REASONABLE FORESEEABILITY IN NEGLIGENCE (1833 - 1882)

by
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'... that humbler power
Which carries on its no inglorious work
By logic and minute analysis'.
Wordsworth, *The Prelude* (1805).

Today the tort of negligence is made up of three elements. They are duty of care, breach of duty and damage. In this study it is proposed to trace the idea of reasonable foreseeability in the three elements during the fifty years 1833 - 1882. The significance of 1882 is that it was the year before the modern duty of care was enunciated.

Negligence in the sense of 'Carelessness'

In *Williams* v. *Holland* (1833)[1] Tindal C.J. laid down this rule:

> ... where the injury is occasioned by the *carelessness and negligence* of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act; ... (emphasis supplied)[2]

The case arose out of an accident on the highway. The defendant so negligently drove his gig that it collided into the plaintiff's cart. The cart was broken to pieces; and the plaintiff's son and daughter, who were in the cart, received injuries. The plaintiff brought an action on the case against the defendant. It was contended for the defendant that the plaintiff should have sued in trespass as the injury was direct. This contention was rejected. Tindal C.J. laid down the rule set out.

This rule was revolutionary. In trespass the distinction remained that between direct injury and consequential injury; but in the action on the case the important distinction was no longer between direct injury and consequential injury — the important distinction was between intention and negligence.

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1 (1833) 2 L.J.C.P. 190.

2 *Ibid.*, at p. 196. For the historical development, see Milsom's *Historical Foundations of the Common Law*, pp. 261-270; and M. J. Prichard, 'Trespass, Case and The Rule in *Williams* v. *Holland*' [1964] C.L.J. 234.

By 'negligence' Tindal C.J. just meant 'carelessness'. His words were: 'carelessness and negligence'. It was in the sense of 'carelessness' that Alderson B. gave his well-known definition of 'negligence' in *Blyth* v. *Birmingham Waterworks Co.* (1856)[3]:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[4]
> (Or a better text)
> Negligence I define to be, either the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing mischief to a third party; not *intentionally*, for then it would not be negligence.[5]

In course of time Alderson B.'s definition was to be used to determine breach of duty. Thus, in *Wakelin* v. *London and South Western Railway Co.* (1884)[6] Brett M.R. said:

> The jury, as between the Judge and a jury, is the only part of the tribunal which can say whether there has been negligence on either side. The Judge is bound to direct the jury as to the legal meaning of the word 'negligence'. To my mind, negligence, if defined at all, ought always to be defined as consisting in the doing of something which a person of ordinary care and skill under the circumstances would not do, or in the omission to do something which a person of ordinary care and skill under the circumstances would do. The Judge, the moment he has stated that proposition, has no right to answer it.[7]

But for Alderson B. there was neither duty nor breach of duty. There was only 'negligence'. The question was simply this, Was the act or omission careless?

Grote v. *Chester and Holyhead Railway Co.* (1848)[8] was decided in this way. The plaintiff was travelling in a train as a passenger of a third party, the Shrewsbury and Chester Railway Company. The train was crossing the river Dee when the bridge collapsed. The plaintiff was injured. The bridge had been constructed by the defendants. The sole issue was whether the defendants had been careless in constructing the bridge. Pollock C.B. said:

> It does not at present distinctly appear whether or not the attention of the jury was directed to the proposition, that if a party, in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted, and the best materials are used, such party is not liable for the accident.[9]

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3 (1856) 11 Exch. 781; 156 E.R. 1047; 2 Jur. N.S. 333.

4 (1856) 11 Exch. 781, at p. 784.

5 (1856) 2 Jur. N.S. 333, at p. 334.

6 (1884) 65 L.J.Q.B. 224 n. (original version of the judgment of Brett M.R.); [1896] 1 Q.B. 189 n. (revised version of the judgment of Brett M.R.).

7 (1884) 65 L.J.Q.B. 224 n. at p. 225.

8 (1848) 2 Exch. 251; 154 E.R. 485.

9 (1848) 2 Exch. 251, at p. 255.

The trial judge, Williams J., was consulted. He said that he had directed the jury in conformity with the proposition. There was, therefore, no misdirection; and judgment was given for the plaintiff. This case was discussed by Lord Atkin in *Donoghue* v. *Stevenson* (1932).[10] Lord Atkin said:

> The law as to the liability to invitees and licensees had not then been developed. The case is interesting, because it is a simple action on the case for negligence, and the Court upheld *the duty* to persons using the bridge to take reasonable care that the bridge was safe (emphasis supplied).[11]

Pollock C.B., however, did not mention duty.

Not all acts could result in the tort of negligence. In *Longmeid* v. *Holliday* (1851)[12] Parke B. distinguished between misfeasance and acts done 'in ordinary intercourse of life'. There the plaintiff's wife, acting for him, bought a naphtha lamp from the defendant. The lamp had been negligently constructed. It exploded while the plaintiff's wife was holding it in her hand, and the naphtha ran over her burning her very seriously. The plaintiff, having recovered damages for the defendant's breach of implied warranty of sale, brought an action for his wife's personal injury. Parke B. first dealt with misfeasance:

> There are other cases, no doubt, besides that of fraud, in which a third person, although not a party to the contract, may sue for damage sustained by him if it be broken. These cases occur where there is a wrong done to a person for which he could have a right of action, although no such contract had been made: as, for example, [1] if an apothecary administers improper medicines to his patient, or a surgeon unskilfully treated him and thereby injured his health, he would be liable to the patient where the father or friend of the patient may have been the contracting party with the apothecary or the surgeon, for though no such contract had been made, the apothecary, if he gave improper medicine, or the surgeon if he took him as a patient and unskilfully treated him would be liable to an action for *misfeasance* . . . [2] 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 he 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. [3] [a case of public nuisance]; [4] and it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or dangerous under peculiar circumstances, as a loaded gun, which he himself has 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 (emphasis supplied).[13]

Parke B. then dealt with acts done 'in ordinary intercourse of life':

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10 [1932] A.C. 562.
11 *Ibid.*, at p. 587.
12 (1851) 17 L.T.O.S. 243.
13. *Ibid.*

> But it would be going much too far to say that so much care is required *in ordinary intercourse of life* between one individual and another, that if a machine not in its nature dangerous; a carriage, for instance, 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, that the former should be answerable to the latter for a subsequent damage occurring by the use of it (emphasis supplied).[14]

Parke B. finally dealt with the case before the court:

> Could it be contended, with justice, in the present case, 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 a breach of contract as to all damage sustained by him? We are of opinion, therefore, if there had been in this case a breach of contract with the plaintiff the husband might have sued for it; but there being *no misfeasance* towards the wife independent of the contract, she cannot sue and join herself with her husband (emphasis supplied).[15]

Thus, the action was dismissed. In *Donoghue* v. *Stevenson*[16] Lord Atkin, referring to this judgment delivered by Parke B., said:

> 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* (emphasis supplied).[17]

Parke B. considered the case as one of 'letting or giving' or, to be accurate, 'lending or giving' because there was no contract of sale between the defendant and the plaintiff's wife. Nowhere did Parke B. mention duty.

Between negligence in the sense of 'carelessness' and negligence as a tort which requires a duty of care there lies a gulf. How was the gulf bridged? Perhaps the answer is quite simple.

The Relationship between Breach of Duty and Duty

In speaking of 'negligence' in the sense of 'carelessness' one tended to speak of 'breach of duty', and from 'breach of duty' one was led to

14 *Ibid.*
15 *Ibid.*
16 [1932] A.C. 562.
17 *Ibid.*, at p. 591.

speak of 'duty'. Contrary to what one may expect, 'duty' was derived from 'breach of duty', and not *vice versa.*

This can be seen in *Brownlow* v. *Metropolitan Board of Works* (1861).[18] There the plaintiffs' vessel collided into certain works constructed by the defendants upon the bed of the river Thames. Williams J. directed the jury:

> You have also to consider whether the piles interfered with the navigation of the river, navigation not meaning merely the going up and down the river, but sailing in security, so that any one who interferes with the security of the navigation, interferes with the navigation. And this case is an illustration of that principle; for if the pilot might have grounded the vessel with safety but for the piles, they would interfere with the navigation, because they interfered with its security and safety.
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> I shall likewise leave to you the question whether there was any *neglect of duty* in not putting up some buoy or signal to mark where the piles were, but I think that immaterial, because the pilot, according to the plaintiffs' evidence, could not have altered his course, as he was powerless to do so, even if he had known of the piles.
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> Still it may be better for you to answer, as a matter of fact, whether you think there was any *duty* on the defendants to give notice of the piles in some way. There is evidence that the conservators were used to give such notices, and I think there is no evidence of duty in the defendants to do so (emphasis supplied).[19]

Thus, Williams J. spoke of 'neglect of duty', and was led by this to speak of 'duty'.

Winfield's Theory

Winfield put forward a different theory:[20]

> In the first half of the nineteenth century contract and tort were slowly being disentangled, and negligence had gradually come into existence as an independent tort (in addition to retaining its old meaning of a mode in which a wrongful act might possibly be committed). In the process of separating contract from tort and in the development of the tort of negligence, a confused notion about *assumpsit* became the germ of the duty idea. It was thought that, as *assumpsit* in contract always showed an 'undertaking' of liability, therefore liability in tort must show something equivalent to it, *i.e.*, 'duty'; and the older cases in which *assumpsit* was a blanket that covered both contractual and delictal liability were cited to support this.[21]

Let us see what Winfield relied on:

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18 (1861) 2 F. & F. 604; 175 E.R. 1205 (affirmed, (1863) 13 C.B.N.S. 768; 143 E.R. 303; (1864) 16 C.B.N.S. 546; 143 E.R. 1241).

19 (1861) 2 F. & F. 604, at pp. 611-612.

20 P. H. Winfield, 'Duty in Tortious Negligence' (1934) 34 *Columbia L.R.* 41.

21 *Ibid.*, at p. 65.

> Now *Langridge* v. *Levy*[22] was not a decision on negligence, indeed it contains no mention of it in argument or in judgment. But it is relevant for our purposes in several directions. In the first place, counsel, in formulating the argument about duty, deduced it almost entirely from older cases of the 'common calling' and bailment kind in which, as I have said, if the idea of duty were present at all, it was hardly ever expressed.[23]
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> Counsel for the plaintiff showed cause against the rule *nisi* by the following arguments: ... (b) The principle of the action was that 'wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, anyone who is injured by the violation of it may have a remedy against the wrongdoer'. In support of this they cited cases nearly all which were on the old 'common calling' type of liability or else were based on bailment.[24]

This was merely counsel's argument. There was, indeed, 'a confused notion about *assumpsit*'. But it existed in the mind of counsel; not in the mind of the judge.

Let us now trace the idea of reasonable foreseeability in the duty of care.

The Duty of Care

There were three settled duty areas. They concerned, first, traffic cases; secondly, manufacturer's liability; and, thirdly, occupier's liability.

Traffic Cases

In traffic cases there was a duty to take reasonable care. The duty was owed to the world at large.

In *River Wear Commissioners* v. *Adamson* (1877)[25] Lord Blackburn said:

> My Lords, the Common Law is, I think, as follows:— Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner.
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> But he does establish such a liability against any person who either wilfully did the damage, *or neglected that duty which the law casts upon those in charge of a carriage on land, or a ship or a float of timber on water, to take reasonable care and use reasonable skill to prevent it from doing injury*, and that this wilfulness or

22 (1837) 2 M. & W. 519; 150 E.R. 863 (affirmed, (1838) 4 M. & W. 337; 150 E.R. 1458 (*sub nom. Levy* v. *Langridge*)).

23 (1934) 34 *Columbia L.R.* 41 at p. 53.

24 *Ibid.* at p. 52.

25 (1877) 2 App. Cas. 743.

> neglect caused the damage. And, if he can prove that the person who has been guilty of either, stood in the relation of servant to another and that the fault occurred in the course of the employment, he establishes a liability against the master also (emphasis supplied).[26]

Manufacturer's Liability

Let us begin with *Winterbottom* v. *Wright* (1842).[27] The case was discussed in *Donoghue* v. *Stevenson.*[28] The declaration was summarized by Lord Atkin:

> 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.[29]

This was an action in tort. Lord Tomlin in his dissenting speech said:

> That the action, which was in case, embraced a cause of action in tort is, I think, implicit in its form, and appears from the concluding sentence of Lord Abinger's judgment, which was in these terms: '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.'[30]

But it was a peculiar action in tort. It was an action in tort which sought to take advantage of *a contract* between the defendant and a third party. The action could not possibly succeed. Rolfe B., in dismissing the action, said:

> The breach of the defendant's duty, stated in this declaration, in [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 main-

26 *Ibid.* at p. 767.
27 (1842) 10 M. & W. 109; 152 E.R. 402.
28 [1932] A.C. 562.
29 *Ibid.* at pp. 588-589.
30 *Ibid.* at p. 600.

> tain 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.[31]

Winterbottom v. *Wright* is no more than a curiosity.

The true beginning is to be found in *Holden* v. *Liverpool New Gas and Coke Co.* (1846).[32] The defendants, a gas company incorporated by Act of Parliament, had for some years supplied gas to a house belonging to the plaintiff. The only means of shutting off the gas was by a stop-cock within the house. The last tenant, on quitting, gave notice to the defendants that he would not require any further supply. While the house remained unoccupied, gas escaped as the result of some damage done by wrong-doers. An explosion took place. The plaintiff brought an action on the case for the damage to the house:

> Case. The declaration stated that the plaintiff, before and at the time of the committing of the grievance by the said Liverpool New Gas and Coke Company as thereinafter mentioned, was, and from thence hitherto had been and still was, lawfully possessed of a certain house, with the appurtenances, situate and being in the borough of Liverpool, in the county palatine of Lancaster; that, before and at the time of the committing of the said grievance, the said Liverpool New Gas and Coke Company was possessed of divers large quantities of a certain dangerous, inflammable, and explosive gas, then being under the care of the said Liverpool New Gas and Coke Company: yet the said Liverpool New Gas and Coke Company, well knowing the premises, but disregarding their duty in that behalf, and contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in the possession and enjoyment of his said house, and to injure the said house, theretofore, to wit, on the 1st of April, 1844, wrongfully and injuriously took such little and bad care of their said gas that, by reason of the carelessness, negligence, and improper conduct of the said company in that behalf, divers large quantities of the said gas of the said company wrongfully and unlawfully then passed, diffused, and spread itself towards, unto, into, and about the said house of the plaintiff, and then caught fire, and exploded therein: by means of which premises the said house of the plaintiff was then greatly damaged, shaken, burnt, and injured, . . .[33]

The action was dismissed, but that was because the plaintiff was guilty of contributory negligence: he should have shut off the gas from within the house. It was contended for the plaintiff that it was the duty of the defendants, upon notice by any tenant of a house that the supply of gas was no longer wanted, to turn off the gas immediately from the house; and that it was accordingly the defendants' duty to have provided an outer stopcock in the street. Tindal C.J. said:

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31 (1842) 10 M. & W. 109, at p. 116.

32 (1846) 3 C.B.1; 136 E.R.1.

33 (1846) 3 C.B.1 at pp. 1-2.

> But, upon looking at the act under which this company was formed, no such direction appears to be given to the company by the legislature; although it appeared in evidence that a different company formed for the supply of gas in the same town, had in fact made use of outer stop-cocks in the street. And we have no authority, as it appears to us, to say, that, as the legislature is silent on this point, the common law would impose this precise duty on the defendants, or any other duty than that which is expressed in the declaration, namely, the general duty of using proper and sufficient care in the supply of gas.[34]

This case was followed by *George* v. *Skivington* (1869).[35] In the latter case the defendant, a chemist, sold a bottle of hair wash to the plaintiff. The defendant knew that the plaintiff bought the hair wash for the use of his wife. The hair wash had been compounded by the defendant negligently, and when the plaintiff's wife used the hair wash, it destroyed her hair. The court, which consisted of Kelly C.B. and Channell, Pigott and Cleasby BB., held the defendant liable. There are two versions of Kelly C.B.'s judgment. It is sufficient to refer to the original version of the judgment, which is the more elaborate. In the original version Kelly C.B. said:

> No question of warranty arises; but the question is, whether, if a chemist or perfumer, or other compounder of an article of this description, sells it for the purpose of being used by a particular person, *named and known to the seller at the time*, a duty is not imposed upon the seller to use ordinary care and ordinary skill in compounding the article in question? . . .
>
> I take it, that everyone who compounds an article for sale has a duty imposed upon him to use ordinary and reasonable care and skill in compounding the article, so as to prevent personal injury to the person who has to use it. The only question, however, in this case upon which any doubt or difficulty can be raised is, whether that duty is thus imposed by law upon the seller or compounder of an article of this description, not merely with respect to the purchaser with whom he enters into a contract of sale, but with respect to any other person or persons *for whose use alone the article is purchased, and for whose use therefore he knows it is destined* . . . Now here I am clearly of opinion that where an article of this description is purchased by A for the use of B, *and it is alleged and stated at the time of the purchase and sale, to have been so purchased, and therefore becomes known to the defendant*, who is the seller of the article — the duty arises upon the part of the seller of the article, that it shall be reasonably fit for the purpose to which it is destined, and that it may be used without danger, so fas as the duty to compound with reasonable and ordinary skill and care is by law imposed upon him . . .
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> Under those circumstances, first taking the proposition of law, that the duty is imposed upon everyone who compounds an article of this description, to conduct himself with regard to the purchaser,

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34 *Ibid.* at p. 14.

35 (1869) 39 L.J. Ex. 8 (original versions of the judgments of Kelly C.B. and Cleasby B.); (1869) L.R. 5 Exch. 1 revised versions of the judgments of Kelly C.B. and Cleasby B.).

> with reasonable care and skill, the first principles of the law, as well as the authority of *Levi* v. *Langridge* (which I do not hold to be necessary for this purpose), shew, that that duty extends to the person to whom afterwards it is destined, *and by whom the person who sells it knows it is to be used, and with respect to whom he has entered into the contract.*
>
> Now, therefore, this duty having arisen, and this duty having been violated, he, the seller, having failed to use reasonable care and skill in the compounding of the article, is liable in an action at the suit of the person *for whom he knew the article was purchased and by whom he knew it was intended to be used* (emphasis supplied).[36]

Cleasby B., in the original version of his judgment, said:

> It seems to me, at all events, that with a person who sells something of this sort, which he alleges to be compounded by himself, with ingredients known only to himself and sold for a particular purpose, there arises a duty that he should take due and reasonable care in compounding, to see that it does not contain some ingredient which is not only unfit for the professed purpose, but extremely injurious. As soon as that duty arises, then you have the allegation of the party to prevent the question of remoteness applying, namely, that it was sold upon this representation to the husband, in order that it might be used by the wife of the person who purchased it, *and it was known to the defendant that it was intended to be used for that purpose.* Then both these things concurring, there is negligence on the part of the defendant, with respect to an important duty, and injury arising from that negligence sustained by the person *who was the party contemplated in the transaction.* It appears to me, that that makes as good a cause of action, I may say, as the cause of action in *Levi* v. *Langridge*, where the allegation was, that the defendant had been guilty of fraud, and the person who had bought the article was the person affected by the fraud (emphasis supplied).[37]

Unfortunately, the words emphasized did not appear in the revised version of Cleasby B.'s judgment:

> 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 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*.[38]

Cleasby B. corrected the mistake in *Francis* v. *Cockrell* (1870):[39]

> The point that Mr. Matthews referred to last was raised in the case of *George* v. *Skivington*, where there was an injury to one person, the wife, and a contract of sale with another person, the husband. The wife was considered to have a good cause of action,

36 (1869) 39 L.J. Ex. 8 at pp. 9-10.
37 *Ibid.* at p. 11.
38 (1869) L.R. 5 Exch. 1, p. 5.
39 (1870) L.R. 5 Q.B. 501.

> *and I would adopt the view which the Lord Chief Baron took in that case.* He said there was a duty in the vendor to use ordinary care in compounding the article sold, and that this extended to the person *for whose use he knew it was purchased,* and this duty having been violated, and he, having failed to use reasonable care, was liable in an action at the suit of the third person (emphasis supplied).[40]

To summarize, the manufacturer owed a duty to take reasonable care. The duty was owed to two classes of persons: first, the person with whom the manufacturer made the contract of sale: *Holden* v. *Liverpool New Gas and Coke Co.*; and, secondly, a person whom the manufacturer was told would use the thing he manufactured and sold: *George* v. *Skivington.*

Extreme interpretations were placed on *George* v. *Skivington* when the case was discussed in *Donoghue* v. *Stevenson.*[41] Lord Buckmaster in his dissenting speech said:

> It is difficult to appreciate what is the importance of the fact that the vendor knew who was the person for whom the article was purchased, unless it be that the case was treated as one of fraud, and that without this element of knowledge it could not be brought within the principle of *Langridge* v. *Levy.* Indeed, this is the only view of the matter which adequately explains the references in the judgments in *George* v. *Skivington* to *Langridge* v. *Levy* and the observations of Cleasby B. upon *George* v. *Skivington* [in *Francis* v. *Cockrell*].[42]

Lord Atkin, having laid down the 'neighbour principle', said:

> 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.[43]
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> 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.*[44]

These extreme interpretations were, with due respect, wrong.

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40 *Ibid.* at p. 515.
41 [1932] A.C. 562.
42 *Ibid.* at p. 571.
43 *Ibid.* at p. 582.
44 *Ibid.* at p. 584.

Occupier's Liability

In *Parnaby* v. *Lancaster Canal Co.* (1839)[45] Tindal C.J. laid down that the occupier owed the invitee the duty to take reasonable care.

There the defendants, a canal company, negligently failed to remove a sunken barge from their canal. The plaintiff's fly-boat collided into the sunken barge and was damaged. The defendants were held liable. Tindal C.J. said that the defendants were not required by Act of Parliament to remove the sunken barge, and then said:

> But, admitting this to be so, the question then arises, whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this company; and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company: and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but *to take reasonable care*, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection, by which his customers suffer injury (emphasis supplied).[46]

In other words, the occupier — whether a canal company or a shopkeeper — owes the invitee the duty to take reasonable care.

But contemporary opinion lagged behind Tindal C.J. The climate of opinion was that reasonable care sounded in contract. In this climate of opinion *Parnaby* v. *Lancaster Canal Co.* was explained as a case where there was receipt of payment. In *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1866)[47] Lord Wensleydale said:

> My Lords, the Court of Exchequer Chamber in both these cases founded its judgment on that of the Exchequer Chamber in the case of *Parnaby* v. *The Lancaster Canal Company*, in which case there was a company incorporated by Act of Parliament, for the purpose of maintaining a canal, to be opened for the use of the public on payment of rates which the canal company might receive for its own benefit (that is, the profits were to be divided amongst the shareholders), and the Court held that the common law imposed a duty on the proprietors not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable

45 (1839) 11 Ad. & El. 223; 113 E.R. 400.
46 (1839) 11 Ad. & El. 223 at pp. 242-243.
47 (1866) L.R. 1 H.L. 93.

> care so long as they kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property.
>
> Of the propriety of this decision there could be no doubt, where the profits were received for the benefit of the company.[48]

Lord Wensleydale (then Parke B.) was one of the judges who heard *Parnaby* v. *Lancaster Canal Co.* in the Court of Exchequer Chamber.

In *Indermaur* v. *Dames* (1866)[49] Willes J. gave the classic definition of the occupier's duty towards the invitee. The plaintiff was a journeyman gas-fitter, and the defendant a sugar-refiner. The plaintiff's master had fixed a patent gas-regulator upon the defendant's premises. The plaintiff was sent to test the new apparatus one evening after darkness had set in. While thus engaged upon an upper floor of the building the plaintiff, without any negligence on his part, fell into an unfenced shaft used for raising and lowering sugar, and was injured. Willes J., delivering the judgment of the court, said:

> The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier *to prevent damage from unusual danger*, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted: *Lancaster Canal Company* v. *Parnaby*; ... (emphasis supplied).[50]

The example of the trap-door, given by Tindal C.J. as an example of the duty to take reasonable care, was now considered by Willes J. to be an example of a duty to take reasonable care 'to prevent damage from unusual danger'. Willes J. said that that protection did not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer but upon the fact that the customer had come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerned himself, and then said:

> The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

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48 *Ibid.* at pp. 123-124.

49 (1866) L.R. 1 C.P. 274 (affirmed, (1867) 36 L.J.C.P. 181 (original version of Kelly C.B.'s judgment); (1867) L.R. 2 C.P. 311 (revised version of Kelly C.B.'s judgment)).

50 *Ibid.* at p. 287.

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.[51]

Willes J. concluded:

> Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means [1] to avert or [2] warn him of it . . .[52]

The defendant was held liable. The decision was affirmed by the Court of Exchequer Chamber. Kelly C.B. delivered a judgment with which the other judges concurred. Kelly C.B. spelt out the alternative measures which the defendant must take:

> What then is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar refinery, and it may very likely be true that such premises usually have holes in the floors of the different storeys, and that they are left without any fence or safeguard during the day while the work-people, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either [1] to put up some fence or safeguard about the hole, or, if he does not, [2] to give such workmen a reasonable notice that they must take care and avoid the danger?[53]

Kelly C.B. quoted in support Willes J.'s statement of the law:

> I think the law does impose such an obligation on him. That view was taken in the judgment in the court below, where it is said: 'With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact.'[54]

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51 *Ibid.* at p. 288.
52 *Ibid.* at p. 289.
53 (1867) L.R. 2 C.P. 311, at p. 313.
54 *Ibid.* at p. 313.

Let us now turn to the occupier's duty towards a licensee. Clearly the occupier's duty towards a licensee could not be as high as that towards an invitee; but it was not defined until *Burchell* v. *Hickisson* (1880).[55] There the plaintiff's sister, aged twelve, was going to the defendant's house on some business connected with the artificial flower trade. The plaintiff, a boy aged four, accompanied her. The front door of the defendant's house was approached by a flight of steps, protected on either side by railings. One of these railings had been for some time displaced, leaving a gap of 18 inches on either side. Rope had been interlaced across the gap, but the rope had worn away and had not been renewed. The sister, who carried a baby, went up the steps, telling her brother to stop below. He disobeyed her. He came up the steps, but fell through the gap into the area below, and sustained injuries. Lindley J. said:

> The plaintiff accompanied his sister to the house, the sister went on business, but the plaintiff did not go on business. He was there not as a trespasser, but as a companion, and his position can be placed no higher than that he was there lawfully, and was not a trespasser. The question then for our determination is, What was the duty of the defendant towards the plaintiff, and what breach was there (if any) of such duty? There could be no duty on the part of the defendant towards the plaintiff further than that the defendant must take care no concealed danger exists.[56]

The plaintiff failed to recover as there was no concealed danger.

Let us now examine how the judges dealt with the duty of care outside the three settled duty areas.

Other Areas

In other areas the judges tended to confine their judgments to the facts of the cases before them, and to define the duty of care in an empirical manner as a duty to do, or not to do, a particular thing.

Let us return to the occupier's duty towards the invitee. The manner in which Willes J. dealt with such duty was typical of the empirical approach, though it appears to be anomalous today. In *London Graving Dock Co. Ltd.* v. *Horton* (1951)[57] Lord Reid, in his dissenting speech, interpreted Willes J.'s statement thus:

> ... Willes, J., does not state the invitor's duty alternatively as a duty either to take care or to give notice. He states the invitor's duty as a general duty to use reasonable care and he does not lay down any particular method as one which an invitor is in all circumstances entitled to adopt in discharging his duty: on the contrary he mentions a variety of methods, 'notice, lighting, guarding, or otherwise', and must, I think, have had in mind that such

55 (1880) 50 L.J.Q.B. 101.

56 *Ibid.* at p. 102.

57 [1951] A.C. 737; [1951] 1 Lloyd's Rep. 389 (*sub nom. Horton* v. *London Graving Dock Co. Ltd.*) (complete text of Lord Porter's speech).

> method should be adopted as reasonable care in the circumstances requires.[58]

This was, with due respect, a modern gloss. We have seen Willes J. spoke of 'the neglect of the defendant and his servants to use reasonably sufficient means [1] to avert or [2] warn him [the plaintiff] of it [the unusual danger]'. Lord Porter gave the correct interpretation:

> I accept the contention that an invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved.[59]

Lord Normand brought out what this meant:

> When there is already knowledge, notice or warning will have no effect and the omission of it can do no harm. So the defendant who has failed to give warning may yet succeed if he proves that the injured person had knowledge of the unusual danger.[60]

Looked at through nineteenth-century spectacles the rule Willes J. laid down makes sense.

Farrant v. *Barnes* (1862)[61] provides a typical example of the way in which the judges of the time tended to define the duty of care. The defendant had a carboy containing nitric acid delivered to the plaintiff, a servant of a carrier, in order that it might be carried by the carrier. The defendant told the plaintiff that the carboy contained acid, but did not tell him that the acid was dangerous. The plaintiff carried the carboy on his back from the carrier's cart, not knowing that the acid was dangerous. The carboy burst and the plaintiff was burnt by the acid. The defendant was held liable. Willes J. said:

> ... I am of the opinion that persons employing others to carry dangerous articles are bound to give reasonable notice of the character of such articles, and are liable, if they do not do so, for the probable consequences of such neglect of duty.[62]

The duty of care was defined in an empirical manner as a duty to do a particular thing.

Similarly, in *Jackson* v. *Metropolitan Railway Co.* (1877)[63] Cockburn C.J. said:

> I take it to be part of the duty of a railway company which invites persons to resort to its stations and to travel by its trains (inter alia) to provide two things: first, sufficient accommodation to meet the ordinary requirements of the traffic; secondly, a sufficient staff to maintain order and prevent irregularity and confusion, and to protect passengers from annoyance, inconvenience, or injury from

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58 [1951] A.C. 737 at p. 779.
59 *Ibid.* at p. 746.
60 *Ibid.* at p. 755.
61 (1862) 31 L.J.C.P. 137.
62 *Ibid.* at p. 140.
63 (1877) 2 C.P.D. 125 (reversed, (1877) 3 App. Cas. 193 (*sub nom. Metropolitan Railway Co.* v. *Jackson*)).

travellers who set not only the regulations of the company but also decency and order at defiance.[64]

There is a case on public nuisance which also illustrates the empirical approach. The case is *Tarry* v. *Ashton* (1876).[65] The defendant was the occupier of a public house in the Strand. From the front of the public house three gas lamps projected over the foot pavement. The defendant instructed an independent contractor to repair and put in good order all the gas fittings upon his premises, but the independent contractor was negligent and did not notice that one of the lamps was out of repair through general decay. Three months later an accident happened. One winter afternoon a servant of the defendant placed a ladder against the bracket of the decayed lamp and mounted the ladder so that he could blow water out of the gas pipes. The afternoon being wet and windy, the ladder slipped. The defendant's servant, to save himself from falling, caught hold of the bracket. The shaking brought the lamp down. The plaintiff, a barmaid, was walking in front of the public house. The lamp, weighing 40 to 50 pounds, fell upon her shoulder, and injured her severely. The court, which consisted of Blackburn, Lush and Quain JJ., gave judgment for the plaintiff. There are two versions of Blackburn J.'s judgment. Blackburn J. laid down three rules. The first rule dealt with want of repair. Blackburn J. said:

> (Revised version)
> It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance of itself... the occupier would be bound to know that all things like this lamp will ultimately get out of order, and, as occupier, there would be a duty cast upon him from time to time to investigate the state of the lamp... *if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered,* then I think he would clearly be answerable for the consequences (emphasis supplied).[66]

The second rule dealt with a latent defect. Blackburn J. said:

> (Original version)
> I do not wish to go any further than is necessary for this case, and I do not care to consider how far the danger to the public, which no doubt did exist, arose from a latent defect,... If... upon investigation no want of repair was discovered, and the injury afterwards happened from a latent defect *which no ordinary exercise of care and skill would have detected,* then I think there would be considerable doubt whether the occupier would be liable in an action for the injury so caused (emphasis supplied).[67]

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64 *Ibid.* at p. 141.

65 (1876) 45 L.J.Q.B. 260 (original version of Blackburn J.'s judgment); (1876) 1 Q.B.D. 314 (revised version of Blackburn J.'s judgment).

66 (1876) 1 Q.B.D. 314, at pp. 318-319.

67 (1876) 45 L.J.Q.B. 260, at pp. 262-263.

The third rule dealt with something done to the premises by a wrong-doer, without the knowledge of the owner or occupier. Blackburn J. said:

> (Original version)
> I do not wish to say that the occupier of premises would be liable for injury caused to a stranger by the fall of his premises, if, for example, a wrong doer had dug out the land near to them and rendered them dangerous without his knowledge. But here it is necessary to go this extent only; which in the supposed case would be, that as soon as the occupier *knew* of the dangerous condition of his premises he would be bound to put them in repair (emphasis supplied).[68]

Blackburn J.'s ground of decision will now be clear. Blackburn J. said:

> (Original version)
> If... upon investigation no want of repair was discovered, and the injury afterwards happened from a latent defect *which no ordinary exercise of care and skill would have detected*, then I think there would be considerable doubt whether the occupier would be liable in an action for the injury so caused.
>
> In the present case I am not obliged to decide this, because it appears that there is evidence to shew that the defendant was in August *aware* that the gas-fittings of this lamp were getting out of repair, and this knowledge led him to say what was very proper — 'It is time these gas-fittings were looked to.' (emphasis supplied).[69]

Friedmann (referring only to the revised version) criticized Blackburn J.'s judgment:[70]

> This decision was based on the evidence that 'the defendant was aware that the lamp might be getting out of repair...' (Blackburn J.), but Blackburn J. apparently could not quite make up his mind whether such knowledge was essential.[71]
>
> If this *dictum* has not quite the customary clarity of the great judge, it seems nevertheless difficult to interpret it in any sense different from that attributed to it by Wright J. in *Noble* v. *Harrison*, that the liability of the occupier depends on knowledge or means of knowledge.[72]

What Friedmann tried to do was to force Blackburn J.'s three rules into the modern formula: 'knew or ought to have known'. Blackburn J. did not have that formula in mind.

No General Principle

Such being the way the duty of care was dealt with in the various areas, it is not at all surprising that no general principle could be laid down about the duty of care.

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68 *Ibid.* at p. 262.
69 *Ibid.* at pp. 262-263.
70 W. Friedmann, 'Incidence of Liability in Nuisance' (1943) 59 *L.Q.R.* 63.
71 *Ibid.* at p. 67.
72 *Ibid.* at p. 68.

One distinction which can be seen was between a duty owed to the world at large — such as that owed by the person driving a carriage — and a duty owed to a particular class of persons, such as that owed by the manufacturer to a person whom the manufacturer was told would use the thing he manufactured and sold. Another distinction which can be seen was between a duty defined in general terms as a duty to take reasonable care and a duty defined in an empirical manner as a duty to do, or not to do, a particular thing. In view of such fragmentation, there was no idea of reasonable foreseeability.

But there was one strikingly modern judgment. It was Brett J.'s dissenting judgment in *Smith* v. *London and South Western Railway Co.* (1870).[73] The defendants, in the course of a very dry summer, allowed hedge trimmings and cut grass to accumulate in heaps on the embankment along which their railway ran. When the heaps had lain there for a fortnight, and were in a very combustible state, a spark from a passing locomotive set them on fire. The wind being very high and the country in a very parched state, the fire spread. It spread through the hedge that bounded the line, over a stubble field and across a lane to the plaintiff's cottage, which was about 200 yards from the spot where the fire broke out. The plaintiff's cottage was burnt down. The defendants were held liable. Brett J., dissenting, said:

> I take the rule of law in these cases to be that which is laid down by Alderson, B., in *Blyth* v. *Birmingham Waterworks Company*: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to average circumstances in ordinary years.' That being the rule, the question here is whether the defendants by their servants have done or omitted to do something which reasonable men placed under such circumstances as they were placed in would have done or omitted to do . . . I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction, and were worked without negligence; and that they might reasonably have anticipated that the rummage and hedge-trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage. It seems to me that no duty was cast upon the defendants, *in relation to the plaintiff's property*, because it was not shewn that that property was of such a nature and so situate *that the defendants ought to have known* that by permitting the rummage and hedge-trimmings

73 (1870) L.R. 5 C.P. 98 (affirmed, (1870) L.R. 6 C.P. 14).

> to remain on the banks of the railway they placed it in undue peril (emphasis supplied).[74]

This judgment, however, was a kind of sport.

Instead of dividing the tort into three elements — duty of care, breach of duty and damage — the judges divided the tort into two elements: breach of duty and damage. Thus, in *Metropolitan Railway Co.* v. *Jackson* (1877)[75] Lord Blackburn said:

> My Lords, in all cases of actions to recover damages for a personal injury against railway companies the Plaintiff has to prove, first, that there was on the part of the Defendants a neglect of that duty cast upon them under the circumstances; and, second, that the damage he has sustained was the consequence of the neglect of duty.[76]

There was no mention of the duty of care except in relation to the breach of duty. The duty of care was that owed 'under the circumstances'.

Between this fragmented duty of care and the modern duty of care there lies another gulf. The gulf was bridged in 1883.

The Modern Duty of Care

The gulf was bridged by three simple ideas.

The first idea was: 'The defendant must owe a duty of care'. Of course, the idea was not new. But it was one thing for the idea to exist at the back of the mind. It was another to bring the idea to the forefront. In *Gray* v. *North Eastern Railway Co.* (9th April 1883)[77] Watkin Williams J. said:

> It was undoubtedly correct to say that actionable negligence consists in the breach of some duty, and that if a duty is not shown to exist there can be no negligence.[78]

The second idea was: 'The defendant must owe a duty of care *to the plaintiff*'. In *Batchelor* v. *Fortescue* (30th April 1883)[79] A. L. Smith J., delivering the judgment of the court which consisted of Watkin Williams J. and himself, said:

> It should be noticed that the cause of action alleged in the statement of claim is, that the defendant knowingly permitted a chain to be used when altogether unfit for use. Of this cause of action no evidence was adduced : but we consider that the statement of claim has been amended by alleging a duty on the defendant *to take due care of the plaintiff*, and averring a breach thereof.

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74 *Ibid.* at pp. 102-103.
75 (1877) 3 App. Cas. 193.
76 *Ibid.* at p. 208.
77 (1883) 48 L.T. 904.
78 *Ibid.* at p. 905.
79 (1883) 11 Q.B.D. 474.

> We are of opinion that no evidence was given to support such a cause of action (emphasis supplied).[80]

The idea was expressed in terms of the particular plaintiff. Should the idea be expressed in general terms, the question would inevitably arise: In what circumstances would a defendant owe a duty of care to a plaintiff? Was it when a defendant could reasonably foresee damage to a plaintiff?

The judgment delivered by A. L. Smith J. was affirmed by the Court of Appeal (2nd June 1883).[81] One of the judges who heard the appeal was Brett M.R. No doubt, Brett M.R. was reminded of his dissenting judgment in *Smith* v. *London and South Western Railway Co.*,[82] where he had said:

> It seems to me that no duty was cast upon the defendants, *in relation to the plaintiff's property*, because it was not shewn that that property was of such a nature and so situate *that the defendants ought to have known* that by permitting the rummage and hedge-trimmings to remain on the banks of the railway they placed it in undue peril (emphasis supplied).[83]

The third idea was: 'And the duty of care is a duty to take reasonable care'. In *Cunnington* v. *Great Northern Railway Co.* (2nd July 1883)[84] Brett M.R. said:

> Now, I myself am prepared to say that, wherever the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that, *unless he used reasonable care*, there must be at least a great probability of injury *to the person charging negligence against him*, either as to his person or property, then there is a duty shown to use reasonable care (emphasis supplied).[85]

This was the first formulation of the modern duty of care — a general duty.

Contained within this formulation was the idea of reasonable foreseeability. The relevant words were: 'wherever the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that,... 'These words stated the reasonable foreseeability test. In *Heaven* v. *Pender* (30th July 1883)[86] Brett M.R. gave his reasons for adopting the reasonable foreseeability test:

> ... 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,

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80 *Ibid.* at p. 477.
81 *Ibid.*
82 (1870) L.R. 5 C.P. 98 (affirmed, (1870) L.R. 6 C.P. 14).
83 *Ibid.* at p. 103.
84 (1883) 49 L.T. 392.
85 *Ibid.* at p. 393.
86 (1883) 11 Q.B.D. 503.

> 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 [?]; . . . [1] 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 . . . . [2] In the case of a railway company carrying a passenger with whom it has not entered into the 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. [3] With regard to the condition in which an owner or occupier leaves his house or property other phraseology ['invitation', 'to lay a trap',] has been used, . . . And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred. It follows, as it seems to me, that there must be some larger proposition which involves and covers both set 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. The proposition which these recognised 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 every one of ordinary sense who did think would at once recognise 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.[87]

In 1882 the duty of care was that owed 'under the circumstances'; there was no idea of reasonable foreseeability. In 1883 the modern duty of care was enunciated; the idea of reasonable foreseeability came into existence. But this was not cause and effect. In what circumstances would a defendant owe a duty of care to a plaintiff? Was it when a defendant could reasonably foresee damage to a plaintiff? Perhaps, but not necessarily.

In *Le Lievre* v. *Gould* (1893)[88] Lord Esher M.R. (as Brett M.R. now was) adopted the idea of physical proximity. Lord Esher M.R., referring to *Heaven* v. *Pender*, said:

> That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them.[89]

In *Heaven* v. *Pender*[90] he had said:

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87 *Ibid.* at pp. 507-509.

88 (1893) 41 W.R. 468 (original version of the judgment of Lord Esher M.R.); [1893] 1 Q.B. 491 (revised version of the judgment of Lord Esher M.R.).

89 [1893] 1 Q.B. 491, at p. 497.

90 (1883) 11 Q.B.D. 503.

> It is undoubted ... 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. [1] 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. [2] 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. [3] 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 person or persons, but has a duty towards him or them.[91]

What proposition did 'these recognised cases suggest'? In *Heaven* v. *Pender* the proposition was reasonable foreseeability. In *Le Lievre* v. *Gould*[92] Lord Esher M.R. adopted a narrow proposition:

> 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.[93]

This physical proximity test was not all-embracing. It would exclude the actual decision of *Heaven* v. *Pender*.[94] This was contained in Cotton L.J.'s judgment, which was the judgment of the majority (Cotton and Bowen L.JJ.):

> 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 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.[95]

Lord Esher M.R., in adopting the physical proximity test, would have to explain *Heaven* v. *Pender* on a separate test — the test of invitation. Invitation was a subsidiary ground on which he had decided *Heaven* v. *Pender*:

> This case is also, I agree, within that which seems to me to be a minor proposition — namely, the proposition which has been often acted upon, that there was [,] in a sense, an invitation of the plaintiff by the defendant, to use the stage.[96]

In *Donoghue* v. *Stevenson*[97] Lord Atkin adopted the idea of reasonable foreseeability, qualified by proximity. Lord Atkin first criticized the reasonable foreseeability test:

> ... the duty which is common to all the cases where liability is established must logically be based upon some element common to

91 *Ibid.* at p. 507.
92 [1893] 1 Q.B. 491.
93 *Ibid.* at p. 497.
94 (1883) 11 Q.B.D. 503.
95 *Ibid.* at p. 517.
96 *Ibid.* at p. 514.
97 [1932] A.C. 562.

> 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.[98]

Lord Atkin then referred to the word 'neighbour' in its Biblical sense of 'one's fellow-man':

> 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. The rule that you are to love your neighbour becomes in law,...[99]

Let us pause here for a moment. At this point Lord Atkin left 'moral wrongdoing' and proceeded to deal with liability in law. He laid down the 'practical guide' as to such liability. This was the 'neighbour principle'. The 'neighbour principle' had two limbs. The first limb — 'you must not injure your neighbour' — dealt with reasonable foreseeability. The second limb — 'Who is my neighbour?' — dealt with proximity. The two limbs were linked by the word: 'neighbour', but used now in a different sense, the sense of 'a person near one'. Lord Atkin said:

> ... you must not injure your neighbour; and the lawyer's question Who is my neighbour? receives a restricted reply. [1] You must take reasonable care to avoid acts or omissions which you can *reasonably foresee* would be likely to injure your neighbour. [2] 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*.... So A. L. Smith L.J.: '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.' 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 extent to *such close and direct relations* that the act complained of directly affects a person whom the person alleged to be bound to

98 *Ibid.* at p. 580.

99 *Ibid.* at p. 580.

> take care would know would be directly affected by his careless act (emphasis supplied).[100]
>
> 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.[101]

What did Lord Atkin mean by 'proximity'? In *Grant* v. *Australian Knitting Mills Ltd.* (1935)[102] Lord Wright said:

> ... if the term 'proximity' is to be applied at all, it can only be in the sense that the want of care and the injury are in essence directly and intimately connected; though there may be intervening transactions of sale and purchase, and intervening handling between these two events, the events are themselves unaffected by what happened between them: 'proximity' can only properly be used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury.[103]

But the requirement of proximity did not apply solely to exclude reasonable possibility of intermediate examination. It was of general application. By 'proximity' Lord Atkin meant 'likelihood of being affected'. In *Donoghue* v. *Stevenson*[104] Lord Atkin said:

> 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 non-existence of a legal right... 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 [likely to be affected] 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.[105]

Let us place in reverse order the two limbs of the 'neighbour principle':

> Who... in law is my neighbour? The answer seems to be — persons who are so closely and directly affected [so likely to be 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.[106]
>
> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.[107]

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100 *Ibid.* at pp. 580-581.
101 *Ibid.* at p. 582.
102 [1936] A.C. 85.
103 *Ibid.* at p. 104.
104 [1932] A.C. 562.
105 *Ibid.* at pp. 595-596.
106 *Ibid.* at p. 580.
107 *Ibid.* at p. 580.

'Likelihood of being affected' related to the plaintiff. 'Reasonable foreseeability' related to the defendant's acts or omissions.

Of course, today the 'neighbour principle' is read as a principle of reasonable foreseeability. This is done by reading it out of context. Despite Lord Atkin's criticisms, the court has, in effect, gone back to the test Brett M.R. set out in *Heaven* v. *Pender*. In *Bourhill* v. *Young* (1942)[108] Lord Russell of Killowen said:

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man .... It will be sufficient in this connexion to cite two passages from well known judgments. The first is from the judgment of Brett M.R. in *Heaven* v. *Pender*: 'Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' The second is from the speech of Lord Atkin in *Donoghue* v. *Stevenson*: '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.'[109]

Le Lievre v. *Gould* and *Donoghue* v. *Stevenson* show that the reasonable foreseeability test was not a by-product of the modern duty of care. But once the modern duty of care was enunciated something inevitably happened. It became necessary to divide the tort into three elements — duty of care, breach of duty and damage. In *Tolhausen* v. *Davies* (1888)[110] A. L. Smith J. said:

> It is now undoubted law that to support what is commonly called an action for negligence against a defendant, the plaintiff must prove a duty to exist between the defendant and him, a breach of such duty, and damage thereby.[111]

Let us now trace the idea of reasonable foreseeability in the breach of duty.

The Breach of Duty

Posing the problem that way, we must not be guilty of an anachronism. In *Donoghue* v. *Stevenson*[112] Lord Macmillan said:

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108 [1943] A.C. 92; [1942] 2 All E.R. 396 (complete text of the speech of Lord Russell of Killowen).

109 [1943] A.C. 92, at p. 101.

110 (1888) 57 L.J.Q.B. 392 (affirmed, (1888) 58 L.J.Q.B. 98).

111 *Ibid.* at p. 394.

112 [1932] A.C. 562.

> 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.[113]

This is a truism. But it hides the past. We have seen that 'negligence' was once used in the sense of 'carelessness'. The question was simply this, Was the act or omission careless? But a subsidiary question arose: How careful must the defendant be? In other words, What was the standard of care?

The same question would arise if negligence was regarded as a tort which required a duty of care, though the question would arise in a different way. The proposition was: The defendant must owe a duty of care. But what was the duty? In other words, What was the standard of care?

We have seen that outside the three settled duty areas the judges tended to define the duty of care in an empirical manner as a duty to do, or not to do, a particular thing. If the duty of care was defined in this manner, there would be no problem as to the standard of care. The defendant must do or refrain from doing the particular thing; no more, no less. But if the duty of care was not defined in this manner, what then? The standard of care was: 'reasonable care'.

Sometimes the expression used was: 'ordinary care'. Brett M.R. hesitated between 'reasonable care' and 'ordinary care'. In *Cunnington* v. *Great Northern Railway Co.*[114] Brett M.R. said:

> Now, I myself am prepared to say that, wherever the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person or property, then there is a duty shown to use *reasonable care* (emphasis supplied).[115]

But in *Heaven* v. *Pender*[116] Brett M.R. said:

> ... whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise 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 (emphasis supplied).[117]

'Ordinary care' was not as accurate as 'reasonable care'. For instance, 'ordinary care' might be suitable for deciding whether leaving a horse

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113 *Ibid.* at pp. 618-619.
114 (1883) 49 L.T. 392.
115 *Ibid.* at p. 393.
116 (1883) 11 Q.B.D. 503.
117 *Ibid.* at p. 509.

and cart unattended in the street was negligent: *Lynch* v. *Nurdin* (1841)[118] — 'He has been deficient in ordinary care' (Lord Denman C.J.)[119] — but the test might give a wrong answer if applied to the supply of gas; the 'ordinary care' taken by gas companies might fall short of what was necessary. In a case where a gas company was sued, *Blenkiron* v. *Great Central Gas Consumers Co.* (1860),[120] Cockburn C.J. directed the jury:

> It is not enough that they do what is usual if the course ordinarily pursued is imprudent and careless; for no one can claim to be excused for want of care because others are as careless as himself; . . .[121]

In a situation where the standard of care was reasonable care, what test would the court apply to determine whether the defendant had taken reasonable care, in other words, whether there was breach of duty?

In *Blenkiron* v. *Great Central Gas Consumers Co.* Cockburn C.J. directed the jury that persons like the defendants must take 'all the precautions which ordinary reason and experience might suggest to prevent the danger'.[122]

In *Lay* v. *Midland Railway Co.* (1874)[123] Bramwell B. applied the test: 'common knowledge'. There a boy, four and half years old, slid along some wooden boarding which fenced a footway bridge. The bridge was fenced by wooden boarding where it crossed a railway and by iron work where it crossed a road. When the boy came to the place where the wooden boarding ended, he tumbled through an aperture in the iron work. Bramwell B. said:

> Now, let us apply our common knowledge of bridges to this case. We are asked to say that our common knowledge of bridges teaches us that a fence to a bridge, which fence is in continuation of a flat surface (I will give Mr. Collyer the benefit of that), and which fence is made of iron with squares or parallelograms, at all events with diagonal pieces from one corner to the other, having apertures in it, is dangerous. Speaking for myself, I must say that my own common knowledge of such fences is precisely the other way. I have known, I am afraid to say how many thousands, such fences as these, and have never heard of anyone getting into mischief because of them. What may happen now after this accident it is impossible to say. Whether the defendants ought or not henceforth to preclude the possibility of children tumbling themselves through in this way, may be a question; but, up to the time when this child tumbled through in this unusual manner, no one ever heard it suggested that such a thing could or would happen. Now, however, that it has happened, it may possibly be the duty of the company to alter this fence.[124]

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118 (1841) 1 Q.B. 29; 113 E.R. 1041.
119 (1841) 1 Q.B. 29, at p. 39.
120 (1860) 2 F. & F. 437; 175 E.R. 1131.
121 (1860) 2 F. & F. 437, p. 440.
122 *Ibid.* at p. 440.
123 (1874) 30 L.T. 529 (subsequent proceedings, (1875) 34 L.T. 30).
124 *Ibid.* at p. 531.

Bramwell B., however, slipped into the language of reasonable foreseeability:

> But to say that this occurrence ought to have been foreseen, ought to have been anticipated, that the man who made the fence ought to have foreseen the possible result of so making it, and that if he had not been negligent he would have foreseen it, is really absolute downright nonsense; and I warrant, if the jury had been asked, 'Do you mean seriously to say that anyone could reasonably have foreseen that a child would come sidling along this flat surface, and then have tumbled through this diagonal aperture?' that not one of them would have said that it could possibly have been foreseen; and yet, because the railway company did not anticipate it, we are asked to say that they have been guilty of negligence. It is absurd.[125]

The test might be formulated in various ways, but it was, in substance, the reasonable foreseeability test. In *Smith* v. *London and South Western Railway Co.*[126] Blackburn J. said:

> I also agree that what the defendants might reasonably anticipate is, as my Brother Channel has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligenc. I have still some doubts whether there was any evidence that they were negligent,... I do not dissent, but I have some doubt, and will state from what my doubt arises. I take it that... it is clear that when a railway company is authorized by their Act of parliament to run engines on their line, and that cannot be done without their emitting sparks, the company are not responsible for injuries arising therefrom, unless there is some evidence of negligence on their part. That being so, I agree that if they have the land at the edge of the line in their own occupation they ought to take *all reasonable care* that nothing is suffered to remain there which would increase the danger. Then comes the question, is there evidence enough in this case of *a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate*.... My doubt is, whether, since the trimmings were on the verge of the railway on the company's land, if the quickset hedge had been in its ordinary state, they might not have burned only on the company's premises, and done no further harm, and whether the injury, therefore, was not really caused by the hedge being dry,... I think it is clear that when the company were planning the railway they could not expect that the hedge would become so dry,... (emphasis supplied).[127]

Let us now trace the idea of reasonable foreseeability in remoteness of damage.

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125 *Ibid.* at p. 531.

126 (1870) 40 L.J.C.P. 21 (original version of Blackburn J.'s judgment); (1870) L.R. 6 C.P. 14 (revised version of Blackburn J.'s judgment).

127 (1870) L.R. 6 C.P. 14, at pp. 21-22.

Remoteness of Damage

In *Greenland* v. *Chaplin* (1850)[128] Pollock C.B. suggested the reasonable foreseeability test. He said:

> ... at present I guard myself against being supposed to decide with reference to any case which may hereafter arise; but, at the same time, I am desirous that it may be understood that I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur.[129]

But this suggestion was not adopted; instead the judges adopted the natural consequences test.

There was a close relationship between the natural consequences test and Bacon's maxim:

> *In jure non remota causa, sed proxima spectatur.*
> It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree.[130]

Bacon dealt with the cause only. But what made a cause 'the immediate cause'? Was it because what followed were natural consequences?

In *Sneesby* v. *Lancashire and Yorkshire Railway Co.* (1874)[131] the plaintiff's cattle were being driven along a road. The road crossed a siding of the defendants' railway on a level. As the cattle were crossing the siding, the defendants' servants negligently sent some trucks down an incline into the siding. The cattle were frightened and scattered. For a time the plaintiff's drovers lost control of all of them. They recovered most of the cattle, but some were found killed on another part of the railway. Blackburn J. said:

> No doubt the rule of our law is that the immediate cause, the causa proxima, and not the remote cause, is to be looked at: for, as Lord Bacon says: 'It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' The rule is sometimes difficult to apply, but in a case like the present this much is clear,

128 (1850) 5 Exch. 243; 155 E.R. 104.

129 (1850) 5 Exch. 243, at p. 248.

130 Bacon's *Elements of the Common Lawes of England* (1630). Part 1: 'The Maximes of the Law,' *Regula* 1.

131 (1874) 43 L.J.Q.B. 69 (original version of Blackburn J.'s judgment); (1874) L.R. 9 Q.B. 263 (revised version of Blackburn J.'s judgment) (affirmed, (1875) 1 Q.B.D. 42).

> that so long as the want of control over the cattle remains without any fault of the owner, the causa proxima is that which caused the escape, for the consequences of which he who caused it is responsible.[132]

But what made 'that which caused the escape' the *causa proxima*? Blackburn J. said:

> It is the most natural consequence of cattle being frightened that they should go galloping about and get into a dangerous position, and, being in the neighbourhood of railways, should get on the line and be run over by a passing train, whether that of the defendants or not is immaterial. When once it is established that the cattle were driven out of control of the plaintiff by the defendants' negligence and that the control could not be recovered till they were killed, which was the natural consequence of their being uncontrolled, the liability of the defendants is beyond dispute.[133]

The expression 'natural consequences' was given its literal meaning. In *Smith* v. *London and South Western Railway Co.*[134] Kelly C.B. said:

> It may be that they [the defendants] did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against *all* circumstances which might result from this, and were responsible for *all* the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for *all* the consequences of their conduct, . . . (emphasis supplied).[135]

The defendants were responsible for 'all' that followed naturally.

It is possible to reconcile this case and *Sharp* v. *Powell* (1872).[136] In the latter case the defendant washed his van on the street. The water ran along the gutter by the side of the street for about 25 yards, down to the corner of another street. There it met with an obstruction, accumulated, and spread over part of the street. There was a sharp frost at the time. Soon the water became frozen over. The plaintiff's horse slipped while passing over the frozen water, and broke its leg. The plaintiff claimed in public nuisance. His claim was dismissed. Grove J. said:

> If in the present case the water had been allowed to accumulate at the place where the carriage was washed, and such had been the immediate cause of the accident, I think the defendant would have been liable for it, but when the water got back to its normal course or channel to which it would have gone had the van been washed in the coach-house (so that the noxious act of the defendant had,

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132 (1874) L.R. 9 Q.B. 263, at p. 267.

133 *Ibid.* at p. 267.

134 (1870) 40 L.J.C.P. 21 (original version of Kelly C.B.'s judgment); (1870) L.R. 6 C.P. 14 (revised version of Kelly C.B.'s judgment).

135 (1870) L.R. 6 C.P. 14 at p. 20.

136 (1872) 41 L.J.C.P. 95 (original version of Grove J.'s judgment); (1872) L.R. 7 C.P. 253 (revised version of Grove J.'s judgment).

> as it were, been got rid of), I do not think that anything had occurred which would make him responsible for what followed afterwards. The damage which the plaintiff sustained was not from the defendant washing his van in the street instead of in his coach-house, . . .[137]

The 'but for' test was not satisfied. There was no causation. No question of remoteness arose.

Conclusion

The period 1833-1882 was an interregnum between the old action on the case and the modern tort of negligence. In 1833 the important distinction in the action on the case became that between intention and negligence. 'Negligence' just meant 'carelessness'. There was neither duty nor breach of duty. But in speaking of 'negligence' in the sense of 'carelessness' one tended to speak of 'breach of duty', and from 'breach of duty' one was led to speak of 'duty'. Thus, duty came into existence. Various duty areas were developed. By 1882 the law had developed up to this point. There was a distinction between a duty owed to the world at large and a duty owed to a particular class of persons. There was another distinction between a duty defined in general terms as a duty to take reasonable care and a duty defined in an empirical manner as a duty to do, or not to do, a particular thing. In view of such fragmentation, there was no idea of reasonable foreseeability. As to breach of duty, it was determined by the reasonable foreseeability test where the standard of care was reasonable care. Remoteness of damage was determined by the natural consequences test. Various ideas thus existed in symbiosis.

137 (1872) 41 L.J.C.P. 95 at p. 98.