TOWARDS A GENERAL THEORY OF NEGLIGENCE AND OCCUPIERS' LIABILITY

By HORST K. LÜCKE*

The tort of negligence, a concept of great antiquity on the continent of Europe,[1] made a fairly late appearance in England. It has some very ancient forerunners in the common law,[2] but as an independent tort embracing the greatest part of the accident law[3] its history has been comparatively short. Indeed, until quite recently some eminent writers doubted its existence,[4] but the affirmation of a broad concept of negligence by Lord Atkin in *Donoghue v. Stevenson,*[5] by Lord Wright in *Grant v. Australian Knitting Mills Ltd,*[6] and by the majority of the House of Lords in *Bourhill v. Young*[7] deprived such doubts of their basis.

Lord Wright's observation that the tort of negligence 'is still in a stage of development',[8] is as true today as it was in 1943. Despite its great importance,[9] and despite the flood of litigation it has produced, its structure and limits remain ill-defined. In particular, the relationship between its general principles and their specific applications, as, for instance, the law of industrial accidents or the law pertaining to traffic injuries, is far from clear.

According to some authorities the law pertaining to the liability of occupiers for injuries sustained by visitors (the occupiers' law) is just another instance of the general law of negligence. This opinion was voiced by Griffith C.J. in *South Australian Co. v. Richardson*[10] when he referred to the invitor-invitee principle as 'not a special and isolated rule, but a particular application of a general rule governing human beings who have intercourse with one another . . .'. Lord Atkin took a similar view in *Donoghue v. Stevenson.*[11] He described the occupiers' rules as nothing but 'instances' of 'some general conception of relations giving rise to a duty of care'. Salmond, apparently presupposing the same idea as correct, attributed the practical difficulties in the occupiers' law to insufficient reconciliation with the general rules of negligence:

* Tutor in the Faculty of Law at the University of Adelaide; Dr. Jur. (Cologne); M.C.L. (New York).

[1] *Cf.* Lawson, *Negligence in the Civil Law* (1950) 27-29; Sohm, *The Institutes of Roman Law* (4th ed., Ledlie translation, 1892) 326-330.

[2] *Cf.* Fifoot, *History and Sources of the Common Law* (1949) 154 ff.

[3] Excluding only the instances of strict liability, like the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330.

[4] *Cf.* Mr Landon's note in (1941) 57 *Law Quarterly Review* 179-183.

[5] [1932] A.C. 562, 578-599. [6] [1936] A.C. 85, 101-108. [7] [1943] A.C. 92.

[8] *Bourhill v. Young* [1943] A.C. 92, 110.

[9] Dean Wright correctly points out: 'Probably no one would quarrel with the statement that "negligence" is by far the most important subject matter in the vast topic of the law of torts.'—'Negligent "Acts or Omissions" ' (1941) 19 *Canadian Bar Review* 465, 466. [10] (1915) 20 C.L.R. 181, 185. [11] [1932] A.C. 562, 580.

> The law on the whole subject is still in a confused state . . . Had it been earlier and more generally recognized that the topic is only one branch of the law of negligence, it might have been seen that the occupiers' duties cannot conveniently be put into strait jackets . . . and the law would then have been freed of some needless refinements and profitless distinctions.[12]

The Law Reform Committee quoted this passage approvingly in its Third Report[13] and thus gave it considerable prominence.

This view has far-reaching practical implications. If it is accepted, the rules which apply to the general tort of negligence, like those concerning *res ipsa loquitur,* contributory negligence, last opportunity or nervous shock, will without question be applicable to the occupiers' law, and the future development of the occupiers' rules will have to correspond to negligence principles. These practical consequences were clearly demonstrated by Lord MacDermott in *London Graving Dock Co. Ltd v. Horton,*[14] when he made a question, more limited in scope but otherwise identical with the one that will be the concern of this article, the turning point of his argument.[15]

The assertion that the occupiers' law is only one branch of the law of negligence might be interpreted to mean that every specific rule in that field is consistent with general negligence principles. This interpretation is quite unacceptable, since many inconsistencies do in fact exist.[16] Historically the development of the occupiers' law has been greatly influenced 'by views . . . of contract and real property law';[17] it has not developed simply as 'a special branch of the law of negligence'.[18]

A more promising interpretation would be that, despite these inconsistencies in detail, at least in principle the idea that the occupier may have to 'take positive steps to protect the visitor from structural defects on the premises',[19] and the general negligence doctrine 'You must not injure your neighbour'[20] have a common foundation. Fleming seems to have had in mind an essential difference between the two when he stated:

> A significant feature of most of the cases dealing with the liability of occupiers . . . is that the cause of complaint is not that the defendant has engaged in carrying on some activity on the premises involving

[12] *Torts* (10th ed. 1947) 471. [13] (1954) Cmd 9305, 21.

[14] [1951] A.C. 737, 758-773.

[15] '. . . [T]he broad concept of neighbourly duty exemplified by *Heaven v. Pender* and *Donoghue v. Stevenson* is [not] entirely irrelevant to the present investigation. The question, as I see it, is whether *Indermaur v. Dames* also exemplifies that concept.' *Ibid.* 766; see also Lord Wright's analysis of Lord MacDermott's judgment in 'Invitation' (1953) 2 *University of Western Australia Annual Law Review* 543, 567-569.

[16] The first comprehensive attempt to analyse the occupiers' law in the United States by contrasting its rules with general negligence principles has revealed many inconsistencies—*cf.* Harper and James, *Torts* (1956) ii, 27.1-27.21.

[17] Lord Wright, *op. cit.* 551. [18] *Ibid.*

[19] Fleming, *Torts* (1957) 429.

[20] *Per* Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580.

> acts of commission fraught with unreasonable risk, but that he failed to take positive steps to protect the visitor from structural defects on the premises . . . such duties are only grudgingly conceded by the common law . . .[21]

The basic difference which Fleming pointed to was the notion that the general law of negligence only awards damages for misfeasance, that is, for active infliction of damage, while in the occupiers' law damages are awarded for failure to afford the visitor active protection, that is, for nonfeasance. If such an essential difference really exists, it would be desirable to keep the occupiers' law and the tort of negligence neatly separate both in academic exposition and in practical application.

The last mentioned interpretation of the view that the occupiers' rules are part and parcel of the general law of negligence will be supported in this discussion. The maxim 'You must not injure your neighbour' and the idea that visitors on premises may be entitled to active protection have a common foundation in the following principle: There may be a duty of care when an avoidable risk of harm arises from something which is so exclusively under the defendant's control that his neighbours depend on his co-operation for their effective protection.

I. The Nonfeasance Doctrine

The difference between misfeasance and nonfeasance is, as Bohlen,[22] Prosser,[23] and Fleming[24] point out, 'deeply rooted in the common law'.[25] Determining the exact meaning of the two terms has been one of the most troublesome and puzzling problems in the law of torts. Despite a number of valuable contributions[26] the essential difficulties remain.[27]

[21] *Op. cit.* 429; Newark—*'Twine v. Bean's Express Ltd'* (1954) 17 *Modern Law Review* 102, 109—took a similar view by referring to the two ideas as 'two distinct categories of negligence'. [22] *Studies in The Law of Torts* (1926) 293.

[23] *Torts* (2nd ed. 1955) 183. [24] *Op. cit.* 159.

[25] The common law is not the only legal system which considers this difference as significant. The same is true for Roman, German and French law: 'In order, however, to give rise to the delict contemplated by the *lex* (Aquilia) there must be *culpa levis in faciendo* on the part of the defendant. *Non facere,* as such, is not a delict': Sohm, *op. cit.* 327; 'A tort can consist in an omission, provided that there is a duty to act': Decision of the 'Reichsgericht'—Reichsgerichtsentscheidungen in Zivilsachen, 135, 235; see the excellent section on *'Faute d'abstention'* by Mazeaud and Tunc, *Responsabilité Civile* (5th ed. 1957) i, 605-622.

[26] Bohlen, *op. cit.* 33-67, 291-342; Wright, *op. cit.* 465-481; McNiece and Thornton, 'Affirmative Duties in Tort' (1949) 58 *Yale Law Journal* 1272-1289; Stone, 'Tort Doctrine in Louisiana: The Materials for the Decision of a Case' (1942) 17 *Tulane Law Review* 159-216; Winfield, *Select Legal Essays* (1952) 70-97; Ames, 'Law and Morals' (1908) 22 *Harvard Law Review* 97-113.

[27] *Cf.* Cardozo, *The Paradoxes of Legal Science* (1928) 76-77: '. . . with all our centuries of common law development, with all our multitudinous decisions, there are so many questions, elementary in the sense of being primary and basic, that remain unsettled even now . . . I have noticed this particularly in connection with the law of torts . . .'.

Nonfeasance in Relation to Breach of Duty

The term 'nonfeasance' is often treated as identical with 'omission'. This has given rise to the idea that there is a legal rule exonerating defendants if they can be blamed only for an omission. Let us test this in reference to an *Indermaur v. Dames*[28] type of case in which the defendant-occupier has omitted a warning called for under the circumstances. Let us assume that the plaintiff has suffered harm from an 'unusual danger' and that he would have avoided the harm had he been warned. Because the 'cause of complaint'[29] is the omission of a warning, is it correct to say that the nonfeasance idea, if given full sway in the occupiers' law, would lead to judgment for the defendant?

The courts do not seem to be unanimous on this point:

> . . . in certain cases the argument that the defendant has been guilty of no more than non-feasance has been put as if . . . it were open to say: 'I admit that I have been guilty of a breach of a legal duty . . . but my fault was that I omitted to do something and that excuses me.' Such an argument was in substance put in *McClelland v. Manchester Corporation*.[30] It failed in that case, but I am by no means sure that it has not in substance succeeded in two or three of the reported cases.[31]

English legal thinking has been influenced to some extent by the American approach to the problem. Even before Fleming imported the American view with only slight qualifications,[32] the authority of the American Law Institute had made some impact. The American method of presenting the general rules of negligence may be set out as follows:

> (1) Negligence is said to consist in *active conduct* which produces unreasonable risks of harm. '. . . negligence consists in the creation of an unreasonable risk of harm . . .'.[33] The American Law Institute states this idea as follows: 'Negligent conduct may be . . . an act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another . . .'.[34]
>
> (2) On the other hand, there is said to be no liability for a mere 'failure to take positive steps to benefit others or to protect them from harm not created by any wrongful act of the defendant'.[35] In such a case of inaction, the defendant is said not to have created a risk, but rather 'he has merely failed to benefit the

[28] (1866) L.R. 1 C.P. 274. [29] Fleming, *op. cit.* 429.
[30] [1912] 1 K.B. 118; and in *Kelly v. Metropolitan Ry Co.* [1895] 1 Q.B. 944—we might add.
[31] *Gorringe v. The Transport Commission (Tas.)* (1950) 80 C.L.R. 357, 375, *per* Fullagar J. [32] *Op. cit.* 119-185. [33] *Ibid.* 149.
[34] *Restatement of the Law of Torts* (1934) ii, para. 284a.
[35] Fleming, *op. cit.* 159.

other by not interfering in his affairs'.[36] In Professor Bohlen's words, the defendant has not brought harm upon the plaintiff 'and created a minus quantity, a positive loss . . . he has failed to benefit him. . . . There is a loss only in the sense of an absence of a plus quantity.'[37] There are said to be exceptions to this principle, and these we shall consider later.

(3) Between these areas of 'active misconduct' and 'passive inaction'[38] there is said to be a '. . . borderline . . . not always easy to draw . . .'.[39] There is a broad range of situations which are difficult to classify.

> . . . [W]hile to use an article known to be defective is palpably misfeasance, and while a mere failure to provide protection for those who by one's bare permission use one's premises is plainly passive nonfeasance, the use of a chattel for a particular purpose without having first ascertained whether it is fit for such purpose is a compound of both. There is both action, i.e. the use of the chattel, and non-feasance, the failure to perform the positive duty of inspecting it to ascertain if it be defective, and then repairing it so as to secure the safety of those apt to be affected thereby. Still, the final cause of whatever injury is sustained being the use of the chattel, the tendency is to consider that the whole constitutes an act of misfeasance.[40]

These cases cause the same difficulties to continental writers.

> *L'opposition entre action et abstention peut . . . être fort délicate. Un automobiliste cause un accident parce qu'il n'appuie pas sur la pédale du frein. Il y a là une faute d'abstention; cependant, cet automobiliste n'est-il pas dans une situation absolument identique à celle du conducteur qui cause un accident en appuyant sur la pédale de l'accélérateur fait positif? Dans les deux cas, il y a une fausse manœuvre; or, manœuvrer, n'est-ce pas agir?*[41]

This *'fausse manœuvre'* analysis seems to have its origin in the Roman Law: *'Non facere,* as such, is not a delict though there are circumstances in which a mere forbearance *(non facere)* may be equivalent to an act *(facere)* in which case the act may be a delict.'[42]

An example which is frequently used to illustrate this point is the case of an engine-driver who fails to turn off steam in time to prevent an accident. When such a case came up in *Kelly v. Metropolitan Railway Co.*[43] and the issue was the possible liability in tort, the defendant relied on the idea that mere nonfeasance, such as the driver's *failure* to turn off steam, could never give rise to liability based on tort. Rigby J. met the defendant's contention with what was later to become the almost universal American answer: 'The

[36] *Ibid.* [37] Bohlen, *op. cit.* 294-295. [38] Fleming, *op. cit.* 159.
[39] *Ibid.*; see also Wright, *op. cit.* 465, 473 and n. 15.
[40] Bohlen, *op. cit.* 294, n. 6. [41] Mazeaud and Tunc, *op. cit.* i, 606.
[42] Sohm, *op. cit.* 327. [43] [1895] 1 Q.B. 944.

proper description of what was done is that it was a negligent act in so managing the train as to allow it to come into contact with the dead-end and so cause the accident.'[44] As can readily be seen, his approach was identical with the *'fausse manœuvre'* analysis quoted above.

In these cases lies a considerable theoretical challenge[45] which is certainly not met adequately by merely couching the problem in hyperbole, thus giving the impression that it cannot be clearly and logically analysed: 'The range of human conduct theoretically susceptible of tort consequence runs from the zenith of clearly affirmative misconduct (misfeasance) to the nadir of clear inaction (nonfeasance), but there exists an area of shadow-land where misfeasance and nonfeasance coalesce.'[46]

The line of reasoning which leads to the conclusion that failure to turn off steam is a case of misfeasance cannot be traced without some difficulty. It must be remembered that the American school of thought defines negligence as a certain type of outward conduct, as distinct from a mental process. The fact that the law does not concern itself with thoughts and feelings, as long as they do not result in physical action, has led American writers to eliminate the mental component of conduct from their negligence analysis. 'Negligence is conduct, not a state of mind,' wrote Terry.[47] His attack on the 'Mental Theory' was renewed by Edgerton: 'Negligence neither is nor involves ("presupposes") either indifference, or inadvertence, or any other mental characteristic, quality, state or process.'[48] Since all conduct consists of mental, or mental and muscular activity, Edgerton's statement meant that attention was being focused exclusively on muscular action. This approach gained almost universal acceptance in the United States.[49] Whatever our opinion of the practicality of this non-mental theory, it must be taken to be the basis of the American 'shadowland' analysis. According to the non-mental theory, the only 'cause of complaint' in the case of the engine-driver is the absence of the muscular action necessary for turning off steam. Its proper description, therefore, appears to be 'nonfeasance', which would lead to judgment for the defendant—an unjust and unacceptable result. There seems to be only one way out of this apparent dilemma: the act of setting the train in motion appears somehow significant, but since the only risk created by it was a perfectly

[44] *Ibid.* 947.
[45] Dean Wright correctly points out that these cases present a 'difficult problem'. *Op. cit.* 473.
[46] McNiece and Thornton, *op. cit.* 1272.
[47] 'Negligence' (1915) 29 *Harvard Law Review* 40.
[48] 'Negligence, Inadvertence and Indifference; The Relation of Mental States to Negligence' (1926) 39 *Harvard Law Review* 849, 852.
[49] *Cf.* American Law Institute, *Restatement of the Law of Torts* ii, para. 282; Prosser, *op. cit.* 119-120.

reasonable one, it, in itself, cannot be called the 'cause of complaint'. One can, however, and this is the salient point of the 'shadowland' analysis, decide arbitrarily that the act of starting the engine and the failure to turn off steam cannot be separated. Viewed together, they contain an element of active conduct which supplies the necessary excuse for calling the whole 'misfeasance'. Failure to turn off steam is not an omission pure and simple; it is an omission in the course of active conduct.

That the American analysis cannot be made more rational than this is admitted even by American writers: '. . . any given set of facts can be compressed to come within the concept of non-feasance or expanded to fit the mould of misfeasance. The trick is a simple one of selecting that point in the series of happenings from which the analysis is to start.'[50] The logical fallacy of this 'trick' becomes apparent when we consider that many omissions occur in the course of active conduct. The 'spiteful man, who, seeing another running into a position of danger . . . omits the warning'[51] may do so in the course of taking a walk or smoking a cigarette. Mazeaud and Tunc find making a distinction between *'abstentions dans l'action'* and *'abstentions pures et simples'* a troublesome task: *'. . . la distinction n'est pas aussi claire qu'on pourrait le croire. Que dire de l'automobiliste qui ne s'arrête pas pour porter secours à une personne en danger qu'il croise sur la route? C'est une abstention: Il s'abstient de s'arrêter. Mais c'est aussi une action: il continue son chemin.'*[52]

The American analysis fails to appreciate the true significance of the act of setting the engine in motion; it is not part of the 'cause of complaint', but rather the basis of the duty to take care.

If, for the sake of the argument, we accept the American and continental tendency to classify these omissions in the course of active conduct as misfeasance, the categories (1) and (3) merge. The concept of duty has no place in this merged category, except to the extent that there is an unconditional duty, resting on everyone, to obey the law and not to create unreasonable risks. This, however, is only a commonplace which hardly merits express mention. Significantly, the term 'duty' does not occur in the American statement of this 'merged' category.[53]

If the foregoing analysis were exhaustive, paragraph 284 (a) of the *Restatement* would be a fairly comprehensive definition of negligence, embracing categories (1) and (3). There are cases of negligent conduct,

[50] Harper and Kime, 'The Duty to control the Conduct of another' (1934) 49 *Yale Law Journal* 886.

[51] *Gautret v. Egerton* (1867) L.R. 2 C.P. 371, 375.

[52] *Op. cit.* i, 606.

[53] *Cf. Restatement* ii, 284a. The writer of this article cannot agree with Lawson's statement: 'In . . . American law it is clear that in an action of negligence a plaintiff must always start by showing that the defendant owed him a duty of care.' *Op. cit.* 34.

however, undoubtedly giving rise to liability, which can only be described as 'plainly passive non-feasance'.[54] Bohlen employs 'failure to provide protection for those who by one's bare permission use one's premises' as a suitable illustration.[55] Failure to keep a heavy lamp projecting over a public footpath in good repair was regarded as actionable, although the lamp was there when the defendant-lessee went into occupation.[56]

In German law these 'plainly passive nonfeasance' cases, in which a duty to take affirmative care exists, are described rather neatly.[57] Such a duty is said to arise:

(1) From previous action which though in itself innocuous has exposed the plaintiff to a hazard which he cannot adequately meet by himself.[58]

(2) From a contractual undertaking with a third party to take care provided that performance of that contractual duty has actually begun.[59]

(3) From a statutory imposition.[60]

(4) From 'social contact'.[61]

The American Law Institute sums up the legal significance of all these purportedly exceptional cases as follows: 'Negligent conduct

[54] Bohlen, *op. cit.* 294, n. 6. [55] *Ibid.*

[56] *Tarry v. Ashton* (1876) 1 Q.B.D. 314-320. The case was decided on the basis of nuisance, but it might just as well have been decided in negligence—*cf.* Winfield, *op. cit.* 91.

[57] *Cf.* Meyer, *Lehrbuch des Deutschen Strafrechts* (1907) 163-164. The German law deems these considerations to be applicable to criminal law as well as to the law of torts: *cf.* para. 823 (2) of the German Civil Code; Lawson, *op. cit.* 30. Winfield must have overlooked these cases when he stated that 'duty' was a 'conception which was alien to Roman Law and of which there is no trace in modern Continental systems'. Winfield, *op. cit.* 90.

[58] *E.g.* if someone takes a small child for a walk, he must not omit returning it to its parents. *Cf. Restatement* ii, para. 321: 'If the actor does an act, which at the time he has no reason to believe will involve an unreasonable risk of causing bodily harm to another, but which, because of a change of circumstances or fuller knowledge acquired by the actor, he subsequently realizes or should realize as involving such a risk, the actor is under a duty to use reasonable care to prevent the risk from taking effect.'

[59] *E.g.* a nurse taking charge of a child while its mother is in hospital. *Cf. Restatement* ii, para. 319: 'One who voluntarily takes charge of a third person whom he knows or should know is likely to cause bodily harm to others if not controlled, is under a duty so to exercise his control as to prevent the third person from doing such harm.'

[60] *E.g.* the mother's duty to care for her children. *Cf. Restatement* ii, para. 316: 'A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know the necessity and opportunity for exercising such control.'

[61] *E.g.* the paralysed old servant, who lives with her master's family, will have to be brought to safety in case of fire. *Cf.* Harper and James, *op. cit.* ii, 1054: 'There are . . . situations in which a previous course of action, not in itself creating risks to others, may have brought the actor into certain socially recognized relations with others which are of such a character as to require affirmative acts to protect them from risks which the person thus required to act had no part in creating.'

may be . . . a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.'[62] There are, according to the American analysis, two definitions of negligence, one for negligent acts of commission (misfeasance) and one for omissions (nonfeasance). In the former, the duty concept has no place; in the latter it figures prominently in distinguishing the rare cases in which inaction results in liability from those in which it does not. The nature of this duty concept is very different from the general duty not to commit torts: the duty is aimed at producing active care and it is conditional in the sense that it rests not on everybody but only on those who are placed in the situations in which the law considers a duty of such active care to arise.

Paragraph 284 of the American *Restatement of the Law of Torts* reads thus:

> Negligent conduct may be either:
> (a) an act which the actor as a reasonable man should realise as involving an unreasonable risk of causing an invasion of an interest of another, or,
> (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

The twofold definition of negligence which we find in paragraph 284 of the *Restatement of the Law of Torts* can also be traced in certain English decisions. Willes J. seems to have had such an analysis of negligence in mind when he said: 'To bring the case within the category of actionable negligence, some wrongful act must be shewn, *or*[63] a breach of some positive duty.'[64] Although the English approach is thus somewhat blurred by ambiguous statements in the courts and by continental and American influences, it is basically different from the American one. Lord Esher has left his mark on the law of negligence and it is mainly due to his influence that English lawyers have been spared the need to find their way in the 'shadowland' which continues to obscure proper analysis in the United States. If Lord Esher had had an opportunity to examine paragraph 284 of the *Restatement,* it is not difficult to guess what his reaction would have been: 'The logic of inductive reasoning requires that . . . there must be a more remote and larger premiss which embraces both of the major propositions.'[65] Finding this 'more remote and larger premiss' is only possible if the American non-mental theory is abandoned. The element which cases falling under paragraph 284 (a) and cases falling under paragraph 284 (b) have in

[62] *Restatement* ii, para 284 (b). [63] Italics mine.
[64] *Gautret v. Egerton* (1867) L.R. 2 C.P. 371, 375.
[65] *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509, *per* Brett M.R.

common is a mental one. Lord Esher makes use of this common element in his description of negligence: 'Everyone ought . . . to think . . . with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law . . . will force him to give an indemnity for the injury.'[66] Thus, in Lord Esher's view, the element common to all cases of negligence is failure to exercise reasonable vigilance and/or failure to use care and skill (that is, to make decisions which are guided by a reasonable regard for the protected interests of others, and to implement them by corresponding conduct). From this it follows that the type of muscular action or inaction which is described in paragraph 284 (a) and (b) of the *Restatement* is more properly looked upon as the first result of negligence, rather than as the negligence itself. Whether this 'first result of negligence' consists of an undesirable act of commission or an omission which should have been avoided, its common basis is always a mental and volitional omission. In this sense it is correct to say: *'Toute imprudence, tout défaut de précautions peuvent s'analyser en omissions.'*[67] Only this view of the matter justifies the unlimited operation which the duty concept actually enjoys in the English law of negligence. Every finding of negligence presupposes that a duty to take care has been established. This duty concept is not identical with the unconditional duty not to commit torts which is implied in paragraph 284 (a) of the *Restatement*; it is rather a conditional duty, only arising in certain circumstances, and it is aimed at inducing care which, at least in the mental and volitional sphere, is always affirmative and active. It is thus akin to the duty concept as it operates in paragraph 284 (b) of the *Restatement*.

Writers have cast doubt on the usefulness of the duty concept as it exists in torts. Dean Wright suggests: 'We are . . . in a dilemma. Some writers do not think duty is of much significance at all in a negligence action.'[68] Winfield considers that all that duty does is make courts go through one test twice over.[69] The critics of the duty concept are curiously in disagreement about the attitude of the courts. While Winfield considered *Heaven v. Pender* to have been 'the historical point at which duty was clinched in the law of negligence',[70] Lawson stated: 'The famous dictum of Brett M.R. in *Heaven v. Pender* . . . implied the disappearance of the duty of care.'[71]

To suggest eliminating the duty concept is to disregard completely

[66] *Ibid.* 508. [67] Mazeaud and Tunc, *op. cit.* i, 606.
[68] *Op. cit.* 465, 467.
[69] *Cf.* Winfield, *op. cit.* 89-97; see also James, *General Principles of the Law of Torts* (1959) 145-146; Lawson, *op. cit.* 35.
[70] *Op. cit.* 89. [71] *Op. cit.* 35.

the deterrent element inherent in the law of torts.[72] When the law speaks of a duty of care it normally does so because it wants to induce careful conduct. The rare cases in which the duty idea is merely used as a convenient vehicle for driving home the desired result of liability[73] should not be allowed to detract from this basic truth. If the duty concept is eliminated, how are we to refute an extortioner's argument, similar to the one in *Bromage v. Genning*,[74] that there is a 'privilege' to commit a tort and that, by the same token, his promise not to commit one is good consideration?

It seems legitimate to disregard these attacks on 'duty' since even the harshest critics admit that the duty element has become so much a part of the law of torts that only legislative measures can eradicate it.[75]

The nonfeasance doctrine has nothing to do with the question whether lack of care results in an omission or a commission. As Mazeaud and Tunc correctly point out, it does not matter whether a driver causes an accident by failing to push down the brake, or by pushing down the accelerator.[76] This much debated question, whether lack of care has resulted in the omission of a safeguard which was called for, or in the commission of an act which should have been avoided, is immaterial when the 'cause of complaint',[77] or, as Winfield even more pointedly called it, the 'form which the breach of duty took',[78] is under consideration. In *Kelly v. Metropolitan Ry. Co.*,[79] Lord Esher M.R. and A. L. Smith L.J. declined to follow Lord Justice Rigby's *'fausse manœuvre'* idea.[80] Clearly recognizing the fallacy of differentiating between 'nonfeasance' and 'misfeasance' on the basis of such a superficial analysis, they pointed out: 'The distinction between acts of commission or misfeasance, and acts of omission or nonfeasance, does not depend on whether a driver or signalman or a defendant company has negligently turned on steam or negligently hoisted a signal, or whether he has negligently omitted to do the one or the other.' In both cases, so A. L. Smith L.J. went on to explain, the 'cause of complaint' is failure 'to take due care'.[81] With equal clarity, Lord Esher M.R. voiced his opinion: 'The plaintiff must rely on and prove negligence, and whether that negligence is active or passive seems to me to be immaterial. Omission to do something which the defendants were bound to do, or an act of com-

[72] *Cf.* Williams, 'The Aims of the Law of Tort' (1951) 4 *Current Legal Problems* 144-151.

[73] When the law uses the term 'absolute duty', for example, it does not attempt to induce a type of care which no reasonable person can take; rather it only uses the term as a convenient way of prescribing strict liability.

[74] (1616) 1 Rolle 368. In this case Lord Coke suggested that there was a 'privilege' to break a contract and thus gave rise to one of the most unhappy speculations in the law of contracts.

[75] *Cf.* Winfield, *op. cit.* 97.

[76] *Op. cit.* 606.

[77] Fleming, *op. cit.* 429.

[78] *Op. cit.* 92.

[79] [1895] 1 Q.B. 944.

[80] *Supra* n. 44.

[81] [1895] 1 Q.B. 947.

mission in doing something which they ought not to have done, may both be acts of negligence.'[82] These views, expressed with the full authority of the Court of Appeal, are the background against which Winfield's remarks on the same subject must be read: 'Once get the duty to take care it is not of the least consequence whether the breach of it consists in an act or in an omission.'[83]

The fact that the defendant in our hypothetical case[84] omitted to warn the plaintiff does not invoke the nonfeasance principle. This principle has nothing to do with the outward form which the breach of duty takes; in the occupiers' law as well as in the general area of negligence 'there are scores of cases in which the defendant's breach of duty arose from inaction on his part'.[85] In this respect, there is no inconsistency between the occupiers' law and the general rules of negligence.

Nonfeasance in Relation to the Duty of Care

Even if the difference between 'omission' and 'commission' is immaterial with regard to breach of duty, it may be of significance when the basis of duty is under consideration. Professor Smith stated that 'the considerations which determine whether there is a duty to act are quite different from the considerations which determine whether the failure to act, once the duty is admitted, constitutes negligence'.[86] Mr Justice Cardozo clearly suggested that the nonfeasance doctrine was important at this level:

> A time-honoured formula often phrases the distinction as one between misfeasance and nonfeasance. Incomplete the formula is, and so at times misleading. Given a relation involving in its existence a duty of care . . . a tort may result as well from acts of omission as of commission in the fulfillment of the duty . . . What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance.[87]

There is, indeed, a strong tendency in English law to consider that a duty of care can only be based on active conduct rather than on omissions.[88] This is particularly noticeable in the cases of the Victorian period. Where an occupier of premises *created* a dangerous situation on his land by an act of commission, a duty arose to make

[82] *Ibid.* 946.

[83] Winfield, *op. cit.* 92; see also *Charlesworth on Negligence* (3rd ed. 1956) 21: 'An omission in the course of performing a duty to take care is indistinguishable in its legal effect from an act.'

[84] *Supra* p. 475.

[85] Winfield, *op. cit.* 92.

[86] Quoted by Winfield, *op. cit.* 91.

[87] *Moch Co., Inc. v. Rensselaer Water Co.* (1928) 247 N.Y. 160, 167; 159 N.E. 896, 898.

[88] *Cf.* Winfield, *op. cit.* 91: 'It is only in rare instances that the courts have inferred a duty to take care from mere omission on the defendant's part.'

the danger innocuous (by lighting, warning or other appropriate means) for those who were permitted to use the land. In *Corby v. Hill*[89] the defendant placed a pile of slates on a private road without lighting it, and the plaintiff drove into it at night, and injured himself. The defendant attempted to set up as a defence the occupiers' permission so to place the slates, but the court held that the occupier would have been liable for the same act of commission and therefore could not validly give such permission. 'One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon . . . so that persons lawfully coming there may receive injury.'[90]

On the other hand, where a licensee sustained injury from a condition which was not due to an act of commission to which a duty of care could be attached, the licensee had no cause of complaint. In *Gautret v. Egerton*[91] the defendant allowed the public access to his dock by a bridge which had fallen into obvious disrepair, and as a result of this disrepair the plaintiff was injured. Willes J. indicated that, had the disrepair been due to a positive act, there might have been liability. 'It may be, as in *Corby v. Hill,* that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way: but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair.'[92] There were, of course, two other 'acts' which could be said to have contributed to the injury, the 'act' of acquiring occupation and the 'act' of giving permission to the public to use the way. In the opinion of Willes J., however, these were not sufficient bases for a duty of care:

> . . . [N]o such liability as this could be cast upon the defendants merely by reason of the soil of the way being theirs. . . . The dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is that the giver is not responsible for damage resulting from the insecurity of the thing unless he knew its evil character at the time, and omitted to caution the donee. [The act of inviting is only negligent, if] there is 'something like fraud'.[93]

It was common in the late nineteenth and early twentieth centuries to explain the whole range of the occupiers' duties as duties arising from active conduct, namely from that of inviting visitors to come on the premises. This belief was voiced by Griffith C.J. in *South Australian Co. v. Richardson*[94] in these words: '. . . The obligation arises from the invitation, and is co-extensive with it . . .'. This view of the matter was so strong that the element of control, which some might have felt to be significant at least as part of the basis of the

[89] (1858) 4 C.B.N.S. 566. [90] *Ibid.* 567, *per* Willes J. [91] (1867) L.R. 2 C.P. 371.
[92] *Ibid.* 375-376. [93] *Ibid.* 375. [94] (1915) 20 C.L.R. 181, 186.

duty of care, was freely dispensed with by the majority in *Heaven v. Pender*.[95] As long as there was an invitation to use the staging, it did not matter that 'after the stage was handed over to the ship-owner it no longer remained under the control of the dock owner'.[96]

Lord Wright's analysis seems to be of a similar nature. He would even prefer to call the occupiers' law the law of 'Invitation':

> The word Invitation is curiously chosen, but it points to the origin of the doctrine. The root idea seems to be that if one asks or invites another to enter on the premises of which the invitor is occupier, he should accept some liability to the invitee for the reasonable safety of the premises to which he is invited.[97]

Even in the most recent cases there is a distinct tendency to resort to some trace of active conduct, be it ever so ephemeral, as a basis for the duty of care, where strict adherence to the rules of the occupiers' law would fail to supply a satisfactory result. *Smith v. Austin Lifts Ltd*[98] exemplifies this. Viscount Simonds, Lord Morton of Henryton, and Lord Somervell of Harrow met the defendant-invitor's reliance on plaintiff's knowledge of the dangerous condition of the premises[99] by pointing to an 'act of the occupiers or their servant'[1] which had changed the condition of the premises and given 'the appearance of security'.[2]

Another area of the law of negligence, in which the conviction has become evident that only active conduct is a proper basis for a duty of care, is the liability of road authorities for accidents due to disrepair of public roads. The salient feature of the cases falling under this head is that the courts have developed a rule that the act of building the road does not attract a duty in tort to keep it in repair. '. . . no action for damages lies against a highway authority at the instance of a person suffering damage from the failure of that authority to carry out its duty to keep its highways in repair.'[3] Once this had been accepted, there was only one way of finding a duty; it had to be attached to some other activity. Acts, other than that of building the road, which resulted in hazardous situations might occur in the course of repairing it: 'For the exemption to apply, the defect must arise from want of repair, not from imperfectly carrying out some operation on the highway.'[4] The cases which have given effect to this particular type of 'activity-duty' are too well known and too well set out in the textbooks to merit further analysis. It suffices

[95] (1883) 11 Q.B.D. 503, 514-517.
[96] *Heaven v. Pender* (1883) 11 Q.B.D. 503, 515, *per* Cotton L.J.
[97] *Op. cit.* 545. [98] [1959] 1 W.L.R. 100.
[99] Defendant thus attempted to invoke the rule in *London Graving Dock v. Horton* [1951] A.C. 737.
[1] [1959] 1 W.L.R. 100, 104, *per* Viscount Simonds. [2] *Ibid.*
[3] Street, *Torts* (1955) 486; *cf. Gorringe v. The Transport Commission (Tas.)* (1950) 80 C.L.R. 357, 373-381, *per* Fullagar J. [4] Street, *op. cit.* 488.

to point out that they provide additional evidence for the fact that the courts feel safest when they can base the imposition of a duty of care on active conduct.

The almost axiomatic belief of the judges in the late nineteenth and early twentieth centuries that a duty of care arose only from active conduct found expression not only in the cases we have touched upon above, but also in another, rather more subtle form which may be stated as follows: If it is the risk created by my conduct which gives rise to a duty of care, then it follows by the same token that I cannot be expected to do more than eliminate the dangers thus arising. The extent of the risk I have created thus becomes the yardstick for the extent of the duty that can be imposed upon me. To require me to do more than that would be to seize upon a mere pretext for asking me to eliminate hazards which are not caused by my conduct. This offshoot of the 'conduct-duty' idea was also implemented in the cases of the late nineteenth and early twentieth centuries with considerable precision. It will be recalled that Willes J. in his well-known dictum in *Indermaur v. Dames*[5] defined the standard of care which invitees could expect invitors to take, and he also indicated the extent to which this standard should be determined by judge and jury respectively:

> . . . [W]e consider it settled law that he . . . is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, . . . must be determined by a jury as matter of fact.

The implication seems to have been that in certain cases the jury was entitled to determine as a matter of fact that something more than mere warning (for example, guarding or fencing) was called for under the circumstances. Lord MacDermott's observation in *London Graving Dock Co. Ltd v. Horton*[6] makes this quite clear:

> Further, the terms he[7] chose to use, particularly with regard to what he described as 'the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise . . .' seem to me to suggest that he would have been content in appropriate cases to leave it to a jury to find as a matter of fact whether the giving of notice amounted to the taking of reasonable care.[8]

Although this was reasonably clear, there emerged, despite the lip-service which was paid to the dictum of Willes J., a tendency 'to lay down as matter of law that when the plaintiff is apprised of the

[5] (1866) L.R. 1 C.P. 274, 288.
[6] [1951] A.C. 737, 770-771.
[7] *I.e.* Willes J.
[8] *Cf.* the even more pointed observations of Lord Reid to the same effect: *ibid.* 779.

danger the duty of the defendant is discharged . . .',[9] thus '. . . invading the province of the jury'.[10] There was a belief that adequate warning was always sufficient and that warning became unnecessary if the plaintiff-invitee had become aware of the danger.[11] This conviction was first voiced by Lord Atkinson in an *obiter dictum*: '. . . one of the essential facts necessary to bring a case within that principle[12] is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered'.[13]

The earliest case which was actually decided on the basis of Lord Atkinson's dictum was *Lucy v. Bawden*.[14] The defendant was the owner of a house and the plaintiff was the wife of one of the tenants. The plaintiff sustained injuries when she fell off the staircase (which had no railing). Since the staircase had remained in the defendant's occupation, the case turned on occupiers' principles. The jury determined that the injury was caused by the absence of a railing and that that absence was due to the negligence of the defendant. The jury also found that the plaintiff had full knowledge of the defective condition of the staircase. Upon these findings, Atkin J. gave judgment for the defendant. He assumed, for the purposes of the argument, that the plaintiff had entered the premises as an invitee and then stated the legal position of invitees as follows:

> On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps . . . If he . . . invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character . . . In such a case the true maxim seems to be *scienti non fit injuria*.[15]

When a very similar case came up in the following year in the High Court of Australia, Isaacs J. attempted to spell out the principle involved more specifically. To him it was inconceivable that the invitor could be under any obligation to change the state of his premises, because over these premises he had complete *dominium*. He was free to protect the invitee by other means: '. . . the occupier may leave his premises dangerous, provided he reasonably protects the invitee'.[16] In stating what he considered to be such 'reasonable protection' as a matter of law, Isaacs J. significantly pointed to what was, in his view, the one and only basis of the duty of care, namely the invitation:

[9] Griffith, 'Duty of Invitors' (1916) 32 *Law Quarterly Review* 255, 256. [10] *Ibid.*
[11] As Isaacs J. put it in *South Australian Co. v. Richardson* (1915) 20 C.L.R. 181, 194: 'If actual notice of unusual danger is sufficient, it necessarily follows that the invitee's knowledge, however acquired, of that danger is equally sufficient to prevent him from complaining.'
[12] *I.e.* the rule in *Indermaur v. Dames*. [13] *Cavalier v. Pope* [1906] A.C. 428, 432.
[14] [1914] 2 K.B. 318. [15] *Ibid.* 325-326.
[16] *South Australian Co. v. Richardson* (1915) 20 C.L.R. 181, 190.

> . . . [I]t is desirable to observe . . . that the duty arises solely from the invitation; . . . The invitee is not compelled to accept the invitation, any more than he can insist on visiting the premises without the invitation. It follows that if the invitor while inviting him informs him of a specific danger, the invitee accepts at his own risk so far as that danger is concerned. He has no right to demand that the danger shall be removed. His remedy is to stay away, and if he does stay away from fear of the danger, he has no ground for complaint against the invitor. In the absence of such special information he is entitled to regard the usual tacit business invitation as one to visit the premises in the condition in which premises of that nature usually are, if reasonably kept as such at the time he visits them.[17]

The decision in *Lucy v. Bawden,*[18] and in particular Mr Justice Atkin's *dictum* quoted above,[19] were called 'an accurate statement of the law' by Lord Buckmaster in the House of Lords and thus raised to the level of first-class authority.[20] Virtually the same problem came up before the House of Lords in *London Graving Dock Co. v. Horton.*[21] It is hard to see how Lord Porter came to the conclusion: 'I cannot myself find much assistance in the decided cases.'[22] Lord Oaksey's view seems more convincing: 'The words of Atkin J. in *Lucy v. Bawden,* approved by your Lordships' House in *Fairman v. Perpetual Investment Building Society,* appear to me directly applicable . . .'.[23] However this may be, *Horton's* case added nothing to the 'principle' invoked by Atkin J. that, the invitation being the only possible source of a duty of care, the invitee can justly complain about nothing but his own folly, if he avails himself of an invitation which adequate warning has rendered harmless.

The belief that only active conduct attracts a duty of care was incorporated into the most ambitious attempt ever made to formulate authoritatively a general rule of negligence. According to Lord Atkin's 'broad' rule in *Donoghue v. Stevenson*[24] a duty of care is only owed to 'neighbours' in the legal sense. He answered the question 'Who, then, in law, is my neighbour?' as follows: '. . . persons who are . . . closely and directly affected by my act . . .'. Charlesworth correctly paraphrased this passage by saying that 'a person owes a duty to take care when he should foresee as a reasonable man that his acts and conduct are likely to cause physical damage to the person or property of another or others . . .'.[25]

Lord Atkin's *dictum* has been widely misunderstood. Dean Wright,

[17] *Ibid.* 192. [18] [1914] 2 K.B. 318. [19] *Supra* p. 487.
[20] *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74, 81-82.
[21] [1951] A.C. 737.
[22] *Ibid.* 748; *cf.* Lord Normand's observation at 755: 'The issue . . . may be stated in this way: the defendants say that if the plaintiff incurred the risk *sciens* he must fail . . . On this issue I am not aware of any direct authority.'
[23] *Ibid.* 758. [24] [1932] A.C. 562, 580.
[25] *Charlesworth on Negligence* (3rd ed. 1956) 22.

referring to Lord Esher and Lord Atkin, stated: 'Both disregard the distinction between acting carelessly to *create* another's harm, and failing to act to *prevent* harm to another.'[26] This would only be correct if Lord Atkin had said 'affected by my act or omission'. In a recent decision of the Supreme Court of New South Wales the same misunderstanding even caused Lord Atkin's words to be misquoted: 'Lord Atkin's statement needs no repetition. It depends on foreseeability of harm to persons who are so closely or directly affected by the negligent act *or omission*[27] that they ought reasonably to have been in the contemplation of the wrongdoer.'[28] Lord Atkin has been deservedly credited with having been an extremely diligent draftsman; if he had meant 'affected by my act or omission', he would have said so. This would have implied the imposition of a duty on anyone who has an opportunity of care or help. Only the clearest words would have sufficed to impute to Lord Atkin an intention of importing an idea so foreign to the spirit of the common law.[29]

More recently the same misunderstanding has appeared in English publications. Heuston states his fourth proposition, purportedly deducible from Lord Atkin's judgment, as follows: '. . . that the criterion of the existence of a duty in the law of negligence (or perhaps in any part of the law of torts) is whether the defendant ought reasonably to have foreseen that his acts or omissions would be likely to result in damage to the plantiff'.[30] Lawson claims that Lord Atkin's generalization has 'broken down'.[31] The reason he assigns is based on exactly the same misunderstanding that we have found with Dean Wright and Heuston: 'The first and most obvious reason, which applies, as has already been said, to all other laws as well, is that there is no general duty to act positively in order to ward off foreseeable danger from another man, even if the act can be done easily and safely and without expense to the defendant.'[32]

It must be admitted that Lord Esher's formula in *Heaven v. Pender*[33] lends itself more easily to the interpretation which Dean Wright has suggested. This, however, is only true if Lord Esher's 'proposition' is taken out of its context. Other parts of his opinion, particularly the one quoted above,[34] clearly indicate that Lord Esher regarded the duty of care as arising from 'invitations',[35] 'permis-

[26] *Op. cit.* 467. [27] Italics mine.

[28] *Drive-Yourself Lessey's Pty Ltd v. Burnside* (1959) S.R. (N.S.W.) 390, 409, *per* Herron J.

[29] It is hard to see how Dean Wright can come to the conclusion that the distinction between 'active conduct' and 'nonfeasance' 'has apparently had little effect in England': *op. cit.* 468. What has fortunately had little effect in England is the failure of most American writers to distinguish between that part of conduct which is the basis of duty and the part which constitutes its breach.

[30] '*Donoghue v. Stevenson* in Retrospect' (1957) 20 *Modern Law Review* 1, 9.

[31] *Op. cit.* 35. [32] *Ibid.* [33] (1883) 11 Q.B.D. 503, 509.

[34] *Supra* pp. 480-481. [35] (1883) 11 Q.B.D. 503, 508.

sions',[36] or acts of navigation in the case of 'ships . . . approaching each other'.[37] From all the examples which Lord Esher uses, it is abundantly clear that he regards 'conduct'[38] to be the only suitable basis of a duty of care. Even if his 'proposition' is taken out of its context, it must be remembered that he requires that the injury to the plaintiff should have been 'caused' by the defendant's conduct. It is difficult to see how Dean Wright can suggest that mere failure to help or to take active care of someone in distress can 'in a sense, be said to cause'[39] this distress. Our understanding of Dean Wright's suggestion is made even more difficult when we are informed by logicians that an omission can never be called the 'cause' of something.[40]

The nonfeasance rule as it has been implemented in English law may be stated as follows: *A duty of care only arises where the risk or emergency is due to some act of the defendant, and the defendant is required to eliminate only such risks as arise from his active conduct.*

II. Nonfeasance and the Occupiers' Law

Whatever the view of Willes J. might have been, the decisions in *Lucy v. Bawden*[41] and in *Horton's* case[42] are perfectly compatible with the nonfeasance rule. The same applies to the analogous decisions in the field of licensor-licensee relations.[43] In fact, most of the occupiers' law can be reconciled with it, because 'inviting' and 'permitting' to enter the premises are instances of active conduct.[44] If 'unusual dangers' or 'traps' exist on the premises at the time the invitation is issued or permission is granted, the act of inviting or permitting involves a distinct risk of harm for the visitor. In such a case, there is 'something like fraud'.[45] Even if the dangers or traps develop later, a duty can be imposed on the basis of an analysis similar to the one in paragraph 321 of the *Restatement*.[46] The safety of trespassers has in no way been jeopardized by such 'fraudulent'

[36] *Ibid.* 509. [37] *Ibid.* 508. [38] *Ibid.* [39] Wright, *op. cit.* 468.

[40] *Cf.* John Stuart Mill, *System of Logic* (9th ed. 1875) i, 381: 'From nothing, from a mere negation, no consequences can proceed.'

[41] [1914] 2 K.B. 318. [42] [1951] A.C. 737.

[43] *Cf. Dobson v. Horsley* [1915] 1 K.B. 634.

[44] The decision of the House of Lords in *Edwards v. Railway Executive* [1952] A.C. 737, seems significant in this context. To make someone a licensee and thus give rise to the respective duty of care, this decision requires express permission or some sort of active conduct from which the licence can be implied. Mere knowledge of the presence of a trespasser does not make that trespasser a licensee: '. . . to find a licence there must be evidence either of express permission or that the landowner has conducted himself that he cannot be heard to say that he did not give it.' *Ibid.* 747, *per* Lord Goddard. '. . . the suggestion that . . . knowledge of itself constitutes the children licensees . . . carries the doctrine of implied licence much too far . . .' *Ibid.* 744, *per* Lord Porter.

[45] *Gautret v. Egerton* (1867) 11 L.R. 2 C.P. 371, 375, *per* Willes J.

[46] *Supra* p. 479, n. 58.

invitations or permissions. The fact that their protection is limited to situations in which some other act of the occupier has harmed them, could also be regarded as the result of the doctrine.

Entrants as of Right

There are, however, some cases in which reconciliation is difficult. As we have seen, Isaacs J. was a strong advocate of the view that active conduct was both the basis and yardstick of the duty of care. He based his opinion that adequate warning was always sufficient on the consideration that 'the invitee is not compelled to accept the invitation'.[47] Although this may apply to most cases, there are exceptions. The policeman who enters private premises in order to make a lawful arrest has, quite independently of any invitation from the occupier, both a right and a duty to enter.[48] The same is true of a sheriff who has come to levy execution, or of a fireman who enters premises in order to prevent a conflagration. Since in these cases the invitation makes no difference, and thus is not suitable as the basis and measure of a duty of care, the only active conduct on which a duty of care could conceivably be based is the 'act' of going into occupation. American cases have established an undoubtedly sound principle that obstruction of a rescue operation which has a reasonably certain hope of success has the same legal effect as the actual infliction of the damage.[49] Some courts have gone further and dispensed with the requirement that the saving factor which has been obstructed must have had a high likelihood of success.[50] By parity of reasoning this extension of the 'obstruction of help' idea could be applied to the occupiers' law: Through going into occupation, the occupier has kept someone else out who would have taken a greater degree of care, and has thus made himself liable for the damage which that other person would have prevented. Such reasoning is fallacious because it dispenses with the need to prove that the damage has, more probably than not, been caused by the wrongful act. Even if it were acceptable, it would still fail to explain the case of a defendant who had become an occupier, not through any active conduct, but merely by inheritance.[51] According to the 'nonfeasance' concept, the above-named entrants would be in precisely the same position as trespassers, since none of the occupiers' acts has jeopardized their safety. The law, however, protects them as if they had received an invitation. 'Officials or others who in the exercise of a

[47] *South Australian Co. v. Richardson* (1915) 20 C.L.R. 181, 192.
[48] *Cf.* Salmond, *op. cit.* 511. [49] *Cf.* Prosser, *op. cit.* 188 and cases cited in n. 97.
[50] *Cf. ibid.*: 'The principle has been carried even to the length of holding that there is liability for interfering with the possibility of such aid, before it is actually being given.' See also cases cited *ibid.* n. 98.
[51] Bohlen stated: 'The occupancy of real estate is, save perhaps in the case where it comes into one's possession by inheritance, a conscious voluntary act.' *Op. cit.* 319.

legal power or duty enter premises'[52] have always been treated at least as licensees, and in most cases they have even been regarded as invitees: '. . . the balance of opinion was in favour of treating them as invitees . . . even though their right to enter by no means depended on any invitation issued by the occupier'.[53] Reconciliation with the nonfeasance rule is not possible.

The Rule in Lucy v. Bawden

Neither can the development that followed the decision in *Horton's* case be explained in terms of the nonfeasance doctrine. That something was wrong with the *scienti non fit injuria* rule as laid down in *Lucy v. Bawden* first became apparent when a case similar to *South Australian Co. v. Richardson* came up in the Australian High Court.[54] The plaintiff had fallen off a platform on a railway station because of inadequate lighting. Although he must have realized that attempting to leave the ill-lit platform was risky, the court felt that recovery was justified under the circumstances. Isaacs J. neither wanted to depart from his previous analysis in *Richardson's* case, nor did he want to deny recovery. He therefore resorted to the rather unconvincing argument that the plaintiff had not *fully* realized the danger. This 'fully realized' requirement is, of course, so vague that it enables the courts to depart from the substance of *Lucy v. Bawden* while still paying lip-service to it. The same device was later seized upon by Lord Denning and Lord Reid in *Smith v. Austin Lifts Ltd*[55] in order to overcome what was felt to be the undesirable consequences of *Horton's* case.[56] Isaacs J. was unsuccessful in persuading his brother judges on the Australian High Court of the correctness of his views. While there is some doubt whether or not Griffith C.J. and Gavan Duffy J. shared his opinion in *Richardson's* case,[57] his analysis found virtually no support in *Bond's* case. Knox C.J. and Starke J. invoked Mr Justice Willes's opinion in *Indermaur v. Dames* against the fallacy of the *'scienti'* rule: 'We may safely return . . . to the duty so carefully formulated by Willes J. and note that in his formula there is

[52] Salmond, *op. cit.* 511.

[53] *Ibid.* 512; see also Paton, 'Entry as of Right' (1950) 24 *Australian Law Journal* 47, 50; Paton, 'The Responsibility of an Occupier to those who enter as of Right' (1941) 19 *Canadian Bar Review* 1.

[54] *Bond v. South Australian Railways Commissioner* (1923) 33 C.L.R. 273.

[55] [1959] 1 W.L.R. 100, 109, 114.

[56] *Cf.* the misgivings as to the soundness of this approach voiced by Lord Morton of Henryton. *Ibid.* 107-108.

[57] The opinion of Griffith C.J. is rather ambiguous on this particular point. One of the 'material' questions according to him was 'whether the road was reasonably safe for the use for which the plaintiff's husband was invited'—*South Australian Co. v. Richardson* (1915) 20 C.L.R. 181, 187. On the other hand, however, he seemed to imply agreement with Mr Justice Isaacs' views: 'Since the obligation arises from the invitation, and is co-extensive with it, it follows that if the invitation itself is qualified by warning of danger or knowledge of danger by the visitor, or otherwise, the obligation is qualified correspondingly.' *Ibid.* 186.

no statement that the duty is performed when the invitee knows or is warned of the circumstances of the danger. On the contrary, the rule states that . . . the question whether . . . reasonable care has been taken . . . "must be determined . . . as matter of fact".'[58] It is on the strength of *Bond's* case that Dixon J. was justified in stating in unmistakeable terms: 'This obligation of care[59] may arise although the visitor is aware of the danger, and it is not necessarily fulfilled by the occupier's acquainting him of its existence.'[60]

The *'scienti'* rule led a rather quiet existence in England until, in 1951, the industrial accident decision of the House of Lords in *Horton's* case sparked off almost universal dissatisfaction. On the basis of Lord Atkin's conviction that only conduct attracts a duty of care, the decision is unimpeachable: The invitation to come on the premises contained no element of fraud, since Horton was well aware of the danger. That he had no real choice to stay away made his position rather precarious, but that was not due to any of the defendant's acts. 'On principle,' Lord Atkin would have said, 'it is difficult to see how an obligation could be imposed . . . larger than the obligation to avoid traps.'[61] The case was not clearly decided on this basis. Lord Oaksey had no reason to search for a rationale, since he decided the case on precedent. But neither Lord Porter nor Lord Normand referred to anything like Lord Atkin's 'principle'.[62] Lord MacDermott and Lord Reid in their dissenting opinions deplored the absence of any principle on which the majority view could conceivably be based.[63] Very soon it was plain that the dissenting opinions in *Horton's* case carried more persuasive weight than the others. Lord MacDermott's emphasis on 'the anomalous situation' which was likely to result from the decision, was bound to cast serious doubt on the wisdom of the majority view:

> I may illustrate this by an instance mentioned in the course of the debate. A, at the end of his day's work, repairs to the local railway station to get home. He goes to the ticket office by the usual and only means of approach. The roof overhead is in a dangerous state and bits of it are liable to fall at any moment. The railway company know of this and could readily avert the danger for those beneath by placing a temporary screen under the defective part. But all they do is to post a notice describing the danger in clear terms. A reads and understands this before he enters the perilous area, but hurries on in order to get his ticket and is hurt by a piece of falling glass. He was not *volens* or careless. Yet, if the appellants are right, he was owed no duty by the company and has no redress.[64]

Jurisdictions which were not technically bound by the judgments

[58] (1923) 33 C.L.R. 273, 278. [59] Of the invitor towards the invitee.
[60] *Lipman v. Clendinnen* (1932) 46 C.L.R. 550, 556.
[61] *Lucy v. Bawden* [1914] 2 K.B. 318, 325. [62] *Ibid.*
[63] *London Graving Dock Co. v. Horton* [1951] A.C. 737, 765, 785. [64] *Ibid.* 764-765.

of the House of Lords tended to repudiate the *'scienti'* rule. Thus in *Long v. Saorstat & Continental Steamship Co. Ltd* (1953) and in *Maguire v. The Pacific Steam Navigation Co. Ltd* (1955)[65] the Supreme Court of the Irish Republic adopted the dissenting opinions of Lord MacDermott and Lord Reid. In the first named of these cases, Kingsmill Moore J. considered the sort of 'immunity' that *Horton's* case grants to the occupier to be open to grave criticism.

Denning L.J. attempted in *Greene v. Chelsea Borough Council*[66] to 'distinguish *Horton's* case out of existence' by pointing out that Horton was quite free to stay away from the place of danger and must be considered *volens*. This interpretation left him free to state: '. . . knowledge or notice of the danger is only a defence when the plaintiff is free to act on that knowledge or notice so as to avoid the danger'.[67] As Morris L.J. and Singleton L.J. pointed out, Lord Justice Denning's opinion was inconsistent with the precise point which *Horton's* case had settled. The somewhat far-fetched character of Lord Justice Denning's argument shows the extent of his dissatisfaction with the *'scienti'* rule.[68]

The inroads which the House of Lords themselves made in *Smith v. Austin Lifts Ltd,*[69] on the principle in *Horton's* case, have already been discussed.[70] Lord Reid and Lord Denning showed that the courts could be slow to the extent of being unwilling ever to call the plaintiff's knowledge a *full* knowledge of the danger, and Viscount Simonds, Lord Morton of Henryton, and Lord Somervell of Harrow showed how some act of the defendant, other than that of inviting the visitor, could be relied on as an additional basis for a duty of care.[71]

Lord Wright summed up his criticism of *Horton's* case as follows: 'I should be sorry if I have to think that the common law is powerless to discourage conduct like that of the appellant company and its underlings from gratuitously exposing an employee or invitee to the danger that Horton suffered which could have been avoided by the provision of an extra plank or two.'[72] Other legal writers have been even more critical of the judgment. Fleming states: 'Thus, from every conceivable point of view, the decision in *Horton's* case was as unfortunate as it was unnecessary, and calls for legislative reversal.'[73] The Law Reform Committee took the same view, recommending statutory reversal in its Third Report,[74] and Parliament in due course

[65] Both unreported—noted by V. T. H. Delany in (1956) 72 *Law Quarterly Review* 34-35. [66] [1954] 2 All E.R. 318, 325. [67] *Ibid.*

[68] *Cf.* Street, *op. cit.* 202. [69] [1959] 1 W.L.R. 100. [70] *Supra* pp. 485, 492.

[71] *Cf.* Dworkin, 'The Double Demise in Horton's Case' (1959) 22 *Modern Law Review* 433.

[72] *Op. cit.* 574; see also Lord Wright's note in (1951) 67 *Law Quarterly Review* 532.

[73] *Op. cit.* 450; see also Hughes, 'Master and Servant' (1955) 18 *Modern Law Review* 497, 499. [74] (1954) Cmd 9305.

adopted this suggestion: '. . . where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all circumstances it was enough to enable the visitor to be reasonably safe.'[75] Thus, *Horton's* case is no longer law in England.[76]

As far as Australia is concerned, *Horton's* case has lost, by virtue of its statutory repeal in England, whatever persuasive force it might once have had,[77] especially as there is earlier High Court[78] and Privy Council[79] authority inconsistent with it. The Australian courts are not committed to following the House of Lords decisions in preference to those of the Privy Council;[80] therefore it should be a small matter for them to decline to adopt *Horton's* case.

It is submitted that no attempt at reconciliation, no matter how refined, will succeed in forcing the whole of the occupiers' law into the narrow mould of the nonfeasance doctrine. Some of the occupiers' rules are incompatible with it.

III. The Common Basis of 'Activity' and 'Occupancy' Duties

Only if we keep the occupiers' law and the general law of negligence in two separate categories can those rules and the nonfeasance doctrine co-exist. Logically, if the two areas merge, the nonfeasance doctrine invalidates the rule which treats 'entrants as of right' as licensees or invitees, and affirms the rule in *Horton's* case. If we insist on incorporation, the 'nonfeasance' doctrine must be sacrificed. However, this is impossible if the doctrine has been authoritatively established as a binding principle of law.

Is the Nonfeasance Doctrine Entrenched in the Law?

If any judgment could be considered as having established the nonfeasance principle as universally valid in the law of negligence, it would be that of Lord Atkin in *Donoghue v. Stevenson*.[81] The extent to which Lord Atkin's well-known 'neighbour' test became part of the law of negligence is a much debated question. Lord Atkin did not intend to lay down a rule of invariable validity. That, he said, was beyond the function of a judge. He was, however, obviously impressed with Lord Esher's logical deduction in *Heaven v. Pender*[82]

[75] Occupiers' Liability Act 1957, s. 2 (4) (Eng.).
[76] *Cf.* Douglas Payne, 'The Occupiers' Liability Act' (1958) 21 *Modern Law Review* 359, 362.
[77] *Cf.* Heuston, 'The Law of Torts in Australia' (1959) 2 *M.U.L.R.* 35, 41.
[78] *Lipman v. Clendinnen* (1932) 46 C.L.R. 550.
[79] *Letang v. Ottowa Electric Railway Company* [1926] A.C. 725.
[80] In New Zealand the situation appears to be different. *Cf. Carroll v. Osburn* [1952] N.Z.L.R. 763.
[81] [1932] A.C. 562, 578-599. [82] (1882) 11 Q.B.D. 503, 509.

that there must be a general principle embracing all the instances of negligence. By limiting Lord Esher's negligence formula with a 'proximity' qualification, Lord Atkin hoped to provide a 'valuable guide'. The difference between such a 'guide' and a principle of law was later explained to some extent by Lord Wright in *Bourhill v. Young*.[83] According to Lord Wright, it seems that a 'guide' only outlines a general trend or policy and encourages, rather than obliges, courts to implement it. In specific cases they may decline to follow the literal meaning of the 'guide' if they can assign reasons for so doing which are not based on outright disagreement with the general policy.[84]

The particular quality that Lord Atkin gave to his 'neighbour' doctrine would have to be disregarded for the purposes of our analysis if later cases had transformed it into a proper principle of law. There can be no doubt that many subsequent cases have been based on it.[85] As Salmond points out: 'As the years went by it became increasingly welcome and its place in the law is now assured.'[86] This does not necessarily mean that it has become more than a 'guide'. Unless the courts have considered themselves bound to follow its *literal* meaning, its nature has not changed. Even if it could be shown that cases in courts other than the House of Lords had applied it as a proper principle of law, it would certainly have been restored to its old position by the decision of *Bourhill v. Young*.[87]

In *Bourhill v. Young*, Lord Atkin's 'guide' was considered and applied. It will be remembered that both Lord Russell of Killowen and Lord Porter accepted Lord Atkin's *dictum* as 'indicating the extent of the duty'.[88] They might be regarded as applying Lord Atkin's test as a principle of law, but they did not constitute a majority. To form a majority they needed the support of Lord Wright whose approach was far more cautious. As his opinion in *Grant v. Australian Knitting Mills Ltd*[89] shows, he hesitated to adopt the 'broad' rule in *Donoghue v. Stevenson*. Despite his valuable general remarks about negligence, he appears to have decided the

[83] [1943] A.C. 92, 107-110.

[84] The interesting question whether the 'neighbour' doctrine has the effect of 'entitling' the courts 'to examine afresh' the merits of older cases—*Cf.* Lord Denning's observations in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 178—thus enhancing their power to overrule older authorities which are inconsistent with the policy announced in *Donoghue's* case, we need not now investigate.

[85] *Alderslade v. Hendon Laundry Ltd* [1945] K.B. 189; *White v. John Warwick Ltd* [1953] 1 W.L.R. 1285; *Gledhill v. Liverpool Abattoir Utility Co.* [1957] 1 W.L.R. 1028; *Denny v. Supplies & Transport Co. Ltd* [1950] 2 K.B. 374; *Pratt v. Richards* [1951] 2 K.B. 208; *Davis v. S. Mary's Demolition and Excavation Co. Ltd* [1954] 1 W.L.R. 592; *Creed v. McGeoch & Sons Ltd* [1955] 1 W.L.R. 1005; *Buckland v. Guildford Gas Light & Coke Co.* [1948] 2 All E.R. 1086; *Mourton v. Poulter* [1930] 2 K.B. 183; *Thompson v. Bankstown Corporation* (1953) 87 C.L.R. 619.

[86] *Op. cit.* 293. [87] [1943] A.C. 92. [88] *Ibid.* 116-117, *per* Lord Porter.

[89] [1938] A.C. 85.

case predominantly on the basis of the 'narrow' rule in *Donoghue's* case. This cautious approach was by no means abandoned by Lord Wright in *Bourhill's* case.[90] He understood the essential element in Lord Atkin's statement to be that of reasonable foresight of danger, and went on to say: 'This general concept of reasonable foresight as a criterion of negligence or breach of duty may be criticized as too vague.' Lord Wright made it quite clear that this vagueness was desirable because it avoided rigid limitations which should, more appropriately, be worked out in later cases: '. . . definition involves limitation which it is desirable to avoid further than is necessary in a principle of law like negligence which is widely ranging and is still in a stage of development.'[91] Being a 'guide' only, Lord Atkin's *dictum* and its implication, the 'nonfeasance' rule, have never become part of the law to such an extent that they could now prevent the broadening of our negligence concept. Therefore, the incorporation of the occupiers' law at the expense of the nonfeasance rule is possible. The exceptions from that rule which we have discovered in the occupiers' law invalidate the proposition that only active conduct attracts a duty of care. The 'logic of inductive reasoning' forces us to search for a 'more remote and larger premiss'.[92]

'Exclusive Control' as the Key to a Broader Principle

The task of finding a common basis for the 'activity-duties' which arise in what is traditionally regarded as the general area of negligence, and the 'occupancy-duties'[93] which arise independently of any activity in the occupiers' law, has rarely been tackled. Landon suggests that 'the wisdom of our ancestors' is the only criterion for the existence of a duty of care: '. . . the duty to be careful only exists where the wisdom of our ancestors has decreed that it shall exist'.[94] Since adverse criticism of this view has been almost universal,[95] it need not be renewed here. Winfield believes 'obvious danger to the public' to be a possible test.[96] Paragraph 291 (2) of the *Restatement* phrases a similar idea: a duty is said to arise in 'situations in which the risk involved in inaction is of such magnitude as to outweigh what the law regards as the utility of permitting the actor to remain inactive'. Surely these are vain attempts to determine one unknown factor by employing another of equal uncertainty.

The cases provide better guidance in this search. *Byrne v. Deane*[97] may serve as a convenient pointer in the right direction. The defendants had failed to remove from a wall on their premises a notice which was allegedly defamatory of the plaintiff and which had been

[90] [1943] A.C. 92. [91] *Ibid.* 110.
[92] Lord Esher M.R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509.
[93] Newark, *op. cit.* 109. [94] *Op. cit.* 183. [95] *Cf.* Wright, *op. cit.* 467.
[96] *Op. cit.* 91. [97] [1937] 1 K.B. 818.

put up by some third person. On the question of publication, Greene L.J. stated:

> It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. . . . I may give as an example . . . a case such as the present where the removal of this particular notice was a perfectly simple and easy thing to do, involving no trouble whatsoever. The defendants, having the power of removing it and the right to remove it . . . must be taken to have elected . . . to leave it there.[98]

The true rationale of these views and their significance for the 'larger premiss we are seeking, will become clear if we interpolate the word 'exclusive' so that the section reads: 'The defendants, having the *exclusive* power of removing it and the *exclusive* right to remove it . . .'. Transferred into the field of negligence, this proposition comes very close to Bohlen's statement: '. . . it will be found that all positive duties arise . . . only where the one party, having exclusive control of the cause of harm, is able to afford protection, and the other, being by the very nature of the relation prevented from protecting himself, must look solely for his safety [to the former]'.[99]

This, taken out of the narrow context in which Bohlen is using it, will help to spell out the major premiss which can claim for the time being to be more accurate than the nonfeasance doctrine: *There may be a duty of care when an avoidable risk of harm arises from something which is so exclusively under the defendant's control that his neighbours depend on his co-operation for their effective protection.*

It is submitted that the element of exclusive control which is the gist of this definition is, unlike the definitions discussed above, not an unknown factor, but rather one which is already reasonably accurately defined by the law. The notion of trespass neatly marks off the area which is under a person's exclusive control. A 'neighbour' whose safety is threatened by defects on someone's premises or structures cannot enter for the purpose of removing the threat because, in so doing, he could commit a trespass to land or to goods. If his safety is affected by someone's careless conduct, he cannot protect himself by physically restraining that person without committing a trespass. Likewise, he has no control over the children of others; if they threaten his safety, he has to turn to their parents for his protection, since legal impediments exist against self-help. In all these cases the 'neighbour' depends on the active co-operation of the defendant for his effective protection.

The above formula must be safeguarded against a possible misunderstanding: It does not claim that a duty of care always exists

[98] *Ibid.* 837-838. [99] *Op. cit.* 307-308.

when a risk flows from something which is under the defendant's exclusive control; it only claims that it may exist. It is probable that a duty of care always arises when the risk flows solely from the area of exclusive control of the defendant. Many risks, however, arise concurrently from the areas of exclusive control of several people. The risks inherent in motor traffic, for example, are created by many agents: The acts of building the road, of designing and manufacturing the cars, of filling the petrol tanks and of driving the cars are all essential factors in the creation of these risks. If every one of the contributors to the risk were required to do everything possible for its complete elimination, the result would be a senseless and wasteful doubling-up of safety precautions. The task of reducing such risks in society calls for co-operative activity. Those involved in the creation of these risks are, in some ways, like a team set up for the purpose of promoting safety. Their common task is to prevent damage, and the considerations which assign specific parts of this job to the members of the team, are largely those of efficiency and convenience. One way of increasing the overall efficiency is to permit every member to expect that the other members will supply their share. There are traces of this idea in Lord Porter's definition of negligence: 'Negligence is the failure to use the requisite amount of care required by the law in the case where the duty to use care exists.'[1] Cases which have actually implemented this 'division of responsibility'[2] are *Phipps v. Rochester Corporation*[3] and *O'Connor v. British Transport Commission*.[4] The 'possibility of intermediate examination' exception, which is part of the narrow rule in *Donoghue's* case,[5] points to the same idea.

Conclusion

There has been a tendency to generalize throughout this article, and this may call for some explanation, since '. . . attempts to state in simple and comprehensive language the fundamental principles of the common law, to rationalize a host of single instances, have always met with hostility'.[6] In a modern state with its innumerable legal disputes, there is grave danger that 'the precedent system will die from a surfeit of authorities'.[7] One way of meeting this danger is to step beyond narrow factual analysis and attempt to articulate the tacit major premisses which have in fact been operative forces in

[1] *Riddell v. Reid* [1943] A.C. 1, 31.

[2] *Cf.* Jolowicz, 'Accidents to Young Children' (1958) 60 *The Listener* 47, 49, correctly states: 'The Court of Appeal has, as I think, rightly drawn attention to the existence of a division of responsibility . . . but the problem of finding the true dividing line has by no means been solved.'

[3] [1955] 1 Q.B. 450. [4] [1958] 1 W.L.R. 346. [5] [1932] A.C. 562, 599.

[6] Heuston, *'Donoghue v. Stevenson* in Retrospect' (1957) 20 *Modern Law Review* 1, 5.

[7] *Qualcast (Wolverhampton) Ltd v. Haynes* [1959] 2 W.L.R. 510, 518, *per* Lord Somervell of Harrow.

the development of the law and which are capable of giving meaning to 'a host of single instances'.[8] Lord Justice Scott's opinion in *Hazeldine v. C. A. Daw & Sons, Ltd*[9] supports this view. He defended attempts to establish broad propositions against 'unfair criticism' by pointing to the 'real value of attempts to get at legal principle'.

Proper analysis must be based on the purpose which the law pursues. Since the law of torts has clearly more than one purpose,[10] the only way to avoid confusion seems to be to keep these purposes separate when analysing a particular question. As Williams aptly stated: 'No one theory adequately explains the whole of the criminal law, and it may be that the law of tort, also, refuses to open to a single key.'[11] This article has mainly focused attention on that part of the law of torts which opens to the 'deterrence' key.[12]

Bearing this in mind, the following conclusion may be stated:

The occupiers' law should be regarded as part of the law of negligence because there is a common basis in the principle that there may be a duty of care when an avoidable risk of harm arises from something which is so exclusively under the defendant's control that his neighbours depend on his co-operation for their effective protection.

This conclusion is based on the following findings:

(1) The nonfeasance doctrine does not purport to exonerate defendants merely because their breach of duty consisted of an omission.

(2) The nonfeasance doctrine, as it has been adopted, expressly or by implication, in many judicial and extra-judicial pronouncements, relates to the basis of the duty of care. Its essence is that a duty of care only arises where the risk or emergency is due to some act of the defendant, and that the defendant is required to eliminate only such risks as arise from his active conduct. Lord Atkin's 'neighbour' doctrine represents the same idea.

(3) The occupiers' law can only be incorporated into the general law of negligence if the nonfeasance doctrine is abandoned. Outside the traditional negligence area which is limited by that doctrine, there are many duties of care which cannot be based on active conduct.

(4) If the basis of negligence is broadened in accordance with these suggestions, it will no longer be possible to regard Lord Atkin's 'neighbour' doctrine as 'a complete and authoritative statement of the fundamental theory of negligence'.[13]

[8] Heuston, *op. cit.* 1, 5. [9] [1941] 3 All E.R. 156, 174.
[10] Williams, *op. cit.* 137. [11] *Ibid.* 138. [12] *Ibid.* 144-151.
[13] Seavey, *'Candler v. Crane, Christmas & Co.*, Negligent Misrepresentation by Accountants' (1951) 67 *Law Quarterly Review* 466, 470.