LIABILITY IN NEGLIGENCE FOR WORDS

Sixty years have passed since Jeremiah Smith [1] pointed out that if a person carelessly scratches another on the nose with his pen, the injury is actionable, but not if with the same pen he carelessly signs a document which ruins that other financially. Regrettably, in this writer's opinion, this would appear still to be the rule at the present day; but recent cases suggest that this apparent anomaly is open to modification and this must be regarded as a justification for the present reassessment.

The first question in every negligence case is whether a duty of care is owed by the defendant to the plaintiff; and the existence of such a duty depends upon whether harm, of the kind which actually took place, ought reasonably to have been foreseen by the negligent actor at the time of the significant act or omission, as likely to be occasioned to the plaintiff in consequence.[2] If one may be forgiven for quoting Lord Atkin, one would ask, as he did, whether the plaintiff is a person "so closely and directly affected by my act that I ought reasonably to have him in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." [3]

Provided, however, I ought reasonably to have in contemplation certain harm to X as a likely consequence of my careless act or omission, there is no *a priori* reason why such careless act or omission with such consequences should not include the uttering of words or the signing of documents, equally as much as more obvious physical acts, as predicating a duty to take care to avoid the foreseeable injurious consequences. To put it another way: if harm is reasonably foreseeable, there is no reason why persons guilty of certain careless acts or omissions should be relieved of liability for the consequences of their carelessness. The essential factor is, however, that the harm must be reasonably foreseeable and this is why the argument *ab inconvenienti* formulated by Winfield is beside the point. He suggests, it will be recalled, the case of "the cartographer who carelessly omits to indicate on his map the existence of a reef. The captain of the 'Queen Mary' in reliance on the map and having no opportunity of checking it by reference to any other map, steers her on to the unsuspected rocks and she becomes a total loss. Is the unfortunate cartographer to be liable to her owners in negligence for some millions

1. *Liability for Negligent Language* (1900) 14 *Harvard L.R.* 184. The literature on this topic is extensive. For some recent essays see Paton (1947) 25 *Canadian Bar Rev.* 123, Seavey (1951) 67 *L.Q.R.* 466, Wilson (1952) 15 *M.L.R.* 160 and Fridman (1954) 32 *Can. B.R.* 638.

2. *Bourhill* v. *Young* [1943] A.C. 92; *Woods* v. *Duncan* [1946] A.C. 401. This is a narrow expression of the principle: *cf. Re Polemis and Furness Withy & Co. Ltd.* [1921] 3 K.B. 560, 577, *per* Scrutton LJ.

3. *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.

of pounds damages?"[4] This is not an argument against liability for negligent words; it is simply a demonstration that catastrophic results may follow apparently trifling lapses; Winfield's argument would not avail a deck officer who laid out the wrong course with a similar result. The question should always be: is the catastrophe sufficiently proximate to the careless act so as to write into the cartographer's existing duty, a further duty to take care that it be avoided ?

Before proceeding further, it would be well to indicate the kinds of negligence that might be supposed to be in the field of liability for words. The field would not be confined to the written word; it would not necessarily be confined to "words" in the strict sense, as in the case of the cartographer. It should include the negligent giving of advice,[5] the negligent conduct of affairs,[6] the negligent making of false statements (not necessarily excluding those which are also defamatory),[7] the negligent publication of statements whether true or false[8] and the negligent making of statements inducing contract.[9] Some of these situations are already taken account of by the law, but they represent a group of states of affairs where a duty of care ought legitimately to be capable of attaching to the person making the "statement." (A caveat ought to be entered at this point; to say that a duty of care may be attached to the making of a "statement" is not to say that it must be so attached in every case. It depends entirely upon the foreseeability of the damage, which in the particular event flows from the making of the statement, whether a duty to avoid that damage is to arise.[10])

The stumbling-block in the way of a plaintiff claiming damages for negligent words lies in the decision of the English Court of Appeal in *Le Lievre* v. *Gould*, [11] a negligent misrepresentation case. Mortgagees of a builder's interest under a building contract advanced money to the builder on the faith of certificates given from time to time by a surveyor, who was employed by the landowner. In consequence of the surveyor's negligence, the certificates contained statements which were false. The Court of Appeal held that there was no duty upon the surveyor owed to

4. Quoted from the judgment of Asquith L.J. in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, 194. *Cf.* the decision in *Woods* v. *Duncan* [1946] A.C. 401.
5. As in *Nocton* v. *Ashburton* [1914] A.C. 932; *Woods* v. *Martins Bank Ltd.* [1958] 1 W.L.R. 1018.
6. As in *Groom* v. *Crocker* [1939] 1 K.B. 194.
7. As in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164; *Guay* v. *Sun Publishing Co. Ltd.* [1953] 4 D.L.R. 577.
8. As in *Furniss* v. *Fitchett* [1958] N.Z.L.R. 396.
9. As in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.
10. *Cf.* in relation to industrial accidents: *Qualcast (Wolferhampton) Ltd.* v. *Haynes* [1959] 2 W.L.R. 510 (H.L.), at pp. 515 (Lord Keith) 517 (Lord Somervell) and 519-520 (Lord Denning).
11. [1893] 1 Q.B. 491,

the mortgagees, to take care to see that the certificates were true, and that *Derry* v. *Peek* [12] had laid down that in the absence of a special duty (as *e.g.* contract) negligent misstatements were actionable only on proof of fraud.[13]

The curious thing about *Le Lievre* v. *Gould*[14] is, however, the summary way in which the negligence claim is disposed of. As C. A. Wright says [15] in another context, "If law is to be something more than the whim of the individual administering it, we should at least expect language which gives the true reasons for what has been done, so that these may be agreed or disagreed with in future controversies." Observe then, *Le Lievre* v. *Gould.*

The only substantial discussion of negligence is to be found in the judgment of Lord Esher M.R. where he says,[16] "No doubt the defendant did give untrue certificates; it was negligent on his part to do so and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract?" This is in fact the crux of the matter; but the question goes unanswered. "A man is entitled to be as negligent as he pleases towards the whole world if he has no duty to them. The case of *Heaven* v. *Pender* [17] has no bearing upon the present question. That case established that under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property." [He then gives two examples of a duty to drive carefully on the highway.] "That is the effect of *Heaven* v. *Pender*,[17] but it has no application to the present case." One looks in vain for the reason why there should be no duty of care to avoid negligent misrepresentation otherwise than *ex contractu*, and for the reason why *Heaven* v. *Pender* should only apply to physical damage to person or property.

The justification for quoting this passage *in extenso* is that it is upon this part of Lord Esher's judgment that the modern rule is said to be

12. (1889) 14 App. Cas. 337.
13. *Per* Bowen L.J. [1893] 1 Q.B. at p. 501.
14. [1893] 1 Q.B. 491.
15. Cases *on the Law of Torts,* 2nd ed., p. 368.
16. [1893] 1 Q.B. at p. 497. This is the passage referred to by Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580, and by Asquith L.J. in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, 188-189.
17. (1883) 11 Q.B.D. 503.

based. Thus Asquith L.J. in *Candler* v. *Crane*, *Christmas & Co.*[18] says, a propos Lord Atkin's speech in *Donoghue* v. *Stevenson*,[19] "He must have considered *[Le Lievre* v. *Gould]* closely. Yet his only reference to it is as annexing a valid and essential qualification to Brett M.R.'s formula in *Heaven* v. *pender."* This is taken to imply approval of *Le Lievre* v. *Gould.* But what Lord Atkin said was: "This *[i.e.* the "neighbour" principle] 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.* [19] The "valid and essential qualification" is therefore the notion of proximity, and this is explained by Lord Atkin himself as not being confined "to mere physical proximity but...to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."[20] With respect to Asquith L.J., there appears to be nothing in *Donoghue* v. *Stevenson* which can be interpreted as approving, far less justifying, the principle asserted in *Le Lievre* v. *Gould*[21] that a duty of care for words can arise only *ex contractu.*

The judgments of the other judges in *Le Lievre* v. *Gould*[21] take the matter little further. Bowen L.J. distinguishes *Heaven* v. *Pender*[22] on the ground that what a man writes on paper is not like a gun or other dangerous instrument; and A. L. Smith L.J. also does so on the ground that that case was "totally different" and further that no contract was proved and that there was in consequence no breach of duty.

It is perhaps a little late in the day to be doubting the decision in *Le Lievre* v. *Gould,* but it is not unfair to say that the ruling on the question of liability lacks any convincing reasoning or authority. In fact, although the case was not primarily argued as such, it was treated by the Court of Appeal as a fraud case in which, as in *Derry* v. *Peek*,[23] the plaintiff had failed to prove dishonesty. It is this indeed which has bedevilled the development of the whole of this field of law. An honest belief by the defendant in the truth of his statement will prevent a person who relies upon that statement succeeding in an action of deceit; but there is no reason why it should follow from this that the defendant's honest belief in his statement should be fatal to an action for negligence,

18. [1951] 2 K.B. at p. 190.
19. [1932] A.C. 562, 580-581.
20. [1932] A.C. at p. 581.
21. [1893] 1 Q.B. 491, 498, 504.
22. (1883) 11 Q.B.D. 503.
23. (1889) 14 App. Cas. 337,

if the statement be negligently made.[24] Still less should it follow that an action for negligence for words ought to fail where the negligence does not lie in the falsity of the statement, but in the circumstances in which the statement came to be published.[25]

Nevertheless even the supposed rule based upon *Derry* v. *Peek*[26] is not without exceptions. Even the Court of Appeal in *Le Lievre* v. *Gould*[27] allowed that the contract relationship might give rise to a duty to take care.[28] Another exception appeared in *Nocton* v. *Lord Ashburton*[29] in the bastard creation of "equitable fraud." But, for the accident that the claim in that case was framed in fraud, it would have been sufficient for the court to say simply that the solicitor owed his client a duty to take care in relation to the advice which he tendered: harm was caused of a kind which the solicitor ought reasonably to have foreseen as a likely consequence of his failure to take care. As it stands, this case is another example of the *damnosa hereditas* of muddle which has followed the attempts in the earlier cases to obtain relief by extending the limits of the tort of deceit.

But, because of this, the absence of a contractual *nexus* was fatal to the plaintiff in *Candler* v. *Crane, Christmas & Co.*[30] in an action against an accountant in circumstances where the accountant well knew of the likelihood of damage to the plaintiff as a probable consequence of his want of care in preparing the accounts of a limited company. The judgments in this case show a sharp cleavage of opinion between Denning L.J. on the one hand, who would have held that the wide general principle expressed by Lord Atkin in *Donoghue* v. *Stevenson*[31] was sufficient to

24. The operative word must be "negligent" or "careless;" much loose thinking can follow the use of the term "innocent" in relation to misrepresentation, *e.g.* as in MacIntyre's article, *A Novel Assault on the Principle of No Liability for Innocent Misrepresentation* (1953) 31 *Can. B.R.* 770. The word "innocent" means "free from fault" and therefore begs the essential question; "negligent" or "careless" are the only proper words to describe careless but not dishonest misstatements.
25. *E.g. Furniss* v. *Fitchett* [1958] N.Z.L.R. 396, where such a proposition would appear to have been canvassed: see pp. 403-404.
26. (1889) 14 App. Cas. 337.
27. [1893] 1 Q.B. 491.
28. *Le Lievre* v. *Gould* does not make it clear whether the existence of the contractual relationship gives rise to a duty of care in tort or whether the duty of care is an implied contractual term. *Furniss* v. *Fitchett* suggests the former, *Groom* v. *Crocker the* latter, and Viscount Simonds in *Lister* v. *Romford Ice Co. Ltd.* [1957] A.C. 555, 573 both at once (in which case the contract/tort relationship is described as "trite law").
29. [1914] A.C. 932.
30. [1951] 2 K.B. 164.
31. [1932] A.C. 562, 579-580,

impose a duty of care on the careless accountant and Asquith and Cohen L.JJ. (the majority) who were content to rely on *Le Lievre* v. *Gould.* [32]

Denning L.J. in a characteristic judgment explained all the earlier cases in terms of "proximity" and concluded that in the case before him there was that necessary degree of proximity to give rise to a duty of care, though on the facts it was absent in *Le Lievre* v. *Gould.* Asquith L.J., whose judgment was the more important of the majority, reasoned on the following lines: (1) *Le Lievre* v. *Gould* was a binding authority unless overruled or distinguishable; (2) *Donoghue* v. *Stevenson* and following cases all related to personal injury or damage to property, and in any case the House of Lords did not have negligent misstatements in mind; (3) assuming, without admitting, that Lord Atkin's "neighbour" principle represented the majority view, such reference as there was to *Le Lievre* v. *Gould* approved it rather than otherwise;[33] (4) that in any case *Le Lievre* v. *Gould* was indistinguishable on the facts from the instant case. This able judgment suffers from its reliance on *Le Lievre* v. *Gould;* whether or not the earlier case was strictly binding, it was accepted at its face value, with the consequence that Asquith L.J., disclaiming responsibility for the illogicality of this part of the law, left it still lacking the rational justification which it needed.[34] It is the logical and cohesive character of the rule as expounded in the judgment of Denning L.J. that gives it its appeal to the lawyer, while its manifest justice appeals to the laymen also. By way of postscript to the case, it may be pointed out that *Donoghue* v. *Stevenson*[35] decided one matter for certain, which has a bearing on the contract-relationship proposition of *Le Lievre* v. *Gould,* namely, that a liability in contract to A (say, Trevanance Mines Ltd.) does not exclude a liability in tort to B (say, Mr. Candler).

Moreover, it is at least open to question whether "contract" in this context means precisely what it says, or whether it means perhaps a relationship like a solicitor-client relationship, irrespective of the existence of a contract strictly so-called between the parties. In *Candler* v. *Crane, Christmas & Co.,*[36] the absence of a contract defeated the claim. On the other hand in *Groom* v. *Crocker,*[37] a claim against a solicitor for negligence, the English Court of Appeal, while holding unanimously that it lay only in contract and not in tort, were nevertheless prepared to treat as a contract a solicitor-client relationship imposed upon an insured person

32. [1893] 1 Q.B. 491.
33. As to this see p. 334, *ante.* Actually Asquith L.J. was not prepared to accept that Lord Atkin's "neighbour" dictum represented the view of anyone but Lord Atkin himself; he would not therefore regard it as part of the *ratio decidendi* of *Donoghue* v. *Stevenson.*
34. [1951] 2 K.B. 164, 194-195.
35. [1932] A.C. 562.
36. [1951] 2 K.B. 164.
37. [1939] 1 K.B, 194.

by his insurance company. (It is not clear why the court preferred to distort the nature of a contract, rather than rest the action in tort, but justice obviously demanded some solution of the kind; consider the position of a client under the Legal Aid scheme in England whose solicitor mishandles his affairs, where there is no contractual *nexus,* because no consideration, between the parties.[38])

More recently in *Woods* v. *Martins Bank Ltd.,*[39] a similar result was arrived at, where the relation was that of banker and customer, but where the question of framing the action in contract or tort was not seriously adverted to. In this case, a prospective customer of a bank was held entitled to recover damages against the bank, when in reliance upon negligent advice tendered to him by the manager, he invested in securities which ultimately proved to be worthless. The plaintiff was not actually a customer of the bank at the date of the earliest advice as the manager was then hoping to induce him to transfer his account from another bank; but in view of the widely publicised advertisements of the services rendered by the bank, including investment advice, Salmond J. was prepared to hold that the bank owed the plaintiff a duty of care in respect of the advice tendered, even although it was gratuitously given.[40]

The precise legal basis for the decision is a little difficult to ascertain. *Le Lievre* v. *Gould*[41] was quoted to the court, but its bearing on the case is not discussed in the judgment[42] and reliance was rather placed on the analogy of the gratuitous bailment cases.[43] The reference to these cases can be no more than analogy because the fact-situations differ fundamentally; but it does emphasise the recognition by the judge that there was a relation between the parties which did not arise *ex contractu.* It has indeed been suggested that the advertisements constituted an offer, which was accepted by the offeree's consulting the manager; but the emphasis placed by the judge on the gratuitous

38. Compare the development of the implied or fictitious contract in questions of agent's warranty of authority as laid down in *Collen* v. *Wright* (1857) 8 E. & B. 647 with the older strictly tort liability in *Polhill* v. *Walter* (1832) 3 B. & Ad. 114.

39. [1958] 1 W.L.R. 1018.

40. [1958] 1 W.L.R. at p. 1032.

41. [1893] 1 Q.B. 491.

42. [1958] 1 W.L.R. at p. 1030.

43. *E.g. Giblin* v. *McMullen* (1868) L.R. 2 P.C. 317. The bulk of the argument seems to have been on the question whether advising on investments was a function of the bank; but the ultimate result may have been affected by the following: (1) that the accounts of the company in which the plaintiff was advised to invest were kept at that very branch of the bank and the manager well knew that they were in financial difficulties; (2) that at least one sum of £3,000 was, to the manager's knowledge, lent by the plaintiff to one company simply so that it could reduce its overdraft with the defendant bank. *Cf.* also *Glanzer* v. *Shephard* (1922) 135 N.E. 275 (Cardozo J.),

character of the relationship (the advice being offered as a bait to the prospective customer) and the fact that it was obviously argued that no duty arose until the plaintiff actually did become a customer,[44] both go to suggest that the liability was not contractual. It is submitted that the simple explanation is the best; there was that degree of contact and confidence reposed as to give rise to a duty of care on the part of the manager to see that his advice was sound. At the least, it would seem that the requirement of a contract before a duty can arise is wearing thin, and "special relationship" would perhaps be less misleading if mere "proximity" is unacceptable.

The other aspect of the negligent words cases relates to the kind of damage foreseeable and suffered; there is some authority for saying that damages are recoverable for personal injuries caused in consequence of negligent statements, and it may be that a distinction is to be drawn between personal injury cases and cases involving mere financial loss. Apart from negligent words, there is of course ample authority for including certain types of financial loss in a claim for damages for negligence, if such loss ought reasonably to have been in the defendant's contemplation — *e.g.* the loss of prospective earnings in an action based on personal injuries. But where the negligence alleged is in negligent words and especially where the plaintiff's interest affected is purely financial or pecuniary in character, damages are much less likely to be recoverable. This too appears to have been derived originally from *Le Lievre* v. *Gould*[45] where Lord Esher M.R. draws or seems to draw a distinction between negligent acts or omissions causing personal injury or damage to property on the one hand, and other heads of loss — particularly financial loss — on the other. He says, in discussing *Heaven* v. *Pender,*[46] "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." [47]

The examples, however, are hardly conclusive. *George* v. *Skivington*[48] is one, although, as Asquith L.J. pointed out in *Candler* v. *Crane, Christmas & Co.,*[49] it is easier to justify the decision on the ground that the hairwash was in fact dangerous than on the ground that the defendant said it was safe. The exact nature of the duty of care in *Sharp* v. *Avery*[50] is also obscure; the plaintiff, a pillion passenger on a motor cycle, was informed by the defendant that he knew the road and

44. [1958] 1 W.L.R. 1018, 1032.
45. [1893] 1 Q.B. 491, 497.
46. (1883) 11 Q.B.D. 503.
47. [1893] 1 Q.B. at p. 497.
48. (1869) L.R. 5 Ex. 1.
49. [1951] 2 K.B. 164, 190-191.
50. [1938] 4 All E.R, 85,

would lead the way. The defendant's recollection was doubtless at fault, for he led the plaintiff's driver into a ditch, in consequence of which the plaintiff was injured. The English Court of Appeal unanimously found for the plaintiff on the ground that he was "neighbour" to the defendant, without however making it clear whether the breach of duty lay in the misstatement as much as in the negligent piloting.

The issues were clearer in *Guay* v. *The Sun Publishing Co. Ltd.,*[51] a decision of the Supreme Court of Canada, where a divided court found against a plaintiff who had suffered nervous shock in consequence of an untrue statement agreed to have been negligently published in a newspaper saying that her husband and children had been killed in a motor car accident. Locke and Kerwin JJ. held that a newspaper publisher owed no duty of care to its readers to avoid innocent misstatements;[52] Kerwin J. added that in any event the plaintiff was not a person so closely and directly affected by the publishing of the report that the defendant ought reasonably to have had her in contemplation as being affected injuriously when it was directing its mind to the act of publishing.[53] Estey J. expressly reserved the question whether there could be recovery for injury or illness consequent upon negligent misstatements, but held that on the facts of the instant case the defendant owed no duty to the plaintiff. Rinfret C.J. and Cartwright J. dissented and would have given damages, on the ground that *Donoghue* v. *Stevenson*[54] should apply wherever a reasonable man in the position of the defendant would have foreseen the probability of the mere communication causing a serious shock with resulting injury to the health of the plaintiff. Cartwright J. said: "The case...is closely analogous to if not identical with, a case in which the defendant has unintentionally but negligently struck the appellant or caused some object to strike him. In principle, I find it difficult to assert that a defendant who unintentionally but carelessly injures an appellant by a blow or an electric shock should be under liability but a defendant who causes a similar, and perhaps more serious injury to an appellant by carelessly inflicting a mental shock by the use of words should escape liability." [55]

More recently in *Furniss* v. *Fitchett,*[56] a decision of Barrowclough C.J. in the Supreme Court of New Zealand, it was held that a plaintiff who suffered nervous shock in consequence of the negligent publication of a medical certificate concerning her mental condition was entitled to recover damages from the doctor who put the certificate into circulation.

51. [1953] 4 D.L.R. 577.
52. "Innocent" is the word used throughout by Locke J. See p. 335, n.24, *ante,* where this usage of the word "innocent" is discussed.
53. [1953] 4 D.L.R. at p. 582.
54. [1932] A.C. 562.
55. [1953] 4 D.L.R. at p. 610.
56. [1958] N.Z.L.R. 396.

It may be noted that although there was in fact a contractual *nexus* between the plaintiff and the defendant in this case, the action was brought in tort (in an attempt to secure exemplary damages). The duty of care was treated as being based upon the broad principle in *Donoghue* v. *Stevenson* and not upon the physician's duty as one following a common calling.

It may be that this class of case would be more readily conceded by the courts as giving rise to an action, since the historical background may be regarded as trespass and the subsequent development by analogy from this root *(via* such cases as *Dulieu* v. *White,*[57] *Wilkinson* v. *Downton* [58] and *Janvier* v. *Sweeney*[59]) more obviously justifies a claim for damages, once nervous shock as a head of damage is accepted, than in cases whose background is the tort of deceit. Yet, if the wrongful act be the same, what real distinction is to be drawn between these heads of damage, now that it is more than 100 years since the forms of action were laid to rest?

Surely the time has come for these fortuitous irregularities to be ironed out. The personal injuries cases should simply be cases where personal injury is the reasonably foreseeable damage; and if other damage should arise instead of or in addition to personal injury a corresponding duty of care ought to arise in like manner. The likelihood of damage should predicate the duty (whether in relation to words or deeds) and not merely the likelihood of certain kinds of damage only. And if it appear that a person is so closely and directly connected with my statement that I ought to have him in mind as being affected financially or otherwise thereby, then that person is my neighbour. There is authority and logic enough to permit this rule to be established and it is submitted that justice would be better done thereby.

H. R. GRAY. *

57. [1901] 2 K.B. 669.

58. [1897] 2 Q.B. 57.

59. [1919] 2 K.B. 316.

* LL.M. (London); of England and of New Zealand, Solicitor; Professor of Law and Dean of the Faculty of Law in the University of Canterbury.