HOUSE OF LORDS

THE HOME OFFICE

v.

THE DORSET YACHT COMPANY LIMITED

Lord Reid

Lord Morris of Borth-y-Gcst

Viscount Dilhorne

Lord Pearson

Lord Reid

my lords,

On 21st September 1962 a party of Borstal trainees were working on 1 Brownsea Island in Poole Harbour under the supervision and control of three Borstal officers. During that night seven of them escaped and went aboard a yacht which they found nearby. They set this yacht in motion and collided with the Respondents' yacht which was moored in the vicinity. Then they boarded the Respondents' yacht. Much damage was done to this yacht by the collision and some by the subsequent conduct of these trainees. The Respondents sue the Appellants, the Home Office, for the amount of (his damage.

The case comes before your Lordships on a preliminary issue whether the Home Office or these Borstal officers owed any duty of care to the Respondents capable of giving rise to a liability in damages. So it must he assumed that the Respondents can prove all that they could prove on the pleadings if the case goes to trial. The question then is whether on that assumption the Home Office would be liable in damages. It is admitted that the Home Office would be vicariously liable if an action would lie against any of these Borstal officers.

The facts which I think we must assume are that this party of trainees were in the lawful custody of the Governor of the Portland Borstal Institution and were sent by him to Brownsea Island on a training exercise in the custody and under the control of the three officers with instructions to keep them in custody and under control. But in breach of their instructions these officers simply went to bed leaving the trainees to their own devices. If they had obeyed their instructions they could and would have prevented these trainees from escaping. They would therefore be guilty of the disciplinary offences of contributing by carelessness or neglect to the escape of a prisoner and to the occurrence of loss, damage or injury to any person or property. All the escaping trainees had criminal records and five of them had a record of previous escapes from Borstal institutions. The three officers knew or

ought to have known that these trainees would probably try to escape during the night, would take some vessel to make good their escape and would probably cause damage to it or some other vessel. There were numerous vessels moored in the harbour, and the trainees could readily board one of them. So it was a likely consequence of their neglect of duty that the Respondents' yacht would suffer damage.

The case for the Home Office is that under no circumstances can Borstal officers owe any duty to any member of the public to take care to prevent trainees under their control or supervision from injuring him or his property. If that is the law then enquiry into the facts of this case would be a waste of time and money because whatever the facts may be the Respondents must lose. That case is based on three main arguments. First it is said that there is virtually no authority for imposing a duty of this kind. Secondly it is said that no person can be liable for a wrong done by another who is of full age and capacity and who is not the servant or acting on behalf of that person. And thirdly it is said that public policy (or the policy of the relevant legislation) requires that these officers should be immune from any such liability.

The first would at one time have been a strong argument. About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence each with its own rules, and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the Courts had from time to time

recognised new duties and new grounds of action. But the heroic age was over, it was time to cultivate certainty and security in the law: the categories of negligence were virtually closed. The learned Attorney-General invited us to return to those halcyon days, but, attractive though it may be, I cannot accede to his invitation.

In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue* v. *Stevenson* [1932] AC 562 may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion. For example, causing economic loss is a different matter: for one thing it is often caused by deliberate action. Competition involves traders being entitled to damage their rivals' interests by promoting their own, and there is a long chapter of the law determining in what circumstances owners of land can and in what circumstances they may not use their proprietary rights so as to injure their neighbours. But where negligence is involved the tendency has been to apply principles analogous to those stated by Lord Atkin (cf. *Hedley Byrne* v. *Heller* [1964] AC 465). And when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty. And then there are cases, e.g. with regard to landlord and tenant, where the law

was settled long ago and neither Parliament nor this House sitting judicially has made any move to alter it. But I can see nothing to prevent our approaching the present case with Lord Atkin's principles in mind.

Even so it is said that the Respondents must fail because there is a general principle that no person can be responsible for the acts of another who is not his servant or acting on his behalf. But here the ground of liability is not responsibility for the acts of the escaping trainees: it is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind. So the question is really one of remoteness of damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendants' carelessness and the damage to the plaintiff.

There is an obvious difference between a case where all the links between the carelessness and the damage are inanimate so that, looking back after the event, it can be seen that the damage was in fact the inevitable result of the careless act or omission, and a case where one of the links is some human action. In the former case the damage was in fact caused by the careless conduct however unforeseeable it may have been at the time that anything like this would happen. At one time the law was that unforeseeability was no defence *(Polemis* [1921] 3 K.B. 560). But the law now is that there is no liability unless the damage was of a kind which was foreseeable *(Wagon Mound No.* 1 [1961] AC 388).

On the other hand, if human action (other than an instinctive reaction) is one of the links in the chain it cannot be said that looking back the damage was the inevitable result of the careless conduct. No one in practice accepts the possible philosophic view that everything that happens was predetermined. Yet it has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness. The convenient phrase *novus actus interveniens* denotes those cases where such action is regarded as breaking the chain and preventing the damage from being held to be caused by the careless conduct. But every day there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty

in holding that the defendant's conduct caused the plaintiff loss. "There " are some propositions which are beyond question in connexion with this " class of case. One is that human action does not *per se* sever the connected " sequence of acts. The mere fact that human action intervenes does not " prevent the sufferer from saying that injury which is due to that human " action as one of the elements in the sequence is recoverable from the " original wrongdoer" (per Lord Wright in *The Oropesa* [1943] P. 32 at page 37).

What then is the dividing line? Is it foreseeability or is it such a degree of probability as warrants the conclusion that the intervening human conduct was the natural and probable result of what preceded it? There is a world of difference between the two. If I buy a ticket in a lottery or enter a football pool it is foreseeable that I may win a very large prize—some competitor must win it. But, whatever hopes gamblers may entertain, no

one could say that winning such a prize is a natural and probable result of entering such a competition.

In *Haynes* v. *Harwood* [1935] 1 K.B. 146 Greer L.J. said:

" If what is relied upon as *novus actus interveniens* is the very kind of " thing which is likely to happen if the want of care which is alleged takes " place the principle embodied in the maxim is no defence. The whole " question is whether or not, to use the words of the leading case *Hadley* " v. *Baxendale 9* Ex. 341 the accident can be said to be the natural and " probable result of the breach of duty."

There is a well known Scottish case *Scotts Trustees* v. *Moss* (1889) 17 R.36 which so far as I am aware has received no adverse comment and which I can cite as an authority because the Scots and English law of negligence are the same. The pursuers occupied land near a place where the defender, a promoter of entertainment, had advertised that a balloon would descend. It descended in the pursuers' field and a crowd who had gathered burst into that field and caused considerable damage. The defender being sued for that damage pleaded unsuccessfully that the pursuers' averments were irrelevant.

Lord President Inglis said :

" This was an exhibition of an entirely different character from an " ordinary balloon ascent, in which the balloon travels where the wind " carries it and makes its descent just where it is possible for it to do so. " Here the descent was to be at the Hawkhill Recreation Grounds. A " number of people were assembled there, and were charged for admis- " sion—and that makes it all the more clear that the descent was to be " at or in the immediate vicinity of the Hawkhill Grounds. Otherwise, " those who had paid for admission to view the descent would not have " seen it—if the descent had taken place at a distance, or at a spot which " was uncertain. But in addition to the spectators who were inside the " grounds, the advertisement most naturally attracted the attention of the " populace generally, and as a balloon can be seen to ascend, and also " the aeronaut to descend out of it, although the public are not within a " particular enclosure, of course a crowd of people came to the neigh- " bourhood. This was quite to be expected ; nothing else could be " expected ; and they stood in the roads and other places adjoining the " recreation grounds and witnessed the descent. The descent took place " in a field upon the adjoining farm of Lochend, which was in the occu- " pation of the pursuers, and there was no doubt that the natural conse- " quence of the descent taking place there was that all the crowds of " people in the neighbourhood immediately rushed to the field in order " to see what had happened or was going to happen.

" The complaint made by the pursuers is that these people entered " the field and broke down the gates and fences and destroyed the crops, " and the case made against Mr. Moss is that he ought to have foreseen " that the descent would be made in some field adjoining the recreation " grounds, and that the natural and almost inevitable consequence of " that would be that the crowd would break into the field and destroy

" the crops. No doubt it could not easily be foreseen that the descent " would be made in that particular field—but, on the other hand, the

" recreation grounds were surrounded by cultivated land, and it could
" be very easily foreseen that the descent would take place on some piece
" of cultivated ground in the immediate vicinity."

Lord Shand said:

" I agree that in the ordinary case the mere bringing of a crowd
" together does not lead to the inference that the person who has been
" instrumental in assembling the crowd is answerable for its actings. I
" think the principle which ought to receive effect is that if the collection
" of the crowd, and the actings of the crowd, are the natural and probable
" consequence of the action of the defender—a consequence which the
" defender ought to have foreseen,—then the case is relevant; for in
" that case the pursuer undertakes in effect to shew that the defender's
" proceedings were the direct cause of the damage done, and I think this
" record now states a case of that class. No doubt, nice questions of
" fact may arise in the inquiry which will take place. The defender says
" that he did not desire the presence of the crowd ; but, on the other hand,
" if the presence of the crowd was the natural consequence of his adver-
" tisement, he cannot disconnect himself from the gathering. Then the
" defender may maintain that he did not anticipate that the descent would
" take place in the pursuers' field. But the pursuers undertake to shew
" that it was quite probable that the descent should occur there. Again,
" the defender says that he cannot be held answerable for the damage
" done by a crowd of outsiders. But the reply is that it was only to be
" expected that the crowd would rush into the field in which the descent
" should occur, and that the result would be the damage of which he
" complains. If it can be shewn on the evidence that the defender was
" the proximate cause of the damage, that it was owing to his action that
" the crowd assembled, and that the garden was invaded and injury done,
" then the pursuers would be entitled to a verdict upon the issue. If
" these results were not such as should reasonably have been anticipated
" from the action of the defender, then the verdict should be in his
" favour."

These cases shew that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens* breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is often the " very kind of thing " which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely.

There was an attempt to draw a distinction between loss caused to the plaintiff by failure to control an adult of full capacity and loss caused by failure to control a child or mental defective. As regards causation no doubt it is easier to infer *novus actus interveniens* in the case of an adult but that seems to me to be the only distinction. In the present case on the assumed

facts there would in my view be no *novus actus* when the trainees damaged the Respondents' property and I would therefore hold that damage to have been caused by the Borstal officers' negligence.

If the carelessness of the Borstal officers was the cause of the plaintiffs' loss what justification is there for holding that they had no duty to take care? The first argument was that their right and power to control the trainees was purely statutory and that any duty to exercise that right and

power was only a statutory duty owed to the Crown. I would agree but there is very good authority for the proposition that if a person performs a statutory duty carelessly so that he causes damage to a member of the public which would not have happened if he had performed his duty properly he may be liable. In *Geddis* v. *Proprietors of Bann Reservoir* 3 App. Cas. 430 Lord Blackburn said (at page 455):

" For I take it without citing cases, that it is now thoroughly well
" established that no action will lie for doing that which the legislature
" has authorised if it be done without negligence although it does
" occasion damage to anyone: but an action does lie for doing that
" which the legislature has authorised if it be done negligently."

The reason for that is, I think, that Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage.

Where Parliament confers a discretion the position is not the same. Then there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that. The present case does not raise that issue because no discretion was given to these Borstal officers. They were given orders which they negligently failed to carry out. But the County Court case of *Greenwell* v. *Prison Commissioners* was relied on and I must deal with it.

Some 290 trainees were held in custody in an open Borstal Institution. During the previous year there had been no less than 172 escapes. Two trainees escaped and took and damaged the plaintiff's motor truck: one of these trainees had escaped on three previous occasions from this Institution. For three months since his past escape the question of his removal to a more secure institution had been under consideration but no decision had been reached. The learned judge held that the authorities there had been negligent. In my view, this decision could only be upheld if it could be said that the failure of those authorities to deal with the situation was so unreasonable as to show that they had been guilty of a breach of their statutory duy and that this had caused the loss suffered by the plaintiff.

Governors of these institutions and other responsible authorities have a difficult and delicate task. There was some argument as to whether the present system is fully authorised by the relevant statutes, but I shall assume that it is. That system is based on the belief that it assists the rehabilitation of trainees to give them as much freedom and responsibility as possible. So the responsible authorities must weigh on the one hand the public interest of protecting neighbours and their property from the depredations of escaping trainees and on the other hand the public interest of promoting rehabilitation. Obviously there is much room here for differences of opinion and errors of judgment. In my view there can be no liability if the discretion is exercised with due care. There could only be liability if the person entrusted with discretion either unreasonably failed to carry out his duty to consider the matter or reached a conclusion so unreasonable as again to show failure to do his duty .

It was suggested that these trainees might have been deliberately released at the time when they escaped and then there could have been no liability. I do not agree. Presumably when trainees are released either temporarily or permanently some care is taken to see that there is no need for them to resort to crime to get food or transport. I could not imagine any more

unreasonable exercise of discretion than to release trainees on an island in the middle of the night without making any provision for their future welfare.

We were also referred to *Holgate* v. *Lancashire Mental Hospital Board* [1937] 4 All E.R. 19 where the alleged fault was in releasing a mental patient. For similar reasons I think this decision could only be supported if it could be said that the release was authorised so carelessly that there had been no real exercise of discretion.

If the Appellants were right in saying that there can never be a right in a private individual to complain of negligent exercise of a duty to keep a prisoner under control, I do not see how *Ellis v. Home Office* [1953] 2 All E.R. 149 can be correct. The plaintiff was in prison and on one occasion, as he alleged, owing to inadequate control by warders another prisoner assaulted and injured him. It was assumed that he had a right of action, and the learned Attorney-General did not challenge this. But when the other prisoner assaulted Ellis he was not in fact under control or he would not have been permitted to carry out the assault. It would be very odd if the only persons entitled to complain of negligent performance of the statutory duty to control prisoners were other prisoners. If the main argument for the Appellants were right I think it necessarily involves holding that *Ellis* was wrong.

It was suggested that a decision against the Home Office would have very far reaching effects : it was indeed suggested in the Court of Appeal that it would make the Home Office liable for the loss occasioned by a burglary committed by a trainee on parole or a prisoner permitted to go out to attend a funeral. But there are two reasons why in the vast majority of cases that would not be so. In the first place it would have to be shewn that the decision to allow any such release was so unreasonable that it could not be regarded as a real exercise of discretion by the responsible officer who authorised the release. And secondly it would have to be shewn

that the commission of the offence was the natural and probable, as distinct from merely a foreseeable, result of the release—that there was no *novus actus interveniens. Greenwell's* case received a good deal of publicity at the time : it was commented on in the Law Quarterly Review vol. 68 page 18. But it has not been followed by a series of claims. I think the fears of the Appellants are unfounded: I cannot believe that negligence or dereliction of duty is widespread among prison or Borstal officers.

Finally I must deal with public policy. It is argued that it would be contrary to public policy to hold the Home Office or its officers liable to a member of the public for this carelessness—or indeed any failure of duty on their part. The basic question is who shall bear the loss caused by that carelessness—the innocent Respondents or the Home Office who are vicariously liable for the conduct of their careless officers. I do not think that the argument for the Home Office can be put better than it was put by the Court of Appeals of New York in *Williams* v. *State of New York* (1955) 127 N.E. 2d. 545 at page 550:

"... public policy also requires that the State be not held liable.
" To hold otherwise would impose a heavy responsibility upon the
" State, or dissuade the wardens and principal keepers of our prison
" system from continued experimentation with ' minimum security ' work
" details—which provide a means for encouraging better-risk prisoners
" to exercise their senses of responsibility and honor and so prepare
" themselves for their eventual return to society. Since 1917, the Legis-
" lature has expressly provided for out-of-prison work, Correction Law,
" § 182, and its intention should be respected without fostering the
" reluctance of prison officials to assign eligible men to minimum security
" work, lest they thereby give rise to costly claims against the State,
" or indeed inducing the State itself to terminate this ' salutary procedure '
" looking towards rehabilitation."

It may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty, and intent on preserving public funds from costly claims, that they could be influenced in this way.

But my experience leads me to believe that Her Majesty's servants are made of sterner stuff. So I have no hesitation in rejecting this argument. I can see no good ground in public policy for giving this immunity to a Government Department. I would dismiss this appeal.

Lord Morris of Borth-y-Gest

my lords,

The claim which the Company advanced in launching this litigation was that their property had been damaged by persons who were in charge of servants or agents of the Home Office and that the damage was the result of the negligence of those servants or agents in permitting or in not preventing the occurrence of the damage. Apart from other defences it was pleaded that in any event no duty of care was owed to the Company. The facts

have not yet been ascertained. It was thought fit, however, to direct that there should be a preliminary trial of a question of law. That was presumably on the basis that it would be of no advantage to investigate the facts that are alleged if, on the assumption that they could all be established, and on the further assumption that if established they suggested careless conduct, there could even so in no circumstances be success in the litigation for the reason that no duty of care was owed to the Company.

It is important to observe the precise point of law which has been presented for determination. Assuming that all the facts in the Statement of Claim are proved would there be owed to the Company " any duty of care . . . " capable of giving rise to a liability in damages? ". The words " any " and " capable of " are to be noted. If it is held as a matter of law that in the circumstances there was a duty of care owed to the Company it would not follow that proof of the facts alleged in the Statement of Claim would necessarily result in victory for the Company. Assuming that some duty of care was owed to the Company being a duty of care with respect to the detention of those in charge and to " the manner in which such persons were " treated, employed, disciplined, controlled or supervised " it would not be until all the relevant facts and circumstances had been examined that it could be determined *(a)* what was the exact nature and quality and extent of the duty that was owed and *(b)* whether there was or was not a breach of the duty as it was found to be. Questions as to resulting or recoverable damage would of course further arise.

It is therefore, in my view, important to remember that we are only asked to decide whether, on proof of the facts pleaded, there was some duty of care. We are not asked to say, and could not say, that if the facts pleaded are proved then breach of a duty owed would automatically be proved. We are not asked to say that the conduct alleged must be held to have been careless conduct. We are only asked to say whether assuming the facts to have been as pleaded there was a duty of care owed to the Company which could or might result in their being able to recover some damages.

The significant facts (i.e. the alleged facts) can shortly be summarised. Seven boys who had been sentenced to Borstal training were (with probably a few others) on an island in Poole Harbour. They had been working there under control and supervision. They were boys whose records included convictions for breaking and entering premises, for larceny and for taking away vehicles without consent. Five of them had a record of previous escapes from Borstal institutions. Lying at moorings off the island was a yacht. There was another yacht nearby. There was no barrier which was effective to prevent the boys from gaining access to the yachts. The boys were in the charge of three officers.

On these facts a normal or even modest measure of prescience and previsision must have lead any ordinary person, but rather specially an officer in charge, to realise that the boys might wish to escape and might use a yacht if one was near at hand to help them to do so. That is exactly what

it is said that seven boys did, In my view, the officers must have appreciated that either in an escape attempt or by reason of some other prompting the boys might interfere with one of the yachts with consequent likelihood of doing some injury to it. The risk of such a happening was glaringly obvious. The possibilities of damage being done to one of the nearby yachts (assum-

ing that they were nearby) were many and apparent. In that situation and in those circumstances I consider that a duty of care was owed by the officers to the owners of the nearby yachts. The principle expressed in Lord Atkin's classic words in his speech in *Donoghue* v. *Stevenson* [1932] AC 562 would seem to be directly applicable. If the principle applied, then it was incumbent on the officers to avoid acts or omissions which they could reasonably foresee would be likely to injure the owners of yachts. They were persons so closely and directly affected by what the officers did or failed to do that they ought reasonably to have been in the contemplation of the officers.

It has been generally recognised that Lord Atkin's statement of principle cannot be applied as though his words were contained in a positive and precise legislative enactment. It cannot be therefore that in all circumstances where certain consequences can reasonably be foreseen a duty of care arises. A failure to take some preventive action or rescue operation does not of and by itself necessarily betoken any breach of a legal duty of care. It has in consequence been suggested that in situations where reasonable foresight can be in operation the decision of a court as to whether a duty of care existed is in reality a policy decision. So it was strongly urged that in the circumstances of a case such as the present there are reasons of public policy which should induce a court to hold that no duty of care arises which is separate from the duty owed by the officers to those by whom they were employed.

It is also always to be remembered that Lord Atkin's speech was made in the affirmation of the proposition that a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will lead to an injury to the consumer's life or property owes a duty to the consumer to take that reasonable care.

It is to be remembered that it is a notable and laudable feature of the system of Borstal training that it aims to achieve all-round development of character and capacities. " It is based on progressive trust demanding in-
" creasing personal decision, responsibility and self-control": it "is not
" compatible with the maintenance of ' safe custody' as an overriding
" consideration ". In keeping with the policy which has been most carefully and constructively evolved it is inevitable that close and constant supervision of each person under training is neither planned nor desirable. The aim is to train to educate and to direct. The hope is to bring about the result that those under training will return as honest and useful members of society. All this is relevant when considering the measure of any duty of care which the officers might owe to the Company and whether they failed to do what in the circumstances they ought to have done: but it in no way determines the question whether the officers did owe some duty of care.

The conclusion that I have reached is that the officers owed a duty to the Company to take such care as in all the circumstances was reasonable with a view of preventing the boys in their charge and under their control from causing damage to the nearby property of the Company if that was a happening of which there was a manifest and obvious risk. If in the day time the officers saw that the boys in their charge and under their control were deliberately setting out to damage a nearby yacht or were in the act of damaging it and if the officers could readily have caused the boys to desist

the facts would warrant a conclusion that there was a failure to take reasonable care. In other circumstances and having regard in particular to the fact that the officers were operating a system which was legitimately designed to give a measure of freedom to those undergoing training it might well

be that the happening of events such as escapes or the causing of damage would not suffice to prove that there had been a failure to exercise due and reasonable care. If the point of law now raised is decided in favour of the Company it does not involve that proof of an escape would necessarily be proof of want of care amounting to a breach of duty towards a neighbour. Nor does the point of law involve that any duty of care owed to the Company need be defined or limited (when the facts ultimately are ascertained) by reference to preventing the escape of boys in training. The concern of the Company is for their property. There might be escapes which would be of no concern whatsoever to the Company. There might be damage to their property which was unrelated to any escape. In the present case the alleged damage to property is said to have been in connection with or following upon escapes. But the duty which the Company in this case claim was owed to them was a duty to take reasonable care in the exercise of powers of control over the boys so as to prevent loss and damage being sustained by the Company.

It has not been contended that the Company had any right of action on the basis of any breach of statutory duty imposed either on the Home Office or on the Borstal officers. The duty of care which was owed to the Company was a duty which arose from the facts and which was quite independent of any statutory obligations. There are statutory powers which authorise detention in Borstal institutions. But the fact that something is done in pursuance of statutory authority does not warrant its being done unreasonably so that avoidable damage is negligently caused. See *Geddis* v. *Bann Reservoir* 3 App. Cas. 430, at page 455.

The duty of care now being considered will to a large extent be conditioned by the duty owed by the officers to their employers and by the instructions given by the employers. Provided instructions are lawful ones they must be obeyed by the officers to whom they are issued. It could not be held that a duty of care owed by the officers to the Company required an exercise of control over the boys which was more stringent than or which ran counter to the instructions issued to the officers as to the way in which their duties were to be discharged. But the duty of care which is owed to the Company is a separate duty from that owed by the officers to their employers. The Company sue in their own right and for a wrong done to them and not *do* use a phrase of Cardozo J. in the *Palsgraf* case 248 N.Y. 339) "as the " vicarious beneficiary of a breach of duty to another ".

The allegations of fact which are made in the Statement of Claim are such that if there is any liability in the Home Office it is on the basis of vicarious liability for the acts or omissions of the officers as their servants or agents. F or the reasons which I have given I consider that the officers could not be held to have been under any duty to the Company to control the boys in some way which conflicted with the directives of the Home Office. In so far as the Statement of Claim may allege liability other than on the basis of vicarious liability different considerations arise. Thus there is an allegation

that there was a failure to give any or any adequate instructions to the officers for maintaining effective watch and control over the boys at night. That may mean that it is proposed at the trial to express criticism of the system which was in operation. That, however, was a matter which was in the discretion of those who had to decide how best to regulate the conditions under which Borstal training should take place. We are not in the present case concerned with a decision to release a boy from training. It might well happen that unfortunate consequences followed a release. A boy might commit crimes shortly afterwards. But the decision would be one made in the exercise of a discretion by someone acting within his powers. Nor is the present case to be compared with the case of *Greenwell* v. *The Prison Commissioners* which was decided in 1951. It is not said in the present case that the boys never ought to have been where they were. In *Greenwell's* case two boys went away from an " open " Borstal institution to which they had been sent. It was held that in regard to one of the boys there was liability for damage locally done. The basis appears to have been that having regard to the record of that particular boy it was not reasonable to

have him and to keep him in an " open " institution where he would be under no restraint. While I would agree with the general statement of the learned Judge in that case to the effect that a duty was owed to a nearby resident to take reasonable care to prevent injury being done to his property by the boys at the Institution, the judgment is not precise as to where the breach of duty lay. The particular institution was a completely open one. There were no physical barriers of any kind to prevent escape. It was accepted that it would have been very difficult to take steps to prevent " escapes ". It does not appear from the judgment that there was any finding of carelessness or neglect on the part of the officers in their care of the boys at the Institution. But the boy who did damage in respect of which it was held that there was liability had a bad record. He had three times previously gone away from this Institution. I prefer so to describe his movements because where effective steps to limit movements can be ruled out as being impracticable the word " escape " does not seem to be the appropriate word. After the last time when the boy had gone away or "escaped " from the Institution (which was in the month of October, 1949, some three months before the "escape" in January, 1950, which gave rise to the claim) it is recorded in the judgment that " the question of his removal " had arisen ". The basis of the judgment seems to have been expressed in the following words:

" Having regard to the great number of escapes taking place to the
" crimes being committed, and particularly to Lawrence's record of
" previous escapes, I cannot think it was reasonable to have this boy
" in this Institution, under no restraint whatever so that he could as
" easily escape for the fourth time on January 31 1950 as he had done
" on previous occasions. Moveover the question of his removal had
" been outstanding for a long time, indeed ever since his previous escape
" in October 1949 and yet he was still there. . . . The plain fact is,
" I think, that the Defendants and their Governor found Lawrence such
" a challenge to their sincere desire to reform him that they forgot or
" overlooked, perhaps temporarily, their duty to their neighbours such
" as the Plaintiff."

Who then was negligent? It is rather vague. The view that there was a failure to give consideration to the case was a surmise. It may be that someone made a decision that Lawrence was for the time being to remain at the Institution but that the matter was later to be reconsidered.

Whatever was the right result in that particular case I think that it is important to point out that liability should not be held to result from what might be an error of judgment on the part of someone making a decision which it is within his powers and his discretion to make. The evidence in the Greenwell case was that from a reformatory point of view the results have been considerably better where training has been in open institutions, rather than in closed institutions. As the whole system of Borstal training aims at reform and rehabilitation it is clear that decisions of policy will have to be made on a weighing up of the balance of competing considerations, as to the appropriate course to be followed in a particular case. There should not be liability merely because unfortunate consequences have followed upon a decision which someone has in his discretion made while acting within his powers.

If A can reasonably foresee that some act or omission of his may have the result that loss or damage may be suffered by B who is someone who would be closely and directly affected by the act or omission there will be some circumstances in which a legal duty will be owed by A to B and some in which it will not. The question arises as to what is the dividing line and on which side does the present case fall. The fact that the immediate damage suffered by B may have been caused by C does not affect the question whether A owed a duty to B: such fact would only relate to a question whether the act or omission of A did result in damage to B. Some act on the part of C might be the very kind of thing which would be likely to happen if there was a breach of duty by A.

In answering the question which I have posed help will sometimes be derived by considering the way in which claims arising in particular cases

have been dealt with by the Courts. Particular decisions in relation to claims arising from sets of facts comparable to those being investigated may if approved give guidance. But precedents do not fix the limits of what may be called duty situations: they illustrate them. If there are no clear cut precedents the Court may have to reach decision whether once the facts and circumstances of a situation are ascertained it can be said that it was a " duty situation ". What should be the basis for a decision? Lord Atkin in his speech in *Donoghue* v. *Stevenson* said (at page 580):

" At present I content myself with pointing out that in English law
" there must be, and is, some general conception of relations giving
" rise to a duty of care, of which the particular cases found in the books
" are but instances. The liability for negligence, whether you style it
" such or treat it as in other systems as a species of ' culpa ', is no
" doubt based upon a general public sentiment of moral wrongdoing
" for which the offender must pay. But acts or omissions which any
" moral code would censure cannot in a practical world be treated so
" as to give a right to every person injured by them to demand relief.
" In this way rules of law arise which limit the range of complainants
" and the extent of their remedy."

At the conclusion of his speech Lord Atkin said that it is advantageous if the law " is in accordance with sound commonsense ".

I consider that the feature in. the present case that there was a right to exercise control over the boys makes the present case sufficiently analogous with cases in which it has been held that there was a duty situation as to make it reasonable so to hold here. In his judgment in *Smith* v. *Leurs* 70 C.L.R. 256 Dixon J. (at page 261) said:

" But apart from vicarious responsibility one man may be responsible
" to another for the harm done to the latter by a third person ; he may
" be responsible on the ground that the act of the third person could
" not have taken place but for his own fault or breach of duty. There
" is more than one description of duty the breach of which may produce
" this consequence. For instance it may be a duty of care in reference
" to things involving special danger. It may even be a duty of care
" with reference to the control of actions or conduct of the third person.
" It is however exceptional to find in the law a duty to control another's
" actions to prevent harm to strangers. The general rule is that one
" man is under no duty of controlling another man to prevent his
" doing damage to a third. There are however special relations which
" are the source of a duty of this nature."

In the present case there was, I think, a special relation of this nature.

There was a special relation in that the officers were entitled to exercise control over boys who to the knowledge of the officers might wish to take their departure and who might well do some damage to property near at hand. The events that are said to have happened could reasonably have been foreseen. The possibility that the property of the Company might be damaged was not a remote one. A duty arose. It was a duty owed to the Company. It was not a duty to prevent the boys from escaping or from doing damage but it was a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to the Company.

Apart from this I would conclude that in the situation stipulated in the present case it would not only be fair and reasonable that a duty of care should exist but that it would be contrary to the fitness of things were it not so. I doubt whether it is necessary to say, in cases where the Court is asked whether in a particular situation a duty existed, that the Court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise the Court must not shrink from being the arbiter. As Lord Radcliffe said in his speech in *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696, 728, the Court is " the spokesman of the fair and reasonable man ".

If someone chooses to keep a wild animal it would, by common assent, be assumed that he is under a duty to prevent its escape. If a person who is in lawful custody has made a threat, accepted as seriously intended, that if he can escape he will injure X, is it unreasonable to assert that in those circumstances a duty is owed to X to take reasonable care to prevent escape? Other situations will present lesser perils. It will be universally

known that the movements and activities of young children may lead to perils not only for them but for others. Consequently there may be a duty of care which may be owed to any one of a class of persons: it could be owed to all persons who could reasonably be foreseen as being liable to be injured by a failure to exercise reasonable care. That was the position in *Carmarthenshire County Council v. Lewis* [1955] AC 549. The duty owed by the nursery school who had a four-year old boy in their care was held to include a duty to users of a nearby highway. The lorry driver who, swerving to avoid the boy, was killed when his lorry struck a telegraph post was, prior to that time, an unidentified member of a class of persons to whom a duty of care was owed. In that case it was argued that though the education authority owed a duty to the child they owed no duty to other users of the highway. In rejecting that contention Lord Reid said in his speech (at page 565):

" If the Appellants are right it means that no matter how careless the
" person in charge of a young child may be and no matter how obvious
" it may be that the child may stray into a busy street and cause an
" accident, yet that person is under no liability for damage to others
" caused solely by the action of the child because his only duty is towards
" the child under his care."

A similar consideration would arise in the present case. If the Appellants are right in the present case it would mean that however careless the officers in charge might be and however obvious it might be that the boys in their charge might do damage to some nearby property which by reasonable care the officers could prevent, there could in no circumstances be liability to the owners of that property because the only duty owed by the officers would be to their employers and to the boys.

In his speech in *Bourhill* v. *Young* [1943] AC 92 at page 107 Lord Wright considered whether the general concept of reasonable foresight as the criterion of negligence or breach of duty may be thought to be too vague. He said, however, that negligence is a fluid principle which has to be applied to the most diverse conditions and problems of human life. " It is a concrete, not " an abstract idea. It has to be fitted to the facts of the particular case". In that case it was held that the motor cyclist (who had driven negligently) had owed no duty to a lady who suffered fright and nervous shock because she was not within the area which he ought reasonably to have contemplated as the area of potential danger. Lord Thankerton quoted words used by Lord Johnston in *Kemp & Dougall* v. *Darngavil Coal Co. Ltd.* [1909] S.C. 1314, 1319 in reference to the proposition that a man cannot be charged with negligence if he has no obligation to exercise diligence, viz. " the obligee in " such a duty must be a person or of a class definitely ascertained, and so " related by the circumstances to the obligor that the obligor is bound, in the " exercise of ordinary sense, to regard his interest and his safety. Only the " relation must not be too remote for remoteness must be held as a general " limitation of the doctrine ".

Those who use the highway must clearly take reasonable care for the safety of all other users of the highway. Someone who by negligence created a dangerous situation by leaving horses unattended in a busy street where mischievous children might cause the horses to run away was held to have owed a duty to a police officer who suffered injury in stopping the horses when they did run away: it ought to have been contemplated that in such a situation there would be an attempt to stop the horses. *(Haynes* v. *Harwood* [1935] 1 K.B. 146). These and other cases are but illustrations of the range and

extent of what ought reasonably to have been contemplated: other cases illustrate the variety of situations in which a duty of care may be owed. If someone is serving a sentence of imprisonment and consequently is not free

to order his own movements I would think it eminently reasonable to hold that those in charge of the prison owed him a duty to take reasonable care to protect him from being assaulted by a fellow prisoner who might have shown himself to be one who might cause harm *(Ellis* v. *Home Office* [1953] 2 All.E.R. 149: *D'Arcy v. Prison Commissioners,* The Times, 17th November, 1955). In each of those two cases the defendants had the power to control the persons who caused injury to the respective plaintiffs. The defendants were not under a duty to ensure that no prisoner would be hurt by a fellow prisoner and the mere occurrence of such an event did not by itself prove that there had been a failure of duty. The circumstances under which the injuries were caused were, however, such as to make it eminently appropriate to hold that a duty of care arose. Without expressing any view as to the facts in the case of *Holgate v. Lancashire Mental Hospital Board* [1937] 4 All.E.R. I consider that in a comparable situation a duty of reasonable care would be owed to those whose safety, as reasonable foresight would show, might be in jeopardy.

in so far as any submission involved that if on principle a duty of care was owed to the Company there should be immunity from liability because of the problems and difficulties which face the Home Office (and all those for whom they are liable) in connection with the administration of the system of Borstal training I can see no possible reason for creating or recognising any such immunity.

For the reasons that I have given I would dismiss the appeal.

Viscount Dilhorne

MY LORDS,

In this appeal we have to decide as a preliminary issue whether on the facts alleged in the Statement of Claim any duty capable of giving rise to a liability in damages was owed by the Appellants, the Home Office, to the Respondent, the Dorset Yacht Co. Ltd.

It appears that ten youths who had been sentenced to Borstal training and who had been detained in the Portland Borstal Institution, a "closed" Borstal, were in September, 1962, on Brownsea Island in the custody of three officers. They all slept in an empty house on the Island and it is alleged that on the night of the 21st or 22nd September, 1962, seven of them escaped while the three officers were asleep. All seven had criminal records including convictions for breaking and entering premises, larceny and taking away vehicles without the owner's consent. Five of the seven had a record of previous escapes from a Borstal Institution. There were yachts moored off [he Island. The seven got on board one and then there was a collision with another, the property of the Respondents. The youths boarded that yacht and cast her adrift. The Respondent's claim is for the cost of repairing ihe damage done to their yacht, most, if not all, of which was caused by the collision,

It cannot, in my view, be disputed that if the three officers and their superiors had directed their minds to the likely consequences of an escape from the Island by any of the youths who were there in custody, they would have foreseen the probability that those escaping would endeavour to seize a vessel to get to the mainland and the likelihood that damage would be done to the vessel seized.

In these circumstances the Respondents allege that there was a duty of care owed to them by the three officers, that there was a breach of it and consequently that the Home Office, the successors of the Prison Commissioners, are vicariously liable to them for the damage done by the youths to their yacht.

The Respondents also allege that there was negligence on the part of the Prison Commissioners in failing to exercise any effective control or supervision over the youths and in permitting them to escape, in failing to make

any or any effective arrangements for keeping the boys under control at night, in failing to give any or any adequate instructions to the three officers for maintaining effective watch or control over the boys at night and in failing to take any or any adequate steps to check the movements of the boys when they knew that there were vessels moored offshore and that there was no effective barrier in the way of the boys to prevent them from gaining access to them.

If there was a duty of care owned to the Respondents by the Prison Commissioners or by the three officers, breach of which would give rise to liability to pay damages in the circumstances of this case, then I can see no reason for concluding that a similar duty of care is not owed in respect of those detained in prisons, detention centres and approved schools who escape therefrom and do damage which is reasonably foreseeable.

Apart from one decision in the Ipswich County Court in 1951 to which I shall refer later, among the thousands of reported cases not a single case can be found where a claim similar to that in this case has been put forward. No case in this country has been found to support the contention that such a duty of care exists under the common law.

Reliance was placed by the Respondents on the classic passage in Lord Atkin's speech in *Donoghue* v. *Stevenson* [1932] AC 562. It should be remembered that the question for decision in that case was not so much as to the existence of a duty of care but to whom it was owed. The question was whether a duty was owed by the manufacturer of ginger beer to the ultimate consumer. Lord Atkin, after pointing out at p. 579 how difficult it was to find in the English authorities statements of general application, said at p. 580:

" And yet the duty which is common to all cases where liability is
" established must logically be based upon some element common to
" the cases where it is found to exist. To seek a complete logical
" definition of the general principle is probably to go beyond the func-
" tion of the judge, for the more general the definition the more likely
" it is to omit essentials or to introduce non-essentials . . .",

" At present I content myself with pointing out that in English law
" there must be, and is, some general conception of relations giving rise

" to a duty of care of which the particular cases found in the books are
" but instances . . .".

" The rule that you are to love your neighbour becomes in law, you
" must not injure your neighbour: and the lawyer's question, Who is
" my neighbour? receives a restricted reply. You must take reasonable
" care to avoid acts or omissions which you can reasonably foresee
" would be likely to injure your neighbour. Who, then, in law is my
" neighbour? The answer seems to be—persons who are so closely
" and directly affected by my act that I ought reasonably to have them
" in contemplation when I am directing my mind to the acts or omis-
" sions called in question."

Lord Atkin in defining the elements common to all cases where a breach of a duty of care gives rise to liability cannot have intended his words to mean that in every case failure to take reasonable care to avoid acts or omissions which could reasonably be foreseen as likely to injure one's neighbour as defined by him was actionable. He cannot, for instance, have meant that a person is liable in negligence if he fails to warn a person nearby whom he sees about to step off the pavement into the path of an oncoming vehicle or if he fails to attempt to rescue a child in difficulties in a pond. In both these instances—and they could be multiplied—it can be said that he could reasonably have foreseen that they would be likely to suffer injury by his omission to take action and that they were so closely and directly affected by his omission to do so that he ought to have had them in contemplation.

If, applying Lord Atkin's test, it be held that a duty of care existed in this case, I do not think that such a duty can be limited to being owed only to those in the immediate proximity of the place from which the escape is made. In *Donoghue* v. *Stevenson* (supra) the duty was held to be owed to consumers wherever they might be. If there be such a duty, it must, in my

view, be owed to all those who it can reasonably be foreseen are likely to suffer damage as a result of the escape. Surely it is reasonably foreseeable that those who escape may take a succession of vehicles, perhaps many miles from the place from which they escaped, to make their get away. Surely it is reasonably foreseeable that those who escape from prisons, Borstals and other places of confinement will, while they are on the run, seek to steal food for their sustenance and money and are likely to break into premises for that purpose.

If the foreseeability test is applied to determine to whom the duty is owed, I am at a loss to perceive any logical ground for excluding liability to persons who suffer injury or loss, no matter how far they or their property may be from the place of escape if the loss or injury was of a character reasonably foreseeable as the consequence of failure to take proper care to prevent the escape.

Lord Atkin's answer to the question " Who, then, in law is my neighbour? " while very relevant to determine to whom a duty of care is owed, cannot determine, in my opinion, the question whether a duty of care exists.

I find support for this view in the observations of Du Parcq L.J. as he then was in *Deyong v. Shenburn* [1946] I K.B. 227. There the plaintiff had been employed in a theatre by the defendant. Some of his clothing had been

stolen from his dressing room due, it was alleged, to the negligence of the defendant.

Du Parcq L.J. said at p. 233: —

"It is said that this is a case of tort and we were reminded of
" observations which are very familiar to lawyers in *Heaven* v. *Pender*

"(1883) 11 Q.B.D. 503 and *Donoghue* v. *Stevenson.* I do not think that
" I need cite them in terms. There are well known words of Lord
" Atkin in *Donoghue* v. *Stevenson* as to the duty towards one's neigh-
" hour and the method of ascertaining who is one's neighbour. It has
" been pointed out (and this only shows the difficulty of stating a
" general proposition which is not too wide) that, unless one somewhat
" narrows the terms of the proposition as it has been stated, one would
" be including in it something which the law does not support. It is
" not true to say that whenever a man finds himself in such a position
" that unless he does a certain act another person may suffer or that if
" he does something another person will suffer, then it is his duty in
" the one case to be careful to do the act and in the other case to be
" careful not to do the act. Any such proposition is much too wide.
" There has to be a breach of a duty which the law recognises and to
" ascertain what the law recognises regard must be had to the decisions
" of the courts. There has never been a decision that a master must,
" merely because of the relationship which exists between master and
" servant, take reasonable care for the safety of the servant's belongings
" in the sense that he must take steps to ensure, so far as he can, that
" no wicked person shall have an opportunity of stealing the servant's
" goods. That is the duty contended for here and there is not a shred of
" authority to suggest that any such duty exists or has existed."

This was cited and followed by my learned and noble friends, Lord Hudson and Lord Morris of Borth-y-Gest, in *Edmunds* v. *West Herts Group Hospital Board* [1957] 1 W.L.R. 415 at pp. 420 and 422.

In *Commissioners of Railways* v. *Quintan* [1964] AC 1054 the question was considered whether on the facts of that case and on the principle of d*onoghue* v. *Stevenson* a general duty of care and liability for negligence for its breach existed in relation to a trespasser. Viscount Radcliffe, delivering the judgment of the Board said at p. 1070:-

" Such a duty it was suggested might be founded on a general
" principle derived from the House of Lords decision in *Donoghue* v.
" *Stevenson.* Their Lordships think this view mistaken. They cannot
" see that there is any general principle to be deduced from that

" decision which throws any particular light upon the legal rights and
" duties that arise when a trespasser is injured on a railway level crossing
" where he has no right to be."

Later he said at p. 1080:-

"... passages occur in one or two of the judgments that suggest that
" a trespasser can somehow become the occupier's ' neighbour' within

" the meaning of the somewhat overworked shorthand of *Donoghue* v.
" *Stevenson"*

In the light of these passages I think that it is clear that the *Donoghue* v. *Stevenson* principle cannot be regarded as an infallible test of the existence of a duty of care; nor do I think that if that test is satisfied, there arises any presumption of the existence of such a duty.

The County Court case to which I have referred is *Greenwell* v. *Prison Commissioners* (1951) 101 L.J. 486. Two boys escaped from the "open" Hollesley Bay Borstal Institution and damaged the plaintiff's truck. It was the fourth escape of one of the two boys. Despite his record he had not been kept under any restraint and was as free to abscond as he had been on the three previous occasions. The judge based his decision in favour of the plaintiff on Lord Atkin's words cited above. He held that a duty of care was owed by the Prison Commissioners to the plaintiff, a duty to take reasonable precautions to prevent him being injured by the depredations of boys escaping. He found that they had been negligent with regard to the escape of the boy who had previously escaped but not with regard to that of the other boy.

If there was a duty to take reasonable precautions to prevent the plaintiff being injured by the depredations of boys escaping, it is not easy to see why he held that the Prison Commissioners were not negligent in relation to the escape of the other boy. Both had criminal records. One, it is true had escaped before. It was an " open " Borstal from which many escapes had been made. Nor is it clear from the report of the case in what respects the judge found that the Prison Commissioners had failed in their duty, but it would seem to have been in keeping the boy who had previously escaped in this institution and without taking any steps to prevent him escaping again. It was for the Prison Commissioners to decide to which Borstal Institution a boy sentenced to Borstal training should be sent and to decide whether he should be moved from one institution to another. The judge appears to have held that it was negligence on their part to have allowed him to remain at Hollesley Bay.

Apart from that case in which *Donoghue* v. *Stevenson* was applied, no shred of authority can be found to support the view that a duty of care, breach of which gives rise to liability in damages, is under the common law owed by the custodians of persons lawfully in custody to anyone who suffers damage or loss at the hands of persons who have escaped from custody.

Lord Denning M.R. in the course of his judgment in this case said that he thought that the absence of authority was

" because until recently no lawyer ever thought such an action would lie"

on one of two grounds, first that the damage was far too remote, the chain of causation being broken by the act of the person who had escaped: and, secondly, on the ground that the only duty owed was to the Crown.

Whatever be the reasons for the absence of authority, the significant fact is its absence and that leads me to the conclusion, despite the disclaimer of Mr. Fox-Andrews for the Respondents of any such intention, that we are being asked to create, in reliance on Lord Atkin's words, an entirely new and novel duty and one which does not arise out any novel situation.

I, of course, recognise that the common law develops by the application of well established principles to new circumstances but I cannot accept that the application of Lord Atkin's words, which, though they applied in *Deyong*

v. *Shenburn* (supra) and might have applied in *Commissioners of Railways* v. *Quinlan* (supra), were not held to impose a new duty on a master to his servant or on an occupier to a trespasser, suffices to impose a new duty on the Home Office and on others in charge of persons in lawful custody of the kind suggested.

No doubt very powerful arguments can be advanced that there should be such a duty. It can be argued that it is wrong that those who suffer loss or damage at the hands of those who have escaped from custody as a result of negligence on the part of the custodians should have no redress save against the persons who inflicted the loss or damage who are unlikely to be able to pay; that they should not have to bear the loss themselves whereas if there is such a duty, liability might fall on the Home Office and the burden on the general body of taxpayers.

However this may be, we are concerned not with what the law should he but with what it is. The absence of authority shows that no such duty now exists. If there should be one, that is, in my view, a matter for the Legislature and not for the Courts.

A considerable number of cases were referred to in the course of the argument, and to some of them I must refer.

In *Smith v. Leurs* (1945) 70 C.L.R. 256 the parents of a boy of thirteen were sued for negligence, it being alleged that they had failed to exercise reasonable care over the use of a catapult by the boy. Dixon J. (as he then was) said at p. 261 :-

" Apart from vicarious responsibility, one man may be responsible to "another for the harm done to the latter by a third person: he may " be responsible on the ground that the act of the third person could not " have taken place but for his own fault or breach of duty. There is " more than one description of duty the breach of which may produce " this consequence. For instance, it may be a duty of care with refer- " ence to things involving special danger. It may even be a duty of care " with reference to the control of actions or conduct of the third person. " It is, however, exceptional to find in the law a duty to control " another's actions to prevent harm to strangers. The general rule is " that one man is under no duty of controlling another to prevent his " doing damage to a third. There arc, however, special relations which " are the source of a duty of this nature. It appears now to be " recognised that it is incumbent on a parent who maintains control " over a young child to take reasonable care so to exercise that control " as to avoid conduct on his part exposing the person or property of " others to unreasonable danger."

It is to be observed that Dixon J. did not suggest that there was any special relationship between a person in custody and his custodian which constituted an exception to the general rule enunciated by him.

In *Carmarthenshire County Council* v. *Lewis* [1955] AC 549 the County Council was held liable in negligence for damages arising out of an accident caused by a young child who had escaped from a school adjoining a highway. He was when at the school under the care and control of the County Council. The duty owed by the County Council appears to me analogous to that owed by a parent to which Dixon J. referred.

An instance where the act of a third person could not have taken place hut for another's fault or breach of duty is to be found in *Stansbie* v. *Troman*, [1948] 2 K.B. 48 where the duty arose out of contract.

The facts in *Thome* v. *State of Western Australia* 1964 WAR. 147. more nearly resemble those of this case. Mrs. Thorne claimed damages in respect of injuries she had sustained as a result of an assault by her husband after his escape from prison. He had been convicted of a number of offences arising out of an incident in which his wife was involved. On his way to prison he had said that he would "get out and fix her". She and another alleged negligence in allowing him to escape.

In the course of his judgment Negus J. said at p. 151: —

" I emphasise that a mere breach of their duty to the Crown to keep
" prisoners in safe custody could not give the plaintiffs a right of action.
" The plaintiffs must establish they had a special duty to Mrs. Thome
" and failed in that duty. The existence of such a special duty, assuming
" that the facts of this case provide an exception to the general rule
" that one man is under no duty of controlling another to prevent his
" doing damage to a third (per Dixon J. as he then was, in Smith v.
" Leurs (supra)) depends on their knowledge that Thorne had a propensity
" and intention or was likely to attack his wife."

He held that though the warders knew of the threat, it could not be inferred from the fact of the threat that Thorne had that propensity and intention.

Negus J. did not suggest that there was any common law duty of care to prevent the escape of prisoners when it was reasonably foreseeable that damage might ensue. He decided the case on the assumption that there was a special duty of care owed to Mrs. Thorne if Thome's propensity and intention was known to the warders, and holding that it was not known it was not necessary for him to decide that such a special duty of care existed.

This case is no authority for the proposition that there is a common law duty of care owed by custodians where it is reasonably foreseeable that damage is likely to follow if through negligence persons are allowed to escape ; nor, indeed, is it any authority for saying that such a duty arises if the custodians have knowledge of a prisoner's particular propensities.

There are two English cases in which the Home Office and the Prison Commissioners respectively have been held liable in damages for injuries suffered by a prisoner at the hands of fellow prisoners. In *Ellis* v. *Home Office* [1953] 2 All E.R. 149 the plaintiff when a prisoner in Winchester prison suffered injuries as a result of an assault by another prisoner. He sued the Home Office for damages for negligence. In the course of his judgment Singleton L.J. said :—

" The duty on those responsible for one of Her Majesty's prisons
" is to take reasonable care for the safety of those within, and that
" includes those who are within against their wish or will of whom the
" plaintiff was one."

In *D'Arcy v. Prison Commissioners* (The Times 15th and 16th November, 1965) the plaintiff while in prison in Parkhurst suffered injuries at the hands of fellow prisoners. He alleged negligence and the Prison Commissioners did not deny that they were under a duty to take reasonable care. The jury found for the plaintiff.

The Attorney-General did not seek to challenge that a duty of care for their safety and welfare was owed by the Home Office to prisoners in a prison. He was not prepared to concede that such a duty was owed to visitors to the prison though it is not easy to see why it is not.

But " matters happening within one's own bounds are one thing and
" matters happening outside those bounds are an entirely different thing "
as Lord Uthwatt said in *Read* v. *Lyons* [1947] A.C. 177. The duties owed by the occupiers of premises to those lawfully upon them are well established. The fact that a duty of care is owed by prison authorities to prisoners within a prison to protect them from injury at the hands of fellow prisoners who are under their control does not lead to the inference that there is a similar duty of care owed by prison and Borstal authorities to prevent injury or loss being suffered by persons outside the prison or Borstal institution at the hands of those who have ceased to be under the control of the authorities. If in the latter case there is no such duty, I do not think it follows that *Ellis* and *D'Arcy* were wrongly decided.

The Attorney-General contended that public policy demanded that the Borstal authorities should be immune from actions of the kind brought by

the Respondents in this case. He drew attention to the following paragraphs in the booklet " Prisons and Borstals " issued by the Home Office in 1960 :—

" 20. The system of training in each borstal seeks the all round
" development of character and capacities .... It is based on pro-
" gressive trust demanding increasing personal decision, responsibility
" and self control .... The conditions of a borstal must then be as
" unlike those of a prison as is compatible with compulsory detention,
" but they must be various and elastic to suit different stages of develop-
" ment . . . .

" 21. Borstal training in the sense above described is not compatible
" with the maintenance of ' safe-custody ' as an over-riding consideration
" and it is inevitable that a proportion of those under training of this
" sort find that it makes too great demands of them and seek to solve
" their problems by escaping. Nevertheless the proportion, given the
" nature of these restless adolescents, is not high, amounting on an
" average to less than one in five of the whole. This absconding is, too
" often, a serious nuisance to the police in the neighbourhood of the
" borstals and where offences are committed by the absconders, to the
" public also: its reduction is therefore a matter of constant care and
" effort by the administration . . . ."

and contended that if such actions lay, it would have an inhibiting effect on those responsible for the training and reformation of those sentenced to borstal training.

While I would not wish to question that the methods now used are in accordance with public policy, it does not follow that public policy requires that losses suffered by individuals at the hands of absconders should be borne by those individuals. If there is such a duty under the common law, the creation of such an immunity is a matter for Parliament.

It has been suggested that a duty of care if owed by those responsible for the administration of the borstal system may be reduced in extent or indeed extinguished if it conflicts with the exercise of powers or of discretion vested by Parliament in those responsible for the administration. If, for instance, the three officers in this case had been told not to take any steps to prevent the youths escaping in order to test their responsibility, it is, I gather, suggested that that would negative the existence of a duty of care in this case. If, for instance, the Home Office decided that a boy who had previously escaped from a borstal institution should remain in an " open" Borstal where no steps were taken to prevent his escape, there would be no liability for foreseeable damage done by him after his escape. If this is right, and the decision to leave the boy who had escaped in the Hollesley Bay Institution was a deliberate decision of the Prison Commissioners, it would seem to follow that *Greenwell* v. *Prison Commissioners* (supra) was wrongly decided.

The Respondents do not claim to be entitled to damages for breach of a statutory duly. If Parliament has authorised a particular course of action, no action at common law can succeed if the damage suffered follows from the pursuit of that course. Similarly if Parliament has vested a discretion in the authorities, no action will lie in respect of the consequences of the exercise of the discretion. If such a duty of care can be owed, it would be open to the courts to conclude that a particular exercise of discretion was so unreasonable and so careless as not to constitute any real exercise of discretion. If such a duty of care can be owed, and its existence and extent depends on what has been done in the administration of the borstal system, the way in which the authorities have exercised their powers and discretion would be called into question in the courts and I agree with the Attorney-General in thinking that this might well have an inhibiting effect.

The statute which now governs Borstal institutions and Borstal training is the Prisons Act, 1952, amended in certain respects by the Criminal Justice Act, 1961. S. 43 of the Act gives the Secretary of State power to provide
" (c) Borstal institutions, that is to say, places in which offenders . . .
" may be detained and given such training and instruction as will
" conduce to their reformation and the prevention of crime."

S. 44 enacts: —
" (1) A person sentenced to Borstal training shall be detained in a
" Borstal institution . . .

" (2) A person sentenced to Borstal training shall be detained in a
" Borstal institution for such period ... as the Prison Commissioners
" may determine and shall then be released . . ."

S. 46 expressly provides for temporary detention until arrangements can be made to take a person so sentenced to an institution and s. 22 (applied to those sentenced to Borstal training by s. 43(3)*(b)*) *inter alia* gives the Secretary of State power to order such a person to be taken in certain circumstances to a place e.g. for medical treatment and provides that, unless the Secretary of State otherwise directs, he is to be kept in custody while he is being taken there, while he is there and

" while being taken back to the prison " (Borstal institution) " in which
" he is required in accordance with law to be detained."

S. 47(5) gives power to make rules for the temporary release of persons sentenced to Borstal training.

From these provisions it would appear to be the case that the Prisons Act requires that persons sentenced to Borstal training be detained, while they are serving their sentences, in Borstal institutions until they are released or taken temporarily away therefrom under s. 22.

If this be so, one wonders what statutory authority there was for the ten youths residing on Brownsea Island.

A Borstal institution is a place in which a person sentenced to Borstal training " may be detained and given such training and instruction as will
" conduce to " his " reformation ". This appears to imply that the training and instruction will take place within the institution.

S. 13(2) (which applies to those sentenced to Borstal training by virtue of s. 14(3)*(c)*) reads as follows: —

" A prisoner" (Borstal detainee) " shall be deemed to be in legal
" custody while he is con lined in or being taken to or from any prison "
(Borstal institution) " and while he is working, or is for any other reason
" outside the prison" (Borstal institution) "in custody or under the
" control of an officer of the prison " (Borstal institution).

This implies that a Borstal detainee may be required to do work outside an institution but it i.s one thing to do work outside it and another to be allowed to reside outside it.

Under s. 47 the Secretary of State may make rules for the regulation and management of Borstal institutions " and for the classification, treatment,
" employment, discipline and control " of persons required to be detained in Borstal and rules providing for the training of particular classes of persons and their allocation to Borstal institutions. Rules so made cannot amend the provisions of the Act or reduce or limit the mandatory provisions requiring detention in a Borstal institution.

Whether or not there was statutory power sanctioning the detention of the ten youths on Brownsea Island, they were by virtue of s. 13 (2) to be deemed to be in custody while there.

If it be the case that a duty of care such as that alleged in this case can exist, then it would seem very desirable that the powers and discretion to be exercised by those responsible for the Borstal system should be defined more specifically and with more precision than at present.

In *Geddis* v. *Bann Reservoir* (1878) 3 App. Cas. 430 Lord Blackburn said at p. 455 : —

" For I take it, without citing cases, that it is now thoroughly well
" established that no action will lie for doing that which the legislature
" has authorised if it be done without negligence, although it does
" occasion damage to anyone; but an action does lie for doing that
" which the legislature has authorised if it be done negligently. And I
" think that if a reasonable exercise of the powers either given by

" statute to the promoters or which they have at common law, the
" damage could be prevented, it is within this rule ' negligence' not to
" make such reasonable exercise of their powers."

In that case it could not in my view be disputed that the defendants owed a duty to the plaintiff to take care to prevent the flooding of his land. They had statutory powers the exercise of which would have prevented that. Their failure to exercise them was held to be negligence.

If those responsible for the administration of the Borstal system do what the legislature has authorised negligently, then an action will lie but negligence in this context must involve a breach of a duty owed to the person who has suffered damage.

This is illustrated by the decision in *East Suffolk Rivers Catchment Board* v. *Kent* [1941] AC 74. A high tide had made a breach in a sea wall and in consequence the Respondent's land was flooded. The Appellants had statutory powers to repair the wall. They carried out the work so inefficiently that the flooding continued for 178 days. The breach of the wall could have been repaired in 14 days.

It must have been reasonably foreseeable that delay on their part in the exercise of their statutory powers would cause damage to their neighbour, the Respondent. Nevertheless it was held that as they were under no obligation to repair the wall or to complete the work after having begun it, they were under no liability to the Respondent.

Lord Simon in the course of his speech said at p. 86 in reference to Lord Blackburn's words in *Geddis:* —

" Lord Blackburn would certainly not wish to be understood as saying
" that such an action would lie in the absence of proof that the
" defendant's negligence caused damage ; indeed negligence in such a
" connection involves the twofold conception of want of care on the part
" of the defendant and the consequential infliction of loss upon the
" plaintiff. As Lord Reading observed in *Munday* v. *London County*
" *Council* (1916) 2 K.B. 331, 334 'Negligence alone does not give a
" ' cause of action ; the two must co-exist.' A third essential factor is
" the existence of the particular duty. As Lord Wright expressed it
" in *Lochgelly Iron & Coal Co.* v. *M'Mullen* (1934) AC 1, 25 'In
" ' strict legal analysis, negligence means more than heedless or careless
" ' conduct, whether in omission or commission: it properly connotes
" ' the complex concept of duty, breach and damage thereby suffered
" ' by the person to whom the duty was owing '."

It is this third essential factor that, in my opinion, is absent in this case. There is no authority for the existence of such a duty under the common law. Lord Denning M.R. in his judgment in the Court of Appeal, I think recognised this for he said at p. 1015:

" It is, I think, at bottom a matter of public policy which we as judges
" must resolve "

and

" What is the right policy for the judges to adopt?"

He went on to say: -

" Many, many a time has a prisoner escaped—or been let out on
" parole—and done damage. But there is never a case in our law books
" when the prison authorities have been liable for it. No householder
" who has been burgled, no person who has been wounded by a criminal
" has ever recovered damages from the prison authorities such as to
" find a place in the reports. The householder has claimed on his
" insurance company. The injured man can now claim on the com-
" pensation fund. None has claimed against the authorities

" Should we alter all this? I should be reluctant to do so, if by so
" doing, we should hamper all the good work being done by our prison
" authorities."

Where I differ is in thinking that it is not part of the judicial function " to alter all this ". The facts of a particular case may be a wholly inadequate basis for a far reaching change of the law. We have not to decide what the law should be and then to alter the existing law. That is the function of Parliament.

As in my opinion no such duty can exist now under the common law my answer to the question raised in this preliminary issue is in the negative and I would allow the appeal.

Lord Pearson

MY LORDS,

An order was made that " the following question of law be tried as a
" preliminary issue before the trial of the action, viz. whether on the facts
" pleaded in the Statement of Claim the Defendants their servants or agents
" owed any duty of care to the Plaintiffs capable of giving rise to a liability in
" damages with respect to the detention of persons undergoing sentences of
" Borstal training or with respect to the manner in which such persons were
" treated, employed, disciplined, controlled or supervised whilst undergoing
" such sentences ".

The form of the order assumes the familiar analysis of the tort of negligence into its three component elements, viz. the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage. The actual damage alleged to have been suffered by the Plaintiffs may be an example of a kind or range of potential damage which was foreseeable, and if the act or omission by which the damage was caused is identifiable, it may

put one on the trail of a possible duty of care of which the act or omission would be a breach. In short, it may be illuminating to start with the damage and work back through the cause of it to the possible duty which may have been broken.

I will not set out the whole of the Statement of Claim but only those facts, alleged or to be inferred from allegations in the Statement of Claim, which are of special importance on my view of the case. There are of course no findings of fact.

(1) The Borstal boys had been working at Brownsea Island under the control and supervision of the Defendants' officers.

2. Presumably the boys had been brought to the Island from a Borstal Institution, and were being kept on the Island, by officers of the Defendants for the purposes of Borstal training.

3. The Plaintiffs' motor yacht, the Silver Mist, was lying at moorings off Brownsea Island.

4. The other yacht, the Diligence of Marston, was presumably also lying at moorings off Brownsea Island or at any rate was somewhere in the vicinity.

5. The Borstal boys made their way to and presumably boarded the Diligence of Marston and caused her to collide with the Silver Mist, and they then boarded the Silver Mist and cast her off and caused her considerable damage.

6. The three officers of the Defendants who had charge of the boys failed to keep any watch or exercise any control over them at the material time but retired to bed leaving them to their own devices.

7. None of those three officers was on duty at the material time.

8. They failed to make any or any effective arrangements for keeping the boys under control at night.

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(9) Knowing that there were craft such as the Silver Mist off-shore and that there was no or no effective barrier in the way of the boys gaining access to such craft they failed to take any adequate steps to check the movement of the boys.

The Plaintiffs are thus complaining of the injurious interference by the Borstal boys with boats moored off Brownsea Island. As these were Borstal boys under detention for compulsory training and the boats were easily accessible and constituted a natural temptation, it can at any rate be argued that interference by the boys with the boats was eminently foreseeable as likely to happen unless the Defendants' officers took precautions to prevent it. According to the allegations in the Statement of Claim no precautions were taken, no care was exercised and no arrangements were made for safeguarding the boats against such interference. It would seem therefore that according to the allegations the injurious interference with the boats was caused by the acts and omissions of the Defendants' officers in bringing the Borstal boys to Brownsea Island and keeping them there under detention for compulsory training and yet taking no care for the safety of the Plaintiffs' boat and the other boat or boats in the immediate vicinity of the place where the boys were being kept. If the Defendants had any duty to take care for the safety

of the boats, then on the facts alleged in the Statement of Claim it would seem that there was a breach of the duty causing the damage of which the Plaintiffs complain.

What would be the nature of the duty of care owed by the Defendants to the Plaintiffs, if it existed?

In my opinion, the Defendants did not owe to the Plaintiffs any general duty to keep the Borstal boys in detention. If the Defendants had, in the exercise of their discretion, released some of these boys, taking them on shore and putting them on trains or buses with tickets to their homes, there would have been no prospect of damage to the Plaintiffs as boatowners and the Plaintiffs would not have been concerned and would have had nothing to complain of. Again the boys might have escaped in such a way that no damage could be caused to the Plaintiffs as boatowners ; for instance, they might have escaped by swimming ashore or by going ashore in a boat belonging to or hired by the Borstal authorities or by having their friends bring a rescue boat from outside and carry them off to a refuge in the Isle of Wight or Portsmouth or elsewhere. On the other hand the boys might interfere with the boats from motives of curiosity and desire for amusement without having any intention to escape from Borstal detention. The essential feature of this case is not the " escape " (whatever that may have amounted to) but the interference with the boats. The duty of care would be simply a duty to take reasonable care to prevent such interference. The duty would not be broken merely by the Defendants' failure to prevent an escape from Borstal detention or from Borstal training. Performance of the duty might incidentally involve an element of physical detention, if interference with the boats by some particular boy could not be prevented by any other means. But if some other means—such as supervision, keeping watch, dissuasion or deterrence—would suffice, physical detention would not be required for performance of the duty.

Can such a duty be held to exist on the facts alleged here? On this question there is no judicial authority except the one decision in the Ipswich County Court in *Greenwell* v. *Prison Commissioners.* In this situation it seems permissible, indeed almost inevitable, that one should revert to the statement of basic principle by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C.562. 580:

" At present I content myself with pointing out that in English law
" there must be, and is, some general conception of relations giving rise
" to a duty of care, of which the particular cases found in the books
" are but instances. The liability for negligence, whether you style it
" such or treat it as in other systems as a species of ' culpa ', is no doubt
" based upon a general public sentiment of moral wrongdoing for which
" the offender must pay. But acts or omissions which any moral code

" would censure cannot in a practical world be treated so as to give
" a right to every person injured by them to demand relief. In this
" way rules of law arise which limit the range of complainants and the
" extent of their remedy. The rule that you are to love your neighbour
" becomes in law, you must not injure your neighbour ; and the lawyer's
" question, who is my neighbour? receives a restricted reply. You must
" take reasonable care to avoid acts or omissions which you can reason-

" ably foresee would be likely to injure your neighbour. Who, then, in
" law is my neighbour? The answer seems to be—persons who are so
" closely and directly affected by my act that I ought reasonably to
" have them in contemplation as being so affected when I am directing
" my mind to the acts or omissions which are called in question."

Reference can also be made to *Hay or Bourhill v. Young* [19431 A.C. 92. Lord Thankerton at page 98 cited words of Lord Johnston in *Kemp and Dougall* v. *Darngavil Coal Co. Ltd.* [1909] S.C. 1314 at page 1310. "The
" obligee in such a duty must be a person or of a class definitely ascertained,
" and so related by the circumstances to the obligor that the obligor is bound,
" in the exercise of ordinary sense, to regard his interest and his safety. Only
" the relation must not be too remote, for remoteness must be held as a
" general limitation of the doctrine." Lord Thankerton then said " I doubt
" whether, in view of the infinite variation of circumstances which may exist,
" it is possible or profitable to lay down any hard and fast principle beyond
" the test of remoteness as applied to the particular case."

It seems to me that *prima facie*, in the situation which arose in this case according to the allegations, the Plaintiffs as boatowners were in law " neigh-
" bours " of the Defendants and so there was a duty of care owing by the Defendants to the Plaintiffs. It is true that the *Donoghue* v. *Stevenson* principle as stated in the passage which has been cited is a basic and general but not universal principle and does not in law apply to all the situations which are covered by the wide words of the passage. To some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just. It seems to me that this case ought to, and does, come within the *Donoghue v. Stevenson* principle unless there is some sufficient reason for not applying the principle to this case. Therefore, one has to consider the suggested reasons for not applying the principle here.

Proximity or remoteness: As there is no evidence, one can only judge from the allegations in the Statement of Claim. It seems clear that there was sufficient proximity: there was geographical proximity and it was foreseeable that the damage was likely to occur unless some care was taken to prevent it. In other cases a difficult problem may arise as to how widely the " neighbourhood " extends, but no such problem faces the Plaintiffs in this case.

Act of third party: In *Weld-Blundell v. Stephens* [1920] A.C. 956 at page 986 Lord Sumner said: " In general (apart from special contracts and rela-
" tions and the maxim *respondent superior)* even though A is in fault, he is
" not responsible for injury to C which B, a stranger to him, deliberately
" chooses to do". In *Smith v. Lewis* (1945) 70 C.L.R. 256 at pages 261-262 Dixon J. said :

" Apart from vicarious responsibility, one man may be responsible
" to another for harm done to the latter by a third person ; he may
" be responsible on the ground that the act of the third person could
" not have taken place but for his own fault or breach of duty. There
" is more than one description of duty the breach of which may produce
" this consequence. For instance it may be a duty of care in reference
" to things involving special danger. It may even be a duty of care
" with reference to the control of actions or conduct of the third person.
" It is however exceptional to find in the law a duty to control another's
" actions to prevent harm to strangers. The general rule is that one
" man is under no duty of controlling another man to prevent his doing

" damage to a third. There are, however, special relations which are
" the source of a duty of this nature. It appears now to be recognised
" that it is incumbent upon a parent who maintains control over a young

" child to take reasonable care, so to exercise that control as to avoid
" conduct on his part exposing the person or property of others to
" unreasonable dangers. Parental control, where it exists, must be
" exercised with due care to prevent the child inflicting intentional
" damage on others or causing damage by conduct involving unreasonable
" risk of injury to others."

In my opinion, this case falls under the exception and not the rule, because there was a special relation. The Borstal boys were under the control of the Defendants' officers, and control imports responsibility. The boys' interference with the boats appears to have been a direct result of the Defendants' officers' failure to exercise proper control and supervision. Problems may arise in other cases as to the responsibility of the Defendants' officers for acts done by Borstal boys when they have completed their escape from control and are fully at large and acting independently. No such problem faces the Plaintiffs in this case.

Statutory duty: Not only with respect to the detention of Borstal boys but also with respect to the discipline, supervision and control of them the Defendants' officers were acting in pursuance of statutory duties. These statutory duties were owed to the Crown and not to private individuals such as the Plaintiffs. The Plaintiffs, however, do not base their claim on breach of statutory duty. The existence of the statutory duties does not exclude liability at common law for negligence in the performance of the statutory duties. In *Geddis* v. *Proprietors of Bann Reservoir* (1878) 3 App. Cas. 430 at pages 455-6 Lord Blackburn said—•

" For I take it, without citing cases, that it is now thoroughly well
" established that no action will lie for doing that which the legislature
" has authorised, if it is done without negligence, although it does
" occasion damage to anyone: but an action does lie for doing that
" which the legislature has authorised, if it be done negligently. And
" I think that if by a reasonable exercise of the powers, either given
" by statute to the promoters, or which they have at common law, the
" damage could be prevented it is within this rule negligence not to
" make such reasonable exercise of their powers ".

Similar reasoning will be found in the speech of Lord Hatherley at pages 438 and 448-9. He said at pages 448-9: " We are not bound, nor entitled,
" to suppose that they will wilfully do injury by the exercise of the legislative
" powers which have been given to them: but it appears to me clearly and
" plainly that they should use every precaution, by the exercise either of
" their powers created by the Act of Parliament itself, or of their common
" law powers, to prevent damage and injury being done to others through
" whose property the works or operations are carried on."

In my opinion, the reasoning applies to the present case. Be it assumed that the Defendants' officers were acting in pursuance of statutory powers for statutory duties which must include powers) in bringing the Borstal boys to Brownsea Island to work there under the supervision and control of the Defendants' officers. No complaint could be made of the Defendants'

officers doing that. But in doing that they had a duty to the Plaintiffs as " neighbours" to make proper exercise of the powers of supervision and control for the purpose of preventing damage to the Plaintiffs as " neighbours ".

Public Policy: It is said, and in the absence of evidence I assume (and perhaps it is common knowledge and can be judicially noticed) that one method of Borstal training, which is employed in relation to boys who may he able to respond to it, is to give them a considerable measure of freedom. initiative and independence in order that they may develop their self-reliance and sense of responsibility. This method, at any rate when it is intensively applied, must diminish the amount of supervision and control which can be exercised over the Borstal boys by the Defendants' officers, and there is then a risk, which is not wholly avoidable, that some of the boys will escape and may in the course of escaping or after escaping do injury to persons or damage to property. There is no evidence to show whether or

not this method was being employed, intensively or at all, in the present case. But supposing that it was, I am of opinion that it would affect only the content or standard and not the existence of the duty of care. It may be that when the method is being intensively employed there is not very much that the Defendants' officers can do for the protection of the neighbours and their property. But it docs not follow that they have no duty to do anything at all for this purpose. They should exercise such care for the protection of the neighbours and their property as is consistent with the clue carrying out of the Borstal system of training. The needs of the Borstal system, important as they no doubt are, should not be treated as so paramount and all-important as to require or justify complete absence of care for the safety of the neighbours and their property and complete immunity from any liability for anything that the neighbours may suffer.

In answer to the question of law which I have set out at the beginning of this opinion, I would say that the Defendants owed no duty to the Plaintiffs with regard to the detention of the Borstal boys (except perhaps incidentally as an clement in supervision and control) nor with regard to the treatment or employment of them, but the Defendants did owe to the Plaintiffs a duty of care, capable of giving rise to a liability in damages, with respect to the manner in which the Borstal boys were disciplined, controlled and supervised.

I would dismiss the appeal.

Lord Diplock

my lords,

This appeal is about the law of negligence. Regrettably, as I think, it comes before your Lordships' House upon a preliminary question of law which is said to arise upon the facts pleaded in the Statement of Claim. This makes it necessary to identify the precise question of law raised by those facts which are very summarily pleaded. Some of them relate to the

acts of seven youths undergoing sentences of Borstal training, others relate to (he acts and omissions of persons concerned in the management of Borstals and, in particular, to the acts and omissions of three officers of the Portland Borstal.

It is alleged and conceded that the Defendant, the Home Office, is vicariously responsible for the tortious acts of the three Borstal officers and any other persons concerned in the management of Borstals. It is not contended that the Home Office is vicariously liable for any tortious acts of the youths undergoing sentences of Borstal training.

At the relevant time, the seven youths were taking part in a working party on Brownsea Island in the custody and control of the three officers. One night the youths escaped from the Island and caused damage to the Plaintiff's yacht which was moored off-shore of the Island. In causing the damage the youths were themselves guilty of trespass to-the Plaintiff's goods.

The three officers did not take any or any effective steps to prevent the youths from escaping from the Island. Although it is not stated in express terms, it is implicit in the language of the pleading that by the time the youths committed the damage they had successfully eluded the custody and control of the officers and had reached a place where it was not physically possible for the officers or anyone concerned with the management of Borstals to exercise any control over the youths' actions.

The only cause of action relied upon is the " negligence " of the officers in failing to prevent the youths from escaping from their custody and control.

It is implicit in this averment of " negligence " and must be treated as admitted not only that the officers by taking reasonable care could have

prevented the youths from escaping, but also that it was reasonably foreseeable by them that if the youths did escape they would be likely to commit damage of the kind which they did commit, to some craft moored in the vicinity of Brownsea Island.

The specific question of law raised in this appeal may therefore be stated as: Is any duty of care to prevent the escape of a Borstal trainee from custody owed by the Home Office to persons whose property would be likely to be damaged by the tortious acts of the Borstal trainee if he escaped?

This is the first time at which this specific question has been posed at a higher judicial level than that of a County Court. Your Lordships in answering it will be performing a judicial function similar to that performed in *Donoghue* v. *Stevenson* [1932] A.C. 562 and more recently in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, of deciding whether the English law of civil wrongs should be extended to impose legal liability to make reparation for the loss caused to another by conduct of a kind which has not hitherto been recognised by the courts as entailing any such liability.

This function, which judges hesitate to acknowledge as law-making, plays at most a minor role in the decision of the great majority of cases, and little conscious thought has been given to analysing its methodology. Outstanding exceptions are to be found in the speeches of Lord Atkin in *Donoghue* v. *Stevenson* and of Lord Devlin in *Hedley Byrne & Co. Ltd.* v. *Heller &*

Partners Ltd. It was because the former was the first authoritative attempt at such an analysis that it has had so seminal an effect upon the modern development of the law of negligence.

It will be apparent that I agree with the Master of the Rolls that what we arc concerned with in this appeal " is ... at bottom a matter of public policy which we as judges must resolve ". He cited in support Lord Pearce's dictum in *Hedley Byrne & Co. Ltd.* V. *Heller & Partners Ltd.* (ubi sup at p. 536): "How wide the sphere of the duty of care in negligence " is to be laid depends ultimately upon the courts' assessment of the demands " of society for protection from the carelessness of others ". The reference in this passage to " the courts " in the plural is significant for, " as always in " English law the first step in such an inquiry is to see how far the authorities " have gone, for new categories in the law do not spring into existence over-night ". (ibid per Lord Devlin at p. 525).

The justification of the courts' role in giving to the judges' conception of the public interest in the field of negligence the effect of law is based upon the cumulative experience of the judiciary of the actual consequence of lack of care in particular instances. And the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases. But the analyst must know what he is looking for; and this involves his approaching his analysis with some general conception of conduct and relationships which *ought* to give rise to a duty of care. This analysis leads to a proposition which can be stated in the form: "In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc., and has not so far been found to exist when any of these characteristics were absent ".

For the second stage, which is deductive and analytical, that proposition is converted to : " In all cases where the conduct and relationship possess each of the characteristics A, B. C, D, etc. a duty of care arises." The conduct and relationship involved in the case for decision is then analysed

to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision. But since ex hypothesi the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the charac-

teristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential. The cases which are landmarks in the common law, such as *Nickbarrow* v. *Mason, Rylands* v. *Fletcher, Indermaur* v. *Dames, Donoghue* v. *Stevenson,* to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability.

Inherent in this methodology, however, is a practical limitation which is imposed by the sheer volume of reported cases. The initial selection of previous cases to be analysed will itself eliminate from the analysis those in which the conduct or relationship involved possessed characteristics which are obviously absent in the case for decision. The proposition used in the deductive stage is not a true universal. It needs to be qualified so as to read: —

" In all cases where the conduct and relationship possess each of the
" characteristics A, B, C and D. etc. *but do not possess any of the*
" *characteristics Z, Y or X etc. which were present in the cases eliminated*
" *from the anaysis,* a duty of care arises ".

But this qualification, being irrelevant to the decision of the particular case, is generally left unexpressed.

This was the reason for the warning by Lord Atkin in *Donoghue* v. *Stevenson* itself when he said (ubi sup. at p. 582/3):

" In the branch of English law which deals with civil wrongs,
" dependent in England at any rate entirely upon the application by
" judges of general principles also formulated by judges, it is of particular
" importance to guard against the danger of stating propositions of law
" in wider terms than is necessary lest essential factors be omitted in
" the wider survey and the inherent adaptability of English law be unduly
" restricted. For this reason it is very necessary in considering reported
" cases in the law of torts that the actual decision alone should carry
" authority, proper weight, of course, being given to the dicta of the
" judges."

The plaintiff's argument in the present appeal disregards this warning. It seeks to treat as a universal not the specific proposition of law in *Donoghue v. Stevenson* which was about a manufacturer's liability for damage caused by his dangerous products but the well-known aphorism used by Lord Atkin to describe a " general conception of relations giving rise to a duty of care ".

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

Used as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care this aphorism marks a milestone in the modern development of the law of negligence. But misused as a universal it is manifestly false.

The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to

no legal liability in the doer or emitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated. The very parable of the good Samaritan (Luke 10 v. 30) which was evoked by Lord Atkin in *Donoghue* v. *Stevenson* illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law. Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.

In *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* which marked a fresh development in the law of negligence, the conduct in question was careless words not careless deeds. Lord Atkin's aphorism, if it were of universal application, would have sufficed to dispose of this case, apart from the express disclaimer of liability. But your Lordships were unanimous in holding that the difference in the characteristics of the conduct in the two cases prevented the propositions of law in *Donoghue* v. *Stevenson* from being directly applicable. Your Lordships accordingly proceeded to analyse the previous decisions in which the conduct complained of had been careless words, from which you induced a proposition of law about liability for damage caused by careless words which differs from the proposition of law in *Donoghue* v. *Stevenson* about liability for damage caused by careless deeds.

In the present appeal, too, the conduct of the defendant which is called in question differs from the kind of conduct discussed in *Donoghue* v. *Stevenson* in at least two special characteristics. First, the actual damage sustained by the Plaintiff was the direct consequence of a tortious act done with conscious volition by a third party responsible in law for his own acts and this act was interposed between the act of the defendant complained of and the sustension of damage by the plaintiff. Secondly, there are two separate " neighbour relationships " of the defendant involved, a relationship with the plaintiff and a relationship with the third party. These are capable of giving rise to conflicting duties of care.

This appeal, therefore, also raises the lawyer's question " Am I my brother's keeper "? A question which may also receive a restricted reply.

I start, therefore, with an examination of the previous cases in which both or one of these special characteristics are present. In the County Court case of *Greenwell* v. *Prison Commissioners* both were present as was the characteristic of physical proximity of the plaintiff's property in the relationship between the plaintiff and the defendant. If this decision is right the plaintiff is entitled to succeed. But the County Court Judge simply treated the case as governed by Lord Atkin's aphorism in *Donoghue* v. *Stevenson* and for reasons already stated I do not think that this approach to the problem is adequate.

In two cases *Ellis* v. *Home Office* (1953 2 All E.R. 149) and *D'Arcy* v. *Prison Commissioners* (Times Newspaper 15th November, 1955) it was assumed, in the absence of argument to the contrary, that the legal custodian of a prisoner detained in a prison owed to the plaintiff, another prisoner confined in the same prison, a duty of care to prevent the first prisoner from assaulting the plaintiff and causing him physical injuries. Unlike the present ease, at the time of the tortious act of the prisoner for the consequences of which it was assumed that the custodian was liable the prisoner was in the actual custody of the defendant and the relationship between them gave to the defendant a continuing power of physical control over the acts of the

prisoner. The relationship between the defendants and the plaintiffs in these two cases too bore no obvious analogy to that between the plaintiff and the defendant in the present case. In each of the cases the defendant in the exercise of a legal right and physical power of custody and control of the plaintiff had required him to be in a position in which the defendant ought reasonably and probably to have foreseen that he was likely to be injured by his fellow prisoner.

In my view, it is the combination of these two characteristics, one of the relationship between the defendant custodian and the person actually committing the wrong to the plaintiff and the other of the relationship between the defendant and the plaintiff which supply the reason for the existence of the duly in care in these two cases—which I conceded as Counsel in *Ellis* v. *Home Office.* The latter characteristic would be present also in the relationship between the defendant and any other person admitted to the prison who sustained similar damage from the tortious act of a prisoner, since the Home Office as occupiers and managers of the prison have the legal right to control the admission and the movements of a visitor while he is on the prison premises. A similar duty of care would thus be owed to him. But I do not think that, save as a deliberate policy decision, any proposition of law based on the decisions in these two cases would be wide enough to extend to a duty to take reasonable care to prevent the escape of a prisoner from actual physical custody and control owed to a person whose property is situated outside the prison premises and is damaged by the tortious act of the prisoner *alter his escape.*

We have also been referred to a number of cases decided in the State courts of New York and California dealing with the liability of the various authorities for physical injuries caused by prisoners who have been negligently released on parole, or on bail or who have been permitted to escape. I do not find them helpful, as this is a field of law in which the modern development in the various jurisdictions of the United States of America has been on different lines from its development in England.

There is also a decision of Negus *J.* in the Supreme Court of Australia: *Thome & Rowe* v. *Western Australia* (1964 WAR 142) dismissing an action for negligently allowing a prisoner to escape and cause physical injury to the Plaintiffs. It is not a decision that any duty of care to prevent escape was owed to the injured persons. The judgment was mainly concerned with the topic of vicarious liability ; the most that can be said is that the learned judge was prepared to assume, without deciding, that such a duty might exist since he found on the facts, perhaps surprisingly, that due care had been taken.

I will refer briefly to a few other previous decisions in which the conduct and relationships involved possessed one or other of the characteristics of the conduct and relationships with which the present appeal is concerned, but also possessed other characteristics which, in my view, deprive these decisions of relevance to the issue of law in the present appeal.

There are two cases in which a plaintiff has recovered against a custodian damages for injuries sustained as a consequence of the subsequent act of a human being whom the custodian has carelessly failed to keep in his custody and control. In neither case was the custody penal custody or the human being who did the act causing the damage one who was regarded in law as responsible for his actions. In *Holgate v Lancashire Mental Hospitals Board* [1937] 4 All. E.R. 19 tried with a jury on assize, the human being causing the damage was of unsound mind. It was held that the doctors had been negligent in allowing him to be released on a visit. Only the summing-up of Lewis J. is reported. I reserve my opinion as to whether this decision was right. The second case which was in your Lordships' House, *Carmarthenshire C.C.* v. *Lewis* [1955] A.C. 449, concerned a child of four who ran out into the road from a school maintained by the defendant and caused an accident on the highway to a driver trying to avoid him. The defendant was held liable for not taking reasonable care to keep the gate shut. The headnote reports the *ratio decidendi* as based on the duty of

an occupier of premises adjacent to a highway and Lord Goddard did found his judgment on this. There seems to me to be a clear and relevant distinction between the responsibility of a custodian for acts which are done after escaping from custody by a human being who is not a reasonable man and so not responsible in law for his own acts, on the one hand, and for acts of conscious volition which are done by a responsible human being on the other hand. Furthermore, in the *Carmarthenshire* case there was no possible conflict between the duty of the defendant Council to the child and its duty to users of the adjacent highway.

There are other cases in which parents have been held liable for the acts of older children, but these can, in my view, be classified as depending on the duty of the defendant to exercise due care in the control of things involving special danger. As is so often the case in the law of tort the basis of this liability is helpfully expounded in a judgment of Dixon J. in the High Court of Australia *Smith* v. *Leurs* (1945 C.L.R. 256).

I do not find it useful to refer to the many other cases cited in which the damage to the plaintiff was not caused by an act of conscious volition of a responsible third person whose conduct the defendant had a legal right to control. The result of the survey of previous authorities can be summarised in the words of Dixon J. in *Smith* v. *Leurs* (ubi sup at p. 262): " The general " rule is that one man is under no duty of controlling another man to prevent " his doing damage to a third. There are, however, special relations which " are the source of a duty of this nature ".

From the previous decisions of the English courts, in particular those in *Ellis* v. *Home Office* and *D'Arcy v. Prison Commissioners*, which I accept us correct, it is possible to arrive by induction at an established proposition of law as respects one of those special relations: viz.

A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics (1) that A has the legal right to detain C in penal custody and to control his acts while in custody ; (2) that A is actually exercising his legal right of custody of C at the time of C's tortious act and (3) that A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B ; and where also the relationship between A and B has the characteristics; (4) that at the time of C's tortious act A has the legal right to control the situation of B or his property as respects physical proximity to C and (5) that A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did.

Upon the facts which your Lordships are required to assume for the purposes of the present appeal the relationship between the Defendant, A, and the Borstal trainees, C, did possess characteristics (1) and (3) but did not possess characteristic (2); while the relationship between the Defendant. A, and the Plaintiff, B, did possess characteristic (5) but did not possess characteristic (4).

What your Lordships have to decide as respects each of the relationships is whether the missing characteristic is essential to the existence of the duty or whether the facts assumed for the purposes of this appeal disclose some other characteristic which if substituted for that which is missing would produce a new proposition of law which *ought* to be true.

As any proposition which relates to the duty of controlling another man to prevent his doing damage to a third deals with a category of civil wrongs of which the English courts have hitherto had little experience it would not be consistent with the methodology of the development of the law by judicial decision that any new proposition should be stated in wider terms than are necessary for the determination of the present appeal. Public policy may call for the immediate recognition of a new sub-category of relations which are the source of a duty of this nature additional to the sub-category

described in the established proposition ; but further experience of actual cases would be needed before the time became ripe for the coalescence of sub-categories into a broader category of relations giving rise to the duty, such as was effected with respect to the duty of care of a manufacturer of products in *Donoghue v. Stevenson.* Nevertheless, any new sub-category will form part of the English law of civil wrongs and must be consistent with its general principles.

Since the tortious act of the Borstal trainees took place after they had ceased to be in the actual custody of the Borstal officers, what your Lordships are concerned with in the relationship between the Home Office and Borstal trainees is the responsibility of the Home Office to detain them in custody. To detain them at all would be to commit a civil wrong to them unless the legal right to detain them were conferred upon the custodians by statute or at common law. In the case of Borstal trainees that right is conferred by statute, viz., section 13 of the Prison Act, 1952. This makes lawful their detention within the curtilage of the Borstal institution and out-

side its curtilage in the custody or under the control of a Borstal officer. This section does not impose upon the Borstal officers or upon the Home Office (to which, by an Order in Council made under section 24 of the Criminal Justice Act, 1961, the responsibility for the administration of Borstal training was transferred) any responsibility to continue to keep trainees in custody. Whatever responsibility it has to do so is imposed by section 45 of the Act (as amended by sections 1-11 of the Criminal Justice Act, 1961), of which the relevant provision is: "A person sentenced to " Borstal training shall be detained in a Borstal institution for such period, " not extending beyond two years after the date of his sentence, as the " (Home Office) "may determine, and shall then be released ". There are also extended powers of release conferred upon the Home Secretary.

The only statutory reference to the purpose of Borstal training is to be found in the definition of Borstal institutions in section 43(1) viz.: "places " in which persons not less than fifteen but under twenty-one years of age " may be detained and given such training and instruction as will conduce " to their reformation and the prevention of crime ". But section 47 gives to the Home Secretary very wide power to make rules " for the regulation " and management of Borstal institutions and for the classification, treatment, " employment, discipline and control of persons required to be detained " therein " including rules for the temporary release of persons " serving a " sentence of ... Borstal training ".

The statute from which the right to detain is derived thus only gives the broadest indication of the purpose of the detention and confers upon the Home Secretary very wide powers to determine by subordinate legislation the way in which the powers of custody and control of Borstal trainees should be exercised by the officers of the prison service. In exercising his rule-making power, at any rate, it would be inconsistent with what are now recognised principles of English public law to suggest that he owed a duty of care capable of giving rise to any liability in civil law to avoid making a rule the observance of which was likely to result in damage to a private citizen. For a careless exercise of his rule-making power he is responsible to Parliament alone. The only limitation on this power which courts of law have jurisdiction to enforce depends not on the civil law concept of negligence, but on the public law concept of *ultra vires.*

The statutory rules in force at the relevant time which deal with discipline and control limit themselves to laying down the general principles to be observed, viz.

" The purpose of Borstal training requires that every inmate, while con- " forming to the rules necessary for well-ordered community life, shall be " able to develop his individuality on right lines with a proper sense of " personal responsibility. Officers shall therefore, while firmly maintaining " discipline and order, seek to do so by influencing the inmates through " their own example and leadership and by enlisting their willing co- " operation."

If these instructions with their emphasis on co-operation rather than coercion are to be followed in a working party outside the confines of a " closed " Borstal or in an " open " Borstal they must inevitably involve some risk of an individual trainee's escaping from custody and indulging

again in the same kind of criminal activities which led to his sentence of Borstal training and which are likely to cause damage to the property of another person. To adopt a method of supervision of trainees still subject to detention which affords them any opportunity of escape is as Lord Dilhorne has pointed out an act or omission which it can be reasonably foreseen may have as its consequence some injury to another person. But the same is true of every decision made by the Home Office, through the appropriate officers of the Borstal service, in the exercise of the statutory power to release a Borstal trainee from detention in less than two years from the time of his being sentenced or to release him temporarily on parole

If one accepted the principle laid down in relation to private Acts of Parliament in the passages already cited by your Lordships from *Geddis* v. *Proprietors of Bann Reservoir* [1878] (2 App. Cas. 430), as a proposition of law of general application to modern statutes which confer upon government departments or public authorities a discretion as to the way in which a particular public purpose is to be achieved, the courts would be required, at the suit of any plaintiff who had in fact sustained damage at the hands of a Borstal trainee who had been released, to review the Home Office decision

to release him and to determine whether sufficient consideration had been given to the risk of his causing damage to the plaintiff.

A Private Act of Parliament in the nineteenth century of which that under consideration in *Geddis* v. *Proprietors of Bann Reservoir* was typical, conferred upon statutory undertakers powers to construct and maintain works which interfered with the common law proprietary rights of other persons. The only conflict of interests to which the exercise of these powers could give rise was between the interests of the undertakers in achieving the physical result contemplated by the private bill they had promoted and the interests of those other persons whose common law proprietary rights would be affected by the exercise of the powers. In construing a statute of this kind it can be presumed that parliament did not intend to authorise the undertakers to exercise the powers in such a way as to cause damage to the proprietary rights of private citizens that could be avoided by reasonable care without prejudicing the achievement of the contemplated result. In the context of proprietary rights, the concept of a duty of reasonable care was one with which the courts were familiar in the nineteenth century as constituting a cause of action in " negligence ". The analogy between the careless exercise of statutory powers conferred by a private act of this kind and the careless exercise of powers existing at common law in respect of property was close and the issues involved suitable for decision by a jury, upon evidence admissible and adduced in accordance with the ordinary procedure of courts of law. There was no compelling reason to suppose that Parliament intended to deprive of any remedy at common law private citizens whose common law proprietary rights were injured by the careless, and therefore unauthorised, acts or omissions of the undertakers.

But the analogy between " negligence " at common law and the careless exercise of statutory powers breaks down where the act or omission complained of is not of a kind which would itself give rise to a cause of action at common law if it were not authorised by the statute. To relinquish intentionally or inadvertently the custody and control of a person responsible at law for his own acts, is not an act or omission which, independently of any statute, would give rise to a cause of action at common law against the

custodian on the part of another person who subsequently sustained tortious damage at the hands of the person released. The instant case thus lacks a relevant characteristic which was present in the series of decisions from which the principle formulated in *Geddis* v. *Proprietors of Bann Reservoir* was derived. Furthermore, there is present in the instant case a characteristic which was lacking in *Geddis* v. *Proprietors of Bann Reservoir*. There the only conflicting interests involved were those on the one hand of the statutory

undertakers responsible for the act or omission complained of and on the other hand of the person who sustained damage as a consequence of it. In the instant case, it is the interest of the Borstal trainee himself which is most directly affected by any decision to release him and by any system of relaxed control while he is still in custody, that is intended to develop his sense of personal responsibility and so afford him an opportunity to escape. Directly affected also are the interests of other members of the community of trainees subject to the common system of control; and indirectly affected by the system of control while under detention and of release under supervision is the general public interest in the reformation of young offenders and the prevention of crime.

These interests, unlike those of a person who sustains damage to his property or person by the tortious act or omission of another, do not fall within any category of property or rights recognised in English law as entitled to protection by a civil action for damages. The conflicting interests of the various categories of persons likely to be affected by an act or omission of the custodian of a Borstal trainee which has as its consequence his release or his escape are thus of different kinds for which in law there is no common basis for comparison. If the reasonable man when directing his mind to the act or omission which has this consequence ought to have in contemplation persons in all the categories directly affected and also the general public interest in the reformation of young offenders, there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another. The material relevant to the assessment of the reformative effect upon trainees of release under supervision or of any relaxation of control while still under detention is not of a kind which can be satisfactorily elicited by the adversary procedure and rules of evidence adopted in English courts of law or of which judges (and juries) are suited by their training and experience to assess the probative value.

It is, I apprehend, for practical reasons of this kind that over the past century the public law concept of *ultra vires* has replaced the civil law concept of negligence as the test of the legality, and consequently of the action-ability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled. It is not the function of the court, for which it would be ill-suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of a civil action at law to a private citizen adversely affected by the way in which the discretion has been exercised. Its function is confined in the first

instance to deciding whether the act or omission complained of fell within the statutory limits imposed upon the department's or authority's discretion. Only if it dia not would the court have jurisdiction to determine whether or not the act or omission not being justified by the statute constituted an actionable infringement of the Plaintiff's rights in civil law.

These considerations lead me to the conclusion that neither the intentional release of a Borstal trainee under supervision, nor the unintended escape of a Borstal trainee still under detention which was the consequence of the application of a system of relaxed control intentionally adopted by the Home Office as conducive to the reformation of trainees, can have been intended by Parliament to give rise to any cause of action on the part of any private citizen unless the system adopted was so unrelated to any purpose of reformation that no reasonable person could have reached a *bona fide* conclusion that it was conducive to that purpose. Only then would the decision to adopt be *ultra vires* in public law.

A parliamentary intention to leave to the discretion of the Home Office the decision as to what system of control should be adopted to prevent the escape of Borstal trainees must involve, from the very nature of the subject-

matter of the decision, an intention that in the application of the system a wide discretion in the application of the system may be delegated by the Home Office to subordinate officers engaged in the administration of the Borstal system. But although the system of control, including the sub-delegation of discretion to subordinate officers, may itself be *intra vires,* an act or omission of a subordinate officer employed in the administration of the system may nevertheless be *ultra vires* if it falls outside the limits of the discretion delegated to him—i.e., if it is done contrary to instructions which he has received from the Home Office.

In a civil action which calls in question an act or omission of a subordinate officer of the Home Office on the ground that he has been "negligent" in his custody and control of a Borstal trainee who has caused damage to another person the initial inquiry should be whether or not the act or omission was *ultra vires* for one or other of these reasons. Where the act or omission is done in pursuance of the officer's instructions, the court may have to form its own view as to what is in the interests of Borstal trainees, but only to the limited extent of determining whether or not any reasonable person could *bona fide* come to the conclusion that the trainee causing the damage or other trainees in the same custody could be benefited in any way by the act or omission. This does not involve the court in attempting to substitute, for that of the Home Office, its own assessment of the comparative weight to be given to the benefit to the trainees and the detriment to persons likely to sustain damage. If on the other hand the officer's act or omission is done contrary to his instructions it is not protected by the public law doctrine of *intra vires.* Its actionability falls to be determined by the civil law principles of negligence, like the acts of the statutory undertakers in *Geddis v. Proprietors of Bann Reservoir* (supra).

This, as it seems to me, is the way in which the courts should set about the task of reconciling the public interest in maintaining the freedom of the Home Office to decide upon the system of custody and control of Borstal trainees which is most likely to conduce to their reformation and the

prevention of crime, and the public interest that Borstal officers should not be allowed to be completely disregardful of the interests both of the trainees in their charge and of persons likely to be injured by their carelessness, without the law providing redress to those who in fact sustain injury.

Ellis v. *Home Office* and *D'Arcy* v. *Prison Commission* are decisions which are consistent with this principle as respects the initial inquiry. In neither of them was it sought to justify the alleged acts or omissions of the prison officers concerned as being done in compliance with instructions given to them by the appropriate authority (at that date the Prison Commissioners) or as being in the interests of the prisoner whose tortious act caused the damage or of any other inmates of the prison. If the test suggested were applied to acts and omissions alleged in those two cases they would in public law be *ultra vires.*

If this analogy to the principle of *ultra vires* in public law is applied as the relevant condition precedent to the liability of a custodian for damage caused by the tortious act of a person (the detainee) over whom he has a statutory right of custody, the characteristic of the relationship between the custodian and the detainee which was present in those two cases, viz. that the custodian was actually exercising his right of custody at the time of the tortious act of the detainee, would not be essential. A cause of action is capable of arising from failure by the custodian to take reasonable care to prevent the detainee from escaping, if his escape was the consequence of an act or omission of the custodian falling outside the limits of the discretion delegated to him under the statute.

The practical effect of this would be that no liability in the Home Office for " negligence " could arise out of the escape from an " open " Borstal of a trainee who had been classified for training at a Borstal of this type by the appropriate officer to whom the function of classification had been delegated, upon the ground that the officer had been negligent in so classifying him or in failing to re-classify him for removal to a " closed " Borstal.

The decision as to classification would be one which lay within the officer's discretion. The court could not inquire into its propriety as it did in *Greenwell* v. *Prison Commissioners* in order to determine whether he had given what the court considered to be sufficient weight to the interests of persons whose property the trainee would be likely to damage if he should escape.

For this reason I think that *Greenwell v. Prison Commissioners* was wrongly decided by the County Court Judge. But to say this does not dispose of the present appeal for the allegations of negligence against the Borstal officers are consistent with their having acted outside any discretion delegated to them and having disregarded their instructions as to the precautions they should take to prevent members of the working party of trainees from escaping from Brownsea Island. Whether they had or not could only be determined at the trial of the action.

But this is only a condition precedent to the existence of any liability. Even if the acts and omissions of the Borstal officer alleged in the particulars

of negligence were done in breach of their instructions and so were *ultra vires* in public law it does not follow that they were also done in breach of any duty of care owed by the officers to the plaintiff in civil law.

It is common knowledge, of which judicial notice may be taken, that Borstal training often fails to achieve its purpose of reformation, and that trainees when they have ceased to be detained in custody revert to crime and commit tortious damage to the person and property of others. But so do criminals who have never been apprehended and criminals who have been released from custody upon completion of their sentences or earlier pursuant to a statutory power to do so. The risk of sustaining damage from the tortious acts of criminals is shared by the public at large. It has never been recognised at common law as giving rise to any cause of action against anyone but the criminal himself. It would seem arbitrary and therefore unjust to single out for the special privilege of being able to recover compensation from the authorities responsible for the prevention of crime a person whose property was damaged by the tortious act of a criminal, merely because the damage to him happened to be caused by a criminal who had escaped from custody before completion of his sentence instead of by one who had been lawfully released or who had been put on probation or given a suspended sentence or who had never been previously apprehended at all. To give rise to a duty on the part of the custodian owed to a member of the public to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee's sentence there should be some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public.

What distinguishes a Borstal trainee who has escaped from one who has been duly released from custody, is his liability to recapture, and the distinctive added risk which is a reasonably foreseeable consequence of a failure to exercise due care in preventing him from escaping is the likelihood that in order to elude pursuit immediately upon the discovery of his absence the escaping trainee may steal or appropriate and damage property which is situated in the vicinity of the place of detention from which he has escaped.

So long as Parliament is content to leave the general risk of damage from criminal acts to lie where it falls without any remedy except against the criminal himself, the courts would be exceeding their limited function in developing the common law to meet changing conditions if they were to recognise a duty of care to prevent criminals escaping from penal custody owed to a wider category of members of the public than those whose property was exposed to an exceptional added risk by the adoption of a custodial system for young offenders which increased the likelihood of their escape unless due care was taken by those responsible for their custody.

I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed

only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steel or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped.

So to hold would be a rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in *Ellis* v. *Home Office* and *D'Arcy v. Prison Commissioners* as giving rise to a duty of care on the part of the custodian to exercise reasonable care in controlling his detainee. In those two cases the custodian had a legal right to control the physical proximity of the person or property sustaining the damage to the detainee who caused it. The extended relationship substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.

In the present appeal the place from which the trainees escaped was an island from which the only means of escape would presumably be a boat accessible from the shore of the island. There is thus material, fit for consideration at the trial, for holding that the plaintiff, as the owner of a boat moored off the island, fell within the category of persons to whom a duty of care to prevent the escape of the trainees was owed by the officers responsible for their custody.

If therefore it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in *bona fide* exercise of a discretion delegated to them by the Home Office as to the degree of control to be adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the " negligence " of the Borstal officers.

I would accordingly dismiss the appeal upon the preliminary issue of law and allow the case to go for trial on those issues of fact.

(306363) Dd. 197039 120 5/70 St.S.