

RESTATEMENT OF THE LAW OF TORTS, II *

ARTHUR L. GOODHART †

In my first article on the *Restatement of the Law of Torts* I expressed the view that the *Restatement* would be of particular value in furthering the study of Anglo-American comparative law. It is of interest to note that Professor Cecil A. Wright, of the Osgoode Hall Law School, Toronto, has reached the same conclusion in a recent article, saying:

“Far from detracting from the value of the work to England or Canada, it is the fact that a rationalised system of common law has been attempted that renders the work important. Even if we treat the *Restatement* as an ‘ideal’ system (which it is not, and does not purport to be), the opportunities presented for comparison with, and criticism of, English law are unsurpassed.”¹

Professor Wright further points out that a time arrives in every system of law, however averse its practitioners may be to theory and principle, when the specific instances must be summed up in terms of broader generalities. Whether we like it or not, it is inevitable that “the mass of English precedents must eventually lead to some comprehensive and rational summation of common law doctrine.”² Therefore, even if the present *Restatement* is tentative rather than final, it has performed an essential service to English as well as to American law in emphasizing the general principles on which that law is based.

Dean Green in a brilliant article disagrees with this view. According to him the attempt to restate the law of torts is premature as, “tort law is too liquid, too much a matter of processes, too growing and luxuriant to submit to any such tight form of statement, and doubtless this accounts for much of the grotesqueness which is found in the *Restatement*.”³ But do not Dean Green’s eloquent metaphors furnish in themselves the best justification for the work of the Institute? A liquid, be it wine or milk, turns sour unless it is tightly bottled, a forest growth which is too luxuriant becomes impassable. It is because this *Restatement* attempts to hew a path of principle through the tangled trees of individual cases that it is of peculiar

* This article is a sequel to an earlier article by Professor Goodhart, which appeared in the February issue of this REVIEW, pp. 411-424.

† B. A., 1912, Yale; LL. B., 1914, LL. D., 1931, Cambridge; D. C. L., 1931, Oxford; author of *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* (1931); *PRECEDENT IN ENGLISH AND CONTINENTAL LAW* (1934); editor, *LAW QUARTERLY REVIEW*; Professor of Jurisprudence and Fellow, University College, Oxford.

1. Wright, *The American Law Institute’s Restatement of Contracts and Agency* (1935) 1 U. OF TORONTO L. J. 17, 32.

2. *Id.* at 18.

3. *The Torts Restatement* (1935) 29 ILL. L. REV. 582, 584.

value. Undoubtedly the law of torts is a more recent and a less orderly growth than is that of the law of contract or of agency, and therefore the formulation of its principles is a more difficult task, but this does not mean that it is too immature or experimental to be dealt with in this way. When text-book writers fifty years ago first undertook to state the law of torts as a coherent system it was argued that they were attempting the impossible. Now we recognize that their work was of vital importance to the proper development of the law.⁴ Perhaps we can hope that the *Restatement* will have a similarly fortunate history. But whether it will or not is a question which can be argued more properly by the combatants already in the field, and I shall continue in my more pedestrian task of comparing English and American law.

Trespass to Land

Although Chapter 7 has the rather formidable title of "Invasions of the Interest in the Exclusive Possession of Land and In Its Physical Condition" it does not differ in any material respect from the English law of trespass.

Apparently, according to section 157, a person who, having been in possession of land, abandons it, remains legally in possession of it until another person has obtained possession. The few English cases on the abandonment of land or chattels are so uncertain that it would be hazardous to state categorically the English rule on this subject, but we doubt whether it is the same as that set out in the *Restatement*. It is true that one who has been in possession of land may for some purposes remain liable after he has abandoned it, but that does not mean that he remains in possession. If *A* enters upon Blackacre, which *B* has abandoned, does he violate *B*'s possession?

Section 159 provides that an unprivileged intrusion in the space above the surface of the earth, at whatever height above the surface, is a trespass. This is the traditional view,⁵ but Professor McNair has recently expressed a doubt whether this correctly represents the common law. "I submit," he says, "that there is nothing in the authorities considered in this chapter to justify us in concluding that the *passage* through the air of a vehicle or a projectile at a height in such circumstances as to noise, smell, *etc.*, as to involve no interference with the reasonable use of the subjacent land and structures upon it and no contact with them amounts to the tort of trespass."⁶ As this subject is now almost entirely covered by statute, it is doubtful whether the courts will ever be called upon to determine the question.

4. See Winfield, *The Law of Tort* (1935) 51 L. Q. REV. 249, 262.

5. Professor Thurston's article, *Trespass to Air Space*, in HARVARD LEGAL ESSAYS (1934) 501, presents this view in an admirably lucid manner.

6. MCNAIR, THE LAW OF THE AIR (1932) 31.

Section 160 states that a trespass may be committed by the failure to remove a thing placed on the land pursuant to a license or other privilege. Illustration 3 is obviously based on the recent English case of *Konskier v. B. Goodman, Ltd.*,⁷ in which Scrutton, L. J., said:

“But they [the defendants] had no more than a limited license and were bound to remove the rubbish when their work was finished; and if they did not remove it within a reasonable time after the work was done, they could not and cannot now contend that the rubbish was lawfully there. By failing to remove it they rendered themselves substantially trespassers and the trespass was a continuing trespass.”

The difficulty in this case is that the rubbish was not brought on to the land, but was the result of tearing down a chimney already on it. Can merely displacing a thing constitute a trespass? Thus Salmond says: “If I trespass on another’s land, and make an excavation there, the trespass ceases so soon as I leave the land, and does not continue until I have filled the excavation up again.”⁸ But if piled-up rubbish may constitute a continuing trespass why does not excavated earth do so? It is important to note that comment (n) points out that a bailor’s failure to remove a chattel from the bailee’s land in accordance with an agreement to retake the chattel is not a trespass.

Section 164 gives the obvious rule that one who intentionally enters on another’s land is a trespasser, even though he acts under a mistaken belief of law or fact. Most of the illustrations are so self-evident that they might safely have been omitted, but number 15 seems open to doubt. “A, mistakenly but reasonably believing that B is murdering his wife, breaks into B’s house to prevent the supposed murder. A’s entry is not a trespass.” There seems to be no English case which would give A a privilege under these circumstances: it seems rather a strong measure to give a private person a privilege to break into a dwelling house because of a suspicion, however reasonable, that a crime is being committed.

Section 165 is an omnibus section dealing with intrusions resulting both from negligent conduct and from extra-hazardous activities; these are usually dealt with separately in English text-books. The liability which the trespasser incurs seems astonishingly wide, for he is responsible not only if his trespass causes harm to the land but also if it causes harm, however innocently, “to a thing or a third person in whose security the possessor has a legally protected interest.” Under comment (e) it is stated that it is not essential that the harm caused was “reasonably to be expected as a result of a trespass on land”; the trespasser is liable for any harm “however antecedently improbable.” We do not believe that this represents the English

7. [1928] 1 K. B. 421, 426.

8. SALMOND, TORTS (8th ed. 1934) 214.

law, but in view of the *Polemis Case*⁹ it is impossible to speak with absolute conviction.

Privilege to Enter Land

Except for the fact that the Institute uses the term *privilege* instead of the word *right*, an English lawyer will feel thoroughly at home in Chapter 8, for the differences are not substantial.

Section 167 is concerned with the effect of the possessor's consent. Comment (h) says that the burden of establishing the possessor's consent is upon the person who relies on it, differing in this respect from a consent to the invasion of any of another's interests of personality. Modern English law does not draw this distinction. Under the old forms of pleading, as set out in the third edition of Bullen and Leake,¹⁰ in actions for trespasses to land, the defence of leave and license had to be pleaded, while in actions for assault this defence could be given in evidence under the general issue. In both cases, however, the burden of establishing the consent was on the defendant.

It is difficult to see why nine illustrations have been given to sections 168 and 169, for they seem to be self-evident. Is it necessary to state that if *A* gives *B* permission to enter his kitchen, it is a trespass for *B* to enter the bedroom? The *Restatement* might have been materially shortened if a number of such obvious comments and illustrations had been eliminated.

On the other hand, section 171, which deals with the termination of consent, ought to have been illustrated. This is one of the most important sections in the whole *Restatement*, but it is not clear what cases it covers. It says that the privilege to enter land is terminated, *inter alia*, by "(b) a revocation of the possessor's consent, of which the actor knows or has reason to know." Does this mean that the English rule established by *Hurst v. Picture Theatres, Ltd.*¹¹ does not apply in America? In that case, the plaintiff, who had purchased a ticket, was forcibly removed from the theatre by the defendants under the mistaken belief that he had wrongfully obtained admission without payment. The majority of the Court of Appeal held that he was entitled to remain after having been asked to leave, and that he could therefore recover substantial damages for the assault. This case has been severely criticized, Salmond saying:

"The decision in *Hurst's Case* does not seem consistent with principle. It appears to confound a licence, which is a mere *jus in personam*, with a demise or easement, which creates a *jus in rem*, and ignores the rule that specific performance will not be granted if damages are an adequate remedy or if the Court cannot supervise the performance."¹²

9. *In re Polemis*, [1921] 3 K. B. 560.

10. PRECEDENTS OF PLEADING (3d ed. 1868) 740.

11. [1915] 1 K. B. 1.

12. *Op. cit. supra* note 8, at 263.

As this is a situation which must frequently arise, it would have been desirable to find a more specific answer in the *Restatement*.

Section 173, which provides that assent obtained by fraud is ineffective, adds in comment (d) that an entry fraudulently obtained is not a trespass if the actor's presence on the land is otherwise privileged. This rule seems more sensible than that given in illustration 2 to section 63, where a man who, on the facts, was entitled to knock another one down was held liable because he did so for the wrong reason.

Sections 177 to 190, which cover the various privileges to enter land, do not seem to differ materially from the English law on this subject, but section 180 is open to some doubt. It provides that a tenant who is entitled at the expiration of his tenancy to anything affixed to the land, is privileged to be on the land for the purpose of removing such thing with reasonable promptness. In England this rule would only apply in the case of a tenancy at will,¹³ for if the tenancy is for a fixed term, so that the tenant knows at what date it will expire, why should he be entitled to any additional time in which to remove the thing from the land?

Section 191 is an omnibus section covering the use of the premises of public utilities. To an English reader it seems odd to see common inn-keepers included under this heading. As their liability can be explained only on historical grounds, and as this liability has been in large part limited by statute it is usual in English text-books to deal with them separately. Under what circumstances the public would be entitled to use the premises of gas and electric light companies, which are included in this section, it is difficult to see; certainly no such privilege exists in England.

Section 192, on the use of public highways, gives as illustrations 1 and 2 two well-known English cases, *Hickman v. Maisey*¹⁴ and *Harrison v. Duke of Rutland*.¹⁵ In return, text-book writers in this country ought to borrow illustration 4 as emphasizing the fact that parking a car in a street may be not only an offence against the public but also a civil wrong against the adjoining possessor of land.

Section 194 deals with travel through air space, which has already been discussed under section 159. It is not clear why this repetition was necessary.

Section 197 provides that a person may enter another's land, other than a dwelling house, for the purpose of protecting himself or others from death or bodily harm or to save lands or chattels from serious harm. The Institute expresses no opinion as to whether such an entry may be made into a dwelling house, but this seems oddly cautious, as in section 164 an

13. Under the AGRICULTURAL HOLDINGS ACT, 13 & 14 GEO. V, c. 9, § 22 (1923), a tenant may remove certain machinery or other fixtures affixed to land "before or within a reasonable time after the termination of the tenancy."

14. [1900] 1 Q. B. 752.

15. [1893] 1 Q. B. 142.

entry for the purpose of preventing a suspected murder is held to be privileged. Strange to say, there does not seem to be a single English case which can be cited as a direct authority on the question of private necessity, but it may be said that the existence of such a privilege is doubtful.¹⁶ On the other hand, it is equally unlikely that a jury would award any damages under such circumstances, so in practice the result is the same.

Section 198 will be of interest to English students, for it deals with a question which, though frequently discussed, is still unsettled in English law. The section states that one is privileged to enter land to reclaim goods which have come there without his consent or fault, subject to liability for any harm done in the exercise of the privilege. In *Anthony v. Haneys and Harding*,¹⁷ Tindal, C. J., expressed the opinion, that this was the law in England, but in *Wilde v. Waters*,¹⁸ Maule, J., took a contrary view. Dr. Stallybrass, the learned editor of *Salmond on Torts*, seems to be exceedingly doubtful whether there is a privilege of recaption under these circumstances.¹⁹

Section 201, which deals with the privilege of entry to abate a private nuisance, contains a *caveat* that the Institute expresses no opinion whether one who has a reversionary interest in land which is injuriously affected by a nuisance has a privilege to abate it. On this point Salmond takes a stronger line for he says: "There seems no reason why a similar right [to abatement] should not belong to the owner of a reversionary interest in the land in those exceptional cases in which a nuisance is actionable at his suit."²⁰

In comment (d) to this section it is said that "a shack or hut so constantly used by tramps as to be a menace to the security of the actor's land" may constitute a nuisance. A similar view of the law was taken by Bennett, J., in the recent case of *Attorney General v. Corke*,²¹ in which he granted an injunction against the owner of a disused brickfield who licensed a horde of caravan dwellers to camp upon it. The novelty of the case arose from the fact that all the acts which interfered with the health and comfort of the neighbourhood were done by these people not on the defendant's land but off it. This case has been severely criticized by Sir William Holdsworth²² and by Dr. Stallybrass,²³ but if it is an innovation, it is an innovation within the spirit of the law.

16. The English law of necessity was discussed at greater length in Goodhart, *Restatement of the Law of Torts* (1935) 83 U. OF PA. L. REV. 411, 420, in connection with sections 73 and 74.

17. 8 Bing. 186 (C. P. 1832).

18. 24 L. J. 195 (C. P. 1855).

19. SALMOND, *op. cit. supra* note 8, at 202, note (p), where all the relevant cases are discussed.

20. *Id.* at 205.

21. [1933] Ch. 89.

22. (1933) 49 L. Q. REV. 158.

23. SALMOND, *op. cit. supra* note 8, at 571. Dr. Stallybrass says that "the mischief which they [the caravan dwellers] do is to be imputed to a *novus actus interveniens*." English writers seem to have a belief that this phrase will solve almost all tort problems.

In section 214 the rules concerning trespass *ab initio* are set out. Of this doctrine Salmond said: "It is to be regretted that a legal fiction due to the misplaced ingenuity of some medieval pleader should have thus succeeded in maintaining its existence and oppressive operation in modern law."²⁴ English law has limited the scope of the doctrine by holding that if there is any independent ground of entry which is not affected by the abuse, it will justify the entry and protect it from the rule of trespass *ab initio*. Thus in the recent case of *Elias v. Pasmore*,²⁵ Horridge, J., said: "The defendants were only trespassers *ab initio* as to the documents and goods that were seized, and they were not liable for any damages in respect of the entry on the premises for the purpose of the lawful arrest of Harrington." Apparently this limitation, which so materially narrows the scope of the doctrine, does not exist in American law, for it is not mentioned in the *Restatement*. In another important respect the American rule seems to be wider than the English one, for any act which is tortious to the person or chattels of a member of the possessor's immediately family or household brings it into play. It would be interesting to know how many American cases there are on this point, and how they justify a rule which has so feeble a basis either in history or principle.

Possession of Chattels

Chapter 9, which deals with various intentional violations of the possession of chattels, is of special interest from the standpoint of comparative law, for no subject is so controversial or uncertain as that of possession. As so few attempts have been made to state the principles on which this branch of the law is based, these sections of the *Restatement* are certain to carry special weight.

In section 216 possession is defined. Immediately one striking contrast with English law is apparent: one who has control as a servant never has possession under American law. The English rule is stated by Sir Frederick Pollock as follows: ". . . the rule is settled in our modern law that a servant does not possess by virtue of his custody, except in one case, namely when he receives a thing from the possession of a third person to hold for the master . . ." ²⁶ It is obvious that this exception is an important one; the large number of English cases on this point show how frequently the

24. SALMOND, *op. cit. supra* note 8, at 222. But see HOLDSWORTH, 7 HISTORY OF ENGLISH LAW (1925) 500, where the rule is considered in a more favorable light, the learned author saying: ". . . the common law has always been careful to provide remedies against abuses of authority which may lead to the oppression of the subject. We have seen that it was for this reason that it carefully guarded against those irregularities in that law of distress in which this doctrine took its rise; and this was one reason for the severity of its rules against abuses of authority by such officials as sheriffs and bailiffs. Therefore the extension of this principle from the law of distress, to cover all cases in which a public authority had been abused, came very naturally to it."

25. [1934] 2 K. B. 164, 168.

26. POLLOCK AND WRIGHT, POSSESSION IN THE COMMON LAW (1888) 60.

question arises. Recently the Court of Criminal Appeal extended the doctrine of a servant's possession to a remarkable degree in *Rex v. Harding*,²⁷ but as it is probable that that case will be explained away "on its special facts", it is not necessary to discuss it here.

Of even greater interest is section 216 (b), which provides that a person who has been in physical control of a chattel with intent to exercise such control may have possession although he is no longer in physical control. This seems to be a correct statement of both the American and the English law, although it conflicts with the frequently quoted view expressed by Salmond:

"How can it be that possession at its inception involves actual physical power of exclusion, while in its continuance it involves merely the power of reproducing this primary relationship? Possession is a continuing *de facto* relation between a person and a thing. Surely, therefore, it must from beginning to end have the same essential nature."²⁸

Salmond seems to have imported this view from the Continent, as no support for it can be found in the common law. The correct view is that expressed by Mr. Justice Holmes:

"But it no more follows, from the single circumstance that certain facts must concur in order to create the rights incident to possession, that they must continue in order to keep those rights alive, than it does, from the necessity of a consideration and a promise to create a right *ex contractu*, that the consideration and promise must continue moving between the parties until the moment of performance."²⁹

Less satisfactory is the further statement in the Institute's definition, that possession continues if "(i) he has not abandoned it, and (ii) no other person has obtained possession." Ought not the *and* to be *or*? If I abandon a chattel does my possession continue until some other person has acquired it? I may still be liable in relation to the chattel for certain purposes, but it is not necessary for that reason to ascribe to me a possession I have surrendered. Moreover, if another person has obtained possession surely I have lost mine, whether I have abandoned the chattel or not.

Section 218 is an interesting one. This provides that a person who intentionally intermeddles with a chattel is only liable for a trespass if (a) the chattel is impaired, or (b) the possessor is deprived of its use for a substantial time, or (c) some bodily harm is caused to the possessor or to some person in whom the possessor has a legally protected interest. English law on this point is probably simpler. Sir Frederick Pollock says:

27. 21 Cr. App. R. 166 (1929). See note on this case in (1930) 46 L. Q. REV. 135.

28. SALMOND, JURISPRUDENCE (8th ed. 1930) 318.

29. THE COMMON LAW (1881) 236.

"Authority, so far as known to the present writer, does not clearly show whether it is in strictness a trespass merely to lay hands on another's chattel without either dispossession or actual damage. By the analogy of trespass to land it seems that it should be so. There is no doubt that the least actual damage is enough. And cases are conceivable in which the power of treating a mere unauthorized touching as a trespass might be salutary and necessary, as where valuable objects are exhibited in places either public or open to a large class of persons."³⁰

Certainly *Kirk v. Gregory*³¹ lays down a stricter rule than that given in the *Restatement*.

Section 223, which gives the seven different ways in which a conversion may be committed, is a particularly useful one, especially sub-section (e), which provides that a conversion may be committed by "disposing of a chattel by a sale, lease, pledge, gift or other transaction *intending to transfer a proprietary interest in it.*"³² By stating that there must be an intention to transfer a proprietary interest, the American rule rationally distinguishes between the auctioneer and the carrier cases, for an auctioneer, however innocently, intends by his act to transfer the proprietary interest while the carrier intends merely to transport the chattel. The American and the English cases reach the same results, but there has been more difficulty in formulating the principle on which the English cases are based. Thus when Salmond says that "every person is guilty of a conversion who, without lawful justification, deprives a person of his goods by delivering them to some one else so as to change the possession",³³ an immediate difficulty arises in the carrier cases, for a railway which, acting innocently for a thief, delivers my stolen goods to a third person, changes the possession and deprives me of my goods. Salmond is forced to explain these cases by saying³⁴ that in such a situation the agent is a "mere conduit pipe", and then to add immediately, "It is by no means easy to find the exact line of delimitation in these cases." The American law by finding such a line in the intention to transfer a proprietary interest avoids this difficulty.

Section 230 (2) states that one who receives the possession of a chattel for storage, safekeeping or transportation, with knowledge or reason to know that the chattel has been stolen, is liable for a conversion. This special rule, limited to stolen property and based in part on negligence, does not have a counterpart in English law. It may, perhaps, be explained on the ground that as the receiver of stolen property is more of a menace in the

30. POLLOCK, *TORTS* (13th ed. 1929) 364.

31. 1 *EX. D.* 55 (1876).

32. The italics are added.

33. SALMOND, *op. cit. supra* note 8, at 321.

34. *Id.* at 317.

United States³⁵ than he is in England, the civil as well as the criminal law must be invoked to limit his activities.

Section 231, which deals with the liability of an agent or servant, is one of the most important in the *Restatement*. It distinguishes between three different situations: (1) where the servant negotiates the transaction and receives possession of the chattel, (2) where he negotiates the transaction but does not receive possession, and (3) where he receives possession in consummation of a transaction negotiated by some other person. American and English law agree that in the first case the servant is liable, while in the third, as he is acting merely in a ministerial manner, "as a conduit pipe", he is not. It is less certain whether English law would agree with American law that he is not liable in the second case. In *Van Oppen & Co., Ltd. v. Tredegars, Ltd.*,³⁶ it was held that "there may be a conversion even though the defendant has never been in physical possession of the goods, if he has dealt with them in such a way as to amount to an absolute denial and repudiation of the plaintiff's right,"³⁷ and in *Oakley v. Lyster*³⁸ this doctrine was carried to astonishing lengths. It is true that in neither of those cases were the defendants acting as servants, but a court would find no difficulty in holding that the principle on which these decisions were based covered such a situation.

Section 236 deals with a question which has given the English textbook writers some trouble. What is the liability of a finder, or of a person on whom the possession of a chattel has been imposed, if he misdelivers it to a third person who is not entitled to it? The answer given by the Institute is that he is under no liability if he reasonably believed that the third person was entitled to its possession. The same conclusion was reached in the recent English case of *Elvin & Powell, Ltd. v. Plummer Roddis, Ltd.*,³⁹ where Hawke, J., held that "if persons were involuntary bailees and had done everything reasonable they were not liable to pay damages if something which they did resulted in the loss of the property."

The remaining sections on conversion need not be noticed in detail. The rules concerning qualified refusal upon demand for delivery, the effect of mistake, and privileges arising from consent seem to be substantially the same in both systems of law. Section 263, which deals with the privilege created by private necessity, probably goes further than do the rules of English law on this point, but the questions involved here are similar to those which have been discussed above in relation to trespass to land because of private necessity.

35. On this point see Jerome Hall's interesting book, *THEFT, LAW AND SOCIETY* (1935).

36. 37 T. L. R. 504 (K. B. 1921).

37. See SALMOND, *op. cit. supra* note 8, at 324, for a discussion of this case.

38. [1931] 1 K. B. 148. See (1931) 47 L. Q. REV. 168, for a comment on this case.

39. 50 T. L. R. 158, 159 (K. B. 1933).

Negligence

In 1889 Lord Herschell was able to say: "I do not think there has been much difference of opinion as to what constitutes remoteness of damage",⁴⁰ but those happy days are long since past; at the present time no two judges or text-book writers agree on what is the scope of negligence or for what consequences of his negligence an actor may be held liable. It is impossible therefore to speak here either of an English or an American rule on this subject; all that we can do is to consider some of the principles set out in the *Restatement*.

Section 281,⁴¹ which purports to give the elements of a cause of action for negligence, states *inter alia* that an actor is liable for the invasion of another's interest if "(b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion." This sounds simple enough, until we get to comment (c), which tells us what is meant by "negligent with respect to such interest." An actor is negligent if he should have realized that his act might have affected an interest in one way, although in fact it affected it in another way which he could not have expected. Thus, although the particular manner in which the harm was caused could not have been foreseen by the defendant, nevertheless the plaintiff can recover because the defendant should have recognized that the situation might be dangerous under other circumstances. To put it shortly, *A*, who has been injured in manner *X*, can recover because he might have been injured in manner *Y*. This "dangerous area" theory of liability must be rather confusing for a jury; if we take illustration 1,⁴² the judge will instruct the jury that they must ignore the fact that *D* has been injured by an explosion; they must decide the moot question whether *D* could possibly have been injured if *A* had driven his car on to the sidewalk, or whether, if there had been a collision in the road, part of the car might have been thrown far enough to strike *D*. Lord Lindley once said, "It must be remembered that the rules as to damages can in the nature of things only be approximately just, and that they

40. *The Argentino*, 14 App. Cas. 519, 523 (1889).

41. See Dean Green's comments on this section, in the article cited *supra* note 3, at 601.

42. "A is driving a car down the street. He drives so carelessly that he collides with another car. The second car contains dynamite. A is ignorant of this and there is nothing in its appearance or in the circumstances to give him reason to suspect it. The collision causes an explosion which shatters a window of a building on an intersecting street, half a block away, inflicting serious cuts upon B who is working at a nearby desk. The explosion also harms C who is walking on the sidewalk near the point where the collision occurs. It also shatters the windows in the building opposite, injuring D at work therein. A is not negligent toward B since he had no reason to believe that his conduct involved any risk of harming anyone at the point where B is injured. A is negligent toward C since he should have realized that careless driving might result in an accident which would affect the safety of those traveling upon the sidewalk, and the fact that the harm occurred in a different manner than that which might have been expected does not prevent his negligence from being in law the cause of the injury. Whether or not A is negligent toward D depends upon whether A as a reasonable man should have expected that the manner in which he drove the car might cause harm to persons in D's situation."

have to be worked out, not by mathematicians, but by juries.”⁴³ In America these functions will have to be combined, for the jury will have to be made up not only of mathematicians but also of engineers if it is to decide the question of the area of danger. How is it to decide whether the area is fifty, one hundred, or two hundred yards, and in what direction the area extends? In illustration 1 a man standing a hundred yards ahead of the car could, perhaps, recover, but a man standing five yards behind it could not, because the driver of the car could not expect to cause harm to a person he had already passed. The “dangerous area” test therefore has the two most serious disadvantages that any legal test can have, for (1) as it is mechanical so its results must be mechanical, and (2) as it involves highly complicated and scientific questions it is impracticable to ask a jury to apply it.

Would not a better test be one based on the word *expectable*, used in so illuminating a manner later in section 302? This word avoids all the difficulty of “probable”, “foreseeable”, “direct”, *etc.* Was it expectable that a collision might cause an explosion? If it was, then every one injured by the explosion ought to recover for the harm suffered. If it was not, then the driver of the automobile ought not be held liable to any one, for the person really at fault was the one who carried the dynamite through the streets in a dangerous manner. In fact the driver’s act was not the substantial factor,—the *causa causans*—which caused the damage.

Equally difficult of analysis is the second point in section 281 (b), that the negligence must be “with respect to such interest or any other similar interest.” What is meant by “any other similar interest?” Illustration 3⁴⁴ is supposed to be illuminating but, as happens sometimes with illuminations, we, for one, are blinded by it. Here *A* cannot recover for the injury to his eyes because this is an interest of personality and not in chattels. But could *A* recover if the explosion had broken his eye glasses, or even his false teeth, which are chattels according to English law? How are we to know what are “other similar interests?” Are all property interests similar or must we divide them into various categories? The number of doubtful questions to which section 281 must give birth seems to be almost unlimited. One further point may be noted. In illustration 3, *A*, who is carrying fireworks which may explode if dropped, is almost certainly guilty of contributory negligence, so that on this ground the railway company would not be liable. The danger of these moot cases is that, as the conclusion reached

43. *Rodocanachi v. Milburn*, (1886) 18 Q. B. D. 67, 78.

44. “A, a passenger of the X and Y Railway Company is attempting to board a train while encumbered with a number of obviously fragile parcels. B, a trainman of the company, in assisting A, does so in such a manner as to make it probable that A will drop one or more of the parcels. A drops a parcel which contains fireworks, although nothing in its appearance indicates this. The fireworks explode, injuring A’s eyes. The railway company is not liable to A.”

is obviously the correct one, we therefore assume that the reason given for it is equally valid. If instead of fireworks, *A* had been carrying a glass vase, which in breaking had driven a splinter into his eye, could he not have recovered?

It is suggested, therefore, that the rules stated in section 281 raise more questions than they settle, and introduce additional confusion into a subject which ought to be a simple one. In this one particular—but only in this particular—can it be definitely stated that the American and the recent English cases on this subject resemble each other, for the English law is equally uncertain and involved. In almost every case the result is a toss-up. In the most recent one to reach the House of Lords, *Liesbosch Dredger v. Edison*,⁴⁵ the court of first instance, the Court of Appeal and the House of Lords all reached different conclusions, and if there had been a fourth court we would probably have had a fourth answer.⁴⁶ Is it not time to return to the simple and workmanlike rule which the English Courts had no difficulty in following before Thomas Beven⁴⁷ introduced his complicated innovations?

Section 282 distinguishes between negligence and conduct recklessly disregarding of an interest of others. The chief importance of this distinction is that contributory negligence is no defence where the actor's conduct has been reckless. English law does not draw this distinction,⁴⁸ gross negligence, to use the stock phrase, being merely negligence with a vituperative adjective.⁴⁹ As the Institute does not express any opinions on the desirability of the rules it has restated, we cannot tell whether the American doctrine works well in practice. It must be difficult to draw a satisfactory line between negligence and recklessness, but that, of course, is not an insuperable objection, for all legal lines must be arbitrary to a certain extent.

Sections 285 and 286, in which the effect of a legislative enactment in determining negligence is discussed, will be of interest to English readers in view of the recent case of *Lochgelly Iron and Coal Co. v. M'Mullan*,⁵⁰

45. [1933] A. C. 449.

46. No better illustration of the confusion in English law can be given than the fact that in *The Edison*, [1932] P. 52, 61, Lord Justice Scrutton took the view that the measure of damages in contract and tort was the same, while in *The Arpad*, [1934] P. 189, 201, he remarked: "It is often said that the measure of damages in contract and tort is the same; I do not think this is strictly accurate."

47. Beven's famous book, *NEGLIGENCE* (4th ed. 1928), gave currency to the *dicta* in three of the judgments in *Smith v. London & South Western Ry.*, L. R. 6 C. P. 14 (1870), where the direct consequence theory was first expressed.

48. Gross negligence may, however, affect the measure of damages in certain cases. See cases cited in *POLLOCK, op. cit. supra* note 30, at 195.

49. *Id.* at 457: "Our law has no hard and fast rules as to different degrees or kinds of negligence, notwithstanding the use of such epithets as "gross", "ordinary" or "slight", and the misplaced ingenuity that has been expended on endeavours to bring our system into line with either real or imaginary distinctions in ancient or modern Roman law."

50. [1934] A. C. 1.

which Dr. Stallybrass, for some reason which we have difficulty in following, has called "epoch-making."⁵¹

Section 288, which deals with violations of a legislative enactment that creates no civil liability, takes as illustration 1⁵² the well-known case of *Sharp v. Powell*.⁵³ This illustration is perhaps more interesting as an example of the high-handed method adopted by legal writers to get rid of a case which conflicts with a theory they favour. Here the case is explained on the ground that the sole purpose of the ordinance was "to expedite travel", but a strong argument in favor of liability would be that such washing would make the street slippery and therefore dangerous. The narrow construction suggested in the illustration never occurred to any of the counsel either for the plaintiff or the defendant, nor was it even mentioned in the various judgments, but as that brings the case into conflict with *In re Polemis*,⁵⁴ Professor Bohlen and Dr. Stallybrass,⁵⁵ although the latter with more hesitation, explain it away on a ground which was never considered by the court.

Section 289 discusses the various factors which are important in determining a standard of reasonable conduct. The ten pages in which these are discussed give us an interesting essay on the subject, but they are of doubtful practical value as what is reasonable must depend on the facts of each case. The knowledge which a reasonable man is supposed to have is rather staggering: "It includes knowledge of the nature, qualities, habits and tendencies of human beings and animals and of the laws of nature and the operation of natural forces." The illustrations to this section seem either too clear to be worth including or too uncertain to be anything but misleading. Illustration 11⁵⁶ is difficult to explain, as the only meaning we can ascribe to it is that a motorist, pursued by bandits, must halt when he comes to a signal which he knows means "stop", but if he is uncertain about the meaning, he then can take a chance. The illustration says nothing about the duty of care on the part of the bandits under these circumstances. Illustration 18, which is repeated a number of times in the *Restatement*, is an interesting one. *A* lends a car to *B* who, he knows, is an habitual

51. SALMOND, *op. cit. supra* note 8, at viii.

52. "A municipal ordinance prohibits the washing of vans on a highway and imposes a penalty for so doing. *A*, in breach of the ordinance, washes his van on the street. The water flows down the gutter. The inlet from the gutter into the sewer is clogged, although *A* neither knows nor should know that this is the case. The water collects in a pool and, the weather being cold, freezes. While *B* is leading his horses along the street, one of them slips on the ice, breaks its leg, and has to be shot. *A* is not liable to *B* under the ordinance, since the purpose of the ordinance is to expedite travel."

53. L. R. 7 C. P. 253 (1872).

54. [1921] 3 K. B. 560.

55. SALMOND, *op. cit. supra* note 8, at 146, note (h).

56. "In the situation described in Illustration 10 [motorist uncertain as to the meaning of signals] *A* would not be negligent in relying upon the particular signal as being similar to the majority which he had previously encountered if he were pursued by bandits or were a state policeman pursuing a murderer. In such case he should recognize the risk involved in a possibility of error as to the meaning of the signal but would be justified in creating it."

drunkard. This is negligence on *A*'s part and makes him liable if *B* gets drunk and injures a third person. Perhaps this result can best be explained by what Professor Bohlen has described as "a very definite feeling that the automobile is so dangerous a means of locomotion that the owner of it should answer not only for the manner in which he drives it, or in which it is driven by those who, as his servants, are engaged in forwarding his business or affairs, but also by anyone whom he permits to drive."⁵⁷ Whether an English court would hold *A* liable under these circumstances is doubtful.

Section 290, which discusses "what the actor is assumed to know", includes in the list the qualities and habits of human beings. This is elaborated in comment (1), which says, "The actor, as a reasonable man, must therefore take life as it is and not as it should be and must realize the likelihood that third persons may act in a variety of ways, all of which are not only morally but legally wrongful." This is good common sense, but in England there is a tendency to say that the wrongful act of a third person must be a *novus actus interveniens*. This is due in large part to Lord Sumner's unfortunate *dictum* in *Weld-Blundell v. Stephens*: "That a jury can finally make *A* liable for *B*'s act, merely because they think it was antecedently probable that *B* would act as he did apart from *A*'s authority or intention seems to me to be contrary to principle and unsupported by authority."⁵⁸ This extraordinary statement, having been made by Lord Sumner, who, owing to his dominating personality, exerted a strangely hypnotic, and frequently unfortunate, influence on English law, has been generally accepted. Thus Dr. Stallybrass, after philosophically saying that "in actual practice the 'isolation' rule does not work great hardship", continues, "We shall therefore adopt as a general rule that a *novus actus interveniens* breaks the chain of causation, whether the intervening act was foreseeable or not."⁵⁹ Why a rule which at best "does not work great hardship" should have been forced into English law because of the words of a single judge, however eminent, it is difficult to explain; perhaps, under the influence of the *Restatement*, Lord Sumner's *dictum* will, in the future, be decently interred and forgotten.

Section 301, which describes the circumstances under which an adequate warning may prevent a dangerous act from being negligent, will prove of great value to students as it analyses in a clear way a number of separate ideas. It is not always easy to distinguish between the effect of a warning which prevents an act from being negligent, a warning which makes action on the part of another contributory negligence, and a warning which has no effect because the other is entitled to disregard it.

57. *The Reality of What the Courts are Doing*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY (1935) 44.

58. [1920] A. C. 956, 988.

59. SALMOND, *op. cit. supra* note 8, at 153.

Section 302 is so cautiously worded that the reader may not realize how important it is. It states that a negligent act may be one which starts a force, the continuous operation of which involves an unreasonable risk to another. This resembles the "direct consequence" rule which is supposed to have been laid down in the *Polemis Case*, but it is less absolute, as the controlling word is "may." Also it does not say that a plaintiff who has been injured by a force which involves an unreasonable risk to another, but not to himself, can recover under this section.

Sub-section (b) is admirably phrased. It says that an act may be negligent because it creates a situation which may be dangerous because of "the expectable action" of another, an animal or a force of nature. As we have already said, the word "expectable" expresses in an accurate manner the basic principle on which the law of negligence ought to be stated.

The tendency of American law to place an exceptional liability on public utilities is shown by illustration 21.⁶⁰ An English court would almost certainly hold that in this case it was the duty of the police to guard the switch, and that there was no negligence on the part of the Railroad Company in running its trains, although it knew that there was danger of sabotage. Its only duty would be to warn the passenger that there was a strike.

Section 303 states that an act is negligent if the actor should realize that it is likely to affect the conduct of another in such a manner as to create an unreasonable risk of harm to the other. This resembles the famous sentence in Lord Atkin's judgment in *Donoghue v. Stevenson*:⁶¹ "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." It has been suggested, however, that this is too wide a statement to be accepted as a general rule, and that it is rather the expression of an altruistic wish than a completely accurate description of English law.

Section 310, which deals with conscious misrepresentations involving risk of bodily harm, states that the actor is liable if he "intends his statement to induce or should realise that it is likely to induce action by the other or a third person." English law has been slower in holding that there is liability for a false statement, however negligently made; there must be fraud, and a false statement is not fraudulent unless there was an intention that the injured person should act on it. Strange to say, in *Langridge v. Levy*,⁶² which is still the leading case on this branch of the law, there was,

60. "The employees of the X and Y Railroad Company are on a strike. They or their sympathizers have torn up tracks, misplaced switches and otherwise attempted to wreck trains. A train of the X and Y Company is wrecked by an unguarded switch so misplaced. A, a passenger, and B, a traveller upon the highway adjacent to the track, sustain harm. The X and Y Company is liable to A and B because it did not guard the switch."

61. [1932] A. C. 562, 579.

62. 2 M. & W. 519 (Ex. 1837).

in fact, no fraud in this sense, for the defendant clearly had no intention that the son should fire the gun—on the contrary, he probably hoped that he would not. Based on so uncertain a foundation, it is not surprising that the English law on this point is doubtful and contradictory. It is to be hoped that English law will develop along the lines of negligence, rather than fraud, as the American seems to be doing; if a man is to be held liable for his negligent acts why should he not equally be responsible for his negligent words?

Section 311 makes "one a part of whose business or profession it is to give information upon which the bodily security of others depends" liable to third persons for bodily harm caused to them owing to erroneous information. Thus an inspector who negligently certified that a boiler was in good condition is held liable to a third person who was injured when it burst. Whether the English courts will follow this view is uncertain; here again it is a question how far the principle of *Donoghue v. Stevenson*⁶³ will be extended.

Sections 312 and 313, which deal with conduct which is negligent because likely to cause physically dangerous emotional distress, show that on this subject American law has been even less successful in working out a rational body of principles than has the English. The caveat to section 313 points out that the Institute expresses no opinion whether a parent can recover for physical injury which he has suffered due to the emotion caused by seeing his child placed in peril. In England *Hambrook v. Stokes Bros.*⁶⁴ has answered the question in the affirmative. The Institute rejects the further view expressed by Lord Justice Atkin (as he then was) that any one, whether a parent or not, can recover under such circumstances,⁶⁵ on the ground that one who negligently drives a car "is not required to take into account the possible presence at the scene of the accident of some one who is so constituted that the shock of witnessing the accident may cause her a distress which in view of her peculiar physical make-up may bring about an illness." Is it peculiar for an American woman, or even man, to be shocked at seeing the perils of others? In view of the experience which shell-shock has provided the medical profession, can it be said that it is extraordinary for shock to produce a physical injury? Instead of this specious explanation given by the Institute, is not the true ground for the American rule the fear of the courts that fraudulent claims will be presented and doubtful medical evidence be given in their support? When writing "off the record" on the reality of what the courts are doing, Professor Bohlen explains the rule on these grounds.⁶⁶

63. [1932] A. C. 562.

64. [1925] 1 K. B. 141.

65. *Id.* at 158-159.

66. *Supra* note 57, at 42.

Sections 315 to 320, which deal with the duty to control the conduct of third persons, go considerably further than does English law. Thus section 316 says that a parent is under a duty to exercise reasonable care to control his minor child, but in English law a parent is under no such liability. It is true that a parent may be liable for his own personal negligence in affording his child an opportunity of doing mischief, *e. g.*, by handing him a gun,⁶⁷ but this liability is not *qua* father as it applies equally to all persons. Similarly, section 317 provides that a master is under a duty, if he has the ability, to control the conduct of his servant when acting *outside* the course of his employment, if the servant is on the master's premises or is using his chattels. Section 318 extends this duty to include third persons, not servants, if the possessor of the land or chattels is present. The rationale of these sections is that, although in general there is no duty to prevent a third person from injuring another, nevertheless in these cases there is a special relation between the actor and the third person which imposes such a duty. It is doubtful whether English law recognizes this duty. Thus Salmond says, "Nor in such a case is the landlord to be deemed to authorise the nuisance simply because, with knowledge of its existence, he refrains from exercising his right of determining the tenancy, or has taken no active steps to prevent what is being done."⁶⁸

Comment (d) to section 322 is ingenious; it would be interesting to know whether it is based on an actual case. It provides that if *A*, driving negligently, injures *B*, who is guilty of contributory negligence, it is *A*'s duty to use reasonable care to prevent any further harm happening to *B*. *B*'s contributory negligence is not a defence here, for the liability "is not imposed as a penalty for the actor's original misconduct, but for a breach of a separate duty to aid the other after his helpless condition caused by the actor's misconduct is or should be known."

Section 328 is a strange one. It provides that one who wrongfully obstructs a highway and thereby prevents third persons, such as firemen or doctors, from giving aid to another, is liable to the other for bodily harm caused by the absence of such aid. It is doubtful whether the English courts would take this view. It might be argued either that this is not an expectable result of obstructing the highway, or that the duty not to obstruct the highway is a duty created for the purpose of expediting traffic and is owed only to the person who has been obstructed.

Liability for Condition and Use of Land

This chapter shows how closely the English and the American law of torts are related, for, instead of establishing a rational system based on the

67. *Beebe v. Sales*, 32 T. L. R. 413 (K. B. 1916).

68. *Op. cit. supra* note 8, at 252. See also *Bowen v. Anderson*, [1894] 1 Q. B. 164; *Malzy v. Eichholz*, [1916] 2 K. B. 308. But *Attorney General v. Corke*, [1933] Ch. 89, may be cited as supporting the American rule.

general principle that a possessor of land should be under a duty of reasonable care depending on the facts of each case, the American law has imported from England all the complicated rules concerning business visitors, licensees, trespassers, *etc.* A French professor, who has been studying the English law of tort, recently wrote that these strict, detailed, and often arbitrary rules seemed to him the least happy part of the body of law which, at best, he seemed to regard with more surprise than admiration. Only one thing can be said in favor of the American law: where there is a difference between it and the English law, the advantage seems, as a rule, to be on the side of the American.

Comment (h) to section 332, which provides that a person may be a business visitor of a lessor although he is merely a gratuitous licensee of the lessee, seems preferable to the rule in *Fairman v. Perpetual Investment Bldg Society*,⁶⁹ where the House of Lords held that when a tenant sub-let a room, the sub-lessee in using the stairs was only a licensee and not an invitee. The Institute cogently points out that a lessor has a business interest in the use of these facilities.

Sections 333 to 338 deal with the liability of possessors of land to adult trespassers. The American rules seem to place a greater duty of care on the possessor of land than do the English ones. Thus if the possessor knows, or should know, that trespassers constantly intrude on a limited area, he must carry on an activity involving a risk of serious bodily harm with reasonable care for their safety. Similarly, he is under a duty to warn constant trespassers of artificial conditions he has created which are highly dangerous. Owing to the apparent conflict between *Addie & Sons v. Dumbreck*⁷⁰ and *Excelsior Wire Rope Co. v. Callan*⁷¹ it is difficult to state the English law with any precision, but it is clear that it gives the trespasser less protection. The general principle stated by Salmond is that he who enters wrongfully enters at his own risk in all respects, subject only to the occupier's duty not to harm him intentionally.⁷² It is probable that an occupier is also liable to a trespasser for positive acts of negligent misfeasance done by him with knowledge of the trespasser's presence, but this is not certain. As in *Mourton v. Poulter*⁷³ Scrutton, L. J., found great difficulty in determining what was the distinction between *Addie's Case* and the *Excelsior Wire Rope Co.'s Case*, it is impossible to speak on this subject with any confidence.

69. [1923] A. C. 74. Lord Sumner said at p. 92: "I think that the Plaintiff was the defendants' licensee not their invitee. Somebody builds the stairs, and the defendants open the door, but the tenant gives the invitation. It was not about the landlord's business that the plaintiff used the stairs, though it may well be that, as a lodger to whom the tenant was seemingly entitled to sub-let a room, she had such a right to go in and out as to make her license irrevocable, so long as she remained a lodger."

70. [1929] A. C. 358.

71. [1930] A. C. 404.

72. SALMOND, *op. cit. supra* note 8, at 521.

73. [1930] 2 K. B. 183, 190.

Section 339 lays down the provisions under which an occupier is liable for artificial conditions highly dangerous to trespassing children. In determining whether the occupier has acted reasonably, the risk to the children must be balanced with the utility of the dangerous condition. Here again the English law is stricter, for *Addie & Sons v. Dumbreck* affirmed the rule that "in cases of trespass there can be no difference in the case of children and adults." But the courts in certain hard cases succeed in evading the rule by holding that if an occupier has knowingly acquiesced in the trespasses of children, they cease to be trespassers and become licensees.⁷⁴

In section 340 a possessor of land is not liable for a dangerous condition if the licensee *knows* of it, while in section 341 he is not liable for harm caused by his activities if the licensees *know or from facts known to them, should know* of them. No reason is given to explain this distinction.

Section 344 is an important one, and marks, we think, a definite superiority in American law. A possessor of land who holds it open to the public for business purposes is under a duty to exercise a reasonably careful supervision over the appliances or methods of an independent concessionaire. Thus, a possessor of land who uses it as a public fair ground is subject to liability to all persons invited to come on the fair grounds to witness the fair. This rule seems eminently reasonable, for the possessor of the land makes a profit from the concessionaires, and, if he is not held liable, a person injured by a defective appliance will in practice have no recourse against anyone as most concessionaires are fly-by-night concerns. In English law no such liability exists, even if the possessor of the land has himself advertised the shows.⁷⁵

On the other hand, English law seems preferable to the American rule set out in section 345, where an unreasonable liability is placed on the possessor of land. He is held liable to persons who are privileged, without his consent, to enter his land, for a condition which involves an unreasonable risk to them. Thus in illustration 2, a policeman, who enters a house by night and falls into a hole which is unobservable in the dark, is held entitled to recover. On substantially similar facts the English Court of Appeal held the defendant not liable in *Great Central Ry. v. Bates*,⁷⁶ Lord Justice Atkin saying: ". . . it appears to me that there was no evidence of any breach of duty towards him [the constable] on the part of the defendant, because it seems to me plain that the duty which would be owed to persons who might reasonably be expected to come into the premises within ordinary business hours would be quite different to any suggested duty on the un-

74. *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A. C. 229.

75. In *Humphreys v. Dreamland (Margate) Ltd.*, 144 L. T. 529, 531 (H. L. 1930), Lord Buckmaster said: "The advertisements, being admitted, it [the possessor] does no more than invite people to this area of land owned by the respondents. It cannot, in my opinion, be construed as an invitation to enter any side show or building which happens to be on the land. . . ."

76. [1921] 3 K. B. 578, 582.

expected visit of a constable coming in the night and entering the premises in the present circumstances." It is difficult to see how under the American rule the owner of property can ever allow a house to fall into disrepair without incurring the risk of being liable, as there is always the likelihood that a policeman may enter it on duty.

Section 347 marks another distinction between American and English law, for in America there is a special and more stringent rule concerning dangerous conditions in the case of a public utility. Counsel for the plaintiff in *Norman v. Great Western Ry.*⁷⁷ claimed that there was a similar rule in English law, but the Court of Appeal held that the duty of a railway company towards persons resorting to its stations and yards was not higher than that of the occupier of private premises towards invitees resorting to such premises in the ordinary course of business.

The advantage swings definitely back to American law in section 353, which provides that a vendor of land who fails to disclose a dangerous condition to the vendee is liable to him and others on the land with his consent for any harm resulting therefrom. The English law, applying the strictest *caveat emptor* doctrine, has recently been stated as follows by Scrutton, L. J., in the unsatisfactory case of *Bottomley v. Bannister*: "Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, *even if he has constructed the defects himself or is aware of their existence.*"⁷⁸ Greer, L. J., although regretfully concurring, said, "The result is unsatisfactory, because in the present case, if the landlord instead of doing the work himself before he sold the house, had done it afterwards as a contractor to Mr. Bottomley, he would have been liable if there were sufficient evidence that it was negligence on his part to have installed the Halliday boiler without a flue."⁷⁹ The result is particularly unsatisfactory to those who desire the law to be simple and symmetrical, for there is now one rule as to real property and another as to chattels. Thus in the *Bottomley Case* a considerable part of the argument was concerned with the question whether the boiler was a chattel or part of the realty, a question which, to adopt Lord Atkin's test in *Donoghue v. Stevenson*,⁸⁰ must seem absurd to everyone "who was not a lawyer."

Section 357 differs radically from English law for it says that a lessor who has agreed to keep the land in repair is subject to liability for bodily harm caused by disrepair to the lessee and others upon the land with his consent. This doctrine was rejected by the House of Lords in *Cavalier v.*

77. [1915] 1 K. B. 584.

78. [1932] 1 K. B. 458, 468. The italics are added.

79. At 478.

80. [1932] A. C. 562, 599.

Pope.⁸¹ The tenant's wife was injured by an accident caused by the want of repairs, which the defendant landlord had contracted with his tenant to perform. It was held that the wife had no action in tort against him, Lord Macnaghten briefly saying: "There is no law against letting a tumble-down house." She obviously had no claim in contract as this was *res inter alios acta*. However correct in theory, the English rule frequently leads to undesirable results.⁸²

Section 359, which deals with the special liability of a lessor who leases land, such as a theatre, for a purpose involving the admission of numerous persons, does not seem to have a counterpart in English law. The illustrations suggest that it must be a rather difficult rule to work in practice.

Section 362, which makes the lessor liable to third persons on the land for repairs negligently made by him, would be decided differently in England, following *Cavalier v. Pope*.

Section 363, which holds that a possessor of land is not liable for harm caused to others outside the land by a natural condition of the land, would probably be followed by the English courts, although it seems illogical to require a possessor to abate a nuisance created on his land by third persons while leaving him under no duty if this nuisance is created by nature.⁸³

Section 370 provides that a possessor who maintains an artificial condition so close to another's land that he should realize that it involves an unreasonable risk to the other coming in contact with it, is liable for bodily harm caused thereby. We have found no English case directly in point, but it is improbable that the courts would decide in accordance with this rule. The highway cases⁸⁴ might, of course, be advanced as an analogy, but they are an exception to the general principle that a man can do with his land as he wishes. Thus in *Ponting v. Noakes*⁸⁵ the defendant had a poisonous yew tree growing next to the plaintiff's boundary line. The plaintiff's horse having eaten some of the leaves which killed it, it was held that the defendant was under no liability since he owed no duty of care in respect of trespassing animals.

In English law a vendor of land is liable to third persons for any nuisance he has created thereon prior to the sale,⁸⁶ but section 373 seems to go slightly further than this, although the interesting illustration given would probably be decided in the same way in England.

81. [1906] A. C. 428.

82. See *Allen v. Waters & Co.*, 51 T. L. R. 50 (Ct. App. 1934).

83. On this point see Stallybrass, *Dangerous Things and the Non-Natural User of Land* (1929) 3 CAMB. L. J. 376, and Goodhart, *Liability for Things Naturally on the Land* (1930) 4 CAMB. L. J. 13.

84. *Barnes v. Ward*, 9 C. B. 392 (1850); *Hardcastle v. South Yorkshire Ry.*, 4 H. & N. 67 (Ex. 1850); *Attorney-General v. Roe*, [1915] 1 Ch. 235.

85. [1894] 2 Q. B. 281.

86. *Harris v. James*, 45 L. J. Q. B. (n. s.) 545 (Q. B. D. 1876).

Sections 378 and 379 provide that a lessor who has not contracted with the lessee to repair the premises is not liable to others outside the land for any dangerous condition which comes into existence after the lessee has taken possession. It is remarkable that on this point English law, as at present declared, places a stricter liability on the lessor, for in *Wilchick v. Marks*⁸⁷ it was held that a landlord was liable to a passerby who had been injured by a defective shutter, the landlord having reserved a right (although not being under a duty) to repair the house and knowing of the defect. Goddard, J., said that there was a general duty which arose from proximity to make the premises safe for passers-by. No definite statement as to English law on this point can, however, be made, for, as Dr. Stallybrass has said, "The authorities on the whole matter are in an unsatisfactory state."⁸⁸

Section 380 contains a special rule which makes a trespasser liable to an extraordinary degree to both the possessor and the members of his household. It is certainly not English law, and Dean Green doubts whether it is American law.⁸⁹ Apparently Professor Bohlen took the same view but was overruled. Illustration 1⁹⁰ is astonishing; here it would be particularly interesting to know whether it represents the facts of an actual case.

Sections 382 and 383 make the interesting point that members of the possessor's household and licensees acting on his behalf are subject to the same liability and enjoy the same immunity as the possessor of the land. On the other hand, under section 386 persons who are on the land for their own purposes do not "share in those privileges of the possessor which permit him to ignore the actual probability of the intrusion of trespassers and which relieve him from liability for his failure to exercise reasonable care to make the land safe for the reception of gratuitous licensees." This section will be of particular interest to English readers, as it has been suggested⁹¹ that the distinction between *Addie & Sons v. Dumbreck*⁹² and *Excelsior Wire Rope Co. v. Callan*⁹³ is that in the first case the defendants were the occupiers of the land while in the second they were mere licensees. This distinction was not, however, recognized by Scrutton, L. J., in *Mourton v. Poulter*.⁹⁴

87. [1934] 2 K. B. 56.

88. SALMOND, *op. cit. supra* note 8, at 255.

89. *Supra* note 3, at 599.

90. "A is driving his car along the highway in a neighborhood with which he is unfamiliar. He asks B to direct him to a certain town. B tells him that he can take a short cut through a private road over which the public is not accustomed to travel which B asserts to be upon his own land but which, in fact, is on the land of C. While driving carefully along the road, he runs over D, C's three-year-old child, who suddenly dashes out from the bushes which border the road. A is liable to D and C."

91. W. O. Hart, *Injuries to Trespasser* (1931), 47 L. Q. REV. 92.

92. [1929] A. C. 358.

93. [1930] A. C. 404.

94. [1930] 2 K. B. 183.

Liability of Persons Supplying Chattels

Chapter 14, which deals with the liability of persons supplying chattels, is particularly worth studying, for it may give the English reader an idea as to the implications that can be drawn from *Donoghue v. Stevenson*.⁹⁵ That case held that a manufacturer of ginger-beer, who had negligently allowed a snail to seek shelter in a bottle, was liable to a third person who had drunk the poisoned liquid. Two of the Law Lords held that there was no liability in the absence of contract; two of them based their judgments in favor of the plaintiff on broad grounds; while the fifth gave his casting vote in favor of the plaintiff but was careful to limit his judgment to the actual facts of the case.⁹⁶ Thus it is open to the English courts in the future to give a wide or a narrow effect to the case. Fortunately, it seems to us, the tendency of the courts seems to be to accept the generous doctrine stated by Lord Atkin.⁹⁷ As the American law was cited with approval in the *Donoghue Case*, we hope that it will continue to influence English law as further cases arise on this subject.

In the *Donoghue Case* the defendant was a manufacturer, but section 388, comment (c), provides that the principle applies "to vendors, lessors, donors or lenders irrespective of whether the chattel is made by them or by a third person." Whether the English courts would be prepared to place so wide a liability on a donor is doubtful, for, on analogy to the property cases, he should only be liable for a trap of which he actually knows. Secondly, in the *Donoghue Case* the plaintiff, however careful, could not have seen the snail as the bottle was opaque, and there are *dicta* in the opinions which suggest that the defendant would not have been liable if the plaintiff could have discovered the defect himself. The *Restatement* says that a supplier is liable if "he has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition." This rule is reasonable, for in most cases a supplier knows that no inspection will be made.

Section 389 goes considerably further than any English case has done, in stating that one who supplies a dangerous chattel to another is liable to third persons "whom the supplier should expect to use the chattel or to be in the vicinity of its probable use", even though "the supplier has informed the other for whose use the chattel is supplied of its dangerous character." The principle on which this rule is based is the reasonable one that the supplier must know that warnings to users are not always effective, but in view of the unaccountable enthusiasm of the English courts for the *novus actus*

95. [1932] A. C. 562.

96. It is strange that the books have not placed more emphasis on Lord Thankerton's judgment, for his was the casting vote.

97. See *Brown v. Cotterill*, 51 T. L. R. 21 (K. B. 1934).

interveniens doctrine, it is doubtful whether it will be followed in this country.

Section 393 provides that the supplier of a chattel may be liable although the dangerous character of the chattel is discoverable by an inspection which a third person is under a duty to the person injured to make. This rule goes further than the English law. In *Caledonian Ry. v. Mulholland*⁹⁸ the Caledonian Railway delivered a coal wagon with a defective brake to the G. & S. W. Railway. The plaintiff's husband, who was employed by the G. & S. W. Railway, was shortly thereafter killed owing to this defect. The House of Lords held that the Caledonian Railway was under no liability, as it owed the workman no duty to inspect the coal wagon. However, in the recent case of *Oliver v. Saddler & Co.*⁹⁹ the effect of the rule was limited, as the House of Lords held that the defendant company, which had supplied rope slings to an independent contractor, owed a duty of care to the latter's workmen, as it knew that the contractor would have no reasonable opportunity of examining the sling and it intended him to rely on its own previous examination.

It is impossible to say at present to what extent sections 397 to 408, which deal with vendors *etc.*, differ from the English law on the subject. It may be suggested, however, that as there seems to be a tendency to construe the rule in *Donoghue v. Stevenson* liberally, it is probable that vendors, independent contractors and lessors of chattels will be held liable under the circumstances described in the *Restatement*. We doubt, however, as we have said above, whether sections 405 and 406, which deal with donors and lenders of chattels, will be followed by the English courts.

Independent Contractors

In a recent article of great interest Mr. Stephen Chapman has attempted to give a consistent basis to the law relating to independent contractors by suggesting that there is a single principle underlying the various particular rules, *viz.*: "If I am under a duty to a person or a class of persons I am liable if that duty is not performed and damage thereby results, and I cannot evade that liability by delegating the performance of the duty to an independent contractor."¹⁰⁰ Neither the Institute nor the English text-book writers seem to have felt that this branch of the law is sufficiently developed to be dealt with along these broad lines, and they therefore state it in terms of separate rules. This is an interesting example of the fact that it is only in the maturity of the law that general principles can be formulated.

98. [1898] A. C. 216.

99. [1929] A. C. 584.

100. Chapman, *Liability for Negligence of Independent Contractors* (1934) 50 L. Q. REV. 71, 75.

Section 411, which holds an employer liable who has failed to exercise reasonable care to employ a competent contractor, substantially resembles English law, but one or two points may be noted. Is not an employer "who employs an independent contractor to . . . (b) perform a duty which the employer owes to third persons" liable even if he employs a competent contractor? The English rule is stated as follows by Dr. Stallybrass: "If an employer is under a duty to a person or class of persons, he is liable if that duty is not performed and damage thereby results, and cannot evade that liability by delegating the performance of the duty to an independent contractor."¹⁰¹ Thus in illustration 5, as *A* is under a duty to repair his house would he not be liable if the cornice fell even if he had employed a competent contractor?¹⁰²

In comment (c) it is said that a master owes his servant not only a duty to select a competent contractor to whom he entrusts the preparation of a safe working place but also, "as stated in section 412, Comment (e),¹⁰³ a duty to inspect the working place and appliances in order to discover whether the contractor's work has been properly done." In *Fanton v. Denville*¹⁰⁴ the English Court of Appeal held that if the employer had delegated to competent persons the provision of the plant he is relieved from liability and that he is under no duty to inspect it; it was pointed out that the employer might have no personal competence which would make his inspection of any value.

Section 415 repeats the provisions of section 344 requiring a possessor of land to exercise reasonable care over a concessionaire's equipment. A cross-reference ought to have been sufficient, as it is not only a waste of space to state the same rule twice, but such repetition also has the more serious disadvantage of forcing the reader to compare the two sections to see whether there is any distinction between them.

In comment (c) to section 422 there is the excellent phrase, "casual negligence in the operative details of work." This whole section is illuminating for the distinction here made is a difficult one to express.

Section 429 seems to be concerned with a question in contract rather than one in tort.

Causation

To comment adequately on the chapter dealing with causation would require an article by itself, as this is probably the most disputed branch of the law. Moreover, such comments could only express a personal view as the English law on this subject is as uncertain as the American. Some

101. SALMOND, *op. cit. supra* note 8, at 120.

102. See *Tarry v. Ashton*, [1876] 1 Q. B. D. 314.

103. This must be a misprint as there is no comment (e).

104. [1932] 2 K. B. 309. See note on this case in (1932) 48 L. Q. Rev. 469.

points may, however, be mentioned although the discussion must be inadequate.

Section 435 provides that if the actor's conduct is a *substantial factor* in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. Thus the Institute seems to reject the foreseeability test as the measure for remoteness of damage. But—and this is most important—the rejection is only apparent, as foreseeability, or, as we prefer to call it, expectability, comes back disguised under the phrase *substantial factor*. Thus section 433, which sets out the considerations which are important in determining whether conduct is a substantial factor in producing harm, proposes as a test "(b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about harm." Similarly, in comment (a) to section 435 it is said, "So too, the manner in which the harm occurs may be so highly extraordinary as to prevent the actor's conduct from being a substantial factor in bringing about the harm." Now the first thing to be noted is that this is merely the foreseeability test in new language. It is true that hindsight seems to have been substituted for foresight, but has it? When we have hindsight nothing is extraordinary, for we can see each step following inevitably on the other; when, after an event, we say "What a highly extraordinary result", we mean that a person before the event could not have expected it. Causation is like a well-written detective story; when we have finished it and know all the facts the result is inevitable—it is only while we are looking forward that there is an element of surprise possible. As Lord Sumner has said, "Everything that happens, happens in the order of nature and is therefore 'natural.'" ¹⁰⁵ It follows that when we know all the facts nothing can be extraordinary. Thus the medieval theologians proved that a capacity for surprise could not be one of the attributes of God as he knew all of the circumstances and causes beforehand.

Expectability is, therefore, the test of an "extraordinary result" whether we are speaking before or after the event. What the *Restatement* does bring out is that the expectability is that of the reasonable man, and not that of the particular actor. Thus to take the illustration from comment (b) to section 433, an uneducated stevedore loading a vessel probably does not expect to start a fire by dropping a plank in a vapor-filled hold, but a reasonable man knows that sparks are caused under such circumstances and that sparks will cause an explosion.¹⁰⁶

105. *Weld-Blundell v. Stephens*, [1920] A. C. 956, 983.

106. This moot case is obviously based on the famous *Polemis* case, but unfortunately it differs from it in its most essential point. The difficulty in the *Polemis* case was caused by the arbitrator's incorrect finding of fact that a reasonable man could not have foreseen that a spark could be caused by dropping the plank, for, once given the spark, the explosion was

The test of causation suggested by the Institute will in practice be the foreseeability one, for in every case the judge or the jury, depending upon the procedural rules, will have to decide whether the plaintiff's damage was "extraordinary" or not. This brings us back to foreseeability, for a consequence which is extraordinary is one that is out of the ordinary while one that is ordinary is, of course, foreseeable. The American courts will, therefore, not be bound by the mechanical "direct consequence" rule, which has been advocated by some distinguished English writers.

The real criticism of the Institute's chapter on Causation is that by overworking the phrase "substantial factor" it may mislead the unwary. We should have thought that a substantial factor in its usual connotation means a material factor and that it remains substantial whether "it appears highly extraordinary" or not. The danger is that in future cases counsel may argue that any factor which is substantial in the ordinary sense of the word will make the actor liable, however extraordinary and unexpected the result may have been.

Similarly, it seems a strange use of language to place section 436, which deals with physical harm resulting from emotional disturbance, under the heading of causation. There is really no question of causation in these cases. As we have said above, the reason why the American courts are hesitant to recognize this type of damage is because they are afraid of fraud. The greater liberality of the English courts in this respect is probably due to the fact that "the accident bar" does not exist to the same extent in this country.

Section 442, which sets out the various considerations which are of importance in determining whether an intervening force is to be considered a superseding cause so as to prevent the actor from being liable for his antecedent negligence, will be of particular interest to English readers, for, as has been said above, the English courts have been peculiarly unfortunate in their use of the phrase "*novus actus interveniens*." Here again the American law has in practice adopted the expectability test, for whether an intervening force is a superseding one or not depends on whether it is extraordinary or normal. Similarly, in section 449 the expectable tortious or criminal acts of third persons, and in section 450 the normal as contrasted with the extraordinary forces of nature, are held not to constitute superseding causes. Again, in section 457 an actor is only held answerable for injuries which result from the risks normally recognized as inherent in the

inevitable. The Court of Appeal, to reach the correct result, had to get rid of the arbitrator's incorrect finding of fact, and did so by giving an incorrect reason. Unfortunately the reason has been taken seriously. The fundamental difference between the rule in the *Polemis* case and that of the Restatement can be made clear by the following illustration. A passenger, drinking tea on deck, negligently drops his cup (belonging to the Steamship Company) and breaks it. A fragment rolls across the deck, down a vent hole, and into the hold where it strikes a spark, sets fire to the petrol vapor, and thus destroys the ship. Under the *Polemis* rule the passenger would be held liable, as the fire was the direct physical consequence of his negligent act; under the Institute's rule he would not be liable, as the consequence was extraordinary and unexpected.

necessity of submitting to medical, surgical or hospital treatment; the illustrations here are particularly interesting for if the "direct consequence" test is applied to them the result in some of the cases will be absurd.

Contributory Negligence

As long as contributory negligence is held to defeat the plaintiff's claim instead of merely lessening the amount of the damages he may recover, as in maritime and modern civil law, this branch of the law of torts must remain unsatisfactory. It is not surprising, therefore, that the American law is as confused and unworkable as the English. Both have adopted the "last clear chance" doctrine in an attempt to do justice to the plaintiff in the more glaring cases, but the Institute has not been more successful in sections 479 and 480 in stating a rule which will be of any practical value than have the Judicial Committee¹⁰⁷ and the House of Lords.¹⁰⁸ *X* steps into the street without looking; *Y*, who is driving at seventy miles an hour, sees him do so when he is 100 feet away but, owing to his speed, cannot stop in time. It is not clear in English law whether the last clear chance doctrine applies here, and, similarly the rules of the *Restatement* leave us in doubt. In America, under section 482 contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety. This must add a new complication to a subject which has been described as a "logical and legal labyrinth."¹⁰⁹ How is recklessness determined? In section 500 the distinction is drawn between negligence which creates an unreasonable risk of bodily harm and recklessness which involves a high degree of probability that substantial harm will result. English judges may congratulate themselves that they are not called upon to explain this fine distinction to the ordinary common jury. Of even greater difficulty is section 501 (2), which provides that a jury may take the defendant's recklessness into consideration in determining whether his conduct bears a sufficient causal relation to the plaintiff's harm to make him liable therefor. It would have been an advantage to have an illustration here to show how this rule works in practice, for it seems strange to make causation depend on recklessness.

Conclusion

It must be obvious that this comparison of American and English law does not pretend to be complete for there are many differences, some of serious importance, which could not be noticed here without swelling this article to inordinate length. Its purpose will have been achieved if it suggests to others that a further detailed study of Anglo-American tort law may be of interest, and that for such a study the American Law Institute's *Restatement* will prove to be a valuable aid.

107. *British Columbia Electric Ry. v. Loach*, [1916] 1 A. C. 719. In *Cooper v. Swadling*, [1930] 1 K. B. 403, 410, Scrutton, L. J., expressed doubts as to whether the rule in *Loach's* case was to be applied in England.

108. *McLean v. Bell*, 147 L. T. 262 (H. L., 1932).

109. *Stallybrass*, in *SALMOND, op. cit. supra* note 8, at 481.