THE NEGLIGENT NUISANCE

> "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion" — *per* Raymond C.J. in *Reynolds* v. *Clarke* (1726) 1 Strange 634.

One side-product of the decision of the Privy Council in *The Wagon Mound* [1] has been to give fresh life to discussion of the relationship between Nuisance and Negligence, with the preponderance of English opinion being in favour of the view that the two torts are rapidly becoming indistinguishable.[2] There is a danger, however, that the attractiveness of this process of apparent rationalisation may cause both courts and writers to overlook the detailed rules of the torts concerned; rules which were not necessarily formulated for irrational reasons and which cannot be disregarded just because they are found in certain particular instances to be inconvenient. In *Letang* v. *Cooper* Diplock L.J. tells us that "it is essential to realise that when, since 1873, the name of a form of action is used to identify a cause of action, it is used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person. To forget this will indeed encourage the old forms of action to rule us from their graves".[3] It cannot, however, be suggested that the remedy flows directly from the fact-situation without any interposition of legal rules between the two; indeed, one reason for the categorisation of fact-situations to which Diplock L.J. refers is to reveal which set of legal rules is appropriate for the decision of the case. True it is that the same set of facts may admit of two or more different categorisations, and that in the end it may be concluded that the rules applicable to the various categories are sufficiently similar to allow of their assimilation, but such a conclusion can only be reached after investigation based upon the traditional conceptual scheme wherein Nuisance and Negligence are treated as separate torts. Before comparing the rules of Nuisance with those of Negligence we must, however, dispose of three preliminary matters which have caused confusion in attempts to expound the law of Nuisance; namely the distinction between Public and Private Nuisance, the overlap between Nuisance and *Rylands* v. *Fletcher,* and the role and significance of liability in Nuisance for the acts of an independent contractor.

1. *Overseas Tankships* (*U.K.*), *Ltd.* v. *Morts Dock & Engineering Co., Ltd.* [1961] A.C. 388.

2. *British Road Services* v. *Slater* [1964] 1 W.L.R. 498 at p. 504, *per* Lord Parker C.J.; Williams, (1961) 77 *L.Q.R.* 179 at pp. 204-210. cf. *The Wagon Mound* (*no.* 2) [1963] 1 Lloyd's Rep. 402 at p. 427, *per* Walsh J.

3. [1965] 1 Q.B. 232 at p. 243.

PUBLIC AND PRIVATE NUISANCE.

These torts are best distinguished by the rights which they protect: in Public Nuisance, rights enjoyed by the whole public or a sufficient section thereof, and in Private Nuisance rights enjoyed by an individual over or in connexion with land. Much doubt has been expressed as to the correct meaning of the word "nuisance",[4] but it is submitted that in Private Nuisance the nuisance is that interference with the plaintiff's rights which the tort is designed to prevent.[5] The law may be prepared to grant an injunction to inhibit a state of affairs which is thought likely to result in the future in such an interference, but here it is not a nuisance but a "potential nuisance" which is enjoined.[6] On the other hand, in Public Nuisance the interference with, for example, the public's right of passage along a highway may take the form of rendering that passage unreasonably hazardous, and in such a case harm which is merely threatened can be a "nuisance".[7] Care must also be taken to distinguish between the various ways in which a question of Public Nuisance may be litigated. The need to protect the public led Friedmann[8] to argue for strict liability in Public Nuisance, but it is only in a suit for an injunction that the action is aimed exclusively at preventing interference with public rights. When a private individual is allowed[9] to bring a suit for particular damage arising from a public nuisance the rights of the

4. See for instance *Salmond on Torts,* (14th ed., 1965) (hereinafter *Salmond*) p. 85; Street, *The Law of Torts,* (3rd ed., 1963) (hereinafter *Street*) p. 212.

5. "A fire that is presently harmless is not a nuisance though it may be fraught with danger and arouse apprehensions of harm. . . the invasion of the common law rights of the occupier or owner of land does not occur until he suffers harm": *per* Windeyer J. in *Hargrave* v. *Goldman* (1963) 37 A.L.J.R. 277 at p. 283.

6. *Ibid.* Seavey, (1952) 65 *Harvard L.R.* 984 at p. 985, suggests that "in an injunction against threatened nuisance it is the conduct which is enjoined and not the consequences" and therefore seems to conclude that the "nuisance" is the conduct resulting in the prohibited interference. The defendant's activities can, however, only be enjoined by the court with reference to damage, although that damage may only be anticipated and not actual.

7. "A thing that dangerously overhangs a highway, and may fall at any minute, is however commonly called a nuisance. It currently and continuously interferes with the safe enjoyment of a public right of way and is thus a public nuisance": *Hargrave* v. *Goldman, supra,* n.5.

8. (1937) 1 *M.L.R.* 39 at p. 43 n.6: "The injured right in public nuisance is not property, as in private nuisance, but a right of the public. The duty of the landowner is in the nature of a public charge on his property. It is therefore absolute, independent of fault." The psychological strength of the concept of public duty is interestingly shown by the fact that even in *Winterbottom* v. *Wright* (1842) 10 M. & W. 109, when Lord Abinger C.B. was busy denying a right to sue in negligence to anyone not in privity of contract with the defendant, he specifically treated cases of Public Nuisance as an exception: "Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of liability is the public duty or the commission of the public nuisance".

9. See for instance Fleming, *The Law of Torts,* (3rd ed., 1965) (hereinafter *Fleming*) pp. 367-369.

general public are only being protected in the most indirect way and there is no obvious reason for a more severe standard of liability than would be thought reasonable in any other suit between private individuals.[10] If the right to recover for particular damage were restricted to cases involving obstruction of the highway and an exceptionally onerous detour by private individuals [11] the public and private aspects of the case could be kept separate and there would be less temptation to allow a private individual to capitalise upon the standard of liability thought necessary to prevent interference with the rights of the general public. In those cases, however, where a ruinous building falls on to the highway and injures a passer-by confusion is likely to arise in a suit for particular damage since the interference with free and safe passage which such a building represents only becomes apparent when the injury to the individual occurs. Any proceeding on behalf of the public against the owner of the building could only be justified as a means of preventing an accident of the sort which in fact occurred; and thus once the idea is allowed to take root that the protection of the public demands the imposition of "strict" liability it might be thought to follow that a similar standard of liability should be imposed in the particular damage suit. It is, however, precisely this close connexion between the public nuisance and the particular damage which makes it necessary to remember that the former is objectionable because of its interference with the rights of the public in general; failure to distinguish between this interference and the private individual's suit for particular damage leads to confusion between the rules of Public and Private Nuisance to the detriment of the clarity of both.

The different considerations governing the protection of public and of private rights should also be borne in mind when considering *Wringe* v. *Cohen,*[12] a case which, it is widely agreed, causes considerable difficulties in any attempt at a comprehensive statement of the law of Nuisance. The gable-end of the defendant's house collapsed in a storm and fell through the roof of the plaintiff's shop; the plaintiff recovered even though the house had been let to a tenant for the previous two years, since the defendant was liable to repair under the lease and it was held to be irrelevant whether he knew or ought to have known of the defective state of the premises. The crux of the Court of Appeal's judgment is expressed by Atkinson J.:[12A]

> In our judgment if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining landowner suffers damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not.

10. Newark. (1949) 65 *L.Q.R.* 480 at p. 484, whilst criticising the possibility of recovering damages for personal injuries in Public Nuisance, regards a particular damage action for excessive interference with the plaintiff's use of the highway as being in accord with principle. It seems, however, to be just as anomalous to allow a private individual to base a suit upon damage to the general public as it is to allow recovery in Nuisance for personal injuries.

11. *E.g. Smith* v. *Wilson* [1903] 2 I.R. 45.

12. [1940] 1 K.B. 229.

12A. *Ibid.,* at p. 233.

The Court then proceeded to use the fact that the premises adjoined the highway (which should surely have been irrelevant in a suit between adjoining occupiers) to justify the imposition on the defendants of liability irrespective of knowledge or means of knowledge of the danger, on the assumption that such a standard of liability obtained in suits for particular damage arising from highway nuisances. Even if the court was correct in its assessment of the standard of liability in Public Nuisance it cannot be correct to allow a rule ostensibly designed for the protection of passengers on the highway to be taken advantage of by persons not using that highway. The law gives formal expression to the different sociological considerations arising from different fact-situations by creating different torts, and it is therefore disturbing to find Denning L.J. explaining *Wringe* v. *Cohen* as having been treated by the Court of Appeal as a case of Public Nuisance,[13] since it scarcely seems open to the court to transfer cases from one tort to another irrespective of the fact-situations which those torts are designed to alleviate.

It is, moreover, dubious whether this approach to the decision can stand with *Bromley* v. *Mercer,*[14] which was not cited to the court in *Wringe* v. *Cohen.* Here the boundary wall of the defendant's property was in a state of disrepair amounting to a public nuisance to the adjoining highway, and the plaintiff accordingly sued in that tort when she was injured by the wall falling on her when she was visiting the premises. The Court of Appeal unanimously held that her claim in Public Nuisance must be limited to the infringement of those rights which the tort was designed to protect. As Warrington L.J. put it:[15]

> A nuisance on a highway gives a right of action to a member of the public lawfully using the highway. The plaintiff was not using the highway.

The difficulties which arise from a failure adequately to delimit the boundaries of Public Nuisance are also shown by *Campbell* v. *Paddington Corporation.*[16] The defendants erected a stand on the highway which interrupted the view from the plaintiff's windows, thereby preventing her from letting her rooms to spectators of a procession, and she recovered in Public Nuisance for the special damage thus caused her by the unlawful obstruction of the highway. The defendant's conduct was, however, only a public nuisance insofar as it interrupted the free passage of persons using the highway and this obstruction should have been entirely irrelevant to any question of the plaintiff recovering for the loss of her view. Professor Street argues that *Campbell* v. *Paddington Corporation* establishes that "provided the damage (loss of view) is caused by the tortious act, it is recoverable even though it is not of the kind in respect of which the duty arose (not obstructing the highway)"[17] and

13. See *Southport Corporation* v. *Esso Petroleum Co.* [1954] 2 Q.B. 182 at p. 198.

14. [1922] 2 K.B. 126.

15 *Ibid.,* at p. 130. See also Lord Simonds in *Jacobs* v. *L.C.C.* [1950] A.C. 361 at pp. 377-378.

16. [1911] 1 K.B. 869.

17. *Street,* p. 240 n. 3.

approves the case as an example of the award of parasitic damages.[18] In all other instances of parasitic damages, however, there has been an initial interference with a protected right of the defendant; in *Campbell's case* the initial interference was with a right of the general public and not of the defendant as an occupier, and it seems contrary to principle thus to allow her to build upon a wrong to someone else.[19] True it is, as Lush J. asserts,[20] that the plaintiff's loss of view was the direct result of the "wrongful" act of the defendants, but the very fact that the case can be apparently rationalised by this blanket term serves to warn against characterisation of conduct as unlawful or tortious without sufficient investigation of the limits of the legal rules upon which that characterisation is based.

A further source of confusion is the device whereby the Attorney General, as *parens patriae,* may sue for an injunction to restrain a "public nuisance" menacing a sufficiently large number of individual citizens. If this were confined to cases where any one of the individuals could have succeeded in a suit for Private Nuisance it would be of merely procedural interest, though even then remarks such as that of Romer L.J. in *Att.-Gen.* v. *P.Y.A. Quarries*[21] that "a normal and legitimate means of proving a public nuisance is to prove a sufficiently large collection of private nuisances" would have to be confined strictly to the category of cases in which they were made. It is, however, possible for the Attorney General to obtain an injunction even in cases where no private individual could sue, either for particular damage arising from Public Nuisance or for Private Nuisance.[22] This indeed seems to have been the case in *Att.-Gen.* v. *P.Y.A. Quarries* itself since, as Denning L.J. points out,[23] isolated explosions, such as were threatened in that case, cannot ground an action for damages in Private Nuisance. The danger of describing such cases as ones of "public nuisance" in the abstract is that it may be thought to follow from placing this verbal label on the situation that in the event of the threatened explosions actually taking place a remedy will be available to private individuals suffering "particular damage", thereby giving those

18. *Street,* p. 450. Street, *Principles of the Law of Damages,* (London, 1962) p. 27.

19. The approach adopted in *Campbell* v. *Paddington Corporation* has however been followed in *Owen* v. *O'Connor* (1962) 9 L.G.R.A. 159 at p. 181, and *The Wagon Mound* (*no. 2*) [1963] 1 Lloyd's Rep. 402 at p. 431. Dean Wright in (1948) 26 *Can. B.R.* 46 at p. 80, argues that *Wringe* v. *Cohen* is part of "a recognition of a broad principle of social responsibility not only to land occupiers and users of the highway but to any person lawfully on adjoining land. It would be exceedingly strange for a court, which has reached a principle of liability by talking of a duty to prevent a risk culminating, to exclude persons obviously within the risk". This seems to assume that in Public Nuisance the risk does not culminate until the *particular* damage is caused: see the learned author's comments on *Noble* v. *Harrison* [1926] 2 K.B. 332. In Public Nuisance, however, the need to protect users of the highway has been thought so important that merely to threaten their safety is, without more, a "nuisance". An adjoining occupier is not obviously within *this* risk since he does not come within the class of citizens whom the tort is designed to protect.

20. [1911] 1 K.B. 869 at p. 879.

21. [1957] 2 K.B. 169 at p. 187.

22. *A.G.* v. *Brighton Co-Operative Society* [1900] 1 Ch. 276.

23. [1957] 2 K.B. 169 at p. 192.

individuals recourse which the law of Private Nuisance specifically denies them. The possibility of such confusion arising is shown by the fact that *Salmond,*[24] *Street,*[25] and *Winfield*[26] all quote *dicta* from *Att.-Gen.* v. *P.Y.A. Quarries* as part of their general exposition of Public Nuisance, without pointing out that the facts and reasoning of the case only justify the granting of a preventive injunction, rather than the remedies applicable to other species of "public nuisance".[27]

NUISANCE AND RYLANDS v. FLETCHER.

It is easy to point to differences in the modern law between the rules of these torts,[28] but certain sources of confusion still exist which can only be explained in the light of the early development of the rule in *Rylands* v. *Fletcher.* The rule appears to be anomalous, and its limits difficult to state, because it was formulated at a time when judicial thinking as to standards of liability in tort was going through a period of drastic revision. Holdsworth[29] points out that the standard of liability imposed in *Rylands* v. *Fletcher,* where absence of negligence will not excuse the defendant, represents the general mediaeval principles of civil liability.[30] The gradual 'moralisation'[31] of the law in the eighteenth and nineteenth centuries had, however, introduced more general ideas of 'fault' into the law of tort and it was the modern viewpoint which Martin B. enunciated in the Court of Exchequer in *Fletcher* v. *Rylands*[32] when finding for the defendants because they had not been 'negligent'. Blackburn J., in refuting this view,[33] relied exclusively on those torts which still imposed 'strict' liability, and in so doing produced a special rule in a situation which only a few years later might well have been attacked solely from the standpoint of Negligence.

Since *Rylands* v. *Fletcher* did not fit in with the climate of legal

24. *Salmond,* p. 181.

25. *Street,* p. 238.

26. *Winfield on Tort,* (7th ed., 1963) (hereinafter *Winfield*) p. 392.

27. We have not here dealt with Public Nuisance as a crime since the present subject is involved enough without the introduction of controversy over *mens rea.* Attempts to use the standard of liability in the criminal law as a pointer to that which should obtain in the civil law seem merely to have produced confusion worse confounded: Paton, (1942) 37 *Illinois L.R.* 1, 9-10.

28. *Winfield,* pp. 463-467; *Street,* pp. 255-257.

29. *History of English Law,* vol. 8, p. 468.

30. "In considering whether a Defendant is liable to a Plaintiff for damage which the Plaintiff may have sustained, the question in general is not whether the Defendant acted with due care and caution, but whether his acts have occasioned the damage": Lord Cranworth in *Rylands* v. *Fletcher* (1868) L.E. 3 H.L. 330 at p. 341.

31. *Salmond,* p. 444.

32. (1865) 3 H. & C. 774 at p. 793.

33. (1866) L.R. 1 Exch. 265.

thought prevailing in the later years of the nineteenth century[34] attempts were made to introduce elements of "negligence" into the rule by defining *Rylands* v. *Fletcher* objects in terms of inherent danger,[35] by emphasising Lord Cairn's casual reference to non-natural user, and by switching the basis of liability from the accumulation[36] to the escape,[37] thereby allowing the introduction of various defences, such as act of stranger, only vaguely hinted at by Blackburn J. The most startling instance of this process is the judgment of Bramwell B. in *Nichols* v. *Marsland*[38] which, far from merely confirming the existence of Act of God as a defence, in fact subverts the whole philosophy of the original Rule. Bramwell B. specifically denies that the case is one of negligence[39] but his concentration on liability for the escape as opposed to the accumulation would seem to leave very few cases where a defendant could be held liable who had not in fact been negligent. *Rylands* v. *Fletcher* itself was explained, as indeed Bramwell B. himself had explained it in his dissenting judgment in the Court of Exchequer,[40] as being analogous to trespass: "there the defendant poured water into the plaintiff's mine."[41] Since at that time liability in trespass was thought to be "strict" this served to create the impression of coherence with principle, but it completely ignores the concept of the defendant acting at his own peril, even on his own property, which underlies Blackburn J.'s statement of the *Rylands* v. *Fletcher* rule. Bramwell B. does not deny that such a concept might have its uses: "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose, and did mischief, that the man who kept him would not be liable";[42] but his Lordship clearly thought it absurd to apply the same standard of liability both to keeping a dangerous beast for

34. The antique nature of the authority cited by Blackburn J. might give pause to those who have seen his Lordship as a precocious apostle of collectivism (Pound, *Interpretations of Legal History* (1923), p. 109), but a much stronger argument against this latter view is the disfavour which the decision subsequently encountered.

35. *Richards* v. *Lothian* [1913] A.C. 263 at p. 280: "Some special use bringing with it increased danger to others". At that period the resemblance to Negligence would have been increased by the "dangerous chattel" rule in the latter tort: *Winfield,* pp. 259-260.

36. "The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril": *Fletcher* v. *Rylands* (1866) L.R. 1 Exch. 265 at p. 279.

37. "The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong": *Nichols* v. *Marsland* (1876) 2 Ex.D. 1 at p. 5, *per* Mellish L.J.

38. (1875) L.R. 10 Ex. 255; Goodhart, (1951) 4 *C.L.P.* pp. 178-184.

39. (1875) L.R. 10 Ex. 255 at p. 259.

40. (1865) 3 H. &C. 774 at p. 790: "the defendants have caused water to flow into the plaintiff's mines which but for their, the defendants', acts would not have gone there".

41. (1875) L.R. 10 Ex. 255 at p. 260. It is however, dubious whether the injury in *Rylands* v. *Fletcher* was sufficiently "direct" to ground an action in trespass: Martin B. in *Fletcher* v. *Rylands* (1865) 3 H. & C. 774 at p. 792; Viscount Simor in *Read* v. *Lyons* [1947] A.C. 156 at p. 166.

42. *Ibid.*

amusement and to the construction of a reservoir.[43] Despite attempts at liberalisation, however, the original Rule still stands and in view of these clashes of authority as to the proper standard of liability one is not surprised at Professor Street's conclusion that "perhaps the most remarkable characteristic of this rule has been its fluidity.[44]

Blackburn J.'s only reference to Nuisance was to point out that in that tort the fact that the defendants had taken "every precaution which prudence or skill could suggest" would not excuse them[45] and it seems difficult to agree with Professor Newark[46] that "the main principle involved was extremely simple, being no more than the principle that negligence is not an element in the tort of nuisance" since Blackburn J.'s authorities are drawn mainly from areas other than Nuisance. However, the prevailing uncertainty as to the proper basis of liability in *Rylands* v. *Fletcher,* and the existence of a number of fact-situations in which it might be possible to apply Nuisance or *Rylands* v. *Fletcher* indifferently,[47] have led to a number of cases being professedly decided in Nuisance which should properly be regarded as examples of "strict" liability imposed in a *Rylands* v. *Fletcher* context. A good example is *Midwood* v. *Manchester Corporation*[48] where a single explosion, resulting from faulty insulation of an electric main, was allowed to ground a suit for Nuisance, the defendants' negligence being held to be irrelevant. Professor Street suggests[49] that the decision is "readily understood" as an application of the state of affairs concept[50] but the judgments refute this.[51] In *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*[52] the *Midwood* case was assumed to have been decided in *Rylands* v. *Fletcher* and this failure accurately to define either the boundaries or the standard of liability in the latter tort is inevitably the source of some confusion as to the parallel concepts in Nuisance.[53]

43. "If [*Rylands* v. *Fletcher*] is based on the assumption that the reservoir was an essentially dangerous instrumentality, the risk of which must be assumed by the man who placed it on the land, we should be dealing with an obvious fiction": Radin, (1943) 21 *Texas L.R.* 697 at p. 712.

44. *Street,* p. 243.

45. (1866) L.R. 1 Ex. at p. 285; we discuss below whether this does in fact justify the assumption that liability in Nuisance is strict.

46. (1949) 65 *L.Q.R.* at p. 487.

47. [1947] A.C. 156 at p. 183.

48. [1905] 2 K.B. 597.

49. *Street,* p. 220.

50. On this see *infra,* p. 26.

51. See *per* Collins M.R. at p. 608, *per* Romer L.J. at p. 609 and *per* Mathew L.J. at p. 610.

52. [1914] 3 K.B. 772.

53. The situation is even more confused in some jurisdictions in America where the *Rylands* v. *Fletcher* rule is not, in theory, recognised but is in fact enforced under the title of "absolute nuisance": see Prosser, *Selected Topics on the Law of Torts* (1953), pp. 164-177; (1942) 20 *Texas L.R.* 399. A recent case which admirably illustrates Prosser's thesis, in that it is a case of "Nuisance" decided

NUISANCE AND INDEPENDENT CONTRACTORS.

The possibility of being liable for the acts of an independent contractor has been thought by some[54] to create an affinity between Nuisance and *Rylands* v. *Fletcher,* as torts of strict liability, rather than between Nuisance and Negligence. As has been pointed out, however,[55] in this context the distinction between torts of strict liability and other torts is not one which has been taken by the courts, the imposition of liability for independent contractors being better explained in terms of the interest which the law seeks to protect. Such liability is not properly speaking vicarious [56] but springs from the danger to protected rights created by the defendants, albeit through the instrumentality of a contractor.

To illustrate these points we may consider the assertion that *Rylands* v. *Fletcher* establishes liability for the acts of an independent contractor. In his judgment Blackburn J. assumes that the question facing the Exchequer Chamber is whether the defendant is under an absolute duty or merely under a duty not to be negligent.[57] If, but only if, the latter is the correct view of the law, "a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir".[58] But the court decided the case in terms of absolute duty and this "renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them".[59] The liability imposed was not, therefore, in any sense vicarious; the defendant had brought on to his own land something which was likely to do damage if it escaped and it was irrelevant that the actual physical implementation of his plans was by a contractor. If the liability were vicarious the contractor would have to be shown to have committed the tort for which liability was imposed, but he clearly had not brought the water on to his land for his own purposes, as Blackburn J.'s statement of the law requires. The whole judgment on this point merely assumes that *qui facit per alium facit per se* and is personally and not vicariously responsible

entirely on *Rylands* v. *Fletcher* authority, is *Burns* v. *Lamb* (1958) 312 S.W.2d. 730 (Tex.). Even if this confusion of nomenclature did not cause a blurring of the concept of Nuisance it would still be undesirable because if the tort is labelled "Nuisance" it may be thought that certain characteristics of the law of Nuisance, which are not necessarily relevant in *Rylands* v. *Fletcher,* should be incorporated into it. Several problems of this sort are raised by an excellent note in (1947) 95 *U.Pa.L.R.* 781.

54. Williams, (1961) 77 *L.Q.R.* 179 at p. 209; *Winfield,* p. 755; *Street,* p. 433; the latter elsewhere emphasises the shifting meaning of "strict liability" (p. 211) and also the restricted extent of liability for independent contractors in Nuisance (p. 256).

55. Jolowicz, (1957) 9 *Stanford L.R.* 690 at p. 695.

56. *Ibid.,* at p. 707.

57. (1866) L.R. 1 Ex. 265 at p. 279.

58. *Ibid.*

59. (1866) L.R. 1 Ex. at p. 287.

for so doing.[60] It is sometimes argued that *Rylands* v. *Fletcher* establishes vicarious liability when the escape is caused by an independent contractor.[61] This was not the view of the judges in the case, since they did not primarily base liability on the escape,[62] and if an employer is thus liable it is not because of any "vicarious" responsibility but because he is expected to guard against an escape caused by any agency, even the act of a stranger, which he should reasonably anticipate.[63]

Since liability in *Rylands* v. *Fletcher* was, at least at its inception, dependent upon unlawful accumulation by the defendant on his own property it was easy to hold him liable irrespective of the actual hands which placed the accumulation there, but the law of Nuisance, in focussing upon interference with protected rights, covers so many more diverse situations that the cases where liability for an independent contractor has been imposed must be studied separately to see whether a similar general liability can be discerned. Firstly, *Bower* v. *Peate*[64] decides that A is liable when the carelessness of his contractor causes B's building to collapse owing to the withdrawal of lateral support to which it was entitled. It is not, however, clear that this action is primarily one of Nuisance[65] and it may better be viewed as a means of establishing a proprietary right; if this is correct the fact of the interference, rather than the state of mind of the interferor, will be conclusive.[66] Secondly, obstruction of, or dangerous activities upon, the highway have given rise to liability for the acts of an independent contractcor, seemingly with a view to protecting the public. No conclusions can be drawn from this for Nuisance generally because only Public Nuisance[67] is involved and the

60. *Winfield,* p. 444 n. 15 argues that the Exchequer Chamber were nonetheless extending the law since they were prepared to consider the possibility of the defendant being liable for the act of his independent contractor. If, however, the court had actually decided this point they would have had to do so by creating vicarious liability in some tort other than *Rylands* v. *Fletcher.*

61. Winfield, (1931) 4 *C.L.J.* 189 at p. 193; *Street,* p. 253.

62. *Supra,* n.37.

63. *Perry* v. *Kendricks* [1956] 1 W.L.R. 85 at pp. 91, 93.

64. [1876] 1 Q.B.D. 321.

65. *Graff* v. *Ringrose Brook Joint Sewerage Board* [1953] 2 Q.B. 318.

66. See Martin B. in *Brown* v. *Robins* (1859) 4 H. & N. 186 at p. 193 and Page Wood V.C. in *Hunt* v. *Peake* (1860) Johns. 705 at p. 710. A similar situation seems to exist in the law of Conversion where the fact that the action originated as a means of determining adverse claims to property (Prosser, *Law of Torts,* (2nd Edition, 1955), p. 66) means that if the defendant's act is in fact inconsistent with the plaintiff's right to property or possession he will be guilty of conversion irrespective of whether or not he intended to challenge these rights. As in the support cases, all that is required is that the defendant's *act,* and not its legal implications, be intended.

67. Jolowicz, (1957) 9 *Stanford L.R.* 690 at p. 700, argues that the liability in the "highway" cases arises from the courts considering the right to safe passage along the highway as being analogous to the proprietary interests in land which are protected by the law of Private Nuisance. As we argue below, however, liability for acts of an independent contractor on the highway was established long before any general liability in Nuisance for independent contractors was suggested, and the "highway" rule seems to gain its force from a desire to protect the general public: see the comments on *Gray* v. *Pullen* (1864) 5 B. & S.

principle is the same in cases of Negligence.[68] Thirdly, there is the difficult decision of the Court of Appeal in *Matania* v. *National Provincial Bank* [69] which seems to establish liability where "the act done is one which in its very nature involves a special danger of nuisance being complained of".[70] In this case, however, the Court of Appeal relied strongly upon its decision three years previously in *Honeywill & Stein* v. *Larkin*[71] which imposed liability on the defendants when the negligence of an independent contractor whom they had employed to take flashlight photographs in the defendants' cinema caused the building to catch fire. The Court of Appeal emphasised that this was "a dangerous operation in its intrinsic nature" [72] and an example of operations which "are inherently dangerous, and hence are done at the principal employer's peril" [73] and the judgment might therefore be thought to be limited to activities which clearly threaten damage to persons or property. The Court used both the "highway" cases and the cases on right of support as authority for this view, since in both groups of cases it could be argued that physical damage to the plaintiffs' property had been threatened.[74] In *Matania* v. *N.P.B.,* however, the Court of Appeal passed from inherent threat of material damage to property to inherent threat of damage *tout court,* and "damage" was interpreted as including "nuisance",[75] this extension of liability under cover of the blanket term "damage" being facilitated by the fact that *Bower* v. *Peate* itself could be regarded as a case in Nuisance, albeit of an anomalous nature. This difficulty was indeed appreciated by Finlay J.:[76]

> It is not at all, of course, a case of the same nature as *Honeywill & Stein* v. *Larkin.* Inevitably these cases differ entirely in their facts. There the question was as to danger; here the question is as to nuisance.

970 by Lord Chelmsford in *Wilson* v. *Merry* (1868) 1 H.L. (Sc.) 326 at p. 341, and also the remarks of Lord Abinger C.B. in *Winterbottom* v. *Wright* (1842) 10 M. & W. 109, quoted *supra,* n.8.

68. *Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392; *Walsh* v. *Holst* [1958] 1 W.L.R. 800.

69. [1936] 2 All E.R. 633.

70. *Per* Slesser L.J. at p. 646.

71. [1934] 1 K.B. 191.

72. *Ibid.,* at p. 200.

73. *Ibid.,* at p. 201.

74. This is obvious in the cases on withdrawal of support, and the Court of Appeal described the highway cases as depending not "merely on the fact that the defendants were doing work on the highway, but primarily on its dangerous character": [1934] 1 K.B. 191 at p. 199.

75. "In *Honeywill & Stein* v. *Larkin.* . . it was a hazardous operation to bring the fire into the theatre. So it was hazardous as regards the possible nuisance to Mr. Matania to bring the noise and dust immediately below his apartment": *per* Slesser L.J. [1936] 2 All E.R. 633 at p. 646.

> "Just as, in my opinion, they would have been liable in this case if they had let the floor down, so in my opinion, they are liable for the damage caused to Mr. Matania by the dust rising up through the cracks in the floor and the noise": *per* Romer L.J., *ibid.,* at p. 649.

76. [1936] 2 All E.R. 633 at p. 651.

However, he allowed himself to be persuaded by his brethren on the grounds, obviously inconsistent with the statement just quoted, that in the *Matania* case there was "a great and obvious danger that *nuisance* would be caused".[77] The view that liability for the acts of an independent contractor extends throughout the law of Nuisance seems, therefore, to be based on a misapprehension; there are few recorded cases of its being applied by the courts[78] and it seems impossible to deduce anything as to the general standard of liability in Nuisance from this fortuitous collection of cases.

NUISANCE AND FORESEEABILITY.

As Prosser points out,[76] the question of the basis of the liability of the defendant is unlikely properly to arise in an "injunction" case since when the aim of the suit is to prevent damage in the future "persistence, over the plaintiff's protests, in continuing conduct which may have been merely negligent or abnormal in its inception is sufficient to establish its character as an intentional wrong".[80] Considerable problems arise, however, when considering liability in actions designed to provide compensation for damage already inflicted. In discussing this problem a distinction is often made[81] between creation and continuance of the nuisance but the value of this approach is dubious since it is clear that "nuisance" is not here used to mean interference with legally-protected rights. Thus in *Sedleigh-Denfield* v. *O'Callaghan,*[82] where trespassers laid a culvert in the defendants' land and did the work incompetently so that the plaintiff's land was flooded, it is usually stated that the defendant was held liable because he "continued the nuisance". However, the nuisance (i.e. the flooding) did not take place until the trespassers had disappeared from the scene, which makes it difficult to see what nuisance of theirs the defendants could have continued, and it seems clear that "continuing the nuisance" is merely a convenient expression for "continuing the state of affairs upon the defendants' land from which the actionable damage to the plaintiff resulted". To object to the phrase is, however, more than a quibble, since it involves discussion of the liability of the defendant other than in terms of his relationship with the damage which the law forbids. To continue a nuisance means here to continue the *threat* of damage, and whilst the threat of damage may constitute the nuisance in some cases of Public Nuisance it cannot do so in a case of Private Nuisance.[83] Even, therefore, if the law demands that the accused should foresee or be aware of the "nuisance" before he can be held to have created or continued it we cannot accept this as an application of a genuine foreseeability test unless — and this does not necessarily

77. *Ibid.* (Italics supplied).

78. An exception is *Spicer* v. *Smee* [1946] 1 All E.R. 489 at p. 495, but that case was, like *Honeywill & Stein* v. *Larkin,* concerned with damage by fire.

79. Prosser, *Law of Torts,* (3rd ed., 1964) (hereinafter *Prosser)* p. 597.

80. *Ibid.*

81. *E.g., Street,* pp. 229-233.

82. [1940] A.C. 880.

83. *Supra,* n.6.

follow — he is also required to have foreseen the damage to the plaintiff for which he is held liable.

These ambiguities may be illustrated from the speeches in *Sedleigh-Denfield* v. *O'Callaghan.* In this case the House was primarily concerned to refute the view of the majority of the Court of Appeal in *Job Edwards* v. *Birmingham Navigation Proprietors*[84] that for continuance of a nuisance there must be an act or default on the part of the occupier of the land on which it exists and "the mere refusal or neglect to remove the nuisance, if it be a private nuisance, does not constitute a default".[85] In order to destroy this argument the House of Lords in *Sedleigh-Denfield* v. *O'Callaghan* merely had to show that the occupier could be liable for continuing a nuisance in circumstances other than when he took positive action to benefit from the state of affairs on his land. Any authority that lay to hand could, therefore, be employed for this purpose and it is not surprising that in *Sedleigh-Denfield* v. *O'Callaghan* we find both a blurred statement of the standard of liability imposed on the defendant in Nuisance and an over-facile assimilation of Private and Public Nuisance, aimed at transferring some of the supposedly more severe liability of the latter into the former.[86]

Firstly, therefore, both Lord Porter and Lord Atkin pointed to instances where the liability of the occupier appeared to be very strict indeed:

> It is clear that an occupier may be liable even though he (1) is wholly blameless (2) is not only ignorant of the nuisance but also without means of detecting it, and (3) entered into occupation after the nuisance had come into existence: see *Broder* v. *Saillard.*[87] Such a liability is I think, inconsistent with the contention that the occupier is not liable for acts of a trespasser of which he has knowledge.[88]

> The liability of an occupier has been carried so far that it appears to have been decided that, if he comes to occupy, say as a tenant, premises upon which a cause of nuisance exists, caused by a previous occupier, he is responsible even though he does not know that either the cause or the result is in existence. This is the decision in *Broder* v. *Saillard.*[89]

It is true that both judges expressed doubts about these cases. Lord Porter suggested that the principle just quoted might be restricted to a

84. [1924] 1 K.B. 341.

85. *Ibid.,* at p. 352. The majority in *Job Edwards* thought that the landowner's duty was different, and much more onerous, in cases of Public Nuisance, but the point is blurred by their reliance on "injunction" cases such as *A.G.* v. *Tod Heatley* [1897] 1 Ch. 560, where the burden is not in fact onerous, insofar as liability is not attached for an unknown condition.

86. *Sedleigh-Denfield* v. *O'Callaghan* is thus exclusively aimed at extending the number of the situations in which the defendant might be held liable; it is therefore not necessarily a reliable guide when cited as an authority for the restriction of the defendant's liability.

87. (1876) 2 Ch.D. 692.

88. [1940] A.C. 880 at p. 919, *per* Lord Porter.

89. *Ibid.,* at p. 897, *per* Lord Atkin.

state of affairs created by a predecessor in title rather than a trespasser, but even in the latter case he thinks that "it is enough if he permitted it to continue after he knew or ought to have known of its existence".[90] Lord Atkin, following *Winfield,*[91] suggested that in *Broder* v. *Saillard* and *Humphries* v. *Cousins*[92] "it is probable that the principle of *Rylands* v. *Fletcher,* though not referred to in the case, would justify the decision".[93] *Rylands* v. *Fletcher* was, however, discussed at some length in *Humphries* v. *Cousins,*[94] and the court refuted the objection that the defendant could not be said to have accumulated for his own purposes a drain carrying other peoples' sewage, which he did not know to exist, by saying that "it was the defendant's duty to keep the sewage which he was himself bound to receive from passing from his own premises to the plaintiff's premises",[95] thereby seemingly creating a strict duty between adjoining occupiers uncontrolled by the limitation usually placed on the *Rylands* v. *Fletcher* principle. Some doubt must, therefore, still remain at least as far as liability for a state of affairs inherited from a predecessor in title is concerned and Lord Atkin indeed says that 'it is possible that the question how far a person is liable for injury to a neighbour's land from a cause emanating from his own land where he himself is ignorant of the cause or effect has still to be determined".[96]

On the facts of the instant case, however, where the state of affairs on the defendants' land had been caused by a trespasser, the House was certain that an occupier was liable for continuing a nuisance when he failed to abate a condition on his land of which he knew or ought to have known. Their Lordships were, however, concentrating so firmly upon emphasising that the defendant might have a duty, qua occupier of land, to abate conditions on his land from which a private nuisance emanated that they did not properly discuss the question of whether he must not only have knowledge, express or implied, of the state of affairs but also foresee damage to plaintiff. Thus at one moment Lord Wright adopts as a definition of Private Nuisance "interferences by owners or occupiers of property with the use or enjoyment of neighbouring property"[97] but then says that the defendant's liability extends to a case where "with knowledge he leaves the nuisance on his land",[98] thereby suggesting that the "nuisance" is the state of affairs and not the damage to the plaintiff. A similar, though more openly acknowledged, ambiguity is to be found

90. *Ibid.,* at p. 919; here again his Lordship is extending and not restricting the defendant's liability, and we cannot therefore be certain that his remarks are intended as a comprehensive statement of liability in a case where the state of affairs is created by a trespasser.

91. See now *Winfield,* p. 422 n.91.

92. (1877) 2 C.P.D. 239.

93. [1940] A.C. 880 at p. 898.

94. (1877) 2 C.P.D., at pp. 244-245.

95. *Ibid.*

96. [1940] A.C. 880 at p. 898.

97. *Ibid.,* at p. 903.

98. *Ibid.,* at p. 905.

in Lord Atkin's opening remarks: "the laying of a 15-inch pipe with an unprotected orifice was in the circumstances the creation of a nuisance or of that which would be likely to result in a nuisance".[99] On the facts of *Sedleigh-Denfield* the exact question of what the defendant must have knowledge of or forsee to incur liability for failure to abate did not arise because, as Lord Atkin said, "in the present case there is ... sufficient proof of the knowledge of the defendants both of the cause and its probable effect",[1] though his Lordship left open the question of whether the damage to the defendant must be foreseeable: "I am not satisfied that granted this reasonable expectation of obstruction it would be necessary for the plaintiff to prove that the particular injury was such as reasonably to be expected to result from the obstruction".[2] The suggestion that the defendants' liability should be assessed with reference to his knowledge of the physical conditions existing on his own land received some support from comparison with cases of Public Nuisance such as *Barker* v. *Herbert* [3] where the occupier was held liable when railings on his property were rendered defective by acts of a trespasser of which he ought to have known, thereby menacing passers-by on the highway.[4] In such a case the menacing condition *is* the (public) nuisance and, therefore, if a defendant is held liable when he should have known of such a condition foreseeability of the damage which the law forbids can be said to be in issue; the same cannot be said with confidence in Private Nuisance where the defendant is impugned for failing to know of or foresee a condition on his land which is merely preliminary to the actual damage forbidden by the law.

Even if we leave aside these difficulties the role played by foreseeability in Nuisance remains uncertain because, in contradistinction to Negligence, the tort is only relevant to a limited number of social situations wherein pre-existing duties may rest upon the defendant in his capacity as owner or occupier of land, and liability may therefore be based by the court not upon any foreseeability of damage but upon some incident of the defendant's social status. Thus when the state of affairs is created by a trespasser, as was the case in *Sedleigh-Denfield* v. *O'Callaghan*[5] and *Barker* v. *Herbert,*[6] the defendant who is charged with "continuing" the nuisance is held liable for failing to take positive action to correct a situation caused by an unauthorised intrusion upon his

99. *Ibid.,* at p. 895.

1. *Ibid.,* at p. 899.

2. *Ibid.,* at p. 896.

3. [1911] 2 K.B. 633.

4. *Per* Lord Wright, [1940] A.C. 880 at p. 905, "The public nuisance in that case was created on the defendant's property and was in that respect more analogous to a private nuisance than a public nuisance committed on a highway or common". With respect, however, this overlooks that the location of the state of affairs constituting the public nuisance is not in point; the essential question is whether the state of affairs unreasonably interferes with a public as opposed to a private right.

5. [1940] A.C. 880.

6. [1911] 1 K.B. 633.

property, and it would be unreasonable to require him to act without actual or implied knowledge of the condition of the premises.[7] When, however, the state of affairs arises from a failure to repair the premises, as in *Wringe* v. *Cohen,*[8] the case against strict liability is much less obvious because the owner might be said to have "caused" the nuisance by failing to discharge a duty imposed by law, whether or not he knew of the actual state of affairs. Such a formulation is, however, very misleading because it involves the confusion of a tortious with a contractual duty. In the *Wringe* v. *Cohen* situation the owner "ought" to have repaired, not because he ought to have realised that failure to do so would cause danger, but because, if he had discharged his duty under the lease, the dangerous situation would not have arisen. Contractual duties are strict, in the sense that a party to a contract is bound to fulfill the promises which he made at the formation of the contract irrespective of any question of "foreseeability". This situation is, however, mitigated by the doctrine of privity which allows only the other party to the contract to insist upon its performance. It cannot be satisfactory to argue that in *Wringe* v. *Cohen* "the *gravamen* of the complaint is the breach of the duty to repair"[9] since this is a complaint which can be made only by the other party to the contract, at least if the complainant seeks to take advantage of the strict contractual liability imposed by the lease. In *Wringe* v. *Cohen* itself the court used the purely fortuitous fact that the premises were situated on the highway[10] to extend the ambit of the defendant's liability to persons other than his tenant but, quite apart from the confusion of public and private nuisance which this involves,[11] the creation of some sort of duty to the public at large cannot per se be a reason for making the content of that duty as strict as it would be if the duty were contractual.[12]

7. "It seems obvious, in the case of a nuisance created by a trespasser, that it would be very hard if the occupier were held liable half-an-hour afterwards if he had had no opportunity of knowing or in fact had no knowledge of the existence of the danger": *per* Somervell L.J. in *Mint* v. *Good* [1951] 1 K.B. 517 at p. 525; "In such a case he has in no sense caused the nuisance by any act or breach of duty": *Wringe* v. *Cohen* [1940] 1 K.B. 229 at p. 233.

8. [1940] 1 K.B. 229.

9. See Hallett J. in *Cushing* v. *Walker* [1941] 2 All E.R. 693 at p. 699F.

10. "The principle is confined to "premises on the highway" and is, I think, clearly correct with regard to the responsibility of an occupier to passers-by" *per* Denning L.J. in *Mint* v. *Good* [1951] 1 K.B. 517 at p. 526. This concentration on the "highway" aspect of *Wringe* v. *Cohen* only serves, however, to cast doubt on the correctness of allowing a private occupier to recover in that case, since proximity to a highway can hardly be a relevant question in Private Nuisance, As Paton, (1942) 37 *Illinois L.R.* 1 at p. 15 n.76, "While it may be logical to distinguish between public and private nuisance it would be ridiculous to have two separate rules for private nuisance according to the location of the house".

11. *Supra,* p. 4.

12. Thus in discussing *Wringe* v. *Cohen* Somervell L.J. says that "if a man has an obligation to repair property abutting on a highway he may well be said to have some degree of personal responsibility for seeing that it does not get into such a condition that it injures people using the highway": *Mint* v. *Good* [1951] 1 K.B. 517 at p. 525. It may indeed follow that his duty to repair imposes upon him *some* duty to persons using the highway, but it does not follow that the content of this duty will be the same as the content of the duty which he owes to his tenant.

AN ANATOMY OF NEGLIGENCE.

The problem facing the court in any Negligence case is traditionally analysed into two separate issues, the issue of culpability and the issue of compensation. In determining the defendant's culpability use is often made of the concepts of duty of care and of breach of that duty, but liability in Negligence cannot arise until some damage has been done to the plaintiff and we therefore strongly support the view of Buckland [13] that these should not properly be regarded as separate concepts, but that talk of "breach of duty" in fact indicates that the defendant is being held liable for causing damage to the plaintiff.[14] It is often stated that the defendant's culpability is determined by a foreseeability test; that is to say, by enquiring whether a reasonable man would have foreseen damage to the plaintiff as being likely to arise from his conduct. This formulation is not, however, strictly accurate since the issue of foreseeability is only preliminary to the question of whether the defendant should be held liable for causing damage to the plaintiff. True it is that the defendant cannot be held liable in Negligence unless he ought to have foreseen damage as likely to occur, but the converse does not necessarily follow since there may be cases where the damage was foreseeable and yet the defendant cannot be held responsible for failing to take precautions against its occurrence. Thus, for instance, the court may decide that although damage was foreseeable the situation, broadly categorised, was not one in which it was appropriate, on historical or policy grounds for the law of Negligence to intervene; in other words, that there was no "notional" duty to prevent the damage occurring. Alternatively, even if the plaintiff can surmount this barrier, the court may still reject his claim by deciding that it would not be socially justifiable, on the particular facts of this case, to inhibit the defendant's freedom of action by requiring him to take precautions against the foreseeable damage. Thus, although the mere fact that foreseeable damage has been caused will often be enough to justify calling the defendant negligent, he may escape culpability either because the risk involved in his conduct was too small to warrant interference, or because the burden of taking precautions would have been too heavy to require of him, or because the social desireability of the end which he was pursuing outweighed the importance of protecting the plaintiff from harm.[15]

The view that questions of culpability turn upon failure to prevent

13. (1935) 51 *L.Q.R.* 637.

14. This point has been obscured by a failure to distinguish between "duty in fact" and "notional duty", both of which ideas are frequently discussed under the heading of "duty of care": see Dias in [1955] *C.L.J.* 198 and (1956) 30 *Tulane L.R.* 377. Buckland's point can only apply to "duty in fact" *i.e.* the question of whether, in this particular case, the defendant ought to have avoided injury to the plaintiff. The question of notional duty is a preliminary issue of policy which has to be resolved before the defendant's "duty" as revealed by the facts of the case can be discussed. It should also be stressed that the argument does not rest merely upon the fact that the plaintiff cannot sue in Negligence unless he has suffered damage, since this is true of many other torts, *Rylands* v. *Fletcher* being an example. In *Rylands* v. *Fletcher,* however, the defendant's wrong is to be found in a distinct previous act, the accumulation, and the damage is merely the necessary pre-condition for *this* plaintiff being allowed to sue for that wrong. In Negligence, as we hope to show, it is very difficult to speak of any wrong being committed by the defendant prior to the causing of the damage in suit.

15. *Winfield,* pp. 188-190; *Fleming,* pp. 119-122.

damage, rather than upon conduct on the part of the defendant which is "careless" in the lay sense, is reinforced by the fact that it is agreed on all sides that "foreseeability" plays a large part in determining culpability.[16] It is true that in ordinary speech, when talking about a person's *conduct,* as opposed to his failure to achieve a certain specific end, we have some idea in our mind of the consequences which might be likely to accrue from his actions; but it is totally unconvincing to suggest that a man's behaviour is usually criticised *solely* on the strength of the the damage to others which it is likely to cause.[17] Furthermore, if it really were the case that the defendant should be deemed culpable if he committed a "negligent" act, the latter being any action from which damage might foreseeably arise, it would be extremely difficult to understand the limitation placed upon the ambit of Negligence in *Bourhill* v. *Young.*[18] Before a "duty of care" to A can arise, damage to A must be foreseeable; it is irrelevant that damage to B was foreseeably likely to arise out of the same set of acts as actually damaged A. Young's conduct was culpable in the sense that damage to other road users was foreseeable as a result of it, and might therefore seem on the *Polemis* argument to be sufficient grounds for an action of Negligence by someone suffering damage as a result of it. If however we insist, as *Bourhill* v. *Young* insists, that damage to the actual plaintiff must have been foreseeable before he can sue we are at least emphasising that the law of Negligence focusses primarily upon the consequences in the world of a man's conduct, rather than upon the conduct itself.

If this argument is correct it will be seen that the distinction between culpability and compensation is illusory, since unless the defendant ought to have foreseen the damage in suit he will not be culpable for failing to prevent it, and therefore no question of his compensating the plaintiff for it can arise. The question of whether this distinction does or should exist is, however, crucial in assessing the nature of liability in Negligence, and we will therefore briefly consider some of the implications of insisting, as the *Polemis* case insists, upon a division between culpability and compensation.

Under the *Polemis* rule cases may arise, such as *Thurogood* v. *Van Den Berghs & Jurgens,*[19] in which the defendant's culpability is founded

16. "The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent": *per* Warrington L.J. in *Re Polemis* [1921] 3 K.B. 560 at p. 574.

17. "It will be said that the duty arises in circumstances in which it is reasonably foreseeable that by conducting oneself in a certain manner one is liable to cause harm to another, and that it consists in conducting oneself differently — in a manner in which one is not liable to cause harm. But what does this mean? It tells us nothing with respect to the nature of the conduct regarded as wrongful. It does not tell us *how* we are not to cause harm, but rather *that* we are not to cause harm — which is reasonably foreseeable. The foreseeability requirement in no way describes or defines the nature of the conduct from which we must abstain": Harari, *The Place Of Negligence In The Law Of Tort,* (Sydney, 1962), p. 40. This dilemma can, however, be avoided if we are prepared to accept that to call a man negligent in law means nothing more than that he has caused harm to others that the law requires him to avoid.

18. [1943] A.C. 92. See the comment on *The Wagon Mound* in *Prosser,* p. 305.

19. [1951] 2 K.B. 537.

upon merely hypothetical damage. Here it is clearly impossible to ask whether the defendant should have prevented the damage occurring since the damage did not occur, and factors usually thought relevant[20] to the assessment of the defendant's culpability are thus excluded. The foreseeability requirement demands that even in these cases the defendant's conduct should be assessed in relation to an interference with the rights of another person, but it seems to be an undue restriction upon the defendant's freedom of action for him to be deemed culpable, and therefore liable to be required to desist from a certain course of conduct, with reference to damage which he has not caused. The potential injustice of this situation is aggravated by the artificiality involved in characterising the defendant's conduct as "negligent" in respect of damage which has not in fact occurred. It is always difficult to come to a clear answer on questions of foreseeability,[21] but the difficulty is obviously aggravated when not only the prevision of the reasonable man but also the damage is hypothetical.[22] Even where this particular problem does not arise a distinction between culpability and compensation may unfairly prejudice the defendant, since once the culpability-label "negligent" is attached to his conduct there may seem to be no logical barrier to his being held liable for all and any of its consequences. The danger which thus arises from the court's failure to assess the defendant's liability in the light of the damage actually being litigated is exacerbated if the *Polemis* directness test is literally interpreted as referring to nothing more than a causal connection.[23]

These points may be further illustrated by considering an argument raised by Hart and Honoré [24] against the view that the foreseeability doctrine of remoteness simplifies the law by bringing culpability and compensation within a single formula. The learned authors argue that when dealing with culpability the concept employed is "foreseeability in the practical sense", that is to say, "foresight of harm such that in all the circumstances a reasonable man would adopt or refrain from a particular course of action".[25] On the other hand, when "ulterior" harm

20. See note 15, *supra.*

21. See p. 20, *infra.*

22. In view of the difficulties involved in characterising the defendant as "negligent" in respect of damage which has not in fact occurred it is perhaps surprising that writers who are unhappy about the general approach adopted in *The Wagon Mound* support the rejection of the "threshold tort" doctrine in that case: see *Honoré,* (1961) 39 *Can.B.R.* 267 at p. 268. We may agree with Lord Simonds that the doctrine is neither logical nor just, inasmuch as it holds the defendant liable for damage *x* because he has inflicted damage *y* and committed a tort in so doing. The *Polemis* rule is however similarly illogical in requiring the defendant to provide compensation for damage *x* because he has been culpable in relation to damage *y.* The threshold tort doctrine does at least have the advantage, which the *Polemis* analysis sometimes lacks, of trying to assess the defendant's conduct with reference to events that have actually occurred.

23. See note 46, *infra.*

24. *Causation In The Law,* (Oxford, 1959), pp. 238-243.

25. *Op. cit.,* at p. 239. Mr. Honoré has repeated this argument in criticising *The Wagon Mound:* "In relation to culpability there is no doubt that damage is reasonably foreseeable if and only if the chance of its occurrence is great enough, in all the circumstances, to induce a reasonable man to take precautions against it": (1961) 39 *Can.B.R.* 267 at p. 273.

is in issue, for instance when the plaintiff is injured in attempting a rescue from a given peril, "foreseeable" is thought to mean something more like "not improbable": "there are many sorts of harm for which recovery is at present allowed, the risk of which *could* not intelligibly figure amongst the reasons for calling the defendant's act negligent, and so *could* not be practically foreseeable, because the estimation of their occurrence presupposes the existence of a dangerous situation which it would be negligent to create".[26]

As we have attempted to argue, however, even if culpability and compensation are separated foreseeability is not the *only* question at issue in dubbing the defendant's conduct "negligent";[27] foreseeability is only a necessary pre-condition of, and not co-terminous with, the obligation to take precautions which constitutes the defendant's duty. Furthermore, the learned authors' argument seems, with respect, to pre-suppose the distinction between culpability and compensation which it seeks to establish. Only if such a distinction exists is it either necessary or possible to go through the process of "calling the defendant's act negligent", independently of considering whether he ought to have prevented the occurrence of the particular damage which is being litigated. Thus, if the defendant has been negligent towards A by putting him in peril it still has to be established that he is liable to B who comes to rescue A. If B's arrival on the scene is unforeseeable no logical absurdity is involved in saying that the defendant cannot be held liable for failing to prevent damage to him, however "negligent" the defendant may have been towards A. If the rescuer is foreseeable it is still perfectly possible to ask, as an independent question, whether the defendant should have prevented the damage which occurred, again irrespective of the fact that he has been "negligent" to A.[28]

It is important to distinguish these objections to the logic of a test based upon foreseeability from objections to the lack of precision of the foreseeability concept itself.[29] The objective approach to Negligence in effect demands that the court assess the defendant's conduct in the light of all the facts known at the time of the trial,[30] and this adjudicative

26. *Ibid.* The argument is adopted in *Fleming,* p. 192.

27. "On the theory that it is foreseeability alone that matters it would be irrelevant to consider how often a ball might be expected to land in the road. . . the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger": *Bolton* v. *Stone* [1951] A.C. 850 at pp. 866-867, *per* Lord Reid.

28. In such a situation the defendant will obviously be barred from advancing one of the main arguments by which liability for causing foreseeable damage may be avoided, *viz.* the social utility of the end in the pursuit of which the damage was inflicted. Nonetheless, we cannot agree with Hart and Honoré, *op. cit.,* at p. 240, that where ulterior harm is concerned it will *never* be the case that the law does not require the defendant to have taken precautions against *this* damage.

29. It is respectfully suggested that the cases cited by Hart and Honoré, *op. cit.,* at pp. 241-243, serve to establish the latter point.

30. As Lord Simonds says in *The Wagon Mound* [1961] A.C. 388 at p. 424, "After the event even a fool is wise. But it is not the hindsight of a fool; it is the

decision by the court produces a flexibility in the law of Negligence which, although perhaps sociologically desirable, considerably handicaps clear analysis. In particular, when speaking of foreseeable damage, it is only possible to demand that the defendant should have foreseen *something like* the damage which in fact occurred,[31] and this gives considerable latitude to a court in determining whether damage which occurred was of the foreseeable "kind" or "type".[32] It is thus possible to produce, by the application of a verbal statement of the foreseeability test, a practical result which seems to run counter to the arguments of principle usually advanced in favour of foreseeability;[33] for instance, it may be doubted whether the Privy Council which decided *The Wagon Mound* intended later courts to draw the conclusion, seemingly inherent in *Smith* v. *Leech Braine*[34] and *Hughes* v. *Lord Advocate,*[35] that once *some* damage of a given "type" (here, "damage by fire") is foreseeable, then *any* damage of that type is recoverable.[36] This is not to say that foreseeability is a mere sham, or that it does not matter whether or not we demand foreseeability of the damage as a pre-condition of recovery,[37] but in this area

foresight of the reasonable man which alone can determine responsibility". It would seem however that the foresight of the reasonable man inevitably involves some hindsight on the part of the *court,* a process which is presumably not threatened by the danger against which His Lordship warns us. "An intervening negligent act by a third person does not, in all cases, constitute a supervening cause relieving an antecedent wrongdoer from liability for negligently creating a dangerous condition. The act is superseding only if it was so extraordinary as to have been reasonably foreseeable. The extraordinary nature of the intervening act is, however, determined by looking back from the harm or injury and tracing the sequence of events by which it was produced. . . . . Whether an intervening act constitutes a supervening cause is a question that is more readily resolved in hindsight, and that which appears to be extraordinary in the abstract may prove to be otherwise when considered in light of the surrounding circumstances that existed at the time of the accident": *Leposki* v. *Railway Express* (1962) 297 P. 2d. 849 at p. 850 (3rd Cir.). See also Green, (1961) 61 *Columbia L.R.* 1401, quoted *infra* n.37.

31. Williams, (1961) 77 *L.Q.R.* 179 at p. 183.

32. Cullity (1962) 25 *M.L.R.* 602; Dias, [1962] *C.L.J.* 178 at p. 182.

33. "It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour": *per* Lord Simonds in *The Wagon Mound* [1961] A.C. 388 at pp. 422-423.

34. [1962] 2 Q.B. 405.

35. [1963] A.C. 837.

36. Dworkin, (1964) 27 *M.L.R.* 344.

37. Thus even a writer who stresses the flexibility (to put it at its lowest) of the foreseeability test seems to acknowledge that it at least limits the court to an assessment of the defendant's conduct relative to the injury being litigated. The problem of what losses are compensable "is but a phase of the determination of how far the duty of the defendant extends. The specific loss must be either included or excluded, and this cannot be done by any *foresight* of the reasonable man or of anyone else, but only by the good *hindsight* of the judge.": Green, (1961) 61 *Columbia L.R.* 1401 at p. 1418. Under the *Polemis* doctrine, however, the problem of what losses are compensable is not a phase in the determination of the extent of the defendant's duty but entirely separate from that question.

it must be acknowledged that the determination of the principle to be followed dictates the results of cases less obviously than in some other branches of the law.

NUISANCE AND NEGLIGENCE COMPARED.

We may now use this picture to compare the tort of Negligence with Nuisance, reviewing seriatim the points which are usually[38] discussed under this heading.

The role of foreseeability.

On *The Wagon Mound* analysis damage is not recoverable unless it it was foreseeable. As we have already attempted to show it is impossible confidently to assert that the same rule obtains in Nuisance, and further difficulty in this respect has recently been generated by what appears to be a failure adequately to distinguish Public from Private Nuisance. In *The Wagon Mound* (*no. 2*)[39] Walsh J. states that in Nuisance the essential conditions for liability are "(1) a wrongful act of the defendant; and (2) a direct and particular injury resulting to the plaintiff", and then goes on to suggest that in Public Nuisance "the wrongful character of the act of the defendant is not to be tested — as is shown, for example, by the case of *Campbell* v. *Paddington Corporation* — by looking to see whether the defendant should have forseen the type of damage which is in fact in suit".[40] In Public Nuisance, however, the type of damage in suit is the particular damage. The mere fact that this does not have to be foreseeable cannot, owing to the anomalous nature of the right to recover for particular damage, be used as an argument that the state of affairs, which constitutes the nuisance, does not have to be foreseeable, more especially when the relation between the nuisance and the particular damage is established in the cavalier fashion of *Campbell* v. *Paddington Corporation.*[41] Walsh J. appears to argue that his analysis applies indifferently to Private Nuisance, but this is clearly inappropriate since there "the wrongful act of the defendant" and "the injury resulting to the plaintiff" are not distinguishable in the same way as particular damage is distinguishable in Public Nuisance. In Private Nuisance the "nuisance" *is* "the injury resulting to the plaintiff" and one cannot base an argument that this does not have to be foreseeable upon the fact that in the different tort of Public Nuisance the particular damage, arising subsequently to the state of affairs which is the nuisance, has merely to be "direct and particular" as opposed to foreseeable.

It should not, however, be assumed that an affinity exists between the rules of particular damage in Public Nuisance and the *Polemis* principle of remoteness of damage in Negligence merely because both make use of

38. *Winfield,* at pp. 434-439: Clerk and Lindsell, *The Law of Torts,* (12th ed., 1961) (hereinafter *Clerk & Lindsell*), pp. 652-656.

39. [1963] 1 Lloyds Rep. 402 at p. 427.

40. *Ibid.,* at p. 435. In *Poirier* v. *Turkewich* (1964) 42 D.L.R. 2d. 259 at p. 264 Smith J. allows recovery for damage that was "reasonably foreseeable". It is not altogether clear, however, whether his Lordship regards this as the dispositive test.

41. *Supra,* p. 4.

a concept of "directness". Exposition of this term as used in *Polemis* is not made easier by the fact that the judges in that case claimed to use Lord Sumner's dictum in *Weld-Blundell* v. *Stephens*[42] about " direct cause" as authority for extending liability beyond mere foreseeability, whereas his Lordship meant to limit liability by exculpating the wrong-doer whenever there was a novus actus interveniens, even though the indirect consequences produced by that novus actus were foreseeable.[43] It is, however, clear that the Sumner dictum was couched in causal terms[44] and "directness" is thus presented in *Polemis* as if it were merely some form of causal test.[45] We need not here pursue the many problems to which this confusion of causation and remoteness gives rise[46] but it is dubious whether the directness requirement in Public Nuisance is similarly a causal one. The relationship stressed in Public Nuisance is between the nuisance or state of affairs and the particular damage,[47] whereas causal questions in law seem properly to be limited to establishing a connection between a person and an event, and not to connections between one event and another. The "direct" connection in *Polemis* seems to have been a relationship of the former type, and if this is the case it is not immediately obvious that the requirement that the relationship between the nuisance and the damage should be direct necessarily predicates a causal relationship of the same kind as that contended for in *Polemis.*

Duty of Care and the scope of Nuisance.

Foreseeability is, as we have argued, the major element in duty in fact, but we must also consider those policy-limitations on the application

42. [1920] A.C. 956 at p. 984.

43. Goodhart, (1952) 68 *L.Q.R.* 514 at p. 526; (1951) 4 *C.L.P.* 177 at p. 195; Payne, (1952) 5 *C.L.P.* 189 at pp. 205-206.

44. "Direct cause . . . conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate": [1920] A.C. 956 at p. 984.

45. "The fact that they did directly produce an unexpected result .... does not relieve the person who was negligent from the damage which his negligent act directly caused .... If the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act": [1921] 3 K..B. 560 at p. 577 *per* Scrutton L.J. See also Asquith L.J. in *Thurogood* v. *Van Den Berghs and Jurgens* [1951] 2 K.B. 537 at p. 553.

46. Thus when Lord Simonds claims in [1961] A.C. 388 at p. 423 to avoid "the never-ending and insoluable problems of causation" by his rejection of the *Polemis* principle he cannot mean also to reject the rule that only damage which the defendant has caused is recoverable. This confusion also undermines the status of the *Polemis* test as a separate rule of remoteness, since although "directness" can be used by a court merely as a cloak for the balancing of policy-factors, thereby allowing full play to the social considerations involved in the solution of remoteness problems, there is also a danger that courts will be forced back on to the literal causal implications of the term as found in the *Polemis* case itself. Since a causal connection between defendant and damage is an inevitable pre-condition of recovery, "directness" in this sense adds nothing to the factors needed to be proved before the defendant can be held liable, and thus excludes consideration of remoteness of damage as a separate question.

47. See for instance [1963] 1 Lloyds Rep. 402 at p. 432.

of the tort of Negligence which are grouped under the heading of "notional duty" with a view to comparing these with the factual limitations on the ambit of Nuisance. Nuisance is limited in scope inasmuch as only plaintiffs in certain factual situations can recover: in Private Nuisance the plaintiff must show some title to land and in Public Nuisance he must be injured whilst exercising the protected public right. It is also arguable that Private Nuisance does not ground recovery for personal injuries as opposed to injuries to property.[48] These limitations on the scope of Nuisance, and the factors discussed under "notional duty" in Negligence, are decisions by the court that for historical or policy reasons the tort concerned is not appropriate to a certain factual situation; no question of foreseeability arises. This latter point should be stressed not only because of the confusion which exists between notional duty and duty in fact (wherein questions of foreseeability do arise) but also because it appears to have been argued[49] that the scope-limitations are an example of "how the risk principle operates in nuisance. The mere fact that an obstruction in the highway is a nuisance, as interfering with the right of passage, will not make the obstructor liable in damages for an accident to which the obstruction contributes, if the obstruction was not an apparent danger. Inconvenience to the public is not the same as danger. Thus if a motorcyclist is involved in an accident and is killed by hitting a telegraph pole illegally placed in the footway, it seems obvious that the person who placed the pole there is not liable, because a pole in the footway is not dangerous, though a nuisance." In such a case, however, the plaintiff is denied recovery not by a foreseeability test (which is what, for Dr. Williams, the "risk principle" involves[50]), but because the damage to which he has contributed does not come within the factual ambit of the tort which he has committed. The "nuisance" is the interference with free passage along the footway and therefore only those whose exercise of this particular protected right has been interrupted are able to build a right of action upon it. Similarly in Private Nuisance damage to persons other than those with a title to land may well be foreseeable, but they are denied recovery simply because they do not fall within the factual area protected by the tort.

Unlike Private Nuisance, Negligence is not limited in scope to one main factual situation (*i.e.* claims by landowners) but the "notional duty" requirement would appear to remove some Negligence cases from the possible ambit of Nuisance. In particular, it is usually stated that a man cannot be liable in Negligence for an omission but that a positive duty must be imposed on him, and in some Nuisance cases, notably *Sedleigh-Denfield* v. *O'Callaghan,* it is hard to see how the defendant is being held liable for anything other than what, in a Negligence case, would be analysed as an omission.[51] It is, however, difficult to dogmatise on this point since the discovery of a duty of positive action lies totally within the court's discretion and the "omission" problem can therefore be circumvented in cases where social justice seems to demand recovery. Thus in the most recent case which might have been thought to raise the

48. *Cunard* v. *Antifyre* [1933] 1 K.B. at pp. 556-557.

49. Williams, (1961) 77 *L.Q.R.* 179 at p. 204.

50. *Ibid.,* at p. 179.

51. This is the view of *Clerk & Lindsell,* para. 61, n. 79.

question, *Hilder* v. *A.P.C.M.*,[52] Ashworth J. declined to lay any special emphasis on the fact that an omission to control the children was involved and adopted as the test of duty whether there had been "reasonable care in all the circumstances". Two rationalisations may be advanced of the duty of positive action in this case. Firstly, the occupiers may have been regarded as being *pro tanto* in loco parentis and therefore directly (not, of course, vicariously[53]) responsible for injuries caused by a negligent failure to control the child. This would, however, be an extension of the law as found in *Carmarthenshire County Council* v. *Lewis*[54] since the occupiers in the *Hilder* case were not in charge of the children in any formal sense, and also because on the facts of the *Lewis* case the care which a reasonable parent-substitute might be expected to take for the child would also have secured the safety of the plaintiff. Whilst, therefore, the House of Lords in *Lewis* emphasised the possibility of a duty existing to control other people's children it is not clear that such a duty extends to controlling activities which do not threaten the safety of the child.[55] The second and more interesting rationalisation is that the defendants in the *Hilder* case were held liable because of their control and occupation of land. This view has been advanced in America to avoid the "omission" difficulty in cases where non-occupiers have caused damage to persons outside the premises[56] and in his recent outstanding judgment in *Hargrave* v. *Goldman*[57] Windeyer J. emphasised that questions of notional duty might be affected by changing views as to the social obligations of persons in the defendants' position, and that "the trend of judicial development of the law of negligence has been to found a duty of care either in some task undertaken or in the ownership, occupation or use of land or chattels".

This concentration upon the social responsibilities of the defendant tends in one sense to assimilate the issues in Negligence to those in Nuisance[58] since it is characteristic of the latter tort that an occupier may

52. [1961] 1 W.L.R. 1434: occupier allowed children to play on his land and they kicked a football into the adjoining highway, thereby causing the death of a motor-cyclist.

53. *Moon* v. *Towers* (1860) 8 C.B. (N.S.) 611 at p. 615, *per* Willes J.

54. [1955] A.C. 549.

55. "I think that all but the most careless mothers do take many precautions for their children's safety, and the same precautions serve to protect others. I cannot see how any person in charge of a child could be held to have been negligent in a question with a third party injured in a road accident unless he or she had failed to take reasonable and practicable precautions for the safety of the child": *per* Lord Reid, [1955] A.C. 549 at p. 566. "The duty owed to the child is to see that it does not become involved in a traffic accident by which it is injured ... If such an accident is not too remote to be foreseen it is not, in my opinion, too remote to foresee injury to the person, other than the child, involved in the accident": *per* Lord Keith, [1955] A.C. 549 at p. 571.

56. *Honaman* v. *City of Philadelphia* (1936) 185 A. 750 (Pa.): liability of occupiers of a public park when members of the public using the park hit a baseball into the street rested upon the "duties and obligations arising out of ownership".

57. (1963) 37 A.L.J.R. 277 at pp. 284-286.

58. Thus Friedmann, (1937) 1 *M.L.R.* 39 at p. 63 suggested that a means of co-ordinating modern judicial development in the law of tort would be to point to tortious responsibilities arising from duties based on special social relations.

be liable, by virtue of his control of the land, even though he has not by his own positive action created the offending state of affairs. On the other hand, the trend of the modern law of Negligence seems to favour the creation of liability at large, to the detriment of the limitations imposed by the notional duty concept.[59] These developments throw into sharp relief the severe factual limitations upon the scope of Nuisance, since not only is that tort restricted to a particular social situation but also, once the "omission" problem has been circumvented, there may be cases even of interference with the use and enjoyment of land or of a public right which can be litigated in Negligence, but not in Nuisance because of the requirement that a nuisance should be in some way continuing. This latter point has been doubted,[60] but it is submitted that the "state of affairs" rationale of cases like *Castle* v. *Augustine Links,*[61] which are used to offset the requirement of continuity, can only properly apply in Public Nuisance cases. In cases of Private Nuisance, where the "nuisance" is the actual damage caused to the plaintiff, attempts to describe the "state of affairs" as the nuisance [62] have led only to the confusion which we have already attempted to describe. Cases of isolated escapes, such as *Midwood* v. *Manchester Corporation,*[63] are also cited against the continuity rule, but these are only dubiously cases of Nuisance at all.[64]

As far as the factual ambit of the two torts is concerned, therefore, the liberalisation of the notional duty concept has made it difficult to point to any factual situation which could be the basis of a suit in Nuisance but not of one in Negligence, and has at the same time cast doubt upon the justification for the continued existence of a separate tort which applies only in a very restricted area.

rather than upon the old forms of action, an example of the new categories being duties "as between those in control of property and a member of the public injured by the use of such property".

59. Examples are the developments in the "omission" area, already noted; the undermining of the misstatement rule in *Hedley Byrne* v. *Heller* [1964] A.C. 465; the strict limitation, imposed in *Sharp* v. *Sweeting* [1963] 1 W.L.R. 665, upon the rule denying liability between lessor and lessee of real property; and s.2 of the Occupiers' Liability Act, 1957, where the "common duty of care" to visitors seems to differ very little from a *Donoghue* v. *Stevenson* duty. That this was the intention of the Legislature in the latter case seems to be shown by s.2 (5) of the Act which states that the question of whether the plaintiff is volens is "to be decided on the same principles as in other cases in which one person owes a duty of care to another". On the other hand, attempts to achieve a similarly beneficial liberalisation as far as duty to trespassers is concerned seem to have been at least temporarily repelled: *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054.

60. *Fleming,* p. 376; *Street,* p. 220.

61. (1922) 38 T.L.R. 615.

62. As in *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880.

63. [1905] 2 K.B. 597.

64. *Supra,* p. 8. *Salmond,* p. 86, n. 21, quotes *Rylands* v. *Fletcher* itself as an example of this sort of "nuisance".

Reasonable Care.

The argument is sometimes advanced[65] that whereas the defendant in Negligence is liable only for failure to take reasonable care, in Nuisance the fact that he has taken such care will not necessarily afford a defence.[66] It is, however, submitted that this apparent distinction between the two torts disappears if their actual legal nature, as opposed to the language sometimes used in discussing them, is properly analysed. Although it is usual to formulate the defendant's liability in Negligence in terms of a duty to take reasonable care, such a statement of the law is most misleading if it suggests that the defendant is being held liable for a subjective state of mind.[67] In Negligence we ought to look at the result which the plaintiff has caused, and his liability should rest upon whether he ought, under the rules already discussed, to have prevented the damage occurring to the plaintiff.[68] If he should have prevented the damage he will be said to have failed to exercise "reasonable care": but this conclusion is merely another way of asserting that the defendant has been negligent or has "broken his duty", and the establishment of the latter point, as a conclusion of law, requires a much more complex balancing of the factors involved than is required to assert, in ordinary lay speech, that a person has not been "careful". When Lindley L.J. says in *Rapier* v. *London Tramways Co.* that "if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say that I have taken all reasonable care to prevent it",[69] he seems to be using "reasonable care"

65. *Salmond,* p. 96; *Fleming,* pp. 379, 381; *Clerk & Lindsell,* para. 1243; Friedmann, (1943) 59 *L.Q.R.* 63 at p. 64.

66. English judicial statements stressing the distinction are hard to discover, though Lord Simonds argues in *Read* v. *Lyons* [1947] A.C. 156 at p. 183, that negligence is not a necessary ingredient in nuisance because "if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it". See also *Porter* v. *Bell* [1955] 1 D.L.R. 62 at p. 64 (Nova Scotia); *Pearson* v. *Kansas City* (1932) 55 S.W.2d. 485 at 489 (Miss.); *Wofford* v. *Rudick* (1957) 318 P.2d. 605 at 608 (New Mexico); *King* v. *Columbia Carbon Co.* (1946) 152 F.2d. 636 at 638 (5th Cir.). Writers also use this alleged distinction to support the view that the "nuisance" is the interference with the plaintiff's rights and not the conduct producing that interference. See for instance the scope-note to *Restatement, Torts,* ch. 40 at p. 221: "private nuisance has reference to the interest invaded and negligence to the conduct that subjects the actor to liability for the invasion". In similar vein *Prosser,* pp. 594-595 and *Fleming,* p. 364.

67. "If one is 'talking English and not law' the conventional definition of negligence as the antithesis of due care demands not reasonably safe conduct but a reasonably attentive or anxious state of mind": Edgerton, (1925) 39 *Harvard L.R.* 849 at 861. There are, however, difficulties in analysing Negligence in terms of "conduct": see *infra,* n. 68.

68. *Fleming,* p. 364 makes the point that "the distinguishing aspect of nuisance, as compared with other heads of liability like negligence, is that it looks to the harmful result rather than to the kind of conduct giving rise to it". It is, however, difficult to see what is meant here by "kind of conduct". On p. 110 Fleming states that the "duty issue" in Negligence is "a duty, recognised by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks", breach of duty being failure to conform to the required standard of care. Thus stated, however, it would seem that a man can be "negligent" without causing damage and, as the learned author of course asserts, this is not the law. Since damage is the gist of liability it might be simpler to say that the duty in Negligence is to avoid foreseeable damage and that a requirement to conform to a certain "standard of conduct" or "standard of care" is merely a roundabout way of stating a duty which does in fact look to the harmful result. See also *supra,* pp. 17-18.

in this lay sense of subjectively trying to prevent damage.[70] In Negligence, however, the mere fact that the defendant has tried to prevent the damage will not save him if damage which he ought to have foreseen has in fact occurred as the result of his conduct.[71] Similarly, in Private Nuisance, once the damage to the plaintiff is characterisable by the court, after considering all the circumstances, as a "nuisance" the defendant's efforts to prevent the damage will not without more exculpate him. Nor is it possible to argue[72] that a distinction between Nuisance and Negligence arises from the fact that it is no defence in Nuisance to prove that usual and reputable methods[73] or, even, all possible precautions[74] have been adopted, since it is also true in Negligence that compliance with the common practice is no more than evidence that "reasonable care" has been used[75] whilst the fact that the precautions required of the defendant in Negligence are relative to the risk involved in his conduct entails that "there may be situations in which an activity must be abandoned altogether if adequate safeguards cannot be provided".[76]

A further argument sometimes raised in this context[77] is that "negligence" on the part of the defendant may be relevant to the question of whether the interference with the plaintiff's rights is sufficiently unreasonable to constitute a nuisance. This latter question depends on all the surrounding circumstances and the relationship between the parties involved[78] and it is clear that an actual intention to damage the plaintiff may tip the balance in favour of the interference being deemed a nuisance.[79] Failure to adopt reasonable precautions against damage may have the

69. [1893] 2 Ch. 588 at p. 600.

70. Confusion on this point seems to spring mainly from Lindley L.J.'s reference to *reasonable* care. It is not clear what "reasonable" means here, but the whole expression cannot have the same sense as "reasonable care" in the law of Negligence since if the latter expression *means* anything (as opposed to being a restatement of the defendant's liability in Negligence) it must mean "a degree of care sufficient to prevent the prohibited result occurring." But Lindley L.J.'s dictum pre-supposes that the prohibited result, the "nuisance", has in fact occurred.

71. This question will, of course, not arise often in practice since if the defendant is reasonably careful, in the lay sense, the threatened damage will not normally occur.

72. See on this point *Clerk & Lindsell,* para. 1237 nn.27-28.

73. *Adams* v. *Ursell* [1913] 1 Ch. 629.

74. *Vanderpant* v. *Mayfair Hotel* [1930] 1 Ch. 138.

75. Charlesworth, *Negligence,* (4th ed., 1962) s.71; *Cavanagh* v. *Ulster Weaving Co.* [1960] A.C. 145.

76. *Winfield,* p. 190 n.21. As Lord Macmillan emphasises in *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 612, there will be cases under the general law of negligence "where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety".

77. *Clerk & Lindsell,* para. 1241.

78. Pollock C.B. in *Bamford* v. *Turnley* (1862) 2 B. & S. 66 at p. 79.

79. *Christie* v. *Davey* [1893] 1 Ch. 316; *Hollywood Silver Fox Farm* v. *Emmett* [1936] 2 K.B. 468.

same effect,[80] but it cannot be assumed from this that "foreseeability", in the sense in which the word is used in the law of Negligence, is involved. Thus in *The Wagon Mound* (*no. 2.*) Walsh J. found that the "careless conduct" of the defendants "was such as to deprive them of the right to claim that their use of the harbour waters had the quality of 'reasonableness'" but emphasised also that the significance of the finding that the defendants had been careless "is different here from that which it would have if the view were accepted that liability in nuisance depends upon whether or not there is liability in an action for negligence. For if that view were accepted the conduct would not be "negligent" unless the actors foresaw the damage in suit".[81] This point is best made by emphasising that in Nuisance the court must ask itself two questions: firstly, whether the factual situation was sufficiently unreasonable to constitute a nuisance and secondly whether the defendant should be held liable therefore.[82] Foreseeability is arguably the test whereby the second question is answered, but in considering the first question the "reasonableness" of the interference with the protected rights is in issue, and whether the defendant should have foreseen the interference is only one factor amongst many in determining whether that interference is a nuisance.[83]

It must, however, be admitted that the distinction between Nuisance and Negligence for which we have contended, based upon the contrast between "reasonableness" as the characteristic concept in the former tort and "foreseeability" in the latter, loses much of its significance in practice owing to the flexibility of the foreseeability test. It might indeed be argued that whatever language the courts employ their actual assessment of the defendant's conduct can only be related to their view of its social desirability: the negligence formula which raises the dual question of foresight and reasonable care "calls for the evaluation of the defendant's conduct in all of its environmental details as reflected by the evidence. The abstract standard is the *foresight* of the ordinarily *prudent person,*

80. *Moy* v. *Stoop* (1909) 25 T.L.R. 262 at p. 263; *Grandel* v. *Mason* [1953] 3 D.L.R. 65.

81. [1963] 1 Lloyds Rep. 402 at pp. 429-430.

82. This is the approach of Lord Parker C.J. in *British Road Services* v. *Slater* [1964] 1 W.L.R. 498 at p. 500. Failure to appreciate this point has led to some needless controversy over the meaning of the word "nuisance". Thus Seavey, (1952) 65 *Harvard L.R.* 984 at p. 985, criticises the view of the *Restatement* (*supra,* n. 66) on the grounds that "nuisance is conduct followed by particular kinds of results". It is, however, possible to agree with Seavey that in deciding a Nuisance suit we have to look both at the prohibited results and at the conduct of the defendant which produced them, whilst still maintaining that clarity is best achieved by restricting the description "nuisance" to the prohibited interference with the rights protected by the tort. This latter use of the term is distorted by those who hold that "nuisance" merely reports the whole result of a Nuisance suit, that "an interest deemed worthy of protection has been invaded by conduct of a type which a court deemed sufficient to involve liability": Wright, (1948) 26 *Can. B.R.* 46 at p. 52; Reed, (1950) 28 *Can. B.R.* 782 at pp. 787-788.

83. It should however be noted that the fact that the plaintiff can recover in Public Nuisance for non-foreseeable particular damage does not prove that foreseeability is *entirely* irrelevant in determining whether a state of affairs is a nuisance, since the connexion between a public nuisance and the particular damage arising from it is not established by the same sort of test as establishes the existence of the public nuisance. The dictum of Devlin J. in *Farrell* v. *Mowlem* [1954] 1 Lloyd's Rep. 437 at p. 440 should be read in this light.

both transparent fictions, but fictions designed to focus attention upon the *reasonableness* of the defendant's conduct in the particular environment".[84] We have already questioned the desirability of completely jettisoning the foreseeability test, if only because that test has the merit of focussing upon the damage that actually occurred,[85] but the degree of latitude which both "reasonableness" and "foreseeability" allow the court is bound to mean that in many cases the test adopted will make little difference to the result.

Intentional acts.

"Many actions in nuisance are based upon intentional acts and negligence would not, in such circumstances, be an appropriate remedy".[86] Here again, there would seem to have been a failure properly to analyse the nature of the tort of Negligence. Once it has been appreciated that to hold a defendant liable in Negligence it is neither necessary nor sufficient to establish that he has been "careless" in the lay sense of the term there seems to be no reason why even the intentional infliction of harm should not ground a Negligence action.[87]

Contributory Negligence.

Although the matter has been controverted there seems to be no doubt that contributory negligence is a defence in Nuisance and that the availability of the defence is not necessarily limited by whether the plaintiff could also have sued in Negligence. This is emphasied by Lord Atkin in *Caswell* v. *Powell Duffryn Collieries*[88] where the defence is explained as being related to the question of whether the plaintiff has contributed to the causation of the accident, irrespective of the cause of action adopted by him. The only possible limitation on this principle is that contributory negligence is not available where the defendant has deliberately

84. Green, (1962) 60 *Michigan L.R.* 543 at p. 571.

85. As Dean Green has arguably admitted: *supra,* n. 37.

86. *Winfield,* p. 439.

87. Dworkin, (1965) 28 *M.L.R.* 92 at p. 93 suggests that Lord Denning M.R. in *Letang* v. *Cooper* [1965] 1 Q.B. 232 at p. 239 tentatively argues in favour of the view that under the modern dispensation Trespass is for intentional acts and Negligence for unintentional acts, with no overlap between the two causes of action. It is not, however, absolutely certain that his Lordship was taking this point, since his main concern is to deny that an action of trespass to the person can lie for a merely "negligent" act. It does not, however, necessarily follow from this that deliberately-inflicted injury cannot ground an action for Negligence, since Lord Denning's main practical argument against allowing the plaintiff to bring Trespass for a negligent act is that he will thus be able unmeritoriously to sue without proof of damage. No such procedural advantages would seem to follow from sueing in Negligence for a deliberate injury. In *I.C.I.* v. *Shatwell* [1964] 2 All E.R. 999 at p. 1003 I Lord Reid speaks of "the inaccurate habit of using the word "negligence" to denote a deliberate act done with full knowledge of the risk", but his Lordship here is speaking of the characterisation of the plaintiff's conduct in the context of the defence of volenti, rather than laying down any principles upon which the availability of an action in Negligence should turn.

88. [1940] A.C. 152 at p. 165.

inflicted damage upon the plaintiff,[89] but it will only be in a very few cases of Nuisance that this situation arises; the law will be different where the defendant has deliberately created the state of affairs, but without any actual intent thereby to damage the plaintiff.

CONCLUSION.

We have not succeeded in giving a very coherent account of Nuisance, and it is at least possible that this failure is partly attributable to the intractability of the material as well as to the defects of the exposition. Since many of the formal distinctions between Nuisance and Negligence seem to be illusory it might be argued that even if there are occasions in Nuisance where liability can be imposed without "foreseeability" there is no social justification for their retention at a time when the tort of Negligence is apparently expanding to cover even those social situations previously thought to be the province of Nuisance. This may well be a valid argument so far as the right to recover for particular damage is concerned, especially since this is the source of most of the current confusion in the law of Nuisance. It is, however, dubious whether we should necessarily welcome the complete fusion of the two causes of action. The characteristic function of Private Nuisance is to determine the respective rights of adjacent landowners, and this involves considering, in a way which is rarely called for in Negligence, the *amount* of interference which each must put up with from the other. Since a particular social situation is involved here, there might be something to be said for having particular rules to deal with it. Nor would such rules necessarily put landowners in an unduely favourable position: for instance, in the *Sedleigh-Denfield* situation it is arguable that the Nuisance rules impose more stringent restrictions than the rules of Negligence upon the freedom with which a defendant landowner can use his land. As Mr. Dworkin points out, "The more that different torts overlap on similar fact situations, the more likely it is that just grievances will not go remediless because the facts fall between two torts" [90] and by rationalising the law some measure of protection for injured parties may be sacrificed. This danger is the more profound if the process in which the courts indulge is not in fact rationalisation at all, but rather is based upon the assumption that the conceptual scheme upon which the present rules of law are founded can be arbitrarily ignored.[91]

R. J. BUXTON*

89. "The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage": *per* Lord Lindley in *Quinn* v. *Leathem* [1901] A.C. 495 at p. 537.

90. (1965) 28 *M.L.R.* 92 at p. 96.

91. I am grateful to Mr. G. D. G. Hall and Mr. D. R. Harris for many helpful comments; neither should, however, be taken as necessarily agreeing with anything herein stated.

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