SOME RECENT DEVELOPMENTS IN THE LAW OF TORTS.*

The history of *Donoghue v. Stevenson*[1] should stand as a warning to anyone who ventures to offer a paper on the present topic and to hazard some speculation as to the possible effect of recent decisions on the law of Torts. That decision was handed down just before I became a law student in New Zealand: and I can remember the way in which the famous "neighbour" principle of Lord Atkin's judgment[2] was regarded at the time almost as if it were the Magna Carta of the action for negligence, rationalising all previous decisions in which the action had successfully been brought and capable of extending the scope of the action almost indefinitely. In fact the possibilities of its extension have turned out to be much less than we were led to believe in 1934.[3]

Two limitations, one inherent and one imposed, appear from the later history of the action for negligence. The first, the inherent limitation, may be illustrated by the decision in *King v. Phillips*[4]—that case which, following Professor Goodhart and adopting the manner of Erle Stanley Gardner one might characterize as "The Case of the Unimaginative Taxi-driver."[5] For my present purposes it might be better to call it "The Case of the Unforeseeable Plaintiff."[6] Shortly, the facts were that the taxi-driver, backing from one road into another, backed into a small boy on a tricycle, injuring the small boy slightly and damaging the tricycle. The boy's mother, at an upstairs window some 70 yards from the accident, heard a scream, recognised it as her son's, looked out of the window, saw the slowly-backing taxi-

* This is an edited version of a paper delivered to the First Legal Convention of the Law Society of Western Australia at Bunbury, Western Australia, on 26th July, 1958. The word "recent" was taken to mean, roughly, since 1950.

1 [1932] A.C. 562.

2 *Ibid.*, at 580 "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

3 Perhaps the over-enthusiastic expositors of the 1930's overlooked Lord Atkin's own warning *(ibid.)* ". . . the lawyer's question, Who is my neighbour? receives a restricted reply."

4 [1952] 2 All E.R. 459 (McNair J.), [1953] 1 Q.B. 429 (C.A.).

5 *Cf.* Goodhart, *Emotional Shock and the Unimaginative Taxicab Driver,* (1953) 69 L.Q. REV. 347.

6 I borrow this phrase from FLEMING, THE LAW OF TORTS, (1957) 153.

cab and the tricycle underneath it, but could not see the boy. She suffered nervous shock as a result of what she had heard and seen. McNair J. adopting Lord Atkin's "neighbour" test, held[7] that she could not recover damages from the taxi-driver on account of this nervous shock because she was " . . . wholly outside the area or range of reasonable anticipation" and this reasoning was upheld by two of the three members of the Court of Appeal.[8]

The second limitation on Lord Atkin's "neighbour" principle I would illustrate by referring to two recent cases. The first is *Candler v. Crane, Christmas and Co.*[9] Here there was little doubt that Candler was a "neighbour", a "foreseeable plaintiff"; and clearly the loss which he suffered through the carelessness of the defendants' servant was a foreseeable loss. The effect of the decision of Asquith and Cohen, L.JJ. is, however, that the duty which, in Lord Atkin's words, is owed to your neighbour: to "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" should be qualified by reference to earlier decisions on the scope of the duty of care to read "likely to injure your neighbour physically" or perhaps "likely to injure your neighbour otherwise than financially." The second is *Edwards v. West Herts. Group Hospital Management Committee,*[10] a decision of the Court of Appeal in 1957. Dr. Edwards, a house surgeon employed by the defendants, was obliged by one of the terms of his employment to live at a hostel provided by them. One of the hostel rules was that each resident should leave his bedroom door key in the lock. Approximately £70 worth of clothing was stolen from Dr. Edwards' bedroom in his absence, and he claimed against the defendants for this loss. One of the grounds of his claim was that the defendant committee owed to him a duty "that they their servants or agents would take reasonable care" of his bedroom and of his clothes and personal effects, and of the key

7 [1952] 2 All E.R. 459, at 461.

8 Singleton L.J. and Hodson L.J. Denning L.J. (as he then was) rested his decision on the reasoning that the taxi-driver could not have foreseen that this mother in these circumstances would suffer injury by shock: but he was of opinion that (following Hambrook v. Stokes Bros., [1925] 1 K.B. 141) the taxi-driver owed a duty of care to the mother. *Cf.* Chester v. Waverley Corporation, (1939) 62 Commonwealth L.R. 1, in which the majority of the High Court (Latham C.J., Rich and Starke, JJ.) all took the view that (in the words of Latham C.J. at 10) "such damage (that is, nervous shock) resulting from a mother seeing the dead body of her child [cannot] be regarded as "within the reasonable anticipation of the defendant."

9 [1951] 2 K.B. 164. The argument for the plaintiff relied heavily on Donoghue v. Stevenson.

10 [1957] 1 W.L.R. 415.

to the door. The defendants denied the existence of any such duty: and this denial was upheld by the Court of Appeal. The decision on this point was founded on the earlier decision on somewhat similar facts in *Deyong v. Shenburn,*[11] in which Du Parcq L.J. (with whom Tucker L.J. and Lord Greene M.R. agreed) disposed of an argument based on the "neighbour" principle of *Donoghue v. Stevenson*: "There has to be a breach of a duty which the law recognizes, and to ascertain what the law recognizes regard must be had to the decisions of the courts",[12] and said also[13] that although a servant may be entitled to recover damages if, through a breach of his master's duty to provide a safe system of working, his clothes are torn off his back, it does not follow that there is a duty on the employer to take steps to safeguard the workmen against loss of the clothes through the wrongful act of a third person. Thus the current standing of the "neighbour" principle of *Donoghue v. Stevenson* is, first, that one's "neighbour" is the person whom one can foresee as a possible plaintiff and, second, that the duty that is owed to him is a duty not to cause certain specified kinds of harm, including physical damage to the person and (possibly) property but excluding financial loss (harm to a person's economic position not resulting from physical injury to his person or property) and loss of property through theft or other wrongful act of a third person. It is possible moreover that only those kinds of harm already recognized by court decisions may be the subject of a duty of care: if so, it is no longer completely true to say, with Lord MacMillan[14]: "The categories of negligence are never closed."

With these general principles in mind I would like to look for a few moments at some recent developments in cases of the type in which through the negligent act of one person physical injury is caused to a second person and as a result of this, loss or harm[15] is caused to a third person. The actions for loss of *consortium* and for loss of *servitium* fall within this class, and in both of these there is a trend towards narrowing the scope of the action, a trend not unconnected with the limitations, already noted, on the scope of the *Donoghue v.*

11 [1946] K.B. 227.

12 *Ibid.*, at 233.

13 *Ibid.*, at 232-233.

14 Donoghue v. Stevenson, [1932] A.C. 562, 621.

15 Other than harm by nervous shock, as exemplified by King v. Phillips *(supra,* note 4). In such cases, the duty of care (where it exists) would, it is submitted, be a duty not to cause nervous shock to the plaintiff by putting him in justifiable apprehension of injury to the third person: it is not necessary that the third person be injured, nor, if he is injured, is the severity of the injury relevant.

Stevenson "neighbour" principle. Thus in *Best v. Samuel Fox & Co.*[16] (in which the House of Lords denied that the wife had the same protected right to the *consortium* of her husband as he had to hers) both Lord Goddard[17] and Lord Morton of Henryton[18] suggest that the wife in such a case is outside the scope of the duty of care: that she is (to repeat the phrase already used) an "unforeseeable plaintiff"; and I think it is fair to say that the same consideration was present to Lord Goddard's mind when he asserted that if the matter were now *res integra* the law would certainly refuse an action to the husband for loss of *consortium* due to negligence.[19] Again, there is in the judgment of Denning L.J. in *Inland Revenue Commissioners v. Hambrook*[20] a hint that the anomalous character of the action *per quod servitium amisit* lies in its admission to the Court of an equally "unforeseeable plaintiff."

This "narrowing" trend to which I refer is manifested also in the restriction of the classes of servants in respect of whom the action for loss of *servitium* will lie. This same case of *Inland Revenue Commissioners v. Hambrook*[20] is the present culminating point of this trend. It will be remembered that as a result of *Commonwealth v. Quince*[21] and *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.)*[22] the Crown cannot recover *per quod servitium amisit* in respect of injury negligently caused to an airman or a constable, even though it is paying sick pay during the period of its employee's incapacity, because neither of them is a "servant" within the meaning of the rule. The constable, it was said in the latter case, exercises his authority at his own discretion by virtue of his office.[23] The question then arises—who are such "servants"?; it has been asked, would (say) the driver of a Post Office van (whose discretion, if any, would be very limited) be within the rule? Mr. Hambrook's victim, Mr. Bryning, was not quite so far down the hierarchy as that: he was a tax officer (an established clerk). As a result he was regarded as having sufficient discretion to take him out of the class of servant to which the action applies.[24] But Denning L.J. (with whose reasons Birkett L.J. and Parker L.J. (as he then was) agreed) based his decision also

16 [1952] A.C. 716.
17 *Ibid.*, at 730-731.
18 *Ibid.*, at 734.
19 *Ibid.*, at 733.
20 [1956] 2 Q.B. 641, 660.
21 (1944) 68 Commonwealth L.R. 227.
22 [1955] A.C. 457.
23 *Ibid.*, at 489.
24 *Per* Denning L.J.: [1956] 2 Q.B. 641, at 666-667.

on the broad ground[25] that, granting the existence of a duty of care, the action *per quod servitium amisit* is shown by the precedents to be available only in respect of servants who can properly be regarded as part of the master's household, in effect, as part of the family—those who rendered services to the head of the family and who "had to be kept by him in sickness and in health." "It was quite reasonable that the master, who had to keep them while sick, should have a cause of action for loss of their services."[26]

Obviously this latest decision, couched, as I say, in terms of refusal to extend the scope of the duty of care beyond existing precedents, is likely to reduce very substantially the scope of the master's action for negligent injury to a servant *per quod servitium amisit*. And in its equation of the servants in respect of whom the action may still lie to members of the family who must be kept in sickness and health it appears to reinforce a trend, discernible in some of the judgments in *Best v. Samuel Fox and Co. Ltd.*,[27] and supportable, in my view, by some of the *dicta* in *Toohey v. Hollier*,[28] to limit the damages awarded in the equally anomalous action for loss of *consortium* due to

25 *Ibid.*, at 666. This, under the principle of Jacobs v. London County Council, [1950] A.C. 361, must, it is submitted, form part of the *ratio decidendi* of the case. But *cf.* Sawer's comment, *Per Quod Servitium Amisit and Crown Servants*, (1956) 30 AUST. L.J. 387, at 389.

26 [1956] 2 Q.B. 641, at 664.

27 [1952] A.C. 716—see *per* Lord Goddard at 728, Lord Porter at 773. *Secus*, Lord Reid (with whom Lord Oaksey expressed his agreement). Lord Morton of Henryton made no reference to the point.

28 (1954-1955) 92 Commonwealth L.R. 618, at 624 (*per* Dixon C.J., McTiernan & Kitto, JJ.) (with reference to Mr. Justice Wolff's award to the male plaintiff of £1,000 for loss of *consortium*): "There was no compensation for anything beyond the interest which the male plaintiff may be supposed to possess in the conduct by the wife of the household affairs and in the performance of domestic duties to his material advantage and the past loss of her society and assistance and the prospect of a suspension again occuring of such society and assistance . . . . [I]t seems at least probable that the assessment of the husband's less specific damages took into account the material consequences to the husband of the wife's reduced capacity to conduct the household affairs." Later, referring to the position in the United States, the Court said (at 627) "[T]he general conclusion appears to be that such elements as mental distress are to be excluded but the material consequences of the loss or impairment of the wife's society, companionship and service in the home and the expense of her care and treatment incurred as the result of the injury form proper subjects of compensation to the husand." The Court also quoted (at 628) a Missouri judgment of 1890 (Barclay J. in Furnish v. Missouri Pacific Railway Co., (1890) 102 Mo. 669, 22 Am. St. Rep. 800, at 801), "By the term "society" in this connection, is meant such capacities for usefulness, aid, and comfort as a wife which she possessed at the time of the injury", and concluded "The application of this doctrine must, of course, be confined to material or temporal loss capable of estimation in money."

negligent injury to the value of the services actually rendered and lost (in addition, of course, to the medical expenses incurred by the husband). On this particular question, however, the law seems still to be in the melting-pot.[29]

It is clear enough, however, that the husband who is obliged to spend money on curing and keeping his wife without (if the cynicism may be pardoned) receiving the customary return of services, etc., may shift his loss to the shoulders of another. It is equally clear that the employer who is obliged to "keep" an injured servant by way of sick pay or pension cannot recover in tort: and an ingenious attempt to recover such expenditure from the negligent party, on the footing

29 Thus, in the more recent and rather curious case of Behrens v. Bertram Mills Circus Ltd., [1957] 2 Q.B. 1, involving as *dramatis personae* the smallest man in the world, his midget wife, the somewhat inappropriately named female Burmese elephant "Bullu" (said by Devlin J. (at 14) to be "no more dangerous than a cow"), and the equally inappropriately named Pomeranian dog "Simba", Devlin J. allowed as a head of damages the husband's loss of earnings during the period for which his wife was not fit to accompany him on tour, and indicated (at 29) that he could have added to that head "a claim for compensation for the loss of his wife's society" though he added to this the rider "which no substitute *domestic help* could give." (Emphasis added). But *cf.* the decision in Kirkham v. Boughey, [1957] 3 All E.R. 153 (husband disentitled to recover wages lost through staying in England (partly) in order to be near his wife): but the claim was not based on loss of *consortium*, as that in Behrens' Case may have been: see *per* Diplock J., [1957] 3 All E.R. 153, at 156-157.
It is submitted (with respect) that the decision of the Full Court of New South Wales (Owen, Herron and Manning JJ.) in Birch v. Taubmans Ltd., (1956) 74 Weekly Notes (N.S.W.) 70, goes too far in its holding that total deprivation of sexual intercourse with the wife is a loss which is temporal rather than spiritual, in terms of the test laid down in Toohey v. Hollier (*supra* note 28), more especially as in an earlier *dictum* the Full Court appears to recognize the relevance of the "cost of replacement of material services" test: "[I]f a consequence is that in his domestic establishment, there are rendered to the husband fewer or inferior comforts, conveniences or assistance, of a temporal as distinct from a spiritual kind, then he may recover in respect thereof without it being necessary for him to incur expenditure in replacing or improving what is done for him." (at 74).
Since this paper was delivered the decision of Devlin J. in McNeill v. Johnstone, [1958] 3 All E.R. 16, [1958] 1 W.L.R. 888, has been reported. In that case the husband was awarded a sum on account of wages which he would have earned had he remained near his place of employment while his wife was in hospital elsewhere, and thus elected to forego the *consortium* of his wife. But Devlin J. conceded that the claim had been dealt with in a "broad way": if recovery were to be had on the basis of loss of *consortium* it would be necessary to take the *consortium* in "the very widest sense of the companionship of his wife", and whether *consortium* could extend so far was "a difficult point to decide." The decision to that effect in Behrens' Case was "that in the very exceptional circumstances of that case it did" ([1958] 3 All E.R. 16, 18-19).

that if the employer had not paid such sums he (the defendant) would have had to pay them by way of damages, so that he was to that extent unjustly enriched, was recently rejected by the Court of Appeal.[30] It would appear that the employer cannot even recover medical expenses, if he incurs them under some arrangement whereby the employee receives medical care at his expense. The recent High Court decision in *Blundell v. Musgrave*[31] is of some interest in this connexion. Musgrave, who was injured as a result of Blundell's negligent driving of a motor-car, was a naval rating. As such he was entitled to free medical attendance (including hospital care). But under the Naval Financial Regulations the Naval Board had power, at its discretion, to disallow free medical attendance or make a charge for it if it considered that the cost should not be borne by the Navy Department. In exercise of this discretion the Naval Board charged its injured employee with the cost of his medical and hospital treatment. At the same time a note was made on his pay sheet that no deductions were to be made on account of this charge unless and until Musgrave recovered the amount of his medical expenses from Blundell. The High Court held[32] that the discretion was properly exercised, that Musgrave had become legally liable to pay the Board for his medical attendance, and that he was therefore entitled to recover these expenses from the appellant as part of his damages, notwithstanding that if he had failed in the action the Naval Board would probably not have pursued its claims. Thus a "loss-shifting" device of a kind originally suggested by Lord Goddard C.J. in the course of his judgment in *Inland Revenue Commissioners v. Hambrook*[33] has been accepted by the High Court.[34]

Fullagar J., in his dissenting judgment, suggested[35] (as a perhaps more straightforward alternative) that in spite of the cases restricting

30 Receiver for the Metropolitan Police District v. Croydon Corporation: Monmouthshire County Council v. Smith, [1957] 2 Q.B. 154. In the first-mentioned case Slade J. had upheld a claim based on unjust enrichment: [1956] 1 W.L.R. 1113 (as Atkinson J. had done eight years before in Receiver for the Metropolitan Police District v. Tatum, [1948] 2 K.B. 68): in the second Lynskey J. had rejected a similarly-based claim: [1956] 1 W.L.R. 1132. The Court of Appeal upheld Lynskey J. and reversed Slade J.

31 (1956) 96 Commonwealth L.R. 73.

32 McTiernan, Williams, Webb and Taylor JJ.: Dixon C.J. and Fullagar J. dissenting.

33 [1956] 2 Q.B. 641, at 656-657.

34 For further comment on this and other devices see Parsons, *Damages in Actions For Personal Injury*, (1957) 30 AUST. L.J. 618.

35 (1956) 96 Commonwealth L.R. 73, at 97-98. This, he pointed out, repeated a suggestion he had already made in Attorney-General for New South

the scope of the action *per quod servitium amisit* the Crown (and perhaps a private employer also) might be able to recover from a defendant tortfeasor "the cost actually incurred in the treatment of the plaintiff." "[T]he necessity for medical aid being a natural and probable result of the tort, it might be said that its cost is recoverable by any person who is under a legal duty to supply it or pay for it." The suggestion is, I submit with respect, attractive but impracticable. It appears to overlook the two current limitations on the operation of the *Donoghue v. Stevenson* principle[36] to which I directed attention at the beginning of this paper. In the first place, it is difficult to see how such a person can be said to be a "foreseeable plaintiff." The result of *King v. Phillips*[37] is that when a child (whom I may reasonably foresee to have a mother) comes within the area of my reasonable foresight—i.e. I ought as a reasonable man to anticipate and guard against the possibility of injury to the child—I need not at the same time foresee the possibility of injury to the mother, and thus owe the mother no duty of care. How then can it be argued that when an adult, who may or may not be employed or whose employer may or may not be under a duty to supply him with medical care,[38] comes within the area of my reasonable foresight, I am also under a duty to this "might-be" employer? And even if this hurdle be surmounted, so that I do owe a duty of care to the employer, can it be said in terms of the *dicta* (already cited) in *Deyong v. Shenburn*,[39] that the duty itself is one which, having regard to the decisions of the courts, the law recognizes?

The second topic I would like to look at for a few moments is *res ipsa loquitur*—that doctrine of which a learned Law Lord once

Wales v. The Perpetual Trustee Co. (Ltd.), (1951-1952) 85 Commonwealth L.R. 237, at 290. A rather broader suggestion along these lines (extended to allow recovery of the cost of support) is made by Brett, *Consortium and Servitium — A History and Some Proposals,* (1955) 29 AUST. L.J. 321, 389, 428, 433-434.

36 Upon which Brett relies in the suggestion made in his articles, above. But he makes the point that the defendant should be liable only if he knew or ought reasonably to have known of the existence of the husband or employer.

37 [1952] 2 All E.R. 459 (McNair J.), [1953] 1 Q.B. 429 (C.A.).

38 If the injured man is wearing (say) a Naval uniform, does that make any difference to the range of my duty? *Cf.* Brett's suggestion, *op. cit. supra* note 35, at 434, that statistically speaking most accident victims have employers (one may add, whether they wear the employer's uniform or not). Might it not be necessary to foresee that the victim has an employer who pays his medical expenses?

39 *Supra,* at 211.

said that nobody would have called it a principle if it had not been in Latin.[40]

When I look back to my student days *res ipsa loquitur* seemed so simple. Perhaps in those days it was. Looking at the edition of Salmond on Torts that I then used[41] I find that all the cases cited under that head are cases in which the plaintiff did no more than prove the accident, and the defendant, without calling any evidence himself, argued that there was insufficient evidence to go to the jury. Given the conditions laid down in *Scott v. London & St. Katherine Docks Co.*[42] that the thing was under the management of the defendant or his servants and the accident was such as does not in the ordinary course of things happen if those having the management use reasonable care, the answer to this argument is, *res ipsa loquitur*. But, Salmond emphasised, it is for the jury to say whether an inference of negligence is to be drawn or not. They may, if they think fit, find for the defendant.

What then has happened to this one-time simple rule? The difficulties seem to me to have arisen in three classes of cases.

(1) Where the defendant in fact offers some evidence, but not enough to show conclusively both (a) how the accident happened and (b) that there was no negligence on his part. This situation in fact arose in Australia, shortly after the publication of the 8th edition of Salmond on Torts, in *Fitzpatrick v. Walter E. Cooper Pty. Ltd.*[43] In that case the death of the plaintiff's husband was caused by two bags of plaster falling on him from a 'skip'. The plaintiff proved the accident and said "res ipsa loquitur." The defendant's witness (who was also co-defendant) swore that the ropes were properly fixed and tied, (though he also admitted that nothing could fall from such a skip if the ropes were properly tied). The jury chose to believe the

40 *Per* Lord Shaw of Dunfermline in Ballard v. North British Railway Co., [1923] S.C. (H.L.) 43, at 56. The phrase has the merit of making it perfectly clear that the principle is being invoked — a fact which could perhaps be overlooked if other language is used. See, e.g., what has been described by Prosser, *Res Ipsa Loquitur in California,* (1949) 37 CAL. L. REV. 183, at 225 as the "supreme example of understatement in all legal literature." "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless." *per* Cook C.J. in Pillars v. R.J. Reynolds Tobacco Co., (1918) 117 Miss. 490, at 500, 78 So. 365, at 366: quoted in WRIGHT, CASES ON THE LAW OF TORTS, (1st. ed. 1954) 226.

41 The 7th edition by W.T.S. Stallybrass (1928), 33-35.

42 (1865) 3 H. & C. 596, at 601 (*per* Erle C.J.), 159 E.R. 665, at 667.

43 (1935) 54 Commonwealth L.R. 200.

defendants;—that is, it believed their assertion that they were not negligent, although that resulted in leaving the cause of the accident a mystery. The High Court[44] held that they were entitled to do so; that is to say, they were entitled to refuse to draw the inference of negligence which seemed inevitably to flow from the happening of the accident together with the admissions of the co-defendant even though the sole rebutting evidence was a sworn denial of negligence.

A not dissimilar situation was presented in each of the two cases next in chronological time—the decision of the House of Lords in *Woods v. Duncan*[45] (the well-known case of the submarine "Thetis") and the decision of the Court of Appeal in *Barkway v. South Wales Transport Co. Ltd.*[46] In the first case the accident, or that part of it which involved the leaving of the bow-cap open, was inexplicable,[47] but the defendant satisfied the court of first instance that he was not negligent, and the House of Lords accepted this. In the second case (that of the 'bus which left the highway because of a burst front tyre) it was impossible for the defendants to show that the burst was due to a specific cause which did not connote negligence on their part, but they could and, it was held,[48] did show that they were not guilty of negligence, in that they in fact used all reasonable care about the management of their tyres. But in each case there were *dicta* which suggested that had the defendant not shown this he would not succeed, and the presumption on behalf of the plaintiff would prevail.[49]

44 Latham C.J., Starke and Dixon JJ.; Rich and McTiernan JJ. dissented.

45 [1946] A.C. 401.

46 [1948] 2 All E.R. 460.

47 "On opening the rear door of No. 5 [torpedo tube], there was a continuous rush of water, due to the fact that the bow-cap was open. How this came about is the main and very obscure problem of fact in the case." *per* Viscount Simon, [1946] A.C. 401, at 415-6.

48 By the Court of Appeal, the judgments in which canvass directly the question of *res ipsa loquitur* and contain the principal *dicta*. The House of Lords found that on the evidence the defendants might have taken an additional precaution (requiring the driver to report heavy blows to a tyre) and hence did not take all the requisite steps to protect their passengers from risk; it accordingly reversed the Court of Appeal on the facts. [1950] 1 All E.R. 392.

49 "Even so, that principle [*res ipsa loquitur*] only shifts the onus of proof, which is adequately met by showing that he was not in fact negligent." *per* Viscount Simon, [1946] A.C. 401, at 419.

"My Lords, assuming that the principle of res ipsa loquitur applies, and establishes that prima facie Lieutenant Woods must have been negligent, it is open to him to prove affirmatively (as in my opinion, he has) that he did throughout exercise reasonable care." *per* Lord Russell of Killowen, *ibid.*, at 425.

"In my opinion, the fracture did not in itself explain the accident in a way which relieved the defendants' *prima facie* liability for it. It was a

It is these *dicta* which have started the English courts on their apparent divergence from what is still the Australian view, and have apparently misled (with great respect) some of the New Zealand judges into following them. Yet I submit that they ought to be looked at as expressing no more than the judicial view of the facts and of the inferences to be drawn from the facts in each specific case. In all the recent English cases the case has been tried at first instance before a judge alone, and on appeal has been subject to the principle enunciated in *Benmax v. Austin Motor Co. Ltd.*[50] that a distinction is to be made between the findings of fact (which are not likely to be upset) and the inferences to be drawn from the findings of fact (on which the appellate court may differ from the trial judge). The result of the adoption of this procedure, I submit, has been to telescope what was originally and still should be a two-stage process—stage (1): does the evidence permit of an inference of negligence so that *res ipsa loquitur?*; stage (2): is the court to draw that inference?—with the result that the finding that the inference *may* be drawn becomes at the same time a finding that it *will* be drawn.

In the most recent decision in England, *Moore v. R. Fox and Sons,*[51] in which a workman was killed by an unexplained explosion of gas under a chemical tank which he was tending, Lord Evershed M.R. (with whom Birkett L.J. agreed) repeats the proposition that it is not enough for the defendants to show that the accident is inexplicable; they must either explain how it happened (*semble,* so as to show that it happened without negligence on their part) or prove that there was no negligence on their part.

neutral event which might, or might not, happen through the negligence of the defendants. I think the defendants must prove, or the evidence as a whole must show, that the burst occurred without any negligence on their part." *per* Bucknill L.J. [1948] 2 All E.R. 460, at 463.

"I agree that the mounting of the omnibus on the footpath was a fact which raised the presumption expressed in the phrase *res ipsa loquitur.* That phrase, however, represents nothing more than a *prima facie* presumption of fault. It is rebuttable by the same defence as is open to any defendant accused of negligence, against whom the plaintiff's evidence has made out a *prima facie* case. When the plaintiff has done that, the *onus* is said to shift to the defendant. In a case where *res ipsa loquitur* the *onus* starts on the defendant and requires him to prove affirmatively that he has exercised all reasonable care, ..." *per* Scott L.J., *ibid.,* at 468. See also Asquith L.J., *ibid.,* at 471. In the House of Lords the effect of *res ipsa loquitur* was only glanced at in passing; see [1950] 1 All E.R. 392, at 394-5 (Lord Parker), 399-400 (Lord Normand), 403 (Lord Radcliffe).

50 [1955] A.C. 370.

51 [1956] 1 Q.B. 596.

You will notice that I said (with respect) that these decisions had misled (or appeared to have misled) some of the judges in New Zealand into following the statement of the effect of *res ipsa loquitur* which they enshrine.[52] I say this because in New Zealand jury trial is still the rule rather than the exception, and it seems *prima facie* wrong that a rule which in origin only enabled the plaintiff to get his case to the jury, which could draw what inference it chose from it, should be used to control the jury in the inference it should draw. This is especially true where the defendant, though he may be able neither to negative negligence nor to explain the accident, may yet be able to suggest alternative ways in which it could have happened. Perhaps there are not many cases in which circumstances like this might obtain. It may of course be that where the trial is before a judge alone, there is no practical reason why the two steps should not be fused. I submit, however, that the danger would be that what is, in my earlier submission, a decision of fact, on the inferences to be drawn from particular facts, will tend to be regarded as a decision laying down a rule of law.[53]

(2) The second class of case in which difficulty arises is where the plaintiff in fact goes further than pleading and proving the bare accident. This is exemplified by two of the New Zealand cases. In

[52] Gresson J. (as he then was) in Voice v. Union S.S. Co. of N.Z. Ltd., [1953] N.Z.L.R. 176, 187-192, and in J.M. Heywood and Co. v. Attorney-General, [1956] N.Z.L.R. 668, at 680-4: Hay J. in Berkett and Futter v. Middlebrook, [1953] N.Z.L.R. 292. *Contra,* however, Fair J. in Voice's Case (*supra*) at 184-7; North J. in MacDonald v. Pottinger, [1953] N.Z.L.R. 196; Finlay J. in Auckland Transport Board v. Coombes, [1954] N.Z.L.R. 901; F.B. Adams J. in Attorney-General v. J.M. Heywood and Co. Ltd., [1955] N.Z.L.R. 1055.

Since these decisions were handed down a permanent Court of Appeal has been set up in New Zealand. Of its members Gresson P. regards *res ipsa loquitur* as imposing on the defendant the burden of disproof, and thus creating something equivalent to a presumption of law, or what PHIPSON (EVIDENCE, 9th ed. by Burrows (1952), at 35) calls a presumption of fact of the stronger kind; North J. regards it as no more than a rule of evidence; Barrowclough C.J. (who was a member of the Court of Appeal in Heywood's Case (*supra*)) has not pronounced upon the point; Cleary J. is a new appointee. Upon the view taken by one of the last-named two the future history of the doctrine in New Zealand seems to depend.

[53] *Cf.* the warning of Du Parcq L.J. in Easson v. London and North Eastern Railway Co., [1944] K.B. 421, 426 (a case in which *res ipsa loquitur* was invoked by the plaintiff). "There is danger, particularly in these days when few cases are tried with juries, of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense." The view taken by Du Parcq L.J. of the meaning of *res ipsa loquitur* (*ibid.,* at 425) was applied by North J. in reaching his conclusions in MacDonald v. Pottinger (*supra*).

Voice v. Union S.S. Co. of N.Z., Ltd.[54] some chests of tea fell off stacked cargo in the hold of a vessel onto the plaintiff. Plaintiff called evidence to show (a) that the chests were stacked on an uneven foundation in the hold (b) that they were stacked on rotten dunnage and that they fell because a piece of this dunnage broke. The evidence for the defence was principally that the stack was firm after the accident and was not leaning; nothing was said about the dunnage but counsel for the defendants submitted in his address that the plaintiff's evidence showed no more than that the dunnage had a latent defect. It appears from the report that plaintiff's counsel in his address had invoked *res ipsa loquitur*. Hay J. directed the jury that the onus was on the defendant to satisfy the jury that the falling of the chests was not due to any want of reasonable care on its part, or perhaps that the falling was due to pure accident. The jury found for the plaintiff. On a motion for a new trial Hay J. rejected a submission that the fact that the plaintiff put forward what he thought to be the cause of the accident left no room for the application of *res ipsa loquitur*, saying that he saw no reason in principle why the plaintiff could not, in tendering his own explanation, at the same time claim the benefit of the maxim in the absence of a fuller explanation by the defendant. In the Court of Appeal Fair J., Gresson J. and Stanton J. all agreed that *res ipsa loquitur* could be invoked notwithstanding that specific acts of negligence were alleged.

Three years later, however, in *J. M. Heywood and Co. Ltd. v. Attorney-General*[55] the Court of Appeal reached a conclusion which qualifies the effect of the earlier decision. In *Heywood's Case* a heavily laden truck had got out of control while descending a hill and had smashed into some Government property. The driver was killed in the smash and there was no direct evidence of the cause. Plaintiff made four specific allegations of negligence: (1) that the truck was overloaded—this was dropped; (2) that the truck was travelling at an excessive speed—this was also dropped; (3) that the driver had been unskilful in his manipulation of the gears and clutch (inspection of the truck after the crash disclosed that the clutch plate was broken and shattered); and (4) that the brakes had failed or that the driver had failed to apply the brakes.[56] The brakes were found to be in fair order

[54] [1953] N.Z.L.R. 176.

[55] [1956] N.Z.L.R. 668.

[56] In addition to these specific allegations, the point that *res ipsa loquitur* was taken early in the proceedings: see Barrowclough C.J. [1956] N.Z.L.R. 668, at 673: "[A]t the commencement of the proceedings in the Supreme Court, the point was taken that the circumstances of the accident were such as to justify the plaintiff is relying on the doctrine of *res ipsa loquitur*.

after the accident, and there was indication of burning of the front brakes. The jury found for the defendant, after a direction by F. B. Adams J. that *res ipsa loquitur* only made out a *prima facie* case and that the onus was on the plaintiff to show that, on the whole of the evidence, the most probable explanation was that the defendant had been negligent. Thereafter on a motion by the plaintiff to set aside judgment F. B. Adams J. entered judgment for the plaintiff as being against the weight of evidence. On appeal all three judges found for the defendant. Gresson J., however, undertook a lengthy discussion of *res ipsa loquitur* and registered his disagreement with the views expressed by F. B. Adams J. in the Supreme Court.[57] But, though he found fresh support for his views in the decision of the Court of Appeal in *Southport Corporation v. Esso Petroleum Co. Ltd.*[58] as well as in *Moore v. R. Fox and Sons*[59] he was of opinion[60] that the effect of the decision of the House of Lords in the *Esso Petroleum Case*[61] was that, since the pleadings alleged specific acts of negligence, which had been rebutted by the defendants, the doctrine of *res ipsa loquitur* could not be invoked *extra* the pleadings. The reasoning in the *Esso Petroleum Case* appeared to be that the defendants had not been given fair notice of the case to be met, and had had no opportunity of developing their case on different lines.[62] Gresson J. was therefore of opinion that, since the plaintiff's case had not been pleaded in such a way as to bring into operation *res ipsa loquitur,* that doctrine should be disregarded. This throws some doubt on the correctness of *Voice's Case,* and appears also to involve putting pleaders to their election whether to plead specific acts of negligence or simply to plead the accident and rely on *res ipsa loquitur*; unless indeed it is open to them, however inelegantly, to plead both.

(3) The third class of case in which difficulty seems to arise is that in which the court feels itself unable to say that "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care."[63]

Just how and when this point was taken is not clear from the record. At all events, it was the defendant and not the plaintiff who began."

57 [1955] N.Z.L.R. 1055.

58 [1954] 2 Q.B. 182.

59 [1956] 1 Q.B. 596.

60 See [1956] N.Z.L.R. 668, at 684.

61 Esso Petroleum Co. Ltd. v. Southport Corporation, [1956] A.C. 218.

62 See *per* Lord Normand, *ibid.*, at 238.

63 The formula used by Erle C.J. in Scott v. London and St. Katherine Docks Co., (1865) 3 H. & C. 596, at 601; 159 E.R. 665, at 667.

This seems to have been the case with the majority of the High Court in *Mummery v. Irvings Pty. Ltd.*[64] You will remember that the plaintiff in that case, going into the defendant's premises, was struck in the face by a flying piece of timber and injured to an extent which the jury assessed as worth £2,500 in damages. Unfortunately perhaps for him, he did not rest content with framing a claim on this simple basis, but instead alleged specific acts of negligence and also two specific sources of a duty of care towards him, one based on occupier's liability and the other on a breach of the Factories and Shops Act 1928 (Victoria). He overlooked a third possibility: vicarious liability of the occupier for the negligent act of his foreman. In considering whether there might have been grounds for allowing an application to amend the pleadings to include this issue the High Court found it necessary to inquire whether there was evidence from which the jury could have inferred negligence on the part of the respondent's foreman. On this point the majority[65] said: "It may be urged that the case is much the same as *Byrne v. Boadle*[66] and *Scott v. London & St. Katherine Docks Co.*[67] and with this we would agree emphatically if the evidence called for the appellant at the trial merely established that upon entering the respondent's premises he was violently struck by a piece of wood flying through the air. But the evidence goes further. It tends to establish—even if it does not clearly establish—that the wood was thrown by the circular saw . . . The question is whether [that] occurrence was such 'as in the ordinary course of things does not happen if those who have the management use proper care.' To that inquiry in this case there cannot be an affirmative answer. We are told nothing of the characteristics of circular saws and we are not told that such an occurrence is usual or unusual or indeed highly improbable. Moreover we are told nothing concerning the size of the piece of wood in question [apparently the defendant company did not preserve it] and it is difficult, if not impossible, in these circumstances to attribute the accident to some act of negligence on the part of the operator . . . [T]he answer, on the evidence in the case, must be 'We simply do not know'." McTiernan J., on the other hand, had no hesitation in saying[68] that this was the kind of thing that ought not to happen in a woodworking shop if the occupier has used reasonable care.

64 (1956) 96 Commonwealth L.R. 99.
65 Dixon C.J., Webb, Fullagar and Taylor JJ., *ibid.*, at 116-7.
66 (1863) 2 H. & C. 722, 159 E.R. 299.
67 (1865) 3 H. & C. 596, 159 E.R. 665.
68 96 Commonwealth L.R. 99, at 129.

Faced with this sort of situation, what is a plaintiff to do? The first question must be, can he anticipate it? or perhaps, how can he anticipate it? I simply do not know. Even those members of the American "realist" school who seem to advocate examination of the personal characteristics of judges have not so far as I know suggested an investigation of their extra-legal knowledge.[69] It may be wise to expect that judicial ignorance of "the ordinary course of things" will be complete. Then the question arises, may he call evidence to establish that *res ipsa loquitur?* The question seems hardly to have been discussed in English legal literature.[70] The majority judgment in *Mummery's Case* seems to invite such evidence; and there are *dicta* in the judgment of North J. in the New Zealand medical negligence case, *MacDonald v. Pottinger,*[71] suggesting that in the absence of expert medical evidence neither the court nor the jury could say that mere failure to detect the presence inside a patient of forceps left in his body after an operation, in spite of the patient's repeated complaints of symptoms of discomfort, of itself connoted negligence, so that *res ipsa loquitur.*[72] Moreover, although in general American decisions are of no direct assistance, I would suggest that it is possible to learn something from American practice in various areas of the law of Torts, and it appears from a note in a recent American law review[73] that the practice of introducing expert evidence to get to the point where "the thing" takes over and tells its own story is not uncommon in American jurisdictions. As far back as 1895, when a nitroglycerin factory exploded and took with it all those who might have been able to give evidence as to what had happened, the plaintiff, whose property also suffered, produced expert evidence to show that if the explosives had been properly manufactured and properly handled the explosion would not

69 It was well known of a former member of the New Zealand bench that he was a most enthusiastic amateur engineer, with interests that extended even to plumbing.

70 Ellis Lewis, *A Ramble with Res Ipsa Loquitur,* (1951) 11 CAMB. L.J. 74, at 80, would reject the expert; he cites Scott L.J. in Mahon v. Osborne, [1939] 2 K.B. 14, at 23 (a medical negligence case) and POLLOCK ON TORTS, 14th ed. (1939) at 358.

71 [1953] N.Z.L.R. 196, at 207.

72 An ironical feature of this case was that, after having consulted his doctor about his discomfort from time to time over a period of three years, plaintiff went to a chiropractor, who promptly X-rayed him and disclosed the presence of the forceps. "Counsel for the plaintiff very properly did not attempt to make anything out of this circumstance, for it was clear that it was the chiropractor's usual practice to X-ray the spinal column of a new patient." *per* North J., *ibid.,* at 207.

73 Note, *The Use of Expert Evidence in Res Ipsa Loquitur Cases,* (1958) 106 U. PA. L. REV. 731.

have occurred.[74] Similar evidence was introduced where the plaintiff received a shock from a telephone supplied and serviced by the defendant;[75] where a water main burst and the allegation was that this would not have happened if it had been properly cared for and maintained;[76] and more recently still, in California, where professional malpractice was alleged but it was not possible for a layman to say as a matter of common knowledge that due care had not been exercised.[77]

In the light of these difficulties which I have outlined, I should perhaps offer my own submissions on the present position of *res ipsa loquitur*. First I would say that Australian law should in my respectful submission continue to follow the older view of the effect of the maxim, the view which is summed up in the statement from the 7th edition of Salmond on Torts, already referred to.[78] This view was in fact that adopted by the High Court in *Fitzpatrick v. Walter E. Cooper Pty. Ltd.*,[79] in *Davis v. Bunn*,[80] and more recently reinforced by the *dicta* in *Mummery v. Irvings Pty. Ltd.*[81] If, and to the extent that, this produces a conflict with the developing English law, in my submission the Australian courts should not seek to follow the Court of Appeal or the House of Lords in preference to the High Court.[82] In *Mummery's Case* the majority of the High Court so interpreted *Woods v. Duncan*[83] and *Barkway v. South Wales Transport Co. Ltd.*[84] that no conflict or inconsistency appeared.[85]

Secondly, I submit that on the strict view of *res ipsa loquitur* the maxim should be invoked only when the plaintiff is unable to adduce

74 Judson v. Giant Powder Co., (1895) 107 Cal. 549, 40 Pac. 1020.

75 Hanaman v. New York Telephone Co., (1951) 278 App. Div. 875, 104 N.Y.S. 2d 315.

76 Buffam's v. City of Long Beach, (1931) 111 Cal. App. 327, 295 Pac. 540.

77 Seneris v. Haas, (1955) 45 Cal. 2d 811, 291 P. 2d 915; Sherman v. Hartman, (1955) 137 Cal. App. 2d 589, 290 P. 2d 894; Costa v. Board of Regents, (1953) 116 Cal. App. 2d 445, 254 P. 2d 85. Citations to these cases and those cited in the three preceding notes are taken from the Note referred to in note 72, *supra*, at 736-7.

78 *Supra*, at 217.

79 (1935) 54 Commonwealth L.R. 200.

80 (1936) 56 Commonwealth L.R. 246.

81 (1956) 96 Commonwealth L.R. 99, at 114.

82 According to the principles laid down in Piro v. W. Foster & Co. Ltd., (1943) 68 Commonwealth L.R. 313. Query, would the fact that in some (but not all) States the jury survives as a trier of fact (for details see FLEMING, THE LAW OF TORTS, (1957) 292-3) amount to a "relevant differentiating local circumstance" (*per* Latham C.J., 68 Commonwealth L.R. 313, at 320)?

83 [1946] A.C. 401.

84 [1950] 1 All E.R. 392.

85 (1956) 96 Commonwealth L.R. 99, at 118-119. For good measure the High Court also suggests that their Lordships' observations were in fact *obiter dicta*. In Waddell v. Ware, [1957] Victorian R. 43, the Full Court of

any other evidence of negligence on the part of the defendant. It may happen however, that (as in *Voice's Case*[86]) such evidence is negatived, but the cause of the accident remains unexplained, and an inference of negligence on the part of the defendant may still be drawn from the mere happening itself. In that case the prudent course (in the light of the *Esso Petroleum Case*[87]) would seem to be to lay the foundation in the pleadings for the invocation of the maxim if this is possible.[88] Lastly, where it is doubtful whether judicial notice will be taken of "the ordinary course of things",[89] plaintiff would, it is submitted, be well advised to lead expert evidence as to what does happen in the

Victoria noted the apparent conflict between the view of the High Court and that of the Court of Appeal in England, but found it unnecessary to resolve it, on the grounds that the plaintiff had given some evidence of the circumstances attendant upon the accident, so that the question became one of balance of probabilities, and *res ipsa loquitur* was excluded. This was, however, before the judgment of the High Court in Mummery's Case.

86 *Supra,* note 54.

87 *Supra,* note 61.

88 In Mummery's Case the majority of the High Court said (96 Commonwealth L.R. 99, at 122) that if the plaintiff, instead of relying on mere proof of the occurrence, himself adduces evidence of the cause of the accident, it is "beyond doubt" that the doctrine of *res ipsa loquitur* will have no place in the case. With the greatest respect, it is not altogether easy to follow their Honours in this part of their judgment. It is not clear whether the phrase "evidence of the cause of the accident" means evidence of the type led by the plaintiff in Mummery's Case itself, which still invites the trier of fact to draw the inference therefrom that the defendant was negligent, or evidence of the type led in Voice's Case, which attempts to pinpoint specific acts of negligence. In the former situation, although plaintiff has proved more than the mere happening of the accident, and thus has produced a different situation from that which gave rise to the *res ipsa loquitur* doctrine, there appears no good reason why the doctrine or something analogous should not be invoked. In the latter, although the defendant may negative the specific allegations of negligence, he may yet be unable either to explain precisely how the accident happened or to show affirmatively that he had in every way taken all reasonable care (although, if forewarned by the pleadings, he may attempt to do so). In that case it would seem that there is still some evidence from which the trier of fact may infer negligence. Their Honours say that to hold that the doctrine of *res ipsa loquitur* is applicable in this situation "would mean that, in cases where the onus of proof is of importance, the result will be determined according to whether the explanatory matter is put before the jury by the plaintiff or the defendant. We cannot think the principle of *res ipsa loquitur* can produce such a capricious and anomalous result." This might be so if the effect of *res ipsa loquitur* is regarded as shifting the onus of proof to the defendant, and thus as raising a presumption of law, or a presumption of fact of the stronger kind (*supra,* note 52). But their Honours have already asserted that it does not have this effect (*ibid.,* at 114).

89 Note that the formulation does not speak of the ordinary course of *ordinary* things—those of which the Judges might be expected to take judicial notice.

ordinary course of things so as to lay a foundation for the invocation of the maxim.

In outlining the facts in *Mummery v. Irvings Pty. Ltd.*[90] I said that plaintiff's claim was based partly on an allegation that defendant, as occupier of the workshop in which he was injured, was in breach of its duty towards an invitee. On this branch of the case "it was assumed that it was incumbent upon the appellant . . . to establish that the operation of the circular saw created an unusual danger on the premises . . . "[91] The High Court said in reference to this that "the duty which the occupier of premises, as such, owes to invitees . . . is a separate and distinct duty from that which is involved when the servant of such an occupier causes injury to some person present on the premises by some casual act of negligence."[92] The almost contemporaneous decision of *Slater v. Clay Cross Co. Ltd.*[93] reinforces this and makes it clear that in respect of current operations on the land the duty of an occupier to persons lawfully on the land (whether licensees or invitees) is a duty to take reasonable care not to injure them, and that the carefully restricted formulations of the different kinds of duty owed to licensees and invitees are irrelevant to this situation. In the course of his judgment, however, Denning L.J. observed that, although the Law Reform Committee had recommended that the distinction between invitee and licensee be abolished, that result had already been virtually attained by the decisions of the courts.[94] That was said by the New Zealand Court of Appeal in *Perkowski v. Wellington City Corporation*[95] to be no more than *dictum,* and indeed it was not necessary for the decision in the case. But there have been some judicial changes in the English law, by which, failing an early adoption of the Occupiers' Liability Act, 1957, Australian law in general and Western Australian law in particular will continue to be influenced. I would like to devote the last part of this paper to noticing one or two of these.

The classic formulation of the difference in duty owed to the two classes was that the occupier was liable to the licensee for damage caused by concealed dangers of which he knew and against which he had not warned the licensee, or of which the licensee did not know;[96]

90 (1956) 96 Commonwealth L.R. 99.
91 *Ibid.*, at 108.
92 *Ibid.*, at 110.
93 [1956] 2 Q.B. 264.
94 *Ibid.*, at 269.
95 [1957] N.Z.L.R. 39, at 63 (Barrowclough C.J.) and 68 (F.B. Adams J.).
96 See SALMOND ON TORTS, (12th ed. by Heuston (1957)) 505.

to the invitee he was liable for damage caused by unusual dangers of which he knew or ought to have known, which damage he did not use reasonable care to prevent.[97] *Qua* licensee the duty has sometimes been expressed as not to set a trap; it would in my submission be better to say not to let a known trap remain. *Qua* invitee the duty is subject to the qualification that the occupier may expect the invitee to use reasonable care for his own safety.

The change hinted at by Denning L.J. is of course a change in the duty towards the licensee: no change in the duty towards invitee is contemplated. But the full effect on the latter duty of the perhaps unfortunate decision in *Thomson v. Cremin,*[98] though its teeth have been drawn by the Occupiers' Liability Act, 1957, is yet to be felt elsewhere than in England. The principal effect is of course to make occupiers liable in all cases for the defaults of their independent contractors—in this case the firm of shipwrights in Fremantle who failed to secure adequately one of the shores supporting shifting boards in the hold of the ship which was the "premises" in question. But the principle of *Indermaur v. Dames* is re-stated far more broadly than the manner in which I have outlined it above. Viscount Simon says[99] the invitor owes to the invitee "a duty of adequate care"; Lord Thankerton[100] that he is under "a duty to take reasonable care"; Lord Wright[101] that the invitor "warrants . . . that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors . . . " This last formulation is much more like the formulation of an occupier's duty to a person entering under contract with him, as set out by McCardie J. in *Maclenan v. Segar.*[102] One cannot help wondering, with great respect, whether Lord Wright, or, indeed, all their Lordships, by some inadvertence had this in mind. Whatever the reason for it, however, I would submit that these *dicta* of their Lordships should not be regarded as containing a correct statement of the English law of the time, nor as binding upon Australian courts.

Quite apart from this defect it is submitted that the decision in *Thomson v. Cremin* is unsatisfactory. The argument in this case was

97 See *per* Willes J. in Indermaur v. Dames, (1866) L.R. 1 C.P. 274, at 288.

98 *Sub. nom* Cremin v. Thomson, (1941) 71 Ll.L.R. 1; "resurrected" as unreported in SALMOND ON TORTS, 11th ed. by Heuston (1953), at 138, 563; now noted [1953] 2 All E.R. 1185; [1956] 1 W.L.R. 103. The lateness of its "discovery", I submit, qualifies it as a "recent" development.

99 [1956] 1 W.L.R. 103, at 106.

100 *Ibid.*, at 109.

101 *Ibid.*, at 110.

102 [1917] 2 K.B. 325, at 332-3.

"straddled" by the argument in and the decision of the Court of Appeal in *Haseldine v. C. A. Daw & Son, Ltd.*,[103] in which it was held that the duty of an occupier to an invitee was sufficiently discharged if it had entrusted the maintenance of the premises (or the relevant part of the premises, in this case a lift) to competent independent contractors, "leaving the expert problems, of which he was ignorant, entirely to his experts who possessed the requisite knowledge."[104] Admittedly where the work entrusted to the independent contractor was of such a nature that no particular *expertise* was required, so that it would have been within the competence of the defendant occupier, the duty of care has been held not to be discharged if the independent contractor has been negligent in leaving the premises in a dangerous condition: thus in *Woodward v. Mayor of Hastings*[105] an occupier was held liable for the negligence of a charwoman who left a snow-covered step in a dangerous condition,[106] and in *Bloomstein v. Railway Executive*[107] the Railway Executive was held liable for the negligence of an independent contractor who left the four bolts and nuts of a weighing machine projecting above the pavement, the inference being that no special skill was needed to screw down or recess the four bolts. But *Thomson v. Cremin* goes well beyond this. That it is felt in England to be an unsatisfactory decision is shown (it is submitted) by the fact that section 2 (4) (b) of the Occupiers' Liability Act, 1957,[108] abrogates its effect. The question still arises, however, whether it will be adopted in Australia, under *Piro v. Foster*.[109] My submission is that it, too, should be rejected.[110]

103 [1941] 2 K.B. 343; argued June 11, 12, 13, 16, 17, July 7, 8, 9, 1941: decision July 31, 1941: Thomson v. Cremin argued July 14, 15, 17, 18, 22, 23, 24, 1941: decision October 20, 1941.

104 *Per* Scott L.J., [1941] 2 K.B. 343, at 357.

105 [1945] K.B. 174.

106 "The craft of the charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which the cleaning of a snow-covered step demands" *per* Du Parcq L.J., *ibid.*, at 183.

107 [1952] 2 All E.R. 418.

108 "[W]here damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done." *Quaere,* might the defendant in Thomson v. Cremin not have been liable under a rule formulated thus, if it could reasonably have been said that he ought to inspect the shipwright's work before unloading began?

109 *Supra,* note 82.

110 Since this paper was delivered the report in Green v. Fibreglass Ltd.,

This, however, is a digression: and I must return to my discussion of developments in relation to the occupier's duty to a licensee. Here we find Denning L.J. (together with Somervell and Romer L.JJ.) at another "growing-point" of the law. In October 1951, a Mrs. Hawkins came to visit a friend who lived in a house occupied and controlled by the Coulsdon-Purley Urban District Council. A flight of stone steps led up to the house, and the bottom step (as was recorded on a schedule signed by the Council's surveyor) was broken at one corner. When Mrs. Hawkins came in it was still light, but she did not notice that the steps were broken. When she left, at eight o'clock in the evening, the porch was unlighted and the steps were dark. In the darkness she trod on the broken corner and fell and broke her leg. She claimed damages from the Council on the ground that the broken step constituted a hidden danger or trap of which they were aware—she being a licensee. Pearson J.[111] found for her, finding that the defendant Council, through its officers, knew of the badly broken step and the lack of light; that a reasonable man would have appreciated the risk involved; but that it was not proved that the defendants appreciated the risk involved. The question then arose—could it be said that this was a hidden danger of which the defendant knew?

The case came to the Court of Appeal in 1953.[112] Both Somervell L.J. and Romer L.J. held that it was open to them to apply to the question "did the Council know of the concealed danger?" the objective test, asking first, did the Council know the facts? and second, would a reasonable man knowing the facts recognise the danger? But Denning L.J. went further. In a characteristic judgment he traced the history and development of the law as to licensees and invitees. The process of reasoning therein is interesting. His Lordship pointed out first that a licensee can recover if he is injured by "current opera-

[1958] 3 W.L.R. 71 suggests that it may be possible to treat the remarks in Thomson v. Cremin, which I have criticised, as *obiter dicta*, and to construe the case as not inconsistent with Haseldine v. Daw. See also the remarks of Barrowclough C.J. (at 420-1) and F. B. Adams J. (at 433) in Lyons v. Nicholls [1958] N.Z.L.R. 409. F. B. Adams J. also notes (*ibid.*) that there are passages in Thomson v. Cremin, as well as in London Graving Dock Co. Ltd. v. Horton, [1951] A.C. 737, in which "the liability of an invitor to an invitee is expressed in terms that are far wider than the commonly-accepted rule." He would regard these as *obiter*. With respect, it is not so clear that the remarks in Thomson v. Cremin were strictly *obiter*: for one thing, they appear to have precluded any inquiry whether the insecure shore was an "unusual danger" to a wharf labourer (though appellants' counsel conceded, for another purpose, that it was the first time a shore had fallen as this one did).

111 [1953] 1 W.L.R. 882.

112 [1954] 1 Q.B. 319.

tions"; next, that he can recover if his injury is brought about by a dangerous state of the premises due to a negligent act of *commission.* As an example of this he cited *Corby v. Hill,*[113] in which a heap of slates had been negligently placed on a private road and a visitor driving along at night ran into them and was injured. Then he pointed out that the law as to liability for acts of *omission* which injured licensees, which had begun by analogy with the law regarding injuries to servants, had within ten years been put on a fresh basis, this time an analogy with the law relating to gifts of chattels which turned out to be defective (*Gautret v. Egerton*[114]). The law regarding liability for such gifts had changed since *Donoghue v. Stevenson,* so that, for example, a manufacturer who sent out gift cakes of soap to the public would be liable if, through negligence in manufacture, the soap injured a user, though he (the manufacturer) did not know of its harmful character. Therefore, he concluded the law regarding licensees should change in sympathy with this. Putting that argument on one side, however, His Lordship next suggested that there was no longer any valid distinction between acts of commission and acts of omission: for example *Corby v Hill*[115] (which involved an act of commission) could equally well have been founded on failure to light the heap of slates, and thus on an act of omission. Though this departed from the principle of *Gautret v. Egerton*[116] there were many cases in which no such distinction had been drawn; he instanced the cases of infant trespassers who had become licensees by being allowed to come on the land and had been injured by failure to take precautions. Denning L.J. next cited *dicta* in the judgments of the Lords in *Fairman v. Perpetual Investment Building Society*[117] to the effect that the landlord was bound not to expose Miss Fairman to a hidden peril of the existence of which he knew or ought to have known.[118] "Ought to have known", His Lordship explained, meant what he (the landlord) actually knew, even though he did not know it was a danger, if the reasonable man would have known that it was. He then added that in the term "actual knowledge" he intended to include "presumed knowledge", for "an occupier oblivious of what is happening under his eyes is in

113 (1858) 4 C.B. (N.S.) 556, 140 E.R. 1209.

114 (1867) L.R. 2 C.P. 371 (Willes J.).

115 *Supra,* note 113.

116 *Supra,* note 114.

117 [1923] A.C. 74.

118 *Ibid.,* at 86 (*per* Lord Atkinson); at 96 (*per* Lord Wrenbury): Denning L.J. also cited *dicta* of Lord Hailsham L.C. in Robert Addie and Sons (Collieries) Ltd. v. Dumbreck, [1929] A.C. 358, at 365 ([1954] 1 Q.B. 319, at 335).

no better position than a man who looks after his property."[119] As authority for this he cited *Ellis v. Fulham Borough Council*[120] (the case of the broken glass in the negligently-raked paddling pool) for the proposition that what an occupier would have known but for his own negligence is to be imputed to him. Finally Denning L.J. concluded that as a result of these separate developments there is little difference left between the occupier's duty to a licensee and his duty to an invitee, and that his duty may now be described as a duty to every person lawfully on the premises to take reasonable care to prevent damage from the dangerous condition of the premises.

This is certainly the state of the law which the Occupiers' Liability Act, 1957, has sought to bring about.[121] But is it completely accurate as a statement of English law as at 31st December 1957 (the law with which Australian courts will continue to be concerned)? My submission is that it goes a little too far, and that a better view of the position just before the Act came into force is that the occupier is liable to the licensee only for concealed dangers (i.e. the facts which constituted a concealed danger) of which he in fact knew, or in respect of which he can be fixed with knowledge through his servants' knowledge, whether or not he in fact understood them to be dangers: while he is liable to an invitee for unusual though visible dangers[122]

119 [1954] 1 Q.B. 319, at 336, citing Lord Maugham in Sedleigh-Denfield v. O'Callaghan, [1940] A.C. 880, at 887.

120 [1938] 1 K.B. 212. With respect, I submit that His Lordship's interpretation of this case is too subtle. It was agreed by all members of the Court of Appeal that the Council knew of the danger (i.e. the possibility that there might be glass in the pool) and took no effective steps to remove it. It is rather over-refined to suggest that the danger was in fact the actual presence of the piece of glass which the workman's rake missed.

121 But the "common [to invitees and licensees] duty of care" is defined as "a duty to take such care as in all the circumstances of the case is reasonable" . . . (sec. 2 (2)): *quaere*, will it be held that the title by which the visitor enters (i.e. whether he would formerly have been an invitee or a licensee) is a relevant circumstance? See Payne, *The Occupiers' Liability Act*, (1958) 21 MOD. L. REV. 359, at 363-4.

122 An unusual danger need not be, though it often may be, concealed: *cf.* Lord Normand in London Graving Dock Co. Ltd. v. Horton, [1951] A.C. 737, at 753. "[A] gangway which is reasonably safe for stevedores and which is no unusual danger for them, may well be an unusual danger for another class of workman or for members of the public generally." What was in Lord Normand's mind was undoubtedly the kind of gangway described in a passage from the judgment of Phillimore L.J. in Norman v. Great Western Railway Co. ([1915] 1 K.B. 584, at 596) quoted by him, *ibid.*, at 752: "a gangway consisting of a plank without a handrail." This could not be called a "concealed" danger.

of which he ought as a reasonable man to have known even though he did not.[123]

Finally, in relation to this field of the law, I would notice the effect of the decision in *Ashdown v. Samuel Williams and Sons Ltd.*[124] In *Indermaur v. Dames,* Willes J. suggested that the reasonable care which the occupier must take to prevent damage from unusual dangers might be by notice, lighting, guarding or otherwise.[125] It has, I think, been assumed that the notice (or warning) must be in sufficiently specific terms and of the precise danger.[126] In *Ashdown's Case* the plaintiff (a licensee) was crossing the premises occupied by the defendants, in order to get to her place of employment, when she was injured by the negligence of servants of the defendants, who were carrying out shunting operations. There was, close to the path which she took, a large notice[127] warning those who read it that every person, whether an invitee or otherwise, was on the property at his own risk, was deemed to have notice of the nature, condition, and state thereof, and would have no claim against the occupier in respect of the condition of the premises or their servants' negligence. Plaintiff had not read the whole notice, but she had read enough to appreciate that it said she would be on the property at her own risk.[128] It will be noticed that the plaintiff gained from the notice no appreciation of the precise

123 *Cf.* the discussion in SALMOND ON TORTS (12th ed. by Heuston (1957)) 507-10.

124 [1957] 1 Q.B. 409.

125 (1866) L.R. 1 C.P. 274, at 288.

126 Heuston, in SALMOND ON TORTS, 12th ed. (1957) 501, note 32 points out that Indermaur had been cautioned by his superior to keep his eyes open, and suggests that this (*plus* perhaps the injunction to keep close to the superior) disentitled him to recover. But (1) the warning was not given by Dames or on his behalf, nor was there evidence that he knew of it (2) it is doubtful whether it was sufficient to tell Indermaur what to guard against. *Cf.* FLEMING, THE LAW OF TORTS, (1957) 448: "[S]uppose, for example, a gasfitter was called in by a factory owner to trace and mend a leak in a pipe as a matter of urgency, would the occupier's duty of protection to him be adequately discharged by giving warning that the floors were rotten and might in places let a man through if he trod on them?" Suppose however, that the warning gave specific indication of the rotten places; that would surely be sufficient.

127 "Large" in more senses than one; the wording of the notice relied on by defendants occupies 18 lines of the Law Reports: Jenkins L.J. described it as "somewhat verbose", but added that what it was intended to convey would be clear to any reasonable person: [1957] 1 Q.B. 409, at 422.

128 The extracts from the notes of plaintiff's evidence contained in the judgment of Jenkins L.J. (*ibid.,* at 423-4) go far to confirm a long-standing belief of my own that the majority of people either do not bother to read notices at all (probably because they think the notice has nothing to say to them) or, if they do read a notice, conclude that the contents are not addressed to them, or perhaps that even if it does appear to be addressed to them it does not mean what it says.

danger by which she was injured;[129] nor did the notice itself specify any particular in which the condition of the property might be defective or dangerous. The plaintiff was held disentitled to recover, however, not on the ground that the occupier by his notice had taken reasonable care to prevent damage to her, but on the ground that the notice imposed conditions on her licence to cross the land, and that defendant had taken all reasonable steps to bring those conditions to the notice of the licensee. It seems clear that an occupier could at common law equally effectively impose similar conditions upon an invitee[130] and section 2 (1) of the Occupiers' Liability Act, 1957, preserves this power. One result of the decision in *Ashdown's Case* may well be that a rash of notices will appear, on all types of premises, seeking to exclude or modify occupiers' liability, and members of the profession may well find themselves advising with more frequency on the sufficiency of the notices and on the adequacy of the steps to be taken to bring the conditions before the licensee or invitee. They will find some assistance from the speeches in *Ashdown's Case* and the decisions referred to therein, tempered however by the chilling realisation that the sufficiency and reasonableness of such steps will ultimately depend on the facts of each particular case.[131]

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129 But both Singleton L.J. (*ibid.*, at 420) and Parker L.J. (as he then was) (*ibid.*, at 430) point out that plaintiff knew that the land was intersected by railway lines and that shunting took place on the land. The latter observed, however: "Where, for instance, an occupier of land used as a shooting school desires to exclude liability for negligent shooting, he may well have to bring to the knowledge of the proposed licensee that the land is so used" because the effectiveness of the exemption clause in any particular case may depend on what the licensee knows as to the user (and perhaps one might add, as to the condition) of the land.

130 *Quaere,* as to persons entering "as of right"—see SALMOND ON TORTS (12th ed. by Heuston (1957)), 483, note 47. Here it may be necessary to draw a distinction, e.g., between persons entering in exercise of a power or duty and members of the public entering on public premises (*ibid.*, 511-3). It may be held possible to exclude liability to the latter but not to the former.

131 For a trenchant criticism of the decision at first instance, which was upheld by the Court of Appeal, and a discussion of some of the possibilities and difficulties, see L. C. B. G[ower] *A Tortfeasor's Charter?*, (1956) 19 MOD. L. REV. 532. An interesting question was raised, in the discussion following this paper, concerning the language in which such notices were couched: in an area largely peopled by New Australians, would it be sufficient to put up a notice in English, or should any such notice be bi- or even multilingual; and if the latter, according to what criteria should the languages be selected?

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