

So much for the sociological side of the legal doctrine of negligence, a matter not to be lightly passed over by the student of jurisprudence, for, as pointed out by Mr. Clarke (*h*), law is but a branch of the science of sociology.

Turning now to a consideration of the psychical bearings of legal negligence, it must be admitted that there is a regrettable amount of confusion in the books as to whether the element of *intention* on the part of the wrong-doer has aught or nothing to do with the theory of liability. For instance, some writers, such as Mr. Horace Smith (*i*), assert that negligence is an "unintentional breach of duty"; while, on the other hand, we find so distinguished a jurist as Professor Salmond, of the University of Adelaide, affirming that negligence is "a form of *mens rea*" (*j*). It is submitted that neither of these obviously divergent views can be accepted as correct. Let us test them by reason and authority.

Dealing, in the first place, with the view that negligence is "an *unintentional* breach of duty," it is reasonable to argue that there may be an *intentional* breach of some particular duty to exercise care not only not coupled with an intent to cause injury to the person entitled to the fulfillment of the duty, but, on the contrary, accompanied by a desire that no injury will be sustained by him by reason of the breach. Let us illustrate this. Suppose A., the owner of a factory, fails to erect a guard or fence around a portion of the machinery in his factory which he knows to be dangerous to the persons employed by him. B., an employee, in consequence of such breach of duty by A., sustains bodily injury. Now, although A. was aware of his duty, and *intended to commit a breach of it*, he never intended that B. should be injured thereby, but, on the contrary, hoped that B. would operate the unprotected machinery without accident. Here B. is undoubtedly liable for negligence (*k*), but could it be said that the negligence is founded on an "unintentional breach of duty?" Clearly in such a case the psychical element of intention

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(*h*) Science of Law, and Law-Making, p. 4.

(*i*) Smith on Negligence, 2nd ed., p. 1.

(*j*) Jurisprudence, p. 433.

(*k*) *George Matthews Co. v. Bouchard*, 28 S.C.R. 580.