

THE HISTORICAL FOUNDATIONS OF THE DUTY OF CARE

JAMES C PLUNKETT*

The duty of care serves a valuable function in the law of negligence: it specifies when damage caused by another's carelessness becomes actionable. This article explores how this valuable function, central to the analysis of liability for negligence, came to be served by the idea of a 'duty of care'. The article first traces the evolution of the duty of care from its earliest beginnings to the point at which it became fixed as an element of the developing action for negligence. The article then explores the judiciary's development and articulation of the duty concept. In particular, it examines how the courts developed tests for the scope and content of a duty, how it came to be a duty of care, and how the existence of such a duty came to be based on the idea of foreseeability.

I INTRODUCTION

The Romans never knew of a 'duty of care', nor would any such concept be familiar to modern Continental lawyers.¹ Within the common law, however, the duty of care plays an important role. Indeed, the presence or absence of a duty of care determines the outcome of many actions for negligence; has been, and continues to be, the subject of extensive judicial analysis in appellate courts; is frequently devoted numerous chapters in tort law textbooks, whilst other torts are rarely assigned more than one;² and, for much of the last century, has been the subject of considerable academic discourse, being central to, for example,

* DPhil Candidate, Christ Church, University of Oxford. I am extremely grateful to Donal Nolan, Mark Lunney, Roderick Bagshaw, Ken Oliphant, and the anonymous reviewers for their valuable comments on earlier drafts. The usual caveat applies.

1 Percy H Winfield, 'Duty in Tortious Negligence' (1934) 34 *Columbia Law Review* 41, 58; David Ibbetson, 'How the Romans Did for Us: Ancient Roots of the Tort of Negligence' (2003) 26 *University of New South Wales Law Journal* 475, 509. This is not to say that functionally similar mechanisms did/do not exist (see, eg, §823(1) of the German Civil Code, and the discussion in F H Lawson, 'The Duty of Care in Negligence: A Comparative Study' (1947) 22 *Tulane Law Review* 111), only that they are conceptually distinct from a discrete element of a negligence enquiry and play a much more limited role.

2 W E Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (Sweet and Maxwell, 19th ed, 2014), for example, dedicates 65 of 832 pages to a discussion of duty; Christian Witting, *Street on Torts* (Oxford University Press, 14th ed, 2015) dedicates three chapters and 90 of 727 pages, whilst Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (Oxford University Press, 5th ed, 2013) dedicates four chapters and 240 of 970 pages, approximately 25% of the entire text, to duty. In each case, duty is devoted more pages than any individual torts (other than negligence, of course), and in most cases more pages than the remaining discussion on negligence (breach, causation, remoteness, and defences).

many modern rights-based theories of private law.³ So how is it, then, that this device, eschewed by both the Romans and modern Civil lawyers, came to occupy such a vital position within the common law, acting as an ‘essential element’⁴ in negligence actions by playing an ‘indispensable’⁵ and ‘necessary’⁶ role? Answering this question is the aim of this article.

The article begins by providing an overview of how the duty of care first came to be an element of the negligence enquiry.⁷ The article then moves on to the important period between the late-19th and early-20th century, about which surprisingly little has been written at all, during which a general conception of the duty of care, with which we are familiar today, was sought, and eventually achieved. By exploring the history of the duty of care, it is hoped that some light may be shed on the often unchallenged assumptions about the nature and place of duty in the modern negligence enquiry.

The focus of this article is, inevitably, English law. Of course, the study of English legal history can be just as beneficial to Australians as it is to the English. Indeed, as Kirby once noted: ‘Do not tell me that the Plantagenets matter not to us in Australia. Or that the clanking chains of English legal history can be ignored by contemporary Australian lawyers.’⁸ This is especially true of the duty of care, which has been embraced in Australia with just as much enthusiasm as it has been in England.

II THE BEGINNINGS OF THE DUTY OF CARE

The term ‘duty’ has been used for centuries, and it is not unusual to find obligations described as ‘duties’ in medieval cases; a ‘duty’ to keep one’s fire safely, for example, can be traced back to the early 15th century.⁹ However, prior to the emergence of an independent action for negligence, ‘duty’ was little more than a word, and played no analytical role in the determination of questions of liability. Indeed, ‘negligence’, too, was little more than a word under the early common law, merely being a way in which a number of discrete wrongs could

3 See, eg, John C P Goldberg and Benjamin C Zipursky ‘The Moral of MacPherson’ (1998) 146 *University of Pennsylvania Law Review* 1733; John C P Goldberg and Benjamin C Zipursky, ‘The Restatement (Third) and the Place of Duty in Negligence Law’ (2001) 54 *Vanderbilt Law Review* 657, 692–751; David Owen, ‘Duty Rules’ (2001) 54 *Vanderbilt Law Review* 767, 785; Nicholas J McBride, ‘Duties of Care: Do They Really Exist?’ (2004) 24 *Oxford Journal of Legal Studies* 417. Cf Donal Nolan, ‘Deconstructing the Duty of Care’ (2013) 129 *Law Quarterly Review* 559, 563.

4 Peel and Goudcamp, above n 2 [5-006].

5 R W M Dias, ‘The Duty Problem in Negligence’ [1955] *Cambridge Law Journal* 198, 204.

6 Lawson, above n 1, 112.

7 It is true that others have written on the early history of duty, though few have focussed on duty specifically, instead examining the history of the law of negligence more generally, whilst those who have focussed on duty specifically, have tended to confine their analyses to a relatively narrow period of time.

8 Michael Kirby, ‘Is Legal History Now Ancient History?’ (2009) 83 *Australian Law Journal* 31, 41.

9 *Beaulieu v Finglam* (1401) in Sir John Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2nd ed, 2010) 610.

be committed; a ‘pleader’s adverb’¹⁰ rather than a wrong in itself. For example, actions were available for: the negligent performance of an undertaking;¹¹ the negligent non-performance of an undertaking;¹² the negligent loss of control of dangerous forces, such as fires,¹³ animals,¹⁴ or water;¹⁵ and the negligent causing of harm through the application of force to the plaintiff’s land, goods or person.¹⁶ Without any suggestion that negligence itself gave rise to liability outside of these discrete situations, a duty of care type device was hardly needed, as the discrete situations in which negligence was an ingredient served the same purpose as the modern duty of care: to identify those situations in which the law imposed an obligation to avoid negligently causing damage to another.

By the end of the 17th century, however, negligence was coming to be seen as the basis for an independent wrong in itself, based on the defendant’s failure to take reasonable care.¹⁷ Indeed, by 1700 plaintiffs were arguing that ‘a man shall be answerable for all mischief proceeding from his neglect or his actions, unless they were of unavoidable necessity’,¹⁸ and, by the middle of the century, a chapter of the influential textbook *An Institute of the Law Relative to Trials at Nisi Prius* which was titled ‘Of Injuries Arising from Negligence or Folly’,¹⁹ suggested that:

Every man ought to take reasonable care that he does not injure his Neighbour; therefore wherever a Man receives any Hurt through the

- 10 Vernon Palmer, ‘Why Privity Entered Tort — An Historical Reexamination of *Winterbottom v Wright*’ (1983) 27 *American Journal of Legal History* 85, 87. In addition to ‘negligently’, adverbs such as ‘improvidently’, ‘unskilfully’, ‘carelessly’ were also used to describe the defendant’s conduct: J H Baker, ‘Trespass, Case, and the Common Law of Negligence, 1500–1700’ in Eltjo J H Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker & Humblot, 2001) 47, 53.
- 11 *Bukton v Tounesende* (1348) in Baker, *Sources of English Legal History*, above n 9, 399 (more commonly known as the ‘Case of the Humber’ or the ‘Humber Ferry Case’).
- 12 *Somerton v Colles* (1433) in Baker, *Sources of English Legal History*, above n 9, 427; *Shipton v Dogge* [No 2] (1442) in Baker, *Sources of English Legal History*, above n 9, 434 (also known as ‘Doige’s Case’).
- 13 *Beaulieu v Finglam* (1401) in Baker, *Sources of English Legal History*, above n 9, 610; *Critoft v Emson and Nicols* (1506) CP 40/978, m. 320 in Baker, *Sources of English Legal History*, above n 9, 619 n 41; *Anon* (1582) in Baker, *Sources of English Legal History*, above n 9, 624; *Turberville v Stampe* (1697) 12 Mod 152; 91 ER 1072.
- 14 *Beneyt v Brokkere* (1358) cited in Robert C Palmer, *English Law in the Age of the Black Death, 1348–1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993) 239, 371; *Mason v Keeling* (1700) 1 Ld Raym 606; 91 ER 1305. The action, known as *scienter* (knowingly), was used where the claimant had knowingly retained an animal with dangerous propensities.
- 15 *Stapleton v Snayth* (1354) YB Pas 19, 32b-33a, [49] cited in Palmer, *English Law in the Age of the Black Death: 1348-1381*, above n 14, 398 and A K Kiralfy, *The Action on the Case* (1951), 210; *Guybon v Palmer* (1516) cited in Baker, ‘Trespass, Case, and the Common Law of Negligence’, above n 10, 62 n 66; *Abbot of Stratford v Hubbulthorn* (1529) cited in Baker, ‘Trespass, Case and the Common Law of Negligence’, above n 10, 62 n 66.
- 16 The action, trespass *vi et armis*, despite having no *formal* requirement of fault, nevertheless does not appear to have been actionable in the absence of negligence: Baker, ‘Trespass, Case, and the Common Law of Negligence’, above n 10, 65.
- 17 Many credit this shift as commencing with *Mitchell v Allestry* (1676) 1 Vent 295; 86 ER 190; (1675) 3 Keb 650; 84 ER 932 (though, the exact spelling of the parties’ names varies). See, eg, John H Baker, *An Introduction to English Legal History* (Butterworths, 4th ed, 2002) 411; S F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd ed, 1981); Ibbetson, above n 1, 501–2.
- 18 *Mason v Keeling* (1700) 1 Ld Raym 606, 607; 91 ER 1305, 1306.
- 19 Francis Buller, *An Institute of the Law Relative to Trials at Nisi Prius* (1760).

Default of another, though the same were not wilful, yet if it be occasioned by Negligence or Folly, the law gives him an Action to recover Damages for the injury so sustained.²⁰

This conceptual shift from discrete actions in which negligence was an ingredient to a single action based on negligence alone, however, presented a potentially major problem: whilst other wrongs were confined to a particular interest,²¹ there were no obvious confines on liability for the potentially limitless consequences of negligent behaviour. To modern eyes this might seem to have provided the ideal catalyst for the development of a duty type control device on the otherwise unbounded action for negligence. Yet, this was not the case at all, as, notwithstanding its potential, the early actions for negligence were not common,²² and so there was no immediate need to limit its scope. On the contrary, the idea of duty first emerged not as a way to limit liability for negligence, but to expand it by allowing claims that would fail in contract to be converted to claims that could succeed in tort.

A Duty Enters Relationship Negligence: From Contract to Tort and the Elevation of Duty

Around the same time that negligence was emerging as an independent wrong, so, too, were ‘contract’ and ‘tort’ emerging as distinct legal entities: the former based on obligations arising from private agreements and the latter concerning obligations arising from law.²³ Generally this distinction was unproblematic, as actions based on non-performance of an undertaking were clearly contractual and actions based on the negligent causation of harm independent of any prior relationship were clearly tortious. But what about actions based on the negligent mis-performance of an undertaking, which were clearly ambiguous: should they be based on the breach of an implied term to perform the undertaking with care or on the negligent performance itself?²⁴ This was particularly problematic in actions for negligence that arose from a prior relationship, including those against lawyers, surgeons, carriers, etc.²⁵ were they based in contract or tort? It took the

20 Ibid 35.

21 Private nuisance, for example, was confined to interference with real property.

22 ‘The means were now in place for the development of a distinct tort of negligence; but it did not happen suddenly. By modern standards there appears to have been remarkably little accident litigation.’ Baker, *An Introduction to English Legal History*, above n 17, 411–12.

23 Baker, *An Introduction to English Legal History*, above n 17, 317–18, 401.

24 David Ibbetson, ‘The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries’ in Eltjo J H Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker & Humblot, 2001) 229, 237. Prior to the tort-contract distinction, both the mis-performance and non-performance of an undertaking fell under the action on the case for *assumpsit* (which can be translated as ‘he has undertaken’): Baker, *An Introduction to English Legal History*, above n 17, 338.

25 M J Prichard, *Scott v Shepherd (1773) and the Emergence of the Tort of Negligence: Selden Society Lecture Delivered in the Old Hall of Lincoln’s Inn, July 4th, 1973* (Seldon Society, 1976) 24–25. Of course, where the plaintiff had a special agreement with the defendant he would obviously sue in contract, but often this was not the case.

courts over 100 years to answer this question, and they did so in the context of the liability of the ‘common carrier’,²⁶ which straddled the tort–contract divide almost perfectly.

At the start of the 18th century the liability of common carriers was grounded in the so-called ‘custom of the realm’, the medieval action that imposed strict liability on innkeepers²⁷ and, later, carriers.²⁸ Over time, however, the custom of the realm came to be seen as nothing but part of the common law and not to be specifically pleaded,²⁹ so plaintiffs ‘dropped the statement of the custom from the declaration and confined themselves to describing the defendant as a common carrier without more.’³⁰ By the middle of the century, however, actions against carriers for lost goods were being classified as contractual. In *Dale v Hall*,³¹ for example, the court held that a ‘promise to carry safely, is a promise to keep safely’.³² The same conclusion was reached more explicitly in *Gibbon v Paynton*: ‘The true principle of a carrier’s being answerable is the reward’.³³ By the later part of the century, however, the courts changed their minds again, and in *Forward v Pittard*,³⁴ the contractual basis of the carrier’s liability was put in doubt:

It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer.³⁵

Although the courts were unable to make up their minds about the true basis of the carrier’s liability, as long as plaintiffs suffered no procedural advantage in either tort or contract, the source of liability was not of paramount importance.

By the start of the 19th century, however, procedural differences between contract and tort were emerging. Perhaps most significantly, the rules of joinder were favourable to plaintiffs who sued in tort: in particular, whilst liability in tort was severable, and so a plaintiff could sue any of a group of defendant carriers, liability in contract was joint, meaning all parties to the simple contract of carriage had to be discovered and listed before they could be sued,³⁶ and the acquittal of *any*

26 Ibid 25.

27 *Navenby v Lassels* (1368) in Baker, *Sources of English Legal History*, above n 9, 603 (also known as *Navenby v Lascells* (1368); see Baker, *An Introduction to English Legal History*, above n 17, 408).

28 *Rich v Kneeland* (1613) in Baker, *Sources of English Legal History*, above n 9, 614–15. See also William Selwyn, *An Abridgement of the Law of Nisi Prius* (4th ed, 1817) 378–80.

29 Prichard, above n 25, 26.

30 Ibid.

31 (1750) 1 Wils KB 281; 95 ER 619.

32 Ibid 282, 620 (Lee CJ). See also James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (University of North Carolina Press, 1992) vol 2, 1118.

33 (1769) 4 Burr 2298, 2302; 98 ER 199, 201.

34 (1785) 1 TR 27; 99 ER 953.

35 Ibid 33; 956.

36 Prichard, above n 25, 27; D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 171–2.

of the co-defendants would be fatal to the plaintiff's claim.³⁷ Actions in tort also had a potentially longer limitation period³⁸ and were thought to entitle a plaintiff to higher damages.³⁹ To avoid the procedural disadvantages associated with contract, plaintiffs who had suffered an injury in the course of the negligent mis-performance of a contract therefore began to formulate their declarations in tort. But how could they justify this? How did plaintiffs distinguish between a claim in tort and a claim in contract? They could not base their claim on the older action on the case for *assumpsit*, as *assumpsit* had recently come to be identified with consideration and so was too closely connected to the promise itself. They could also not base their claim on the custom of the realm as it was no longer being pleaded.⁴⁰ Instead, plaintiffs distinguished between actions in tort and contract by defining the source of the defendant's 'duty':⁴¹

The nineteenth century witnessed an increasing recognition that the main division within the law of obligations was that between contract and tort ... Given this division some distinguishing criterion was essential, but ... none could be found within the earlier common law. Moreover, since it was well established that in a wide range of cases a tortious action could be brought for the negligent performance of a contractual duty it was no solution simply to say that an action was contractual whenever there was a relevant contract between the parties. The most straightforward test was to analyse both contractual and tortious obligations as arising out of breaches of duties, and to say that the duty in contract arose out of the agreement of the parties while the duty in tort arose by operation of law.⁴²

Unsurprisingly, plaintiffs' attempts to use 'duty' as a tool by which they could circumvent the formalities of a claim in contract were contested by defendants. Initially, the courts sided with the defendants and insisted that, despite the plaintiff's allegations of a 'duty' in tort, the cause of action against a common

37 Prichard, above n 25, 27; Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 171–2.

38 In contractual actions the limitation period commenced at the point of the breach, whereas in tort it commenced at the time of the injury. See *Battley v Faulkner* (1820) 3 B & Ald 288; 106 ER 668; *Dyster v Battye* (1820) 3 B & Ald 448, 106 ER 727; *Fraser v Swansea Canal Navigation Co* (1834) 1 Ad & El 354, 110 ER 1241. See also Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 172.

39 Palmer, 'Why Privity Entered Tort', above n 10, 89.

40 According to Prichard, it was also 'too cumbersome an allegation to develop into any kind of generalised test': Prichard, above n 25, 31.

41 Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries', above n 24, 237.

42 David Ibbetson, "'The Law of Business Rome': Foundations of the Anglo-American Tort of Negligence' (1999) 52(1) *Current Legal Problems* 74, 88. See also Winfield, above n 1, 65:

In the first half of the nineteenth century contract and tort were slowly being disentangled, and negligence had gradually come into existence as an independent tort (in addition to retaining its old meaning of a mode in which a wrongful act might possibly be committed). In the process of separating contract from tort and in the development of the tort of negligence, a confused notion about *assumpsit* became the germ of the duty idea. It was thought that, as *assumpsit* in contract always showed an "undertaking" of liability, therefore liability in tort must show something equivalent to it, i.e., 'duty'...

carrier was always contractual.⁴³ Yet, in *Govett v Radnidge*,⁴⁴ where the defendant carrier negligently staved a hogshead of treacle as they were loading it, the King's Bench held that the plaintiff was entitled to sue in tort:

What inconvenience is there in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire.⁴⁵

The court affirmed its position in *Ansell v Waterhouse*, a case in which a stagecoach proprietor received the plaintiff's wife to be carried safely 'yet the defendant not regarding his duty in this behalf conducted himself so carelessly, negligently and unskillfully...' that the coach was overturned and the plaintiff's wife 'was greatly injured &c'.⁴⁶ Despite the defendant arguing that the plaintiff was required to sue in contract, and so locate and join all 16 other proprietors of the stagecoach as co-defendants, the plea was rejected and the plaintiff was permitted to proceed in tort.⁴⁷ In *Bretherton v Wood*⁴⁸ the Court of Exchequer Chamber affirmed that an action against a common carrier could be grounded purely in tort: 'A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it'.⁴⁹

In the following years, other cases of negligence arising from a prior relationship also came to be grounded in tort.⁵⁰ In *Boorman v Brown*,⁵¹ for example, the Court of Exchequer held that a broker owed a duty to his client because 'the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort'.⁵² And so by the end of the first quarter of the 19th century actions for negligence against those in prior relationships were able to be based in tort and rested upon the defendant's 'duty' arising from law.

B Duty Enters Non-Relationship Negligence

The start of the 19th century saw a significant increase in the number of negligence claims brought before the courts. Winfield attributes the rise to 'industrial machinery. Early railway trains, in particular, were notable neither for speed nor for safety. They killed any object from a Minister of State to a wandering cow,

43 Prichard, above n 25, 27–28.

44 (1802) 3 East, 62; 102 ER 520.

45 Ibid 70; 523 (Lord Ellenborough CJ).

46 (1817) 6 M & S 385; 105 ER 1286.

47 Ibid. See also Prichard, above n 25, 28.

48 (1821) 3 Brod & Bing 54; 129 ER 1203.

49 Ibid 62; 1206. See also Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 172.

50 Prichard, above n 25, 28.

51 (1842) 3 QB 511; 114 ER 603.

52 Ibid 527; 609 (Tindal CJ). This sweeping statement, 'open to the objection that it made every breach of contract into a tort', was soon scaled down: Palmer, 'Why Privity Entered Tort', above n 10, 91.

and this naturally reacted on the law'.⁵³ Whatever the cause, the increase in claims forced the courts to offer further guidance as to the proper scope and limits of negligence actions. Although negligence actions arising from prior relationships had come to rest on the idea of the negligent breach of a tortious duty, duty did not yet play an explicit role in the determination of liability for negligence in non-relationship cases. This, however, soon began to change as the language of duty eventually permeated actions for non-relationship negligence.

As had been the case with relationship negligence, initially the language of 'duty' was only used by plaintiffs. In *Daniels v Potter*,⁵⁴ for example, the plaintiff was injured when he was struck by the defendants' cellar flap as he was walking in the street. In his declaration the plaintiff alleged that

it was the duty of the defendants so to place the flap as not to injure any of the king's subjects passing along the highway; and that they, not regarding their duty, so negligently, carelessly, and improperly placed it, that, by reason of their negligence, it fell upon the plaintiff and injured him.⁵⁵

Shortly thereafter, in *Luxford v Large*,⁵⁶ a plaintiff sued a defendant shipowner for negligently sailing his steamship in such a way that it created a large swell in the River Thames, which filled and sank the plaintiff's boat. Again, the plaintiff described the defendant's negligence as consisting of a breach of duty ('not regarding his duty, &c.').⁵⁷ Then, in *Drew v The New River Co*,⁵⁸ the plaintiff alleged that by reason of the defendants being

about to perform certain works respecting certain water-pipes of theirs under the pavement of a public footway ... thereupon it became *the duty of the defendants*, by their workmen and servants, to use due and proper care and precaution in performing the said work, and laying and depositing the said stones, &c., so that the King's subjects might not be injured thereby ...⁵⁹

53 Percy H Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 *Law Quarterly Review* 184, 195. For a more detailed overview of the societal background see also: W R Cornish and G de N Clark, *Law and Society in England 1750–1950* (Sweet & Maxwell, 1989) 483–4: 'Transport provided the most dramatic evidence of increasing risk. The improvement of eighteenth century roads through turnpike trusts and new techniques of construction brought a growth of road traffic that constantly threatened the very advances. Yet speeds increased: from 4–5 mph in mid-century to 10–14 mph by 1830'; Donal Nolan, 'The Fatal Accidents Act 1846' in T T Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 127, 135–7. See also Baker, *An Introduction to English Legal History*, above n 17, 412, who notes that '[t]he apparent explosion in the number of negligence cases ... is in part an illusion caused by the beginning of nisi prius reporting in the 1790s. Nevertheless, there does appear to have been an increase in the number of cases.'

54 (1830) 4 C & P 262; 172 ER 697.

55 *Ibid* 265; 698 (Wilde Serjt) (during argument).

56 (1833) 5 C & P 421; 172 ER 1036.

57 *Ibid* 422; 1036.

58 (1834) 6 C & P 754; 172 ER 1449.

59 *Ibid* 754; 1449 (emphasis added). See also Prichard, above n 25, 42.

The year 1837, however, marked a ‘turning point’,⁶⁰ as both defendants and judges, rather than just plaintiffs, began to adopt the language of duty, with judges even using the idea of duty to determine questions of liability. The first such case appears to be the well-known *Vaughan v Menlove*,⁶¹ where the defendant’s carelessly constructed hayrick had caught fire and burned down the plaintiff’s nearby house. In response to the plaintiff’s declaration that the defendant had not been ‘regarding his duty’,⁶² the defendant denied liability using the same language as the plaintiff:

there was no duty imposed on the Defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence: the Defendant had a right to place his stack as near to the extremity of his own land as he pleased ...⁶³

Vaughan J, however, rejected the defendant’s submission on the basis that ‘every one takes upon himself the duty of so dealing with his own property as not to injure the property of others’.⁶⁴

Later the same year was the case of *Langridge v Levy*.⁶⁵ The defendant had sold a gun to the father of the plaintiff, and falsely represented that the gun was ‘good, safe, and secure’.⁶⁶ However, after the father gave the gun to his son, the plaintiff discharged it and was injured when the gun ‘burst and exploded’ in his hands.⁶⁷ As the plaintiff could not argue that he was a party to the contract of sale it was instead argued that liability arose by reason of a breach of the defendant’s duty: ‘The law imposes on all persons who deal in dangerous commodities or instruments, an obligation that they should use reasonable care’.⁶⁸ The defendant, however, disputed this: ‘no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise’.⁶⁹ The court agreed with the defendant, as to uphold the widely expressed duty formulated by the plaintiff would

lead to that indefinite extent of liability ... [and] would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby.⁷⁰

60 Winfield, ‘Duty in Tortious Negligence’, above n 1, 51.

61 (1837) 3 Bing NC 468; 132 ER 490.

62 *Ibid* 469; 491.

63 *Ibid* 472; 492.

64 *Ibid* 477; 494.

65 (1837) 2 M & W 519; 150 ER 863.

66 *Ibid* 519, 863. The court held that it was, in fact, ‘a bad, unsafe, ill-manufactured and dangerous gun’.

67 *Ibid*.

68 *Ibid* 525; 866.

69 *Ibid* 521; 864.

70 *Ibid* 530; 868.

Notwithstanding the court's rejection of the plaintiff's submissions on duty, it nevertheless found for him on the grounds of deceit: the defendant had warranted the gun to be safe, which it was not, and this was fraudulent misrepresentation.⁷¹

Duty was again the determining factor in the famous and much-discussed case of *Winterbottom v Wright*.⁷² The Postmaster-General had contracted with the defendant to provide a mail coach, and, separately, with the plaintiff's employer to horse the coach and to provide a driver. The plaintiff, who was employed to drive the coach, was injured when he was thrown from the coach after its wheel fell off, the result of the defendant failing to maintain the coach as he was required to do under his contract with the Postmaster-General. As the carriage had been provided by the defendant under contract to the Postmaster-General, there was no contract between the plaintiff and the defendant. The plaintiff therefore alleged that the defendant owed him a 'duty' by virtue of his contract with the Postmaster-General to 'keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid'.⁷³ The court, however, found that no such duty existed, as to allow the plaintiff to be owed a duty based on a contract to which he was not a party

might be the means of letting in upon us an infinity of actions ... [and unless] we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.⁷⁴

Although the basis for the denial of a duty has been the subject of much discussion,⁷⁵ it was nevertheless the lack of a relevant duty that determined the question of liability.

By the middle of the 19th century, then, the idea of duty was being used to explain liability in cases of both relationship and non-relationship negligence alike. Nevertheless, there was no sudden assertion of a duty in *every* negligence claim or any dramatic change in the style of pleadings;⁷⁶ duty was still only being used in an ad hoc manner to bolster claims, rather than because it was required. However, now that the language of duty had become commonplace, it was only 'a very short step from this to say that negligence is not actionable *unless* there is a duty to take care'.⁷⁷

C Duty as an Element of the Action for Negligence

Despite the language of duty being used in relationship negligence since the very early 19th century and non-relationship negligence since the 1830s, it was not

71 Ibid 531–2; 868–9. See also Winfield, 'Duty in Tortious Negligence', above n 1, 53.

72 (1842) 10 M & W 109; 152 ER 402.

73 Ibid 109; 403.

74 Ibid 113–14, 404–5 (Lord Abinger CB).

75 Palmer, 'Why Privity Entered Tort', above n 10.

76 Prichard, above n 25, 33.

77 Winfield, 'Duty in Tortious Negligence', above n 1, 54 (emphasis in original).

until the second half of the century that judges began to insist that a duty of care was a *necessary* ingredient in cases of negligence. One of the earliest such cases appears to have been *Degg v Midland Railway Company*,⁷⁸ where Bramwell B held, ‘There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person... there can be no action except in respect of a duty infringed...’⁷⁹ The position was forcefully affirmed in 1860 by Erle CJ in *Marfell v The South Wales Railway Co.*⁸⁰

The undefined latitude of meaning in which the word ‘negligence’ has been used, appears to me to have introduced the evil of uncertain law to a pernicious extent; and I think it essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence.⁸¹

And in 1862 Wilde B insisted in *Swan v The North British Australasian Co (Ltd)*⁸² that ‘[t]he action for negligence proceeds from the idea of an obligation towards the plaintiff to use care, and a breach of that obligation to the plaintiff’s injury’.⁸³ The insistence on a duty of care was soon seen in other cases,⁸⁴ and Wilde B’s definition was incorporated into Addison’s 1864 edition of *A Treatise on the Law of Torts*.⁸⁵ What, however, was the motivation for this significant change? It seems that the elevation of the importance of duty of care in liability for negligence was the result of a number of factors.⁸⁶

As we have already seen, the concept of duty allowed courts to distinguish between the bases of contractual and tortious obligations. As Ibbetson explains:

the most straightforward test was to analyse both contractual and tortious obligations as arising out of breaches of duties, and to say that the obligation in contract arose out of the agreement of the parties while the duty in tort arose by operation of law ... [and] More importantly for the present investigation, it provided a further stimulation to conceive of liability in tort in general as deriving from the breach of a legal duty, and liability in negligence in particular as deriving from the breach of a duty of care.⁸⁷

78 (1857) 1 H & N 773; 156 ER 1413.

79 Ibid 781–2, 1416.

80 (1860) 8 CB(NS) 525; 141 ER 1271.

81 Ibid 534; 1275.

82 (1862) 7 H & N 603; 158 ER 611.

83 Ibid 636; 625.

84 See, eg, *Cox v Burbidge* (1863) 13 CB(NS) 430, 436; 143 ER 171, 173 (Erle CJ) (‘[there had to be] some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff’); *Grill v The General Iron Screw Collier Co (Ltd)* (1866) LR 1 CP 600, 612 (Willes J) (‘[negligence] is really the absence of such care as it was the duty of the defendant to use’). See also William Cornish et al, *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol 12, 923.

85 C G Addison, *Wrongs and their Remedies, Being A Treatise on the Law of Torts* (V and R Stevens, Sons, and Haynes, 2nd ed, 1864) 15.

86 Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 170–4; Ibbetson, ‘The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries’, above n 24, 235–41.

87 Ibbetson, ‘The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries’, above n 24, 238.

Ibbetson also points to the tendency in the 19th century to equate negligence with neglect, such that doing something badly (misfeasance) was seen as a different type of wrong to neglecting to do something that was required (negligence). The analysis of liability in terms of a neglect or breach of a duty, however, explained liability for acts as well as omissions:⁸⁸ negligence was the omission to do something you had a duty to do, or the doing of something you had a duty not to do.

The duty–breach structure was also convenient as it not only mirrored the historic twofold structure of the action on the case, which required the plaintiff to set out the facts of their action that gave rise to the defendant’s particular obligation as well as the way in which the obligation had wrongfully been breached,⁸⁹ but also provided a simple way to explain why liability attached to some types of negligent conduct but not others; in the former there was a duty to take care and in the latter there was not.⁹⁰ The shift also appears to have been influenced, albeit on a higher level of generality, by the passing of the *Common Law Procedure Act 1852*, which abolished the forms of action and thereby prompted a more ‘scientific treatment of principles’ of common law.⁹¹

However, perhaps the most significant reason for the adoption of an analysis of liability based on the breach of a duty was that it allowed judges to have more control over the open-endedness of the early law of negligence. In particular, without any limitation on recoverability for carelessly caused harm, there was a considerable expansion in claims for negligence in the first half of the 19th century,⁹² and judges soon became concerned about ‘the fact that juries were willing to give damages on the merest suggestion that defendants — particularly railway companies — had been negligent’.⁹³ In *Wilkinson v Fairrie*,⁹⁴ for example, although the defendant directed the plaintiff into an unlit passage where he fell down an open stairwell, the plaintiff’s claim was abruptly rejected on the basis that ‘if he could see his way, the accident was the result of his own negligence; if he could not ... he ought not to have proceeded without a light’.⁹⁵ By insisting on the existence of a duty, and then formulating that duty as they saw fit, judges were

88 Ibbetson, “‘The Law of Business Rome’”: Foundations of the Anglo-American Tort of Negligence’, above n 42, 87–8; Ibbetson, ‘The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries’, above n 24, 236.

89 The older writs generally adopted the syntactical structure ‘whereas X, nevertheless, Y’. As Birks explains, ‘The whereas clauses thus supplied the relevant background and, in particular, advanced some basis for the defendant’s being under a legal duty to the plaintiff to behave differently from the dreadful way in which the ‘nevertheless’ sentence then reveals that he did behave’: Peter Birks, ‘Negligence in the Eighteenth Century Common Law’ in Eltjo J H Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker & Humblot, 2001) 173, 186. See also Ibbetson, ‘How the Romans Did for Us: Ancient Roots of the Tort of Negligence’, above n 1, 511–12.

90 Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 171.

91 Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens and Sons, 1887) vii.

92 Cornish et al, *The Oxford History of the Laws of England*, above n 84, 921–2.

93 *Ibid* 923.

94 (1862) 1 H & C 633; 158 ER 1038.

95 *Ibid* 634; 1038 (Pollock CB following Bramwell B in the court below).

able to exercise far greater control over questions of liability.⁹⁶ Indeed, the more precisely the judges defined the duties, the more control they had, as they could remove cases from juries altogether where they believed the relevant duty did not exist. In *Collis v Selden*,⁹⁷ for example, a plaintiff was injured when a chandelier, negligently hung by the defendant, fell on him. Rather than find that a general duty existed and leave the question of breach to the jury, the judge determined the matter himself by holding that no relevant duty existed in the first place, because:

There would be no end of actions if we were to hold that a person having once done a piece of work carelessly, should, independently of honesty of purpose, be fixed with liability in this way by reason of bad materials or insufficient fastening.⁹⁸

As a result of the courts' tendency to define duties of care in such great detail, there soon emerged a long list of specific instance duties. This is evident in Beven's *Principles of the Law of Negligence*,⁹⁹ in which he devoted 700 pages to the multitude of individual duty situations. This approach to duty later came to be known as the 'multifarious' duty approach.

Of course, it was one thing to say that a duty was necessary, but another to explain why a duty existed in one case and not another. What, then, was the test for the existence of a duty? It seems that the earliest duties were simply based on the old 'forms of action' and earlier common law:

A duty to ensure passenger safety was recognized, which was analogous to contractual duties, or to duties imposed by those exercising a 'common calling'. The duty to take care to avoid collisions was seen as analogous to the interests protected by the action of trespass. A duty not to leave hazardous items in public places was recognized, and analogized to nuisance. A duty not to sell dangerous goods was recognized, which was a version of the duty not to deceive.¹⁰⁰

Indeed, in Beven's *Principles of the Law of Negligence* we find many 'duties' that are said to arise from cases that occurred sometimes hundreds of years before negligence giving rise to liability, let alone any conception of duty.¹⁰¹ Later duties, on the other hand, appear to have developed incrementally, 'whereby the plaintiff was expected to demonstrate the existence of a duty of care by showing that the case fell within an already recognized duty situation or was very closely analogous to one'.¹⁰² When there was no existing authority the duty was therefore

96 J C Smith, 'Clarification of Duty — Remoteness Problems through a New Physiology of Negligence: Economic Loss, a Test Case' (1974) 9 *University of British Columbia Law Review* 213, 221; Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 173.

97 (1868) LR 3 CP 495.

98 *Ibid* 497–8 (Willes J). See also Cornish et al, *The Oxford History of the Laws of England*, above n 84, 944.

99 Thomas Beven, *Principles of the Law of Negligence* (Stevens and Haynes, 1889).

100 Cornish et al, *The Oxford History of the Laws of England*, above n 84, 923–4.

101 Many of which were mere jurisdictional artefacts, having evolved from the early courts' jurisdictional limits into substantive law: see, eg, Milsom, above n 17, 286–7.

102 Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 190.

unlikely to be recognised. Courts were also quick to deny the existence of a duty where they felt it would lead to a significant extension in liability. In *Morgan v The Vale of Neath Railway Co*,¹⁰³ for example, Pollock CB denied that a master owed a duty to a servant who had been injured by the negligence of another servant, because '[i]t appears to me that we should be letting in a flood of litigation, were we to decide the present case in favour of the plaintiff'.¹⁰⁴ In some sense, then, the law of negligence was again beginning to resemble a long list of discrete torts in which negligence was an ingredient rather than a conceptually unified whole. This, however, was soon about to change.

III TOWARDS A GENERAL CONCEPTION

Whilst the multifarious approach to duties gave the judiciary the control they sought, at a time when academics such as Austin, Wendell Holmes and Pollock were looking for more philosophical foundations of negligence and tort law, much of which was based around the language of duty,¹⁰⁵ the unprincipled and 'uncultivated wilderness' of single instance duty situations of which the law consisted seemed unsatisfactory.¹⁰⁶ Was there a test for the existence of a duty of care that could be based on something more abstract, with the result that a more general rule could be formulated? Was there a principled explanation as to *why* a duty existed in one situation and not another of which the existing cases were just instances?

Without any theoretical framework, the existing single instance duties were far from conceptually uniform and varied in both scope (to whom it was owed) and content (what the duty entailed): some duties were owed to the world at large whilst others were only owed to a certain class of persons; some duties were a duty to take reasonable care whilst others were a duty to do a particular thing.¹⁰⁷

The tortious duty of a manufacturer to a consumer, for example, although at one time arguably not existing at all,¹⁰⁸ came to be owed only to those particular consumers whom the manufacturer subjectively knew had planned to use their

103 (1865) 1 QB 149.

104 Ibid 155. See also *Stubley v The London and North Western Railway Co* (1865) 1 Ex 13, 18 (Bramwell B):

If such a precaution is necessary here, it must also be used elsewhere; and the argument would shew that on every road, every canal, every railway in the kingdom, means must be taken to warn people against the consequences of their own folly. It would cost too much to provide such a machinery of precaution.

105 Cornish et al, *The Oxford History of the Laws of England*, above n 84, 890–1, 941.

106 'The Duty of Care Towards One's Neighbour' (1883) 18 *Law Journal* 618, 619.

107 E K Teh, 'Reasonable Foreseeability in Negligence (1833–1882)' (1975) 5 *University of Tasmania Law Review* 45, 50–62.

108 *Winterbottom v Wright* (1842) 10 M & W 109; 152 ER 402.

goods.¹⁰⁹ The duty was first described in *George v Skivington*.¹¹⁰ Here, a chemist compounded and then sold a bottle of hair shampoo to the plaintiff for the use of his wife. The shampoo turned out to have been negligently compounded and when used by the plaintiff's wife caused her hair to fall out. It was held that

where an article of this description is purchased by A for the use of B, and it is alleged and stated at the time of the purchase and sale, to have been so purchased, and therefore becomes *known* to the defendant, who is the seller of the article — the duty arises upon the part of the seller of the article, that it shall be reasonably fit for the purpose ...¹¹¹

The court was quick to note, however, that '[t]he case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended.'¹¹²

The duty of property owners, meanwhile, whilst extending to all entrants, varied in content depending on the status of the entrant.¹¹³ The duty to an invitee, for example, was 'the exercise of reasonable care ... to prevent damage from unusual danger, of which the occupier knows or ought to know';¹¹⁴ the duty to a licensee was to refrain from laying traps and wilful deceit;¹¹⁵ whilst the duty to a trespasser, if it could be described as a duty at all, was merely to abstain from the intentional infliction of harm.¹¹⁶

In traffic cases, both on roads and on the water, however, a duty was effectively owed to the whole world, and its content was simply to take reasonable care: '[the] duty which the law casts upon those in charge of a carriage on land, and a ship or a float of timber on water, [is] to take reasonable care and use reasonable skill to prevent it from doing injury'.¹¹⁷

109 Though, a duty would also exist if the seller fraudulently misrepresented that the product was safe (*Langridge v Levy* (1837) 2 M & W 519; 150 ER 863) or the product was dangerous per se (R F V Heuston, 'Donoghue v Stevenson in Retrospect' (1957) 20 *Modern Law Review* 1, 11).

110 (1869) 5 LR Ex 1, 39 LJ Ex 8.

111 (1869) 39 LJ Ex 8, 9 (Kelly CB) (emphasis added).

112 (1869) 5 LR Ex 1, 4 (Pigott B). See also *Blakemore v Bristol & Exeter Railway* (1858) 8 E & B 1035; 120 ER 385; Michael L Richmond, 'The Development of Duty: *Langridge to Palsgraf*' (1987) 31 *Saint Louis University Law Journal* 903, 905–10.

113 Norman S Marsh, 'The History and Comparative Law of Invitees, Licensees and Trespassers' (1953) 69 *Law Quarterly Review* 182. Up to seven categories of entrant eventually existed, before being replaced with a common duty of care in the *Occupiers' Liability Act 1957* 5 & 6 Eliz 2, c 31. See also Cornish and Clark, *Law and Society in England 1750–1950*, above n 53, 505–7.

114 *Indermaur v Dames* (1866) LR 1 CP 274, 287 (Willes J). Willes J's judgment was later affirmed in the Court of Exchequer: *Indermaur v Dames* (1866–7) LR 2 CP 311.

115 *Gautret v Egerton* (1867) LR 2 CP 371, 374–5 (Willes J). See also *Indermaur v Dames* (1866) LR 1 CP 274 (Willes J).

116 *Deane v Clayton* (1817) 7 Taunton 489, 521; 129 ER 196, 209 (Dallas J). The line between 'intend' to inflict and 'negligently' inflict, however, was not clear: Marsh, above n 113, 188.

117 *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 (HL), 767 (Lord Blackburn). Though note Spencer, who argues that '[b]efore the First World War, at the dawn of the motor age, the English courts came within a whisker of imposing strict liability upon the owner of a motor-car for all the damage which it causes in use': J R Spencer, 'Motor-cars and the Rule in *Rylands v Fletcher*': a Chapter of Accidents in the History of Law and Motoring' (1983) 42 *Cambridge Law Journal* 65, 65.

Duties could also be very specific, as in a duty to do or refrain from doing a particular thing, hardly going beyond the facts of the particular case. In *Farrant v Barnes*,¹¹⁸ for example, the defendant delivered a carboy of nitric acid to the plaintiff's master. The plaintiff, not being warned that the acid was dangerous, carried the carboy on his back and was injured when it burst. On the question of duty Willes J said:

as matter of legal duty, a person who gives another dangerous goods to carry ... is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such notice.¹¹⁹

In *Jackson v Metropolitan Railway Co*,¹²⁰ the duty was also formulated narrowly:

I take it to be part of the duty of a railway company which invites persons to resort to its stations and to travel by its trains (inter alia) to provide two things: first, sufficient accommodation to meet the ordinary requirements of the traffic; secondly, a sufficient staff to maintain order and prevent irregularity and confusion, and to protect passengers from annoyance, inconvenience, or injury from travellers who set not only the regulations of the company but also decency and order at defiance.¹²¹

The existing law therefore offered little guidance in the way of a generalised duty test. Duties of different content and scope, whilst seemingly appropriate for the cases they were designed for, had little general application; a duty based on the defendant's knowledge of the identity of the plaintiff, for example, would all but eliminate liability for traffic accidents,¹²² whilst any general duty to take care, if owed to the whole world, would render the entire duty enquiry meaningless.

A Heaven v Pender

Of course, it should not be surprising that the duty cases did not emerge from any *a priori* general principles, but, rather, that general principles only later emerged from the duty cases. As Buckland and McNair observed, in the formative periods, common lawyers, much like Roman lawyers, were not great theorists and simply

118 (1862) 11 CB(NS) 553; 142 ER 912.

119 Ibid 563; 916. See also Teh, above n 107, 60.

120 (1877) 2 CPD 125.

121 Ibid 141 (Cockburn CJ). See also Teh, above n 107, 60–1.

122 Another limitation of basing the duty on the defendant's knowledge of the consumer was identified in *MacPherson v Buick Motor Co* 217 NY 382 (NY, 1916). The plaintiff purchased a motor vehicle from a car dealership which, in turn, had purchased the vehicle from the defendant manufacturer. The plaintiff was later injured as he was driving the vehicle due to a defect in one of the vehicle's wheel spokes. The defendant denied the existence of a duty as they had no contract with the defendant. Yet, as Cardozo J pointed out, the plaintiff, as the final consumer, despite his identity not being known to the defendants, was just about the *only* person the defendant could be sure would be affected by their negligence, and the car dealership, to whom the defendants admitted a duty, were 'the one person of whom it might be said with some approach to certainty that by him the car would not be used' (at 391).

decided cases on their facts, rather than from first principles; it was only when they looked back that general principles emerged.¹²³

The first person to attempt to extrapolate a principle from the many duty cases was Sir William Brett, the Master of the Rolls. The central feature of Brett MR's duty formulation was the idea of 'foreseeability'. Brett MR first introduced the idea of foreseeability into the duty realm in 1870: 'I am of opinion that no reasonable man could have foreseen [the damage] ... [therefore it] seems to me that no duty was cast upon the defendants'.¹²⁴ In 1883 he attempted a more general formulation still, feeling that a duty *should* be owed

wherever the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person or property, then there is a duty shown to use reasonable care.¹²⁵

However, Brett MR's most famous formulation came later that same year in the case of *Heaven v Pender*¹²⁶ where he explicitly acknowledged that he was attempting to formulate a duty formula that applied to *all* cases of negligence:

When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. ... In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used, ... it seems to me, that there must be some larger proposition ... The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.¹²⁷

123 W W Buckland and Arnold D McNair, *Roman Law and Common Law* (Cambridge University Press, revised 2nd ed, 1965) 11.

124 *Smith v London and South Western Railway Co* (1870) LR 5 CP 98, 103.

125 *Cunnington v The Great Northern Railway Co* (1883) 49 LT 392, 393.

126 (1883) 11 QBD 503.

127 *Ibid* 508–9.

Brett MR's formulation was significant for two reasons. First, it described the content of the duty as simply a duty to use care, rather than a duty to do or not to do a particular thing. And second, his test transcended the traditional categories of duty by relying on a common theme. In essence, the existence of a duty, which was a duty to take care, depended on 'foreseeability'.¹²⁸

The other two members of the court, although also finding for the plaintiff (on the narrower ground that they were invitees),¹²⁹ were 'unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains'.¹³⁰ However, as early as 1885 Brett MR's formulation was being advocated by plaintiffs¹³¹ and in 1888, Hawkins J of the Queen's Bench Division said of Brett MR's formula: 'That, in my opinion, is a correct statement of the law.'¹³² Brett MR, too, continued to use his wide formulation in subsequent cases.¹³³

Other judges, however, felt that Brett MR's formulation was too wide and preferred the narrower approach of Lord Justices Cotton and Bowen. In *Caledonian Railway Co v Mulholland*,¹³⁴ for example, the brakes failed in the defendant's freight car and killed an employee of the purchaser of the car's load. Although it was clearly foreseeable that a negligently maintained freight car could injure its intended users (indeed, this was put forward by the respondents), Lord Herschell found that 'if we were to hold that such an obligation existed, some very strange consequences would ensue — consequences so unreasonable, it seems to me, as to shew that the duty cannot exist'.¹³⁵

128 James P Murphy, 'Evolution of the Duty of Care: Some Thoughts' (1980) 30 *DePaul Law Review* 147, 147 ('This rationale was that duty hinges on foreseeability, nothing more and nothing less'); Teh, above n 107, 67 ('What proposition did "these recognised cases suggest"? In *Heaven v Pender* the proposition was reasonable foreseeability'); Leon Green, 'The Duty Problem in Negligence Cases' (1928) 28 *Columbia Law Review* 1014, 1029 ('Upon analysis it is clear that this formula is identical with the "foreseeability" or "anticipation of harm" formula').

129 Richmond, above n 112, 921.

130 *Heaven v Pender* (1883) 11 QBD 503, 516 (Cotton LJ, with whom Bowen LJ concurred).

131 *Hurst v Taylor* (1885) 14 QBD 918, 919: '[t]he defendants' obligation comes within the terms of the proposition enunciated by Brett, MR, in *Heaven v Pender*'.

132 *Thrussell v Handyside & Co* (1888) 20 QBD 359, 363.

133 See, eg, *Thomas v Quartermaine* (1887) 18 QBD 685, 688 ('you are bound not to do anything negligently so as to hurt a person near you, and the whole duty arises from the knowledge of that proximity'); *Coventry, Sheppard & Co v Great Eastern Railway Co* (1883) 11 QBD 776, 780 ('the documents have a certain mercantile meaning attached to them, and therefore the defendants owed a duty to merchants and persons likely to deal with [them]'); *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68, 72 ('if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, ... there is a duty to take reasonable care that the statement shall be correct'). See also Cornish et al, *The Oxford History of the Laws of England*, above n 84, 947.

134 [1898] AC 216 (HL).

135 *Ibid* 226 (Lord Herschell).

Outside of the courts, academic descriptions of Brett MR's generalised formula ranged from 'the true rule'¹³⁶ to 'dangerously wide'.¹³⁷ Others dismissed his quest for a general formula entirely: 'Perhaps [lists of specific instance duties] cannot be avoided, as the world has not, in the matter of wrongs, agreed upon any wide principle such as "perform your promises," which is at the bottom of the law of contracts.'¹³⁸ And Pollock later observed that whilst *Heaven v Pender* 'may now be regarded as based on a conception sound in principle, ... [t]he precision of a neat draftsman has never been counted among [Brett MR's] accomplishments'.¹³⁹

Perhaps in response to the mixed reactions to his duty formulation, Brett MR, who had by that stage become Lord Esher, later stated that he 'detest[ed] the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'¹⁴⁰ Shortly thereafter, following some confusion over the extent to which his duty formula created liability for negligent misstatements,¹⁴¹ Lord Esher also took the opportunity to clarify, and arguably narrow, his previous formulation to make it clear that it was never intended to apply to negligent statements, but only negligent *acts*:

The case of *Heaven v Pender* ... established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.¹⁴²

The existence of a duty, then, depended on not only foreseeability but on physical 'nearness', or proximity. By the close of the 19th century, however, Lord Esher appeared to have retreated from his generalised formula even further,¹⁴³ stating that liability in negligence is the neglect of 'some duty' and giving specific instances of such duties, thereby seemingly embracing the traditional multifarious approach:

a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a

136 Horace Smith, *A Treatise on the Law of Negligence* (St Louis: F H Thomas Law Book Co, 2nd ed, 1884) 8.

137 'Duty Not to be Negligent: Towards Whom and Under what Circumstances it Arises' (1883) 27 *Solicitors Journal* 778, 778–9.

138 'The Duty of Care Towards One's Neighbour', above n 106, 619.

139 Frederick Pollock, 'The Snail in the Bottle, and Thereafter' (1933) 49 *Law Quarterly Review* 22, 25.

140 *Yarmouth v France* (1887) 19 QBD 647, 653.

141 *Derry v Peek* (1889) 14 App Cas 337; cf *Cann v Willson* (1888) 39 Ch D 39.

142 *Le Lievre v Gould* [1893] 1 QB 491, 497. Arguably, however, this was already clear from his existing formula's limitation to 'injury to the person or property of another.'

143 Cornish et al, *The Oxford History of the Laws of England*, above n 84, 949.

duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner or occupier; and, if by the negligent management of his house he causes injury, in either of these cases he is liable.¹⁴⁴

Textbooks of the time also seem to approve of the multifarious approach to duty. In Salmond's *The Law of Torts*, for example, the existence or absence of a duty of care is said to pertain to a 'detailed exposition of the law' and not on 'general principles of liability',¹⁴⁵ whilst Pollock describes the 'modern way of regarding legal duties' as not being a 'general duty not to do harm'.¹⁴⁶ By the end of the 19th century, then, after Brett MR's brief flirtation with the idea of a generalised test, the law again returned to the single instances approach to the duty of care.¹⁴⁷

B The Twentieth Century and the Ever-Changing Role of Foreseeability

Following Brett MR's failure to achieve a general duty formula, the courts of the early 20th century were notable for their absence of any critical discussion of duty:

The neatness and consistency which had characterized the development of the law in Great Britain seemed lost. Exceptions began to proliferate in the law, because judges could find precedent for almost any proposition by carefully writing their opinion in the proper terms.¹⁴⁸

As late as 1928, almost 50 years after *Heaven v Pender*, Leon Green of Yale Law School lamented the lack of any judicial guidance on the question of duty:

Where shall he find the source of duties? Do judges find them ready made? Do they assume them? Do they create them, and if so, do they create them in wholesale, or must each court create a particular duty which fits the particular case then before it? So far as I have been able to discover, the common law courts have stumbled through the whole period of their existence without committing themselves on this inquiry. Perhaps it is a subject which is not to be talked about.¹⁴⁹

Green then described Brett MR's judgment of *Heaven v Pender* as 'the most impressive attempt to answer this puzzling question' of when a duty of care will

144 *Lane v Cox* [1897] 1 QB 415, 417.

145 John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907) 22 (a similar quote appears in all subsequent editions prior to 1932).

146 Pollock, *The Law of Torts*, above n 91, 22 (more or less the exact same quote is found in all 14 editions of Pollock's textbooks). See also C G Addison, *A Treatise on the Law of Torts or Wrongs and their Remedies* (Stevens and Sons, 8th ed, 1906) 13 ('The circumstances, under which such a duty may arise are so multifarious that the subject will be dealt with in detail later').

147 Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries', above n 24, 243.

148 Richmond, above n 112, 924.

149 Green, above n 128, 1024.

'be imposed upon affirmative conduct and to what extent'.¹⁵⁰ The position of the time was also succinctly summed up, albeit retrospectively, by Asquith LJ in *Candler v Crane, Christmas & Co*:

Certain classes owed duties of care to certain other classes: road users to other road users; bailees to persons entrusting property to them; doctors and surgeons (and originally barbers) to persons entrusting their bodies to them; occupiers of premises to persons whom they invite or permit to come on the premises; and so on. These categories attracting the duty had been added to and subtracted from ... time to time. But no attempt had been made in the past to rationalize them; to find a common denominator between road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of care and some other classes who might be expected equally to be so bound should be exempt — no attempt, that is, save that of Lord Esher, MR (from which his colleagues dissociated themselves) in *Heaven v Pender* ...¹⁵¹

Nevertheless, although it may not have been obvious at the time, a generalised test of duty continued to develop quietly in the background, and the test centred around the idea introduced by Lord Esher: foreseeability.

Although Lord Esher was responsible for introducing foreseeability as a test for the existence of a duty, he was not the first to advocate its role in determining questions of liability. Indeed, as far back as the Romans, liability for damage to goods (under the *Lex Aquilia*) depended on some idea of foreseeability.¹⁵² Within the common law, however, foreseeability first emerged as a question of the remoteness of the damage.¹⁵³ Although such questions were traditionally the sole responsibility of the jury, by the middle of the 19th century judges were beginning to remove cases from juries, and make a finding of no liability, where they believed the damage was not sufficiently 'proximate' or was too 'remote':¹⁵⁴ after all, there were cases where the breach of a conventional duty might directly

150 Ibid 1028.

151 [1951] 2 KB 164, 188.

152 Paul, *On Sabinus*, book 10 D 9.2.31 ('*Culpam autem esse, quod cum a diligente prouideri poterit, non esset prouisum*') (There is fault when what could have been foreseen by a diligent man was not foreseen). Of course, as was noted above, as the Romans had no equivalent of duty, this is best seen as a test for fault, or *culpa*, rather than evidence of a Roman duty equivalent.

153 At the time, 'remoteness' encompassed what we would today describe as 'factual causation' and the broad meaning of 'legal causation' (*novus actus interveniens* and remoteness/proximate cause). That is, they concerned whether the damage could be said to be attributable to the behaviour of the defendant. Factual and legal causation do not appear to have become distinct entities until around the 1960s. Indeed, 'causation in fact' was not mentioned until the 8th edition of *Winfield on Tort* (Sir P H Winfield, *Winfield on Tort* (Sweet & Maxwell, 8th ed, 1967) 80); was not the subject of a chapter until the 13th edition (Sir P H Winfield and J A Jolowicz, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 13th ed, 1989)); and was never treated as a separate enquiry in *Pollock's Law of Torts* (the 1951 edition being the 15th and final) (Frederick Pollock, *Pollock's Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens, 15th ed, 1951)) or *Salmond and Heuston on the Law of Torts* (the 21st, and final edition, coming as late as 1996) (R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21st ed, 1996)).

154 Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' above n 24, 246.

cause unforeseeable damage for which the court did not believe the defendant should be held liable. Judges were therefore using remoteness — in much the same way that they were using the emerging concept of duty — as a method of limiting the liability of defendants.¹⁵⁵ Although the idea that a defendant was only responsible for the ‘proximate’ consequences of his conduct dated back to Francis Bacon in the 16th century¹⁵⁶ and, in the case of liability for negligence, to Buller’s *Nisi Prius*,¹⁵⁷ it was not until 1850 that the idea was formally adopted by the courts.¹⁵⁸

I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated.¹⁵⁹

The idea was further expanded upon by Frederick Pollock in his first edition of *The Law of Torts*:

those consequences, and those only, are deemed ‘immediate,’ ‘proximate,’ or, to anticipate a little, ‘natural and probable,’ which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct.¹⁶⁰

Soon, however, questions of foreseeability were no longer being considered as determinative of the remoteness of the damage, but of whether the act had been negligent in the first place. In *Blyth v Birmingham Waterworks Co*,¹⁶¹ for example, an unusually severe frost froze the defendant’s fire hydrants which subsequently caused water to escape from the mains and flood the plaintiff’s house. All members of the court agreed that the accident was unforeseeable, yet did not even consider the question of remoteness, instead holding that because the accident was unforeseeable there was insufficient evidence of negligence for the matter to

155 Cornish et al, *The Oxford History of the Laws of England*, above n 84, 928. See also J G Fleming, ‘Remoteness and Duty: The Control Devices in Liability for Negligence’ (1953) 31 *Canadian Bar Review* 471, 476–8.

156 Francis Bacon, *Maxims of the Law* (London, 1598): ‘*Regula I: In iure non remota causa, sed proxima spectatur*’ (Rule 1: In law the proximate cause is looked to, not the remote one). See also Cornish et al, *The Oxford History of the Laws of England*, above n 84, 928; Ibbetson, ‘The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries’ above n 24, 246.

157 Buller, above n 19, 36 (‘it is proper in such cases to prove that the injury was such, as would probably follow from the act done’).

158 Courts had previously refused to impose liability on the basis that the harm was not the ‘natural consequence’ of the defendant’s act, but as Cornish et al notes, these tended to involve harm caused by third parties rather than harm that was unforeseeable: Cornish et al, *The Oxford History of the Laws of England*, above n 84, 928–34.

159 *Greenland v Chaplain* (1850) 5 Ex 243, 248; 155 ER 104, 106 (Pollock CB). Pollock CB made similar remarks in *Rigby v Hewitt* (1850) 5 Ex 240, 243; 155 ER 103, 104: (‘of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result’). In both cases, Pollock CB was alone in his views, the rest of the court preferring a ‘natural consequences’ test.

160 Pollock, *The Law of Torts*, above n 91, 28.

161 (1856) 11 Ex 781; 156 ER 1047.

be left to the jury.¹⁶² The same conclusion was reached more explicitly by Channel B in *Smith v London & South Western Railway Co.*¹⁶³

where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not ... but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.¹⁶⁴

The implications of *Smith* were potentially very far-reaching, as once it was established that the defendant's conduct was negligent, liability ensued for *all* consequences, whether they were foreseeable or not. It is therefore not surprising that in the years that followed, Brett MR attempted, albeit unsuccessfully, to bring questions of foreseeability into the determination of duty.¹⁶⁵

Notwithstanding *Smith*, however, foreseeability was soon again being considered as a question of remoteness. In *Victorian Railway Commissioners v Coultas*,¹⁶⁶ a crossing guard negligently invited a woman and her husband to drive their buggy across a railway track crossing into the path of an oncoming train, thereby placing them 'in imminent peril of being killed'. Although the woman and her husband were not physically injured, the wife suffered severe shock and so sued the crossing guard's employer. The Privy Council found for the defendants on the grounds that the damage suffered by the wife was 'too remote', as the plaintiff's injury could not 'be considered a consequence which, in the ordinary course of things, would flow from the negligence of the [defendant]'.¹⁶⁷

By the start of the 20th century, however, the appropriate place for foreseeability in the negligence enquiry was *again* being questioned. In *Dulieu v White & Sons*,¹⁶⁸ the defendant lost control of a horse-drawn carriage and crashed into the public house in which the pregnant plaintiff was working. As a result of the collision the plaintiff suffered severe shock and gave birth prematurely. Kennedy J implied that matters concerning foreseeability ought to be dealt with under duty rather than remoteness. In particular, after discussing a recent unreported case that had been decided on the grounds that the harm was too remote, he stated:

162 Ibid 785 (Bramwell B) ('it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident'); 2 Jur NS 333, 334 (Alderson B) ('The whole thing was an accident occasioned by frost, which was utterly unforeseen... That cannot be called negligence').

163 (1870) 6 CP 14 ('*Smith*').

164 Ibid 21 (Channel B).

165 Though note the comments of Beven, who suggests that foreseeability applies *only* 'in determining what is negligence ... [and] not in limiting the consequences flowing from it when once established': Thomas Beven, *Negligence in Law* (Stevens and Haynes, 2nd ed, 1895) 106. Cf Frederick Pollock, *The Law of Torts* (Stevens and Sons, 7th ed, 1904) 40 n g.

166 (1888) 13 App Cas 222.

167 Ibid 225 (Couch).

168 [1901] 2 KB 669.

I should myself, as I have already indicated, have been inclined to go a step further, and to hold upon the facts ... that, as the defendant neither intended to affect the plaintiff injuriously nor did anything which could reasonably or naturally be expected to affect him injuriously, there was no evidence of any breach of legal duty ...¹⁶⁹

Although Kennedy J's quote could be interpreted as doubting either the existence of a duty or any evidence of a breach, the fact that he had only just given a construction of the case based on duty ('as I have already indicated') suggests that the former interpretation is the correct one. What could 'reasonably or naturally be expected' (that is, what was reasonably foreseeable), was again playing a role in the determination of a duty.

There was, therefore, no consensus on the role that foreseeability was to play in the determination of liability: the authorities suggested it could be applied at the duty, breach or remoteness stages. Additionally, the vagueness of the language used in cases provided little guidance on what, exactly, it was that needed to be foreseeable. *Smith*, as we have seen, unhelpfully said that 'the question what a reasonable man might foresee is of importance' without more.

The turning point appears to have come in 1921 following the case of *Re Polemis & Furness, Withy & Co Ltd*¹⁷⁰ which held that, whilst foreseeability of damage is relevant in determining whether an act is negligent, once the defendant's act is deemed to be negligent, 'the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act ...'.¹⁷¹ Although *Re Polemis* was silent on the issue of duty, it had nevertheless clarified and defined the role of foreseeability at the breach and remoteness stages of the negligence enquiry: at the breach stage the question was whether *some* damage was foreseeable,¹⁷² whilst at the remoteness stage foreseeability of the *exact kind of damage actually suffered* was irrelevant.¹⁷³

With the role of foreseeability in breach and remoteness now rigidly defined, duty was the obvious vehicle for expanding or limiting liability on the basis of foreseeability: but if not foreseeability of some damage, or foreseeability of the kind of damage actually suffered, then foreseeability of what? It was not long until this question was answered. In *Hambrook v Stokes Brothers*¹⁷⁴ the defendant failed to secure their parked lorry, causing it to roll down a hill by itself. When the plaintiff's wife, who was accompanying her children to school, saw the out-

169 Ibid 675 (Kennedy J).

170 [1921] 3 KB 560 ('*Re Polemis*').

171 Ibid 577 (Scrutton LJ).

172 In that a reasonable person would not engage in certain behaviour if it created a foreseeable risk of *some* harm, and the fact that the harm that *actually* occurs is of a different kind to that foreseen does not make the unreasonable behaviour retrospectively reasonable.

173 The wide test was subsequently subject to much criticism, but, as noted by Davies: 'A wide remoteness test [the 'directness' test] was unexceptionable when duty was narrowly conceived.' Martin Davies, 'The Road From Morocco: *Polemis* through *Donoghue* to No-Fault' (1982) 45 *Modern Law Review* 534, 541.

174 [1925] 1 KB 141.

of-control lorry, she became very worried for the safety of her children, who had turned the corner in front of her and so were out of her sight. Although she did not see the ensuing collision, she suffered severe anxiety and shock, which eventually killed her, when she heard that a child answering the description of her daughter had been injured. Clearly there was no issue of breach, as *some* damage was surely foreseeable, and *Re Polemis* ensured that the question of remoteness was not in issue. There still, however, had to be a duty in the first place, and yet *Dulieu v White & Sons* had earlier confined the duty in cases of psychiatric harm to ‘shock which arises from a reasonable fear of immediate personal injury to *oneself*’.¹⁷⁵ The plaintiff’s wife, however, suffered shock from a fear of immediate personal injury to her *children*. If the plaintiff were to succeed, a new duty would need to be recognised, and Bankes LJ did this on the basis that harm to the *actual plaintiff* was foreseeable. In particular, after finding that the authorities established that ‘what a man ought to have anticipated is material when considering the extent of his duty’¹⁷⁶ he employed a simple syllogism:

1. A man owes a duty where he ought to foresee that his negligence might cause mental shock to a mother occasioned by fearing for her own safety.
2. From the perspective of the defendant, there is no difference between a mother fearing for her own safety and a mother fearing for her child’s safety.
3. A man therefore owes a duty where he ought to foresee that his negligence might cause mental shock to a mother who suffers mental shock occasioned by fearing for her child’s safety.

Forty years after *Heaven v Pender*, then, duty was again coming to be based on the question of foreseeability; in particular, whether the defendant ought to have anticipated, or foreseen, harm to a person in the position of the plaintiff.¹⁷⁷

Of course, even though the role of foreseeability in the duty enquiry had now been articulated, foreseeability of harm to the particular plaintiff could not be the *only* requirement for a duty to exist; such a rule, although narrower than Brett MR’s formulation, would nevertheless remain open to similar objections. Other than foreseeability of harm to the plaintiff, then, what else was required? To this

175 *Dulieu v White & Sons* [1901] 2 KB 669, 675 (Kennedy J) (emphasis added).

176 *Hambrook v Stokes Brothers* [1925] 1 KB 141, 151 (Bankes LJ). Whilst Atkin LJ acknowledged that the ‘question appears to be as to the extent of the duty, and not as to remoteness of damage’ (at page 158) he was less explicit than Bankes LJ in his reasons for expanding the existing duty to include the plaintiff.

177 Whilst this construction was later famously adopted by Cardozo CJ in the New York Court of Appeals case *Palsgraf v Long Island Railway Co*, 162 NE 99 (NY, 1928), and by Lord Wright in *Bourhill v Young* [1943] AC 92, it was not entirely new. As early as *Langridge v Levy* the court specifically rejected the theory that ‘wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer’: *Langridge v Levy* (1837) 2 M & W 519, 531; 150 ER 863, 868 (Parke B). Goodhart, on the other hand, attributes the view to Brett MR’s comments in *Smith v London & South Western Railway Co* (1870) 5 CP 98, 103: ‘Brett, J, dissented on the ground that the defendant had not been negligent *in regard to this particular plaintiff*, although the act of leaving the inflammable heaps might have been negligent in relation to others’ (emphasis added) (Arthur L Goodhart, ‘The Unforeseeable Consequences of a Negligent Act’ (1930) 39 *Yale Law Journal* 449, 453). Though see also Goodhart’s comments that such a construction makes the duty enquiry identical to the remoteness enquiry: at 465.

question *Hambrook v Stokes Brothers* offered little guidance, yet an attempt to do exactly that was just around the corner, and it was instigated by a snail in a bottle of ginger beer.

C Donoghue v Stevenson

The duty issue was addressed again in the famous Scottish case of *Donoghue v Stevenson*.¹⁷⁸ According to the pleadings, the pursuer suffered gastro-enteritis and mental depression, inter alia, after drinking from a bottle of ‘snail-infected ginger beer’ that had been purchased for her by a friend. As the ginger beer had not been purchased by the pursuer she could not sue in contract and so was forced to argue that liability arose by reason of a tortious duty of a manufacturer ‘to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.’¹⁷⁹ Shortly after the pursuer’s writ was lodged, the defender made an application for the writ to be struck out and, despite the application being dismissed in the Court of Session, it was upheld in the Inner House of the Court of Session three to one. The pursuer appealed to the House of Lords.

Lord Atkin, like Brett MR, believed in a general conception of duty, and in 1931, prior to delivering his speech in *Donoghue v Stevenson*, said in a lecture delivered at King’s College London, ‘I doubt whether the whole law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you.’¹⁸⁰ Lord Atkin believed it ‘remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty’,¹⁸¹ but also recognised that the attempt at a general formula ‘made by Brett MR in *Heaven v Pender* ... [a]s framed ... was demonstrably too wide’. He nevertheless acknowledged that it appeared ‘if properly limited, to be capable of affording a valuable practical guide.’¹⁸² Lord Atkin’s ‘practical guide’, famously known as ‘the neighbour dictum’, was based on foreseeability, but, as suggested by Lord Esher in *Le Lievre v Gould*, limited by the notion of ‘proximity’:

in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the

178 [1932] AC 562.

179 Ibid 578–9 (Lord Atkin).

180 Lord Atkin ‘Law as an Educational Subject’ [1932] *Journal of the Society of Public Teachers of Law* 27, 30. Lord Atkin, however, seems to have taken the idea from Pollock, who had said in his 1895 edition of *The Law of Torts*, “‘Thou shalt do no hurt to thy neighbour.’ Our law of torts, with all its irregularities, has for its main purpose nothing else but development of this precept’: Frederick Pollock, *The Law of Torts* (Stevens and Sons, 4th ed, 1895) 12. A similar statement was made in Pollock, above n 91, 3: ‘all members of a civilized commonwealth are under a general duty towards their neighbours to do them no hurt without lawful cause or excuse’; though, as Hepple later noted, ‘[a]s a proposition of law, this was certainly wrong in 1887’: Bob Hepple, ‘Negligence: The Search for Coherence’ (1997) 50 *Current Legal Problems* 69, 76.

181 *Donoghue v Stevenson* [1932] AC 562, 579 (Lord Atkin).

182 Ibid 580.

books are but instances ... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. 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. This appears to me to be the doctrine of *Heaven v Pender* ... as laid down by Lord Esher (then Brett MR) when it is limited by the notion of proximity introduced by Lord Esher himself and A L Smith LJ in *Le Lievre v Gould*.¹⁸³

Lord Atkin ultimately held that the impossibility of intermediate inspection satisfied the proximity requirement and that the defender therefore owed the pursuer a duty of care. Two of the other four Law Lords also found for the pursuer, although in separate speeches, and the matter was relisted for proof. Following the defender's death from appendicitis shortly after the case was heard, the case was settled for a reported amount of £200.¹⁸⁴ There was never a hearing of evidence, and Mrs Donoghue never proved that there was really a snail in the ginger beer.¹⁸⁵

In light of the five individual speeches, identifying a clear ratio decidendi from *Donoghue v Stevenson* was no simple task and there has been much discussion as to what, exactly, it was.¹⁸⁶ At its narrowest, it had overruled *Winterbottom v Wright* and stood for nothing more than that a manufacturer now owed a duty to consumers. Indeed, this was the interpretation favoured by most commentators,¹⁸⁷ including the reporter who authored the 'somewhat conservative headnote'.¹⁸⁸ Then there was the view that it had simply approved the multifarious approach to duties, which could be extended only by close analogy to existing duties. This appeared to be the view of Lord Macmillan, who based his finding for the pursuer on the fact that '[t]he categories of negligence are never closed.'¹⁸⁹ The wider view, however, was a rejection of the multifarious approach to duties of care and the adoption of a test whereby duties of care were now owed to anyone who had suffered an injury to their 'life or property'¹⁹⁰ and could be considered one's

183 Ibid 580–1.

184 M R Taylor, 'Mrs Donoghue's Journey' in Peter T Burns (ed), *Donoghue v Stevenson and the Modern Law of Negligence: The Paisley Papers: The Proceedings of the Paisley Conference on the Law of Negligence* (Continuing Legal Education Society of British Columbia, 1991) 33. See also P Handford, 'The Snail's Antipodean Adventures' [2013] *Juridical Review* 315.

185 William W McBryde, 'Donoghue v Stevenson: The Story of the "Snail in the Bottle" Case' in Alan J Gamble (ed), *Obligations in Context: Essays in Honour of Professor D M Walker* (W Green, 1990) 13, 26.

186 See, eg, Heuston, above n 109, 5–9; Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 190–1.

187 See, eg, the case notes in (1932) Sol J 387; Note, [1933] *Cambridge Law Journal* 116; (1932) 173 LT 411; (1932) 174 LT 399; (1932) 74 LJ 75; Comment, (1932) 7 *Canadian Bar Review* 478. See also Ibbetson, *A Historical Introduction to the Law of Obligations*, above n 36, 190.

188 *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 189 (Asquith LJ).

189 *Donoghue v Stevenson* [1932] AC 562, 619 (emphasis added) (Lord Macmillan).

190 Ibid 599 (Lord Atkin).

‘neighbour’, as per Lord Atkin’s formula. This is undeniably the popular view of the case.

Whatever the true ratio of the case, it could no longer be said that duties of care were ‘a subject which is not to be talked about.’¹⁹¹ On the contrary, ‘[t]he factors underlying a decision to recognise a new duty [were] now the subject of open analysis and discussion’.¹⁹²

IV CONCLUSION

Prior to the emergence of negligence as an independent wrong, there was little need for a duty of care; the discrete nature of the wrongs in which negligence was required performed essentially the same function, limiting liability for negligence to a set of defined situations. As negligence developed into a wrong in its own right, however, its potential reach was practically limitless, yet few chose to make use of the emerging action, and so there was no immediate need to impose restrictions on its scope. On the contrary, duty was first employed as a way of *expanding* the scope of negligence, by reformulating breaches of contractual duties, which arose by reason of agreement, as breaches of tortious duties, which arose by reason of law. Over time, this terminology spread from relationship negligence to non-relationship negligence, and, eventually, negligence was no longer actionable without a duty. As the action for negligence expanded, however, the focus of duty changed from inclusionary to exclusionary. Yet this was not because duty was the *only* way to limit liability for negligence, but, as a result of the division of functions between judge and jury, because it was the most convenient.

By the last quarter of the 19th century, although duty was firmly established into the analysis of liability for negligence, the courts were yet to offer an adequate explanation for why a duty existed in one situation but not another. Brett MR was the first to make such an attempt and his explanation was that duties were of uniform content (duty to take care), and that their scope depended on the idea of foreseeability. Although Brett MR’s explanation was eventually rejected, the idea that duty depended on some notion of foreseeability was not easily forgotten. The climax of this development was in 1932, when Lord Atkin pronounced his neighbour dictum: the duty, as Brett MR had suggested, was a duty to take care, and its existence depended on a modified version of Brett MR’s foreseeability formula. Although judicial development of the duty test has continued over the last 80 years, the general position remains relatively unchanged: the question of when damage caused by another’s careless conduct becomes actionable is determined by reference to the duty of care.

The modern duty of care is therefore not the inevitable result of the search for analytical cohesion in liability for negligence, but, rather, a primarily unarticulated judicial device motivated by notions of convenience and attempts to increase

191 Green, above n 128, 1024.

192 Heuston, above n 109, 24.

judicial authority. Of course, none of this is to say that the duty of care does not perform a valuable function in the modern law, but simply to help rid us of the Whiggish view that legal history tells us that this function must be performed by a duty of care.