ERRATUM

The correct title of this article is

SOME ASPECTS OF THE EMPLOYEE'S COMMON LAW REMEDY

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INTRODUCTION

Despite the almost universal provision in Anglo-American legal systems for workmen's compensation, the common law action for damages remains popular among employees. English judges have commented on the crowding of the court lists by such cases,[1] and Birkett L.J. has referred to *Wilsons & Clyde Coal Co. v. English* as "perhaps the most quoted case in the courts today".[2] The English workman's preference is in this respect shared by his Australian counterpart for, as Professor Heuston has observed, common law actions against the employer "are now apparently arising in Australia with almost the same frequency as in England".[3] The main reason for this preference, of course, is the higher level of compensation generally obtainable at common law,[4] but much responsibility for the current spate of common law actions must also be attributed to the indulgent attitude shown by the courts towards employees.

In resisting the trend towards workmen's compensation legislation in the early part of this century, Professor Jeremiah Smith pointed to the inconsistent results reached when both an employee and an outsider were injured by the same accident, and commented that these inconsistencies were "due to the fact that the rule of liability adopted by the [workmen's

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1 E.g., Hilbery J. in *McLeod v. Bauer* (1951) 85 Ll. L. Rep. 125, 126; *cf.* Street, *The Law of Torts* (1955) 212: "there are now more High Court actions connected with this topic than any other"; and *cf.* Salmond, *Torts* (11th ed., 1953) 131. In 1945 Dr. Stallybrass predicted that if the doctrine of common employment were abolished, "a spate of 'gold-digging' actions would flood the Courts, in which plaintiffs would endeavour to obtain from a compassionate jury higher damages than those obtained under the [Workmen's Compensation] Acts": Salmond, *Torts* (10th ed.) 110.

2 *M.L.R.*, 15 (1952) 277, 279.

3 *Melbourne U.L.R.*, 2 (1959) 35, 40. Of course, to speak of all the states of Australia in one breath is in this context to mislead. Tasmania, with its traditional trilogy of tourism, wool and apples, does not occupy a very important place in this development. Nearly three-quarters of Australia's factories are located in Victoria and N.S.W., while Tasmania has only 3% of the total. Moreover, less than 50% of these Tasmanian factories have more than four employees. (*Official Year Book of the Commonwealth of Australia* (1959) No. 45) pp. 154-5—figures for fiscal 1956-7). These figures roughly reflect the respective proportions of employee-employer litigation in the various states.

4 Street, *The Law of Torts*, p. 212, n. 5; Salmond, *Torts* (11th ed.) 131. Munkman gives examples of recent awards in an appendix to his *Employers' Liability at Common Law* (4th ed.).

compensation] statute (liability for damage irrespective of fault) is in direct conflict with the fundamental rule of the modern common law as to the ordinary requisites of a tort".[5] Professor Smith went on to predict that these inconsistencies would "not be permitted to continue permanently without protest",[6] and that the new legislation would lead to agitation for the abolition of fault doctrines generally.

To a large extent these gloomy forebodings have come true. In the United States, where the statutory remedy — in the areas in which it operates — is exclusive, criticism has been levelled at the rare remnant areas of employer's liability where reasonable care remains the appropriate standard: "To apply the concepts of 'negligence' and 'proximate cause' to the infinite complexities of modern industry is like catching butterflies without a net".[7] In England and Australia, where butterflies are caught both with and without nets, the coexistence of strict liability seems to have had an errosive effect on fault standards,[8] which has prompted some judges to reassert the need to prove fault in common law actions. In England, Lord Tucker has said:

> ". . . it appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations upon employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations".[9]

while in Australia, Fullagar J. has expressed the belief

> "that the courts have gone too far, and that there are reported decisions which it is impossible really to justify on the footing that the ultimate basis of liability in such cases is negligence".[10]

The truth is probably not so much that workmen's compensation legislation has caused a relaxation of standards — although, by accustoming people to the idea of compensation as a first charge on industry, it may have produced a climate in which such a result would be more easily reached — as that the legislation reflects a change in ideology which is a common factor behind both developments. Jeremiah Smith, individualist that he was, spoke for the nineteenth century, to which he was closer in spirit than the present, when he deplored the growth of

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5 *Harvard L.R.*, 27 (1914) 235, 238-9.

6 *Ibid.*, 344, 363.

7 *Carter v. Atlanta and St. A.B.R.Co.* (1949) 338 U.S. 430, 437-8, *per* Frankfurter J. (These concepts are applied, under the U.S. Federal Employers' Liability Act, to injuries sustained by employees of railroads engaged in interstate commerce).

8 Although this process has not been confined to employers' liability; see generally Ehrenzweig, *Negligence Without Fault* (1951) *passim*; Fleming, *Torts* (1957) ch. 13, and the sources cited therein at p. 309, n. 12.

9 *Latimer v. A.E.C. Ltd.* [1953] A.C. 643, 658; *cf. infra,* nn. 71-73; and *cf.* the emphasis which runs through all the speeches in the House of Lords in *Davie v. New Merton Board Mills Ltd.* [1959] 2 W.L.R. 331. The comment of Lord Macmillan in *Young v. Bristol Aeroplane Co. Ltd.* is similar in the sense that it criticises the developing judicial sympathy for employees. [1946] A.C. 163, 177-8.

10 *Hamilton v. Nuroof (W.A.) Pty. Ltd.*, (1956) 96 C.L.R. 18, 33.

workmen's compensation systems and the concomitant decline of fault liability.[11] The difference in attitude between the nineteenth and twentieth centuries is reflected in judicial observations. While the doctrine of common employment was frequently eulogised in the earlier century,[12] it became the object of universal disapproval during this century.[13]

Thus viewed, the improved position of the workman may be regarded as another example of the phenomenon of the law being adapted to conform to the changing needs and attitudes of society.[14]

In addition, the judges responsible for this amelioration have probably been influenced partly by the realisation that legal decisions in this area may play a particularly important part in elevating the standards of industry. The law of torts is probably not very effective as a deterrent when it deals with casual acts of inadvertent negligence on the part of individuals,[15] but when a whole industry may be affected by a decision, it would seem to gain considerably in effectiveness.[16] This suggestion is supported by the fact that cases involving large groups are often

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11 "Professor Smith had done his creative work during the last part of the nineteenth century, and he had been a contemporary witness of the final triumph of the moral element in tort law . . . Professor Smith, true to the individualistic temper of his time, deplored the compensation movement . . ." Malone in *Louisiana L.R.*, 12 (1952) 231, at pp. 231 and 234.

12 Pollock C.B., for example, expressed the belief that "there was never a more useful decision or one of greater practical and social importance in the whole history of the law [than *Priestley v. Fowler*]": *Vose v. Lancashire and Yorkshire Rail Co.*, (1858) 27 L.J. Exch. 249, 252.

13 Lord Atkin expressed the general feeling when he observed that "there are none to praise, and very few to love" the doctrine: *Radcliffe v. Ribble Motor Services Ltd.*, [1939] A.C. 215, 223; *cf.* Kenny, *Select Cases on Torts*, 90: "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase". And *cf.* MacKinnon L.J., "It is a doctrine which lawyers who are gentlemen have long disliked": *Speed v. Thos. Swift and Co.* [1943] K.B. 557, 569.

14 *Cf.* Croom-Johnson J. in *Best v. Fox* [1950] 2 All E.R. 798, 800: "The law of England is a living law. It develops, and must develop, according to the changes in the social life and social outlook". *Cf.* Black J., speaking of the allied question of assumption of risk, in *Tiller v. Atlantic Coast Line R.Co.* (1942) 318 U.S. 54, 58-60: "Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry . . . In the pursuit of its general objective the common law took many forms and developed many doctrines. . . ."

15 *Cf.* Glanville Williams in *Current Legal Problems*, 4 (1951) 137 [n. 29]; C. A. Wright in *Can. B.R.*, 26 (1948) 46, at p. 46.

16 There seem to be two main reasons for this:

(a) pressure towards accident prevention is best applied to large groups, which stand to lose economically from frequent adverse litigation, and which are in a strategic position to institute effective disciplinary techniques (*cf.* 2 Harper and James, *Torts* (1956) 756).

(b) tort decisions are more effective deterrents where large units are concerned, since one reason for the normal ineffectiveness of the law of tort is the "lack of adequate publicity" of its decisions and doctrines (*cf.* Glanville Williams, *op. cit., supra,* n. 15, at n. 29), whereas the outcome of cases affecting large groups is usually awaited with keen interest by those groups. (The less stringent tort doctrines applicable to children are occasionally attributed to the same "lack of adequate publicity").

regarded as test cases.[17] It is here *par excellence* that the law's function of social engineering is successful.

Furthermore, the economics of the situation make it highly desirable for the law to intervene with its sanctions. The financial interest of the employer may run counter to his obligation to take care for his employee's safety,[18] so that, if the industry is competitive, he may be led to ignore precautions in order to be able to market his products at competitive prices. On the other hand, if the law by imposing liability induces one employer to take a certain precaution or otherwise change his conduct, all the other manufacturers will be forced to conform. The importance of economic considerations, and the need for a standard rule applicable to all members of an industry is demonstrated by the following revealing exchanges between counsel for plaintiff and two executive members of the defendant company in a leading case on the subject:

Q: Do you ever consider the provision of ladders for your men, for such windows where there are no hooks for safety?

Mr. O'Gorman: Not unless they are all windows which require the use of ladders. With an ordinary window with what is a reasonably safe sill to stand on, we allow him to clean it in that fashion.

Q: On that view, it is possible to send a lorry with two or three ladders and cleaners for each ladder.

Mr. Mahoney: Yes, but we would not get a job.

Q: Why not?

Mr. Mahoney: We would have to price our job according to whether long or short ladders. . . .

Q: Would you agree that it would be much safer on a high building to clean the windows by ladder than by putting men up on the sills with no safety belts and no hooks?

Mr. Mahoney: I agree, but we do not price for a job with long ladders if it is not necessary. If the windows call for long ladders all our competitors . . .[19]

There is another reason why it is desirable that courts should utilise their opportunities to influence industrial standards. Workmen in familiar repetitive situations often become careless of their own safety. This makes it especially desirable that employers should exercise constant

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17 *E.g., General Cleaning Contractors Ltd. v. Christmas* [1953] A.C. 180, see *per* Lord Reid at p. 193: "I would not think it proper or fair to the appellants to consider this case were it not for the fact that the appellants' counsel in effect asked us to treat the case as a test case and enlighten employers in the trade as to their duty . . ."

18 *Cf.* Morris in *Col. L.R.*, 42 (1942) 1147, 1155: "We can ill-afford to let those whose interest may run counter to paying the bill for sufficient, and sometimes expensive, safeguards escape liability because all of them are guilty of the same shortcomings . . ." On the other hand the cost of safety devices will often be justified even on a purely economic basis, since such devices usually increase production, by reducing time lost through accidents, by minimising unfavourable employee attitudes, by reducing fatigue, and by reducing replacements by inexperienced employees. See N. R. F. Maier, *Psychology in Industry*, at pp. 329, 338 and 362 respectively. But sometimes management must be educated to take steps which are really in its own interest.

19 See *General Cleaning Contractors Ltd. v. Christmas* [1953] A.C. 180, 195-6.

vigilance for the safety of their employees—by instructions, encouragement to use safety devices provided, and the institution of safe systems of work—and the law should add its authority to this moral obligation. This has been well put by Lord Oaksey in the *General Cleaning* case:[20]

> "In my opinion, it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition".

On the other hand, of course, there are some situations where it is desirable to leave decisions to the man on the job,[21] and courts have shown that they are sensitive to such considerations. In fact, it was Lord Oaksey who three years earlier had observed that "a good leader of men (and an employer is a leader of men) leaves to his men as much discretion as he can, otherwise unforeseen circumstances will upset the best laid plan".[22]

Indeed, when the cases are considered[23] it will be seen that, in striking a delicate balance between requiring employers to "assume the functions of a matron or grandmother"[24] on the one hand, and condoning lax supervision on the other, the courts have proved themselves not unworthy of their responsibility.

Again, the law can assist in the elevation of standards by buttressing the practice of keeping abreast of latest developments and knowledge. In sustaining an action for negligence, a plaintiff must prove both tendency to cause harm[25] and reasonable foreseeability of this tendency.[26] *Bolton v. Stone*[27] is an example of a case in which the plaintiff failed because he could not satisfy the court about the anterior question of

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20 *Ibid.*, 189-190; *cf. ibid*, 194, *per* Lord Reid: "It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do and to supply any implements that may be required such as, in this case, wedges or objects to be put on the window sill to prevent the window from closing . . ."

21 *Cf.* Maier, *Psychology in Industry*, 91 ff.

22 *Winter v. Cardiff R.D.C.* [1950] 1 All E.R. 819, 823.

23 See *infra*, part III.

24 See *infra*, n. 71.

25 *Bolton v. Stone* [1951] A.C. 850.

26 *Roe v. M.O.H.* [1954] 2 Q.B. 66.

27 [1951] A.C. 850.

intrinsic danger, but even if the conduct in question was in fact dangerous, a plaintiff will fail unless he can show either that the defendant knew, or that he ought to have known, of the danger.[28] The latter phrase is the important one in the present context. It is at this point that evidence of current research and developments becomes relevant. If the defendant has not made any reasonable attempt to keep pace with new developments in the industry—assuming causation—the court will easily find that the defendant ought to have known of the danger latent in his conduct:

> "In my judgment an employer is not entitled to wait until the matter as forcibly brought to his attention either by an outbreak of disease in his factory or something of that sort. I think that under modern conditions something more is required and would be accepted by reasonably good employers as being required. An employer must take reasonable steps to keep his knowledge on the matter up to date. I do not think that this includes, except perhaps in exceptional cases, making independent researches of his own, but he must not allow himself to fall behind the standard which is adopted by reasonably good employers in the industry".[29]

It is proposed in the remainder of this article: (1) to examine the history of the law relating to the employer's obligation to provide for his employee's safety; (2) to consider the cases in the sensitive area of industrial relationships concerning the need to provide safety devices and to issue instructions; (3) to examine the cases involving the employer's responsibility where work is done on outside premises; and (4) to consider to what extent the employer will be liable for the acts of persons not his servants. These topics are selected not for reasons of logical relationship, but because the general area is a large one and cannot be canvassed in any detail within the space available. They have the virtue of being topical and, it is also believed, present in sharp focus the delicacy of the problems involved.

II

> "In England for the 100 years between the decision in *Priestley v. Fowler* and the abolition of the doctrine of common employment the determination to avert, or at least reduce, the consequences of that decision led to a great deal of artificiality and refinement which would have been otherwise unnecessary. The shadow of it is still upon us".[30]

The doctrine of common employment is generally said to have originated in 1837 with *Priestley v. Fowler*.[31] In fact, that case does not seem to involve the question of a master's vicarious liability for the negligence of one servant to another, since the declaration suggests that the overloading

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28 *Cf.* case cited *supra*, n. 26.

29 *Graham v. Co-op. Wholesale Soc. Ltd.* [1957] 1 All E.R. 654, 656, *per* Devlin J.

30 *Davie v. New Merton Board Mills Ltd.* [1959] 2 W.L.R. 331, 335-6, *per* Viscount Simonds.

31 (1837) 3 M. & W. 1. Holdsworth seems even to imply that the facts did present a question of vicarious liability: *History of English Law*, vol. i, viii, p. 480.

complained of had been effected by the master himself.[32] The plaintiff, a butcher's assistant, alleged that he had been injured by the collapse of a van he was driving, as a result of it being overloaded. The judgment obtained in a lower court in the plaintiff's favour was set aside by the Court of Exchequer. Consistently with his generally conservative outlook,[33] Lord Abinger C.B. emphasised the calamitous results and widespread liability which would follow from a decision in the plaintiff's favour:

> "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker, or from a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins".[34]

In addition, Lord Abinger pointed to the servant's better opportunity to know of the risk involved, and concluded with the observation that a decision in the plaintiff's favour would encourage the servant to omit the diligence to protect the master from the negligence of his fellow servants. Lord Abinger considered this "a much better security against any injury the servant may sustain by the negligence of others engaged under the

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32 "Nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded . . ." (3 M. & W. 1, 2). It seems clear then that any foundation for the doctrine of common employment must have been laid by way of dicta only; *cf.* Fleming, *Torts* (1957) 488, n. 11: ". . . The so-called defence of common employment was only a by-blow of that decision".

33 *Cf.* his equally pessimistic (and equally unfortunate) comment in *Winterbottom v. Wright* (1842) 10 M. & W. 109, 114: "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". And *cf.* the similar conclusions: "the absurdity of these consequences . . ." (3 M. & W. 1, 6,) and "the most absurd and outrageous consequences, to which I can see no limit. . . ." (10 M. & W. 109, 114).

34 3 M. & W. 1, 5-6. "These instances seem to show personal apprehensions rather than any principle . . ." *per* Lord Wright, *Radcliffe v. Ribble Motor Services Ltd.* [1939] A.C. 215, 239. For a contrary view, see Pound in *Harvard L.R.*, 53 (1940) 365, 373 ff.

same master, than any recourse against his master for damages could possibly afford".[35]

Whatever the weight—as a precedent—the decision may have carried, the reasoning of Lord Abinger was clearly endorsed and made part of the *ratio* in *Hutchinson v. York Newcastle & Berwick Co.*[36] by Alderson B.,[37] and the final seal of approval was supplied in 1858 by the House of Lords in the *Bartonshill* cases.[38]

The reporter's comment on the latter cases, that the accident,"though melancholy", had settled the law,[39] proved subsequently to be unduly optimistic; eighty years later the House of Lords and the Court of Appeal disagreed about the true operation of the doctrine.[40]

Uncertainty in application[41] was not the worst feature of the doctrine. Many other criticisms were from time to time levelled at the rule, such as the comment that it was stated "with little regard to reality or to modern ideas of economics or industrial conditions".[42] Altogether the doctrine was quite unpopular,[43] and it has now been universally abolished.[44]

The purpose of this brief historical survey is to explain many of the nice dialectical refinements in this area of the law.[45] These were conceived in order "to avert, or at least reduce, the consequences of"[46] the unpopular common employment doctrine, and have now been rendered redundant by the Law Reform Act, and cognate legislation. The question remains: What are we to do with this doctrinal legacy? Should we forget all about the *Wilsons & Clyde* decision and the elaborate trilogy of duties erected by the common law judges? Or can they still be utilised?

Some textbook writers[47] and judges[48] have expressed the former view, that with the abolition of the doctrine we are back to the pristine

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35 *Ibid.*, 7.

36 (1850) 5 Exch. 343.

37 Hence Dr. Kenny's comment, *supra*, n. 13.

38 See *Bartonshill Coal Co. v. Reid* (1858) 3 Macq., 266; *Bartonshill Coal Co. v. McGuire* (1858) 3 Macq. 300.

39 3 Macq. 301 n. Quoted in Lord Thankerton's speech in *Wilsons and Clyde Coal Co. v. English* [1938] A.C. 57, 74.

40 In *Radcliffe v. Ribble Motor Services Ltd.* [1939] A.C. 215.

41 "Since [the *Bartonshill* cases] various opinions have been expressed by the Courts as to the definition of the 'common work'. I strongly suspect that one cause of the difficulty has been the unsatisfactory statement of any principle on which the rule is founded . . ." *Radcliffe v. Ribble etc.* [1939] A.C. 215, 229, *per* Lord Atkin.

42 *Wilsons and Clyde Coal Co. v. English* [1938] A.C. 57, 80, *per* Lord Wright.

43 See *supra*, n. 13; *cf.* Salmond, *Torts* (10th ed.) 109. Its abolition in England was "noted with relief" by Unger, see *M.L.R.*, 12 (1949) 347.

44 Law Reform (Personal Injuries) Act, 1948 (1(1) (England); N.S.W. Workers' Compensation Act, 1926, S.65; N.Z. Law Reform Act, 1936, S. 18; Tas. Employers' Liability Act, 1943; S.A. Wrongs Act, 1936-51, S. 30 (introduced in 1944); Vic. Employers and Employees Act, 1945; Qld. Law Reform Act, 1951; W.A. Law Reform (Common Employment) Act, 1951; A.C.T. Law Reform (M.P.) Ordinance, 1955, S. 21.

45 *Cf. supra*, n. 30.

46 *Ibid. Cf. per* Viscount Simon in *Bristol Aeroplane Co. v. Franklin* [1948] W.N. 341, 342; and *cf.* Goodhart in *L.Q.R.*, 74 (1958) 397, 399, n. 7.

47 Eng., Salmond, *Torts* (11th ed.) 131.

48 See *infra*, nn. 49, 50, and *cf.* Pearce L.J. in the case cited *infra*, n. 50, 271.

question of reasonable care uncluttered by any judicial refinements. A representative expression of this view in Australia is the following statement of the High Court.

> "The defence of common employment has been abolished by statute (*Law Reform (Common Employment) Act*, 1951 (No. 29) (W.A.)) and there is no longer any point in the distinction between on the one hand the liability of an employer if reasonable care is not exercised to establish and maintain a safe system of work whether it is his failure to exercise due care or that of a servant to whom he has delegated fulfilment of the responsibility, and on the other hand the vicarious liability which formerly he did not, but which he now does, incur for the casual acts of negligence of a fellow servant, although in superintendence of the operations . . ." [49]

In England, Parker L.J. expressed a similar view when he said:

> "It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but I prefer to consider the master's duty as one applicable in all the circumstances, namely, to take reasonable care for the safety of his men . . ." [50]

It is submitted, however, that we should not abandon all the learning which has accumulated around the doctrine of common employment. Much of it is still useful. The obligation to institute a safe system of working is still useful in that it serves to emphasise the fact that an employer may be liable in circumstances where it is difficult or impossible to predicate negligence on the part of any individual. In relation to the obligation to exercise care in the choice of employees, the employer may still be liable quite independently of his vicarious liability. Let us consider each of those obligations.

Concerning the obligation to inaugurate a safe system of work, it must at once be conceded that the historical importance of this duty lay in the attempt to curtail the operation of the doctrine of common employment. It is clear that there are cases in the reports[51] which would be decided differently since that doctrine has been abolished. But it is still proper to observe that room is left for the application of the propositions developed in the cases decided prior to its abolition. There still remain cases such as *Smith v. Baker & Sons*,[52] *General Cleaning Contractors v. Christmas*,[53] *Wilsons & Clyde Coal Co. v. English*[54] where such propositions serve as a useful reminder that an employer may be liable even though one cannot

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[49] *Hamilton v. Nuroof (W.A.) Pty. Ltd.* (1956) 96 C.L.R. 18, 25, *per* Dixon C.J. and Kitto J.

[50] *Wilson v. Tyneside Window Cleaning Co.* [1958] 2 All E.R. 265, 272-3.

[51] *E.g., Colfar v. Coggins and Griffith (Liverpool) Ltd.* [1945] A.C. 197; *Winter v. Cardiff R.D.C.* [1950] 1 All E.R. 819.

[52] [1891] A.C. 325.

[53] [1953] A.C. 180.

[54] [1938] A.C. 57.

predicate negligence on the part of any single employee. The point has been well put by Professor Street:

> "It is true that, since that [Law Reform] Act abolishes the defence of common employment, this strict marking off of personal duty has become less important in circumstances where the plaintiff can in any event prove fault by a fellow-servant. Yet, it would be misleading to state that the distinction can now be ignored; for there will still be many cases where the employer is in breach of his personal duty and yet no employee is at fault; further, the distinction remains the basis of judicial thinking on the subject, and the development and implications of the cases cannot be understood if this is not grasped".[55]

As for the obligation to provide competent staff, the Law Reform legislation has minimised the importance of this obligation by extending the principle of vicarious liability to many cases which formerly could only be brought as cases in which the employer had failed to exercise care in selecting competent staff. There nevertheless remain some cases not covered by this extension and which, therefore, must still be framed in the old way. *Hudson v. Ridge Manufacturing Co. Ltd.*[56] is a good example. The plaintiff was injured as the result of a prank played on him by a fellow employee notorious for his habit of indulging in horseplay. The conduct in question was obviously not such as to attract vicarious liability, since it was not performed in the course of employment.[57] The employers were nevertheless held liable on the basis of their failure to provide competent workmen — they should have dismissed the practical joker on becoming aware of his idiosyncracies.[58] Munkman[59] gives, as another example of a situation in which the duty to provide competent staff may still be important, that of a skilled and properly qualified employee who, using reasonable care, has been wrongly assigned by his employer to a job for which he is through lack of experience unfitted.

Cases such as the *Hudson* case and those mentioned in an earlier paragraph[60] demonstrate the inaccuracy as a universal proposition of the

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55 *Law of Torts*, 213. *Cf.* Munkman, who after quoting from Viscount Simon's speech in *Bristol Aeroplane Co. v. Franklin* [1948] W.N. 341, points out that "later cases have shown [that] 'safe system' is a great deal more than a gloss on common employment, it is a substantive duty of fundamental importance". See his *Employer's Liability* (2nd ed., 1952) 86, n. 1. Another reason for preserving the common law doctrines on this obligation is the possibility of an employer being held liable for the acts of a person not technically classifiable as his servant—as to which see *infra*, part V.

56 [1957] 2 All E.R. 229.

57 *Cf. Smith v. Crossley Bros. Ltd.* (1951) 95 Sol. Jo. 655 (cited in the *Hudson* case). In the *Hudson* case, counsel for the plaintiff "did not contend that the employers were vicariously liable for any negligent act of a fellow servant" [1957] 2 All E.R. 229, 230), and it seems clear that the employee was acting "on a frolic of his own".

58 At least the employee should have been dismissed when the attempt to discipline him proved unsuccessful: "In my judgment, therefore, the injury was sustained as a result of the employer's failure to take proper steps to put an end to that conduct, to see that it would not happen again and, if it did happen again, to remove the source of it." [1957] 2 All E.R. 229, 231, *per* Streatfield J.

59 *Op. cit.*, p. 84, citing as an illustration *Butler v. Fife Coal Co.* [1912] A.C. 149.

60 See nn. 52-54.

statement that "there is no longer *any* point"[61] in drawing a distinction between vicarious liability and the employer's failure to perform a personal obligation. In the *Hamilton* case the High Court of Australia doubtless had in mind cases such as the one before it, of which it is correct to say that such a distinction is not crucial, since the employer will be liable on either basis. But it is more accurate to say that the obligation to provide competent staff "has lost much of its former importance",[62] than that its importance has been completely destroyed.

III

> "A psychological problem arises when men are required to use safety devices, for many men like to do the job in the old way and fear that they may appear to be timid if they seem afraid to take chances. They feel that the gadget slows production, and that they are experienced enough to get along without the safety accessory. Because of such reactions, men must be educated to respect safety methods . . ." [63]

There are some occupations in which the employer has in constant use in his factory a material which is dangerous to the workmen unless some precautionary measure is taken. Examples are synthetic glue, involving the risk of dermatitis,[64] molten metal carrying with it the risk of severe burning, [65] dust given off in moulding processes—with the attendant risk of silicosis,[66] and chips of metal thrown out in hammering, grinding and chiselling work involving the risk of damage to the eye.[67] The appropriate preventive measures in such cases are, respectively, the use of gloves or barrier cream, the wearing of spats or special boots, the wearing of masks, and the use of goggles.

The basic duty resting on the employer is, of course, that stated in the familiar language of Lord Herschell:

> "the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk".[68]

The question which arises, however, is, what does the exercise of reasonable care require the employer to do in the above-mentioned type of case? In *Paris v. Stepney B.C.*[69] it was assumed that the mere *provision* of

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61 See *supra*, n. 49 (italics supplied).

62 Fleming, *The Law of Torts* (1957) 488; *cf.* James, *General Principles of the Law of Torts* (1959) 183.

63 N. M. Maier, *Psychology in Industry*, 336. For another treatment of the problems raised by the following cases, see D. G. Cracknell in *Industrial L.R.*, 14 (1959) 2.

64 *Woods v. Durable Suites Ltd.* [1953] 1 W.L.R. 857; *Clifford v. Charles H. Challen and Son Ltd.* [1951] 1 K.B. 495.

65 *Haynes v. Qualcast Ltd.* [1958] 1 All E.R. 441, and unreported cases cited in footnote at *ibid.*, 443.

66 *Crookall v. Vickers-Armstrong Ltd.* [1955] 2 All E.R. 12.

67 *Finch v. Telegraph Co. Ltd.* [1949] 1 All E.R. 452; *Paris v. Stepney B.C.* [1951] A.C. 367; *Nolan v. Dental Mfg. Co. Ltd.* [1958] 2 All E.R. 449.

68 *Smith v. Baker and Sons* [1891] A.C. 325, 362.

69 [1951] A.C. 367.

the appropriate prophylactic—in that case, goggles—would satisfy the employer's duty. But subsequent courts have been influenced by the reality of the employment relationship and the notoriously blase attitude exhibited by employees toward familiar dangers, and thus require employers not merely to provide, but also to encourage and exhort the men to use, precautionary measures.

> "The standard which the law requires is that they [the employers] should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself. . . ." [70]

Other courts have shown a reaction to such decisions saying, in effect, that the imposition of such a duty forces the employer to "assume the functions of a matron or grandmother".[71] Viscount Simonds doubtless had such decisions in mind when he said recently that he deprecated "any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and imbecile child".[72] Singleton L.J. has also said that he does not "believe it to be part of the common law of England that an employer is bound, through his foreman, to stand over workmen of age and experience every moment they are working and every time that they cease work, in order to see that they do what they they are supposed to do".[73]

Certainly it is a mistake to infer from the authorities holding in favour of the employee that in all cases and all circumstances, an employer who has failed to exhort and encourage his employee to avail himself of the precautionary devices which he has provided must automatically be held liable. That was the mistake made by the trial judge in *Haynes v. Qualcast Ltd.*[74] where the plaintiff, in the course of carrying a ladle of molten metals, had spilled some on himself sustaining painful but not lasting injury. The injury would have been avoided had the

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70 *Per* Denning L.J. in *Clifford v. Challen* [1951] 1 K.B. 495, 497-8. *Cf. Crookall v. Vickers-Armstrong Ltd.* [1955] 2 All E.R. 12; *Nolan v. Dental Manufacturing Co. Ltd.* (1958) 2 All E. R. 449.

71 *Per* Lord Evershed M.R. in *Haynes v. Qualcast Ltd.* [1958] 1 All E.R. 441, 445. *Cf. supra,* nn. 21, 22.

72 *Smith v. Austin Lifts Ltd.* [1959] 1 W.L.R. 100, 105.

73 *Woods v. Durable Suites Ltd.* [1953] 1 W.L.R. 857, 862; *cf. ibid.,* 864, *per* Morris L.J.: "The duty to exercise due care to provide effective supervision does not involve that an employer must provide a corps of overseers to ensure that some process, in regard to which there has been faithful and ample coaching, is at all times properly carried out."

74 Unreported; see, on appeal [1958] 1 All E.R. 441, and [1959] 2 All E.R. 38.

plaintiff been wearing spats provided by the employers, but the defendant's foreman had not, in view of the plaintiff's long experience, warned or urged the plaintiff to wear the spats.

The trial judge regarded himself as bound by authority to hold, contrary to his first impression, that the employers had failed in their duty to the employee in not warning him to take precautions. The House of Lords, reversing the decision of the Court of Appeal, held that the trial judge's first impulse was the right conclusion on the facts as he found them, and that there was no inflexible rule invariably requiring encouragement and exhortation. In doing so the House of Lords did not overrule the cases which said that the exercise of due care required more than the mere provision of safety devices, although some members at least hinted that such a trend was not to be encouraged:

> "One [word of caution] is that, though, indeed, there may be cases in which an employer does not discharge his duty of care towards his workmen merely by providing an article of safety equipment, the courts should be circumspect in filling out that duty with the much vaguer obligation of encouraging, exhorting or instructing workmen, or a particular workman, to make regular use of what is provided . . ." [75]

The majority agreed that the trial judge's reasoning revealed the danger "of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense".[76]

In the face of such stern warnings and the persistent, if implicit, criticism of the practice of formulating "any new principles or gloss on the familiar standard of reasonable care",[77] it is probably rushing in where angels fear to tread to suggest propositions of any more concrete character than that the employer is bound to exercise reasonable care for the safety of his workmen. Nevertheless it is believed that some rationalising features emerge from the cases which may be useful guides in predicting the outcome of future cases. It is submitted that the following factors affect the question of the need to supervise workmen and to encourage the taking of precautions.

(1) Consistently with the proposition that "an employer owes a particular duty to each of his employees",[78] it is recognised that the age and experience of the employee concerned may be an important factor affecting the need for warning and exhortation.[79]

(2) Again consistently with *Paris v. Stepney B.C.*—in particular with the proposition that the standard of care required of the defendant is

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75 *Per* Lord Radcliffe in *Qualcast Ltd. v. Haynes* [1959] 2 All E.R. 38, 40.

76 *Per* du Parcq L.J. in *Easson v. London and North Eastern Ry. Co.* [1944] 2 All E.R. 425, 430; quoted in the speech of Lord Denning, see [1959] 2 All E.R. 38, 44.

77 *Per* Lord Somervell of Harrow, *ibid.*, 44.

78 *Paris v. Stepney B.C.* [1951] A.C. 367, 375, *per* Lord Simonds.

79 Compare *Clifford v. Challen* where a trainee of three years experience succeeded with *Woods v. Durable Suites Ltd.* and where a skilled 56-year-old employee, who had worked with the defendants "for some time," failed. *Cf.* also the words of Lord Radcliffe in the *Haynes* case [1959] 2 All E.R. 38, 40, and *cf. Robinson v. W. H. Smith and Son* [1901] 17 T.L.R. 423.

conditioned in part by the severity of the injury likely to be sustained if the risk materialises—it is recognised that "the greater the danger the greater the precautions which are necessary".[80] Accordingly it is submitted that the following statement, made by Parker L.J. in the *Haynes* case[81], has not been impugned[82] by anything said subsequently in the House of Lords:

> "It is quite clear that in an operation of this sort [carrying molten metal] there is a risk, and a risk of serious injury—true, not injuries which are likely to be fatal or to affect the eyes, but clearly such as are likely to produce injury by burning. It seems to me perfectly clear, in those circumstances, that there is a duty on employers, not only to have protective clothing available, but to inform anybody coming into their employment that they have got that equipment, and to take some steps to educate the man to wear the equipment for his own safety. Exactly what those steps should be, I find it unnecessary to determine. In some cases the hazard may be so great and the injury, if it occurs, so serious, that it might be necessary to make the wearing of the protective clothing a rule of the factory. Again, where the matter is not so serious, mere advice might be sufficient."

(3) The workman's appreciation of the risk involved.[83]

(4) The nature of the job, *i.e.*, whether it is of a routine nature or not.[84]

(5) The likelihood that, out of consideration for their own comfort or for other reasons unrelated to safety, employees will be reluctant to use the preventive devices.[85]

It should be added that although in conformity with the proposition set out in the second of the above paragraphs it will not always be necessary to "encourage and exhort" the men to use the precautionary devices, there are nevertheless many cases where the employer should at least bring the fact that the devices are available to the attention of the employee, and others where, in view of the exigencies of the situation and the known habits of the employees, it will be necessary to have the devices available at the point where they are needed. Not only did the employer in the *Clifford* case fail to encourage the use of barrier cream; he did not even make the cream available at the shop where the work took place. Similarly in *Finch v. Telegraph Co. Ltd.*[86] it was held that merely having available a supply of goggles for those who saw fit to ask for them was not a discharge of the employer's responsibility. In these cases "it is not

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80 *Per* Singleton L.J. in *Woods v. Durable Suites* [1953] 1 W.L.R. 857, 862; *cf. Qualcast Ltd. v. Haynes* [1959] 2 All E.R. 38, 42. *per* Lord Keith of Avonholm.

81 [1958] 1 All E.R. 441, 446: *cf. ibid.*, 444, *per* Lord Evershed, M.R.

82 But is in fact supported.

83 See *per* Lord Keith of Avonholm in *Qualcast Ltd. v. Haynes* [1959] 2 All E.R 38, 42.

84 *Cf. supra,* nn. 20, 70.

85 *E.g., Nolan v. Dental Mfg. Co. Ltd.* [1958] 2 All E.R. 449—experienced toolsetters preferred "to grind by natural vision" instead of using goggles: *cf. Crookall v. Vickers Armstrong Ltd.* [1955] 2 All E.R. 12.

86 [1949] 1 All E.R. 452.

enough for [the employer] to have available somewhere in the factory the appliances necessary to minimise the danger: the system of working must be one in which the appliances will be available at the place where they are needed . . ." [87]

IV

Very frequently it happens today that an employee is called upon to work on premises occupied by somebody other than his employer. This is especially true of the servicing occupations, such as window cleaning, plumbing, painting, and welding. The old-style individual painter or plumber has been replaced by firms which specialise in such work, and which in effect act as intermediaries between the workmen and those requiring services. When this happens the question often arises as to the duty owed to his employee by the employer, who does not occupy the premises, and who may have agreed with the occupier to provide and maintain equipment. The provision of equipment which is standard for each job and which is requisite for the carrying out of the special functions for which the firm is employed—such as paint brushes or cleaning equipment—is normally the responsibility of the employer. On the other hand, equipment which is merely ancillary to the main function and which varies from job to job—such as staging, scaffolding, etc.—is generally provided by the occupier or head contractor.

When this question first came before English courts their first impulse was to say that the employer in such circumstances owes no duty to the employee to see that the premises are safe:

> "Applying, I hope, the common sense test, it does seem to me a very curious proposition that, when a householder asks a contractor to come in and paint his house, unless the contractor goes over the whole house to see that every floor is safe or takes reasonable steps to see that the house is safe, he, the contractor, is liable if the floor collapses and one of his workmen is injured. . . . it seems to me a great extension of the doctrine of reasonable care which an employer has got to take with regard to his men, that wherever they are sent out to work, he has got to go and see that the premises are reasonably safe for them to work upon. I have, therefore, as a proposition of law, very grave difficulty in seeing that there is any liability on the employers in this case". [88]

Denning L.J. criticised *Taylor* in *Christmas v. General Cleaning Contractors*, [89] but *Taylor* survived those criticisms which were treated as *obiter dicta*. [90] Of course, even while this view was current the immunity of the

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87 *Per* Cohen L.J. in *Clifford v. Challen* [1951] 1 K.B. 495, 500. *Cf. Woods v. Durable Suites Ltd.* [1953] 1 W.L.R. 857, 864: "If an employer allows safety precautions to lapse and to fade away into desuetude, it may well be that, on the facts of a particular case, there may be proof that there has been a failure to exercise due care and skill to provide a proper system of work. . . ." (*per* Morris L.J.).

88 *Taylor v. Sims and Sims* [1942] 2 All E.R. 375, 378. *Cf. Hodgson v. Brit. Arc Welding Co.* [1946] K.B. 302.

89 [1952] 1 K.B. 141, 148.

90 *Cilia v. H.M. James and Sons* [1954] 1 W.L.R. 721 (Byrne J.).

employer was not held to include defects in the system used, as distinct from defects in the premises.[91]

It was during the currency of this view that *Horton v. London Graving Dock*[92] was litigated, and the failure of the plaintiff to recover against the employer in similar circumstances in *Hodgson v. Brit. Arc Welding Co.*[93] presumably explains why the action was brought only against the occupiers in *Horton's* case.

> "It must be remembered that, at the date when Horton brought has case — it was in 1948 — it was commonly supposed that a man, placed as he was, could not sue his employers. It was often said at that time that employers who send their men out to work on the premises of other people have no responsibility for the safety of those premises; and that it was for the occupiers to see that the premises were safe for the workmen and not for the employers to do so: see, for instance, *Taylor v. Sims & Sims* ([1942] 2 All E.R. 375 at p. 378, *per* Lewis J). So Horton sued only the occupiers. . . ." [94]

Following a series of cases[95] containing *dicta* which cast doubt on the cases categorically denying any duty, the House of Lords held against the employer in *Smith v. Austin Lifts Ltd.*[96]

What then is the duty owed by the employer to his employee when the latter is working on another's premises? To say that it is a duty of reasonable care is to provide little assistance in predicting the outcome of cases, especially when more helpful statements of concrete standards are available.[97]

First of all it may be said, as Lord Reid has said,[98] that it is a duty of a "limited nature". This fact derives, of course, from the truism that "precautions dictated by reasonable care when the servant works on the master's premises may be wholly prevented or greatly circumscribed when the place of work is under the control of a stranger".[99] That is why it has been easy to rationalise the cases which flatly deny the existence of any duty as examples of the duty having been discharged. In many

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91 *Garcia v. Harland and Wolff Ltd.* [1943] K.B. 731.

92 [1951] A.C. 737 (*sub. nom. London Graving Dock v. Horton*).

93 [1946] K.B. 302.

94 *Smith v. Austin Lifts Ltd.* [1959] 1 All E.R. 81, 93 (*per* Lord Denning who goes on to suggest strongly that Horton would have succeeded against his employers).

95 *Christmas v. General Cleaning Contractors Ltd.* [1952] 1 K.B. 141, 148; *Davie v. New Merton Board Mills Ltd.* [1958] 1 All E.R. 67, 85; *Wilson v. Tynside Window Cleaning Co.* [1958] 2 All E.R. 265, 272; *cf. Biddle v. Hart* [1907] 1 K.B. 649, 653.

96 [1959] 1 W.L.R. 100.

97 On this point the present writer, in the face of some (possibly) contrary judicial indications (*e.g., supra,* nn. 75-6) prefers to adopt the position taken by the current editor of Salmond: "On the . . . question of the appropriate standard of care to be observed in any particular case there is much evidence to show that Australian courts, like those in England, are quietly abandoning the 'featureless generality' that the defendant is bound to take the care of a reasonable man in favour of the more helpful formulation in terms of risk. This is particularly noticeable in cases dealing with the duty of an employer to take reasonable care for his servant's safety . . ." Heuston in *Melbourne University L.R.,* 2 (1959) 35, 40.

98 *Davie v. New Merton Board Mills Ltd.* [1959] 2 W.L.R. 331, 358.

99 *Wilson v. Tyneside Window Cleaning Co.* [1958] 2 All E.R. 265, 271, *per* Pearce L.J.

of the situations in which the problem arises it is reasonable for the employer to assume, unless there are contrary indications, that the occupier will have concerned himself with the safety of the premises; so that generally the requirement of reasonable care will be satisfied even though the employer makes no inspection and does absolutly nothing to make the premises safe.

> "To hold a master stevedore, in the absence of special circumstances of suspicion, subject to a general duty towards his men to inspect the structure of the vessel, whether permanent or temporary, whether shifting-boards, stanchions or the like, would, I think, be contrary to practice and inconsistent with the exigencies of the case. He comes on board the vessel, the shipowner's premises, to carry out the loading or discharging, and, unless there are special stipulations in the contract, is *prima facie* entitled to assume that the shipowner has discharged his duty of care in regard to the safety of the premises. He is on board the ship for a special and limited purpose and has in the ordinary course no right to interfere with the structure, temporary or permanent, of the vessel. No doubt, if there are apparent indications which he observes, or ought to observe, that the structure is defective, he owes a duty to take reasonable measures for the protection of his men. . . ." [100]

It is submitted that the key to the proper principle lies in the phrase used by Lord Wright, "in the absence of special circumstances of suspicion." *Smith's* case is the only one in which it has been held that the duty was not discharged, and there it is significant that the existence of a defect in the premises had come to the notice of the employers; indeed, they had reported the defect to the occupiers on four separate occasions.[101] This suggested limitation is consistent with Lord Denning's supposition[102] that an action against the employers in *Horton's* case would have been successful, because in the latter case the employers had notice of the existence of a defect by the complaints of their employees. It is also consistent with the decision in *Bott v. Prothero Steel Tube Co. Ltd.*[103] that an employer had satisfied his duty to his employee by inquiring of the occupiers whether a travelling crane was safe, and receiving an assurance that it was.[104]

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100 *Thomson v. Cremin* [1953] 2 All E.R. 1185, 1192, *per* Lord Wright. *Cf.* the following statement of Hilbery J. (in *Hodgson v. British Arc Welding Co. Ltd.* [1946] 1 K.B. 302, 304) the similarity of which in the light of the belated publication of *Thomson v. Cremin* is striking: "I think that it is putting the duty of an employer in those circumstances too high to say that an electric arc welding firm . . . is under a duty separately to inspect every piece of scaffolding in order to see that what the shipwright has done has been done with proper care and skill. They are not competent, or qualified, to criticise what the shipwright does in the way of erecting a scaffold. The shipwright is an expert in the matter, whereas the sub-contractors probably know nothing about it. It would be ridiculous to say that the employer in those circumstances was responsible to his workmen, because he, who knows nothing about the erection of scaffoldings and how to make them reasonably safe, did not inspect with the eye of ignorance the work which was being done with the eye of knowledge and skill . . ."

101 [1959] 1 W.L.R. 100, 102.

102 *Ibid.*, 117.

103 (1951) W.N. 595.

104 *Cf.* also *Mace v. Green and Silley Weir Ltd.* [1959] 2 Q.B. 14; *Szumczyk v. Associated Tunnelling Co.* [1956] 1 W.L.R. 98.

The effect of the discussion in this part may be summed up in the following proposition: An employer may reasonably assume that premises out of his control are in a safe condition (*i.e.*, he is not obliged to inspect such premises)[105] unless he has reason to suspect that the premises may not be safe.[106]

V

In the two or three decades prior to the decision of the House of Lords in *Davie v. New Merton Board Mills Ltd.*[107] a respectable body of authority had been accumulating around the proposition that the employer's duty "is to supply and instal proper machinery so far as care and skill can secure this result",[108] so that an employee injured by defective equipment would succeed on a showing that anybody along the line from manufacture to installation had acted negligently.[109] So regarded the employer's duty would have been comparable to that of the occupier towards contractual entrants[110] and, possibly,[111] invitees.[112]

105 *Mace's* case (*supra*, last note); *Wilson v. Tyneside Window Cleaning Co.* [1958] 2 All E.R. 265.

106 *Smith v. Austin Lifts Ltd.* [1959] 1 W.L.R. 100.

107 [1959] 2 W.L.R. 331.

108 *Wilsons and Clyde Coal Co. v. English* [1938] A.C. 57, 88, *per* Lord Maugham.

109 Passage cited last note: *cf. ibid.*, 78, *per* Lord Wright; *Paine v. Colne Valley Electricity Supply Co. Ltd.* [1938] 4 All E.R. 803, 807, *per* Goddard L.J.; *Naismith v. London Film Productions Ltd.* [1939] 1 All E.R. 794, 798, and *ibid.*, 796, *per* Lord Greene, M.R.; *Bain v. Fife Coal Co.* [1935] S.C. 681, 693; *Donnelly v. Glasgow Corpn.* (1953) S.C. 107; *Hamilton v. Nuroof (W.A.) Pty. Ltd.* (1956) 96 C.L.R. 18, 34, *per* Fullagar J.; Charlesworth on *Negligence* (3rd ed.) 395 (S. 634); Batt, *Law of Master and Servant* (4th ed., 1949) 335, nn. 5, 6; see also authorities collected by Webber in *Current Legal Problems* 12 (1959) 56, 63 ff. The proposition also gains indirect support from statements that the master's duty to his servant is higher than the occupier's duty to his invitees: see *London Graving Dock v. Horton* [1951] A.C. 737, 746, *per* Lord Porter; *Christmas v. General Cleaning Contractors* [1952] 1 K.B. 141, 148, *per* Denning L.J.

110 *Francis v. Cockrell* (1870) L.R. 5 Q.B. 501; *Maclenan v. Segar* [1917] 2 K.B. 325; *Watson v. George* (1953) 89 C.L.R. 409. The phrase "so far as reasonable care and skill can make (premises safe)" recurs constantly in both contexts: *cf.* the passage of Montague Smith J. in L.R. 5 Q.B. 501, 513 — accepted by McCardie J. in *Maclenan v. Segar* as the correct statement of the legal position affecting contractual entrants — with the statements of Lord Maugham (*supra*, n. 108), Goddard L.J. (*supra*, n. 109), and Batt (*supra*, n. 109). And *cf.* Charlesworth, *op. cit., supra*, n. 109. In the light of this comparison it is submitted that Lord Maugham's formulation of the employer's duty, while admittedly unusual (*cf. infra*, n. 113), is neither "unique" nor "a new and hybrid form of liability", as Dr. Goodhart has suggested in *L.Q.R.*, 74 (1958) 397, 401.

111 It was often assumed that the occupier's liability towards contractual entrants for the default of independent contractors (*supra*. n. 110) was a distinguishing feature between the duties owed to contractual entrants and invitees. The discovery by Professor Heuston of *Thomson v. Cremin* (1941) [1953] 2 All E.R. 1185, tended to cast doubt on this assumption. Now, however, Lord Reid has in turn cast doubt on the general conclusion as to the effect of *Thomson v. Cremin*: "The shipowner did not seek to avoid liability either in his pleading or in his case submitted to this House or in argument in this House because of the negligence being that of an independent contractor. So there could be no decision of this House on that matter: it was not submitted for decision. Therefore there could be no *ratio decidendi*, and any observations on that matter must in my view be regarded as *obiter dicta* . . .", *Davie v. New Merton Board Mills Ltd.* [1959] 2 W.L.R. 331, 358. See also *Green v. Fibreglass Ltd.* [1958] 2 Q.B. 245, especially at pp. 251-2.

112 See last note, to which may be added *Woodward v. Hastings Corpn.* [1945] K.B. 174, *Wilkinson v. Rea Ltd.* [1941] 1 K.B. 688, and *Bloomstein v. Railway Executive* [1952] 2 All E.R. 418. A suggested reconciliation between these cases and *Haseldine v. Daw and Son Ltd.* [1941] 2 K.B. 343, is that the occupier will not be liable where technical knowledge is involved; see Salmond, *Torts* (11th ed.) 563; Street, *The Law of Torts*, 204, n. 2, and *cf. Green's* case, *supra* last note, *per* Salmon J.

Such a liability, while unusual,[113] is clearly distinguishable[114] from the absolute liability involved in a warranty of safety.[115] The distinction may be seen by comparing the liability of a vendor of goods for breach of an implied warranty—which will not be avoided by a showing that the defect was latent, and was neither discoverable by the exercise of due care nor the result of negligence in manufacture or handling[116]—and the occupier's liability, which only exists where the contractual entrant can establish negligence on the part of somebody concerned with the premises. It is perhaps an interesting commentary on the importance of the personal element in the development of the common law that the former liability could at one stage have easily been assimilated to the latter, were it not for the impulse of the members of the Court of Appeal in 1877.[117] The fact remains that the former liability was made absolute,

113 The *Maclenan v. Segar* principle "is, however, from some points of view, a curious rule. The obligation is, in legal theory, contractual, but the liability depends on a breach by somebody at some stage of a common law duty . . . to use reasonable care. It seems clear that the rule does not impose liability in the absence of negligence on the part of anybody . . ." *Watson v. George* (1953) 89 C.L.R. 409, 424-5, *per* Fullagar J. In the case of the employer, as in that of the occupier, a contractual relationship exists with the plaintiff. While the experience of *Priestley v. Fowler* may have predisposed courts in recent years to emphasise the tortious aspects (*cf.* Hamson, (1958) *Camb. L.J.* 27, 28), the fact that a contractual relationship exists may be important. It has recently been held that an action against the employer may be pleaded either in contract or in tort, *Matthews v. Kuwait Bechtel* [1959] 2 Q.B. 57.

114 This claim is made without disrespect to some of the members of the House of Lords in *Davie's* case who apparently had difficulty in drawing the distinction: see *e.g.*, Viscount Simonds at [1959] 2 W.L.R. 331, 335: "I observe that such a view of the law [as that held by Jenkins L.J. in the Court of Appeal] is usually accompanied by a disclaimer of any idea that an employer warrants the fitness of the tool he supplies and do not find the reconciliation easy." And *cf. ibid.*, 345 *per* Lord Morton of Henryton.

115 See Salmond, *Torts* (11th ed.) 554, nn. (t), (u), and Fleming, *The Law of Torts* (1957) 434, n. 34, and references there cited.

116 *Randall v. Newson* (1877) 2 Q.B.D. 102; *Frost v. Aylesbury* [1905] 1 K.B. 608. The point is illustrated by *Daniels v. White and Sons* [1938] 4 All E.R. 258.

117 The legal lineage is interesting, and instructive. *Readhead v. Midland Ry. Co.* (1867) L.R. 2 Q.B. 412 (Queen's Bench; Lush and Mellor JJ., Blackburn J. dissenting), (1869) L.R. 4 Q.B. 379; (in the Exchequer Chamber; Kelly, C.B., Byles, Keating and Montague Smith JJ., Channell and Bramwell BB.; judgment delivered by Montague Smith J.) decided that in contracts of carriage, a limitation that the defendant should not be liable for defects which are unknown and undiscoverable by the exercise of reasonable care should be implied. When the Court of Exchequer Chamber dealt with the question of the occupier's liability towards contractual entrants in *Francis v. Cockrell* (1870) L.R. 5 Q.B. 501 (Kelly C.B., Keating, Montague Smith and Cleasby JJ., Martin and Channell BB.), it was commonly accepted that the *Readhead* limitation applied to occupier's liability. Thus when the question of the liability of the vendor for latent defects in personal property arose, *Readhead v. Midland Ry. Co.* was confidently relied upon by defendant's counsel. See *Randall v. Newson* (Queen's Bench; Blackburn and Lush JJ. (1877) 2 Q.B. 102; in the Court of Appeal; Kelly C.B., Mellish L.J. and Brett and Amphlett JJ.A.; judgment delivered by Brett J.A.). While this argument was accepted by the Court of Queen's Bench, it was rejected by the Court of Appeal: "If the article or commodity offered or delivered does not in fact answer to the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable" (2 Q.B. 102, 109). Although this reasoning could be applied with equal cogency to the case of the contract of carriage, the *Readhead* principle was dismissed as confined in its application to contracts of carriage (*ibid.*, 110-1). Kelly C.B., who in *Francis v. Cockrell* had commented in *obiter dicta* that the *Readhead* limitation applied to contracts of sale, resiled from this position. After assenting to the judgment of Brett J.A. he "observed that, if the language imputed to him in *Francis v. Cockrell* be correctly reported, he must have expressed himself inaccurately, and he had no intention to apply the doctrine in *Readhead's* case to a contract for the sale and purchase of an article to be applied to a specific purpose" (*ibid.*, 111-2).

thus serving to illustrate the conceptual difference between the two forms of liability.

To the extent that this brief historical survey challenges the decision reached by the House of Lords in the *Davie* case,[118] it may fairly be said to beat the air. It is clear, however, as the House of Lords has itself indicated,[119] that many borderline cases remain, and the length to which the proposition laid down extends will only be known after further cases have been litigated. It may therefore be profitable to consider intermediate cases.

The House of Lords has made it clear that an employer who has purchased tools from a reputable retailer will not be liable to an employee for the negligence of the manufacturer of the equipment, provided the defect in question is not such that it should have been detected on a reasonable inspection by the employer. Let us start at the opposite end of the scale and first consider cases which are clearly within the ambit of the employer's liability.

To begin with, it is clear that where the employer has a section of his own workshops devoted to the manufacture of tools to be used by other employees, he will be liable to the latter for the negligence of the servants engaged in manufacturing the tools.

> "It follows that if in the present case the first defendants had employed some competent person as their servant or agent to make drifts for the use of their fitters, and the person so employed had negligently made the defective drift which broke and injured the plaintiff, the first defendants would clearly have been liable to the plaintiff for breach of their common law duty to take reasonable care to provide sound tools, and the fact that they had employed a competent servant or agent to perform that duty would have afforded no defence".[120]

This is really only an application of the principle laid down in the *Wilsons & Clyde* case, when we recall that there "it was assumed throughout that the manager whose negligence had caused the accident was a servant of the employer".[121] (in the light of the decision in the *Davie* case, employers who have in the past operated departments for the manufacture of tools may now be "advised to hand over their toolmaking to a subsidiary company or to buy their tools in the market".[122]).

Next, we may consider the position where the defect results from the negligence of an independent contractor. It has just been observed that in the *Wilsons & Clyde* case it was assumed that the tortfeasor concerned was a servant of the defendants. He was apparently in a position of higher management, but may nevertheless have been a servant. But what

118 *Cf.* the well-argued case presented by Dr. Webber in *Current Legal Problems* 12 (1959) 56, to the effect that the *Davie* decision involves a judicial re-interpretation of the authorities.

119 [1959] 2 W.L.R. 331, 342 (*per* Viscount Simonds) and *ibid.*, 359-60 (*per* Lord Reid).

120 [1958] 1 Q.B. 210, 219, *per* Jenkins L.J.

121 [1959] 2 W.L.R. 331, 338, *per* Viscount Simonds.

122 Suggested by counsel in the Court of Appeal, see [1958] 1 Q.B. 210, 216.

would the correct analysis have been if the employers had hired a temporary consultant to iron out the problems associated with the system of working in the collieries? Surely they would have been equally liable for the negligence of the consultant even though he would probably have been classifiable as an independent contractor.

As one writer has said:

> "If an employer employs a contractor to build or repair for him a factory or power station or other industrial or business premises, the employer as well as the contractor himself is legally responsible for the latter's negligent work, even though the employer took every care to engage a highly competent and reputable contractor and whether or not the employer was able to check the quality of the work when completed".[123]

This conclusion is consistent with a passage from *Bain v. Fife Coal Co.*[124] which was cited with approval by all the members of the House of Lords in the *Wilsons & Clyde* case,[125] and is supported by other authority.[126] Indeed, it is a conclusion that seems even to have been accepted in the *Davie* case.[127]

To take the next step, and to say that the employer will be liable when he engages a manufacturer to make tools to his own specifications, would not seem to involve any difficulty, and it has even been said that this situation "is plainly identical with that of the contractor to build or repair premises".[128] Although Jenkins L.J. also considered that this step could be taken without any difficulty,[129] the words of Viscount Simonds have nipped any budding confidence in the inevitability of this conclusion:

> "It was said that an employer might, instead of purchasing tools of a standard design, either from the manufacturer direct or in the market, order them to be made to his own design. If he did so and if they were defective and an accident resulted, it was clear (so the argument ran) that he would be responsible. I agree that he would, if the fault lay in the design and was due to lack of reasonable care or skill on his part. There is no reason why he should not. A more difficult question would arise if the defect was not due to any fault in design (for which the employer was responsible) but to carelessness in workmanship . . ." [130]

These words sound like the circumspect utterances one expects from common law judges who like to honour the tradition of dealing with each case as it comes along. It may well be that the conclusions of Grunfeld

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123 Grunfeld in *M.L.R.*, 21 (1958) 309, 310.

124 1935 S.C. 681, 693.

125 [1938] A.C. 57, at pp. 62, 73, 76, 80, 87 (Lords Atkin, Thankerton, Macmillan, Wright and Maugham respectively).

126 *Macdonald v. Wyllie* (1898) 1 Fraser 339; *Paine v. Colne Valley Electricity Supply Ltd.* [1938] 4 All E.R. 803; *Baird v. Addie* (1854) 16 D. 490.

127 [1959] 2 W.L.R. 331, 359 (*per* Lord Reid) and *ibid.*, 360 (*per* Lord Tucker); *cf.* [1958] 1 Q.B. 210, 238 (*per* Parker L.J.).

128 Grunfeld, *op. cit., supra,* n. 123, 311.

129 His Lordship took the view that this result "must also be regarded as settled" [1958] 1 Q.B. 210, 219.

130 [1959] 2 W.L.R. 331, 342.

and Jenkins L.J. will in this respect ultimately prevail. Assuming they do not, however, it is clear that the case of a direct purchase from the manufacturer is an *a fortiori* case. If the employment of a manufacturer to make tools to the employer's specifications is not a sufficient "delegation" to render the master liable to his employee for the default of the manufacturer, clearly a direct purchase of ready-made tools is even less so. And even if the courts do accept Jenkins L.J.'s inclination to treat the former as a delegation of the employer's duty, they may draw the line at this point.

Whatever the ultimate disposition of the "manufacture to specification" problem, the indications are strong that the courts will not regard a direct purchase from a manufacturer in any different light from the *Davie* case. In the *Davie* case the employers had purchased through a supplier. The Scots case of *Donnelly v. Glasgow Corporation*[131]—which concerned a direct purchase and which was decided in favour of the employee—might at first sight appear to support the drawing of a distinction between a direct purchase and a purchase through a retailer.[132] But that case was universally condemned in the House of Lords and must now be regarded as overruled. It seems clear then that the *Davie* case principle covers the case of the direct purchase. In fact, three members of the House of Lords expressly said that "it would have made no difference if the drift had been purchased direct from the manufacturer, who could not be held to be persons entrusted by the respondent company with the performance of their common law duty towards their employees".[133]

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131 1953 S.C. 107.

132 Such a distinction would also explain the persistent emphasis in Parker L.J.'s judgment in the Court of Appeal on the absence of any contractual relationship between the manufacturer and the employer.

133 [1959] 2 W.L.R. 331, 361 (*per* Lord Tucker); *cf. ibid.*, 345 (*per* Lord Morton of Henryton) and 366 (*per* Lord Keith of Avonholm). And *cf.* [1958] 1 Q.B. 210, 238 (*per* Parker L.J.).