



Summer 1995

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Recommended Citation

33 Duq. L. Rev. 807 (1994-1995)

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Duquesne Law Review

Volume 33, Summer 1995, Number 4

The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries

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The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten.¹

Negligence doctrine has long distinguished misfeasance (a “misdoing”) from nonfeasance (a “not doing”), purporting to provide that the former occasions liability and the latter does not. The distinction’s seed was sown in the fifteenth century, a time at which the courts expressly recognized neither the concepts of negligence nor “duty” as each is now known to the common law. During the early fifteenth century, common law courts spoke of “misfeasance” when a defendant by act or omission had failed to perform what modern law would label a duty. It invoked “nonfeasance” for defendants who, with respect to the controversy at issue, had, in modern terms, no duty to act or forbear. Hence, if a court of that era opined that “defendant’s conduct was a misfea-

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1. *Allegheny College v. National Chautauqua Cty. Bank*, 246 N.Y. 369, 373 (1927) (Cardozo, C.J.).

sance," it meant only that with respect to the plaintiff, the defendant had a duty to act or forbear and failed to honor it. If, on the other hand, it ruled that "defendant committed a mere nonfeasance," it intended to express that in relation to the plaintiff's injury, the defendant had no duty to act or forbear.²

Those original usages have been lost in a tangle of careless judicial expression. A profound confusion has replaced them, and in the realm of negligence, the words nonfeasance and misfeasance now wreak conceptual chaos. On one hand, modern negligence law is said to attach liability to imprudent acts or omissions.³ On the other, it continues in a mindless, mechanical manner to countenance the statement that nonfeasance, which it equates with inaction, raises no liability.⁴

The law (if it has a will) never intended that nonfeasance and misfeasance should be distinguished, since in logic inaction is one form of action. Rather, it planned that one should be liable for the harm he causes by acting in violation of a duty, or by failing to act when action was his duty. It is unfortunate that negligence law, when it first arose in the nineteenth century, should have somehow acquired, adopted, and endorsed the false differentiation between nonfeasance and misfeasance first created four hundred years earlier. For scholarly review of the historical records does show rudimentary efforts by some thinkers of the sixteenth century to abolish the distinction and to regulate conduct on the basis of duty.

Part I of this article lays the basis for subsequent discussion by (a) examining the manner in which English courts early defined and distinguished misfeasance and nonfeasance, (b) identifying the single case from which there emerged the erroneous jurisprudence that produced the law's confused perspective on the terms, and (c) probing the conceptual tensions to which the terms then gave rise from the fifteenth through the nineteenth centuries. Building on Part I, Part II describes the manner in which "nonfeasance" and its supposed contradistinction to "misfeasance" now muddles the law of negligence. Through historical inquiry it demonstrates that the confusion reflects, in truth, the law's failure ever to delimit the notion of duty as it, in turn, informs the realm of negligence. Part III sets forth a workable conceptual scheme through which courts might determine that with respect to negligence, a given defendant does or does not

2. For an historical analysis of the early fifteenth century treatment of nonfeasance, see notes 5-21 and accompanying text.

3. See note 27 and accompanying text.

4. See note 93 and accompanying text.

owe a duty to a given plaintiff. It thus unburdens the common law of the befuddlement with which it has so long lived in this regard and, indeed, frees it to delete "nonfeasance" and "misfeasance" from its lexicon.

I. HISTORICAL FOUNDATIONS OF NONFEASANCE AND MISFEASANCE — THE CONFUSION EMERGES⁵

Very early common law shows no distinction between misfeasance and nonfeasance. Imprudence wrought liability whether the defendant's behavior pertained to an act or an omission.⁶

5. Unless otherwise noted, translations of all cases herein cited derive from J.H. BAKER & S.F.C. MILSOM, *SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750* (1986).

6. As early as 1247, judgment was rendered against individuals for failure to act. See *Pleas of the Manors of the Abbey of Bec for the Martinmas Term, A.D. 1247*, 2 SELDEN SOC'Y 9-10 (1888). In *Manors of the Abbey of Bec*, the record reveals that liability was imposed on the entire township of Little Ogbourne for failing to wash the lord's sheep and failing to reap. *Id.* The record, however, does not reveal whether a duty existed, either at law or by contract, to perform these acts. *Id.* Similarly, in 1293, a man was found liable for allowing the lord's pigs to perish through his negligence in tending to them. See *Court of Brightwaltham, A.D. 1293*, 2 SELDEN SOC'Y 170 (1888). Both cases indicate that under some circumstances thirteenth century common law imposed liability for inaction.

In *Waldon v. Mareschal*, the plaintiff counted that a veterinarian "took in hand and made himself responsible [*manucepit*]" to cure an ill horse. *Waldon v. Mareschal*, Y.B. Mich. 43 Edw. III. fo. 33, pl. 38 (1370), translated in A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 212 (1975). "Afterwards, the aforesaid John [the veterinarian] performed his cure so negligently" that the horse died. *Waldon*, Y.B. Mich. 42 Edw. III, fo. 33, pl. 38. The defendant all but acknowledged that he would have been liable had the action been brought in covenant and if plaintiff had produced the requisite instrument, signed and sealed, such instrument also being known as a "specialty." *Id.*; see note 13 for a discussion of specialties. Yet the suit was sustained despite the specialty's absence, demonstrating that imprudent omission, in this case, "default of a cure," wrought liability, much as negligent omission does today. See *Waldon*, Y.B. Mich. 42 Edw. III, fo. 33, pl. 38. Fourteenth century common law, of course, was steeped in formalism and it appears that the *Waldon* plaintiff succeeded in part because he included in his pleadings the word *manucepere*, thus transforming a parole agreement, otherwise unenforceable, into defendant's duty of prudent action. SIMPSON, at 212.

[Plaintiff's] choice of the word *manucepit*, with the curious construction that follows it, is not at all easy to explain. *Manucepere* is a verb with a very specific legal meaning in the fourteenth century, developed in connection with the writ of mainprise (*de manucaptione*). It must be translated with this in mind, so that the sense of the passage is probably something like this: "that the aforesaid John took in hand and made himself responsible for the said William's horse so far as its illness is concerned, and afterwards the aforesaid John performed his cure so negligently that his horse died." This powerful assertion and the peculiar grammatical construction through which it is expressed is mirrored in the French of the year-book report, and this cannot be accidental. Thus Kirton says in argument, "Because he has counted that he ought to have taken responsibility for the horse's malady . . . [*q. il. av.*]

Conceptually the distinction first announced itself in 1400 when a litigant first attempted to extend the action of trespass on the case in *assumpsit*⁷ to nonperformance of a parole promise where

empris son cheval del malady]"

Id.

Also during the mid-fourteenth century, when *assumpsit* began to make its mark on trespass on the case, there arose the case of *Bukton v. Tounesende*, more commonly known as *The Case of the Humber Ferryman*. See *Bukton v. Tounesende*, 22 Lib. Ass., fo. 94, pl. 41 (1348). In *Bukton*, plaintiff agreed that defendant should carry his horse across the Humber River. *Bukton*, 22 Lib. Ass., fo. 94, pl. 41. Over plaintiff's objections, defendant overloaded his boat causing the horse to drown. *Id.* Plaintiff sued defendant in trespass. *Id.* Defendant objected on the ground that the case sounded more properly in covenant since it pertained to inaction. *Id.* He argued that he could not be liable in covenant, and therefore not at all, because plaintiff failed to produce a specialty. *Id.* However, the court found that defendant committed a trespass by overloading his boat in the face of plaintiff's objections. *Id.* The decision indicates that fourteenth century common law imposed liability for imprudent action.

All four cases just discussed indicate that thirteenth and fourteenth century common law imposed liability on those who caused damage through carelessness or imprudence, whether by act or omission. Liability did not depend on the action of covenant and its attendant specialty, but rather on the law's conception of duty (although that word does not appear in the reports).

7. The action of trespass on the case in *assumpsit* is hinge-pin to the history of contract. Although the reports are sufficiently vague and incomplete to leave doubt even on fundamental points, it appears that in the fifteenth century one's promise was enforceable only if set forth in a writing, signed and sealed, the writing being known as a "specialty." See SIMPSON, cited at note 6, at 9-13. Breach gave rise to an action in covenant. *Id.* The action was not available, however, to one who claimed breach of an oral promise. *Id.* Hence the oral promise was per se unenforceable. *Id.*

Nonetheless, during the fifteenth century, it became established that if a party first made a parole promise, presumably as part of an exchange, and then began to act on it, he was obliged to perform with care and prudence. See note 26 and accompanying text. Faulty performance would subject him to suit in trespass on the case in *assumpsit* — a subspecies of trespass on the case. The beginning of the performance was the *assumpsit* or "undertaking" and created a duty of diligence, the breach of which supported the suit. See, e.g., Anon., Caryl's Report, BL MS. Harley 1624, fo. 28 (1493) ("An action on the case lies only where a thing is done badly, by an actual act . . . but for not building the house a writ of covenant lies, if there is a writing, and if not there is no remedy."); *Shipton v. Doige*, Y.B. Trin. 20 Hen. VI, fo. 34, pl. 4 (1442) [hereinafter *Doige's Case*] ("If a carpenter undertakes to make me a house, and does not do it, I shall not have a writ of trespass but only an action of covenant (if I have a specialty). But if he makes the house, and does it so badly, I shall have an action of trespass on my case . . ."). Regarding the nature of *assumpsit* see James B. Ames, *The History of Assumpsit* (1 & 2), 2 HARV. L. REV. 1, 53 (1888) [hereinafter *History of Assumpsit*]. See SIMPSON, cited at note 6, at 199-215; 3 THOMAS A. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 245-67 (F.B. Rothman ed. 1980) (discussing the nature of trespass on the case and its origin); see also Morris S. Arnold, *Accident, Mistake, and Rules of Liability In The Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361 (1979); S.F.C. Milsom, *Trespass From Henry III To Edward III (Part III.)*, 74 L.Q. REV. 561 (1958); S.F.C. Milsom, *Not Doing Is No Trespass*, [1954] CAMBRIDGE L.J. 105. Regarding liability for tortious acts prior to the advent of trespass on the case see Charles O. Gregory, *Trespass To Negligence To Absolute Liability*, 37 VA. L. REV. 359 (1951); S.F.C.

the resulting loss involved no physical damage.⁸

In *Watton v. Brinth*,⁹ the plaintiff brought an action of trespass on the case in assumpsit,¹⁰ alleging that the defendant, “[u]ndertook . . . to construct well and faithfully within a certain time certain houses of Watton, yet the same Brinth took no care

Milsom, *Trespass From Henry III To Edward III* (pts 1 & 2), 74 L.Q. REV. 195, 407 (1958); John H. Wigmore, *Responsibility For Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894); Percy H. Winfield & Arthur L. Goodhart, *Trespass and Negligence*, 49 L.Q. REV. 359 (1933).

8. Before 1400, actions for trespass on the case in assumpsit were brought only for injury to humans or their animals. SIMPSON, cited at note 6, at 218.

9. Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9 (1400).

10. “Assumpsit” did not arise as an action unto itself until the mid-sixteenth century. SIMPSON, cited at note 6, at 273. Before then, the word signified an undertaking to act in exchange for some payment or performance, which act, if improperly pursued, gave rise to a suit in trespass on the case for resultant damages to person or property. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 638 (5th ed. 1956). The undertaking gave rise to what modern law would term a duty. See *Marshal’s Case*, Y.B. Hil. 19 Hen. VI, fo. 49, pl. 5 (1441). In *Marshal’s Case*, the plaintiff brought a writ of trespass on the case against the defendant for undertaking in London to cure the plaintiff’s horse. *Marshal’s Case*, Y.B. Hil. 19 Hen. VI, fo. 49, pl. 5. The medicines, according to the writ, were applied “negligently and carelessly” resulting in the horse’s death. *Id.* However, the marshal averred that he had originally undertaken to cure the horse in Oxford and had been successful in that endeavor. *Id.* When the horse subsequently fell ill in London, the marshal applied his medicines “*de son bon gre*” (meaning either gratuitously or voluntarily). *Id.* Discussing this case, Plucknett explained the significance of assumpsit as hinge-pinned on which liability turned: “[i]f, however, he [the marshal] undertakes to cure it, and I on the faith of that undertaking allow him to treat the horse, then the risk falls upon him and I have suffered a wrong if my horse is the worse for his treatment.” PLUCKNETT, at 638.

Curiously, Plucknett precedes his explanation with the remark: “[i]f I voluntarily hand over my horse to the care of a horse-doctor, he treats the animal at my invitation and therefore at my risk.” *Id.* In relation to both medieval and modern day liability, that statement appears inaccurate. Whether the risk falls on an individual has no relation to that person’s “voluntary” act in allowing another to care for his chattel. Perhaps it was the words of Chief Justice Newton that caused Plucknett’s confusion:

[Suppose] my horse is sick, and I go to a marshal for advice, and he says that one of his horses had such a disease and he applied certain medicines to his horse, and will do the like for my horse; and he does so, and then the horse dies; shall I have an action? I say I shall not.

Marshal’s Case, Y.B. Hil. 19 Hen. VI, fo. 49, pl. 5. Plucknett might have taken Newton’s words to mean that by voluntarily delivering the horse to the defendant, the plaintiff lost any right of action for improper treatment. But Plucknett must have failed to read carefully the sentence immediately preceding the above-quoted language: “[n]ow, for what [the defendant] did of his own free will you shall not have an action.” *Id.* It is clear that Newton referred not to the plaintiff’s voluntary act but to a hypothetical veterinarian’s willingness to treat gratuitously. A gratuitous undertaking was not the sort of assumpsit that supported an action in trespass on the case. Taken in its entirety, Newton’s statements simply meant that where one person voluntarily or gratuitously attempts to assist another there is no liability if the endeavor fails because the person performing the act owes no duty to one who is gratuitously benefiting from the act. *Id.*

to construct the houses of the same Watton in the said time."¹¹ The defendant proclaimed that the action sounded more properly in covenant¹² and that the plaintiff failed to present a specialty.¹³ Justice Rikhill explained to the plaintiff that because, "[y]ou have counted on a covenant, and you have shown nothing [in proof] of it, take nothing by your writ, but be in the mercy."¹⁴

The same reasoning and result obtained nine years later when a plaintiff brought an action of trespass on the case in assumpsit against a carpenter who had allegedly failed to build a house according to his oral promise.¹⁵ The plaintiff argued that if the defendant had begun to perform, but built the house inadequate-

11. *Watton*, Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9.

12. The action of covenant dates to 1201. 3 STREET, cited at note 7, at 115. By 1227 the "writ" appeared on the Register. See F.W. Maitland, *The History Of The Register Of Original Writs*, 3 HARV. L. REV. 97, 113 (1889). The action of covenant "[l]ies to recover damages for the breach of a sealed promise (covenant) to do [or to refrain from doing] some particular act." 3 STREET, cited at note 7, at 114. The relief granted by the action of covenant was analogous to that by an action of trespass on the case in assumpsit. *Id.* The only difference between the actions was that the former requires production of a specialty, whereas the latter could be maintained upon a parole agreement, provided that the plaintiff could demonstrate either that the defendant performed his task negligently or commenced performance and did not complete it. *Id.*

13. *Watton*, Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9. Although authoritative sources are shy to provide a definition of a "specialty," all signs clearly indicate that it refers to an instrument executed with ceremony or formality, often including signature, seal and delivery. A specialty was originally a sealed instrument that served as evidence of indebtedness. 2 STREET, cited at note 7, at 8. Eventually the sealed obligation itself served as foundation of any action in debt. *Id.* at 9. Although a specialty was once enforceable without a seal, it fell victim to the formalized procedures in place at the end of the reign of Edward I. *Id.* at 18; cf. FREDERICK POLLOCK & FREDERIC W. MAITLAND, *A HISTORY OF ENGLISH LAW* 218 (2d ed. 1968) (noting that an action was dismissed for lack of a specialty as early as 1243).

The requirement of a seal probably arose because "[t]here was practically no judicial machinery for sifting the truth of oral testimony" in order to ascertain the validity of a parole promise. 2 STREET, cited at note 7, at 18. Additionally, "[t]here was no conception as such as the later doctrine of consideration" by which to measure liability. *Id.* Over the past three hundred years some have characterized a specialty as a substitute for consideration. See, e.g., WILLIAM R. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS* 59-60 (4th ed. 1887); LEAKE ON *CONTRACTS* 76 (1867). Street thinks they are mistaken:

In modern times the notion that something must always be given for a promise in order to make it binding has become so deeply imbedded in legal consciousness that our judges have sought to bring the specialty contract within the doctrine [of consideration] by declaring that the seal raises a presumption of consideration. This fancy has been indulged for more than three hundred years. But it is as erroneous as it is superfluous.

2 STREET, cited at note 7, at 19; accord WILLIAM L. CLARK, *HANDBOOK OF THE LAW OF CONTRACTS* 67 (4th ed. 1931) ("It is often said that a seal imports consideration, but . . . this is incorrect.")

14. *Watton*, Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9.

15. Anon., Y.B. Mich. 11 Hen. IV, fo. 33, pl. 60 (1409).

ly, the suit would lie, and that it surely ought to lie if the defendant failed to build at all.¹⁶ Chief Justice Thirning acknowledged that a defendant who had undertaken a parole promise would be liable for failing to perform it properly.¹⁷ However, he distinguished improper performance from total failure to perform for “[w]hen a man makes a covenant, and will not do anything under this covenant, how shall you have an action against him without specialty?”¹⁸ The suit was therefore dismissed since it appeared to the court “[t]hat this action is taken at common law for something which is a covenant in itself, of which nothing is shown, the court hereby awards that you shall take nothing by your writ, but be in the mercy.”¹⁹

No doubt the courts that decided *Watton* in 1400 and the anonymous carpenter case of 1409 wished to express their view that a promise not under seal raised no duty to begin performance but that it did raise a duty to perform properly and diligently if performance should first begin.²⁰ The courts did not mean to suggest that a failure to act was in all circumstances exculpatory, but only that an unsealed promise itself raised no duty to act because it was unenforceable. Although the decisions just discussed did not feature the word “nonfeasance,” they were the bud from

16. *Anon.*, Y.B. Mich. 11 Hen. IV, fo. 33, pl. 60.

17. *Id.*

18. *Id.*

19. *Id.*

20. This interpretation is supported by the words of Justice Brecheley in *Watton* who noted that had the plaintiff alleged that the defendant had begun to perform and thereafter by “negligence” had done nothing, the judgment would have been otherwise. *Watton*, Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9. The term “negligence” often appears in pleadings and arguments throughout the fourteenth and fifteenth centuries. See, e.g., *Watkins’ Case*, Y.B. Hil. 3 Hen. VI, fo. 36, pl. 33 (1425) (“Take the case where a farrier covenants with me to shoe my horse, and by his negligence he misdrives a nail into my horse. . . .”); *Skyrne v. Butolf*, Y.B. Pas. 11 Ric. 11, p. 223, pl. 12 (1388) (“He has said expressly that you . . . so negligently applied the medicines . . . that he was made worse.”); *Stratton v. Swanlond*, Y.B. Hil. 48 Edw. III, fo. 6, pl. 11 (1374) (writ alleging that a surgeon undertook to cure plaintiff’s hand and by the surgeon’s negligence the plaintiff’s hand “was made so much worse”); see also note 6 for examples of other cases where negligence was averred. Negligence, during this era, was not recognized as an independent tort. Percy H. Winfield, *The History of Negligence in Torts*, 42 L.Q. REV. 184, 184 (1926). Rather, negligence, as utilized in the context of these early cases, meant the manner in which an act was performed. *Id.*

Notions of negligence also surfaced in the anonymous carpenter case. See *Anon.*, Y.B. Mich. 11 Hen. IV, fo. 33, pl. 60. The court implied that had the carpenter begun performance and then pursued it negligently, an action in *assumpsit* would have properly applied. *Id.* The cases therefore indicate the beginning of performance subjected defendant to a duty to follow through with reasonable care and prudence.

which flowered the confusion that now surrounds it.²¹

In 1425, a writ was brought against a mill-maker who undertook to construct a mill and then failed to perform.²² The plaintiff produced no specialty.²³ Justice Martin dismissed the action declaring: "[f]or there no wrong is supposed by the writ in the sense of anything having been done (*per le fescance d'un chose*), but only the not doing (*le noun fescance*) of a thing, and that sounds solely in covenant."²⁴ The words were ill-chosen, and taken at face value their message was inaccurate. Fifteenth-century common law did impose liability for inaction outside the writ of covenant.²⁵ Justice Martin probably meant to say that if an action in trespass on the case in assumpsit were based on nonperformance of a parole promise, then a mere failure to begin performance would be inadequate to support the action. In saying, however, that the "not doing of a thing" was actionable only in covenant, he would lead all but the most scrupulous listener to believe that inaction could not, under any circumstances, create liability.

The historical record thus strongly suggests that Justice Martin, a lone judge, with one carelessly worded statement²⁶ created the conceptual web, two continents wide, in which "misfeasance" and "nonfeasance" are now tangled. On the one hand is it written that negligence may arise from acts or omissions,²⁷ and on the

21. See SIMPSON, cited at note 6, at 220-22.

22. *Watkins' Case*, Y.B. Hil. 3 Hen. VI, fo. 36, pl. 33 (1425). This case is also known as *Wykes' Case*.

23. *Watkins'*, Y.B. Hil. 3 Hen. VI, fo. 36, pl. 33.

24. *Id.*

25. See note 7 and accompanying text.

26. Justice Cokayne also made his contribution to the mischief, also by confusing the word "nonfeasance" with nonperformance of a parole promise:

Suppose someone covenants to clean out (*mouder*) certain ditches which are near my land, and he does not do it, so that through his default the water which should have run in the ditches floods my land and destroys my corn: I say that I shall have a good writ of trespass for this *nonfeasance*. Likewise here.

Watkins', Y.B. Hil. 3 Hen. VI, fo. 36, pl. 33 (emphasis added).

Justice Cokayne saw no reason to distinguish wrongful action from wrongful omission and so thought the *Watkins'* writ should have been sustained. *Id.* Justice Babington also agreed and likewise confused "nonfeasance" with "nonperformance":

Suppose someone covenants with me to roof my hall in a certain house, within a certain period, and he does not roof it on time, so that for want of roofing the timber of my house is rotted through by the rain, I say that in this case I shall have a good writ of trespass *sur le matter monstre* against the person who made the covenant [to roof] with me: and in that case . . . I am damaged by the nonfeasance of the [roof. Likewise here, the plaintiff is damaged by the nonfeasance of the] mill.

Id.

27. See *Daurizio v. Merchants' Despatch Transp. Co.*, 274 N.Y.S. 174, 183

other that liability for negligence arises from misfeasance only; a nonfeasor commits no wrong.²⁸ The *Watkins'* court responded not, as it seemed to say, to the absence of action, but to the absence of duty since the maker of a parole promise had no obligation to act on it.

Faced with the rule that nonperformance of a parole covenant was inactionable, disappointed promisees began to plead that the promise and its subsequent nonperformance amounted to a "deceit."²⁹ The act of deceit became the basis of the action instead of defendant's nonperformance and for such complaints the courts awarded relief.³⁰ Thus, so long as deceit and disablement

(N.Y. Sup. Ct. 1934) (Negligence may consist of either "performance of an act in an improper manner [or] . . . failure to perform an act" or may partake of both.); *Kelly v. Metropolitan Ry. Co.*, [1895] C.A. 944, 946 ("Omission to do something which the defendants were bound to do, or an act of commission which they ought not to have done, may both be acts of negligence."); *Blyth v. Birmingham Water Works*, 11 Ex. 781 (1856) ("The definition of negligence is the omitting to do something that a reasonable man would do, or doing something which a reasonable man would not do."); see also 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* 712 (2d ed. 1986) ("[D]efinitions of negligence include both acts and omissions."); 65 C.J.S. *Negligence* § 2(6) (1955) ("It is . . . well settled that actionable negligence may consist of, or be based on, either omission or commission, or it may consist of both omission and commission; [m]isfeasance, nonfeasance, or both together may constitute negligence."); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 41 (1915) ("[N]egligence is doing what a reasonable and prudent man would not have done or not doing what such a man would have done.").

28. See note 94 and accompanying text.

29. Most often attorneys were able to circumvent the nonfeasance issue by alleging that the defendant had "schem[ed] wickedly to defraud" the plaintiff. See *Somerton v. Colles*, Y.B. Pas. 11 Hen. VI, fo. 25, pl. 1 (1433) (the writ), Y.B. Trin. 11 Hen. VI, fo. 55, pl. 26 (1433) (part I of the argument), Y.B. Hil. 11 Hen. VI, fo. 18, pl. 10 (1433) (part II of the argument), Y.B. Pas. 11 Hen. VI, fo. 24, pl. 1 (1433) (part III of the argument) [hereinafter *Somerton's Case*]; see also *Shepton v. Doige*, CP 40/725, m. 49 d. (Pas. 1442) (the record), *Doige's Case*, Y.B. Trin. 20 Hen. VI, fo. 34, pl. 4 (1442) (plaintiff alleged that the defendant "craftily schem[ed] to defraud" him by enfeoffing land to a third party); *Anon.*, Y.B. 3 Hen. IV, M. fo. 3, pl. 12 (1401), translated in SIMPSON, cited at note 6, at 251-52 (plaintiff alleged that the defendant had deceived him by allowing a third party to convey lands that were promised to plaintiff to another).

30. Allegations of deceit to circumvent nonfeasance issues were pleaded as early as 1401. See *Anon.*, Y.B. 3 Hen. IV, M. fo. 3, pl. 12 (1401), translated in SIMPSON, cited at note 6, at 251-52. In that case the plaintiff paid the defendant, who was an agent of the lord of the manor, five shillings so that the defendant might persuade the lord to grant part of his lands to the plaintiff. *Anon.*, Y.B. 3 Hen. IV, M. fo. 3, pl. 12. The defendant did not perform his promise and the lord enfeoffed the land to another. *Id.* Rather than alleging an undertaking by the defendant, plaintiff alleged that the defendant had deceived him by allowing the lord to convey the land to a third party. *Id.*

This method of pleading was expanded upon in *Somerton's Case*. See *Somerton's Case*, Y.B. Pas. 11 Hen. VI, fo. 25, pl. 1 (1433) (the writ), Y.B. Trin. 11 Hen. VI, fo. 55, pl. 26 (1433) (part I of the argument), Y.B. Hil. Hen. VI, fo. 18, pl. 10 (1433) (part II of the argument), Y.B. Pas. 11 Hen. VI, fo. 24, pl. 1 (1433) (part III of the argument). In *Somerton's Case*, plaintiff retained the defendant, an attor-

of performance were evident, assumpsit could be brought for non-performance of a parole agreement.³¹

To the careful thinker, allegations of deceit tended to expose as false the distinction between action and inaction.³² On one hand, the cases alleging deceit could be construed as pure cases of non-feasance; plaintiff's complaint simply being nonperformance of a parole covenant.³³ On the other hand, however, these cases could be classified as misfeasance in that the defendant had performed an affirmative act which damaged the plaintiff.³⁴ Liability then, was not dependent upon a defendant's action or inaction, but rather upon whether the defendant owed a duty to the plaintiff and whether breach of that duty would result in harm to the plaintiff.

Notwithstanding the rise of actions in deceit, there prevailed throughout the fifteenth century a statement akin to this: non-performance of a parole covenant was inactionable as mere non-feasance; faulty performance, however, was actionable in trespass on the case in assumpsit as negligent misfeasance.³⁵ Yet, by the

ney, to act as his legal advisor with respect to the lands which the plaintiff intended to purchase, or, alternatively, to lease. *Somerton's Case*, Y.B. Pas. 11 Hen. VI, fo. 25, pl. 1. The defendant then "maliciously revealed all [plaintiff's counsel]" to another, became the other's attorney, and procured the property for him. *Id.* The defendant argued that the proper action was covenant. *Somerton's Case*, Y.B. Trin. 11 Hen. VI, fo. 55, pl. 26. This argument was rejected since a writ of covenant was proper where one was retained to perform specific acts, failed to do so, and where a specialty existed between the parties. *Somerton's Case*, Y.B. Hil. 11 Hen. VI, fo. 18, pl. 10. The situation presented was different, however, for not only had the defendant failed to procure the manor for plaintiff, he had become counsel for another, revealed plaintiff's legal affairs, and procured the manor for that third party. *Id.* By doing so the defendant had disabled himself from ever performing the act for plaintiff and had thereby deceived the plaintiff. As if by magic, the word "disablement" transformed what otherwise should have been an action in covenant into an action of trespass on the case for deceit. *Id.* For a complete analysis of *Somerton's Case* see 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 431-34 (1977).

The principles set forth in *Somerton's Case* were expanded to encompass the immediate vendor of an item in *Doige's Case*. See *Doige's Case*, Y.B. Trin. 20 Hen. VI, fo. 34, pl. 4. In *Doige's Case*, the defendant agreed to sell her lands to the plaintiff and the plaintiff paid the purchase price in advance. *Shepton*, CP 40/725 m. 49 d. The defendant agreed to convey the land to the plaintiff within fourteen days. See SIMPSON, cited at note 6, at 256. Instead of conveying the land as promised, the defendant enfeoffed the land to another. *Shepton*, CP 40/725 m. 49 d. Not unlike the above mentioned cases, an action in covenant could not be brought since it was impossible to compel a person to honor an agreement which was no longer capable of being performed. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 383 (3d ed. 1990). Thus, the plaintiff counted that the defendant had "[c]raftily schem[ed] to defraud him." *Shepton*, CP 40/725 m. 49 d. For a thorough discussion of *Doige's Case*, see 3 HOLDSWORTH, at 435-39.

31. See generally BAKER, cited at note 30, at 383.

32. SIMPSON, cited at note 6, at 252.

33. *Id.*

34. *Id.*

35. See Anon., Y.B. 14 Hen. VI, fo. 18v, pl. 58 (1435):

end of the century, some thinkers, at some level seemed to recognize that action and inaction were ultimately indistinguishable and that a parole covenant, (if made as part of an exchange),³⁶

I quite agree that the case of the carpenter [who is not liable for his failure to build] . . . is [good] law; but if the carpenter covenants to make me a good, strong house of a particular form, and makes me a weak, bad house of another form, I shall have a good action of trespass on my case. Also if a farrier covenants with me to shoe my horse well and competently, and in shoeing it he injures it with a nail, I shall have a good action on my case. Again, if a leech undertakes to cure me of my illnesses and gives me medicines but does not cure me, I shall have a good action on my case. Also if a man covenants with me to plough my land at a seasonable time, and he ploughs at an unseasonable time, I shall have an action on my case. And the reason in all these cases is that he has taken upon himself a matter in fact beyond that which sounds in covenant.

Anon., Y.B. 14 Hen. VI, fo. 18v, pl. 58; see also SIMPSON, cited at note 6, at 234-36.

36. The significance of pleading an exchange or consideration in actions for trespass on the case in *assumpsit* is unclear. Whether the case involved nonfeasance or misfeasance, plaintiff's pleadings normally featured the phrase, "[i]n return for a certain sum of money paid to the [defendant] beforehand." See *Skyrne v. Butolf*, CP 40/509, m. 230 (1388). Alternatively, the pleadings averred that the defendant "[u]ndertook in return for the said certain amount." See *Somerton's Case*, Y.B. Pas. 11 Hen. VI, fo. 25, pl. 1. Yet in some cases the plaintiff failed ever to plead prepayment or a promise to pay. See, e.g., *Stratton v. Swanlond*, Y.B. Hil. 48 Edw. III, fo. 6, pl. 11 (1374); *Waldon v. Mareschal*, Y.B. Mich. 43 Edw. III, fo. 33, pl. 38 (1369); *The Case of the Humber Ferryman*, 22 Lib. Ass., pl. 41 (1348). Therefore, it "[c]annot [be] assume[d] that the averment was essential simply from the fact it was commonly made." SIMPSON, cited at note 6, at 237.

One might speculate that payment or prepayment had no relevance to cases wherein the plaintiff alleged misfeasance — faulty performance of a parole covenant. See *R.H. Moch v. Renssalaer Water Co.*, 159 N.E. 896, 898 (1928) ("It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."). There is evidence to support this assertion. In *Powtney v. Walton*, the defendant demurred to an action on the case because "[n]o consideration [was given] for the *assumpsit*." *Powtney v. Walton*, 1 Rolle Abr. f. 10, pl. 1 (1598). The action was allowed despite the lack of consideration "[f]or the defendant's negligence is the cause of action and not the *assumpsit*." *Powtney*, 1 Rolle. Abr. f. 10, pl. 1; see SIMPSON, cited at note 6, at 238 (citing *Powtney* for the same proposition and cautioning that "[w]e must resist the temptation to say dogmatically either that this restated what had always been the case or that the law was changed"); but see JAMES B. AMES, LECTURES IN LEGAL HISTORY 130 (1913) (contending that even though "[t]he statement of the *assumpsit* of the defendant was for centuries . . . deemed essential in the count, [these types of actions had] always sounded in tort. [T]he actions were not originally, and are not to-day, regarded as actions of contract. . . . [C]onsideration has, accordingly, never played any part in the declaration.").

More troublesome in this regard are cases in which plaintiffs pled pure failure to perform. These actions were generally not cognizable in the fifteenth century and courts had little occasion to inquire after the importance of consideration, compensation, or exchange. SIMPSON, cited at note 6, at 238. *Watkins' Case* however, does reveal a cursory discussion of the matter. See *Watkins' Case*, Y.B. Hil. 3 Hen. VI, fo. 36, pl. 33. Chief Justice Babington believed that the writ would be sustainable only if it alleged payment. *Id.* Justice Cokayne was willing to imply compensation, "for it shall be presumed that he would not have made the mill for nothing." *Id.* While neither judge assigned paramount importance to the issue, "[t]he idea may

should raise liability for harm caused by pure failure to perform, just as it did for a performance that was imperfect. Speaking at Gray's Inn,³⁷ Chief Justice Fyneux said that:

[I]f one makes a covenant to build me a house by a certain day, and he does nothing about it, I shall have action on my case on this nonfeasance as much as if he had been guilty of a misfeasance; for I am damaged by this: *per Fyneux*. And he said that it had been thus adjudged³⁸ and he

have been that, because the action was for nonfeasance, remuneration had some *special* relevance." SIMPSON, cited at note 6, at 239 (emphasis added).

Within the fifteenth century, the only other case that bears meaningfully on the issue of consideration is *Anon.*, Mich. 19 Hen. VI, HLS MS. 156, unfol. (C.P. 1440). In that case, by agreement defendant was to enfeoff plaintiff of certain lands. *Anon.*, Mich. 19 Hen. VI, HLS MS. 156, unfol. The defendant breached and plaintiff brought an action in trespass on the case. *Id.* The court ruled that "[the] bargain [was] purely a covenant." *Id.* Justice Ayscough analogized the case to that of the carpenter who failed to build, averring that if the plaintiff had produced a specialty, he could maintain an action for the nonfeasance, but in its absence, he was without remedy. *Id.*

Justice Ayscough's remarks appear to be the first in which the term "bargain" appears in relation to the action of trespass on the case in assumpsit and it is unclear what, exactly, it signifies. The word suggests the parties had, as would be likely, formed an agreement whereby plaintiff would pay and defendant would enfeoff. The record tells not, however, whether plaintiff had prepaid defendant at the time of default. It may be that he did, since Thomas Browne, second prothonotary of the court, said in relation to the case: "[i]f a man pays a sum of money to have a house made for him, and it is not done, he shall have an action of trespass on his case because the defendant has [received a] quid pro quo and the plaintiff is damaged." *Id.*

As suggested by Browne's statement, there seems to have been, in the fifteenth century, some school of thought to the effect that a parole promise was enforceable through trespass on the case in assumpsit if the aggrieved promisee had, at the time of the breach, already paid or performed to the promisor's benefit.

The common sense behind Brown's theory was clear — the carpenter who had benefited ought to perform, and if he had the plaintiff's money in pocket it was rather foolish to suppose that the plaintiff had suffered no loss through the nonfeasance. In such a case nonfeasance certainly had caused loss. Reasoning of this kind eventually carried the day.

SIMPSON, cited at note 6, at 240. *See, e.g.*, *Johnson v. Baker*, CP 40/914, m. 104 (1493) (the record); Caryll's Report, BL MS Harley 1624, fo. 28 (1493) (the argument); *Anon.*, Trin. 27 Hen. VI, Statham Abr., 1624, fo. 28 (1493); *Anon.*, Trin. 27 Hen. VI, Statham Abr., *Actions sur le cas*, pl. [25] (C.P. 1449) (permitting action of trespass on the case where plaintiff paid defendant to perform a task which defendant did not perform).

37. Gray's Inn is one of the principal inns of court in London, England. WILIAM R. DOUTHWAITE, *GRAY'S INN* (1987). The inns of court "are certain private unincorporated associations, in the nature of collegiate houses, located in London, and invested with the exclusive privilege of calling people to the bar; that is, conferring the rank or degree of a barrister." BLACK'S LAW DICTIONARY 789 (6th ed. 1990).

38. While Fyneux stated that this issue had been adjudged, no evidence of such a case has been uncovered in the King's Bench rolls. J.H. Baker, *The Reports of Sir John Spelman II*, 94 SELDEN SOC'Y 270 (1978) [hereinafter *Spelman Reports*]. Professor Baker reports that an action against a carpenter in 1499 proceeded to declaration and imparlance, but adds that this "does not necessarily mean that the case was judicially before the court." *Id.*

held it to be law. And so it is if one bargain with me that I shall have his land to me and my heirs for £20, and that he will convey the estate to me if I pay him the £20, that if he will not convey the estate to me according to the covenant, I shall have an action on my case, and I will not need to sue out a *subpoena*.³⁹

Fyneux was thus suggesting that a suit should lie against one who, as part of an exchange, issued an oral promise and failed to act on it.⁴⁰ He saw sameness, it seems, in faulty action and a failure of action where action was warranted. Fyneux's statement, therefore, marks an early awareness in the law that the terms "nonfeasance" and "misfeasance" are of themselves inconsequential; that liability attaches to behavior in breach of duty whether that behavior be stealing, striking, or sitting still.

*Orwell v. Mortoft*⁴¹ further depicts the law's crude but clear attempt to expose as spurious the distinction between nonfeasance and misfeasance and so to abolish the so-called nonfeasance doctrine.⁴² The court seemed to recognize, *sub silentio*, that liability should attach to the breach of a duty whether the breach be manifest in action or a failure to act. The facts as alleged were that the plaintiff brought and paid for the barley of the defendant, the parties agreeing that the defendant would hold the grain for the plaintiff and deliver it to him on demand.⁴³ When the demand came, however, the defendant refused to deliver, and instead converted the grain to his own use.⁴⁴ The plaintiff brought an action in trespass on the case in *assumpsit*.⁴⁵

Justice Frowicke referred the matter in part to the question of

39. Trin. 14 Hen. VII, Fitz. Abr., *Action sur le case*, pl. 45 (1499).

40. The significance of this passage is much debated partially because Fyneux made no express reference to consideration in respect of the carpenter case and it is unclear, therefore, whether he believed a consideration to be essential to plaintiff's case. See note 36 and accompanying text; see also SIMPSON, cited at note 6, at 261 ("read as a whole, the note . . . perhaps envisages payment"); WILLIAM JONES, *THE LAW OF BAILMENTS* 37 (1781) ("[I]t is possible that Fyneux might suppose a consideration, though none be mentioned."). Professor Baker notes that:

This report has given some difficulty because no mention is made of prepayment. If Fyneux, C.J. really did not think prepayment essential, his views differed from those of his contemporaries. . . . In any case, taking the passage as a whole, together with the statement about not conveying land (where prepayment is mentioned), it seems very likely that the report is simply imprecise.

Spelman Reports, cited at note 38, at 270.

41. Y.B. Mich. 20 Hen. VII, M. fo. 8, pl. 18 (1505).

42. See SIMPSON, cited at note 6, at 263 ("[The Chief Justice] makes it plain that he was prepared, if not to abandon the doctrine entirely, at least to countenance very considerable inroads upon it").

43. *Orwell*, Y.B. Mich. 20 Hen. VII, M. fo. 8, pl. 18.

44. *Id.*

45. *Id.*

deception,⁴⁶ noting: (a) (implicitly, if not expressly), that one party is duty-bound not to deceive another,⁴⁷ and (b) that a nonfeasance bottomed in deception is therefore actionable.⁴⁸ Justice Kingsmill went further, proclaiming that the word "nonfeasance" is not of itself lethal to a plaintiff's prayer for relief.⁴⁹ Instead he believed that where a duty is breached by nonfeasance or misfeasance some action should lie:

And where a general action lies, a special action on the case does not lie, as where assize of nuisance lies, action on the case lies not. But for a nonfeasance, action on the case lies, as if an attorney does not execute his office or a labourer does not do his service in tending my land, for I am damaged, and no general action lies.⁵⁰

With *Orwell* as precedent,⁵¹ early sixteenth century common law spawned a trend toward this position: whenever a defendant breached a duty, the aggrieved party would have an action.⁵² *Orwell* therefore is significant as testimony to the law's tendency ever to revise its notions of duties and to recognize, slowly but surely, that liability pertains not to action or inaction, but, once again, to behavior in breach of duty.

Yet early sixteenth century common law sponsored an alternative trend as well, apparently born, as earlier noted, of Justice Martin's unfortunate remark in *Watkins' Case*.⁵³ Not-

46. The decision also raised the question of whether plaintiff could proceed in action of debt. Debt was, at the time, the broadest and most rigid of the common law actions. 3 STREET, cited at note 7, at 127. It was appropriate to the plaintiff who wished "[t]o recover money or chattels due and made a certain in amount by contract, by custom, or by record." *Id.* If the action of debt was to follow from default on a contract, plaintiff would have to (a) allege that a quid pro quo had passed to the debtor at the moment the debt arose, or (b) present a specialty. *Id.* at 127-28. Regarding the history of the action in debt see 3 STREET, cited at note 7, at 127-43.

47. *Orwell*, Y.B. Mich. 20 Hen. VII, M. fo. 8, pl. 18.

48. *Id.* Frowicke's discussion referred in part to the disablement doctrine in *Doige's Case*. See *Doige's Case*, Y.B. Trin. 20 Hen. VI, fo. 34, pl. 4 (1442). See also SIMPSON, cited at note 6, at 257-59. In substance, Frowicke seems to observe that one who wished to characterize the defendant's actions as an affirmative wrong might consider that in converting the barley to his own use, he had actively disabled himself from making good his covenant.

49. *Orwell*, Y.B. Mich. 20 Hen. VII, M. fo. 8, pl. 18.

50. *Id.*

51. Interestingly, the result in *Orwell* is unknown. SIMPSON, cited at note 6, at 263. The case is significant, however, for the reported statements of Frowicke and Kingsmill, as just discussed, and their implications for the judicial recognition that "nonfeasance" might, in its way, be a form of wrongful action.

52. Professor Simpson writes that some jurists came to recognize that if "there had been a wrong" a remedy should follow. SIMPSON, cited at note 6, at 264. Most likely, in using the word "wrong," Professor Simpson himself meant, simply, the breach of a duty.

53. See *Watkins'*, Y.B. Hil. 3 Hen. VI, fo. 36, pl. 33. See notes 24-27 and ac-

withstanding the *Orwell* decision and Fyneux's talk at Gray's Inn,⁵⁴ a good many sixteenth century jurists continued to speak of the difference between nonfeasance and misfeasance and its importance to liability. Subtly and slowly, they lost sight of the fact that fifteenth century courts first created the semantic differentiation only as a means of ruling that a parole covenant was unenforceable.⁵⁵ Instead, they began, through conceptual carelessness, to afford the words nonfeasance and misfeasance a significance of their own. In 1516, at Gray's Inn, the carpenter who failed to build was once again the centerpiece of hypothetical discussion:

[Proposition;] a man covenants to build a house and does not, he [to whom the covenant is made] shall have an action on the case.

Harlak[enden]: and Hales to the contrary: for a man shall not have an action on the case for not doing something, albeit he shall have an action on the case for misfeasance. Thus, if he had built the house but not according to the covenants, he should have an action on the case; but not for nonfeasance.

Ting[lenden]: It seems that he shall [not?] have an action on the case. But he said that he would not take that (maxim) too generally, since if nonfeasance caused injury to some other thing he should have an action on the case. Thus, if a man have a house without a roof and he covenants with a man by parole to tile his house by a certain day, and he does not do it, he shall have an action on his case; because some other thing (namely the timber) is injured by this nonfeasance. Likewise, if a man covenants by parol to look after my sheep and then they drown, I shall have an action on my case. Likewise if a man is bound by the tenure of his land to repair a sea-wall and does not do it, so that my land is flooded, I shall have an action on the case. Likewise, if a man is bound to keep a ditch or a bridge clean and does not do so, I shall have an action on the case; as a result of this nonfeasance the common way is impaired. But where the nonfeasance is no injury except to my person, I shall not have an action on the case.⁵⁶ And, that is the case here: therefore [the action does not lie].

Dyllon to the contrary: for every law is grounded on reason, and reason wills that if a man has injury he should have an action. Now, he has injury by this nonfeasance; and so if he shall not have an action on the case he will be without remedy. So he thought that he should have action on the case: *quod W. Martin concessit*.⁵⁷

companying text.

54. See Trin 14 Hen. VII, Fitz. Abr., *Action sur le case*, pl. 45 (1499). See notes 37-40 and accompanying text.

55. See notes 7-25 and accompanying text.

56. It is unclear what Tinglenden meant by this statement for actions of trespass on the case had long been available for personal injury. See notes 6-7. It has been speculated that Tinglenden was referring to economic loss or mere inconvenience. See BAKER & MILSOM, cited at note 5, at 402 n.9.

57. LI MS. Misc. 486(2), fo. 7v (1516), translated in *Spelman Reports*, cited at note 38, at 272.

In reason and logic these jurists were exploring the duties associated with a parole covenant. Yet they fixed on "misfeasance" and "nonfeasance" as though those words were their subject. If Harlakenden and Hales believed that the carpenter ought not to be held to his parole promise, they might have said this: "We continue to believe that one has no duty to honor a parole covenant." If Tinglenden believed that a parole promise was unenforceable only to the extent that a failure to perform caused physical damage to some existing property,⁵⁸ he might have said just that. Instead, however, the debaters expressed themselves by stating, for example: "[a] man shall not have an action on the case for not doing something, though he shall have an action on the case for misfeasance"⁵⁹ and "[i]f nonfeasance causes injury to some other thing he should have action on the case."⁶⁰ Insofar as the law inherits it, the subject of this 1516 colloquium was thus transformed by "lazy repetition"⁶¹ into something entirely different from that which was truly at issue — a discussion concerning the enforceability of parole promises. The words in which it was cast, however, fed and fueled, for all posterity, the erroneous proposition that nonfeasance is (a) fundamentally different from misfeasance and (b) necessarily harmless.⁶²

By 1533 tension between the two tends brought the following

58. Regarding the relevance of physical and economic damage to trespass on the case in *assumpsit* see note 7 and accompanying text.

59. LI MS. Misc. 486(2), fo. 7v (1516) (Harlakenden and Hales), translated in *Spelman Reports*, cited at note 38, at 272.

60. *Id.* (Tinglenden).

61. "[U]ncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to lazy repetition; and repetition soon establishes it as a legal formula, indiscriminatingly [sic] used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

62. Interestingly, in 1520, Chief Justice Fyneux and his colleagues lost what would seem to be a good opportunity permanently to lay away notions of nonfeasance and misfeasance and so to preclude their reemergence first in the law of *assumpsit* and then in that of negligence. See *Cleymond v. Vyncent*, Y.B. Mich. 12 Hen. VIII, fo. 11, pl. 3 (1520). In *Cleymond*, one Roger Penson sought to buy from Cleymond six barrels of salted salmon. *Cleymond*, KB 27/1037, m. 40 (1520). Cleymond questioned Penson's ability to pay and Penson's father guaranteed the debt. *Id.* Penson defaulted, his father died, and Cleymond sued the father's estate. *Id.* Cleymond prevailed. *Cleymond*, Y.B. Mich. 12 Hen. VIII, fo. 11, pl. 3.

Uttering not one word about misfeasance or nonfeasance, Chief Justice Fyneux acknowledged that the action could not have been maintained against the father had he been alive since (a) debt did not lie on a parole agreement and (b) an action of trespass on the case could, under no circumstance, follow from a gratuitous promise. *Id.* Nonetheless, the court sustained the action on the grounds that the elder Penson's soul might be endangered if the debt were not paid and, interestingly, that plaintiff had relied on a gratuitous promise to his detriment. *Cleymond*, Y.B. 12 Hen. VIII, fo. 11, pl. 3.

results. On one hand, he who failed to perform a parole promise was liable in trespass on the case in assumpsit as Chief Justice Fyneux and others thought he should be. *Pykering v. Thurgoode*⁶³ made that plain and represents the last reported decision in which a court related the word nonfeasance to trespass on the case in assumpsit.⁶⁴ The plaintiff, a brewer, purchased the defendant's malt, paying half the purchase price ab initio with the balance due on delivery.⁶⁵ The defendant did not deliver and the plaintiff therefore bought elsewhere at a higher price.⁶⁶

The majority of the court thought such allegations made out a cause of action.⁶⁷ As to defendant's argument that his conduct constituted only a nonfeasance, Justice Spilman said:

It seems that an action on the case lies, for when a man has a tort done to him, and has sustained damages, he can have an action, but for this reason: when the defendant broke his promise and assumption, he did a tort to the plaintiff, and the plaintiff has sustained damages by the failure to deliver the malt. Therefore the law will give him an action, and no action lies on this except an action on the case. And therefore the action lies. And in some books a difference has been taken between nonfeasance and malfeasance, so that on the one an action of covenant lies, and on the other an action on the case. This is no distinction in reason, for if a carpenter for £100 covenants with me to make a house, and does not make it before the day assigned so that I am deprived of lodgings, I shall have an action on my case for this nonfeasance just as well as if he made it badly.⁶⁸

The passage is significant on two counts. First, it sets forth more clearly that which lay deep below the surface of earlier rulings: one who breaches a duty is liable for any harm thus caused. Second, it indicates the court's awareness that whether a behavior be characterized as action or inaction, it raises liability if, and only if, it constitutes a breach of duty. The court seemed to recognize that "[t]he distinction between misfeasance and nonfeasance . . . was altogether too shadowy to be maintained."⁶⁹

After *Pykering*, the word nonfeasance no longer served as incantation that would exculpate, for instance, the famed carpenter

63. Spelman, *Reports*, p. 4, pl. 5 (1532).

64. SIMPSON, cited at note 6, at 269.

65. *Pykering*, Spelman, *Reports*, p. 4, pl. 5.

66. *Id.*

67. *Id.*

68. *Id.*

69. AMES, cited at note 36, at 142 (discussing the demise of the nonfeasance doctrine in the sixteenth century).

who for a consideration promised to build and then failed to even lift his hammer. He would be bound by his agreement even though the promisee showed to specialty. In that sense, then, *Pykering* put to death the "doctrine" of nonfeasance as it had previously operated. Yet the word nonfeasance retained an incorrigible vitality. By force of habit, many persisted in preserving its supposed importance to the law and in thinking its contradistinction to "misfeasance" a jurisprudential necessity. The issues of nonfeasance and misfeasance lost their place in trespass on the case, but they did not go homeless.

By 1530 the common law recognized assumpsit as an action with its own identity.⁷⁰ No longer a tagtail to trespass on the case, assumpsit stood as a suit unto itself and pertained to the enforcement of agreements.⁷¹ Assumpsit was the parent to the modern contract action. It gave legal life to the "informal agreement" — an exchange of promises or performances undertaken without a sealed writing.⁷² As a veritable corollary to the notions on which assumpsit rested, there developed the doctrine of consideration providing in essence, that a promise not under seal was enforceable only if it was made pursuant to an exchange.⁷³ Therefore, the gratuitous promise or *nudum pactum*⁷⁴

70. SIMPSON, cited at note 6, at 303-07. The conceptualization of assumpsit as an action in its own right represented not only the severance of its ties to trespass on the case, but also (a) a history in which "special assumpsit" gave way to "general assumpsit" and (b) its separation from the action of debt. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 22 (1990); see generally *History of Assumpsit* (pts 1 & 2), cited at note 7.

71. Indeed, its emergence as an independent action represents, in modern terms, the severance of tort and contract. It may be said that the severance was finalized in *Slade v. Morely* (also known as *Slade's Case*) wherein it was held that a plaintiff might recover in assumpsit by alleging a debt arising from an exchange, without alleging also a subsequent promise to pay. *Slade v. Morely*, 4 Co. Rep. 92 (1602) Therefore, the plaintiff need not have alleged, specifically, the "wrong" or "tort" inherent in a broken promise, but rather the breach of an agreement to pay. *Slade*, 4 Co. Rep. at 92. See BAKER, cited at note 30, at 392-97; FARNSWORTH, cited at note 70, at 22; C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 358-63 (1949); CHRISTOPHER C. LANGDEL, A SUMMARY OF THE LAW OF CONTRACTS § 48 (F.B. Rothman ed. 1980); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 346-56 (2d ed. 1981); PLUCKNETT, cited at note 10, at 645-53; 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 143 (3d ed. 1957); see also J.H. Baker, *New Light on Slade's Case*, 29 CAMBRIDGE L.J. 51 (1971); David Ibbetson, *Sixteenth Century Contract Law: Slade's Case in Context*, 4 OXFORD J. LEGAL STUD. 295 (1984); H.K. Lücke, *Slade's Case and the Origin of the Common Courts* (pts 1-3), 81 L.Q. REV. 422, 539 (1965), 82 L.Q. REV. 81 (1966); A.W.B. Simpson, *The Place of Slade's Case in the History of Contract*, 74 L.Q. REV. 381 (1958).

72. SIMPSON, cited at note 6, at 273.

73. *Id.* at 406-08.

74. The phrase *nudum pactum* today denotes a gratuitous promise, not ordinarily enforceable. See, e.g., *Whale Oil Co. v. State*, 42 N.Y.S. 208, 211 (1954);

was unenforceable in assumpsit, as it is now unenforceable in contract.⁷⁵ It was in this last named principle that the word nonfeasance, ousted from the realm of trespass on the case, temporarily took shelter.

In *Elsee v. Gatward*,⁷⁶ the defendant undertook gratuitously⁷⁷ to refurbish plaintiff's premises, but failed to honor the promise.⁷⁸ The court wrote that "[i]n this case, the defendant's

Wilmington & W.R. Co. v. Alsbrook, 14 S.E. 652, 658 (N.C. 1892); *Virtue v. Stanley*, 151 P. 270, 273 (Wash. 1915). However, it seems once to have referred to a promise that was simply unenforceable whatever the reason, as for example, the fifteenth century parole promise on which performance was never begun. See SIMPSON, cited at note 6, at 272.

The record is not entirely clear on the point, however, for certain language in *John Style's Case*, suggests that even in the sixteenth century, some jurists might have thought "nudum pactum" to import a promise made without consideration:

For instance, if I promise to make you a house by a certain day, and I do not do so, this is only nudum pactum, on which [you] shall not have an action on the case; and [you are] not wronged as a result of this nonfeasance. If [you were] wronged by it, it would be otherwise. For instance, if I am bound in a bond in £ 100 to pay £20 by such and such a day, and I deliver the £20 to a stranger and he promises to deliver it [to the obligee] before the day, and he does not pay it before the day, so that I have forfeited by bond, I shall there have an action on the case for the nonfeasance; for he has wronged me. The law is the same if I give certain money to someone to make me a house by a certain day and he does not make it by the day, there that is a consideration why I shall have an action on my case for the nonfeasance.

John Style's Case, Yorke's reports, BL MS. Hargrave 388, fo. 215 (c. 1530).

75. See FARNSWORTH, cited at note 70, at 22-23; FIFOOT, cited at note 71, at 399; see also BAKER, cited at note 30, at 394; PLUCKNETT, cited at note 10, at 643-44. The gratuitous promise might, of course, be enforceable according to the doctrine known as promissory estoppel, designed to make one whole who has reasonably relied to his detriment on a promise gratuitously given to him. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); 1 CORBIN ON CONTRACTS § 94 (1963); 1 FARNSWORTH, cited at note 70, at 134-47; 1 WILLISTON, cited at note 71, at 609-19; see also Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981); Warren A. Seavey, *Reliance Upon Gratuitous Promises Or Other Conduct*, 64 HARV. L. REV. 913 (1951); Norman F. Arterburn, *Liability for Breach of Gratuitous Promises*, 22 ILL. L. REV. 161 (1927-28); Warren L. Shattuck, *Gratuitous Promises — A New Writ*, 35 MICH. L. REV. 908 (1937).

76. 5 Term. Rep. 143 (1793).

77. As read by the court, plaintiff's complaint failed to allege that defendant's promise was made in exchange for consideration and so, in the realm of legal fiction, it is "fact" that the defendant's promise was gratuitous. In all probability, of course, the transaction was of the usual commercial type in which plaintiff was to pay for defendant's services. Indeed, the complaint alleged that plaintiff "retained and employed" the defendant, but the court did not, apparently, consider these words an allegation of consideration. *Elsee*, 5 Term. Rep. at 143, 149-50.

78. *Id.* at 144. The complaint set forth two counts. The first averred that the defendant did not finish his work and that as a result, "the walls of the premises were greatly sapped and rotted and the ceilings damaged and spoiled, and the plaintiffs . . . were thereby put to additional expense." *Id.* The matter arose in a day, of course, when in determining that a complaint did or did not state a cause of action,

undertaking was merely voluntary, no consideration for it being stated," and thus concluded that "no action will lie against him for the nonfeasance."⁷⁹

In *Thorne v. Deas*,⁸⁰ defendant gratuitously promised to procure insurance for plaintiff's ship.⁸¹ He failed to fulfill his promise, the ship was wrecked, and plaintiff sued for the loss that the insurance would have compensated if the defendant had kept his word.⁸² "The chief objection raised to the right of recovery in this case," Chancellor Kent explained, "is the want of consideration for the promise. The offer on the part of the defendant to cause insurance to be effected was perfectly voluntary."⁸³ He decided then that "one who undertakes to do an act for another without reward is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss. In other words he is responsible for a misfeasance but not for a nonfeasance."⁸⁴

Notably, the court cited the 1400 decision of *Watton v. Brinth*⁸⁵ as the "earliest case on the subject."⁸⁶ But *Watton* was not precedent on point, and the erroneous reference again describes the confusion in which nonfeasance and misfeasance are caught. *Thorne* and *Watton* involved different issues: *Thorne*, the enforceability of a gratuitous promise, and *Watton*, the enforce-

courts viewed words with fastidious formalism. In that regard, it is interesting and perhaps important, that the plaintiff's first count did not allege, precisely, that the defendant began work, but rather that he did not finish it. *Id.* As discussed in the text, the court thought the first count to allege the breach of a gratuitous promise and hence an inactionable "nonfeasance." *Id.* at 149-50. It is possible, if not likely, that the outcome would have been different if the first count had not alleged merely that defendant failed to finish the work and thus produced damage, but that he had in fact begun it and produced damage by then failing to finish.

The second count alleged, in substance, that the defendant began performance and in the process used materials that put plaintiff to unnecessary expense. *Id.* at 144.

79. *Id.* at 149.

80. 4 Johns. 84 (N.Y. Sup. Ct. 1809).

81. *Thorne*, 4 Johns. at 84.

82. *Id.* at 84-85.

83. *Id.* at 95.

84. *Id.* at 96-97.

85. Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9 (1400). Chancellor Kent referred to the *Watton* case as *Watson* throughout his opinion.

86. *Thorne*, 4 Johns. at 97. Concerning *Watton*, Chancellor Kent wrote:

[I]t appears that the defendant promised to repair certain houses of the plaintiff and had neglected to do it to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said that if the plaintiff had counted that the thing had been commenced, and afterwards by negligence nothing done, it had been otherwise. Here the court, at once, took the distinction between nonfeasance and misfeasance.

Id. at 97-98 (citing *Watton*, Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9).

ability of an agreement not embodied in a sealed writing. In 1400, when *Watton* was decided, one had no duty to act on his parole pledge whether or not it was given for a consideration. Assumpsit had no existence apart from trespass on the case and the common law did not enforce agreements *per se*.⁸⁷ The *Watton* court ruled, in substance, that an action of trespass on the case in assumpsit did not lie for simple breach of a parole promise.⁸⁸ In 1806, the year of *Thorne*, assumpsit had lived three hundred years as an action in its own right and the common law did, therefore, enforce parole agreements.⁸⁹ The issue before Chancellor Kent concerned the duty imposed, not by a parole agreement, but by a gratuitous promise. *Watton* and *Thorne* raised issues that were fundamentally different, yet Chancellor Kent viewed *Watton* as relevant authority apparently because it justified him in proclaiming that one is "responsible for a misfeasance but not for a nonfeasance."⁹⁰

In sum, the record reveals that wherever they appeared in decisions between 1400 and 1800, the words nonfeasance and misfeasance lacked any true conceptual legitimacy. From the early fifteenth to the mid-sixteenth centuries, the courts spoke of "inactionable nonfeasance" when they meant only to say that a defendant had no duty to perform a parole agreement. They spoke of misfeasance when they meant only to say that, under some circumstances, one did have a duty to act toward others with a certain measure of care and prudence. Yet, in the mid-sixteenth century, as earlier noted, the common law determined that one did have a duty to honor a parole agreement. Unwilling to part with the words to which they had grown attached, the courts then began to write of "inactionable nonfeasance" when they intended only to rule that one had no duty to honor a gratuitous promise.

The nineteenth century transformed assumpsit into the modern contract action and trespass on the case into the suit in negligence. It is in the realm of negligence that "nonfeasance," "misfeasance," and the confusion that surround them now make their home.

87. See note 13 and accompanying text.

88. *Watton*, Y.B. Mich. 2 Hen. IV, fo. 3v, pl. 9.

89. See notes 70-72 and accompanying text.

90. *Thorne*, 4 Johns. at 97.

II. MISFEASANCE AND NONFEASANCE AS THEY INFECT MODERN NEGLIGENCE LAW

It is written that negligence, as an actionable tort unto itself, was born in the early nineteenth century (although the word appeared in decisions of earlier centuries).⁹¹ In modern terms, one is negligent if he commits a misfeasance, which means that in view of all surrounding circumstances, he pursues such act or omission as is inconsistent with the mentality and judgment of a reasonably prudent person operating under analogous circumstances.⁹² Yet negligence does not of itself occasion liability for

91. As late as 1926, Winfield, in his exposition on the history of negligence, queried whether negligence was an independent tort or "merely one of the modes in which it was possible to commit most torts." Winfield, cited at note 20, at 184. In probing the historical development of negligence, Winfield explored the abridgments of such legal scholars as Rolle, Shepard, Bacon, Viner and Comyns, noting that a subject heading for negligence:

[D]oes not exist. . . . But under the title "Actions upon the case," there are attempts to classify the heap of unsifted matter of which those remedies had become the nucleus, and there is a misty conception that inadvertent acts and omissions should form a separate class. The idea barely existed in Rolle (1668), but it gets less nebulous with his successors, until it appears as "action upon the case for negligence" in Comyns (1762).

Id. at 194-95; accord 1 STREET, cited at note 7, at 182 ("No such title is found in the years books, nor in any of the digests prior to Comyns (1762-67)."). Winfield concluded that until the end of the nineteenth century:

[T]he history of negligence is a skein of threads, most of which are fairly distinct, and no matter where we cut the skein we shall get little more than a bundle of frayed ends. In fact the tale is from beginning to end almost exclusively a narrative of action upon the case.

Winfield, cited at note 20, at 185; contra 1 STREET, cited at note 7, at 189-90 (contending that until the end of the nineteenth century "the action of *trespass* was the exclusive remedy in all cases where damage was directly done in the immediate performance of any act, albeit the injury was to negligence and not intentionally done." (emphasis added)); Percy H. Winfield, *Duty In Tortious Negligence*, 34 COLUM. L. REV. 41, 48 (1934) (Defendant would be liable for harm to a person or his property in the "ordinary action of trespass . . . whether the harm inflicted were inadvertent or intentional.").

92. See, e.g., *Travelers Indem. Co. v. Titus*, 71 Cal. Rptr. 490, 493 (Cal. App. 1968) ("[O]ne doing an act which a reasonably prudent person would not do, or failing to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate conduct of human affairs, is guilty of negligence."); *Cleveland C.C. & St. Louis R.R. Co. v. Ivins*, 12 Ohio Cir. Dec. 570, 570 (1896) ("Whether or not an act or omission is negligent seems to be determined by what under like circumstances would men of ordinary prudence have done."); *Union Transp. Co. v. Lam*, 123 P.2d 660, 662 (Okla. 1942) ("Negligence comprehends a failure to exercise due care as required by the circumstances of the case; a failure to do what a person of ordinary prudence would have done under the circumstances or the doing of what such a person would not have done under the circumstances."); *Loonan Lumber Co. v. Wannamaker*, 131 N.W.2d 78, 79 (S.D. 1964) ("Negligence has been defined as the failure to exercise . . . due care. . . . It is the failure to use such care as an ordinarily prudent or reasonable person would use under the same or similar circumstances.").

the damages it causes. Rather, as to any defendant and plaintiff, negligence is actionable only if the former owed the latter a duty not to be negligent.⁹³ And notwithstanding the settled notion that negligence may inhere in an omission, all of American negligence law is subject to the seemingly contrary statement that one breaches no duty by mere "nonfeasance," even if that nonfeasance was negligent because one party is under no duty to take action for the benefit of another.⁹⁴

93. See, e.g., *Tapper v. Ager*, 599 F.2d 376, 379 (10th Cir. 1979) ("Negligence does not exist in the abstract, it contemplates a legal duty owing from one party to another . . ."); *Jacoves v. United Merchandising Corp.*, 11 Cal. Rptr. 469, 484 (Cal. Ct. App. 1992) ("To establish liability for negligence, it is a fundamental principle of tort that there must be a legal duty owed to the person injured . . ."); *Riley v. Gulf, C. & S.F. Ry. Co.*, 160 S.W. 595, 597 (Tex. Civ. App. 1913) ("Legal responsibility for negligence does not exist in absence of a duty of care . . ."); *Bottomley v. Bannister*, 12 K.B. 458, 476 (1932) ("It is a commonplace of the law of negligence that before you can establish liability for negligence you must first show that the law recognizes some duty toward the person who put forth the claim."); *Le Lievre v. Gould*, 1 Q.B. 491, 497 (1893) ("The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence A man is entitled to be as negligent as he pleases toward the whole world if he owes no duty toward them."); see also 1 C.G. ADDISON, A TREATISE ON THE LAW OF TORTS 19 (4th ed. 1876) ("But before an action [in negligence] can be maintained, it must of course be clearly proved that the law imposes upon the defendant the duty with which he is charged with neglecting."); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 791-92 (2d ed. 1888) ("The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed."); 1 STREET, cited at note 7, at 195 n.5 ("The law of negligence historically starts from the idea of failure in the performance of a determinable provable legal duty.")

Beyond duty and breach, the law requires, of course, causation and damages. See, e.g., 4 HARPER, JAMES & GRAY, cited at note 27, at 185-86; LEON GREEN, RATIONALE OF PROXIMATE CAUSE (1927); ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); CHARLES T. MCCORMICK, DAMAGES (1935); 1 & 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES (2d ed. 1991); Charles O. Gregory, *Proximate Cause in Negligence-A Retreat from Rationalization*, 6 U. CHI. L. REV. 36 (1938); Fleming James, Jr. & Roger Perry, *Legal Cause*, 60 YALE L.J. 761 (1951); James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); Clarence Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189 (1962); Roscoe Pound, *Causation*, 67 YALE L.J. 1 (1957); Jeremiah Smith, *Legal Cause in Actions of Tort* (pts. 1 & 2), 25 HARV. L. REV. 102, 233 (1911).

94. For example, in *Lewis v. Razzberries*, a nightclub operator was not liable for his failure to protect a patron from the harmful acts of a second patron, because "[t]he terms 'misfeasance' and 'nonfeasance' distinguish between not exercising reasonable care when acting, regardless of whether a duty to act exists, and not performing voluntary tasks in all instances, where there is no duty to act. Liability arises from misfeasance . . . but not from nonfeasance." *Lewis v. Razzberries, Inc.*, 584 N.E.2d 437, 441 (Ill. App. 1991). See *Wright v. Arcade Sch. Dist.*, 40 Cal. Rptr 812, 814 (Cal. Dist. Ct. App. 1964) ("One who voluntarily engages in affirmative action has a duty to use care in performing the assumed task. . . . [A] failure to act does not amount to actionable negligence . . ."); *Trum v. Town of Paxton*, 109 N.E.2d 116, 118-119 (Mass. 1952) (holding that a highway official who failed to remove poisonous cuttings from a public road was not liable for death of animals who ate them because "[a] public officer . . . is not liable for . . . negligence which

Most often, perhaps, modern tort law associates "nonfeasance" with one's failure to attempt a rescue, even an "easy rescue" and so relates the term to the familiar rule, much criticized and explored, that one citizen has no duty to rescue another whom he sees in distress.⁹⁵ Yet, there is no doubt that failures to act do

amounts to nothing more than an omission or nonfeasance While nonfeasance is the omission of an act which a person ought to do, misfeasance is the improper doing of an act which a person might lawfully do"); *Doupe v. Genin*, 1 Sweeny 25, 32 (N.Y. Sup. Ct. 1869) ("There is a class of wrongs known as misfeasances, for which remedies are provided The mere omission to do a thing, which a person is not required to do, would occur no liability."); *In re The Liverpool Household Stores Ass'n*, 59 Law. Rep. 616, 617 (1890) ("[A] misfeasance does not include a nonfeasance, and . . . no complaint can be made . . . of a sin of omission, as distinguished from one of commission"); see also RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *Id.* § 314 cmt. c ("The rule stated in this Section is applicable irrespective of the gravity of danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection. The origin of this rule lay in the early common law distinction between action and inaction, or 'misfeasance' and 'nonfeasance.' "); R.W.M. DIAS & B.S. MARKESINIS, *THE LAW OF TORTS* 51 (1984) ("[T]here is no liability for a failure to act."); John M. Adler, *Relying Upon The Reasonableness of Strangers: Some Observations About The Current State of Common Law Affirmative Duties To Aid or Protect Others*, 1991 WIS. L. REV. 867, 872-73 ("If a court characterizes the defendant's behavior as nonfeasance . . . the defendant ordinarily will owe no duty to the plaintiff; the case may be dismissed.").

95. It is still true, generally, that "no ordinary bystander is under a duty to attempt the rescue of a child from drowning in what he knows to be shallow water." PERCY H. WINFIELD, *A TEXT-BOOK OF THE LAW OF TORTS* 404 (4th ed. 1948). The adult's failure to rescue is not pardoned for its reasonableness but for want of duty. See, e.g., RESTATEMENT (SECOND) OF TORTS § 314 (1965); *Allen v. Hixson*, 36 S.E.2d 810, 810 (Ga. 1990); *McFall v. Shimp*, 127 PITTSBURGH LEG. J. 14, 14-15 (1978); *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959); *Riley v. Gulf, C. & S.F. Ry. Co.*, 160 S.W. 595, 597 (Tex. Civ. App. 1913); Robert L. Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196 (1946).

The absence in the common law of a generalized duty to rescue is ongoing fuel for professorial publication. A slew of writers, purporting to be morally outraged by the common law's callousness in this regard, vent their view that the law should march to the beat of common decency and so impose on its citizens an obligation of rescue where the potential rescuer might act with minimal risk to herself. Some such writers show substantial thought. Others, it seems, make only vapid offerings with their hollowness, hidden in a cover of extravagant phrases like "responsibility thesis," and "positive duty theorist," augmented usually by a parade of words ending in "ism." See, e.g., JUDITH THOMSON, *ACTS AND OTHER EVENTS* 221-17 (1977); Adler, cited at note 94; Alexander W. Rudziski, *The Duty To Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW* 91, 123 (James M. Ratcliffe ed., 1981); James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112-13 (1908); Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980); H.D. Minor, *Moral Obligation as a Basis of Liability*, 9 VA. L. REV. 420 (1923); Wallace M. Rudolph, *The Duty To Act: A Proposed Rule*, 44 NEB. L. REV. 499, 499-503, 509 (1965); J.H. Schield, *Affirmative Duty to Act in Emergency Situations: The Return of the Good Samaritan*, 3 J. MARSHALL J. PRAC. & PROC. 1, 13 (1969); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247

and always have occasioned liability in negligence. Suppose defendant driver, accelerating on a highway at an otherwise appropriate rate, sees a child run on to the road and place herself in his path. He has ample time to brake his vehicle and stop without striking the child but decides, instead, not to lift his foot from the accelerator and to proceed at unchanged speed and course. He determines, in other words, to do nothing about the situation before him, but rather to continue the status quo. Because of his failure to act — his omission — he is liable for the injuries of the child he strikes. Similarly, if defendant, backing his truck, “pins” plaintiff against a wall, the law requires that he act affirmatively to release the plaintiff by driving the truck forward even if he had no reason to know of the plaintiff’s presence and so was not negligent in first trapping him.⁹⁶

That is so, at least, in the modern era.⁹⁷ There is clearly some

(1980); Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983).

For better or worse, the law has, in fact, made some movement toward a duty of rescue. See, e.g., *Hutchinson v. Dickie*, 162 F.2d 103, 106-07 (6th Cir. 1947); *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976); MINN. STAT. ANN. § 604.05 (West 1988); VT. STAT. ANN., tit. 12, § 519 (1973).

96. See RESTATEMENT (SECOND) OF TORTS § 322 (1965). Section 322 provides:

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

Id. This principle is explained in Illustration 1:

A negligently or innocently runs down B on an unlighted country road. B is unconscious. A leaves B lying in the middle of the highway, where another car subsequently runs him over. This is an entirely new harm from which A should have protected him and for which A is subject to liability to B whether or not A would have been liable for the original harm.

Id. § 322 cmt. a, illus. 1.

97. It might not have been so in the earlier part of the century. In *Turbeville v. Mobile L. & R. Co.*, the plaintiff’s intestate, through his own negligence, fell in front of the defendant’s streetcar, and through no negligence of the motorman, was struck by its safety guard which apposed the victim’s neck and suffocated him. See *Turbeville v. Mobile L. & R. Co.*, 127 So. 519, 520 (Ala. 1930) The motorman did not back off, which act, would have saved the victim. *Turbeville*, 127 So. at 520-21. Wrote the court:

While it may be conceded that these circumstances imposed on those present the duty, from the standpoint of common humanity, to use their best judgment in doing what they could to relieve the unfortunate victim from his peril, we know of no principle of municipal law that imposed on the defendant or its servants a legal duty to relieve him by backing the car off his body or lifting it up so as to relieve his peril. It certainly could not be said that such duty rested on a mere bystander who witnessed his misfortune and who was in no way legally responsible for his predicament. If this be so, what reason can be found in the law to say that the defendant or its servants were under duty to act, when they were guilty of no wrong or negligence in producing or

conceptual tension, then, between the prevailing notions that (1) negligence and hence "misfeasance" may inhere in acts or omissions, and (2) nonfeasance, though it be negligent, occasions no liability because one has no duty to act for another's benefit. "Omission" and "nonfeasance," therefore, must have different meanings since a defendant might suffer liability for one but not the other. That curiosity raises this question: What is the difference between a nonfeasance on the one hand and a negligent omission on the other? Since nonfeasance, as a concept, now makes its home within the notion of "duty," the answer should take account of that word's history as it informs the law of negligence.

The word duty made no significant appearance on the common law stage until the end of the eighteenth century. Before that time, many forms of action provided recovery for injury unintentionally produced "and in some of them there were elements which, at a much later date and in a somewhat misty fashion, helped judges to import 'duty' as we now know it into the conceptions of negligence" although those elements "were quite invisible to the lawyers of the earlier period."⁹⁸ From the time of Henry III, he who practiced a "common calling"⁹⁹ was duty-bound to be careful, attentive, and prudent in his work or be liable for the consequences. Between the fourteenth and eighteenth centuries, then, the common law took for granted the notion of duty. With respect to actions of harm unintentionally produced, the only manner in which a plaintiff alleged a breach of duty was, simply, to describe the acts or omissions of which he complained and the form of action in which they sounded. Somewhere in his mind, and the court's, if it sustained the action, there lurked the notion that defendant was under a duty not to have behaved as the plaintiff claimed he did. That was so whether the suit concerned the acts of public officials, bailments, prescriptions, or control of dangerous instrumentalities.

As the eighteenth century gave way to the nineteenth, the

bringing about the unfortunate situation?
Id. at 521.

98. Winfield, cited at note 91, at 44.

99. Although during the time of its legal significance the phrase was difficult of definition, it probably described those who held themselves out in some public fashion to perform a public service with specialized property or skill. It included, certainly, the innkeeper and the common carrier. See Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927); see also 3 WILLIAM BLACKSTONE, COMMENTARIES 165 (1803); OLIVER WENDELL HOLMES, THE COMMON LAW 183 (1881); MARSHALL S. SHAPO, THE DUTY TO ACT 7-60 (1977); Winfield, cited at note 20, at 185-89.

word negligence assumed legal significance and began to forge an action destined to replace trespass on the case.¹⁰⁰ But the word made its debut without overt connection to anything called "duty."¹⁰¹ Toward the mid-nineteenth century, the word "duty" sounded its first cries.

In *Langridge v. Levy*,¹⁰² "duty" asserted itself, expressly, as the word on which the decision might turn. The defendant, a seller of guns, advised plaintiff's father that a particular gun was "good, safe, and secure."¹⁰³ The plaintiff discharged the gun and it exploded, producing an injury that ultimately required amputation of his hand.¹⁰⁴ Recovery in trespass on the case was disallowed because: (1) "no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise;"¹⁰⁵ (2) the injury was too remote; and (3) there was no privity of contract between the defendant and the minor child.¹⁰⁶ The plaintiff argued that: (1) whenever a duty is violated, "any one who is injured by the violation of it may have a remedy against the wrongdoer;"¹⁰⁷ (2) the defendant was duty-bound not to sell such articles as he knew it might produce injury; and (3) the absence of a contract between the plaintiff and the defendant was therefore inconsequential.¹⁰⁸

The court rejected the plaintiff's arguments pertaining to duty.¹⁰⁹ Yet in the arena of negligence, the case launched the

100. See Winfield, cited at note 91, at 48.

101. See, e.g., *Wayte v. Carr*, 2 D. & R. 255 (1823) (while it was customary for a driver of a coach to pass on the off-side, it was not negligent for him to pass on the near side when the street was broad enough); *Wordsworth v. Willan*, 5 Esp. 273 (1805) (a person who negligently drove his carriage by not leaving sufficient room in the road for others to pass would be liable to persons or chattels harmed); *Aston v. Heaven*, 2 Esp. 533 (1797) (owners of a coach were not liable to injured passengers when there was no negligent conduct on the part of the coachman); *Scott v. Shepard*, 2 W. Bl. 892 (1773) (Blackstone, J., dissenting) (an action of trespass would not lie when the harm suffered was "only consequential").

102. 2 M. & W. 519 (1837), *aff'd sub nom. Levy v. Langridge*, 4 M. & W. 337, *aff'd sub nom. Levi v. Langridge*, 1 Horn & H. 325 (1838).

103. *Langridge*, 2 M. & W. at 519.

104. *Id.* at 521.

105. *Id.*

106. *Id.* at 521-22. The common law doctrine of privity provided "that no one but the parties to a contract can be bound by it or obtain rights by it." 2 WILLIAM F. ELLIOT, COMMENTARIES ON THE LAW OF CONTRACTS § 1406 (1913). See, e.g., *Exchange Bank v. Rice*, 107 Mass. 37 (1871) ("The general rule is, and always has been, that a plaintiff, in an action on a simple contract, must be the person from whom the consideration of contract actually moved, and that a stranger to the consideration cannot sue on the contract."); see also Vernon V. Palmer, *The History of Privity — The Formative Period (1500-1680)*, 33 AM. J. LEGAL HIST. 3 (1989).

107. *Langridge*, 2 M. & W. at 530.

108. *Id.* at 524-25.

109. *Id.* at 530. The court did, however, find the defendant liable for misrepre-

notion of duty and many courts of the nineteenth century, speaking of negligence and duty, cited it, rightly or wrongly, as authority.¹¹⁰

*Winterbottom v. Wright*¹¹¹ further advanced the notion of duty as an ingredient on which a negligence action would depend. By contract with the Postmaster General, the defendant supplied, maintained, and repaired mail coaches.¹¹² The plaintiff, a mail coachman, was permanently injured through some deficiency in one of the coaches for which the defendant had responsibility.¹¹³ The plaintiff alleged negligent maintenance on the defendant's part, and so proclaimed a right to recover from him.¹¹⁴ The court ruled that the defendant's duty to repair the coaches arose only through his contract with the Postmaster.¹¹⁵ The plaintiff, who was not a party to the contract, lacked privity and so had no right of action.¹¹⁶

Langridge and *Winterbottom* set the stage on which duty, as an element of a negligence action, first appeared. By the mid-nineteenth century, they had given rise, generally, to this species of thought and inquiry:

- (i) There was a contract or agreement between A and B whereby A was bound to do something for B, or was permitted to do something, or was bound to supply B with something. (ii) C, who was no party to the contract, was injured by A's imperfect, but unintentional misperformance of his contract or agreement with B, or by abuse of B's license. (iii) C sued A for the tort of negligence. (iv) A's defence was: "My duty was limited to my contract or arrangement with B. You, C are a stranger to that contract: How can I be under a duty to you?" (v) Hence, the courts were forced to deal with the question, "Was there a duty towards C?" And thus the consideration of this question became of prime importance and duty became an essential in negligence.¹¹⁷

sentation and deceit. *Id.* at 531-32.

110. See, e.g., *Heaven v. Pender*, 11 Q.B. 503 (1883) (Brett, M.R.) (fact that *Langridge* was decided on the ground of fraudulent misrepresentation "in no way negatives the proposition that the action might have been supported on the ground of negligence and not fraud"); *George v. Skivington*, L.R. 5 Ex. 1 (1869) ("Substitute the word 'negligence' for 'fraud' and the analogy between *Langridge v. Levy* and this case is complete" and so a duty is imposed on defendant "to use ordinary care."); *Farrant v. Barnes* 11 C.B.N.S. 553 (1862) (citing *Langridge* for the proposition that when a "defendant, knowing the dangerous character of the article, and omitting to give notice of it to the plaintiff, so that he might exercise his discretion as to whether he would take it or not, was guilty of a clear breach of duty").

111. 10 M. & W. 109 (1842).

112. *Winterbottom*, 10 M. & W. at 109.

113. *Id.* at 110.

114. *Id.* at 113.

115. *Id.*

116. *Id.* at 114-16. See note 106 and accompanying text.

117. *Winfield*, cited at note 91, at 55.

With *Langridge* and *Winterbottom* as precedent, courts and commentators alike began, during the late nineteenth century, expressly to proclaim that duty represented a threshold issue on which any negligence suit would depend.¹¹⁸ The concept's development, however, was somewhat "hesitant and sluggish"¹¹⁹ but took its place definitely in *Heaven v. Pender*.¹²⁰ That case, it is said, first articulated the duty on which a negligence action rested and so distinguished the action from those which might attend allegations of trespass, breach of contract, and violation of statute.¹²¹ Lord Esher proclaimed that one's duty generally to exercise care with respect to others need not rest on statute nor on the actions of trespass or contract. Rather, he wrote, there was a "larger proposition," providing that:

[W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of others, a duty arises to use ordinary care and skill to avoid such danger.¹²²

Lord Esher's "larger proposition" made no distinction between acts, omissions, nonfeasance, or misfeasance.¹²³ As of 1883, therefore, those words had not yet made their way into the negligence doctrine. Lord Esher thought at the outset only this much: one's duty with respect to negligence was to behave reasonably, prudently, and attentively in relation to others.¹²⁴ Others of the period, however, seem to have sensed that the scope of duty in negligence ought to be more restricted, and so declined to endorse

118. See, e.g., *Degg v. Midland Ry. Co.*, 1 H. & N. 773, 781-82 (1857) ("There can be no action [in negligence] except in respect of a duty infringed."); 1 ADDISON, cited at note 93, at 19.

119. Winfield, cited at note 91, at 57 (citing *Heaven v. Pender*, 11 Q.B. 503 (1883)).

120. 11 Q.B. 503 (1883).

121. James P. Murphy, *Evolution Of The Duty Of Care: Some Thoughts*, 30 DEPAUL L. REV. 147, 147 (1980).

122. *Heaven*, 11 Q.B. at 509. See Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 N.W. U. L. REV. 778, 779 (1953) (stating that Esher's passage was the first to attempt to make "negligence correlative to an antecedent duty to use care"); Murphy, cited at note 121, at 148 (referring to this passage as "the first statement of the modern concept of duty in tort law").

123. See Murphy, cited at note 121, at 150 ("Lord Esher's larger proposition applies with an equal amount of force to both acts and omissions."); but see Francis H. Bohlen, *The Basis Of Affirmative Obligation In The Law Of Torts*, 53 AM. L. REG. 209, 212 (1905) (claiming the passage was limited to affirmative acts only); 3 HARPER, JAMES & GRAY, cited at note 27 at 653 (endorsing Bohlen's contention).

124. Murphy, cited at note 121, at 147.

Esher's "larger proposition."¹²⁵ And a scant ten years after deciding *Heaven*, Esher himself amended the pronouncement there put forth and introduced into negligence law the distinction between nonfeasance and misfeasance: "[i]f one man is near to another, or is near to the property of another, a duty lies upon him *not to do that* which may cause a personal injury to that other, or may injure his property."¹²⁶ Esher's statement concerning the man who is "near to" another might have inspired Lord Atkin's so-called "neighbourhood principle,"¹²⁷ which like Esher's "larger proposition," made no distinction between acts and omissions:

The rule that you are to love your neighbour becomes in law; you must not injure your neighbour, and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹²⁸

In America, the notion of duty as relevant to negligence matured largely through a line of opinions penned by Justice Cardozo.¹²⁹ The first is *MacPherson v. Buick Motor Co.*¹³⁰ The

125. *Id.* at 151.

126. *Le Lievre v. Gould*, 1 Q.B. 491, 497 (1893) (emphasis added).

127. *See Donoghue v. Stevenson*, [1932] A.C. 562.

128. *See Donoghue*, A.C. 562, at 580. Interestingly, Lord Atkin thought his "neighbourhood principle" to embody Lord Esher's "larger proposition," as set forth in *Heaven*, and also the "limiting" statement that appears in *Le Lievre*. *See Donoghue*, A.C. 562, at 580 (citing *Heaven*, 1 Q.B. at 509 and *Le Lievre*, 11 Q.B. at 497). Lord Atkin thought that in *Le Lievre*, Esher meant only to limit liability with respect to the defendant's physical proximity to the plaintiff — "to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act." *See Donoghue*, A.C. 562, at 581. Lord Atkin failed to consider the possibility that, with the words "not to do" as used in *Le Lievre*, Esher meant to attach liability to affirmative acts only and not to that which had been historically called "nonfeasance."

129. Notions of duty were in some form apprehensible in earlier decisions and even the word appeared every now and then. *See Thomas v. Winchester*, 6 N.Y. 397 (1852). *Thomas* concerned a consumer of a mislabeled product. *Thomas*, 6 N.Y. at 406. The consumer, of course, had no privity with the manufacturer. *Id.* at 407. The manufacturer had carelessly labeled a bottle of belladonna, a poisonous drug, as "extract of dandelion" which was known as a "mild and harmless medicine." *Id.* at 398. Believing it to be dandelion extract, plaintiff's wife ingested the substance and became seriously ill. *Id.* Plaintiff brought suit, not against the immediate seller, but against the manufacturer. *Id.* at 406. The court affirmed a judgment for the plaintiff, explaining that the danger of injury was a foreseeable consequence associated with the mislabeling:

plaintiff sued an automobile manufacturer for personal injuries caused by a defective wheel on his car.¹³¹ Justice Cardozo rejected the conception, announced in *Thomas v. Winchester*,¹³² that a general duty of care toward others lay only with respect to items that were “inherently dangerous,” and seems to have understood that virtually all things of creation import risk depending on the manner or circumstances in which they are employed.¹³³ Therefore, he wrote:

If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.¹³⁴

Moreover, he opined that “[w]e have put aside the notion that the duty to safeguard life and limb, when the consequence of negligence may be foreseen, grows out of contract and nothing else.”¹³⁵ Thus, Cardozo took beyond infancy the proposition that, with respect to all activities, each individual owes a duty of care to all foreseeable others — regardless of privity, regardless of contract — and that an individual’s failure to honor it subjects him to liability in negligence.

In 1928, Cardozo faced *R.H. Moch Inc. v. Rensselaer Water Co.*,¹³⁶ wherein the defendant had, by contract, agreed to provide a city with water to serve various needs including the extinguishment of fire.¹³⁷ While the contract was operative a fire de-

So highly does the law value human life, that it admits of no justification wherever life has been lost and the carelessness or negligence of one person has contributed to the death of another. And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a *duty* of that other.

Id. at 409 (emphasis added) (citations omitted). The court opined that the manufacturer’s duty to the ultimate consumer arose not through any contractual relationship, but rather through its act of placing the poison in the hands of one who would sell it knowing, then, that someone would likely consume it. *Id.* at 410. See also *Devlin v. Smith*, 89 N.Y. 470 (1882) (holding that a duty to third parties “exists when [a] defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use”).

130. 111 N.E. 1050 (N.Y. 1916).

131. *MacPherson*, 111 N.E. at 1051.

132. 6 N.Y. 397 (1852). See note 129 and accompanying text.

133. *MacPherson*, 111 N.E. at 1053.

134. *Id.*

135. *Id.*

136. 159 N.E. 896 (N.Y. 1928).

137. *Moch*, 159 N.E. at 896.

stroyed the plaintiff's warehouse.¹³⁸ The plaintiff sued the water company alleging that it "omitted and neglected after . . . notice [of the fire] to . . . furnish" such quantity of water as (a) was reasonably within its power to supply and (b) would have prevented all or part of the loss.¹³⁹

Cardozo found the matter fundamentally different from *MacPherson* and ruled that the plaintiff did not make out a cause of action.¹⁴⁰ Here he related the notions of nonfeasance and misfeasance to the duty surrounding negligence and also undertook, in his way, to differentiate nonfeasance from actionable omission.¹⁴¹ Acknowledging that they did not represent precise or perfect concepts, Cardozo ruled nonetheless that the words nonfeasance and misfeasance did have meaning and that they stood for a principle on which his ruling rested.¹⁴² Referring implicitly to the fourteenth and fifteenth century decisions, he wrote that:

It is ancient learning that one who assumes to act, even though gratuitously,¹⁴³ may thereby become subject to the duty of acting carefully, if he acts at all. The plaintiff would bring its case within the orbit of that principle. The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. A time-honored formula often phrases the distinction as one between misfeasance and nonfeasance. Incomplete the formula is, and so at times misleading. Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law. What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance. If conduct has gone forward to such a stage that in action would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. So the surgeon who operates without pay is liable, though his negligence is in the omission to sterilize his instruments . . . the engineer, though his fault is in the failure to shut off steam; the maker of automobiles, at the suit of someone other than the buyer, though his negligence is merely in inadequate inspection. The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped

138. *Id.*

139. *Id.*

140. *Id.* at 898.

141. *Id.*

142. *Moch*, 159 N.E. at 899.

143. As to whether the proposition applied to gratuitous promises in medieval times see note 6 and accompanying text.

where inaction is at most a refusal to become an instrument for good.¹⁴⁴

As a general proposition then, Cardozo would distinguish a negligent omission¹⁴⁵ from inactionable nonfeasance by reference to this question: Did the defendant's action go forward to such a stage that inaction would produce an affirmative injury as opposed to the denial of a benefit? If the answer is "no," the defendant is an innocent nonfeasor. If it is "yes," then he might be a negligent misfeasor, depending, of course, on the prudence or imprudence with which the defendant acted. Cardozo would explain both *Thomas* and *MacPherson* by noting that the defendants had, in each case, "launched" instruments capable of producing harm. Once embarking on such an undertaking, their negligent omissions were actionable. In *Moch*, he would say, the defendant had not launched any instrument capable of doing harm but rather had withheld an instrument which would have accomplished some good.

Cardozo's view as set forth in *Moch* governs decisions to the present day.¹⁴⁶ It seems to provide that no omission is actionable unless first preceded by something fairly to be called positive action. He asks whether "conduct" has gone forward to such a stage that inaction would commonly "produce harm." It is important that in Cardozo's view, liability for omission rests on some underlying conduct through which the omission arose and does therefore depend at bottom on the distinction between action and inaction.

Within the judicial arena, it seems that Cardozo more than others forged a concept of duty generally¹⁴⁷ and in particular

144. *Moch*, 159 N.E. at 898 (citations omitted).

145. Unfortunately Cardozo does confuse his own explication somewhat by characterizing defendant's conduct at one point as a "mere negligent omission . . . at most the denial of a benefit. It is not the commission of a wrong." *Id.* at 899 (emphasis added).

146. See, e.g., *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 805 (Minn. 1979) (implicitly adopting the rationale of *Moch* to support the contention that ordinances were created to further a municipality's own interests and thereby created a duty to the public and not to a particular class of individuals even when death occurred); *Kircher v. City of Jamestown*, 543 N.E.2d 443, 445, (N.Y. 1989) (citing *Moch* for the principle that "a municipality's duty to provide police protection was ordinarily owed to the public-at-large and not to a specific person or class" even when serious bodily harm has occurred); *Kornblut v. Chevron Oil Co.*, 407 N.Y.S.2d 498, 501, 503 (1978), *aff'd*, 400 N.E.2d 368 (N.Y. App. Div. 1979) (citing the *Moch* principle to deny liability where a man died while changing a flat tire on a hot summer day after waiting more than two hours for a tow truck to arrive which by contract with the state had promised assistance to disabled motorists within thirty minutes of notification).

147. No discussion of Cardozo's contribution to the evolution of duty is complete without reference, at least, to *Palsgraf*. See *Palsgraf v. Long Island R.R. Co.*,

attempted to explain, adequately or not, the seeming paradox that (1) omission may generate actionable negligence but (2) that an individual is generally exculpated if his behavior were characterized as nonfeasance.

As negligence has coursed its one hundred and fifty years it is not only the courts, but also notable commentators who have sought somehow to address and resolve the paradox here at issue, by identifying abstract rules or propositions, purporting rationally to explain the difference between inactionable nonfeasance on the one hand and such omissions as constitute actionable misfeasance on the other. One of the first among them was Professor Francis Bohlen, who, some ninety years ago, wrote that:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.¹⁴⁸

Bohlen explained that actionable misfeasance differed from inactionable nonfeasance in (1) "the character of the conduct complained of" and (2) "the nature of the detriment suffered in consequence thereof."¹⁴⁹ In cases of active misfeasance, Bohlen

162 N.E. 99 (N.Y. 1928). The matter at issue pertained neither to the difference between nonfeasance and misfeasance nor its relationship to the concept of actionable omission. Rather, in *Palsgraf*, Cardozo sought to define (1) to whom a duty is owed and (2) if a duty is owed, the scope of that duty. *Palsgraf* requires that (1) the plaintiff was in the class of persons who could foreseeably be injured by defendant's conduct and (2) the risk through which plaintiff's damage arose be that which infected the defendant's conduct with negligence at the onset. *Palsgraf*, 162 N.E. at 101. Probably the case causes more puzzlement than it should and that might be due to Cardozo's tendency, throughout his decision, to write in terms of the defendant's lack of duty to Mrs. Palsgraf, the plaintiff, as a person outside the class of persons to whom injury was foreseeable, when perhaps he should have ruled that the injury complained of was not of the sort whose risk initially infected the defendant's conduct with negligence. See Thomas A. Cowan, *The Riddle of the Palsgraf Case*, 23 MINN. L. REV. 46 (1938); Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789 (1930); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Warren A. Seavey, *Mr. Justice Cardozo And The Law Of Torts*, 39 COLUM. L. REV. 20 (1939), 52 HARV. L. REV. 372 (1939), 48 YALE L.J. 390 (1939); Note, *Loss-Shifting And Quasi-Negligence: A New Interpretation Of The Palsgraf Case*, 8 U. CHI. L. REV. 729 (1941).

148. Francis H. Bohlen, *The Moral Duty To Aid Others As A Basis Of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908); see also LAWRENCE H. ELDRIDGE, MODERN TORT PROBLEMS 13 (1941) ("There is a fundamental difference, I believe, between a misfeasance and a nonfeasance. . . . The man who is guilty of a misfeasance makes the other's condition worse than it was before, while the man who is guilty of a nonfeasance does not worsen the other's condition.").

149. Bohlen, cited at note 148, at 220.

writes, the defendant intrudes on the plaintiff and “positively” worsens his condition, leaving him in a state of greater danger than he would have occupied absent the defendant’s behavior.¹⁵⁰ In the case of nonfeasance:

[B]y failing to interfere in the plaintiff’s affairs, the defendant has left him just as he was before; no better off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury. . . . [Nonfeasance creates] a loss only in the sense of an absence of a plus quantity.¹⁵¹

This distinction, Bohlen maintains, “lies at the root of the marked difference in liability at common law for the consequences of misfeasance and non-feasance.”¹⁵² Bohlen acknowledges that the difference between nonfeasance and misfeasance poses more difficulty in practice than in theory and that there exists conduct “partaking of the nature of both.”¹⁵³ Nonetheless, he maintains, “nonfeasance” simply refers to that situation in which a defendant does no “positive” harm, and “misfeasance” to the situation in which by “interference” with the plaintiff, the defendant does “positive” harm. In reviewing Bohlen’s position, several others have acknowledged that it poses practical difficulties, but by and large have endorsed it.¹⁵⁴

Bohlen’s perspective on misfeasance and nonfeasance seems palpably inadequate to explain the jurisprudential phenomenon at issue. It fails to explain *Thorne v. Deas*,¹⁵⁵ allegedly the first American case in which the matter arose. The *Thorne* case involved a loss for which the plaintiff was uninsured.¹⁵⁶ The defendant had promised, without consideration, to procure insurance, but failed to keep his word.¹⁵⁷ The report indicated that

150. *Id.* (“[T]he defendant, by interfering with plaintiff or his affairs, has brought a new harm upon him, and created a minus quantity, a positive loss.”).

151. *Id.* at 220-21.

152. *Id.* at 221.

153. *Id.* at 220.

154. *See, e.g.*, Adler, cited at note 94, at 872 (“Whatever practical difficulties a court may encounter in distinguishing nonfeasance from misfeasance, once made, the distinction is more than academic.”); Harold F. McNiece & John V. Thornton, *Affirmative Duties In Tort*, 58 YALE L.J. 1272, 1272 (1949) (“The line between ‘active misconduct’ and ‘passive inaction’ is not easily drawn.”); *but see* Weinrib, cited at note 95, at 252 (“For principled use by courts, the unelaborated distinction between active and passive conduct is inadequate.”).

Justice Cardozo, it seems, implicitly endorsed Bohlen’s view in *Moch*. *See* H.R. *Moch v. Rensselaer Water Co.*, 159 N.E. 896 (1928). For a discussion of *Moch* see notes 136-45 and accompanying text.

155. 4 Johns. 84 (N.Y. Sup. Ct. 1809).

156. *Thorne*, 4 Johns. at 84.

157. *Id.*

the plaintiff would have procured insurance on his own absent the defendant's promise.¹⁵⁸ Therefore, the defendant did subject the plaintiff to a "positive" loss; the plaintiff's position was genuinely worsened by the defendant's inaction. If the defendant had not made his promise, the plaintiff would have had his insurance and the loss would have been compensated. Yet, the court ruled that the case involved only inactionable nonfeasance;¹⁵⁹ Bohlen's formulation does not explain the result.

Apply Bohlen's perspective to the trucker who reverses his vehicle and, without fault, pins a person against a garage wall. Any "intrusion" on the plaintiff was innocent and if it caused plaintiff's immediate death, defendant would not be liable. If, however, the plaintiff does not die, the law requires defendant to drive forward and release him. How, though, does that requirement square with Bohlen's view? If the defendant were to leave plaintiff in his precarious position he would not then be intruding on him and, it seems, he would fail to produce any "positive harm." Rather, defendant leaves the plaintiff in a position that he did not in any way wrongfully create. Bohlen's formulation would exculpate him, but the law would not — and Bohlen would likely agree that it should not.

Apply Bohlen's view to the driver who does not brake, and imagine, also, that a third party witnesses the scene from a rocking chair on her front porch. Although she has the opportunity to rescue the child with minimal risk to herself, she takes no action. As defendant continues in the course of travel, the witness continues in her course of rocking.

It is beyond question that the driver commits actionable negligence if he strikes the child and that he is liable for the resulting injuries. It is also beyond question that the third party witness who watches from her porch is liable for nothing.¹⁶⁰ Is it not rational, however, to characterize both driver and witness as innocent nonfeasors? Each pursues lawful behavior before the child appears. After the child appears, they continue to behave precisely as they had; neither takes any action, but instead commits an omission. The driver omits to save the child by braking the vehicle he lawfully operates and the witness omits to save the child by rising from the chair in which she lawfully rocks. Is it not also rational to posit that neither the driver nor the witness has "intruded" on the child for the very reason that each has continued

158. *Id.*

159. *Id.* at 96-97.

160. Except where the most modern inroads require otherwise. *See, e.g.*, MINN. STAT. ANN. § 604A.01 (West Supp. 1995); VT. STAT. ANN. tit. 12, § 519 (1973).

in a course of action begun before the child, by his own design, arrived on the scene? Many might note, in quick response, that the driver is “doing” something — driving a car — and that in omitting to brake, he fails to do it in a way that affords reasonable protection to the child.¹⁶¹ Yet, such a response does not answer to Bohlen’s criteria associating misfeasance with an intrusion on the plaintiff or his affairs.

In 1949, Professors McNiece and Thornton suggested, implicitly, if not expressly, that Bohlen’s formulation does not stand up to the case of the driver who fails to brake.¹⁶² They did this by proclaiming that the case represented a matter entirely apart from misfeasance or nonfeasance and that only “superficial” analysts would disagree.¹⁶³ The driver’s behavior, they wrote, constituted a “pseudo-nonfeasance”:

Superficial analysis may suggest that this is a nonfeasance — that is, that the plaintiff is complaining of the defendant’s omission to . . . apply the brakes. In truth, however, the plaintiff is complaining of nothing of the sort. The gravamen of his cause of action is the anti-social *act* of the defendant in propelling the vehicle forward so as to run the plaintiff down.¹⁶⁴

If there are superficial analysts at work on this matter their names might be McNiece and Thornton. It is all too easy to hope that on the strength of so professorial a construction as “anti-social act,” readers will dismiss from their minds the driver who fails to brake and the puzzle he poses with respect to nonfeasance. The common law knows of no cause of action whose “gravamen” rests on an “anti-social act” and the authors have, therefore, failed to explain the driver’s liability.

Perhaps by introducing the phrase “anti-social,” McNiece and Thornton assumed that the hypothetical driver intended to strike the child. Maybe they suggested, somehow, that the “gravamen” of the resulting suit rested on battery, and not negligence. Imagine, though, that the defendant omits to brake, not because he wishes to strike the child, but because he genuinely (and most unreasonably) believes that the child will likely remove himself from the vehicle’s path, or that the vehicle’s impact will not injure the child, or that the vehicle will, on its own, fly over the child. Surely McNiece and Thornton would hold the driver liable

161. Furthermore, it might be noted that the witness also is “doing” something. She is living. Specifically, she is passing an afternoon, and failing to pass it in a way that affords reasonable protection to the child.

162. See McNiece & Thornton, cited at note 154, at 1272-73.

163. *Id.* at 1272.

164. *Id.*

if he omitted to brake on the strength of any such belief. But if the belief is honest, how would they label his behavior "anti-social," except by characterizing all negligent omissions as "anti-social," in which case they draw a full and empty circle in which there remains the unanswered question: Which "anti-social" omissions are actionable, and which are not?

Others, too, have addressed the problem of nonfeasance and omission, among them advocates of something called the "responsibility thesis."¹⁶⁵ The responsibility thesis provides that the absence of liability for so-called nonfeasance in fact relates to causation. John Casey, for example, writes that, "[i]f a man does not do X, we cannot properly say that his not doing X is the cause of some result Y unless, in the normal course of events, he could have been expected to do X."¹⁶⁶ This statement seems short on scholarship. In recognizing that a man's failure to do X would be the cause of Y if "in the normal course of events others would expect him to do it," knowingly or not, Casey reveals that the question he explores pertains to duty, which for unexplained reasons, he prefers to rename "cause." The responsibility thesis contributes nothing to an inquiry after negligence law's apparent inconsistency: that liability may attach to omission, but not to "nonfeasance." Rather, it comes from those who think new labels make new ideas.¹⁶⁷

Another writer has suggested that negligence law might do away entirely with the distinction between misfeasance and nonfeasance and provide, simply, that all acts or omissions raise liability if they fall below the standard applicable to a reasonably prudent person — except where liability would contravene sound

165. See John Casey, *Actions and Consequences*, in *MORALITY AND MORAL REASONING* 180 (Casey ed., 1971); see also ERIC D'ARCY, *HUMAN ACTS* (1963); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 191-92 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEG. STUD.* 151 (1973).

166. Casey, cited at note 165, at 180.

167. It produces some veritable perversions of reason. Those who mistake the absence of duty for the absence of causation, have spawned the most peculiar of statements from those who have read and accredited their writings. One Robert Justin Lipkin, for example, argues for a common law duty to perform an "easy rescue." See Lipkin, cited at note 95. He describes cases wherein rescue is required pursuant to a special relationship. *Id.* at 269. He also describes and fails to discredit the "responsibility thesis." *Id.* at 267-68. Instead, therefore, of proceeding with his argument on the basis of duty, Lipkin argues that liability should attach to failure to rescue even though there be no causal link between the defendant's behavior and the plaintiff's harm — "the problem of causation fails as an argument against the general duty of easy rescue for this reason: if causation is not required for liability in the area of special relationships, why should it be required in cases involving strangers?" *Id.* at 268-69.

public "policy."¹⁶⁸ For example, Adler notes:

Society should require reasonable efforts to aid or protect others absent overriding competing societal interests. Courts should allow juries to consider the reasonableness of injury-causing behavior (even if the behavior could be characterized as nonfeasance) as long as there is no policy concern that outweighs the goals promoted by a finding of liability.¹⁶⁹

The proposal's essence, then, is housed within the meaning of "policy," but the author declines expressly to define or delimit the concept as it operates in relation to his thesis.¹⁷⁰ In sum, it would seem that the proposal offers nothing save a suggestion, that the law (1) eliminate the distinction between nonfeasance and misfeasance, and (2) find something better with which to replace it. What that better thing might be the author does not suggest.¹⁷¹

168. Adler, cited at note 94, at 901.

169. *Id.*

170. *Id.* at 903-04 ("It is not the purpose of this Article to prescribe a particular list of [policy] factors to be adopted by all jurisdictions, but rather to encourage the adoption of an approach that may be adapted by courts working within the established framework of the court's common law traditions.")

171. The author does refer with approval to *Schuster v. Altenberg*, from which, it appears, his proposal largely arises. See, Adler, cited at note 94, at 902-03. (citing *Schuster v. Altenberg*, 424 N.W.2d 159 (Wis. 1988)). In *Schuster*, the plaintiff was injured because of her mother's psychosis. *Schuster*, 424 N.W.2d at 160. She sued her mother's psychiatrist for failure to issue a warning regarding the nature and danger of the psychosis. *Id.* at 161. Concerning the psychiatrist's duty to warn, the court opined:

[W]e need not engage in analytical gymnastics to arrive at our result by first noting that at common law, a person owes no duty to control the conduct of another person or warn of such conduct, and then finding exception to that general rule where the defendant stands in a special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of the conduct.

Id. at 165 n. 3.

Rather, the court decided that a duty of ordinary care was imposed on the defendant unless "public policy" should dictate otherwise. *Id.* at 166-67. The court offered this list of public policy considerations or "factors" that would militate against liability:

- (1) the injury is too remote from the negligence; or
- (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or
- (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or
- (4) allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or
- (5) allowance of recovery would be too likely to open the way for fraudulent claims; or
- (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Id. at 167.

Adler seems heartily to approve of this list of "factors," although he notes

The American Law Institute (the "ALI"), like all authorities, avers that negligence may inhere not only in action, but in an omission to commit an act to which one is duty-bound.¹⁷² It also sets forth the countervailing principle that one generally has no duty to act on behalf of another, even where as a reasonable person, he sees the opportunity to prevent harm at negligible cost to himself. The ALI notes that this rule represents the classic distinction between nonfeasance and misfeasance:

A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from doing so by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.¹⁷³

Finally, the Restatement sets up a series of exceptions to the general rule just cited and so, without identifying any commonality among them, identifies a variety of situations in which one is obliged to act affirmatively on behalf of another. Notably, one does have an affirmative duty to act affirmatively if:

that he would welcome lists of a wide variety. See Adler, cited at note 94, at 903-05. It is noteworthy that the list's first and third items are nothing new; they pertain to long-standing principles in negligence law. The first bears on proximate cause and "remoteness," two issues much debated throughout the history of negligence. See, e.g., Francis H. Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 U. PA. L. REV. 79, 149 (1901); R.W.M. Dias, *The Duty Problem in Negligence*, 13 CAMBRIDGE L.J. 198 (1955); A.L. Goodhart, *Liability and Compensation*, 76 L.Q. REV. 567 (1960); GREEN, cited at note 93; Gregory, cited at note 93; James & Perry, cited at note 93; Pound, cited at note 93; Glanville Williams, *The Risk Principle*, 77 L.Q. REV. 179 (1961); J.F. Wilson & C.J. Slade, *A Re-examination of Remoteness*, 15 MOD. L. REV. 458 (1952).

The second item is unclear of meaning. It might abolish the famed thin skull rule. See *Smith v. Leech Brain & Co.*, 2 Q.B. 405 (1962); Seavey, cited at note 147, at 32-33. In the alternative it would reiterate the proposition that a defendant be held liable in negligence only if his misbehavior is a cause-in-fact of plaintiff's loss. The fourth item is utterly devoid of specificity and might, for its breadth, replace all of tort law. The fifth and sixth raise issues not only of theory but of practice and administration and in relation to a theoretical proposition merit only parenthetical mention.

172. The Restatement (Second) of Torts provides that:

Negligent conduct may be either:

- (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or
- (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

RESTATEMENT (SECOND) OF TORTS § 284 (1965).

173. *Id.* § 314 cmt. c, illus. 1 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). Comment c explains that "[t]he rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection." *Id.* § 314 cmt. c.

[T]he peril in which the actor knows that the other is placed is . . . due to . . . [a] force which is under the actor's control. . . . [H]is failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance.¹⁷⁴

With this particular exception, the ALI would account for the liability of the driver who omits to brake and the innocence of the witness who watches from the porch.¹⁷⁵ Yet the ALI omits to explain (a) why the law should treat inaction as action simply because injury results from "a force . . . within the actor's control" and (b) what, in any event, the cited phrase means. The American Law Institute describes a plaintiff who falls in the path of defendant's slowly moving train. If defendant's railway yardworker knows of plaintiff's peril, then, according to the ALI, he is bound to take action to stop the train. An unrelated bystander, however, would have no such duty, apparently because the train is within the control of the one and not the other.¹⁷⁶ In the nature of things, does not the bystander have some control over the train? She can signal the yardworker, who, in turn can signal the engineer, who, in turn, might brake the train. Indeed, she might signal the engineer just as the yardworker might do. The ALI's exception pertaining to "a force . . . within the actor's control" is not the unambiguous formulation its creators might have imagined it to be and fails adequately to explain the very scenario the ALI sets up as an illustration.¹⁷⁷

174. *Id.* § 314 cmt. d.

175. The ALI illustrates this principle thus:

A, a trespasser in a freight yard of the B Railroad Company, falls in the path of a slowly moving train. The conductor of the train sees A, and by signaling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander would not be liable to A for refusing to give such a signal, the B Railroad is subject to liability for permitting the train to continue in motion with the knowledge of A's peril.

Id. § 314 cmt. d, illus. 3.

176. *Id.* § 314 cmt. d.

177. The Restatement further provides that a variety of "special relationships" occasion a duty of affirmative action. *Id.* § 314A. The common carrier is obliged to act on behalf of an injured or endangered passenger. *Id.* The innkeeper has a like obligation toward his guests. *Id.* The owner of land has an analogous duty toward those who enter at his invitation. *Id.* One, who by legal obligation or voluntary action, undertakes to care for another, has a corresponding responsibility toward the person for whom he cares. *Id.* The employer is similarly bound to his employee. *Id.* § 314B.

ALI expressly acknowledges that the "special relationships" it identifies stand as isolated exceptions to the general rule regarding nonfeasance and, further, declares that the list might not be exhaustive — that other "special relationships" might impose duties of affirmative action as well. *Id.* § 314A caveat. As the ALI explains:

This Section states exceptions to the general rule, stated in § 314, that the

With respect to omission and nonfeasance, the Restatement imparts only this message: omission amounts to negligence on the part of one who has a duty to act and one has a duty to act under certain circumstances. As to what those circumstances might have in common, and as to what then the "rule of duty" truly might be, the Restatement is silent.

Half a millennium of historical inquiry makes this much clear: for courts and commentators alike, a quest for the meaning of nonfeasance and misfeasance and their significance to liability is, and always has been, an inquiry after the meaning of duty. The law might henceforth avoid the trouble these words produce and the supposed distinction between them if only in the realm of negligence it finds for itself a meaningful conception of duty. The ideal formulation would harmonize and explain all of the decisions whose correctness common sentiment seems to endorse, a great many of which have already been discussed. It would account also, of course, for the long-standing and concomitant notion that one has no duty to "rescue" another.

fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations. . . .

Id. § 314A cmt. b. Yet, it offers no insight as to what makes the listed relations "special," what they might have in common, or by what criteria courts might enlarge their number. To some degree, ALI's special relationships reflect long-standing common law doctrines, purporting to impose otherwise unrecognized duties of care on those who practiced "common callings." See note 99 and accompanying text.

Modern courts have, in fact, expanded the class of "special" relationships that warrant a duty of rescue. See, e.g., *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976) (citing a special relationship between an attacker and his psychotherapist as ground for imposing a duty on the psychotherapist to warn the decedent of the attacker's intentions to murder decedent where attacker informed his psychotherapist of his intentions two months prior to the murder); *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976) (friends have a special relationship and so some duty affirmatively to protect one another when they undertake to pass an evening together and so render themselves "companions engaged in a common undertaking"); but see *Parish v. Truman*, 603 P.2d 120 (Ariz. Ct. App. 1979) (special relationship does not exist between a host and social guests and the host owes no duty to protect the guests from criminal attacks by third persons even though the host knew of criminal activity in the area); *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968) (police have no duty to protect an individual citizen even where the victim and potential assailant have both been identified and the victim has requested protection in absence of a special relationship between the victim and police).

III. THE MEANING OF DUTY

To quest after a conception of duty is to search for meaningful words that express those sentiments — those impulses to decision making that identify the obligation of care, if any, that a person does or does not have toward those with whom one coexists. Contravening most cherished wishes, the law is not to be found in this, or in any other context, within simplistic formulations drawn from “holdings”¹⁷⁸ or “hornbooks,” easily reproduced in celebrated “black letters.” Rather it lives in ideas that serve as bases, not on which answers are found, but upon which judgments are made. Such ideas, of course, must assume the form of words, since words “are the machinery by which the power of thought is handled.”¹⁷⁹ And although words have meaning, they are mere adumbrations of thought and call, always, for interpretation.¹⁸⁰

To find a meaning for duty in negligence law is to transcend the word with which courts have historically justified their decisions, for these do not offer any genuine insight into the underlying values of right and wrong at work.¹⁸¹ The “real” rule, the law that really governs in this realm, lies beneath the words with

178. “A decision of a case is no more law than the light from last night’s lamp is electricity.” Leon Green, *The Duty Problem In Negligence Cases*, 28 COLUM. L. REV. 1014, 1015 (1928).

179. Green, cited at note 178, at 1018.

180. See FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (1970). Lieber notes:

Were we desirous . . . of avoiding every possible doubt, as to what we say, even in the most common concerns of our daily life, even if we pronounce so simple a sentence as ‘give me some bread,’ endless explanations and specifications would be necessary; but in far the greater number of cases, the difficulties would only increase, since one specification would require another. To be brief, the very nature and essence of human language, being . . . not a direct communion of minds, but a communion by intermediate signs only, renders a total exclusion of every imaginable misapprehension, in most cases, absolutely impossible.

Id. at 27.

181. See Green, cited at note 178, at 1021-22. Green explains:

When we say in a particular case that plaintiff had a right, defendant was under a duty, and the like, this but means that we have already passed judgment. We are merely using these terms to pronounce the judgment passed. The process has been concluded in some unknown way; the result is merely being vocalized. We play around with our legal technic, make use of our robust phrases, as though they disclosed the secret of our judgment. But it is a rare thing that an opinion acknowledges the forces which must have impelled the judgment pronounced. . . . But I am quite sure that as lawyers we constantly delude ourselves and likewise delude others by insisting that those delightful word jousts we call opinions are dependable guides to the workings of the judicial processes.

Id.

which most judges have sought to confirm their instincts and distract their readers. It is a sense of balanced impulses born of human nature and nurture alike. To state it is to express, in comprehensible words, some set of factors that lead those who "pronounce" the law, more or less, to say that a given defendant did or did not have a duty to a given plaintiff. And that effort, if successfully pursued, solves the puzzle of nonfeasance, misfeasance, act, and omission. As Green writes:

So far as I have been able to discover, the common law courts have stumbled through the whole period of their existence without committing themselves on this inquiry. Perhaps it is a subject which is not to be talked about. We are clearly dealing with the very processes by which law is generated. And doubtless the questions as to the paternity of [duty] brought forth in case after case is embarrassing enough at best.¹⁸²

Green himself undertook to find the meaning of "duty" in negligence law.¹⁸³ He, like others, relies first on the distinction between action and inaction, writing that:

The most definite boundary of negligence law is the line between affirmative and negative conduct. Broadly speaking no person is under a duty to another unless he has entered upon some course of conduct towards such other. As long as a person does nothing he comes under no duty imposed by law.¹⁸⁴

He, like others, acknowledges that "the line of affirmative conduct has not always been easy to draw,"¹⁸⁵ and puts forth a case similar to those discussed above:

Take for instance the case in which defendant runs into plaintiff with an automobile or train and seriously hurts him without the violation of any duty to plaintiff. Does defendant then owe plaintiff a duty to stop and render assistance? Courts have held not. But it ought to be clear that a defendant in such a case is not in the position of one who had merely done *nothing* as in the case of a defendant who stands by and sees a baby run over or a blind man walk off a cliff when defendant could rescue either without danger to himself. On the contrary, the defendant has affirmatively hurt the plaintiff and in so far as affirmative conduct is concerned, defendant is well inside the lines. He may well not have violated any duty to plaintiff in hurting him, but the fact remains that he did hurt plaintiff. Now the question is entirely different. Having hurt plaintiff should the law impose a duty upon defendant to take further steps to render aid to his victim? Why should it? Why should it not? The

182. *Id.* at 1024.

183. See Green, cited at note 178; Leon Green, *The Duty Problem In Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929).

184. Green, cited at note 178, at 1026-27.

185. *Id.* at 1027.

assumptions made by the courts generally preclude this most important question.¹⁸⁶

Although seldom set forth in so many words, it should be self-evident that injury cannot occur except through some risk — some situation to which there attaches a danger, whether large or small. A set of circumstances through which injury might arise creates a risk and is, of necessity, a prerequisite to the events that generate a negligence suit. One can be negligent only with respect to some risk.¹⁸⁷

When the doctrines of (1) trespass on the case in *assumpsit*, (2) *assumpsit per se*, and (3) modern negligence law, refer to mere “nonfeasance” and today to the concomitant absence, generally, of a duty imposed on one to aid or to rescue another, they seem always to have been reaching for this proposition: One is duty bound to behave prudently only with respect to such risks as are attributable to him. They have been asking, *sub silentio*, this simple question: Absent the defendant’s existence as a person (or entity), would the plaintiff have nonetheless suffered the damage of which he complains? If the answer is yes, (although this question can only be asked unconsciously) then the risk through which the plaintiff was damaged cannot be attributable to the defendant and the defendant is a nonfeasor only. In such cases, the damage may well be caused by the defendant’s behavior — his failure to act — which proposition is easily established by reference to a second question: Absent the defendant’s failure to act, would the plaintiff have nonetheless suffered the damage of which he complains? The answer to that question might easily be “no” — which means that the defendant’s failure to act has caused the damage at issue — even as the answer to the question previously asked is yes.

That is so, for example, of the hypothetical case described earlier¹⁸⁸ in which the driver declines to brake for the child while an onlooker continues to rock in her chair. With reference to the onlooker:

- (1) Absent her existence would the child nonetheless be hurt? The answer is yes; the driver would nonetheless have been pursuing his course and struck the child. The risk through which the child was in-

186. *Id.* (alteration in original).

187. The characterization of the risk through which injury occurs and its relationship to negligence liability poses one of the more vexing questions to which the common law is heir. See generally KEETON, cited at note 93; Seavey, cited at note 147; Williams, cited at note 171.

188. See notes 160-61 and accompanying text.

jured, then, cannot be attributed to her.

- (2) Absent her failure to act, would the child nonetheless have been hurt? The answer is no; she could have saved him — her omission caused his injury. It seems, however, that because the answer to the first question is no, the law regards this onlooker as a mere nonfeasor.

As to the matter at issue, that principle explains almost every pertinent case on record from the fourteenth through the twentieth centuries. The carpenter who had promised to build, presumably for consideration, but failed to do so, was said to be a mere nonfeasor and so liable for no damage.¹⁸⁹ The reason is that absent his existence — had he never been born — the plaintiff's position would be unaltered. The debates among England's medieval legal lords, including those at Gray's Inn,¹⁹⁰ may have amounted only to that.

The scenarios set forth in the Restatement are similarly explained. The ALI speaks of a defendant's failure to prevent a blind man from stepping in front of a moving automobile and proclaims that he shall not be liable.¹⁹¹ It speaks also of one who falls in the path of a moving train.¹⁹² A stranger to the railroad who witnesses the scene and might easily act to save the victim by warning the engineer creates no liability for her omission.¹⁹³ The reason is that absent the stranger's existence, the victim's plight would have been unaltered.

One has no duty then to modify that which, absent one's presence on this earth, would nonetheless have been obtained. And that simple principle has been hiding for six hundred years within the word nonfeasance. What then of the cases in which the answer to the question posed is "yes?" What if it be so that absent the defendant's existence the risk through which plaintiff was damaged would not have arisen? In that case, the defendant has a duty not to be negligent with respect to the risk at issue. Where one person's existence creates a risk that impinges on another, one is duty-bound to refrain from such acts or omissions, that with respect to such risks, are negligent. The principle may well explain the distinction between *MacPherson v. Buick Motor*

189. See notes 9-21 and accompanying text.

190. See notes 37 and 57 and accompanying text.

191. See RESTATEMENT (SECOND) OF TORTS § 314 cmt. c, illus. 1; see also note 173 and accompanying text.

192. See RESTATEMENT (SECOND) OF TORTS § 314 cmt. d, illus. 3; see also note 174 and accompanying text.

193. See notes 172 and 174 and accompanying text.

Co.,¹⁹⁴ on one hand, and *R.H. Moch v. Rensselaer Water Co.*,¹⁹⁵ on the other.

As earlier noted, the defendant in *Moch* had breached its contractual obligation to supply water to a municipality, and its omission thus prevented plaintiff from extinguishing a fire that destroyed his building.¹⁹⁶ In *MacPherson*, the defendant had failed to inspect an automobile wheel it manufactured, which malfunctioned and caused injury to the plaintiff.¹⁹⁷ In *MacPherson*, Cardozo ruled that the defendant owed the plaintiff a duty not to be negligent.¹⁹⁸ In *Moch*, he held that the defendant had no such duty.¹⁹⁹ Justifying the distinction, Cardozo wrote that the “query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.”²⁰⁰

His query might better serve the cause of jurisprudence if thus rephrased: Absent the defendant’s existence would the plaintiff’s plight have been altered? Is it not clear that the cases are better, more precisely, and more correctly explained by reference to just that question? Had the defendant water company never existed — had there been no water promised to the city — plaintiff’s building would have burned just the same.²⁰¹ Yet, had the Buick Motor Company never existed, plaintiff, in that case, would not have suffered his injury. Liability in *MacPherson*, therefore, arose because: (1) absent the defendant’s existence the risk through which the plaintiff was injured would not have arisen, which fact creates a duty to refrain from negligence, and (2) the defendant’s omission to inspect was negligent by prevailing standards.²⁰²

The Restatement’s Section 314 is similarly explained. As earlier noted, it provides that a first person must act affirmative-

194. 111 N.E. 1050 (N.Y. 1916).

195. 159 N.E. 896 (N.Y. 1928).

196. *Moch*, 159 N.E. at 896.

197. *MacPherson*, 111 N.E. at 1051.

198. *Id.* at 1053.

199. *Moch*, 159 N.E. at 896.

200. *Id.* at 898.

201. There is, of course, the possibility that the municipality would have contracted with some other water company which might have performed better in an emergency. That possibility goes to the question of detrimental reliance on defendant’s performance and suggests that absent the defendant’s existence, plaintiff might indeed have fared better in the fire. If in *Moch*, plaintiff had argued before Cardozo that the defendant had indeed “launched an instrument of harm” by undertaking to supply water and therefore precluding others from doing so, he might have well prevailed.

202. See note 93 and accompanying text.

ly to aid a second if the danger threatening the second is "due to . . . [a] force . . . which is under the actor's control. . . . [H]is failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance."²⁰³ That provision, it appears, was designed to avoid any repetition of the decision in *Turbeville v. Mobile L. & R. Co.*,²⁰⁴ in which the plaintiff's intestate, through his own negligence, fell in front of defendant's streetcar and might have been helped had the motorman then acted to move the car backward.²⁰⁵ The ALI, in its way, seems to ask that such a motorman in the future be held liable for his failure to act. It proclaims that his omission is to be "treated as though he were act[ing]."²⁰⁶ As in *MacPherson*, the true and proper explanation is first, that absent the trolley company's existence, the risk that led to plaintiff's predicament would not have arisen, and so defendant came under a duty not to be negligent toward plaintiff with respect to that risk, and second, of course, that the motorman's omission was negligent by all prevailing standards.²⁰⁷

CONCLUSION

A historical inquiry into the jurisprudence of nonfeasance, misfeasance, the persistence of those words in the twentieth century, and the perplexities they produce for a common law that attaches liability to negligent acts and omissions reveals first, that the underlying problem is in identifying those circumstances in which one citizen has a duty not to behave negligently toward another, and second, that such a duty, although not necessarily negligent, arises if, and only if, it may be said that absent the defendant's existence, the risk through which plaintiff was injured would not have arisen.

Resorting somewhat haphazardly to the word nonfeasance, courts and commentators alike have all the while been invoking this principle: Action and omission may both be negligent, but one has a duty to refrain from negligence only as to those risks created by one's existence on earth. It is time, now, for the com-

203. RESTATEMENT (SECOND) OF TORTS § 314 cmt. d.

204. 127 So. 519 (Ala. 1930). See note 97 and accompanying text (discussing the import of *Turbeville*). The illustration that the ALI provides, however, is different but analogous. See RESTATEMENT (SECOND) OF TORTS § 314 cmt. d, illus. 3; see also note 174.

205. *Turbeville*, 127 So. at 520-521.

206. RESTATEMENT (SECOND) OF TORTS § 314 cmt. d.

207. See note 93 and accompanying text.

mon law to replace its use of “nonfeasance” with that proposition — a proper and more precise reflection of the principles its expositors have all the while sought to vindicate.

