NEGLIGENCE AND "RULES OF LAW"

In *Tucker* v. *Ang Oon Hue,*[1] the defendant, a building contractor, left a large heap of lime in an open space, comprising portion of an unmade road or thoroughfare, which was freely and frequently used by the public and where children often played. The plaintiff, a boy aged five years, watched two children throwing heaps of this lime at each other and received a handful of lime in his face. As a result, he lost the sight of his right eye.

In the action for damages alleged to result from the defendant's negligence, Buttrose J. firmly tied the issue to the principle that the plaintiff must show that the defendant foresaw, or ought reasonably to have foreseen, the reasonable probability of danger arising from placing the lime in the position it occupied. The learned judge held, *as a matter of fact,* that in the circumstances the plaintiff ought to have foreseen the danger to children. He did, indeed, grant and consider the special difficulties created in applying this principle to situations involving children, and distinguished a number of cases from the one before him. But he saw clearly that these difficulties are difficulties requiring a decision of fact, and not the determination of a legal rule. It is not true, as a case note in this journal suggested recently,[2] that "according to the traditional view...much patient judicial research remains to be carried out before the rules with regard to liability for mortar abandoned in a public amusement park, or outside a school-gate, can be 'discovered;'" to understand the law of negligence is to understand that there are no rules of law concerned with the liability for mortar. However real the problems of application, at the core of the law of negligence lie general principles of liability, and the wealth of specific decisions, no matter how useful or interesting their reasoning, cannot all be treated as additional "rules of law." The jury may be becoming rare in civil cases, but the fact that a judge decides both the issues of law and those of fact does not destroy the distinction between them.

8. (1958) 24 M.L.J. 189.
9. [1946] A.C. 588; [1946] 2 All E.R. 124.
10. LL.B. (Leeds); Assistant Lecturer in Law in the University of Malaya in Singapore.

1. (1959) 25 M.L.J. 115.
2. *Ante, p.* 151. See also p. 369, *pott.*

This very point, indeed, is brought out clearly in another recent case of interest, *Qualcast (Wolverhampton) Ltd.* v. *Haynes,*[3] in the House of Lords. Their lordships considered firstly whether there was a failure of duty on the part of the appellant employers, who had supplied protective clothing for an experienced moulder, but had put no pressure on him to wear it; with one dissenting voice (Lord Cohen's), they decided there was not. The point of interest, however, is the second: whether reasons given by judges for reaching conclusions on a question of negligence which would have been decided by a jury if there were one, are propositions of law. Their lordships held they are not. Lord Sommervell of Harrow reminded us that jury's decisions did not become part of our law citable as precedent; even a judge's direction to the jury would be reported or citable only in very exceptional circumstances. Now, when judges make decisions of fact, they naturally give reasons where a jury would have given none; "but if the reasons given by a judge...are to be treated as 'law' and citable, the precedent system would die from a surfeit of authorities" *(loc. cit.,* pp. 43-44). Lord Denning, in his judgment, recognises that judges are consistently confronted with cases in which superior judges have given reasons for coming to their conclusions of fact. Those reasons often seem to judges (and indeed to counsel) to be so expressed as to be rulings in point of law; "whereas they were in truth, nothing more than propositions of good sense" (*loc. cit.,* p. 45).

The learned judge's ultimate refusal to fall into such error and thus allow himself to be distracted from exercising the little law and much good sense needed in the case before him is the noteworthy feature of *Tucker* v. *Ang Oon Hue.*

A. E. S. TAY.[4]

3. [1969] 2 All. E.R. 88; [1969] 2 W.L.R. 610.
4. Of Lincoln's Inn, Barrister-at-Law; of Singapore, Advocate and Solicitor; Assistant Lecturer in Law in the University of Malaya in Singapore.