Choice between competing basic norms, as an unavoidable task of a municipal court, still eludes the practicalities of judicial business.[28]
G. KOLTS, Comment Editor—Fourth Year Student.

DUTY OF CARE AND STANDARD OF CARE

CORRESPONDENCE—J. G. FLEMING AND W. L. MORISON

J. G. FLEMING TO W. L. MORISON

29th April, 1952.

Dear Bill,

I have got a problem on my mind on which, I am sure, you can throw some light, and trust you will pardon me for troubling you in this matter.

In your article on "The Duty of Care"[1] you seem to be stressing the point that the apparent tautology in the Atkin formula of duty with the standard of care (negligence) leads, *inter alia*, to a confusion between the respective functions of judge and jury.[2] You eschew the use of the phrase "violation of duty" (Stallybrass) because it implies that "under that head the only and the simple inquiry is whether the defendant's conduct was in breach of a duty precisely and concretely laid down under the duty head",[3] and cite *Camkin v Bishop*[4] as an example of the court's trespassing on the preserve of the jury. My difficulty is in understanding how you can (i) separate the duty-relationship from the standard of care required by the law, (ii) reconcile your standpoint with the precise *legal* definitions of the standard of care in the occupier cases.

To start with, I agree with you that in simple accident cases involving physical impact it is for the jury to decide whether the defendant's conduct fell short of the (relatively undefined) standard of care, but in many fields of tort liability the courts have evolved more complicated formulae and thus, in effect, withdrawn from the jury the important task of weighing the interest of the plaintiff which is alleged to have been violated against the utility of the defendant's conduct. There is, of course, a strong school of thought which holds that we have gone wrong in the occupier cases and ought to have rested on a more general formula of care, leaving it to the jury to work out the difficult task of social engineering. The fact remains, however, that this has not been done. In those cases, therefore, the jury question can be answered almost mechanically, unless the jury disagrees with the law was formulated by the judge.[5]

As to the first point, it seems to me an over-simplification to say that the only inquiry for the court is as to the existence of a duty-relationship without also having to define what that duty, if any, is. Is it a duty to take affirmative action or merely to refrain from acting in a certain way? In the "nervous shock cases", how can we say that A owed a duty to B without having regard to the concrete circumstances of the case in question? It seems to me that in a case like *Hambrook v Stokes*[6] it is for the court to decide as a question of law whether the duty to take care so as not to cause physical injury is limited or not to shocks arising from apprehension of danger to the plaintiff himself or whether it extends also to cases of apprehended danger to others—relatives or third parties. The

[28] See also *infra* for a note by the present writer on the later *High Court of Parliament Act Case*. So far as judicial choice of the basic norm is concerned, that case could only raise the same issues as the Separate Representation of Voters Act; and the need to choose could be evaded in a similar manner.

[1] W. L. Morison, "A Re-examination of the Duty of Care", (1948) 11 *Mod. L. Rev.* 9.

[2] *Id.* at 25.

[3] *Id.* at 26, n. 55.

[4] (1941) 165 L.T. 246.

[5] See Jerome Frank, *Law and the Modern Mind* (Eng. ed. 1947) 170 ff.

[6] *Hambrook v Stokes Bros.* (1925) 1 K.B. 141.

question is not simply Did the defendant owe a duty? but What kind of duty? It is pretty obvious that the courts differentiate between cases of physical impact and shock—*Bourhill v Young*[7] might perhaps have been decided differently if a piece of metal from the defendant's motor-bike had struck the plaintiff. Would you not agree?

In short, my impression is that only in certain cases is the *standard* of care left at large by the court and its determination relegated to the jury. In many others it has been usurped by the court under the guise of determining the standard of care. Leon Green's observations[8] rather strengthen the view I am here putting forward. I have asked Dean Griswold for a copy of *Judge and Jury*[9] and it may well be that it can suggest the answer.

None of this, of course, affects the central thesis of your article, with which I wholeheartedly agree.

Yours very sincerely,
JOHN FLEMING.

W. L. MORISON to J. G. FLEMING

6th June, 1952.

Dear John,

I have taken some time to reflect upon the points raised in your letter of the 29th April, but to what purpose I am not sure even as I begin this letter, and trust that you will let me have the benefit of your criticisms of it.

I do agree with you that our final basis of reference must be what the courts have done, whether we like it or not, provided that they have adopted a settled practice. But there are certain problems in the nature of things with which the courts must grapple in one way or another, and, in so far as judicial practice has not finally crystallised, it seems to me that it is open to one to advocate that mode of analysis which will raise the issues for the court in the clearest way. Perhaps you will forgive me, therefore, if I begin by trying to indicate what some of those problems seem to me to be, and what kind of analysis of the tort of negligence is likely to be least productive of confusion about them.

Reduced to the barest essentials, what I was trying to establish in the article in the *Modern Law Review*[10] was that on the authorities it is impossible to agree with Lord Atkin that the law always requires the defendant to behave like a reasonable man, and consequently one cannot agree that the question whether the defendant owed a duty of care to the plaintiff is answered by asking whether a reasonable man in the position of the defendant would have exercised care not to harm the plaintiff. On the contrary, the court must ask in every case: Is this a situation in which the law requires, or is going now to require, the defendant to exercise care in the interests of the plaintiff, or is it a situation in which the defendant may unreasonably create risks for the plaintiff with impunity?

Few would question, I think, that this problem must arise on the authorities, and that the proper place for considering it is under the duty head. The issue which your letter raises is whether it is the only problem which should be raised under the duty head, or whether we should not rather consider under the same head the problem, assuming that some standard of care was required of the defendant in the circumstances, *What* standard? Or, using the alternative mode of expression adopted in your letter, "the question is not simply Did the defendant owe a duty? but What kind of duty?"

Posed in this second way, both questions seem obviously to come under the duty head. But I cannot help feeling that this way of putting it takes an unfair advantage by exploiting an ambiguity in the word "duty". I would claim that

[7] (1943) A.C. 92.
[8] Correspondence in (1943) 21 *Can. Bar. Rev.* 417-421.
[9] Leon Green, *Judge and Jury* (1930).
[10] Cited *supra* n. 1.

duty as one element only in the cause of action in negligence must have a quite artificial, non-Hohfeldian sense. If it were used in its scientific sense it would have to embrace all the elements in the cause of action in so far as there were rules of law about them at all, and every defence which could be raised to the action would also have to enter into the statement of the duty. But nobody would contend that all this should come under the duty head in negligence. The law abstracts certain issues for convenience and considers only them under the duty head. What I suspect is happening in some of the decisions is that this is being lost sight of in particular sets of circumstances, and the scope of the content of the duty head is therefore tending to grow. It seems to me that the same trend is discernible in Blackburn's article on "*Volenti Non Fit Injuria* and the Duty of Care".[11] His argument that the defence of *Volenti Non Fit Injuria* must be a defence of no duty seems to depend on using the word duty in a scientific sense, and falls to the ground if the duty head is regarded merely as a convenient repository into which we separate certain problems for the purpose of clarity of analysis.

My view would be that the function of the duty concept in negligence which I have outlined is difficult enough to grasp in any case, and that the purpose of clarity would be served if the only problem treated under this head were the problem whether the law raises a duty of care in the type of situation in which the parties found themselves *vis-a-vis* one another. I am not sure, however, whether you think this is theoretically possible, because you say your first difficulty is to see how one can separate the duty-relationship from the standard of care required by law. It may well be that you are only saying that you cannot see how such a separation is consistent with the authorities, but if indeed you are saying that it is theoretically impossible, I think it must be because you are accepting the view, with which I disagree, that "duty" is used in its scientific sense when we talk of the duty of care.

This is not to say that I think the question of reasonable care ought to be left at large to the jury in all cases once the court has determined that the situation before it is a duty situation. I do not think I disagree with Holmes, J.,[12] when he says that the featureless generality that the defendant was bound to use such care as a prudent man would use under the circumstances ought to be continually giving place to the specific one that he was bound to use this or that precaution under these or those circumstances. If the courts arrived at no further utterance than the question of negligence, Holmes says, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know and would assert, by implication, that nothing could be learned by experience. But what I would urge is that these questions of the standard of care can be dealt with most conveniently simply *as* questions of the standard of care under the negligence rather than the duty head. If you put rules of law about what conduct is reasonable under the duty head, the result will almost inevitably be to give an impetus to the view which is recurrent in the law—Brett, M.R.'s, view[13] seems to me to be exactly the same as Lord Atkin's—that this is *the* duty problem. Putting it under the negligence head is itself likely to be productive of some confusion, admittedly; because when this course is adopted doubt may arise as to whether the court is dealing with the question whether on the particular facts there is evidence of negligence to go to the jury or whether it is laying down rules of law about the standard of care to be observed under the circumstances. But I am bound to say that this is a type of confusion which seems to me to be beneficial. If a judge prematurely lays down a rigid rule which later experience shows to be unfair, it is open to the courts in later cases

[11] (1951) 24 *A.L.J.* 351.

[12] O. W. Holmes, *The Common Law* (1887) 110.

[13] See *Heaven v Pender* (1883) 11 *Q.B.D.* 503, at 509.

to argue that the previous decision was on a question of fact only and lays down no rule. But it is much more difficult to argue in this way if the previous court treated the problem as one of defining the duty. We might be much better off if the courts in the occupier cases had proceeded in the former way rather than the latter.

To complete this rather wistful excursion into the field of what I would advocate, I should add that if the law is going to be that a plaintiff cannot recover for certain kinds of damage, e.g. nervous shock, unless he establishes a link of a more special kind than is required by the ordinary remoteness of damage rules between the act of the defendant and the damage, this ought to be treated just as a special remoteness of damage rule, and not as a rule relating to the special kind of duty owed with regard to that kind of damage. If it is treated in the latter way, the natural inference is that questions of remoteness are quite generally questions of the kind of duty owed—which of course is precisely the position if the word duty is used in its Hohfeldian sense—and the whole tripartite division of the elements in the tort of negligence begins to break down.

But now I must submit this gentle intellectual construction to the brutal facts set out in your letter. Your view is that in the nervous shock cases the courts have gone further than laying down a duty of reasonable care and have, under the duty head, limited the duty in relation to nervous shock in a way in which it is not limited in relation to other kinds of injury. You ask whether I would not agree that *Bourhill v Young*[14] would have been decided differently if the plaintiff had been struck by a flying piece of metal. I do not think it would have been. If this had happened, one gathers that all the court would have held that the defendant could not reasonably have foreseen this and that, therefore, no duty was owed in regard to that any more than in regard to nervous shock. Lord Thankerton says "The risk of the bicycle ricochetting and hitting the appellant, or of flying glass hitting her, in her position at the time, was so remote, in my opinion, that the cyclist could not reasonably be held to have contemplated it."[15] Lord Russell of Killowen says[16] that his speed in no way endangered her. Lord Macmillan says[17] that she was not so placed that there was any reasonable likelihood of her being affected by the cyclist's careless driving. Lord Wright says that the appellant was completely outside the range of the collision.[18] And Lord Porter was prepared to assume without deciding that "all types of injury are included, physical, mental and emotional, and that once a defender is shown to be negligent to a pursuer he is liable for all such consequences."[19]

If, then, *Bourhill v Young* does not require us to recognise the existence of a specially limited kind of duty in relation to nervous shock, does *Hambrook v Stokes Bros.*?[20] I cannot see that it does. The duty which Atkin, L.J., conceived to be broken in that case was the very duty which you refer to in your letter as that involved in "simple accident cases",[21] which you agree can be stated consistently with my theory. The language which Bankes, L.J., uses, on the other hand, is very favourable to your own method of analysis, for he treats the problem before the court as one of the extent of the defendant's duty. But the conclusion to which he came was merely that the defendant's duty was *not* limited in the manner suggested by Kennedy, L.J.'s, dictum, and I think he left

[14] Cited *supra* n. 7.
[15] *Id.* at 99.
[16] *Id.* at 102.
[17] *Id.* at 105.
[18] *Id.* at 111.
[19] *Id.* at 113.
[20] Cited *supra* n. 6.
[21] *Id.* at 156, 158.

open the question whether the duty might not be as widely stated as a duty of reasonable care merely.

I should not like to leave you with the impression, however, that I feel there is nothing in *Bourhill v Young* which is upsetting to my analysis. The position is rather that I am worried by a different aspect of the case from the ones on which you lay emphasis. Provided the courts confine themselves to defining the situation in which the parties stood in relation to one another under the duty head, I do not think it matters to my analysis that the situation and relationship are defined in highly concrete terms. The question of what was reasonable care in that situation is left to be decided under the negligence head, even if, for instance, the court decides, under the duty head, that people on the roadway only owe a duty of care to people within ten feet. But by saying that the duty was owed to people "within the area of danger", what the court in *Bourhill v Young* did was to define the area of duty by reference to the conception of what the defendant might reasonably have foreseen, and all courts which have applied *Bourhill's Case* (e.g., in *Farrugia's Case*)[22] or do apply it in future, will have to determine this. I do not see how one can keep the question of whether there was a duty in the circumstances distinct from the question of what was reasonable care in the circumstances if one is to ask what the defendant might reasonably have foreseen as part of the duty question. But I hope, in view of the diversity of analyses revealed in *Woods v Duncan*[23] and the impossibility of accepting Lord Atkins' principle, from which the court in *Bourhill v Young* proceeded, that this method of analysis will not become fixed in the law.

Turning now to the occupier cases, the way in which the courts analyse the duty of the occupier to licensees certainly does not consist with my suggestion as to the proper analysis of an action for negligence. The courts certainly do not separate the duty problem from that of the standard of care, but treat them as one. And I am bound to admit that in this instance this produces a simplicity of analysis which seems desirable. What I should tend to argue here is that once the court has reached the point where it can lay down the standard required with the precision achieved in this instance there is no point in separating the two problems, but at this point the action ceases to bear very much relation to ordinary actions of negligence and ought to be regarded as a separate tort. I do not know whether the action by a licensee against an occupier ever did bear much relationship to ordinary actions of negligence, though I think actions by invitees against occupiers did until very recently. Before Horton's[24] case I thought that the duty here was just one of reasonable care - full stop. Even after Horton's case I still thought it might be possible to treat the action as one of negligence, as I understand negligence, by saying that the situation which gave rise to the duty of reasonable care—full stop—was the relationship between an invitee who did not know of a danger on the premises and the occupier. But now in the recent case *Christmas v General Cleaning Contractors Ltd.*[25] we have the court deciding a question of the standard of care by defining the word "unusual" in the definition it has adopted of the duty owed. And I do not propose to try to define my way out of this particular difficulty, for I do not think the courts have reached the stage in this particular field where the duty is so concrete that considerations of what is due care have become irrelevant. I think you are quite right in saying that here is an action for negligence which will not square with my analysis. But I am afraid I am stubborn enough not to be disposed to abandon my attitude in view of this one instance.

But the elaboration of my position which your letter has forced me to

[22] *Farrugia v Great Western Railway Co.* (1947) 2 All E.R. 565.
[23] (1946) A.C. 401.
[24] *London Graving Dock Co. Ltd. v Horton* (1951) A.C. 737.
[25] (1952) 1 K.B. 141.

engage upon does leave me with the feeling that any implication in my article—and I am afraid there was one — that the division of the fields of judge and jury would be relatively easy but for Lord Atkin's principle is insupportable. All I could say now is that the encroachment by the courts on the functions of the jury which Holmes regarded as desirable could proceed in rather more orderly fashion but for Atkin's principle. On the view I have put, it is open to the courts under the negligence head progressively to lay down more rules as to the standard of care instead of leaving the question of reasonabe care at large to the jury, even to the point where no question of reasonableness any longer arises and a new tort is precipitated. Moreover, even under the duty head—and this ruins the distinction I made between *Camkin v Bishop*[26] and *Ricketts v Erith Borough Council*[27] in the article however hard I tried to patch up the trouble by additional notes while the article was going through the press — such is the nature of judicial precedent that the courts always have some degree of latitude in redefining the situation which gives rise to the duty. On reflection I do not think one can argue that it was wrong for the court in *Camkin v Bishop* to say that the duty of a schoolmaster to a pupil is not raised by every situation in which the pupil is under the control of the master, but only in most, and that the situation where the pupil is allowed to leave the school on a half-holiday is an exception to the general rule. The position of the jury is thoroughly indefinite on any possible view of negligence and only becomes definite when the question of negligence no longer arises.

I am wondering as I close whether there are not Australian decisions which will provide you with further ammunition. Dixon J.'s judgment in *Insurance Commissioner v Joyce*,[28] for instance, certainly seems relevant. What do you think of his statement: "In the case of a driver whose ability to manage and control a car or whose judgment and discretion in doing so is impaired by drink, the position of the voluntary passenger has been determined by three different principles. In the first place, he has been regarded as depending upon a relation which by accepting a place in the conveyance he sets up between himself and the person responsible for its management. For those who believe that negligence is not a general tort but depends on a duty arising from relations, juxtapositions, situations or conduct or activities, the duty of care thus arises. For those who take the contrary view, the standard of care is thus determined. But whatever be the theory, the principle applied to the case of the drunken driver's passenger is that the care he may expect corresponds with the relation he establishes. If he knowingly accepts the voluntary services of a driver affected by drink, he cannot complain of improper driving caused by his condition, because it involves no breach of duty."[29]

Many thanks again for putting me through the hoops.

Yours sincerely,

BILL MORISON.

J. G. FLEMING TO W. L. MORISON

25th June, 1952.

Dear Bill,

Very many thanks for your letter of the 6th and the trouble you have taken in answering my queries. It was not my intention to arouse doubts in your mind, more particularly as regards the merits of your paper in the Modern Law Review, but to settle difficulties of my own. I am glad to say that, as a result of our correspondence on this question, I am beginning to see a clearer picture.

The following remarks will be rather disjointed since I have not prepared a rough script, but I know you will excuse this.

[26] Cited *supra* n. 4.
[27] (1943) 169 L.T. 396.
[28] (1948) 77 C.L.R. 39.
[29] *Id.* at 56-57.

(1) I agree with you that it is possible to separate the "duty question" and the "standard of care", and that it may be more conducive to clarity to keep these issues apart from that of "negligence", if only because it affects to a very large extent the division of function between judge and jury or (as you would have it) because any other course might lead to a mental confusion between the "test" for ascertaining the duty relation and whether there has been negligence. I am not too greatly impressed with the latter point, however, because I conceive that only the tyro can fall into the error of thinking that the former can be solved by resort to a mechanical formula. For that reason, I doubt if what I suggested in my previous letter has to any appreciable extent affected the argument in your article. As regards the 'duty' concept, the reiteration of the foresight test in *Bourhill v Young*[30] is not really disturbing, because in cases of *physical harm* to person or tangible property (at any rate, if there are no complicating circumstances) that test, viz., experience, seems adequate. It cannot, of course, cover the whole ground. I have had something to say about this aspect in my article in the current number of A.L.J.[31] and it is not therefore necessary to elaborate it further.

(2) If we, then, separate the duty question from the standard of care, it is obligatory for the purposes of exposition to insist that *both* are for the determination of the court, not the jury. The standard of care is most frequently left at large, in the sense that the court passes off responsibility to the jury after laying down the general formula of the "reasonable man".[32] In some type-situations, however, the standard has crystallized into more concrete rules, as e.g. in the occupier cases;[33] similarly in statutory negligence, but you may say with some justice that this last category is not really an instance of liability for negligence at all. In so far as courts have occasionally attempted to lay down specific rules as to standards of conduct in 'running down' cases, e.g. *Baker v Longhurst*[34] this could be explained in the same manner. (*In this instance,* however, there has been a marked reaction, because it was found futile to concretize standards in anticipation and it was thought that elasticity was more important than certainty. I would not, however, go the whole way with Pound's view as expressed in his Social Control Through Law.[33])

(3) *Prosser*[36] points out that "standard of conduct is the necessary complement to duty."[37] He adds: "It is quite possible, and not at all uncommon, to deal with the standard of conduct required of the individual in terms of "duty." Thus it may be said that the driver of an automobile approaching an intersection is under a duty to moderate his speed, to keep a proper lookout, to blow his horn, but that he is not under a duty to take precautions against an unexpected explosion of a manhole cover in the street. But the problem of "duty" is sufficiently complex without subdividing it to cover an endless series of details of conduct. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the

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[30] Cited *supra* n. 7.

[31] J. G. Fleming, "The Action Per Quod Servitum Amisit" (1952) 26 *A.L.J.* 122, particularly at 127-128.

[32] See Leon Green, *op. cit. supra* n. 9, 153-185 [(1928) 37 *Yale L.J.* 1029].

[33] The reason for this may well have been the fear lest juries would not share the judicial view that landowners stood in need of protection: See Leon Green, *op. cit.* 128-130.

[34] *Baker v E. Longhurst & Sons Ltd.* (1933) 2 K.B. 461.

[35] Roscoe Pound, *Social Control Through Law* (1942) 48-49.

[36] William L. Prosser, *Handbook of the Law of Torts* (1941).

[37] *Op. cit.* 224, 281-282.

light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty. The distinction is one of convenience only, and it must be remembered that the two are correlative, and one cannot exist without the other."[38]

The only objection I have to this passage, is with reference to the remark that the "duty is always the same . . ." In so far as standards of conduct in certain type-situations have crystallized at different levels, as e.g. in the occupier cases, they cannot be said to be "the same", except perhaps in the sense that such, for any given situation, is the standard expected of the reasonable man. This is hardly realistic when considered in the light of cases like *Horton v London Graving Dock*.[39]

(4) I cannot agree with your view (as I understand it) that as soon as the standard has crystallized a *new* (or separate) tort has come into existence. Though it may be that the duty of occupiers was developed prior to the general negligence concept, it is a species of that genus since there are present all the requisite elements of the tort of negligence. (Lord Wright in *Glasgow Corporation v Muir* called the duty of an invitor "a special subhead of the general doctrine of negligence."[40]) Hence I do not hold with the debates whether the duty towards invitee or licensee is an instance of liability for negligence, on the basis whether the standard of care exacted can be related to that of the "reasonable man." (On this point you might enlighten me on the enigmatic statement by Winfield.[41]) Separate tort—yes, if you assent to the proposition that in every duty situation there is a separate tort, but not in the wider sense which impinges on the present matter.

(5) As regards the nervous shock cases, you may be right in saying that *Bourhill v Young* would have gone the same way if the injury had been sustained by direct physical impact. I did not want to suggest that the *language* used in the judgments gave any support for a distinction.[42] Nevertheless, it seems to me that the *Farrugia*[43] test is, *in reality*, worlds apart from the approach used in the nervous shock cases.

I do question, however, that this type of case can be explained by reference to rules of remoteness of damage. "Remoteness" in the *Polemis*[44] sense refers to 'extent of liability' and assumes that there is liability for *some* consequences. In the nervous shock cases the question is simply whether such injury involves liability at all. I agree however that these cases do not advance my argument. They raise the question of "duty" and nothing else. Whether the duty is "not to shock" or (more restricted, probably) not to cause physical harm[45] does not matter for the present purpose.

(6) With regards to *Camkin v Bishop*[46] and *Rickett's Case*,[47] these are illustrations of the fact that in certain cases the courts formulate the standard of care in terms of duty, and in others do not. Since both are questions for the court, the result is not affected. I concede that the situation could be dealt with by leaving it to the jury altogether whether in their opinion the defendant had "acted reasonably." As you say, "the position of the jury is thoroughly indefinite."

I am sure that we have cleared the air and arrived at a substantial level

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[38] *Op. cit.* 224.
[39] Cited *supra* n. 24.
[40] (1943) A.C. 448, at 461.
[41] P. H. Winfield, *Text Book of the Law of Tort* (5th edn.), 559.
[42] See letted cited *supra* n. 8 at 418.
[43] *Supra* n. 22.
[44] *Re Polemis and Furness, Withy & Co. Ltd.* (1921) 3 K.B. 560.
[45] See C. A. Wright's Case Note (1943) 21 *Can. Bar Rev.* 65.
[46] Cited *supra* n. 4.
[47] Cited *supra* n. 27.

of agreement. It has certainly been of inestimable benefit to me.'

As always yours,
JOHN FLEMING.

[This exchange of views, which neither Dr. Morison* nor Dr. Fleming† intended for publication, was intercepted at a late stage by the Chairman of the Editorial Committee. It appealed to him as of such interest to students, including those of the learned writers, that they have been prevailed upon to permit its publication here. It has undergone only formal editing, mainly footnoting, for this purpose.]

THE SUPPRESSED REFERENCE IN THE "VOLENS" PRINCIPLE

The purpose of the present comment is to call attention to one of the principal sources of confusion which continue to affect the doctrine of "*Volenti Non Fit Injuria*" or "Assumption of Risk".[1] Its thesis is that analysis will be clarified if it is more often recognised that both the above modes of stating the doctrine contain relative expressions, that in neither formulation is the entity to which the expression relates made explicit, that there is a conflict of judicial opinion about what this entity is, and that this conflict of opinion is frequently concealed by the false supposition that the main difficulty lies in analysing the nature of the relationship rather than in defining the terms between which the relationship exists.[2]

It is common ground that a person who assumes a risk cannot in general recover damages for what would otherwise be a legal injury. But the principle as thus stated is incomplete, for one cannot speak of a risk in the abstract, and therefore the principle can only be significant if the person stating it has in mind the risk *of something.* And if one expresses one's self instead in the form that no legal injury is done to a consenting party, the problem still arises: To what must the party consent in order to deprive himself of a remedy? The tempting simple solution that it is the *injuria* — legal injury — to which the party must be *volens* has to be rejected as self-contradictory. The principle itself denies that there is any *legal* injury where the party is *volens.*

I. THE ANSWER IN SMITH v BAKER[3]

Prior to the decision of the House of Lords in *Smith v Baker* the authorities appeared to favour the view that the risk which must be voluntarily run by a plaintiff before the defence could be successfully raised was the risk of suffering the harm—physical or economic—for which the defendant would otherwise be bound to compensate the plaintiff. This is almost explicit in the judgment of Bowen L.J. in *Thomas v Quartermaine*:[4] "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the

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[1] As ordinarily understood, the first principle covers a somewhat wider ground than the second: *e.g.*, it applies to a consent to have inflicted upon one what would otherwise be a battery. But the present comment is concerned only with that part of its field of operation which coincides with that of the doctrine of assumption of risk.

[2] It is contended only that this thesis holds good for English law. In the United States it appears that *Smith v Baker infra* is not generally accepted [see A. L. Goodhart, "Rescue and Voluntary Assumption of Risk" (1934) 5 *Cambridge L.J.* 192 at 195-196] and that the general doctrine is differently conceived. But see Fleming James, Jr., "Assumption of Risk" (1952), 61 *Yale L.J.* 141, whose conclusions as to the American law are similar to those reached in the present comment as to English law.

[3] *Smith v Charles Baker & Sons* (1891) A.C. 325.

[4] (1887) 18 Q.B.D. 685.