

H. L. (Sc.) instance of negligence where the law exacts a degree of  
1932 diligence so stringent as to amount practically to a guarantee  
DONOGHUE of safety.

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With these preliminary observations I turn to the series of English cases which is said to compose the consistent body of authority on which we are asked to nonsuit the appellant. It will be found that in most of them the facts were very different from the facts of the present case, and did not give rise to the special relationship, and consequent duty, which in my opinion is the deciding factor here. *Dixon v. Bell* (1) is the starting-point. There a maid-servant was sent to fetch a gun from a neighbour's house; on the way back she pointed it at a child, and the gun went off and injured the child. The owner of the gun was held liable for the injury to the child on the ground that he should have seen that the charge was drawn before he entrusted the gun to the maid-servant. "It was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious." This case, in my opinion, merely illustrates the high degree of care, amounting in effect to insurance against risk, which the law extracts from those who take the responsibility of giving out such dangerous things as loaded firearms. The decision, if it has any relevance, is favourable to the appellant, who submits that human drink rendered poisonous by careless preparation may be as dangerous to life as any loaded firearm. *Langridge v. Levy* (2) is another case of a gun, this time of defective make and known to the vendor to be defective. The purchaser's son was held entitled to sue for damages in consequence of injuries sustained by him through the defective condition of the gun causing it to explode. The ground of the decision seems to have been that there was a false representation by the vendor that the gun was safe, and the representation appears to have been held to extend to the purchaser's son. The case is treated by commentators as turning on its special circumstances, and as not deciding any principle of general

(1) 5 M. & S. 198.

(2) 2 M. & W. 519; 4 M. & W. 337.

application. As for *Winterbottom v. Wright* (1) and *Longmeid v. Holliday* (2), neither of these cases is really in point, for the reason indicated in the passage from Sir Frederick Pollock's treatise which I have quoted above. Then comes *George v. Skivington* (3), which is entirely in favour of the appellant's contention. There was a sale in that case by a chemist of some hairwash to a purchaser for the use of his wife, who suffered injury from using it by reason of its having been negligently compounded. As Kelly C.B. points out, the action was not founded on any warranty implied in the contract of sale between the vendor and the purchaser; and the plaintiff, the purchaser's wife, was not seeking to sue on the contract to which she was not a party. The question, as the Chief Baron stated it, was "whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it was injured." And this question the Court unanimously answered in the affirmative. I may mention in passing that Lord Atkinson in this House, speaking of that case and of *Langridge v. Levy* (4), observed that: "In both these latter cases the defendant represented that the article sold was fit and proper for the purposes for which it was contemplated that it should be used and the party injured was ignorant of its unfitness for these purposes": *Cavalier v. Pope*. (5) It is true that *George v. Skivington* (3) has been the subject of some criticism, and was said by Hamilton J., as he then was, in *Blackler v. Lake & Elliot, Ltd.* (6), to have been in later cases as nearly disaffirmed as is possible without being expressly overruled. I am not sure that it has been so severely handled as that. At any rate I do not think that it deserved to be, and certainly, so far as I am aware, it has never been disapproved in this House.

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(1) 10 M. & W. 109.

(2) 6 Ex. 761.

(3) L. R. 5 Ex. 1.

(4) 2 M. & W. 519; 4 M. & W. 337.

(5) [1906] A. C. at p. 433.

(6) 106 L. T. 533.

H. L. (Sc.) *Heaven v. Pender* (1) has probably been more quoted and discussed in this branch of the law than any other authority, because of the dicta of Brett M.R., as he then was, on the general principles regulating liability to third parties. In his opinion "it may, therefore, safely be affirmed to be a true proposition" that "whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The passage specially applicable to the present case is as follows (2): "Whenever one person supplies goods . . . for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that, unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence." Cotton L.J., with whom Bowen L.J. agreed, expressed himself (3) as "unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived," but the decision of the Court of Appeal was unanimously in the plaintiff's favour. The passages I have quoted, like all attempts to formulate principles of law compendiously and exhaustively, may be open to some criticism, and their universality may require some qualification, but as enunciations of general legal doctrine I am prepared, like Lord Hunter, to accept them as sound guides. I now pass to the three modern cases of *Earl v.*

(1) 11 Q. B. D. 503.

(2) 11 Q. B. D. 510.

(3) 11 Q. B. D. 516.

*Lubbock* (1); *Blacker v. Lake & Elliot, Ltd.* (2); and *Bates v. Batey & Co., Ltd.* (3) The first of these cases related to a van which had recently been repaired by the defendant under contract with the owner of the van. A driver in the employment of the owner was injured in consequence of a defect in the van which was said to be due to the careless manner in which the repairer had done his work. It was held that the driver had no right of action against the repairer. The case turns upon the rule that a stranger to a contract cannot found an action of tort on a breach of that contract. It was pointed out that there was no evidence that the plaintiff had been invited by the defendant to use the van, and the van owner was not complaining of the way in which the van had been repaired. The negligence, if negligence there was, was too remote, and the practical consequences of affirming liability in such a case were considered to be such as would render it difficult to carry on a trade at all. "No prudent man," says Mathew L.J., "would contract to make or repair what the employers intended to permit others to use in the way of his trade." The species facti in that case seems to me to differ widely from the circumstances of the present case, where the manufacturer has specifically in view the use and consumption of his products by the consumer, and where the retailer is merely the vehicle of transmission of the products to the consumer, and by the nature of the products is precluded from inspecting or interfering with them in any way. The case of *Blacker v. Lake & Elliot, Ltd.* (2), is of importance because of the survey of previous decisions which it contains. It related to a brazing lamp which, by exploding owing to a latent defect, injured a person other than the purchaser of it, and the vendor was held not liable to the party injured. There appears to have been some difference of opinion between Hamilton J. and Lush J., who heard the case in the Divisional Court, as to whether the lamp was an inherently dangerous thing. The case seems to have turned largely on the question whether, there being a contract of sale of the lamp between the vendor and the purchaser, the article was of such a

(1) [1905] 1 K. B. 253. (2) 106 L. T. 533, 537. (3) [1913] 3 K. B. 351.

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dangerous character as to impose upon the vendor, in a question with a third party, any responsibility for its condition. This question was answered in the negative. So far as negligence was concerned, it may well have been regarded as too remote, for I find that Hamilton J. used these words: "In the present case all that can be said is that the defendants did not know that their lamp was not perfectly safe, and had no reason to believe that it was not so, in the sense that no one had drawn their attention to the fact, but that had they been wiser men or more experienced engineers they would then have known what the plaintiff's experts say that they ought to have known." I should doubt indeed if that is really a finding of negligence at all. The case on its facts is very far from the present one; and if any principle of general application can be derived from it adverse to the appellant's contention, I should not be disposed to approve of such principle. I may add that in *White v. Steadman* (1) I find that Lush J., who was a party to the decision in *Blacker v. Lake & Elliot, Ltd.* (2), expressed the view "that a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows." As for *Bates v. Batey & Co., Ltd.* (3), where a ginger-beer bottle burst, owing to a defect in it which, though unknown to the manufacturer of the ginger-beer, could have been discovered by him by the exercise of reasonable care, Horridge J. there held that the plaintiff, who bought the bottle of ginger-beer from a retailer to whom the manufacturer had sold it, and who was injured by its explosion, had no right of action against the manufacturer. The case does not advance matters, for it really turns upon the fact that the manufacturer did not know that the bottle was defective, and this, in the view of Horridge J., as he read the authorities, was enough to absolve the manufacturer. I would observe that, in a true case of

(1) [1913] 3 K. B. 340, 348.

(2) 106 L. T. 533.

(3) [1913] 3 K. B. 351.

negligence, knowledge of the existence of the defect causing damage is not an essential element at all. H. L. (Sc.) 1932

This summary survey is sufficient to show, what more detailed study confirms, that the current of authority has by no means always set in the same direction. In addition to *George v. Skivington* (1) there is the American case of *Thomas v. Winchester* (2), which has met with considerable acceptance in this country and which is distinctly on the side of the appellant. There a chemist carelessly issued, in response to an order for extract of dandelion, a bottle containing belladonna which he labelled extract of dandelion, with the consequence that a third party who took a dose from the bottle suffered severely. The chemist was held responsible. This case is quoted by Lord Dunedin, in giving the judgment of the Privy Council in *Dominion Natural Gas Co. v. Collins & Perkins* (3), as an instance of liability to third parties, and I think it was a sound decision.

In the American Courts the law has advanced considerably in the development of the principle exemplified in *Thomas v. Winchester*. (2) In one of the latest cases in the United States, *MacPherson v. Buick Motor Co.* (4), the plaintiff, who had purchased from a retailer a motor-car manufactured by the defendant company, was injured in consequence of a defect in the construction of the car, and was held entitled to recover damages from the manufacturer. Cardozo J., the very eminent Chief Judge of the New York Court of Appeals and now an Associate Justice of the United States Supreme Court, thus stated the law (5): "There is no claim that the defendant knew of the defect and wilfully concealed it. . . . The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser. . . . The principle of *Thomas v. Winchester* (2) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements

(1) L. R. 5 Ex. 1.

(2) 6 N. Y. 397.

(3) [1909] A. C. 640.

(4) 217 N. Y. 382.

(5) 217 N. Y. 385.

H. L. (Sc.) of destruction. If the nature of a thing is such that it is  
1932 reasonably certain to place life and limb in peril when negli-  
DONOGHUE gently made, it is then a thing of danger. Its nature gives  
v. warning of the consequences to be expected. If to the  
STEVENSON. element of danger there is added knowledge that the thing  
Lord Macmillan. will be used by persons other than the purchaser and used  
without new tests, then, irrespective of contract, the manu-  
facturer of this thing of danger is under a duty to make it  
carefully. That is as far as we are required to go for the  
decision of this case. There must be knowledge of a danger,  
not merely possible, but probable. . . . There must also  
be knowledge that in the usual course of events the danger  
will be shared by others than the buyer. Such knowledge  
may often be inferred from the nature of the transaction.  
. . . . The dealer was indeed the one person of whom it  
might be said with some approach to certainty that by him  
the car would not be used. Yet the defendant would have  
us say that he was the one person whom it [the defendant  
company] was under a legal duty to protect. The law does  
not lead us to so inconsequent a conclusion."

The prolonged discussion of English and American cases  
into which I have been led might well dispose your Lordships  
to think that I had forgotten that the present is a Scottish  
appeal which must be decided according to Scots law. But  
this discussion has been rendered inevitable by the course  
of the argument at your Lordships' Bar, which, as I have said,  
proceeded on the footing that the law applicable to the case  
was the same in England and Scotland. Having regard to  
the inconclusive state of the authorities in the Courts below  
and to the fact that the important question involved is now  
before your Lordships for the first time, I think it desirable  
to consider the matter from the point of view of the principles  
applicable to this branch of law which are admittedly common  
to both English and Scottish jurisprudence.

The law takes no cognizance of carelessness in the abstract.  
It concerns itself with carelessness only where there is a duty  
to take care and where failure in that duty has caused  
damage. In such circumstances carelessness assumes the

legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

To descend from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant establishes her allegations, the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterized as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom

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H. L. (Sc.) does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker, through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness," and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I

do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequence of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them.

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My Lords, the recognition by counsel that the law of Scotland applicable to the case was the same as the law of England implied that there was no special doctrine of Scots law which either the appellant or the respondent could invoke to support her or his case; and your Lordships have thus been relieved of the necessity of a separate consideration of the law of Scotland. For myself, I am satisfied that there is no specialty of Scots law involved, and that the case may safely be decided on principles common to both systems. I am happy to think that in their relation to the practical problem of everyday life which this appeal presents the legal systems of the two countries are in no way at variance, and that the principles of both alike are sufficiently consonant with justice and common sense to admit of the claim which appellant seeks to establish.

I am anxious to emphasize that the principle of judgment which commends itself to me does not give rise to the sort of objection stated by Parke B. in *Longmeid v. Holliday* (1), where he said: "But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

(1) 6 Ex. 761, 768.

H. L. (Sc.) I read this passage rather as a note of warning that the standard  
1932 of care exacted in human dealings must not be pitched too  
DONOGHUE high than as giving any countenance to the view that negligence  
v. STEVENSON. may be exhibited with impunity. It must always be a question  
Lord Macmillan. of circumstances whether the carelessness amounts to  
negligence, and whether the injury is not too remote from the  
carelessness. I can readily conceive that where a manu-  
facturer has parted with his product and it has passed into  
other hands it may well be exposed to vicissitudes which may  
render it defective or noxious, for which the manufacturer  
could not in any view be held to be to blame. It may be a good  
general rule to regard responsibility as ceasing when control  
ceases. So, also, where between the manufacturer and the  
user there is interposed a party who has the means and  
opportunity of examining the manufacturer's product before  
he re-issues it to the actual user. But where, as in the present  
case, the article of consumption is so prepared as to be intended  
to reach the consumer in the condition in which it leaves the  
manufacturer, and the manufacturer takes steps to ensure  
this by sealing or otherwise closing the container so that the  
contents cannot be tampered with, I regard his control as  
remaining effective until the article reaches the consumer and  
the container is opened by him. The intervention of any  
exterior agency is intended to be excluded, and was in fact in  
the present case excluded. It is doubtful whether in such a  
case there is any redress against the retailer: *Gordon v.*  
*M'Hardy*. (1)

The burden of proof must always be upon the injured party  
to establish that the defect which caused the injury was  
present in the article when it left the hands of the party whom  
he sues, that the defect was occasioned by the carelessness of  
that party, and that the circumstances are such as to cast  
upon the defender a duty to take care not to injure the  
pursuer. There is no presumption of negligence in such a  
case as the present, nor is there any justification for applying  
the maxim, *res ipsa loquitur*. Negligence must be both  
averred and proved. The appellant accepts this burden of

(1) 6 F. 210.

proof, and in my opinion she is entitled to have an opportunity of discharging it if she can. I am accordingly of opinion that this appeal should be allowed, the judgment of the Second Division of the Court of Session reversed, and the judgment of the Lord Ordinary restored.

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*Interlocutor of the Second Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent to pay to the appellant the costs of the action in the Inner House and also the costs incurred by her in respect of the appeal to this House, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.*

*Lords' Journals, May 26, 1932.*

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Agents for the respondent: *Lawrence Jones & Co., for Niven, Macniven & Co., Glasgow, and Macpherson & Mackay, W.S., Edinburgh.*