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The Tortious Liability of Non-Occupiers For Dangerous Premises

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The problem of the liability of a non-occupying vendor or lessor towards persons injured on the premises who are not in a direct contractual relationship with the vendor or lessor, has long vexed the courts. In 1942, Professor Glanville Williams attempted to clarify the situation by submitting three propositions of law upon which a non-occupier's liability was to be based:[1]

(1) That the lessor or vendor of property should be under a duty of care in fact to disclose any defect that he is aware of, and that would not be discoverable on reasonable inspection by the lessee or purchaser, and that would make the premises not reasonably fit for habitation. If he breaches the duty, he is liable for damages resulting from the breach to the lessee, or vendee, or third parties lawfully on the premises.

(2) A *builder* who *leases* or *sells* his building is liable in tort for negligence if the building negligently contains a latent defect that causes damage to the person or property of the lessee or purchaser or of third persons.

(3) One who enters the realty to repair or build on the premises, or to erect a fixture, is liable in tort for negligence if his work negligently contains a latent defect that causes damage to the person or to the property of the other contracting party or of third persons.

Sixteen years later in 1958, the case of *A. C. Billings Limited v. Riden*[2] was decided and both the Court of Appeal and the House of Lords indicated that Propositions (2) and (3) are the present state of the law (although not in any way supporting Proposition (1), which we submit is untenable).[3]

It is thus proposed to confine our discussion to the reasons why Propositions (2) and (3) can be considered good law today. Consider first the words of Scrutton, L.J. in the case of *Bottomley v. Bannister*:[4] "Now it is at present well established English law that in the

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1 Williams (1942), 5 Mod. L. Rev. 194.

2 [1956] 3 All E.R. 357; reversed *sub nom. Riden v. A. C. Billings & Sons Ltd.*, [1957] 3 All E.R. 1 (H.L.).

3 See in this regard, *Cavalier v. Pope*, [1906] A.C. 428; *Smith v. Manable* (1843), 11 M. & W. 5.

4 [1932] 1 K.B. 458 at p. 468.

absence of an 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."

In that case, the defendant, a builder, sold a house to Bottomley who was allowed to take possession as a tenant at will pending the execution of deeds. The gas burner which was installed had no flue to carry the fumes from the burner outside, and as a result Bottomley and his wife were found dead in the house due to asphyxiation. Their child brought the action under the Fatal Accidents Act.

Greer, L.J. sitting with Scrutton L.J. and Romer L.J. in the Court of Appeal, relied in part on Lord Atkinson's statement in *Cavalier v. Pope*,[5]—"no duty is, at law, cast upon a landlord not to let a house in a dangerous or dilapidated condition, and further, that if he does let it while in such a condition, . . . [he is not liable for injury to the tenant or to the tenant's guests] . . .". But *Cavalier v. Pope* was a case of non feasance by the landlord, who promised to repair a defect and did not. The landlord had not performed any positive act on the premises to create a defect before the tenant moved in. Since the defendant in *Bottomley v. Bannister* did perform a positive act of misfeasance, it would appear that Lord Atkinson's statement is too broad to be relied on as authority for excusing the landlord from any liability.

Later that year, *Donoghue v. Stevenson*[6] was decided by the House of Lords. Lord Atkin, in his "manufacture's dictum", stated that[7] "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to that consumer to take that reasonable care."

This particular statement emphasizes the inability of either the consumer or the person who purchased from the manufacturer (the retailer) to examine the product and find any defective parts. The phrase "no reasonable possibility of intermediate examination" was extended in the case of *Haseldine v. Daw*[8] to "no reasonable opportunity for the examination".[9] In this case, the extended doctrine was

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5 [1906] A.C. 428 at p. 432.
6 [1932] A.C. 562.
7 *Ibid.*, at p. 599.
8 [1941] 2 K.B. 343.
9 *Ibid.*, at p. 375 per Goddard L.J.: " . . . the question of the engineers' liability . . . depends on whether the principle of *Donaghue v. Stevenson* applies to the case of a repairer as it does to a manufacturer of chattels, when, from the nature of the case, it appears that there is no reasonable opportunity for the examination of the chattel after the repair is completed and before it is used, and when the use by persons other than the person with whom the repairer contracted, must be contemplated or expected." And at p. 376, the learned judge continues " . . . the governing factor is the possibility or probability or contemplation that an inspection would take place. . . ."

applied by Goddard L.J. in order to impose liability on the repairer of a lift as against a passenger injured through the repairer's negligence. The court proceeded on the basis that since the owner of the premises could not be expected to check the repairs, the repairer owed a duty of reasonable care to all passengers.

Prior to the decision in the *Haseldine* case, the development of this area of the law had been somewhat checked by the case of *Otto v. Bolton & Norris*.[10] The facts in this case lent themselves to an overruling of the *Bottomley* case and to an application of the principles evolved in the *Donoghue* case. The defendant-builder sold a house to the plaintiff's daughter, with a warranty that it was well built. Six months later, the ceiling fell in causing damage to the property and to

expert before buying the property? We submit that this is too onerous a burden to put on the buyer or lessee.

Bottomley v. Bannister and *Otto v. Bolten & Norris*[12] were followed in *Davis v. Foots*[13] where, before the lessee took possession, the landlord negligently removed a gas fixture. The lessee and his wife died of gas poisoning their first night in occupation. The Court cited Scrutton L.J.'s statement on caveat lessee and Atkinson J.'s judgment in *Bottomley v. Bannister* and proceeded to dismiss the action.

If the reader will recall Professor Williams' third proposition for a moment, he will note that repairers or independent contractors who are called in by the owner or landlord have a special liability. This situation must be distinguished from the second proposition, where the act complained of was done by the vendor or landlord or their agent before possession was given over to the buyer or lessee.

In these circumstances, the repairer may be under a contract with the person who calls him in. However, not only should the repairer be liable to his contracting party for any injury resulting to him from his negligent act, but also, by virtue of *Donoghue v. Stevenson*,[14] he should be under a duty not to act in such a way as to cause a risk of harm to those who will enter on the premises. This duty arises from the fact that the contractor is doing a positive act on the premises.

This approach was not adopted in *Malone v. Laskey*[15] where a sub-tenant asked the head landlord to repair a flush cistern in the lavatory. The repairs were negligently carried out, and in consequence, the sub-tenant's wife was injured when the cistern fell on her. It was held that since there was no contract between the wife and the landlord, she could not recover.

Despite the fact that *Donoghue v. Stevenson* clearly abolished the notion that privity of contract was essential for recovery in such circumstances, the view expressed in *Malone v. Laskey*[16] again prevailed in the case of *Ball v. London County Council*[17] where the plaintiff, a daughter of the tenant, was injured when a boiler installed seven years previously by the landlord exploded due to inadequate safety-valves.

Tucker L.J., after referring to the doctrine of caveat emptor and lessee, admitted that there was no authority for stating that if a landlord has let premises or sold them, and later enters the premises at the request of the tenant or purchaser, the mere fact that he happens to be the landlord or vendor absolves him from the duties otherwise attaching to a builder or contractor who works on the premises. He conceded that there is no cloak of immunity protecting the landlord

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12 *Ante* footnote 10.
13 [1940] 1 K.B. 116.
14 *Ante* footnote 4.
15 [1907] 2 K.B. 116.
16 *Ibid.*, at p. 151.
17 [1949] 2 K.B. 159.

if he later enters the premises to carry out operations. He should be considered as an ordinary repairer.

Tucker L.J., then looked to *Malone v. Laskey* for the law on repairer's liability and held the defendant not liable, completely overlooking the *Donoghue v. Stevenson* principle. The trial judge, who found for the plaintiff, relied on an observation by Greer L.J. in the *Bottomley* case,[18] that had the landlord, after Bottomley was in possession, done the work as a contractor for him, he would have been liable if he were negligent. But Tucker L.J. in the appeal court interpreted this as meaning the defendant would be liable to the tenant under the contractual obligation to repair, and that he would owe no duty to strangers injured by the negligent performance of the contract.

Evershed, L.J., also admitted that it is an irrelevant consideration that the London County Council, who did the work, were also the landlord of the premises. But he found on the basis of *Malone v. Laskey,* that the landlord owed no duty to the plaintiff.

Precedent was finally broken in *Mooney v. Lanarkshire County Council,*[19] a Scottish case. A tenant was let into possession of a house owned and built by the defendant, while the Council was still in the process of constructing the front path. The Council was held liable in negligence to a visitor of the tenant who tripped on a metal obstruction that was left unlighted and unprotected by the defendant. The court turned down the defendant's argument that their liability should be that of an occupier to a licensee. They were no longer in control and possession of the premises, and they could not rely on the tenant's defence, which was based on an occupier-licensee relationship. Lord Thomson stressed that the Council was being held liable as a contractor and could not hide behind their status as landlord. The court distinguished *Ball v. London County Council*[20] on the ground that the defendant in that case had finished his work whereas here the contractor was in the process of carrying out an assignment. His lordship then employed the "duty to your neighbour" principle articulated in *Donoghue v. Stevenson* and stated,[21] "Where contractors are working on a pathway ... (they cannot say that they do not incur) ... liability to a person who is injured, with the sole exception of the person who contracted with them to do the work."

The distinction thus drawn implied that a contractor was liable to all parties lawfully on the property if his work was as yet incomplete.

The recent case of *A. C. Billings v. Riden*[22] posed a set of facts identical to the *Mooney* case except that in the former case, the landlord had hired an independent contractor to repair the front path. The plaintiff was a visitor to the house during the construction period. Both the Court of Appeal and the House of Lords disapproved of *Ball v. London County Council*[23] and in substance both courts held that the

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18 [1932] 1 K.B. 458, at p. 478.
19 [1954] S.C. 245.
20 [1949] 2 K.B. 159.
21 [1954] S.C. 245, at p. 252.
22 [1957] 3 All E.R. 1.
23 [1949] 2 K.B.

landlord, qua contractor, owes a duty to the public not merely during the period of construction or repair, but after completion as well.

Lord Patrick, in the *Mooney* case, commented:—[24].

" . . . [cases hold] . . . that a landlord was not liable to the invitee or licensee of his tenant for accidents caused by the defective or dangerous condition of the premises, even when he was personally responsible for the installation of the defective or dangerous thing—*Bottomley v. Bannister, Otto v. Bolton, Davis v. Foots.* These are cases where the defect or danger was in existence prior to the letting of the premises to the tenant or purchaser . . . in this case, the defect or danger is created by the landlord, after the date of the demise."

It is submitted that there should be no distinction in the two instances cited by Lord Patrick, and that the landlord should be liable in either case because he did the work of a repairer and thus created a risk of harm to visitors entering on the premises. Lord Patrick points out that the fact that the defendant who created the danger was also the owner of the premises must be dismissed as irrelevant. Similarly, the fact that the person who does the construction work on the premises before it is let or sold is also the landlord or vendor, should be dismissed as inconsequential, and the above mentioned cases can all be decided on the *Donoghue v. Stevenson* principles of negligence. In the *Billings* case, the trial judge dismissed the action against both the defendant contractor and the occupiers of the house. On appeal the contractor was held liable. The dismissal of the action against the occupiers was not appealed, since they were vis-a-vis the plaintiff, licensor and licensee. It was found at trial that they did not know of the danger nor should they have known of it.

On the appeal, the contractor argued that his only obligation was to warn, and since the visitor was aware of the danger, the necessity of a warning was obviated and he had performed all his duties. Denning L.J., as he then was, answered that argument by stating that the court was concerned with the liability not of an occupier of land, but with that of a contractor doing work on land. He said:[25] " . . . the contractor's duty is not confined to his duty under the contract to his employer. He is under a general duty imposed by law to use reasonable care to prevent damages to persons whom he may reasonably expect to be affected by his work."

Denning L.J. then reiterated that liability arises from the person doing work on the land, whatever his own position is qua the land;[26]

"It is a duty which rests on anyone who does work on the land, including the occupier himself. If the occupier does work on his own land, he is under the same duty as a contractor. The reason is because the duty arises, not out of the fact of occupation, but out of the fact that he is doing work which he knows or ought to know may bring danger to others, and that gives rise to a duty of care . . ."

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[24] *Ante* footnote [21] at p. 262.
[25] [1956] 3 All E.R. 357 at p. 361.
[26] *Ibid.*, at p. 361.

Denning L.J. then remarks that *Malone v. Laskey*[27] and *Ball v. London County Council*[28] are inconsistent with the above reasoning and must be considered as over-ruled by *Donoghue v. Stevenson*[29] and *Haseldine v. Daw*[30]— the plaintiff need not be a party to the contract of repair or construction to bring an action. The House of Lords also disproved of the former two cases.

The effect of this decision is that there is now express authority for stating that a landlord, who after the demise of premises enters the realty to repair or construct, and does so negligently, can be held liable for injury arising after the work is done, to a person, whether that person is the tenant or the tenant's guests. We submit that the same result would ensue if the builder, after having sold the house to a purchaser now in possession, enters the premises to make some structural alterations. The fact that he happens to be the vendor should not provide him with immunity, for his liability rests on his duty owed as a contractor.

The above quoted passages of Denning L.J. can be so construed as to cut a wide swath through the doctrine of caveat emptor and lessee, and to reach the conclusion stated by Professor Williams. The builder, be he vendor or landlord, would be liable to a purchaser or other persons injured through the negligent construction of the house. The builder is a contractor and a person later on the premises is one whom "he [the contractor] may reasonably expect to be affected by his work."

In the House of Lords, Lord Somervell commented:[31] " . . . a person executing works on premises . . . is under a general duty to use reasonable care for the safety of those whom he knows or ought reasonably to know may be affected by his work."

This statement lends further weight to the submission that the vendor or landlord can be held liable in his capacity as a contractor. There are no adverse comments on this point in the other judgments in the House of Lords.

Denning L.J.'s conclusion that an occupier who does work on his land has the same duty as a contractor, necessarily excludes the occupier from relying on the three types of duty owed by an occupier (to an invitee, licensee and trespasser) as established in *Indermauer v. Dawes*[32]. This reasoning follows Denning L.J.'s comment, in an earlier case[33] that the artificial distinction between invitees, licensees and trespassers should be wiped out. At that time he indicated that the occupier's liability to a person injured on the premises should depend on ordinary principles of negligence. In the Ontario case of *White v. Imperial Optical Co. Ltd.*,[34] the trial judge accepted this as

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27 [1907] 2 K.B. 141.
28 [1949] 2 K.B. 159.
29 [1932] A.C. 562.
30 [1941] 2 K.B. 343.
31 [1957] 3 All E.R. 13.
32 (1866), L.R. 1 C.P. 274.
33 *Slater v. Clay Cross Co. Ltd.*, [1956] 3 W.L.R. 232 at p. 235.
34 [1957] O.W.N. 8.

the present state of the law, but the Ontario Court of Appeal[35] held that the distinctions still remain a part of Ontario law. However, the Ontario Court of Appeal is only applying these distinctions in cases involving nonfeasance by the occupier. The court is not precluded from holding the occupier liable on ordinary principles where he negligently carries on *repairs* to his premises.

One statement made by Lord Reid in *A. C. Billings v. Riden* is noteworthy since it seems to imply that if the occupier did the repair work, his duty would be that of a licensor, and not a contractor. In regard to the defendants claim for classification as a licensor, he states;[36] "It is not alleged that the appellants were authorized by the occupiers to prevent safe access to the house at times when their men were not working. The only reasonable justification I know for the rights of a licensee being limited as they are is that a licensee generally gives no consideration for the rights which the occupier has given him and must not be allowed to look a gift horse in the mouth. That cannot apply to the appellant who gave no concession to the respondents. In the present case I see no reason why the contractor who chooses to prevent safe access by visitors should be entitled to rely on any specialty in the law of licensor and licensee."

If Lord Reid is saying that had the occupier done the repairs, his duty would be that of a licensor to licensee, he is taking a directly opposite view from Lord Denning's contention that the occupier's duty arises out of the repairing and not the occupation.

Proponents of the strict caveat emptor rule may argue that since Lord Reid is permitting the occupier to rely on his status as such, and is not forcing him into the position at law of a contractor, then similarly the builder, who happens to be the vendor or landlord, can also rely on the latter position, and thus avoid the liability of the contractor.

But the analogy has a defect in its reasoning, since the occupier repairs by virtue of his position as occupier, whereas a person does not build because of his position as vendor or landlord. He only acquires the latter classification after he has performed the function of a contractor.

In conclusion, it is relevant to review the validity of Professor William's three propositions of law enunciated at the commencement of this article. In the opinion of the authors;

(1) Proposition 1 is untenable. On the basis of the *Bottomley v. Bannister* case, it is clear that a mere lessor or vendor is not liable for defects in the property.

(2) Propositions 2 and 3 are good law to-day. On the basis of the *A. C. Billings v. Riden* case, a contractor or builder cannot avoid liability for negligent work by claiming the status of a landlord or a vendor.[37]

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[35] [1957] O.W.N. 192 at p. 193, per Roach J.A.
[36] [1957] 3 All E.R. 1 at p. 4.
[37] For an analysis of *Riden v. Billings,* see Risk (1958), 16 Fac. L. Rev. 126.