# NEGLIGENCE: INSTRUCTION PAPER

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ARTHUR MARTIN CATHCART

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# NEGLIGENCE

## INSTRUCTION PAPER

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# CONTENTS

## CHAPTER I

### Nature of Negligence

*Negligence as a Basis of Responsibility*



*Elements of Actionable Negligence*



## CHAPTER II

### Standard of Care

*In General*



*Degrees of Care and Negligence*



*Duty of Care on Part of Maker or Vendor of Chattel Toward Users Other Than Immediate Vendees*

# CONTENTS

# NEGLIGENCE

## CHAPTER I

## NATURE OF NEGLIGENCE

### NEGLIGENCE AS A BASIS OF RESPONSIBILITY

**§ 1. Legal Responsibility for Harm.** The kinds of harm that are known to human experience are infinitely varied: they range from loss of property to loss of friends; from physical pain to mental suffering; from that which is gross and tangible to that which is refined and spiritual. Suppose that a man has suffered harm of some sort and that he contemplates bringing an action against his neighbor to recover damages for that harm: upon what will his right to maintain such an action depend? Obviously he must be able to show that the occurrence of the harm of which he complains was a breach of the neighbor's legal duty toward him. If there existed a valid contract between the two whereby the neighbor had agreed to protect him from such harm, it is plain that the neighbor is liable for breach of contract. But suppose that no contract was in existence: it is plain that we must find a breach of duty that is quite independent of contract; that is to say, it must appear that the neighbor has committed a tort. Upon what does responsibility for harm in the law of tort depend? Generally speaking, it depends upon the nature of the particular harm and the circumstances under which it was inflicted. Assuming that the harm itself is not of a sort too vague or intangible for the law to notice, the defendant's liability must depend upon his relation to the harm which the plaintiff has suffered. Directing our attention to this relation, we discover an obvious limitation. If the defendant neither caused nor could have prevented the

harm of which the plaintiff complains; if, for example, the particular loss or damage was the necessary result of the plaintiff's own independent act, or of the action of a third person over whom the defendant had no control, or of the operation of a blind natural force, like flood or earthquake, over which nobody has any control; then we say at once that it would be absurd to hold the defendant liable. Common sense teaches us that, in the absence of contract, a man could not fairly be held responsible for the occurrence of any event which he neither caused nor could have prevented.

**§ 2. No Liability for Mere Nonfeasance.** But common sense will not enable us to detect all the limitations to defendant's liability. *A* deliberately sets fire to *B's* house. As a natural consequence the house burns down. Is *A* liable? Common sense tells us that he is and the law so regards him; he has culpably caused a great loss to *B*. Suppose, however, that just after *A* has kindled the fire and while the struggling flame may easily be extinguished with a pail of water, *C* comes along and discovers what *A* has done. Water in abundance is at hand; *C* is able-bodied and it is the work of a moment to put out the fire; or, if he does not choose to put out the fire himself, he may shout an alarm and bring neighbors who will be glad indeed to render so slight a service to *B;* but *C* neither puts out the fire nor gives the alarm and the house burns down. Here common sense, unaided by legal knowledge, might lead us astray upon the question of *C's* liability to *B*. He could have prevented great loss to *B* by making slight exertion; he did no act at all and *B* suffers. *C's* moral delinquency is perfectly clear; if the law treated him as legally at fault, common sense would doubtless approve such treatment; and yet nothing in law is more certain than that *C* is not liable to *B* on these facts. It will be noted that *C* had nothing to do with starting the fire; no act of his aided in the destruction of *B's* house; he simply failed to do an act that would have prevented its destruction. That failure was morally culpable, but it will not make him legally liable. If a man

will act he must take care to act in such a way as to avoid harming others; but the common law does not cast upon him the duty of initiating action so as to prevent the occurrence of harm to others. Indeed it is a general rule that, in the absence of contract or other undertaking treated by the law as contractual, there is no legal duty to act affirmatively. It necessarily follows that a man is not liable for mere inaction or nonfeasance.[1]

**§ 3. Responsibility for Acts.** Suppose, however, that defendant's relation to plaintiff's harm consists not in a mere failure to prevent it by means of a positive act, but that some act of the defendant's appears as a link in the chain of causation that has produced the plaintiff's injury. Now it appears that the defendant's act has helped bring about the harm of which the plaintiff complains. In a physical sense that harm is in part, at least, a consequence of defendant's action. Will that alone make the defendant liable? The law answers "No." Upon what, then, does liability for such a consequence depend?

One of the ablest of modern law writers has shown that at common law civil liability for harm depends, in the absence of contract, upon three considerations: (1) The character of the harm done and the extent to which the law is willing to go in protecting an individual from such harm; (2) the existence of a responsible causal relation between the defendant's act and the plaintiff's harm; (3) the absence of a legal excuse for defendant's act, as, for example, self-defense or official duty.[2] The character of the harm done we shall have occasion to consider later; the subject of legal excuse is more appropriately treated under the head of torts; we are here concerned with but one of these considerations, viz, the existence of a responsible causal relation between the defendant's act and the plaintiff's harm. Waiving, for the present, all question as to the character of the harm inflicted and as to the pos-

[1] Union Pacific R. R. v. Cappier, 66 Kas. 649.

[2] Wigmore, J. H., The Tripartite Division of Torts, 8 Harvard Law Review 200-210.