraph 8.