8. The grounds on which Kinsella, J. in *Lund's Case*[89] sought to distinguish *Re Dulles*[90] are tenuous.

9. The judgments of the New South Wales Full Court upholding Kinsella, J.'s decision at first instance perhaps inadequately consider the private international law aspects of the effects of a defendant's appearance before a foreign court.

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NEW BOUNDARIES FOR DONOGHUE v. STEVENSON
ANDREWS v. HOPKINSON
RIDEN v. A. C. BILLINGS & SONS LTD.

Two recent English decisions illustrate judicial approval of new rules of liability fathered by the principle in *Donoghue* v. *Stevenson*[1] at the expense of old rules of immunity.

Though he decided the case primarily in contract the trial judge, McNair, J., in *Andrews* v. *Hopkinson*[2] was prepared to extend the duty of care formulated in *Donoghue* v. *Stevenson* to the vendor of a defective chattel who had done nothing active to make the chattel defective. The facts were that a servant of a second-hand car dealer, the defendant in the case, assured the plaintiff that a small 1934 saloon car was a "good little bus" upon which "he would stake his life". Consequently the plaintiff paid a small deposit and secured the balance by way of hire-purchase agreement after having first acknowledged in a delivery note that he was satisfied with the car's condition. Due to defective steering mechanism rendering the car unsafe for use on a highway, the car collided with a lorry and the plaintiff thereby suffered serious injury. McNair, J. found as a fact that the defective condition of the car causing the collision could have been easily discovered by any competent mechanic and further that any motor dealer should have appreciated that in a car of the kind sold to the plaintiff the steering mechanism was one of the most likely places to find excessive and dangerous wear. He held that:

1. The words spoken by the defendant's servant cited above amounted to a warranty of fitness and the plaintiff could recover on the contract with the defendant, concluded by his accepting delivery and entering into a hire-purchase agreement. His Honour thus called on the device used in *Routledge* v. *McKay*[3] for escaping the difficulty created by the fact that a hire-purchase transaction is normally not between dealer and purchaser but between finance company and purchaser.

2. The plaintiff's injuries were a direct and natural result of the breach of the warranty and damages were recoverable in respect of those injuries.

3. The defendant was also liable in tort to the plaintiff for his servant's negligence which lay in delivering to the plaintiff a motor car with a dangerous defect discoverable by reasonable diligence and in failing either to have the car examined by a competent mechanic prior to sale or to warn the plaintiff that it had not been so examined.

The finding of liability in tort was not essential to the decision but the principle accepted by McNair, J. may yet prove to be of considerable significance. Here it would seem is the first case in English law where the duty of care formulated in *Donoghue* v. *Stevenson* has been imposed on the vendor in a combination of circumstances where—

(a) the chattel was not dangerous *per se;*

(b) the vendor did nothing active to make or change the defective chattel. Thus we may distinguish the cases of similar liability imposed on manu-

[89] *Cf. supra* n.1. [90] (1951) Ch. 842.
[1] (1932) A.C. 562. [2] (1956) 3 All E.R. 422 (Q.B.).
[3] (1954) 1 All E.R. 855 (C.A.).

facturers, repairers and assemblers who do something active to make the chattel defective; and

(c) the vendor did not know of the defect in the chattel..

His Honour purported to rely on *Herschtal* v. *Stewart and Ardern*[4] where Tucker, J. held that the defendant motor car dealers were liable in damages for personal injuries suffered by the plaintiff when a wheel came off his car which the defendants had just re-conditioned. However, the latter case hardly justifies the novel principle because there the defendants did something active towards creating the dangerous defect, namely re-conditioning the vehicle, whereas there was no such activity on the part of the defendant in *Andrews* v. *Hopkinson*. So also for further example one may recall in *George* v. *Skivington*[5] the defendant chemist himself compounded the defective hairwash. It remains to be seen whether the principle on which McNair, J. relied will win judicial approval and if so what will be the measure of that approval. Exactly what relationship of proximity between defendant and purchaser will become necessary ? And if the vendor is to be held liable on this new principle, may it not be argued that a donor or bailor of a defective chattel may be found similarly liable ?

The other recent English decision illustrating the continuing fertility of *Donoghue* v. *Stevenson* is *Riden* v. *A. C. Billings & Sons Ltd.*[6] The respondent contractors were engaged in constructing a front approach to the house of a Government Department in which a caretaker and his wife resided. The respondents obstructed the normal approach to the house and accordingly suggested to the caretaker's wife an alternative route involving danger to its users. The plaintiff visited the caretaker and when leaving the premises suffered injury using the dangerous route. Denning and Birkett, L.JJ. (Roxburgh, L. J. dissenting) held that the respondents as contractors doing work on the premises were under a duty to use reasonable care to prevent damage to persons whom they might reasonably expect to be affected by their work, and that they had failed in such duty as regards the plaintiff.[7]

In reaching his decision Denning, L.J. (with whom Birkett L.J. agreed) took the case out of the scope of occupier's liability for dangerous premises and decided that where a defendant actively interferes with the condition of premises he may incur liability on an extension of the *Donoghue* principle in respect of a danger "reasonably foreseeable". He offered his now familiar explanation of the case of *London Graving Dock* v. *Horton*[8] that the latter was decided on the ground that the plaintiff, as regards the defendant occupier, was free to accept, and did accept, the risk. Whether this is a justifiable explanation of *London Graving Dock* v. *Horton* may be doubted but the set of judicial opinion obviously favours similar treatment. The Lord Justice could of course have distinguished *London Graving Dock* v. *Horton* on the basis that the latter case was concerned with occupier's liability whereas the Defendants in the present case were not the occupiers of the dangerous property. One would have thought that the duty of a non-occupier could not be higher than that of an occupier, but consistency must suffer when the judiciary determine to seal off inconvenient authority.

Ball v. *London County Council*[9] had also to be overcome. Denning L.J. impugned its authority by stating that that case was based on *Malone* v. *Laskey*[10] which in turn was inconsistent with *Donoghue* v. *Stevenson* because it propounded the principle of no liability in tort outside contractual relationship. No doubt it is desirable to dispose of *Ball* v. *London County Council* if possible; but it must be conceded that the Court of Appeal therein relied on *Malone* v. *Laskey*, not for the principle rejected in *Donoghue* v. *Stevenson*, but

[4] (1940) 1 K.B. 155.
[5] (1869) L.R. 5 Ex.1.
[6] (1957) 1 Q.B. 46.
[7] Subject to the question of contributory negligence.
[8] (1951) A.C. 737.
[9] (1949) 2 K.B. 150.
[10] (1907) 2 K.B. 141.

for the principle that where a defendant who is not an occupier makes realty or fixtures to realty dangerous he will only incur liability if he makes the premises "inherently dangerous".

It would therefore seem that the *Donoghue* v. *Stevenson* principle has invaded the field of liability for dangerous premises, and the decisions in *Buckland* v. *Guildford*[11] and *Davis* v. *St. Mary's Demolition*[12] have been confirmed. But it is still a matter of doubt whether the principle will be admitted where the defendant is unquestionably the occupier of the dangerous premises. In *Thompson* v. *Bankstown Corporation*[13] it was held by the High Court that against an occupier of realty the plaintiff may allege breach of the *Donoghue* v. *Stevenson* principle of liability; yet in *Lewis* v. *Sydney Flour Pty. Ltd.*[14] such a plea was rejected by the N.S.W. Full Court. The "contemporaneous acts" idea adopted in *Dunster* v. *Abbott*[15] for excluding the law of occupier's liability is not always available and would not have been available in *Riden* v. *A. C. Billings & Sons Ltd.* had the respondents been occupiers. The idea of "active creation" suggested by the latter case may prove a better guide to the courts — it could ground a principle that where the defendant has actively created the danger the occupier's tortious liability is irrelevant, its relevance being confined to non-feasance situations. But if this idea is to prevail such authorities as *London Graving Dock* v. *Horton* must go, since in the latter case for instance it is apparent that the Defendant "actively created" the danger. *L. CONTI, Case Editor — Third Year Student.*

FORMALITIES OF MARRIAGE WHERE COMPLIANCE WITH THE *LEX LOCI CELEBRATIONIS* IS IMPOSSIBLE

TACZANOWSKA v. *TACZANOWSKI AND RELATED RECENT CASES*

The recent decision of the English Court of Appeal in *Taczanowska* v. *Taczanowski*[1] raises the interesting question of what law is to be applied by a British court to determine the formal validity of a marriage between non-British subjects in a case where compliance with the *lex loci celebrationis* (the general requirement of formal validity) has been found to be impossible. It appears to have been clearly established that where the parties to such a marriage are British, or at least one of them is, then provided the ceremony complies with the requirements of the common law of England (or the common law insofar as it is suited to local conditions in certain cases) it will be held valid by a British court.[2] What has not come up for decision until the the last few years, however, is the problem which arises where this type of marriage is celebrated between foreigners. Cases of impossibility of compliance with the *lex loci celebrationis* have been said to arise in three different ways all of which were examined and discussed by the Court of Appeal in *Taczanowska* v. *Taczanowski*.[3] They are as follows:—

1. Where there is no local form of marriage in the Christian sense or in the sense "recognised by civilised States"[4] in the country where the marriage takes place.
2. Where a Christian form of marriage does exist but the facilities required to conform to it are non-existent.
3. Where a local form of a Christian nature exists, and can be complied with, but special circumstances render it inapplicable.

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[11] (1948) 2 All E.R. 1086 (K.B.).
[12] (1954) 1 All E.R. 578 (Q.B.).
[13] (1953) 89 C.L.R. 619.
[14] (1956) S.R. (N.S.W.) 189.
[15] (1954) 1 W.L.R. 58.
[1] (1957) 3 W.L.R. 141.
[2] See *Dalrymple* v. *Dalrymple* (1811) 2 Hag. Con. 54; *Lautour* v. *Teesdale* (1816) 8 Taunt. 830; *Phillips* v. *Phillips* (1921) 38 T.L.R. 150.
[3] (1957) 3 W.L.R. 141.
[4] A.V. Dicey, *The Conflict of Laws* (6 ed. 1949) 769.