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GRATUITOUS UNDERTAKINGS AND
THE DUTY OF CARE

CHARLES O. GREGORY

I

First year law students always have difficulty with the concept of
duty in the law of negligence. For that matter, their professors
do not find it easy and certainly have a hard time getting it across
intelligibly in class. Yet the expanding field of duty of care is the most
important part of our common law of torts. This facet of the common
law is experiencing profound changes under the impact of modern
developments in liability insurance and of analogous trends toward
placing on enterprises the losses occasioned by the risks they create.

No doubt it is a bit old fashioned to talk about liability for negligence
in terms of duty and cause. But it seems necessary in order to give be-
ginning students something to hold onto as a framework for the confu-
sion now constituting our law of negligence. Hence, at the risk of being
pedantic, I am going to indulge in some elementary observations before
embarking on a discussion of duty of care in the actual doing of things
which there is no obligation to do at all, in the first place.

Negligence occurs not only by doing things in a sub-standard fash-
ion. It also occurs by failing to do certain things under circumstances
indicating that such failure is likely to prove harmful to others. I hate
to suggest the old distinction between misfeasance (doing something
the wrong way) and nonfeasance (not doing anything at all). But after
using the more accurate circumlocutions, these terms seem refreshingly
convenient. To illustrate what they mean, driving an automobile care-
lessly is misfeasance. So is tossing a bottle out of a window into the
street. And so is anything in the way of active conduct which foresee-
ably creates a risk of harm towards others. Nonfeasance, on the other
hand, occurs when anybody breaks a promise by failing or refusing to
do something which he has said he would do. It also occurs when one
refuses to go to the help of another, even though his granting assistance
is the only way of preventing harm to the other person. And it occurs

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when the owner of land or a chattel fails to make an inspection of his property to discover latent defects which subsequently cause harm to others. Unfortunately the distinction between misfeasance and nonfeasance—however clear it may be conceptually—sometimes becomes blurred in actuality. For it is occasionally difficult to say whether behavior attributed to a defendant is action or non-action; and sometimes non-action occurs in such a way and at such a time as to make it appear a part of a preceding and closely connected course of active conduct.

In any event, however negligence may occur, it is well established that it does not always entail liability, even when damage ensues. Before the negligent defendant can be held liable, the court must be convinced that he was under a duty of care, that his negligence was a breach of such duty, and that it was what is euphemistically called the proximate cause of the damage sustained by the plaintiff.

This is not the time or place to try to explain what negligence is or to describe in detail the nature of the simple negligence issue. Nor is it appropriate here to discuss the complicated meanings which have been read into the term “proximate cause.” In passing, however, it seems proper to suggest that whatever else the proximate cause formula has served to denote, it has nothing to do with the concept of duty. Too often it has been stated that the famous Palsgraf case was concerned with the notion of duty and that Cardozo had concluded that Mrs. Palsgraf could not get to the jury because there was no duty of care toward her. I think that notion is quite false, since the railroad obviously owed her a duty of care because she was a ticket-holder on the station platform. Cardozo concluded only that there had not been a breach of this duty because the defendant’s servants had not been negligent toward her. His conclusion was based on the fact that the evidence showed no conduct on their part foreseeably endangering her person in any way. And Andrews’ dissent that it did in fact cause her harm has no bearing at all on the matter of duty.

The concept “duty” is really a term of art in the law of negligence. Its existence implies that relationship between the parties which requires the exercise of care by the one toward the other. This relationship manifests itself in all sorts of ways—sometimes by circumstances which are most informal and at other times by circumstances which are highly formal. What these circumstances were yesterday may not be what they are today; and who can say what they will be tomorrow? But the most ordinary and casual instances of duty to take care are per-

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ceived in the everyday conduct of human beings acting and moving about in physical juxtaposition to each other. They are free to engage in normal activity; but if they are doing so where others have a right to be, then they must act prudently with a view of avoiding harm to such others. On the other hand, if they are actively creating risks on their own land, an entirely different set of considerations affect the determination of duty to be careful.

Perhaps it is unnecessary to emphasize the formal importance of duty or no-duty in negligence litigation; but it will do no harm to recall it at this time. The duty issue gives the court a powerful control over the handling of negligence actions before a jury. For even if the evidence clearly indicates negligence on the part of the defendant, the court may still keep the case from the jury and direct a verdict for the defendant if it concludes, as a matter of law, that there was no duty on the defendant’s part to exercise care. Thus, it is for the court alone to determine when a jury may speculate on whether or not a defendant has been guilty of actionable deviation from the standards of due care. In view of the generally acknowledged vagaries of laymen sitting on juries, this is an important element of control in keeping the common law consistent. There are some who believe that such power in the courts too severely restricts the imposition of liability. Others, however, are convinced that it keeps the law within reasonable bounds, since it enables the courts to spell out the rules of the game in a wisely conservative fashion and to expand the scope of liability step by step only in accordance with the actual needs of a changing society.

The hardest problems in the field of duty grow out of inaction or the failure to do that which, if it had been done, would have prevented the harm complained of—in short, nonfeasance. As a rule, when a failure to do something causes damage to another and is at the same time a breach of contract, then the harmed promisee may maintain an action based on negligence. This is an action in tort; and the duty of care finds its source in the contract between the parties. Indeed, contract is perhaps the strongest and most reliable genesis of duty that can be found in the common law.

Much of our common law of torts is now devoted to the recognition of a duty of care from one who is a party to a contract toward another who is not a party to that contract. So deeply imbedded in our culture was the belief that contract gave rise to duty, that our common-law courts at first clung to the notion that every contract also delimited the duty strictly to the contracting parties. Thus, in spite of the fact that
one who provided a chattel for another knew that his failure to discover and correct defects would endanger third parties, he was nevertheless held immune from liability to such persons and was made answerable only to him for whom he had provided the chattel—all because of the presence of privity of contract with the former and because of lack of such privity with the latter.\(^2\)

As our law has developed, of course, foreseeability of harm to such third parties has become a tremendously important item in the recognition of duty of care toward them. In this process, however, the equal importance of the original contract relationship has not been neglected. For it has served to take the original transaction out of the field of gratuitous undertakings and has placed it, rather, in the area of undertakings for profit and gain.\(^3\) Through devices like contracts for the benefit of third persons or, more simply, just because of plain everyday foreseeability of harm to third persons, the courts have transcended the notion that contract any longer serves to delimit duty to the contracting parties alone. As to such third parties, arguably, the transaction may still appear to be a gratuitous one; but the original contract indicates that, as far as the negligent provider is concerned, he got something from somebody and should not be classed simply as one who has merely been granting favors for nothing in return.

II

It is impossible in one brief essay to discuss all aspects of the duty issue in negligence litigation or even to broach all aspects of duty in connection with nonfeasance or failure to act. I intend, therefore, to confine my further remarks to a special conceptual development of duty—that is, to situations where there is originally no duty to do anything at all but where the alleged tortfeasor nevertheless embarks upon a course of action gratuitously and involves somebody else in damages.

A good starting point is the grand old case of *Coggs v. Bernard.*\(^4\) Here the defendant gratuitously undertook to move some casks of brandy for the plaintiff from here to there, and in so doing he mis-


\(^3\) See Cardozo, J., in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1915), where he cites Indermaur v. Dames, L.R. 1 C.P. 274 (1866), the leading case on the duty of a landowner to business visitors—i.e., the pecuniary benefit theory—as an analogy to the manufacturer’s duty toward the ultimate consumer.

\(^4\) 2 Ld. Raym. 909 (1703). This case will be mentioned so often throughout this article that its citation will not be repeated.
handled and dropped one of the casks so that it broke, to the plaintiff's damage. The court made it quite clear that if the defendant, after having gratuitously promised to move the brandy, had failed altogether to do so, the plaintiff could not have held him accountable for any damage he suffered thereby. The reason was that the defendant's neglect would have been a mere breach of promise—nonfeasance—not amounting to a breach of contract because the promise was unsupported by consideration. It would not do to allow a tort action here, in spite of the fact that defendant's failure to fulfill his promise was a neglect amounting to negligence, because that would circumvent the whole law of contracts. Consideration being absent, there was therefore no duty to act. And if there were no duty to perform, then neglect or nonfeasance resulting in harm should not be regarded as actionable.

This feeling on the part of the early common-law judges was fundamental indeed. In the absence of positive law, such as a statute requiring a certain course of conduct, or of some special relationship, including contract, nothing in our culture could be deemed to impose an obligation on anyone to do anything for anybody. Each man could with impunity refuse to aid, or deal in any way with, his fellow man. Of course, if he contracted to do certain things for another, his failure to embark upon the performance of his promise would make him liable for a breach of contract. In this sense alone was pure nonfeasance actionable at all. On the other hand, if he did embark upon a compliance—say, the furnishing of a chattel—but wholly neglected to make a proper inspection and to remedy a defect which shortly resulted in damage to the person of his customer, then his negligence in the nature of nonfeasance became actionable as a tort. Curiously enough, while such a neglect is accurately called a nonfeasance, it is apparent that it is not the same kind of pure nonfeasance which is involved in the case of completely ignoring the contract to deliver. Already, then, we find ourselves hedging on the concept of nonfeasance as it was originally contemplated. In this latter situation, it means simply the failure to perform some particular act under circumstances which required the doing of that act if the basic duty underlying the whole transaction was to be observed. Certainly the distinction just made is important, since it suggests the difference between actions *ex contractu* and *ex delictu*.

But let us consider a completely unrelated situation. Suppose D happens along and sees a stranger lying on the sidewalk in great distress. Now D can render assistance to this man and thus obviate ultimate great harm to him. We may even suppose that if D does not help him,
such harm is inevitable. Nevertheless, D refuses to render any assistance and goes his way. Here, then, the stranger sustains damage which, but for D's neglect, would not have occurred. May we therefore conclude that D's neglect caused the stranger's ultimate avoidable damage? While such a conclusion would be rash, indeed, under the circumstances here related, it would not seem queer at all if D were the head of a boys' camp and the "stranger in distress" were one of his charges.

We are told, however, that D is under a moral obligation to render assistance to the stranger in distress—one of those duties of imperfect obligation which are left to the consciences of individuals. But the common law takes no cognizance of such duties. Arguably the explanation for this state of the law is the deep-seated cultural conviction in Anglo-American society that you cannot make people do what they have no desire to do—you cannot make each man his brother's keeper. An equally good legal explanation may be that there is nothing to seize upon as the basis of actionable tort because there is nothing but absolute nonfeasance involved in the transaction. Naturally, if there were some legal duty to render assistance, then this element of nonfeasance would not stand in the way of liability. But this legal duty (if not imposed by statute) must find its source in some relationship which is more or less consensual in its origin—something self-imposed like contract, master and servant or a family tie. It is noteworthy that a failure to comply with a contract obligation to render assistance in such a case would probably result in an action of tort and not just an action for breach of contract. While disregard of a family duty to render assistance might not give rise to any action at all, because of the close domestic relationship, it would probably be a violation of the criminal law.

It has occasionally been suggested that we should change our law to require the rendering of aid to strangers; but such a development smacks of collectivism and seems unsuited to our individualistic culture. The closest approach to such a duty is in statutes requiring motorists to aid people whom they have non-negligently been instrumental in hurt-

5 References to duties of imperfect obligation occur both in Pasley v. Freeman, 3 T.R. 51 (1789) and in Thorne v. Deas, 4 Johns. (N.Y.) 84 (S. Ct., 1809). For the above assertion in the text see Ames, Law and Morals, 22 Harv. L. Rev. 97 (1908) and Duty to Aid One Not Imperiled by Defendant's Fault, 17 Notre Dame Lawyer 51 (1941).


7 Ames, op. cit. supra note 5, at 111 et seq. See also Duty to Aid One Not Imperiled by Defendant's Fault, 17 Notre Dame Lawyer 51 (1941).
In the meantime, however, certain developments in the law of contracts have gone far to impose a duty to act where formerly no such duty would have been recognized. While this development has hardly gone so far as to create liability for non-performance of an executory promise, such as that mentioned above in *Coggs v. Bernard*, yet it seems to be approaching that extreme.

Take the old case of *Thorne v. Deas*. There the two plaintiffs owned a half interest in a vessel, the defendant owning the other half. One of the plaintiffs was captain of the vessel. As he was about to leave the port of New York on a voyage, the plaintiff-captain suggested that they step over to the underwriters and insure the vessel against loss at sea. The defendant, however, told the plaintiffs to rest assured—that he would take care of it immediately after the ship had sailed. Relying on this promise, the plaintiff-captain sailed; and the other plaintiff, also relying on this promise, refrained from doing anything about it himself. When the vessel was shipwrecked, the plaintiffs brought suit for damages against the defendant because he had not had the boat insured.

Chancellor Kent declared that no action could be maintained for breach of the defendant's promise because it was unsupported by consideration and was, therefore, not a binding contract. This decision seems more unjust to me than letting off a passerby who refuses to help a stranger in distress. After all, the defendant had solemnly promised that he would insure the vessel and thereby led the trusting plaintiffs not to do it themselves, which they otherwise would have done. But what could Chancellor Kent do, as he read the common law precedents? Surely there was no contract in existence, but only a *nudum pactum*. Unless he was to change the most vital part of the law of contracts, it appeared that he had to excuse the defendant for this nonfeasance. How about labelling the defendant's duplicity a tort and allowing recovery under that heading? Although his behavior smacked of deceit, he had made no misrepresentation of a present existing fact but only a bare promise as to future conduct. And Kent's contemporaries were not friendly to the notion of a later time that the defendant might have been held on proof that when he made the promise, he did not intend to fulfill it and was thus misrepresenting a present existing fact—the state of his mind.


9 Rest., Contracts § 90 (1932). As to this, see 1 Williston, Contracts § 138 (rev. ed., 1936).

10 4 Johns. (N.Y.) 84 (S. Ct., 1809).

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He could, of course, have concluded that the defendant's neglect to take out insurance on the boat was negligence. The difficulty here, however, was that even though the defendant was negligent in not doing what he had promised to do, his neglect was simply nonfeasance. Furthermore, there was no duty of care because, again, there was no contract obliging him to do anything about carrying out his promise. Defendant was admittedly a louse in almost every sense of the word; but the only way to make him civilly accountable in tort would be to find a duty to perform in a binding contract. As we shall presently see, however, a later New York court felt that such a tour de force was not so impossible as Chancellor Kent thought it was.\(^\text{12}\)

In the meantime, how about the defendant in \textit{Coggs v. Bernard} who, in gratuitously moving plaintiff's brandy, had broken one of the casks? Although he was under no binding promise to perform, yet he was held liable for the damage which occurred. But that was because he stuck his neck out and actually entered upon the performance of his promise. At that point he passed beyond the realm of nonfeasance into the area of feasance—action or conduct—with specific physical reference to the plaintiff's property which he had taken into his charge. Then, for the first time, the judges had something to sit in judgment on without first having to find a binding contract as a source of duty. Thus, they concluded, the defendant did not have to undertake to fulfill his bare gratuitous promise to move the casks; but once he had undertaken to do so by assuming control of the casks and starting to perform, then what he \textit{did} he would \textit{have} to do carefully. Here was the distinction between nonfeasance and misfeasance with a vengeance. For conduct in relationship to the interests of others presumes duty, at least when the plaintiff's interest involved is rightfully where it happened to be when the defendant acted in relation to it.

This idea is very fundamental, indeed, and is older than the modern law of negligence. Indeed, Chief Justice Holt referred to the defendant's negligent handling of the casks as a sort of "deceipt."\(^\text{18}\) How far is this basic idea to be carried? That depends, of course, on what you regard as an undertaking or entering upon performance sufficient to carry the defendant out of the realm of nonfeasance and into the area of feasance. In \textit{Coggs v. Bernard} there were two factors which contributed to this transition. They were (1) the defendant's taking the casks in charge—a bailment, and (2) his actually setting out with the casks across the city in his cart. Must both of these factors, then, be


present to constitute feasance in the nature of an undertaking or entering upon, in order to give rise to a duty of care? It would not seem so, as there are many actionable undertakings or enterings upon performance imaginable which have nothing to do with personal property. And you can’t have bailments without personal property. Hence, the second factor of actually entering upon a course of conduct with respect to the plaintiff’s interest seems to be the essential criterion of duty in these types of cases.

But what would be the significance of bailment alone, without misconduct thereafter? Suppose that the defendant, having gratuitously promised to move the casks, merely took them into his warehouse and left them there indefinitely, to the great damage of plaintiff who had counted on having them moved at a certain time. There is still no contract, the whole matter as yet being merely a gratuitous undertaking. Yet the defendant might seem to have gone beyond the state of nonfeasance by taking the casks into his possession. But the plaintiff’s harm occurred as a consequence of the defendant’s failure to do anything else—which certainly looks like nonfeasance. Defendant can say to plaintiff: “All I did do was done well. The casks are still in my warehouse, unharmed. Take them away any time you want to come for them.” Should the defendant be allowed to escape liability under the circumstances on the ground that there was no duty of care, because contract was absent and the only harm ensued from nonfeasance after the bailment took place?

I don’t know what Chief Justice Holt might have said about this; but in our times the defendant might be held to a duty of care for the results of such nonfeasance, once he had gone so far as to take possession of the plaintiff’s chattels. This is indicated by Carr v. Maine Central Railroad.\textsuperscript{14} There plaintiff was overcharged for freight by defendant railroad; but the rules of the Interstate Commerce Commission prohibited rebates of any sort without official consent. Defendant offered gratuitously to secure an adjustment from the I.C.C.; and pursuant to this arrangement, plaintiff handed over the necessary documents to the defendant. The railroad thereafter neglected to do anything about the matter within the six month’s limitation period allowed, after which it was too late to secure clearance for the rebate. Plaintiff’s suit for the amount of the overcharge was met with the defense that this was merely the breach of a gratuitous promise—a type of nonfeasance not actionable in the absence of a binding contract. The New Hampshire Su-
preme Court, however, allowed recovery on a negligence theory, inferring duty of care from the misfeasance implicit in the defendant's having undertaken the task in the sense of entering upon its performance. This "course of conduct" had begun when the defendant took the documents from the plaintiff, that being the first step in the nature of performance. Naturally the defendant's real offense was nonfeasance after the bailment; but the court concluded that such neglect was actually a negligent doing of what defendant had started to do with relation to the plaintiff's interest. Moreover, it was impossible for the plaintiff to have the matter taken care of when defendant alone had the necessary documents.

Perhaps an even more intriguing case is *Siegel v. Spear & Co.* There plaintiff had bought some furniture from defendant on the installment plan; and when the plaintiff planned to give up his apartment, the defendant offered to warehouse the furniture for him gratuitously during his absence. After this offer was made and accepted, but before the bailment actually occurred, plaintiff told defendant that he would get the furniture insured; but defendant told plaintiff to leave the matter to him, since he could do it more easily and cheaply. The bailment itself was then made. The plaintiff relied on defendant's promise to insure; but the defendant neglected to take out the insurance and the warehouse was accidentally destroyed by fire a few weeks thereafter, the furniture in question being a total loss. Plaintiff sued defendant for the value of the furniture and was met with the defense that the promise to insure was gratuitous, unsupported by consideration, and with the argument that the neglect, being merely a nonfeasance, was not actionable since there was no duty to perform. The New York Court of Appeals, however, allowed the plaintiff to recover; but its theory of decision is not at all clear. Indeed, the court seemed utterly unable to make up its mind as to whether the duty violated arose from a "contract" to insure or from an "undertaking" to perform.

Here there was simply a gratuitous promise; and the defendant's lapse seems to have been the purest of nonfeasance. To what extent, then, did the bailment of the furniture to the defendant change matters? Although this bailment was no doubt a crucial factor in the court's decision, theoretically it is hard to see how it really could have changed matters at all. In *Carr v. Maine Central Railroad*, it is true, the bailment had been regarded as the first step in performance, taking the

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15 Note 12 supra.
16 78 N.H. 502, 102 Atl. 532 (1917).
transaction out of the field of nonfeasance and embarking the defend-
ant on a course of active conduct from which it could withdraw only
by the exercise of care. But there the bailment was made as a necessary
and contemplated move under the promise and as a first step in its ful-
fillment. In the furniture case, however, the promise was not made
until after the bailment was already arranged for, having absolutely
nothing to do with the bailment itself—and it is hard, indeed, to see how
that case involved anything but pure nonfeasance. For there was really
no undertaking or entering upon performance of the type which would
constitute feasance or active conduct and which would thus enable the
court to find a duty by implication in the absence of a binding con-
tract—at least, not as a step necessary to the fulfillment of the promise
to insure.

Nevertheless, the Siegel case appears in some ways to be one of mis-
feasance involving an implied duty of care. And there is language in
Crane’s opinion to some extent justifying this interpretation. For he
says: “But if in connection with taking the goods McGrath [defend-
ant’s agent] also voluntarily undertook to procure insurance for the
plaintiff’s benefit, the promise was part of the whole transaction and
was linked up with the gratuitous bailment.” This language would
have given stronger support to the tort theory based on misfeasance if
the italicized part had read: “... the bailment was part of the whole
transaction and was linked up with the gratuitous promise.” But the
two readings of this clause seem more or less convertible. And Crane’s
following sentence lends additional support to the tort theory, bearing
in mind that both the bailment and the promise were gratuitous. There
he said: “The bailee, if such a contract were within McGrath’s agency,
was then under as much of an obligation to procure insurance as he was
to take care of the goods.”

In my opinion, however, the decision in this furniture case cannot
easily be reconciled with the Coggs v. Bernard theory of tort liability.
In order to bring such a case within the category of action or feasance
—the entering upon performance—I believe that the bailment must be
the first step necessarily contemplated in fulfillment of what had been
promised or undertaken and not just a casual occurrence incidental
thereto. Here the bailment had absolutely nothing to do with the
promise to insure and could not possibly be regarded as the first step
in its performance. This gratuitous bailment could imply in the way of

18 Ibid.
duty of care only an obligation on the part of the defendant, once he had accepted the goods, to take ordinary care of them such as keeping them locked up and protected from the weather or from such hazards as he might negligently have created to harm them.

Actually the court itself appears somewhat uneasily to have felt much as I do about this matter, for it seems to have gone ahead and recognized consideration sufficient to make a binding contract of the promise to insure. Thus, it found the duty of care in that contract and not implicit in the fact that defendant had engaged in feasance—had actually entered upon the performance of a gratuitous promise. It is important to note, however, that the court did not infer consideration from any detriment to the plaintiff, for his non-exercise of the right to insure was not bargained for by the defendant. In a way, this seems to have been a plain case of promissory estoppel in the sense of Section 90 of the *Contracts Restatement*.19 Plaintiff had changed his position in reliance on the defendant's promise; and when he was damaged as a result of nonperformance, the court proceeded as if there were consideration and gave the promise the effect of a binding contract from which it inferred a duty of care. As Crane, J., observed: "We are inclined to think that if the contract were made—and we must assume it was as there is evidence to sustain the findings of the jury to this effect—there was in the nature of the case a consideration sufficient to sustain the promise."20

If this interpretation of *Siegel v. Spear* is correct, then the fact, and relative occurrence in time, of the bailment became matters of indifference. Indeed, the apparent theory of the decision would even allow a recovery in *Thorne v. Deas*,21 were that case to arise again. As to this, Crane, J., observed: "I find that *Thorne v. Deas* (supra) has been seldom cited upon this question of consideration and whether or not we would feel bound to follow it to-day must be left open until the question comes properly before us."22 Nevertheless, I cannot help

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19 Rest., Contracts § 90 (1932).
20 To make sure that everyone concerned is completely at sea, note the following passage about *Siegel v. Spear* in 1 Williston, Contracts § 138 (rev. ed., 1936): "The promise was enforced on the basis that it was made at the time of the bailment and the possession of the goods was thereafter surrendered. There is no element of consideration in the case, in view of the fact that the bailment was gratuitous and the promise to insure was actually made just after the bailment had been agreed upon; there is simply reliance upon the undertaking of the bailee." The quotation from Crane's opinion, above, appears in *Siegel v. Spear*, 234 N.Y. 479, 481-2, 138 N.E. 414, 415 (1923).
21 4 Johns. (N.Y.) 84 (S. Ct., 1809).
22 Siegel v. Spear, 234 N.Y. 479, 484, 138 N.E. 414, 416 (1923). Note, however, that Crane had already observed the following on pages 482-3: "When McGrath stated
thinking that the rationale of the Siegel case is far from clear. In the first place it seems to be an action sounding in tort, with recovery based on the defendant’s neglect to insure—a nonfeasance—where the duty of care was found to arise in a binding contract supported by consideration of a sort. And I just don’t believe that the court would have gone this far if there had been no bailment in the case.

Suppose the plaintiff had kept the furniture in his own apartment and, after asking the defendant’s advice about getting insurance, had been told by the defendant to go ahead with his vacation—that he would take care of the insurance gratuitously. Had defendant neglected to perform this promise on which the plaintiff relied, and had taken no step to carry it out, would the court really hold him liable if the apartment house burned up and the furniture was destroyed? If it would, then the theory of promissory estoppel would be completely vindicated and Thorne v. Deas would no longer be law. But I will believe that New York has gone that far only when I see a square decision to that effect. In the meantime the actual circumstances of the Siegel case render its decision inconclusive. While the bailment could hardly be regarded as the first step in the performance of the gratuitous promise to insure—because the promise, when made and accepted, did not have any necessary connection with the bailment—nevertheless it was an important psychological factor in the case. Thus, it may be said to have played a part roughly analogous to impact in the fright and mental anguish cases. While this observation may seem farfetched, yet I can extract nothing more precise from the court’s language in the Siegel case.

III

In most of the situations where defendant is under no initial duty of care to act, there is no bailment involved to clarify (or confuse) the issue. Most of these situations arise in connection with hurt people or with children (and even grown-ups) who are in a position of peril, under circumstances where the defendants were not responsible for

that he would insure the furniture it was still in the plaintiff’s possession. It was after his statements and promises that the plaintiff sent the furniture to the storehouse. . . . It is in this particular that this case differs from Thorne v. Deas (4 Johns. 84, 99) so much relied upon by the defendant. . . . He [the plaintiff in Thorne v. Deas] gave up possession of none of his property to [the defendant]. . . . The case would have been decided differently, no doubt, if he had.”

28 Reference is made to the old rule that the consequences of mental disturbance negligently created were not actionable without incidental impact. See Holmes, C.J., in Homans v. Boston Elevated Railway, 180 Mass. 456, 61 N.E. 737 (1902).
their plight but were in a position to save them from serious harm. These cases are generally lumped under the category of moral obligation to render assistance, in implied recognition that there is no legal duty to do so. And this holds true even where the defendant has non-negligently, or without initial duty to avoid negligence, been instrumental in creating the plight of the plaintiff. Thus, most of these cases occur in railroading, where trespassers are unwittingly hurt on the tracks.

Under the so-called humanitarian doctrine, at least one state court places railroads under a duty of care to avoid harm initially to unseen trespassers in helpless peril on the tracks, and this precedent has been mentioned as an analogy bearing on the matter under discussion. But surely it has nothing to do with this matter and constitutes only a judicial vagary confusing the common-law duty of care owed by landowners, as qualified by the doctrine of last clear chance. We are fairly entitled to confine our inquiry here to the situation where the railroad’s servants discover that someone has been hurt on the right of way without the fault of the railroad. What must they do? Clearly they cannot proceed with the train while the hurt person is still hanging from the front of the engine or is lying on or so closely to the tracks that he would be further endangered by continued progress of the train. Hence—if the railroad is going to continue to function—its servants may simply place the hurt person to one side without incurring liability of any sort. Arguably such a course would be the first step in feasance—an item of conduct involving the railroad in a duty to go further and remove the hurt person to a hospital. But no such case appears to have been litigated.

Usually the crew takes charge of the hurt person, rendering first aid and undertaking to get him to a hospital or to place him in the hands of his family or friends, under a doctor’s care. While the railroad crew is not obliged to do this, simply embarking upon such course of conduct compels the railroad to see it through prudently. Subsequent neglect of any sort raises a jury issue of negligence with respect to further damage, even when any other course might interfere with the crew’s discharge of its duties in performing the railroad’s business. Thus, there is no duty in such cases to do anything, but if anything is done, which involves taking the hurt person in charge, then it must be

24 For a citation of cases and discussion, see Becker, The Humanitarian Doctrine, 12 Mo. L. Rev. 395 (1947) and 13 Mo. L. Rev. 374 (1948).
done carefully. The very act of charity puts a noose around the neck of the kind-hearted person, from which he can escape only by persuading a court and jury that he proceeded without reproach.

It is hard to say how far courts will push this notion in recognizing a duty of care, short of the defendant’s actually taking the hurt person in charge so that nobody else could render him assistance. Suppose a motorist perceives a hurt person lying beside the road and, without touching him, says to him that he will fetch him aid. If he drives off and dismisses the whole matter from his mind, how can he be held liable? Would it make any difference if he drove to a garage, telephoned a couple of doctors’ numbers, and then impatiently dropped the whole matter because their lines were busy? He had entered upon the performance of his promise; but would any court hold him to have assumed a duty of care? Yet if the hurt person told the next passer-by not to bother with getting help because assistance was on its way, something like promissory estoppel as a source of duty of care might be pressed against the original offeror of assistance. He might even have gotten a doctor or hospital on the phone and carelessly given incorrect instructions for reaching the hurt person. Would this be such an entering upon or undertaking as to create a duty of care sufficient to hale him before a jury? Or suppose he actually got an ambulance and then could not recall exactly where the patient was. Indeed, suppose while he was on his way to secure help, he negligently ran his car off the road or into somebody else’s car. If a court and jury might review all such instances as possible actionable negligence, merely because the defendant had by his “undertaking” passed out of the area of nonfeasance and into that of feasance, thus placing himself under a duty to see it through, the denial of charity would be at a premium.

Perhaps courts should never recognize a duty of care in these cases unless the defendant actually takes the hurt person in charge and, by so doing, forecloses the possibility of another granting assistance more effectively. And the same should probably be true in all situations where one gratuitously undertakes to render aid to another. Surely one who tries to rescue a drowning person should not be held accountable simply because a court and jury think he might have done better. If he does get him on land and then undertakes to resuscitate and care for him, there might be some reason to hold that the rescuer had assumed a duty of care. But most courts would not hold that a rescuer

had violated a duty of care against himself when he plunges into the path of danger negligently created by a third person and thus bar his recovery of damages because of his contributory negligence. Similarly they should not place a rescuer under a duty of care toward the rescued person unless it clearly appears that he has taken such person in his exclusive charge and thereafter neglects to use ordinary care under the circumstances.

There are several instances of employees taken sick at their places of work, where the employers are not obliged to help them but nevertheless undertake to do so and thereafter behave in a questionable fashion. In one case an employee became ill with a bad headache. Her employer sent her home in a car. As the driver neared her home, he encountered a pool of water in the road through which he was reluctant to drive. Hence he asked the employee to go the rest of the way alone, on foot, which she did. She was overcome when she reached her home and died. The New Hampshire court held that its voluntary undertaking placed the employer under a duty of care toward the deceased and that it would be for the jury to decide whether or not there was negligence. Similarly, when an employee is hurt at his work, his employer may not be under a duty to care for him, but if the employer's nurse is offered to render treatment, then there is a duty of care that such treatment be reasonable and not negligent.

A close analogy is perceived when business visitors are taken sick or are non-negligently hurt in stores, theaters and amusement parks. It is doubtful whether the enterprise is under any duty to render assistance to the person in trouble; but if it does, then it is held to a duty of care in doing so. A failure to do anything at all is apparently not a breach of duty in such situations, at least when the calamity to the suffering person has nothing to do with any activity occurring on the land. Thus, a patron of a bathing beach run for profit fell on some steps and was badly shaken up, although his fall was not due to the negligence of the proprietor. He requested aid from the attendant, who put him off while he waited on others; and when the patron was seriously hurt in a desperate effort to help himself, the court refused to recognize that there had been any duty of care, let alone a breach of it by the de-

27 See 12 A.L.R. 909 (1921) and 46 A.L.R. 389 (1927). See also Bohlen, op. cit. supra note 6, at 312 for a different view prevailing with respect to seamen.
fendant's neglect. On the other hand, where a child falls on an escalator and gets his fingers caught in the "comb," several courts have recognized a duty on the part of the proprietor to use care in stopping the escalator and in extricating the child from further harm, even though they concede the absence of negligence in the original mishap. In the leading case of Buch v. Amory, however, the New Hampshire court held that there is none but a moral duty on the part of an enterpriser to avoid harm to a young known trespasser from the continued operation of stationary machines in a manufacturing plant. While such a decision makes sense if the situation is simply nonfeasance, such a characterization appears to be strained. This seems more like a landowner's duty of care to avoid harm through active conduct toward a known trespasser. Perhaps there is a distinction between a train moving over rails and a revolving buzz saw which is screwed to the floor; but they both seem like active conduct and should be treated as such.

One class of enterprisers—public carriers—appear to be under some sort of duty of care toward patrons who become ill on their premises, although even here they may usually escape liability under the sheltering category of nonfeasance. But recognition of a fairly broad duty to act in these situations seems apparent, because they already have the unfortunate patron in charge, under circumstances where he could not possibly secure other adequate assistance. After all, the passenger-carrier relationship rests on a rather special contractual basis. Certainly it is easy to understand those carrier cases involving drunks and others who are able to walk but are not in condition to take care of themselves. When conductors help such people off trains and other vehicles they must go farther and see them to a safe place, because of the manifold dangers of traffic. Carriers may also get rid of obnoxious drunks; but in putting them off, they assume a duty to see them clear of the dangers associated with public carriage.

83 Bohlen, op. cit. supra note 6, at 308-9.
One of the best known cases in this general field is *Depue v. Flattau*. There the plaintiff drove up to the defendants' farm on a cold winter's evening, ostensibly to buy furs and cattle but also with the idea of getting himself invited for supper and, perhaps, for the night. Apparently the defendants did not like the plaintiff. They gave him supper; but when he proposed spending the night, they turned him down. Insisting that he be on his way, the son of the house helped him into his fur coat and started him for the door and his sleigh. The plaintiff seemed unwell because he stumbled and partially fainted. Nevertheless, the son of the house put him into his sleigh, placed the reins in his hands and started the horses off in the right direction. Next morning plaintiff was found on the road where he had fallen out of the sleigh, having sustained severe injury from freezing. The defendants claimed that they were under no duty to house the plaintiff or to take care of him; but the Minnesota court held that they were under a duty to behave far differently from the way in which they did. First it talked about the moral duty to aid persons in distress. Then it brought out and relied upon Brett's famous dictum in *Heaven v. Pender*, a principle which even Brett himself later denied when he had become Lord Esher. That dictum read as follows: "... Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize 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." If this counsel of perfection means that anyone who happens upon another in distress is bound to help him, then it is completely fallacious. It certainly cannot be taken to create a legal duty of care where only a moral duty has existed before. Nevertheless, this proposition has functioned as a sort of ideal in stimulating the growth of duty of care required by manufacturers to ultimate consumers and other members of the public not in privity of contract with them. At the same time, of course, that development

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35 100 Minn. 299, 111 N.W. 1 (1907).
36 11 Q.B.D. 503, 509 (1883).
rests primarily on contract with someone who, in turn, brings the defective chattel nearer the consumer or injured person; and it is based essentially on the idea that a manufacturer is engaged in a profitable business relationship with the public rather than being in pursuit of merely gratuitous undertakings.

I have never seen anyone suggest that Brett's dictum be used to place on a gratuitous donor or bailor the affirmative duty of inspecting the chattel involved in order to discover and correct or disclose a latent defect in it, even though the courts seem ruthless about enforcing a duty to disclose known defects in such cases. While the absence of pecuniary gain relieves the gratuitous conferrer of a benefit from having to make an inspection to discover defects, for some curious reason it does not relieve him from the burden of opening his mouth to relate the existence of a known but unapparent defect. Perhaps this reason is plain common decency towards one's fellow man, although there is a legalistic analogy to setting a trap if such known defect is not disclosed, which suggests the unrealistic but not uncommon notion of an implied intent to harm. At any rate, that analogy seems less astonishing than Chief Justice Holt's suggestion of "deceit" in the negligent performance of a gratuitously undertaken act for another, and this observation, in turn, invites speculation on whether the true explanation cannot be found in the theory of Coggs v. Bernard. Thus, the gratuitous bailor does not have to lend his car; but if he does, he must do so carefully—an acknowledged duty which he violates if he fails to warn of known latent defects and which he does not violate if he simply lends the car for what is it, as far as he knows.

Here I must digress to comment on the sentimentality exhibited over the duty of care owed by the owner of premises to business and social visitors. It seems natural for courts to place an affirmative obligation of care on landowners to keep their premises in safe condition for visitors who make a limited entrance on premises for business purposes. And to me it seems natural for the same courts to treat purely social visitors quite differently. If I am willing to put up with my house as it is, I should expect my friends to do likewise or to refrain from coming. Naturally, I should expect short shrift if I know of some latent danger on my premises and do not warn my guests about it. But I think the courts should confine the duty of care toward social guests to instances of what I shamelessly call "gross negligence." Even in cases of known but undisclosed latent defects, I would not subject a householder to the risk of facing a jury unless the trial judge were
satisfied that the evidence indicated what I would call gross negligence. Many state legislatures have shown in the host-guest statutes a similar feeling about the active conduct of driving. There seems more reason to suppose that the same idea should apply to the nondisclosure of latent but minor known defects in automobiles, where such a nondisclosure could not reasonably be construed as gross negligence. Surely the same is true of homes. So many cars and homes have something wrong with them; and until the time when everybody carries properly adjusted liability insurance, imposition of a broader duty of care on the average citizen seems unduly harsh.

Anyhow, the Minnesota Court in Depue v. Flatau failed to make a convincing case under either Brett's dictum or a moral-legal duty of care. Certainly, its analogy to the railroad case of Marr's Administrator did not sustain this latter theory. There a railroad was held under a duty of care toward a drunken passenger whom its servants helped from a train and put on a station platform, whence he roamed in the dark as a trespasser into the railroad yard and was non-negligently killed by a switching engine. That decision is acceptable either because of the railroad's unusually great contractual duty of care toward passengers or because its servants had undertaken to see the drunk to a point of safety and had performed this undertaking inadequately by not removing him from the railroad's premises. The Minnesota court's recognition of a duty of care in the Depue case seems justifiable only because of the physical undertaking or entering upon the act of seeing the plaintiff into his sleigh and on the road to his home. Having gone that far, the defendants should have acted prudently under the circumstances. For instance, they might actually have driven the plaintiff all the way home.

It is certainly annoying to be told that either social or business guests, by collapsing on your doorstep or in your parlor, can thus legally compel you either to take care of them or to see them safely to some appropriate refuge. But in all common sense, what else can be done about situations of this sort? Suppose P is visiting you and becomes unconscious on your sofa, through no fault of yours. Presumably, you may leave him there and do nothing about it, no matter how much this course of inaction would worsen his ultimate condition. But

41 Note 34 supra.
who would behave in this fashion? You would either put him to bed and call a doctor or have him removed to his home or to a hospital. Although if you did nothing you have probably violated no legal duty of care, that would not be true if he came to enough to get on his feet and you shunted him out onto the public sidewalk where you left him to his own devices. Such conduct would probably be regarded as misfeasance in violation of an implied duty of care. Suppose someone collapsed on the floor of a store and thus became an interference to the continuance of business. No doubt the storekeeper could ignore him with impunity (although what storekeeper would?); but if he wished to get rid of this nuisance, any method he adopted would probably involve him in a duty to take prudent steps under the circumstances.

Another line of cases fits more naturally into the old rule of *Coggs v. Bernard*. These are the landlord-tenant cases, an example of which is *Gill v. Middleton*.42 There a landlord had leased a house to the plaintiff's husband and had not agreed to maintain the premises in good condition. The floor of the privy became unsafe to step on, and the tenant requested the landlord to fix it. Although he was not obliged to do so, the landlord did undertake to repair the floor of the privy, and after he had worked on it, he assured the plaintiff that it was all right. When she used the privy, in reliance on the landlord's repairs, the floor gave way and she fell into the vault, sustaining injuries. The Massachusetts court, acknowledging that the landlord was under no obligation to make the repairs or even to comply with his gratuitous executory promise to do so, held that when he nonetheless chose to fulfill his promise, he must be held to the standard of care ordinarily employed by mechanics and under a duty to live up to such a standard. While there is some sort of local confusion about ordinary and gross negligence in these cases in Massachusetts, the court in *Gill v. Middleton* thought that this landlord's conduct was tantamount to either type of negligence, perhaps because of his assurance to the plaintiff that the floor was made safe.43

There are other kinds of informal situations which afford trouble in the field under discussion.44 Thus, suppose a railroad, having no statu-

42 105 Mass. 477 (1870). For cases in general, see 150 A.L.R. 1373 (1944).
44 A few miscellaneous examples of cases which there is not room enough here to discuss are: Thomas v. Studio Amusements, Inc., 50 Cal. App. 2d 538, 112 P. 2d 552 (1942); Roadman v. Johnson Motor Sales, 210 Minn. 59, 297 N.W. 166 (1941); Sult v. Scandrett, 119 Mont. 570, 178 P. 2d 405 (1947); Brunelle v. Nashua Building & Loan
tory duty to do so, establishes a watchman at a public crossing and subsequently discontinues this service without notifying the public. A motorist who is thereafter hit by a train at the crossing, not having stopped because the watchman was not there, can build a good case for recognition and breach of a duty to maintain a watchman. Here is a kind of estoppel, analogous to the promissory estoppel employed in Siegel v. Spear.45 Having undertaken to supply this special service, the railroad must continue its performance or else notify cross-traffic that it has been discontinued. This theory would not work with transients who did not know that there ever had been a watchman at the crossing. Estoppel would benefit only those who had been lulled into a sense of security by a pre-knowledge of the fact that the watchman had once been provided. Hence, it is hard to accept that part of Erie Railroad v. Stewart46 which places the railroad under a duty of care to have notified all motorists struck at the crossing, whether or not they had known that the watchman had once been provided.

This extension of the case might possibly be justified under the theory of Coggs v. Bernard. That is, the defendant railroad, not originally required to maintain a watchman at the crossing, nevertheless did voluntarily inaugurate this service and performed it negligently by not keeping the watchmen there after having started to do so. But that would seem like an absurd application of a perfectly good theory. It would more properly be applied where the flagman was present and negligently waved the out-of-state motorist over the crossing as a train approached.

In a somewhat more troublesome case, the owner of a car took it to a garage to have repaired a known defect in the steering wheel.47 The defendant garage returned the car to its owner with the assurance that the repair was made. Actually, as it later transpired, no work at all had been done on the car, the garage proprietor having honestly but carelessly thought it was fixed. The car owner thereupon set off upon a trip with the plaintiff as his companion, and because of the defect the
car left the road, causing harm to the plaintiff. Here the Washington Supreme Court declared that no duty of care was owed to the plaintiff by the garage. That court had already accepted the rule of *MacPherson v. Buick Co.*, and the plaintiff contended that the substitution of the word “repairer” for “manufacturer” should operate under that doctrine to imply a duty of care by the garage toward people like the plaintiff, who would foreseeably be hurt if the repairing had been negligently done. With this argument the court wholeheartedly agreed, but it denied that the garage defendant was even a repairer. “It did nothing upon the automobile. It only agreed to repair and did not do it.” Then the court proceeded to declare: “Had the respondent undertaken to repair the steering gear and had negligently done the work, a different question would be presented. . . .”

Here the defendant had had the auto in his possession as a bailee for repair and had stated that it was repaired. Of course, this case does not really fit into the context of this article because the car did not belong to the plaintiff, no promise had been made to him, and the defendant had not gratuitously promised to fix the car. He was operating for profit and gain and this was a regular business transaction with the owner of the car. But I should have supposed—as long as the court itself raised the point of undertaking and entering upon performance as the source of duty to the plaintiff—that when the garage took the car into its hands, it had passed beyond the area of nonfeasance and into the ambit of feasance, or actual undertaking. Certainly there was a kind of estoppel effected, even in favor of the plaintiff; for the car owner, who had known of the defect, might very well have warned the plaintiff of it if he had known that the repair had not been made. Even if there was a plausible excuse for denying recovery to the plaintiff here under the doctrine of *MacPherson v. Buick Co.*, which seems doubtful, there appeared to be ample evidence on which to ground an undertaking and, hence, an implied duty of care toward the plaintiff on the theory of *Coggs v. Bernard*.

What would the Washington court have done with a case like *Gill v. Middleton*, supposing that the landlord did not actually repair the floor of the privy but nevertheless assured his tenant’s wife that he had done so and that she might thereafter safely use it, which she did, to her damage? Or suppose that the garage proprietor had told the car

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50 105 Mass. 477 (1870).
owner that he would fix the steering gear gratuitously, took the car into his garage, did nothing on it at all, and then returned it with the assurance that it was repaired, in reliance on which the owner himself used the car and was hurt. While we might all agree that complete non-action in these situations would involve the defendants in no breaches of duty, even after gratuitous verbal undertakings or promises, yet what did happen, together with the assurance that the repairs had been made, should place these defendants under duties of care toward the plaintiffs who relied and were hurt. The undertaking or entering upon sufficient to take a case out of the area of nonfeasance and bring it under the category of feasance, thus giving rise to a duty of care, probably should be inferable as a matter of common sense from attendant circumstances. And such an undertaking might well be inferred from behavior which is plainly nonfeasance, as long as the defendant thereafter deliberately creates a sort of estoppel by lulling the plaintiff into a sense of security with purely verbal assurances that the requested change has been made. In other words, it seems plain that there are situations where words alone, spoken in the absence of any obligation to speak them, might qualify as undertakings or acts quite sufficient to justify the implication of a duty of care, as long as such words are not promissory but are representational in character, whether or not they are innocently or negligently made. Certainly such instances would more closely resemble Chief Justice Holt’s “deceipt” in Coggs v. Bernard than did the defendant’s actual physical conduct in that case.

V

The foregoing account reveals the source of duty of care in a variety of situations. It is difficult to find any common thread running through these various patterns. But they all suggest a gratuitous undertaking, either in words or in conduct, by which a defendant relates himself to a plaintiff in such a way that the latter is lulled into a sense of dependence and false security. Our common law has always placed great emphasis on possible pecuniary benefit to the defendant as a criterion in determining whether or not he is under a duty of care. If his negligent omission or nonfeasance has occurred as part of an entire transaction originally founded on a business venture involving gain, then our courts are more willing to recognize a duty to avoid such negligence by omission or nonfeasance. On the other hand, if the whole transaction is in the nature of a gratuitous undertaking, then
they tend to deny the presence of duty unless the defendant has engaged in some active conduct in relation to the plaintiff's interest. Aside from a possible development based on the idea of promissory estoppel, this trend seems fairly uniform.

But it is still quite difficult to determine just when an omission, which is concededly nonfeasance, is allowed to retain that characteristic in order to support the conclusion of "no duty" or, on the other hand, borrows color from preceding items of active conduct so as to become merely a part of a whole transaction of activity, thus supporting the conclusion of "duty of care" and its breach. An interesting example of this subtle problem occurred in *Pease v. Sinclair Oil Co.*

There the defendant oil company circularized science teachers in schools and colleges, offering them gratuitously small and compact exhibits of highly refined petroleum products. The plaintiff, a high school chemistry teacher, wrote and procured one of these exhibits for his class. It arrived by express and consisted of small jars of colorless liquid labeled "gasoline," "benzine," "kerosene," etc. Some months after the exhibit had been put up in the school laboratory, the plaintiff procured a chunk of metallic sodium which he planned to use experimentally in tiny pieces. Pure sodium oxidizes rapidly and must be protected from even the moisture in the air. A tiny piece on water bursts into flame. It is usually kept in oil to prevent oxidization. Needing some kerosene in which to store the sodium, the plaintiff opened the bottle from the defendant's exhibit marked "kerosene" and poured it over the sodium which he had placed in a glass jar. A violent explosion occurred, causing the plaintiff serious injuries. Then it transpired that several of the bottles in defendant's exhibit including that marked "kerosene" contained distilled water, and the defendant's explanation was that most absolutely pure petroleum products looked just like water anyway, and that the exhibit was much safer to ship when the bottles contained water instead of inflammatory liquids. No word of this substitution, however, was communicated to the plaintiff or to any other recipient by the defendant.

Was there a duty of care in this case on the part of the defendant and, if so, was there negligence amounting to a breach of such duty? The only reprehensible part of this whole transaction was the defendant's failure to warn the plaintiff of the substitution of water for the inflammable liquids in the exhibit. That failure, of course, was pure nonfeasance. But it was merely an item in a course of conduct

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51 104 F. 2d 183 (CA. 2d, 1939).
GRATUITOUS UNDERTAKINGS AND THE DUTY OF CARE

initiated and carried through by the defendant, and, as such, took color from the preceding circumstances becoming a part of such conduct or feasance rather than retaining in isolation the characteristics of nonfeasance. How do we know this? As far as I can tell, only because the court so concluded when it took the position that the defendant had gone so far in a course of conduct that its failure to go further was more like launching an instrument of potential harm rather than like merely refusing to become an instrument of good. Of course, the court noted that this gift exhibit was essentially an advertising scheme and, as such, introduced a possible element of pecuniary gain into the transaction. But this makeweight probably had little to do with the decision. The crux of the matter lay in the fact that the defendant knew its exhibit would end up in a science laboratory where the contents of the bottles might conceivably be used for what they purported to be. It was this realization, coupled with the knowledge that water—a harmless enough item in most contexts—might prove to be harmful when used as a different chemical substance, that influenced the court, especially since it would have been so easy for the defendant to put the teacher “in the know.” In spite of the defendant’s sincere motive of achieving safety in shipping the exhibit, the whole transaction smacked of a kind of estoppel and of a sort of “deceipt,” if we may again borrow Chief Justice Holt’s word from Coggs v. Bernard. As a matter of common sense, therefore, the court simply concluded that the defendant had gratuitously set in motion a series of acts which properly exposed its behavior to the scrutiny of a jury.

Now we gain nothing by kidding ourselves that we have achieved anything like a principle of universal and infallible application in this development from Coggs v. Bernard. For whether or not the courts will use this principle to find a duty of care will always depend upon the circumstances. In spite of elements like reliance and estoppel, undertaking and entering upon, exclusive assertion of protective interest over the plaintiff, and the like, there are still inarticulate considerations of policy which upset the accurate and satisfactory operation of that principle. And the best illustration I can find to support my disillusionment concerning this principle is the typical water company case.

A private water company secures a franchise from a city. As a condition to securing a monopoly, it contracts with the city to install water hydrants at specified places and to maintain pressure in such

hydrants sufficient to extinguish fires. In return for this service, the city agrees to pay the water company somewhere between \$12.00 and \$50.00 per year per hydrant—an amount barely sufficient to provide for their upkeep. Then a building of one of the citizens, the plaintiff, catches on fire and is burned to the ground because there is no pressure in the hydrants. Here the plaintiff sues the water company for loss of the building due to its negligence and, except in three states, is given a very cold reception by the courts.\(^{53}\)

The plaintiff in this type of case usually has three strings to his bow. He asserts a right to recovery under statutes in most states requiring public utilities to render adequate service to all citizens. The courts declare that such statutes mean only that the service must be offered and sales of water be made in due course, on a non-discriminating basis. He asserts a right as a third party beneficiary of the contract between the city and the water company, looking to the contract as the source of a duty of care owed to him. Almost uniformly the courts say that it was never intended in the contract between the city and water company to set up any rights in private citizens, at least with regard to fire hydrants, which could be converted into duties of care to avoid loss by fire through insufficient pressure. In addition, he asserts a common-law duty of care on the part of the water company to each property owner purportedly protected against fire by the hydrants. And it is here that the principle we have pursued throughout this essay falls so ignominiously to the ground.

In one of the leading cases of this type, *Moch Co. v. Rensselaer Water Co.*,\(^{54}\) the plaintiff sought recognition of this common-law duty of care through the theory underlying *MacPherson v. Buick Co.* It noted that defendant's enterprise, at least insofar as it affected the installation and maintenance of hydrants, was contractual in its inception and it relied on the foreseeability of dependence and use by third parties like itself to bridge the gap of absence of privity of contract. While the plaintiff might well have proceeded directly on the theory of *Coggs v. Bernard*, stressing the fact that the water company was holding out its hydrant service to the public, had exclusively taken over this enterprise in that locality, had built up a sense of reliance on the part of the citizens which might operate as an estoppel, had actually entered upon performance of this undertaking in direct physical relationship to the property holdings in the community, and had done

\(^{53}\) See 62 A.L.R. 1196 (1929).

\(^{54}\) 247 N.Y. 150, 139 N.E. 596 (1928).
all this carelessly, it chose the more circuitous route. But Cardozo in his opinion rapidly brought the crux of the matter down to this Coggs v. Bernard approach. As a matter of fact, he made it quite plain that his conception of MacPherson v. Buick Co. was the issue of duty to avoid harm by nonfeasance or omission in the context of previous conduct involved in a fairly special relationship. He pointed out that the duty of care undertaken by a manufacturer toward the ultimate consumer came from its having embarked upon the enterprise to make and sell for profit—a course of conduct which, when begun, acquired sufficient impetus to comprise as a part of such undertaking any omissions such as neglect to discover by inspection and to correct latent defects. Thus he makes the application of the MacPherson v. Buick Co. rule a veritable function of the doctrine of Coggs v. Bernard, recognizing that nonfeasance as such cannot give rise to a duty of care in the absence of rather special relational factors.

Applying himself to the water company case in hand, Cardozo soars off into the ethereal sphere of cryptic verbalism in a most unsatisfactory manner. "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all," he says, suggesting that "time-honored," but "incomplete" and "at times misleading" formula comprising the distinction between misfeasance and nonfeasance. "The query," he goes on to say, "always is whether the putative [or supposed] wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." Somewhat querulously he remarked: "The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort."55

Then, in a manner befitting Abinger at his stuffiest in Winterbottom v. Wright,56 Cardozo deprecates the extension of liability to the point that would logically make a water company responsible for a holocaust laying an entire city low. And if this step could not be taken,  

55 The first of these three quotations appears in Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928); the other two appear ibid., at 168 and 898.

56 10 M. & W. 109 (1843). Thus Cardozo said at page 168 and 898 of Moch Co. v. Rensselaer Water Co., note 55 supra: "We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty."
then his court could not take the first step of letting merely the plaintiff recover. "The law does not spread its protection so far." Thus Cardozo pays lip service to legal principles which he had done so much to mold into their modern form, while at the same time he produces a sense of frustration in the classroom with his facile manipulation of common law and his argument *in terrorem* to achieve a result opposite to that indicated by the rules themselves. For most students—and, I daresay, most professors, as well—start out with the feeling that a water company does not have to engage in the undertaking of supplying water through pipes and hydrants which they install, but if it does enter upon such a course of action, particularly in close physical juxtaposition to the property interests of citizens and where by its exclusive position it induces a sense of reliance on their part, then it should be placed under a duty to see this undertaking through with care. In light of plain inferences from the situations discussed above in this article, it seems absurd to suppose that the water company had not set its hand to the task of supplying pressure in the hydrants so that its failure to go through with its undertaking becomes mere "inaction...at most a refusal to become an instrument for good," thus saving it from a duty of care to go further. Such manipulation of legal doctrine suggests that the god has clay feet and that the common law is a pretty poor thing.

But this sort of treatment by Cardozo should immediately put the wary student on his guard. Cardozo knew what he was doing in the *Moch* case and his underlying reasons are soundly in keeping with modern trends in tort law. At the same time his opinion is misleading, since he did not plainly reveal why he reached his decision. Here he suggests the high priest who is dealing with the mystic formulas of a theology which the neophytes are trying to comprehend. Someday they will understand what goes on, and why, as they draw nearer to the inner circle. In the meantime, it would be unfortunate to let it appear that the principles of the law are not infallible. When the repositories of social wisdom intuitively realize that the strict application of these principles would produce an undesirable result, they must manipulate the principles so it appears that they either lead to—or, at least, do not forbid—the desirable result. Thus are the principles themselves maintained and, at the same time, is justice achieved. And this is particularly true when the presiding mentor has an axe to grind, inso-

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far as the prevailing principles in their modern form are largely of his making.

Perhaps I am too rough on Cardozo, although I think not. For he did throw out a couple of broad hints in the *Moch* opinion. He spoke of "the crushing burden that the obligation would impose," and observed: "A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward." This latter remark had to do with the $42.50 per hydrant per annum which the city paid the water company. And if these hints do not reveal the reasons for the New York Court's decision in the *Moch* case, then reference to some of the older water company cases from other jurisdictions should make it plain, as I shall soon indicate.

The real reason for the decision in the *Moch* case seems to be that fire insurance companies, and not water companies, are the appropriate social institutions for bearing losses by fire under these circumstances. Practically all property owners today carry fire insurance. They pay plenty for the protection they get and the insurance companies are professional risk-bearers, well able to shoulder the losses which occur. Indeed, losses by fire should be left finally on them unless there is some good reason for allowing them to shift the burden elsewhere. Now, suppose a fire insurance company carries the risk on a house which is burned to the ground by sparks negligently emitted by a passing railroad engine. Here it pays the loss to the house owner and is subrogated to the latter's action in tort against the railroad. The railroad is managed to administer the risk of losses by fires which it negligently sets on adjacent property; and there is no good reason why it should not pay for this loss. Since the house owner cannot recover twice—once against the insurance company and once against the railroad—and since, as between these two companies, the railroad is clearly in the wrong, then it seems equitable to leave the ultimate loss on its shoulders. While this line of reasoning may seem to apply equally well to the water company cases under discussion, a moment's reflection may indicate otherwise.

Certainly Cardozo realized that a decision for the Moch Company was tantamount to a decision for Moch's fire insurance underwriter against the water company. Any right acknowledged to Moch would be equitably assigned by subrogation to its fire insurance carrier—and would quickly be asserted. But what could the water company do about administering this risk? It always received $42.50 per hydrant

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per annum, regardless of the nature of the property holdings near any particular hydrant or of the changes which took place in the neighborhoods. That left it virtually nothing to fund against the contingency of loss which might be indirectly occasioned through an inadvertent failure of the water pressure. Take a hypothetical residential or factory area served by one hydrant. The total fire insurance premiums paid to cover the buildings represented from the risk of fire would be a fairly substantial sum, depending upon their value. Cardozo thought the sum of $42.50 insufficient to warrant the conclusion that a negligent water company should be made to relieve a fire insurance company from bearing the ultimate risk of loss by fire; and he knew that that is what would happen in a subrogation action if the water company were held liable to the property owner for negligence in not maintaining the pressure at the hydrant. Of course, that would not be so where the property owner had neglected to take out fire insurance. But you could hardly have one law for imprudent property owners and another for their more prudent neighbors. Moreover, almost all property owners carry fire insurance nowadays as a matter of routine. Certainly if the duty of care of a water company were established in an action brought by an uninsured property owner, it would seem impossible not to recognize the same duty of care when an insured home was burned; and any right there recognized would automatically pass to the insurer by subrogation when it had paid the loss.

The distinction between allowing the home owner to recover against the spark-throwing railroad and denying his recovery against the pressure-deficient water company is rather subtle, but perhaps possible to maintain. After all, the railroad company did cause the fire by its negligent operation in the first place, whereas the water company had absolutely nothing to do with causing the fire. This rather shabby recourse to the difference between nonfeasance and misfeasance may seem unsatisfactory; but no doubt it had a good deal to do with Cardozo's thinking in the Moch case. For the railroad was a risk creator and the water company was not.

Even less clear, however, is the distinction between these water company cases and those where the pressure on the hydrants is ample, but, because of the negligent acts of outsiders, the water cannot be used to extinguish the fires. Thus, when the fire hose is stretched across tracks from the hydrant to the fire and is needlessly severed by a passing train or trolley car,59 or where a building contractor had negligent-

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ly driven piles through and had shattered the water main, the property owner is allowed to recover against the outsider whose interference made it impossible to use the water pressure. And it makes no difference that the property owner is insured, his insurance company being subrogated to his rights after paying him off. Here an even shabbier recourse to the distinction between nonfeasance and misfeasance is invoked. The railroad and the building contractor in these cases did not create the risk of fire. They only acted negligently to prevent the conferring of a benefit that otherwise would have been bestowed.

It is extremely hard to reconcile most of the water company cases with recognized legal principles, particularly as there are three jurisdictions in which the property owner may recover against the water company because of low pressure in the hydrant. And in two of these his fire insurance company is subrogated to his right of action. But these three jurisdictions do not agree among themselves on the proper theory underlying liability; and for a while they had the U.S. Supreme Court guessing on this subject. At the theoretical level any desired result seems possible, depending upon how you read and apply the available principles. Florida follows the third party beneficiary rule, using the contract as a source of duty of care to permit recovery in tort. North Carolina, on the other hand, seems to lean toward the theory of Coggs v. Bernard, a course which temporarily won the approval of the U.S. Supreme Court in 1906. But while Kentucky also allows the property owner to recover, it stoutly maintains that such recovery is for breach of contract and is not in tort. Now if recovery is allowed at all, it would presumably have to be in tort, for it is hard to see how the contract obligation toward the third party beneficiary could do more than provide the source of duty of care on which to found a negligence action. The U.S. Supreme Court seemed clearly to concede this in its review of the North Carolina court's judgment. But the Kentucky court nevertheless insisted that the recovery was not in tort, its sole reason apparently being to allow

60 Concordia Fire Ins. Co. v. Simmons Co., 167 Wis. 541, 168 N.W. 199 (1918).
61 Ibid.
63 Florida and North Carolina.
64 Guardian Trust Co. v. Fisher, 200 U.S. 57 (1906).
65 Florida Public Utilities Co. v. Wester, 150 Fla. 378, 7 So. 2d 788 (1942).
66 Note 64 supra.
67 Burford & Co. v. Glasgow Water Co., 223 Ky. 54, 2 S.W. 2d 1027 (1928).
68 Note 64 supra.
recovery by the property owner but to prevent his fire insurance company from becoming subrogated to his right of action against the water company! "If the water company had willfully or negligently set fire to the property, it would have been guilty of a tort, and it then could be said that in paying the loss the insurance companies were discharging an obligation, which, in equity and good conscience, should have been discharged by the water company." But such was not the case, it said, the liability of the water company being "predicated solely on the breach of its contract to furnish sufficient facilities to extinguish the fire," while the insurance companies, in paying up, did not discharge any obligation of the water company but only their own contractual undertakings.

The most striking of all these water company cases, however, are those in the majority rule jurisdictions where even the cities which have directly contracted with the water companies are denied recovery for loss by fire of public buildings. Because of the direct contract privity on which to found duty of care, it would seem almost impossible to deny liability there; yet that is exactly what happened. And these decisions emphasize the fact that no amount of legal principles will be permitted to stand in the way of the desired result. Such a variety of positions by the courts make the general principles of the common law seem rather ridiculous. But some of the cases in which recovery is denied clearly reveal the true rationale underlying the majority rule. Stated simply, it is a determination to place the loss of these fires right on the shoulders of fire insurance companies—and nothing more. This determination, obliquely shared even by the minority view state of Kentucky is so strong that the majority view states will not let an uninsured property owner recover from the negligent water company, even if it is the contracting city itself. For these courts seem convinced that property owners should carry fire insurance and deserve no sympathy if they fail to do so. Presumably most fires are started accidentally or through the fault of the property owner himself—at least not by financially responsible third party tortfeasors. Since the handy and relatively cheap device of fire insurance is available, the courts seem bent on compelling all property owners, including contracting municipalities themselves, to depend only on fire insurance for protection against the risk of low pressure in fire hydrants.

69 Burford & Co. v. Glasgow Water Co., 223 Ky. 54, 57, 2 S.W. 2d 1027, 1028 (1928).
The Kentucky compromise may seem preferable to this seemingly harsh rule. In that state an uninsured property owner may recover against the water company, and if he has only partial insurance, he is permitted such recovery to the extent that he is not insured, in addition to his insurance money, and all recourse through subrogation is denied the insurance company.  

But this compromise might be deemed unacceptable in most states because of the somewhat fantastic rationalization necessary to support it—that the liability of the water company is not in tort but in contract, thus leaving no claim in tort to which the insurance company can be subrogated. As indicated above, the U.S. Supreme Court clearly held that if the water company is held liable to the property owner, it is a liability in the nature of tort and not contract.  

True enough, the only issue before that court was whether the judgment of the North Carolina court in favor of the property owner qualified as a judgment in tort under a statute giving precedence to such judgments over first mortgage liens. Nevertheless, this conclusion seems so obvious that the Kentucky compromise, even if it correctly states that subrogation occurs only where liability in tort exists, can hardly win general acceptance.

The opinions of the courts applying the majority rule indicate that their basic operating premise is a belief that the loss in these cases should be borne only by fire insurance companies. In the Maine case, where the city sued for loss of its town hall by fire, the court referred to the familiar rule of Hadley v. Baxendale and gave the whole rationale of its decision in the following sentence: "It certainly cannot be reasonably claimed that for the moderate consideration received by a water company under such a contract as the one actually made in the case at bar, it was within the contemplation of both parties that the water company had undertaken to make good the loss which would result from the destruction of the plaintiff's property by fire." And that was where there was contract privity between the parties! Compare Cardozo's argument in the Moch case, that the water company "will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward."

The clearest statement of this position, however, appears in the

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71 Note 67 supra.
72 Note 64 supra.
74 Ibid., at 325 and 699.
75 Note 58 supra.
Ancrum decision of the South Carolina court.\textsuperscript{76} That court first suggests the general purposes for contracts of this sort as being “to promote the prosperity of the city ... by lessening the risk of destruction of property by fire, by lowering the rate of insurance, increasing the general sense of security and, therefore, the general happiness, diminishing the risk of numbers of persons being thrown out of employment, and generally in giving steadiness and confidence to the life and enterprises of the city.” All these are legitimate public ends, for which “the city has the right to pay out public funds.” But it doubts “whether [the city] has the right to apply public funds to the larger compensation which a water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence,” an expenditure of public funds which would discriminate in favor of those with property in peril and against those otherwise situated. And it went on to say: “In addition to this, if it is considered, as is held in some jurisdictions, that the action for loss in cases like this is an action of tort, then for their fire losses the insurance companies would be subrogated to the rights of the owner of the property and entitled to recover from the water company .... That a water company assuming such liabilities would have to demand very large compensation to have any profit or even to save itself from bankruptcy is most obvious.” It concluded that the contract between the city and the water company “is naturally to be referred to the purpose of the city to promote the general municipal welfare ... rather than to indemnify individual property owners from fire loss; the compensation to be paid is fifty dollars each for seventeen hydrants—a sum on its face utterly inadequate to meet the expenses of furnishing the water and to afford compensation for the enormous risk the plaintiff insists was assumed.”\textsuperscript{77}


\textsuperscript{77} Ibid., at 295–7 and 155–6. Compare the language of the New Jersey Supreme Court in Atlas Finishing Co. v. Hackensack Water Co., 10 N.J. Misc. 1197, 163 Atl. 20 (S. Ct., 1932), where recovery was denied on a contract theory, on the theory of Coggs v. Bernard and on the basis of the violation of a statute. There the court said, in part on page 22: “That no liability for failure to furnish fire protection could have been contemplated from such a situation [public service price setting] is obvious. It is even more apparent when we consider the enormous liability which the water company would be compelled to assume, under plaintiff’s theory of implied obligation without any adequate, and, it may be said, any consideration at all, commensurate with the hazard involved. Under the requirements of the Public Utility Act ... the defendant water company, was required to supply water to all indiscriminately within the field of its operations, and at uniform rates presumably based upon water supplied as a commodity or as merchandise. Therefore the defendant would be obliged to supply water to premises involving all degrees of fire hazard at the same uniform rates, thus assuming liability, practically as an insurer, for millions of dollars worth of property, upon which, either from the nature of the business or the locality in
The Kentucky court,\textsuperscript{78} allowing recovery by the property owner against the water company but denying subrogation to the fire insurance company, observed: "Here the fire was not caused by a tort on the part of the water company. The most that can be said is that the loss might have been averted if the water company had complied with its contract. Therefore the case is one where it is sought to make the water company liable, not merely to a citizen and property owner who was not a party to the contract, but to a third person with whom such citizen and property owner had contracted for insurance against fire." And remarking that subrogation is a rule of equity designed to achieve justice, it declared that its application here would defeat justice. Then, observing that "property owners generally carry fire insurance," it said: "But, if it once be held that insurance companies are subrogated to the property owner's right of action against the water company, there will be every inducement for the insurance companies to sue the water company in the hope that they may obtain a recovery. The water company is entitled to live and to make a fair return on the investment. To meet the increased liability, higher water rates will be necessary. The added burden will fall on the consumers. The result will be that the citizens and property owners will not only pay for fire protection premiums sufficient to cover the risk assumed, but will also pay higher water rates for the purpose of relieving the insurance companies of the liability which they have been paid to assume. In our opinion this will operate oppressively on the people, and will run counter to a sound public policy."\textsuperscript{79} And to clinch this line of thought the U.S. Supreme Court\textsuperscript{80} remarked of the city's undertaking to contract with the water company: "It bought the citizen no new right of action, and did not bargain to secure for him an indemnity against loss by fire, but left him to protect himself against that hazard by insurance, paying the premium directly to an insurance company instead of indirectly through taxation." And it also noted that a contrary intention would have allowed for greater compensation to the water company in amounts fluctuating with the variation of risk from year to year, instead of the same small amount indefinitely, also deprecating "the use of public money to secure a private benefit to the owner of private property."\textsuperscript{81}

\textsuperscript{78} Burford v. Glasgow Water Co., 223 Ky. 54, 56, 57-8, 2 S.W. 2d 1027, 1029 (1928).
\textsuperscript{80} Ibid., at 232, 233.
The foregoing account seems amply to justify my explanation for Cardozo's cryptic handling of the *Moch* case. I have had students suggest, however, that a development more consistent with the extension of liability in general would have led to recovery against these water companies with the idea of compelling them to administer the risk of loss occasioned by low pressure in hydrants through liability insurance. That would no doubt be in accordance with developments toward enterprise liability stemming out of *MacPherson v. Buick Co.* and with the general trend toward absolute liability without fault. For the general extension of tort liability in modern times is occurring mainly where the inadvertence or conduct of some enterpriser—some defect in his product or some mischance in his active undertakings—has alone created the risk of harm and the subsequent damage, under circumstances where only the enterpriser is in a practicable position to administer the consequences of risks he creates either through self-insurance or liability insurance made possible by slightly increased prices. Consumers as a rule cannot practicably carry insurance against such contingencies. The trend in our law now seems to be away from leaving the consequences of chance harm on individuals and toward placing the burden on society through the institution of liability insurance. For insurance companies can easily spread the absorption of such chance harms over all society.

But the situation in these water company cases is quite different. First of all, the only interest involved is property, usually real property; and the risk is invariably fire, against which most individuals have long been taking out insurance as a matter of routine. Second, the risk of fire is not created or initiated in any way by the negligent water companies but is only aggravated by the failures of pressure at the hydrants. While I believe this to be a poor distinction, yet the existence of fire indemnity insurance as an established and popularly used agency for administering and absorbing these losses obviates the social need for pursuing the matter any further. This works no undue hardship on fire insurance companies, for they never have any trouble in becoming subrogated against third party tortfeasers who have started the fires. Furthermore, as indicated above, in view of the prevalence of private recourse to fire insurance, it would be a questionable use of municipal tax funds to pay additional amounts to water companies so that they might purchase liability insurance. I assume that they could not be held liable without providing them with some financial aid to cushion them against this

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liability. Then, of course, most of us believe that property owners who do not protect themselves with fire insurance are guilty of a type of contributory negligence. So, if the risk of loss is already socialized through private fire insurance contracts, why not leave it right there instead of trying to shift it to some other pigeon-hole of this modern institution of community loss absorption?

This discussion must be disillusioning to first year law students who expect to stake their professional futures on the principles of the common law. They must wonder why Cardozo did not come clean and say in the Moch case just why the theory of Coggs v. Bernard was so inadequate when it seemed at first to offer the right answer? Perhaps he felt that there still remains enough usefulness for legal principles to justify their unsullied retention at a high theoretical level. Or perhaps, as is more likely, he knew that the lawyer who has his eyes open and can see what is going on around him, will use legal principles only as a framework for his career—something to give him direction—and will never cease looking for wisdom in the everyday facts of life all around him. For the wise lawyer must learn that social policy in the law cannot be reduced to a formula, any more than can life itself.

VI

What can a student salvage from this study of the inception of duty of care under a variety of informal circumstances? Basically he can proceed on the assumption that, in the absence of any promise to act or of any duty to act inherent in statute or some relationship between the parties, one is not under a duty of care to aid or assist another or to undertake anything in his behalf. At the same time he can safely assume that if one does, by his conduct, undertake to do something for another in a way that relates him directly to the interest of that other, such as taking it in his exclusive possession or charge or in a way that induces dependence or reliance on his action, then there is a duty to act carefully. As far as gratuitous promises are concerned, however, there is no duty to carry them through unless he has compromised himself by some act closely associated with the other's interest involved, in such a way as to invoke reliance of the other in the nature of an estoppel on himself. How far this notion will extend in the absence of such a closely related act, however, depends upon how far courts are willing to carry the modern concept of promissory estoppel in recognizing something akin to consideration for the purpose of making the promise a binding contract and thus a source of duty. But within this framework of generalities the student must beware of pitfalls. For when these generalities
are tied in with other developments in the field of duty of care, such as those involving "the assault upon the citadel of privity" like *MacPherson v. Buick Company*, they may or may not prove useful and accurate. And whether or not they do depends upon basic policies that underlie the direction of our modern law of negligence and are, as yet, almost completely inarticulate in the opinions of judges.

The student of today must be aware of the power of judges to manipulate perfectly good legal doctrine at will and to recognize that such judicial license is all a part of the traditional common-law process. He must expect a steady trend in favor of shifting loss from the shoulders of individuals to the back of the community as a whole, through the coffers of enterprise or through the pockets of insurance companies, knowing all the time that they in turn spread this loss throughout society—for somebody must pay in the final analysis, and that somebody is always the collective individuals comprising the community as a whole. But he must become used to the idea that "duty" is a concept which may be used not only to extend this trend but also to reverse it—apparently as courts see fit. Thus, in *Waube v. Warrington* he may perceive a most arbitrary exploitation of the duty concept to relieve liability insurance companies from a slight burden they certainly should be made to bear. There, in spite of a steady trend toward extension of liability for the foreseeable consequences of fright induced by tortious conduct, the Wisconsin court refused to hold liable for the death of plaintiff's wife a motorist who had negligently run down and killed her small child in the street, the sight of which caused the death by shock of the mother as she stood in a position of personal safety from collision in her yard.

Then, of course, there are the water company cases. But these are easily reconciled with the prevailing drift toward socialization of loss; and they serve amply as the exception which more than proves the rule. In light of all the confusion in this essay, how can I better end it than by quoting Chief Justice Holt's gracious benediction to *Coggs v. Bernard*, the very case that started all this trouble in the first place? "I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle."  

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84 216 Wis. 603, 258 N.W. 497 (1935).