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THE DOCTRINE OF NEGLIGENCE.[1]

Negligence, as a ground of legal responsibility, signifies a case of failure to do at all, or failure to do in a proper manner some act which it was the duty of the alleged delinquent to perform; by which failure the right of the party to whom the duty related was injured. In its popular, and in its ordinary legal acceptation, the term *negligence* is applied only to cases of mere omission, in which no wilful purpose to do wrong is supposed. A methodical digest of the law upon this subject will be attempted in the following pages.

The experience of every lawyer will verify the observation, that among all the questions brought before our courts, none are of more common occurrence, and none more apt to be perplexing, than those which turn on the negligence of one or the other party or the concurrent negligence of both parties in the case at bar. Upon no subject has the genius of our modern jurisprudence developed more complex and nice distinctions; and I think, it may be safely added, no distinctions in the whole range of our jurisprudence are more disconnected and confused. The employments and relations of life in commercial communities are diversified into an almost infinite variety. To different employments and different relations,

[1] The introductory chapter of an unpublished work.

a graduated standard of duty has been applied. To some of these it has been deemed the policy of civil justice to apply a rigorous; to others a less rigorous; to others an indulgent rule of care, attention or skill. The discreet application of this standard in the adjudication of causes, must always demand from those concerned in them a vigilant and comprehensive criticism. No lawyer is competent for this task who has not had occasion to make the whole doctrine, in its widest scope, a subject of thorough and systematic study. An essay to gather into one harmonious text the disconnected threads of principle running through a vast multitude of occasional adjudications, if at all successful, must serve to facilitate his inquiries.

But little novelty will be expected, either in definition, reasoning or illustration; and but little beyond the most guarded and diffident criticism, of any doctrines, which seem to have the sanction of a preponderating weight of authority, would be tolerated by the profession.

The real aim of such an essay should be to collect the principles relating to the subject into a methodical order, and in a perspicuous form; tracing the system back to the radical truths from which its practical doctrines originate; collecting into one connected view the decisions of many courts; furnishing in the case of contradictory authorities, *data* for comparison and judgment; and thus affording to the student the advantage of a convenient, expeditious, and orderly view of the subject.

Negligence must always be a question of fact, and almost always for the determination of a jury. Besides the accidental similitudes and analogies to be met with in reported cases, the lawyer's library can furnish him but little aid in the trial of such questions. It may at once be pronounced impracticable to invent specific tests of negligence; or in other words to contrive formulas for the various degrees of care incumbent on men in various situations. The thing to be done is to give to those, whose office it is to conduct such investigations, a ready, assured, easy and persuasive use of the few general principles which is all that legal science can bestow upon its ministers.

Negligence, according to the above definition, is always a case of failure to fulfil a duty. The duties, legal as well as moral, which man owes to his fellow man, grow out of his nature and relations in life. They may be classified sufficiently for our present purpose, as those which are assumed by express contract; those which are specially prescribed by statute; and those which are annexed by implication to certain employments, relations, conditions or occasions in human affairs. A duty, when predicated of any person in any case, signifies that he is legally bound in respect to the rights of some other person touching the particular subject matter, to do or not to do some certain thing, affecting the enjoyment of those rights. This idea of action or abstinence from action, which is involved in every supposition of duty, implies, by necessity, the POWER of the agent to act or abstain from action as the case may be. This easily conducts us to the truth, that every duty enjoined by law must be founded on and measured by the power of the agent to perform it; not always the power he may chance to possess in his own person, but sometimes such as he could and should avail himself of from extrinsic sources. Very few, indeed, of our social duties could be fulfilled by the sole agency of our own personal faculties. This fundamental truth will be found to consist with every view of the subject. A man may contract to do an impossible thing. If impossible in the nature of things, the contract is absurd and void. If impossible only to the contracting party, under the circumstances of the case, it is regarded as his own folly to incur such an obligation. The other party is not necessarily presumed to know that the act was not feasible; and hence, though in strictness it cannot be said that it is his duty to do a thing impossible for him to do, it was still his duty to ascertain and know, before making the contract, whether he could perform it; and, at all events, it may be affirmed as his duty in such a case, to compensate the contractee for the damages of non-performance. So, if after the making of the contract, it becomes impossible, from causes beyond his control and not imputable to his own agency, the duty to do the specific thing proposed of course ceases; but this does not, by necessary consequence, exonerate him in all cases from the duty of paying the damages.

We have said that the idea of duty is always founded on the supposition of power or capacity to fulfil it. This proposition does not mean, that in any individual case, a court is to analyse the faculties of the individual agent; measure their extent; and adjust the standard of legal duty by that measure. The economy of human justice forbids this. It is required to operate through the instrumentality of general laws; in other words, to apply an uniform rule to cases which are not uniform but diverse in their circumstances. It vindicates itself from blame for occasional and frequent instances of injustice only by pointing to the general aggregate of its results. The proposition means, that the definitions of duty in the jurisprudence of the State are framed not with reference to particular individuals, but to the whole community, considered generically as an indefinite number of human beings; and, hence, those definitions are based on a general hypothesis of human capacity.

Man is endowed by his Creator with certain corporeal, moral and intellectual faculties, composing what we call his nature; and this is the ground work of all his social duties. A very brief exposition of this idea will suffice. He has senses for the perception of physical objects; the capacity and instincts for observation; passions, affections, habits; he has curiosity, fear, confidence, memory, judgment, and by the aid of all these, he has in some measure foreknowledge of future consequences. He understands the operations of physical causes; the principles which govern the elements; the succession of the seasons; the processes of vegetation; the phenomena of the heavens; the instincts and habits of animals; the physical and social conditions under which he lives; the ordinary course of human affairs; the nature of mechanical agencies, and the faculties, instincts, and habits of our own race. Experience teaches him that certain causes *must*, that certain other causes probably *will*, and that certain others possibly *may* produce certain effects. But his resources of knowledge are not circumscribed within his own circle of observation. By the aid of a professional education, and consulting the focal lights of science and art, he is sometimes enabled to trace the chain of causation far beyond the common

limit; to foresee remote contingencies and guard against dangers, yet distant and dormant, by seasonable and apt precautions. From the dictates of his own moral sense, or from the express law of the State, he knows his own rights and duties, and the corresponding rights and duties of his neighbor. His civil responsibilites are developed from and proportioned to these endowments. He is bound to act, because he knows how to act. It is because he apprehends, or must be supposed to apprehend the approach of impending evils, and has it within his power to avoid or prevent them, that natural justice pronounces the practice of suitable care, circumspection, and prudence to be his duty.

But this duty, as a question for legal adjudication, always supposes the agent, who is chargeable with it, to stand in relation with some other party, to whom it is owing. The degree of care required of any one is based on the hypothesis, that all other parties are equally able, and, therefore, equally bound to exercise due care and prudence on the occasion. The one who is charged with the obligation, and the one who claims it, are both supposed to be in possession of the same rational faculties. Hence the duty alleged, in any case, is moulded by reference to the concurrent duties of all others concerned in the subject matter; and hence the familiar maxim of our courts, so unfailingly repeated in the trial of actions on the case, that the plaintiff, in order to recover for the negligence of the defendant, must himself appear to be free from negligence, proximately contributing to the injury.

Prudence is to be maintained in every theory of civil justice as an universal duty of man, without regard to the position of superior right in which he may happen to stand. Even when the victim of malicious wrong, he is not excused from an obligation inherent in his nature as an intelligent being; and to which his instincts must always prompt him. The great first object of all law is to *prevent* injury—the next to circumscribe its effects. This failing, it offers its feeble and too often ineffectual aid for redress. In the prevention of wrong, it must call on human prudence in every juncture, as its most potent auxiliary. It commands even the blameless sufferer, while under the hands of the wilful wrong-doer, to use those

means of self-protection which are in his power, as if he was conscious of no law promising reparation. And thus we see that the fundamental idea, from which the whole doctrine of negligence is deduced, is, that reasonable care is an universal duty of all men in all cases and in all relations—a duty not superseded, but only *assisted* by the law.

We find, however, that, in the progressive refinement of jurisprudence, it has come to recognize distinctions in the measure of care or skill to be exacted in different cases. For instance, a gratuitous bailee is held to exercise but little more than the *minimum* degree, just above the undefined but supposable point, where negligence ends and fraud begins. On the other hand, a common carrier is held responsible for the very *maximum* of the scale, and considered almost as an insurer in its broadest sense. If one party be found in a position of legal right on the occasion of the accident in question, the comparative responsibilities of the parties are marked always with attentive reference to this relation. If a person employ, in the course of his business, agencies of a dangerous nature, he is sometimes held liable for a want of skill and precaution, coming little short of prescience. A distinction is observed between private agents and public officers; between private corporations and such as are of a public character; and of the latter, commonly denominated *municipal*, between those which are created by special charter, and those which exist by the constitution and laws of the State, and not by the supposed will of the inhabitants. In some adjudications of respectable authority, though not yet standing above the reach of controversy at the bar, where the victims of accident have been children, incapable of discretion from their extreme youth, the scale of care has been adjusted to the exigencies of the case, and the person, having under his control the agency of injury, held liable for a degree of prudence sufficient to guard against the lack of it in the person injured.

But, after taking a full view of all the distinctions to be found in the books, the radical truth will be found underlying all, that, in every vicissitude of life, every man is bound, in avoiding the evils which beset his path, to exercise that degree of prudence which is

within the compass of his capacity, and which is rationally dictated by the occasion. The economy of human justice, the principles of a sound morality, and the instincts of our nature, alike suggest and enjoin this rule.

It is not obvious to a cursory glance, how any distinctions, in the degree of care to be used in avoiding injury, would be maintainable under this rule. After saying that we are all required to practice proper prudence in our conduct, it might seem, that any attempt at graduating this cardinal and universal duty must be essentially arbitrary. But, on further reflection, it will be seen, that, though the scale may not always have been accurately marked, and though sometimes an impracticable degree of precision may have been attempted, yet, after all, this plan of graduation is simply an application, by the lights of practical experience of the general principle stated, to various classes of cases and various classes of social relations.

The weight of duty, obviously, is not always the same. When assumed by voluntary and express contract, its obligation, of course, is modified by the terms of the contract. The nature of the subject matter, the consideration, the probability of danger, the reasonable expectations of the parties, and the prevailing usage at the time and place, are all to be considered as elements in the calculation. If the contract be made by persons in a particular employment, public policy, founded upon a comprehensive range of considerations, may have dictated a peculiar rule of duty, as in the case of common carriers. But the law always supposes, that the care and skill it requires is within the presumable capacity of the party; and that the occasion reasonably called for its exercise.

The duties, which are of legal cognizance, we have distinguished as those which are created by express contract; those which are prescribed by statute, as regulations of municipal policy; and those which are implied by law in certain employments, relations, conditions and occasions. It is manifest, on a little consideration, that in this inquiry we shall have no concern with those duties which exist only by force of special agreement between the parties. Because, when the particular act to be done, and the mode of doing

it are explicitly pointed out in the agreement, a breach of its stipulations, whether a misfeasance or a nonfeasance, must be regarded as wilful, and, therefore, not presenting the characteristic features of negligence. If the mode of action be not specified, it is then left as a question of rational construction by the rules of law, and the case at once falls essentially under one or the other of the two remaining classes. These two classes, moreover, for greater simplicity, may be conjoined under one definition; and the duties embraced in them described as those duties, which the municipal law, following the dictates of natural justice, declares to be incumbent on all persons holding to each other certain relations, in a certain state of circumstances.

As a duty always implies a correlative right, a clear exposition of the rights to be protected must necessarily serve to demonstrate the duties to be enforced by civil law.

The usual classification of rights is familiar to every student. It may not be useless in this disquisition to attempt a more general definition. The term "right" denotes that relation of exclusive possession and enjoyment which any member of a civil society holds to any given object, instrument, or condition of good; such relation being consistent with the concurrent rights of all other members, at the time, place and occasion supposed.

The idea of social relations and intercourse implies certain territorial limits within which they are to take place; and, therefore, proximity of location, and frequent contact between the individuals composing the community. The closer this proximity and the more frequent this contact, the more multiplied will be the occasions of interference or collisions in the daily pursuits of life. The conditions of space for the enjoyment of rights by any given number of persons, being thus limited, each is inevitably subjected to the pressure and inconvenience of more or less restraint; and hence the maxim—*sic utere tuo, ut alienum non lœdas.* Every one must use his own right so, that at the same time his neighbor may enjoy his.

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