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Remoteness and Duty: The Control Devices in Liability for Negligence

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I

The negligence concept must undoubtedly be acclaimed as the most creative factor in the modern law of tort liability. Owing to its dynamic qualities it has not only proved the most disruptive force in the break-up of the traditional conglomerate system of nominate torts which was so intimately bound up with the pre-Judicature writ system, but it has also furnished a unifying force of vast potential in a branch of law which has suffered its due share of haphazard development and historically-conditioned anomalies. At a crucial period of social re-orientation it emerged as a powerful instrument for translating these new ideals and standards into the legal sphere. The sources of its persuasiveness and attractions to the modern mind are not far to seek. Foremost among them is the fact that it gives expression to a strong contemporary postulate of justice which seeks to make liability commensurate with fault (except where this ideal yields to a supervening policy demanding near-unqualified responsibility for activities fraught with exceptional danger). No less significant a feature is that it provides the most effective medium yet devised for replacing the old system of

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rule-law by an individualized administration of justice in an area of legal control which is concerned less with the regulatory function of fashioning patterns of human behaviour in advance than with the adjustment of losses which have occurred without adversion to their legal consequences. Though the negligence concept has established itself in modern law as a singularly pervasive force and negligence litigation overwhelmingly occupies the attention of the courts, the mechanisms associated with it are, in part, still imperfectly understood and partly continue to give occasion for intensive controversy.

In the United States, during the last generation at any rate, realistic comprehension of the functional operation of the devices employed in negligence litigation has become almost a commonplace, principally in academic discussion but also, though to a lesser extent, in court opinions. By comparison, all too often our approach to the problems surrounding negligence liability cannot be regarded as other than immature. Any discerning critic of our leading textbooks must be impressed with their inadequacy of perception and treatment and deplore the opportunities missed in guiding the profession to a clearer understanding of the functioning of concepts which they are, or will be, constantly called upon to handle in practice. The traditional exposition of the "tort of negligence" still proceeds along the lines of enumerating a few "rules" on the time-worn analytical pattern, which perhaps meets the need in relation to such nominate torts as defamation and conversion but is hopelessly deficient as a guide to a comprehension of the basic issues involved here. The duty and causation concepts, which constitute the framework for the constant experiments in social engineering involved in negligence litigation are much neglected, and little, if any, attention is drawn to the vital considerations of policy which are accommodated within their ambit. While the duty notion is briefly dismissed after some reference to the foreseeability formula,¹ the so-called problem of causation is customarily discussed under the headings of "general conditions of liability",² or even "judicial remedies",³ without so much as a hint at the necessity of differentiating between its incidence to negligence and other types of liability or, indeed, any reference to the inter-connection and similarity of function between it and the duty concept. This forced isolation in treatment of different aspects of

¹ This has now been much improved in the new (11th) edition of Salmond.

² Winfield, Textbook of the Law of Tort.

³ Salmond on Torts.

the same problem cannot fail to obscure the real issues which call for decision and to divert attention from the operation of the mechanism as a whole. The rule-minded atmosphere of exposition ignores the value-judgments which are so prominent in the solution of negligence cases, and instead of conveying an impression of the dynamic qualities inherent in the concepts clustered around this type of liability, adheres to the mechanistic mumbo-jumbo which has been doggedly retarding our understanding of the operation of law in society since the heyday of analytical positivist thought.⁴

Our courts cannot be altogether absolved from blame for this state of affairs. While it may be true that in the largest number of negligence cases the decisions as such can meet the standards of an exacting critic, the accompanying opinions are all too often couched in phraseology which suppresses the vital "inarticulate major premise" beneath a manipulation of verbal formulas, thereby leading the unwary to the impression that the solution of problems encountered can be readily accomplished by a mere imitation of the formal process of reasoning disclosed in judgments. More serious are the numerous instances where judges themselves have evidently fallen victim to the same error and foundered among the verbal symbols of their own creation. Particularly in connection with the so-called problem of causation, the inept language traditionally employed has often led to error of reasoning which could have been avoided by a clearer perception of the nature of the issues confronting the court. On the whole, however, with us it has been the courts who have been blazing the trail, with the expounders of theory trying to catch up with new judicial developments. Is it a vain hope that a little soul-searching among the teachers of law could lead to a rectification of this deplorable position?

II

One of the basic differences between negligence liability and nominate torts of the traditional pattern is that the latter deal with conduct infringing a strictly defined kind of interest, whereas the former does not, by definition, carry any indication of the scope of protection to which it is directed beyond an apparent reference to the

⁴ This indictment of the standard treatises on the law of torts does not purport to embrace the several investigations by contributors to learned journals and certain other commentators. Outstanding among them have been the various articles by Professors Friedmann and Goodhart, Dr. W. L. Morison and Dean C. A. Wright. In their company, should also be mentioned Professor Glanville Williams, particularly in connection with his book, *Joint Torts and Contributory Negligence*.

blameworthiness of the person who has caused the loss or injury. To permit imposition of liability for *any* harm brought about by conduct accompanied by actual or imputed appreciation of risk of injury to others is a position which could conceivably be adopted by a system of law, but so vast a restriction on individual freedom of action would have proved unacceptable in the social climate to which we are currently habituated. Not only would such a drastic step have entailed a virtual disruption of the existing framework of tort liability but it would have run counter to the ingrained individualistic attitude of the common law, with its decided emphasis on self-reliance and its perhaps over-sensitive reluctance to restrict the sphere of individual action. The limits of protection afforded by law had to be more narrowly drawn and the potentialities of the negligence concept more closely harnessed to accord with the less ambitious postulates of our time. The basic problem in connection with the "tort" of negligence is, therefore, that of limitation of liability. The mechanisms associated with liability for negligence, such as the duty and causation concepts, are nothing more or less than the control devices fashioned by the courts to achieve that purpose. Their function may be assessed both from this general point of view as a necessary feature conditioned by the otherwise unlimited scope of the action for negligence or more particularly as instruments designed to assist judicial control of jury "law".

The pattern evolved for the handling of negligence litigation left in the hands of the jury the vital function of determining the so-called question of fact whether the defendant's conduct fell below the standard of reasonable care imposed by society. The determination of this issue itself involves a value judgment which often requires a sensitive appreciation of the balance between the utility of the defendant's conduct and the harm suffered by the plaintiff. Indeed, genuine fact-issues in negligence cases are so limited in scope as to be qualitatively insignificant. Conscious of juries' lack of objectivity and their tendency to bias in favour of plaintiffs, the courts have consistently whittled down their freedom of decision even in respect of the finding of negligence *vel non*. The well-known device of the directed verdict, or allowing an appeal on the ground that the verdict was against the weight of evidence, is an outstanding example by which the court's own evaluation of the standard of socially deficient conduct in each individual case may be enforced. Nor is it the sole weapon in the court's armoury, since the judge also controls the issue of the

general standard of care applicable to the type-situation before it. That is always a "question of law"⁵ and has received relatively little attention. It is the judge's function to instruct the jury upon it, in the normal case by reference to the formula of the reasonable and prudent man. There are, however, several situations where that standard has been more specifically refined, if not deviated from, in order to advance a special policy, usually but not necessarily in favour of the defendant. This has notably occurred in English law in relation to the occupier cases where a finely adjusted gradation of duties has been evolved, in response, perhaps, to a conscious desire to shield landowners from what was conceived an otherwise too onerous burden. Whether this hierarchy of duties is, in fact, desirable or the particular standards thus fixed correspond to present social objectives, is not here in question. It is sufficient to draw attention to this phenomenon as another significant control device in negligence litigation.⁶

The traditional division of functions between judge and jury, however, has not been the sole determining factor of the judicial attitude to the solution of the crucial question of limitation of liability. Although that aspect has undoubtedly been instrumental in the shaping of the pattern of negligence litigation and has borne its share in the fashioning of the concepts employed in it, it is to be borne in mind that the most vital of these, namely, the duty concept, did not assume its current importance until jury trial had become virtually obsolete in England which—so far as we are concerned in Australia—furnishes the bulk of controlling decisions. True, it can be observed that, in the exercise of the so-called fact-finding function, trial judges themselves occasionally show the same emotional susceptibilities which formerly had been thought of as the virtual monopoly of juries, and to that extent stand in need of similar restraints, but it is worth emphasizing that, in any event, the structural peculiarities of the negligence concept necessitated the adoption of mechanisms designed to subserve the purpose of limiting legal responsibility.

⁵ The statement by Lord Wright in *Lochgelly Iron Co. v. M'Mullan*, [1934] A.C. 1, at p. 23, that "the standard of duty must be fixed by the verdict of a jury" either refers to the "particular" standard or was made per incuriam. The law is correctly stated by MacDonald J. in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, at p. 254: "It is the function of the Judge to determine whether there is any duty of care imposed by the law upon the defendant and if so, to define the measure of its proper performance; it is for the jury to determine, by reference to the criterion so declared, whether the defendant has failed in his legal duty".

⁶ See (1953), 1 Syd. L. Rev. 69.

III

The action of negligence is a relatively modern creation stimulated by the rapid intensification in the pace of human enterprise and the complexity of the conditions of existence in the rising urban and industrial society of the 19th century. The span of its development has therefore been short, and it is hardly a matter for surprise that its constituent elements have only now barely crystallized and that their functional relationship towards each other is still in a stage of trial and error in search for more definitive adjustment. Recognition of this fact points to the need for careful and selective handling of precedents, which can frequently be regarded as no more than tentative experiments in technique. Past experience of the operation of the judicial process in England and her legal satellites also suggests caution against unduly hastening the process towards finalisation until we possess more adequate information on which to base selection.

Until the emergence of the duty concept and the gradual perception of its potentialities, the conceptualistic device employed by the courts for imposing limitations on the extent of liability for negligence was that of "causation". Not only was the formula of "remoteness of damage" familiar, but it accorded with the then-held notion that, just as in relation to the traditional heads of liability, the tortious character of "negligence" was conditioned solely by the legal quality of the conduct which caused the resulting damage. It was the act or omission alone to which the law attached significance; the ideas of relationship and area of risk were not yet clearly apprehended as integral features of the negligence concept itself. This line of thought emerges succinctly from some of the opinions of the Court of Exchequer Chamber in *Smith v. L. & S.W. Ry.*⁷ according to which, once it is established that the defendant's conduct was negligent in the sense of containing the elements of foreseeable harm to somebody, liability ensues for all consequences actually resulting from the breach in causal sequence. To off-set such far-reaching imposition of liability, the courts sought refuge in the complementary mechanism of "remoteness of damage". An example of this technique occurs in *Victorian Rly. Comrs. v. Coultas*⁸ where the Privy Council, on this ground, denied recovery for injuries sustained through nervous shock suffered as the result of apprehension of physical danger but unaccompanied by actual impact. The opinion is of additional interest

⁷ (1870), L.R. 6 C. P. 14, *per* Kelly C.B., Channell B. and Blackburn J.

⁸ (1888), 13 App. Cas. 222.

not only for its admission that under cover of that elusive formula was hidden the substantive policy consideration that a contrary conclusion would open "a wide field for imaginary claims"⁹ but also because of its noticeable retreat from the pronouncements in the *Smith* case to limitation of liability for such consequences only "which, in the ordinary course of things, would flow from the negligence" of the defendant.

The conclusion reached by the Privy Council was, in effect, a policy decision denying legal protection to the claim for security from mental disturbance against unintentional interference. The crucial problem related to the nature of the interest invaded; in other words, to the area of protection afforded by law against negligent conduct. To seek its solution in terms of remoteness, that is, causation, will at best lead to an evasion of judicial responsibility to articulate the genuine premise of the decision, and at worst deceive the court as to the true nature of the issue before it. "Remoteness" is a meaningless concept unless precision is lent to it by an explanation of why "damage" is held too remote in one case and not in another. Nor should we submit to the illusion that this can be achieved, at least in this class of case, by reference to the additional formula of "consequences occurring in the ordinary course of things". The question involved in the present situation is not whether nervous shock suffered in these circumstances is a normally encountered phenomenon, but whether society is prepared to burden members of the community with responsibility of accounting for such harm. Ought they to be under a legal obligation to observe care for the protection of others against the incidence of such risk?

The danger of the remoteness concept lies in the fact that it obscures this value judgment and aids the facile impression that the solution of the problem can be attained by resort to a category of general applicability.¹⁰ The policy considerations appropriate to a negligence issue may well be of a quite different order from those arising in connection with some other head of legal liability. Indeed, the need for differentiation in that respect has not invariably been ignored, having regard to what the courts do rather than say, for how otherwise could we explain that claims under the Workmen's Compensation Act have been sustained for nervous shock suffered through seeing a fellow worker killed in an industrial ac-

⁹ Leon Green's "administrative factor". See Judge and Jury, chap. 4.

¹⁰ Some torts have their own peculiar rules of limitation of liability, e.g., *Peek v. Gurney* (1873), L.R. 6 H.L. 377 (deceit), *Cox v. Burbridge* (1863), 13 C.B. (N.S.) 430 (cattle trespass).

cident,¹¹ while the same injury suffered as the result of witnessing a similar happening in a street collision has been held "too remote" a consequence in an action for negligence?¹² The difference is not conditioned merely by the fact that under the statute liability is predicated upon whether the personal injury was "caused to the workman" by an accident arising out of or in the course of employment—which might suggest that the sole inquiry here is as to causal sequence in the factual sense. This cannot be the true explanation because from it would follow that an employer is liable for absolutely all consequences of which the accident was, according to "scientific laws", the necessary antecedent. The determining factor, I would suggest, is rather that in the one case we are dealing with what is almost tantamount to insurance, in the other with a more individualistic principle which denies protection to those whose powers of emotional resistance fall short of the rather exacting standards imposed by the community at the present time.

A further serious objection to the remoteness formula is the subtly insinuated notion that, once having decided the question of culpability with reference to the defendant's "act", the sole remaining issue is that of "compensation", a "question of fact". Perhaps one of the most astounding examples of this egregious source of error is *Rothwell v. Caverswall Stone Co.*¹³ where the plaintiff had sustained injury through a fall from a platform and, owing to negligent hospital treatment, was left with a permanently irreducible dislocation of the shoulder. The trial judge, in a claim under the Workmen's Compensation Act, dismissed the application on the ground that "the incapacity was due substantially to bad medical treatment and not to the original injury", and the Court of Appeal refused to disturb that decision because, in the view of the majority,¹⁴ the judge's finding on the question was one of *fact*. It seems almost too obvious to be deserving of emphasis that the limitation placed on the employer's liability must have proceeded on grounds of policy, of law, since there could be no doubt that, but for the original accident, the plaintiff would not have suffered the incapacity. The interposition of negligent treatment in hospital cannot neutralize the causal fact-sequence at issue, though it may nevertheless relieve the defendant from legal liability beyond that point.

¹¹ *Yates v. S. Kirkby Collieries*, [1910] 2 K.B. 538.

¹² *Smith v. Johnson* (1897), unreported decision of D.C. by Wright and Bruce JJ., cited in *Wilkinson v. Downton*, [1897] 2 K.B. 57, at p. 61.

¹³ [1944] 2 All E.R. 350. See the excellent comment thereon by C. A. Wright in (1945), 23 Can. Bar Rev. 440.

¹⁴ This view has now been endorsed by the House of Lords in *Hogan v. Bentinck Collieries*, [1949] 1 All E.R. 588.

Such a conclusion, however, must inevitably be attributed to a decision of law. In an outspoken dissenting opinion, Scott L.J. drew attention to the "terrible temptation" of shirking the intellectual task and taking refuge in the view that the judgment under appeal was a finding of fact with which the appellate court was forbidden to interfere. The majority decision is the more disturbing because, misled by its mistaken premise, it wholly failed to take into account the explicit policy of the statutory compensation scheme which aims at the replacement of liability based on fault by a system of near-insurance.¹⁵ While agreeing with the suggestion that limitations of this nature are foreign to its objective, it is more questionable whether "cause in fact" alone should have been *considered*.¹⁶ As already pointed out, it is inconceivable for any contemporary legal system to countenance liability for all consequences *ad infinitum* and thus avoid the need for appropriate restrictions. The crucial problem is at what point to insulate responsibility. This vital task can be successfully discharged only by a clear and conscious adersion to the policy factors involved in the different fact-situations, not by resort to the traditional verbalism of "causation" or "remoteness of damage".

The foregoing observations are not, of course, intended to convey the impression that genuine "cause" problems are not encountered in negligence litigation but to question whether the inquiry into extent of liability is usefully furthered by reasoning in terms of remoteness. Causation is a phenomenon which can usually be ascertained with a fair degree of assurance on the basis of accumulated experience and past observation of sequences. In the words of Lord Wright, it is "a mental concept, generally based on inference or induction from uniformity of sequence as between two events. . . . This is the customary result of an education which starts with our earliest experience."¹⁷ It is therefore a jury question *par excellence*. In the absence of a finding of causal relationship between the defendant's conduct and the damage or injury complained of, liability is negated *in limine*. This inquiry usually produces little difficulty in practice, and there are few cases reaching the courts on the issue of so-called causation in which there is any

¹⁵ To it might well apply the remarks by Lord Simon in *Adams v. Naylor*, [1946] A.C. 543, at p. 549, speaking of the Personal Injuries (Emergency Provisions) Act, 1939, that "the primary purpose of the statute is not to take away rights of compensation, but to make provision for compensation under a scheme which would cover large numbers of [persons] who would otherwise not be compensated at all".

¹⁶ Thus C. A. Wright (1948), 26 Can. Bar Rev. at p. 65.

¹⁷ In the *Monarch S. S. Co.* case, [1949] 1 All E.R. 1, at p. 16.

doubt that the defendant's conduct was a material factor in causing the plaintiff's loss in the sense of having been its necessary antecedent. The usual and more difficult problem is to select those factors which are of sufficient significance to justify the imposition of legal liability and to draw a boundary along the line of consequences beyond which the injured party must either shoulder the loss himself or seek reparation from another source.

Fundamental misconceptions as to the nature of these essentially different inquiries show a remarkable power of resistance in our court opinions. The judgment of Denning J. (as he then was) in *Minister of Pensions v. Chennell*¹⁸ is a poignant reminder of the strength of false conceptualism, from which even judges of outstanding perspicuity seem to find difficulty in emancipating themselves. After committing himself to the proposition that the award of a war pension "depends on causation and causation alone", unlike negligence liability where the defendant is not necessarily responsible for all consequences of his wrongful act, he has recourse to a variant of the familiar time-worn verbal counters by asserting a distinction between "causes" and "the circumstances in or on which they operate", in order to escape from the ineluctable logic of his self-chosen premise that in pension cases limitation of responsibility, apart from the law of factual causation, plays no part whatever. In none of the examples which Denning J. marshals as illustrations of the supposed distinction, and of the additional proposition that in some circumstances an extraneous event may be so "powerful" a cause that the other "ceases to be a cause at all", is there the slightest doubt of causal connection in the factual sense. Thus, despite his lucid and valuable emphasis on the need for differentiation when dealing with what superficially appears to be the self-same problem in relation to different heads of liability, he finally falls back on intuitive evaluation under cover of meaningless verbal categories in order to avoid frank articulation of the policy factors influencing his decision.

IV

Much importance has been attached on both sides of the Atlantic to the decision of the English Court of Appeal in *In re Polemis*¹⁹ as a significant, if not controlling, expression of the "English solution" to the question of limitation of liability in negligence cases. It was, however, less of a turning-point as regards method of ap-

¹⁸ [1947] K.B. 250.

¹⁹ [1921] 3 K.B. 350.

proach than a departure—though even that has been questioned—from the previously accepted formula for determining remoteness. The problem is still not discussed in terms of risk and relationship but treated in isolation from the so-called aspect of culpability. Once the legal quality of the defendant's conduct as negligent or innocent has been determined by reference to the foreseeability of *any* damage, liability extends to all loss which is "directly" traceable to the negligent act.

One of the most interesting features of the case is the revealing influence of language on substantive reasoning. Semantic study has brought awareness of the independent momentum which language once chosen can acquire and of the influence it constantly exerts on thought-processes. In the terminology used by the court, the issue was one relating to the "measure of damages" or "compensation", not "culpability".²⁰ Thus stated, the inquiries do appear distinct, and the "directness" test is not an implausible solution of the former. The error consists in regarding the problem as concerned with *quantification of damages*, and it is not improbable that the inept verbal formulation of the question for decision has been largely responsible for obscuring the fact that the true problem here involved concerns instead the anterior inquiry into extent of responsibility.²¹ At once, the close connection between it and "culpability" becomes more apparent, and it is a not impossible conjecture that, had this analysis of the issue been adopted, a different solution might well have been the result.

Criticism of the decision in *In re Polemis* has been more vocal and persuasive than its defence. Not a few of the objections, however, seem to be insubstantial or misplaced. The argument that it involves a distinction, both inconvenient and unjustifiable, between extent of liability in contract and in tort²² assumes acceptance of the premise that the determining policy considerations are alike. That assumption must be resisted. There is considerable difference in the objects pursued by law not only between the adjustment of losses caused by socially unreasonable conduct (tort) and the vindication of reasonable expectation of benefits from promises (contract), but also between the various bases of tort liability. An undifferentiated approach may satisfy the quest for uniformity but is unlikely to produce desirable decisions.

²⁰ See the quotation from Lord Sumner's judgment in *Weld-Blundell v. Stephens*, [1920] A.C. 956, at p. 984.

²¹ Cf. Goodhart at (1952), 68 L.Q. Rev. at pp. 522-3.

²² Thus Goodhart, *The Imaginary Necktie and Re Polemis* (1952), 68 L.Q.Rev. 514.

More cogent is the demonstration that an act cannot be negligent without reference to consequences. Since negligence connotes an actual or imputed appreciation of the risk of harm, it is impossible to divorce the legal quality of conduct from the consequences which result from it. An act may, therefore, be negligent as to certain consequences and not to others.²³ From it, however, does not follow that the "direct consequence" rule is based on an analytically unsound foundation, since the decision in *In re Polemis* does not dispense with the necessity of establishing that the defendant's act was likely to cause *some* damage. What it does is to impose liability beyond that point even in respect of unforeseeable loss. It is as well to recognize that *to that extent* the rule introduces a principle of liability irrespective of "blameworthiness". But this conclusion, though certainly at variance with the notion that liability in negligence should be commensurate with fault, may well be justified by reference to the perfectly understandable policy of making him pay who has "set the whole thing in motion" rather than forcing the innocent victim to shoulder his own loss.²⁴ On a balance of justice, the scales are indeed heavily loaded against the actor. As has been rightly said, "if any of us are accustomed to a different and less comprehensive view of the extension of liability, he may prefer that view to the English rule, but he cannot say that it is any better. The judgment lies in the realm of values and what you choose depends upon what you want."²⁵

It is doubtful whether, as has been suggested, the *Polemis* rule is more desirable than any other "from the point of view of administrative facility" on the ground that it is much easier of application.²⁶ The rule represents an inherently indeterminate category, since the term "directness" as such lacks precision. There is no clear dividing line between what is direct and indirect, with the result that a decision either way is conditioned not by the rule itself but by ulterior non-legal factors. This should give little cause for apprehension because the quest for certainty and easy predictability in a field such as this is incapable of realization whatever the formula which finds acceptance, be it "directness", "foreseeability" or the "risk" approach. It does, however, destroy its claim to superiority on this score. Judicial interpretation of the principle

²³ See Goodhart, *The Unforeseeable Consequences of a Negligent Act*, reprinted in his *Essays*, p. 129.

²⁴ Cf. Prosser on Torts, pp. 343-4.

²⁵ Gregory, *op. cit.*, at p. 47. See also Prosser, p. 185; and Seavey, Mr. Justice Cardozo and the Law of Torts (1939), 52 Harv. L. Rev. at p. 374.

²⁶ Gregory, *op. cit.*, at p. 48.

in subsequent cases amply supports this impression. Did Scrutton L.J. refer to the so-called doctrine of *novus actus interveniens* when he contrasted damage "in fact directly traceable to the negligent act" with loss "due to the operation of independent causes having no connection with" it?²⁷ In *The Edison*²⁸ financial loss caused by the negligent sinking of a dredger and increased by the pecuniary embarrassment of the plaintiff was disallowed as being "indirect", although Lord Wright, in whose opinion the other members of the House concurred, declined recourse to that convenient nostrum. Instead, he preferred to restrict liability by a manipulation of the term "directness", which he interpreted as confined to "immediate physical consequences of the negligent act". But what is meant by "physical consequences"? It is clearly not the same as "physical damage". All we are told is that "the appellants' want of means was *extrinsic*". More recently, Denning L.J. has stated the view that it was a case of an "extraneous event being so powerful a cause as to reduce the rest to part of the circumstances in which the cause operates".²⁹ We may, perhaps, find it difficult to see the difference in quality between impecuniosity on the one hand and the vapour-filled hold on the other, since both were conditions operating at the time when the defendant's conduct occurred and set in train the disastrous sequence of events, but it is in the last resort unprofitable to challenge the assertion that one was more potent or powerful than the other, as long as these terms are left undefined. In the words of a distinguished commentator, "is it [not] all a matter of choosing whichever word suits an intuitive judgment?"³⁰

The line of approach selected being identical with that in *In re Polemis*, it is instructive to compare the view of the dissentients in the well-known *Palsgraf* case.³¹ Starting from the same point of departure, namely, that "where there is an unreasonable act and some right that may be affected, there is negligence", Andrews C.J. chose to determine the question of extent of liability by the device of "remoteness" or what in the United States is more commonly called "proximate cause". But, unlike English judges, being more conscious of the deficiencies of verbal concepts, he frankly avowed that the line must be drawn on the basis of consideration of con-

²⁷ [1921] 3 K.B. 350, at p. 377.

²⁸ [1933] A.C. 449.

²⁹ *Minister of Pensions v. Chennell*, [1947] K.B. 250, at p. 256.

³⁰ C. A. Wright, *The Law of Torts: 1923-1947* (1948), 26 Can. Bar Rev. 46, at p. 57.

³¹ (1928), 248 N.Y., 339.

venience, which defied formulation in fixed rules. "What we mean is that because of convenience, of public policy, or a rough sense of justice, the law *arbitrarily* declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . There is in truth little to guide us other than common sense." These last remarks were recently echoed by Denning L.J. who, in dealing with a case of nervous shock in terms of remoteness rather than duty, confessed his defeat with the concluding words: "Where is the line to be drawn? Only where in the particular case the good sense of the judge decides."³²

It is finally necessary to caution against a possible source of misunderstanding which consists in isolating the *Polemis* decision from the general judicial approach to the issue of limitation of liability current at the time. To regard the judgments in the *Smith* and *Polemis* cases as representing the "English view" on this question would suggest a policy of far-reaching and comprehensive responsibility for the consequences of negligent conduct. Such a conclusion, however, does not in the least correspond with the actual position in which the general hedging devices embodied in the so-called rules of causation were given free rein so as to restrict, if anything, unduly the legal incidence of liability. The ingrained tendency of the courts to advance policy judgments by a denial of causal relationship was an effective counterweight to any drastic implications of the "directness" test. The law reports provide a veritable feast for anyone whose hankering after dialectical ingenuity is likely to be satisfied by speculations about "causa causans" and "causa sine qua non", metaphors like "snapping the chain of causation", "active" and "passive" forces and similarly agreeable word pictures which spell the illusion of scientific reasoning but more often than not are evidence of judicial inability or unwillingness to articulate the reasons for limiting the area of legal responsibility. What can better illustrate the generally restrictive viewpoint than the fact that Lord Sumner, in the very judgment which contains the first authoritative formulation of the "directness" rule, employed it in order to cut liability to a point lower than would have been the result under the "foreseeability" test and then proceeded to enunciate in categorical terms that responsibility does not extend to injury which a third party deliberately chooses to inflict on the plaintiff, even though the opportunity for such intervention was furnished by the defendant's negligence and the resulting loss was an appreciable risk created by it?³³

³² *King v. Phillips*, [1953] 1 All E.R. 617, at p. 624.

³³ *Weld-Blundell v. Stephens*, [1920] A.C. 956, at pp. 984, 986.

It is one of the apparent paradoxes so frequently encountered in legal development that the more recent, virtual displacement of the *Polemis* rule by the "foreseeability" test has not involved a narrowing of the legal incidence of liability for negligence as might be inferred having regard to the verbal implications of these concepts, but on the contrary has been accompanied by a more sympathetic attitude to widening the area of legal protection. Atkin L.J.'s estimate in 1924 that "the full effect of the decision in *In re Polemis* has not yet . . . been fully realized"³⁴ has, in retrospect, proved an exploded miscalculation, if intended to convey the idea that the rule would exert a decisive influence in the future. It is not, as suggested by Winfield,³⁵ that the courts have simply ignored it and reverted to the foreseeability test of "remoteness", as that the alternative control device of "duty" has in the intervening years almost completely eclipsed the causation formula as the regulatory mechanism for denial or imposition of liability on grounds of policy.³⁶

V

English law has in general terms long been familiar with the notion that mere failure to observe a certain standard of reasonable care does not entail liability for resulting harm, unless there was an obligation in the circumstances to conform to it. Duty has been defined as an obligation, recognized by law, to conform to a particular standard of conduct for the protection of others against unreasonable risks.³⁷ The tardy entrance of the concept into our legal system, brought to prominence in the "contract-tort catena" of cases in the middle of the last century, has been traced in a well-known investigation by Winfield, who concludes that "*Heaven v. Pender* is the historical point at which duty was clinched in the law of negligence. Later cases are concerned not so much with emphasizing the necessity of proving duty as with the exploration of its scope and the tests for ascertaining its existence."³⁸ While in the common garden litigation little attention is paid to this requirement, its existence usually being assumed, in marginal and qualitatively more significant cases the question cannot be evaded whether the facts can be subsumed to a so-called duty situation.

³⁴ *Hambrook v. Stokes*, [1925] 1 K.B. 141, at p. 156.

³⁵ Textbook (5th ed.) p. 68.

³⁶ This is well recognized by J. D. Payne, 1952 Current Legal Problems 189.

³⁷ Prosser, pp. 177-8.

³⁸ Duty in Tortious Negligence (1934), 34 Col. L. Rev. 41, at p. 58.

Recognition of a duty of care is the outcome of a value judgment that the plaintiff's interest, which has been invaded, is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. Thus stated in terms of a theory of interests, the basic policy question arising in negligence cases is brought to the surface. Unfortunately, however, here as elsewhere conceptualism has long delayed an open analysis of the issues involved. Since negligence consists in the creation of an unreasonable risk of harm, the existence of a duty of care involves the notion of foreseeability that certain conduct is likely to expose others to the risk so created. Duty, negligence and risk are terms of relation. "This element of reasonable prevision of expectable harm soon came to be associated with a fictional Reasonable Man whose apprehensions of harm became the touchstone of the existence of duty, in the same way as his conduct in the face of such apprehended harm became the standard of conformity to that duty."³⁹ The basic shortcoming of judicial technique has been to elevate the formula of foreseeability to a position where it is often regarded as the sole determining factor whether a duty of care is recognized or not.⁴⁰ This task is beyond its capacity. Duty presupposes foreseeability of damage but foreseeability does not entail a necessary inference of duty. The imposition of a duty in the absence of foreseeability involves introduction of a principle of strict liability, as negligence implies appreciation of risk by the reasonable man. There are perhaps a few isolated instances where the law appears to countenance the existence of a duty relationship in such circumstances, as for example, in the rescue cases in which, under a cloud of emotive language ("danger invites rescue. The cry of distress is the summons to relief"), the objective limits of foreseeability have been severely stretched in order to encourage altruistic action, but the result is better explained as an ingenious exploitation of the inherent indeterminacy of the foreseeability concept in the interest of furthering a specific policy demanded by contemporary social opinion.

There are, however, many situations in which the law denies its aid to victims of negligence despite foreseeability of harm. Economic interests are as yet quite imperfectly vindicated by English law, as is seen in the denial of liability for financial loss caused by

³⁹ *Per* MacDonald J. in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, at p. 254.

⁴⁰ The controlling study in Dr. Morison's *A Re-examination of the Duty of Care* (1948), 11 Mod. L. Rev. 9.

negligent mis-statements⁴¹ and the restricted scope of protection afforded to relational interests beyond the limits of the traditional actions *per quod servitium* or *consortium amisit*.⁴² The immunity enjoyed by landlords and vendors in respect of the condition of premises and the reluctance to extend responsibility for nervous shock indicate notable gaps in the protection of personal security. Liability for negligence in *word* has in material respects been developed differently from liability for negligence in *act*. These examples are sufficient to explode the delusion that resort to the foreseeability test will solve the inquiry as to duty and permit an escape from evaluation of the ever competing interests of freedom of action, on the one hand, and of security, on the other, in the light of the pertinent policy factors appropriate to the occasion.⁴³ Failure to recognize the specific creative function of the duty concept in controlling the area of legal responsibility for negligence with reference to the nature of the interests infringed and the type of conduct complained of is at the root of the contention that it is an unnecessary notion, involving a duplicated inquiry into the same question whether the defendant's act or omission fell below the standard of reasonable care. To the challenge that the one involves a question of law while the other raises a so-called question of fact, in the sense of falling within the province of the jury, it is answered that the court is in any event called upon to rule as a matter of law whether there is sufficient evidence for the case to be submitted to the jury, so that it adds little to the existing devices for control of jury "law". The formulations of the duty test propounded by Lord Esher M.R. in *Heaven v. Pender*⁴⁴ and, in slightly different language, by Lord Atkin in *Donoghue v. Stevenson*⁴⁵ are indeed tautologous with the definition of negligence itself, both depending on whether the fictitious prudent observer would have contemplated the likelihood of injury resulting from the conduct which is called in ques-

⁴¹ See *Candler v. Crane Christmas*, [1951], 2 K.B. 164. The same seems to apply to nervous shock caused by negligent mis-statements: *Guay v. Sun Publishing Co.*, [1952] 2 D.L.R. 479, but see *Wilkinson v. Downton*, [1897] 2 Q.B. 57.

⁴² See *Best v. Fox*, [1952] A.C. 716, and my discussion of this matter in (1952), 26 Aust. L.J. 122. This conclusion used to be explained in terms of remoteness: *Cattle v. Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453, and see comment thereon by Fullagar J. in *A.-G. for N.S.W. v. Perpetual Trustee Co.* (1952), 85 C.L.R. at p. 286.

⁴³ "Accordingly there is always a large element of judicial policy and social expediency involved in the determination of the duty problem, however it may be obscured by the use of the traditional formulae": per MacDonald J. in *Nova Mink v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, at p. 256.

⁴⁴ (1883), 11 Q.B.D 503, at pp. 506-7.

⁴⁵ [1932] A.C. 562, at p. 580.

tion. The tautology, however, relates only to the verbal symbols employed; it does not involve the proposition that the function of the respective inquiries is identical or that they are in truth solved by reference to the same criterion. In so far as the task which is now acknowledged as inherent in the duty question was discharged, in the days before it attained wide-spread prominence, under the category of sufficiency of evidence, it is just another example of value judgments being stealthily admitted to the solution of legal problems under cover of concepts which are seemingly concerned with an entirely different issue. There may be ample evidence of negligence and yet no obligation to conform to the standard of reasonable care. If sufficiency of evidence be denied on the inarticulated ground that in reality the plaintiff's interest is deemed undeserving of legal protection, this indicates a failure of judicial technique which hardly merits perpetuation.

The test for ascertaining duty in terms of foreseeability has been a fertile source of misapprehension. Not only do we frequently witness an indiscriminate transposition of passages from judgments dealing with duty into discussions on negligence, and vice versa, but there are occasionally more serious lapses. In a recent Canadian case it was said: "Whether a duty exists or not in the particular circumstances is a question of fact that ought to be determined by the jury or fact-finding Judge who have superior advantages to appellate courts in that respect".⁴⁶ Not dissimilar was the suggestion in an English case, where a mother had sustained nervous shock as the result of witnessing from an upstairs window her child being knocked down in the street, that the trial judge, "having arrived at the conclusion that the boy's mother was outside the range of the reasonable anticipation of the driver, . . . an appellate court should hesitate long before disturbing his conclusion".⁴⁷ In view of the justifiable doubts which have been raised whether, as the result of the decision in *Bourhill v. Young*,⁴⁸ English law extends the same protection against disturbance of the nervous system as against physical injury through direct impact, the foreseeability test appears, in any event, a singularly tenuous support for any decision denying recovery. To evade the task of consider-

⁴⁶ *Per* O'Halloran J.A. (diss.) in *Guay v. Sun Publishing Co.*, [1952] 2 D.L.R. 479, at p. 486. This error seems to be due to a confusion arising from the ambiguity of the term "question of fact". Whether a duty exists or not depends on the "fact"-situation but nevertheless raises a question of law, that is, belongs to the judge.

⁴⁷ *Per* Hodson L.J. in *King v. Phillips*, [1953] 1 All E.R. 617, at p. 624.

⁴⁸ [1943] A.C. 92. These doubts will be more fully justified *infra*. And see *King v. Phillips*, [1953] 1 All E.R. 617, *per* Singleton and Denning L.JJ. at pp. 619, 622.

ing the specific policy factors involved in the situation by treating the trial judge's decision as a finding of fact or analogous to it, recalls the similar attitude by the Court of Appeal to the problem of remoteness in the *Rothwell* case.⁴⁹ The technique is as unjustifiable and barren in the one instance as in the other.

Foreseeability is what Stone describes as a "category of indeterminate reference", not only in the sense that its existence is necessarily a matter of individual opinion but also because it is in reality nothing but a screen for allowing the court to reach a conclusion which it desires to achieve. Lord Macmillan has pointed out that "the standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. . . . But there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. . . . What to one judge may seem far-fetched may seem to another both natural and probable."⁵⁰ It would be short-sighted, however, to deny that such divergences as to what is expectable are conditioned less by differences in experience and observation than in the choice of desirable objectives. These policy grounds, whether consciously apprehended or not, play a decisive part in the formation of the judicial estimate of probability. The case, particularly if of a marginal nature, is prejudged by an "ought" decision before being cast into the mould of foreseeability. What the judge "thinks ought to be, what he wants to see happen — in other words his values and his notions of sound and desirable social policy—are bound to play a large part in influencing his choice or repudiation of the factors upon which a claim of probability or foreseeability leading to liability may be created. And if a judge's function is to do justice, this, after all, is no more than we should expect."⁵¹

The point is illustrated by the division of opinion in the High Court of Australia in *Chester v. Waverly Corporation*.⁵² In that case, Evatt J. was at one with the majority in regarding the imposition or denial of duty as depending upon whether nervous shock resulting from a mother seeing the dead body of her child should be regarded as within the reasonable anticipation of the defendant. Behind this common phraseology, however, were hidden fundamental differences as to the desirable scope of legal pro-

⁴⁹ [1944] 2 All E.R. 350. See *supra*.

⁵⁰ *Glasgow Corpn. v. Muir*, [1943] A.C. 448, at p. 457.

⁵¹ Gregory, *op. cit.*, at p. 51.

⁵² (1939), 62 C.L.R. 1.

tection against emotional disturbance. To Latham C.J., "it is not a common experience of mankind that the spectacle, even of sudden and distressing death of a child, produces any consequences of more than a temporary nature in the case of bystanders, or even of close relatives who see the body after death has taken place".⁵³ By a more detailed tracing of events, Evatt J. found no difficulty in reaching the conclusion that parents resorting to the place of accident to seek for the child and to rescue him from danger might themselves sustain physical injury by shock and distress.⁵⁴ For him, undisguised sympathy with the underprivileged victim⁵⁵ tipped the scales against a public authority capable of passing the imposition of liability on the broader shoulders of the rates and tax paying public; for the majority, protection must be denied as involving too onerous a burden on notoriously impecunious local authorities even at the expense of an individual's claim to personal security. The reality lurking behind their conclusion, which involves an exceedingly high expectation of endurance to the incidents of modern life in a complex urban and industrial community, can be gauged from the embarrassingly outspoken conservatism of Rich J.'s concluding remarks: "The attempt on the part of the appellant to extend the law of tort to cover this hitherto unknown cause of action has, perhaps, been encouraged by the tendencies plainly discernible in the development which the law of tort has undergone in its progress towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen entirely out of favour. In this respect perhaps judges are only following humbly in the footsteps of juries."⁵⁶ But what has all this to do with foreseeability?

In *Att.-Gen. for N.S.W. v. Perpetual Trustee Co.*, Fullagar J. based his denial of responsibility for financial loss sustained by the Crown, as employer of a policeman who had been negligently injured, on the ground that "such a claim as the present is based on a breach of an alleged duty of care to a person who could no more fairly be expected to be in the contemplation of a defendant than an independent contractor or a partner or an insurer against accident".⁵⁷ If this were the true reason, how are we to explain that,

⁵³ At p. 10.

⁵⁴ At p. 23.

⁵⁵ See at pp. 17-18. Cf. the outspoken comment by Vaisey J. in *Brock v. Richards*, [1951] 1 K.B. 529, at p. 540.

⁵⁶ At pp. 11-12.

⁵⁷ (1952), 85 C.L.R. 237, at p. 288.

in the rescue cases, the law holds a man bound to surmise the risk of secondary (physical) injury caused to another, and this, although it would not have occurred without the conscious intervention of the plaintiff? The latter may well be an exception to the general rule, but why? The conditions of expectability will not provide the answer.

Not infrequently judges resort to the device of varying the usual formulation of the foreseeability test in order to promote conclusions which are perhaps regarded as incapable of realization by simply bending the concept in the process of application. This technique has been employed in several recent cases in order to exonerate a defendant whose conduct had created an appreciable risk of harm, though to an interest which the court was not prepared to vindicate on obvious grounds of policy. In *Farrugia v. Great Western Ry. Co.*⁵⁸ Lord Greene M.R. had emphasized that a duty of care is owed to anyone within the area of potential danger irrespective of whether the defendant had or had not any reason to expect the particular plaintiff to be there at the time. That was a case of direct physical injury on the highway. By contrast, in a wife's action for personal loss suffered by her as the result of her husband's sexual incapacitation caused by the defendant's negligence, the claim, in so far as based on the "tort of negligence" was briefly disposed of on the ground that she was "a person to whom [the defendant] owed no duty and of whom . . . he had no knowledge".⁵⁹ Similarly, in the nervous shock case of *King v. Phillips*, we encounter the contention that "the driver owed a duty to the boy, but he knew nothing of the mother. . . . He could not know that she was at the window."⁶⁰ The usual foresight test would be directed to the inquiry whether it can reasonably be anticipated that a mother seeing her child crushed by a car is likely to sustain harm, not whether the defendant ought to have contemplated her presence at the window, or indeed making duty dependent on his actual knowledge of her presence there. It is well to heed the warning against falling into "the error of confusing the precise chain of circumstances by which the plaintiff incurs the injuries or damage of which he complains with the question whether he, acting as he did, falls within the general description of persons likely to be affected. The exact course which events take can seldom be foreseen in detail. But it is another thing to

⁵⁸ [1947] 2 All E.R. 565.

⁵⁹ *Best v. Fox*, [1950] 2 All E.R. 798, at p. 804, *per* Croom-Johnson J. See (1951), 67 L. Q. Rev. 37.

⁶⁰ [1953] 1 All E.R. 617, at p. 620, *per* Singleton L.J.

treat it as reasonable to foresee in a general way the kind of harm that may ensue from acts and omissions and, under wide and indefinite categories, the sorts of situation men must occupy for the harm to be likely to reach them".⁶¹ Can we regard it as purely fortuitous that in the just-mentioned situations, the area of responsibility for negligence is particularly stringently controlled, in the first by a well-recognized refusal to allow recovery for secondary economic harm to relational interests, in the other by a traditional and perhaps over-sensitive distrust of claims for non-traumatic injury?

In the nervous shock cases in particular, the courts have consistently experimented with various devices in order to confine redress within easily controllable limits. In the earlier stages, as we have seen, reliance was placed on the concept of remoteness, emotional disturbance, even if accompanied by physical symptoms, being regarded as a consequence not ordinarily flowing from inadvertent conduct, unless "calculated to cause physical harm".⁶² When this outright denial of relief was relaxed, arbitrary limitations were imposed, such as insistence on apprehension of personal danger to oneself,⁶³ later to be superseded by the requirement that the plaintiff must have witnessed the accident with his own "unaided senses",⁶⁴ and culminating in the latest pronouncement that there is no duty of care except to persons "within the area of physical impact".⁶⁵ None of these qualifications are necessary inferences of the foresight test, and can be rendered consistent with the latter only in the sense that judicial policy does not exact anticipation of such consequences from the reasonable man. But this is no more than an ipse dixit and indicates the futility of placing reliance on foreseeability as a premise for constructive reasoning in the handling of the duty question. Clearly, the courts have not yet freed themselves from the fear that to treat nervous shock on the same lines as external injuries incurred through direct impact would open "a wide field for imaginary claims".⁶⁶ This is what Dean L. Green has called the "administrative factor".⁶⁷ Yet it is

⁶¹ *Thompson v. Municipality of Bankstown*, [1953] A.L.R. 165, at p. 171, per Dixon C.J. and Williams J.

⁶² For the qualification, see *Wilkinson v. Downton*, [1897] 2 Q.B. 57, clearly a case of negligence, not intentionally inflicted nervous shock.

⁶³ Per Kennedy L.J. in *Dulieu v. White*, [1901] 2 K.B. at p. 682; per Sargant L.J. in *Hambrook v. Stokes*, [1925] 1 K.B. 141.

⁶⁴ *Hambrook v. Stokes*, [1925] 1 K.B. 141.

⁶⁵ *Bourhill v. Young*, [1943] A.C. 92, though not shared by Lords Wright and Porter.

⁶⁶ *Vict. Ry. Commrs. v. Coultas* (1888), 13 App. Cas. 222, at p. 226.

⁶⁷ Judge and Jury, chap. 4.

difficult to resist the force of MacKinnon L.J.'s remarks: "The principle must be that mental and nervous shock, if in fact caused by the defendant's negligent act, is just as really damage to the sufferer as a broken limb—less obvious to the layman, but nowadays equally ascertainable by the physician. That alleged shock resulting from apprehension as to a less important matter may well be material in considering whether the allegation be proved. But fear that unfounded claims may be put forward, and may result in erroneous conclusions of fact, ought not to influence us to impose legal limitations as to the nature of the facts that it is permissible to prove".⁶⁸ However that may be, the actual handling of nervous shock claims affords an instructive example of restrictive judicial legislation by manipulations of a verbal concept for the purpose of accomplishing results corresponding to extra-legal judicial postulates.⁶⁹

VI

These observations should indicate sufficiently the obvious limitations inherent in the concept of foreseeability. It may well be asked, therefore, what advantages, if any, we derive from talking the language of duty rather than remoteness? The answer must be that, although both are equally indeterminate, the former has the merit of at least encouraging articulation of the policy values which determine judicial choice and of bringing to the fore the "creative legislative problem"⁷⁰ facing courts in these situations. Equally important is the fact that duty with its emphasis on risk is better integrated in the notion of liability for negligence than the neutral concept of remoteness. The "area of potential danger" is a useful formula to focus attention on the crux of the problem confronting us, namely, to stake out, as a matter of law, the boundaries of responsibility for the consequences of inadvertent conduct. It not only enables us to approach intelligibly the question of what interests are deemed worthy of legal protection against careless interference, but has proved of great value in resisting the temptation of holding all too readily that the intervention or co-operation of causes other than the defendant's negligence absolves from liability. Remoteness carries an unfortunate connotation of proximity in time and causal

⁶⁸ *Owens v. Liverpool Corp.*, [1939] 1 K.B. 394, at p. 400.

⁶⁹ Denning L.J., unwilling to admit a classification of interests, and particularly a distinction between the claims to emotional and physical security, was inevitably driven to explain the difference in legal protection in terms of remoteness: *King v. Phillips*, [1953] 1 All E.R. 617, at pp. 623-4. He evidently took the word-magic of foreseeability for reality.

⁷⁰ C. A. Wright (1948), 26 Can. Bar Rev. at p. 60.

relationship, diverting attention from the real considerations which ought to determine liability. Talk of "real", "effective" or "substantial" cause often discloses nothing but an intuitive assessment of responsibility. If, instead, we ask ourselves, Was the other factor in question within the risk unreasonably created by the defendant? we are at least forced to face squarely the problem in issue. It is perhaps not surprising that, during the relatively short time in which this re-orientation in approach has been proceeding, the courts have, on the whole, encountered less difficulty with the so-called problem of *novus actus interveniens* and produced more acceptable conclusions than heretofore. To insulate liability merely because of the intervention of another agency which was directly instrumental in producing harm is "more a rule of thumb than a view".⁷¹ It would be hardly worth pointing out, were it not for constant errors of analysis still encountered, that every consequence is the result of more than one cause, usually of very many.⁷² If we were to hold that a defendant escapes liability for damage to which his conduct has substantially contributed merely because other causes were also operative, an injured party would never obtain redress. The judicial task has always been to isolate one or more from among numerous causes as legally significant to the question of legal responsibility. The children cases, from *Lynch v. Nurdin*⁷³ to the most recent pronouncements in *Yashuk v. Oliver Blais*⁷⁴ and *Thompson v. Municipality of Bankstown*,⁷⁵ are ample evidence that the intervention of human action does not necessarily relieve defendants from liability for resulting harm, if the operation of such forces was within the risk created by them. In other respects, however, it has only been of late that the "last wrongdoer" doctrine is slowly being abandoned under the influence of the duty approach with its concomitant notion of risk. In the *Northwestern Utilities* case⁷⁶ Lord Wright affirmed a duty resting on the supplier of natural gas to guard against the danger of third persons conducting operations in the vicinity of their mains which might, as they did, damage the pipes and cause the escape of gas with resulting injury to neighbouring property. This principle was taken a step further in *Stansbie v. Troman*⁷⁷ where the defendant's negligence had created an opportunity for a third person to commit a crime. "The reason why the decorator owed a duty to the householder to leave the

⁷¹ Gregory, *op. cit.*, at p. 47.

⁷² See Carpenter, *Concurrent Causation* (1935), 83 U. of Pa. L. Rev. 941.

⁷³ (1841), 1 Q.B. 29.

⁷⁴ [1949] A.C. 386.

⁷⁵ [1953] A.L.R. 165.

⁷⁶ [1936] A.C. 165.

⁷⁷ [1948] 2 K.B. 48.

premises in a reasonable state was because otherwise thieves or dishonest persons might gain access to them".⁷⁸ In fact, the risk of this occurrence was the very reason why the defendant was under a duty to leave the front door locked. It is quite unnecessary to duplicate the course of reasoning by inquiring further into the remoteness aspect of the *actus interveniens*, as was done on this occasion. The question of responsibility was already answered by affirming the existence of a duty to anticipate the action of malefactors. There is still evidence, however, of considerable reluctance to admit that careless medical treatment is within the scope of normal risk where physical injuries have been negligently inflicted on the plaintiff,⁷⁹ although it has been held that subsequently contracted streptococcal septicaemia is an infection which constitutes a recognized danger "and is regarded as part of the *possible* consequences of the infliction of a wound".⁸⁰ Is this a case of one profession paying an undue compliment of proficiency to another?⁸¹

For the reasons indicated, the duty concept seems to me a notable advance in dealing with the problem of limitation of responsibility in negligence compared with the other devices of remoteness and insufficiency of evidence. Once the futile quest for a universal test to determine duty has been abandoned as an unattainable (and undesirable) objective, its advantages as a starting-point of inquiry into the appropriate policy factors competing for selection in determining the area of legal protection against unreasonable risks will become more apparent. To regard "duty" as useless and superfluous because there is not one case which could not have been just as well decided on some other ground is a criticism⁸² which, with respect, misses the point. The existence of available substitutes can hardly be denied. What is in question is whether these are as suitable for the purpose in hand.

What, then, has been the impact of the duty approach on the *Polemis* rule? The difficulties of reconciliation are self-evident. The one is based on the idea that the reasons which lead to the creation of liability should also limit it, that responsibility should not extend beyond the *risk* itself; the other introduces strict liability without fault in respect of unforeseeable consequences. It is notable

⁷⁸ *Per* Tucker L.J. at p. 52.

⁷⁹ *Cf. Rothwell v. Caverswall Stone Co.*, *supra*, which provides an *a fortiori* analogy for negligence liability.

⁸⁰ *Adelaide Chemical Co. v. Carlyle* (1940), 64 C.L.R. 514, *per* Dixon J. at p. 534.

⁸¹ *Cf. Prosser*, p. 362.

⁸² Winfield, *Duty in Tortious Negligence* (1934), 34 Col. L. Rev. at pp. 64-5, 66.

that where the duty is imposed by statute, it has long been the accepted rule that there is no redress for damage "which was not contemplated by the statute and as to which it was not intended to confer any benefit on the plaintiffs".⁸³ Why should liability be more extensive where the duty is of judicial creation? Foreseeability has always—and must inevitably—be at the basis of liability for negligence, and in so far as the "directness" rule is at variance with the notion that negligence liability should be commensurate with fault, it cannot be other than an anomaly in this branch of law. Its isolation from the general stream of tortious liability is accentuated by the continuing tendency to withdraw from advanced positions of strict liability except with regard to the control of ultra-hazardous activities.⁸⁴ It is, of course, pragmatically possible to maintain both the duty approach and the *Polemis* rule, and indeed interpret the latter in terms of a duty to protect others against unforeseeable consequences of negligent acts, but the essential inconsistency remains of holding that one who can foresee harm to *A* is liable for unforeseen consequences to *A* and refusing to hold him for unforeseen harm to *B*.⁸⁵ Whether the unforeseen damage is suffered by *A* or *B* is entirely fortuitous. The difficulty is fundamental and cannot be brushed aside with the consolation that "the Court would try to find some method of avoiding such a result".⁸⁶ As pointed out earlier, one may well sympathize with a policy compelling a person who has, if only slightly, departed from the standard of reasonable conduct to make good the resulting loss, including such as falls outside the risk created by him, rather than let the completely innocent victim bear it himself, but to pursue this objective in relation to "unforeseeable harm" and to abjure it in relation to the "unforeseeable plaintiff" introduces into the law of negligence an element of stress which it is difficult to justify on rational grounds. Both are like aspects of the same problem of limitation of responsibility, and cannot be divorced from each other by the verbal distinction between culpability on the one hand and compensation on the other.⁸⁷ We must face the fact that the analysis adopted by the Lords in *Bourhill v. Young*⁸⁸

⁸³ *Gorris v. Scott* (1874), L.R. 9 Ex. 125, per Kelly C.B. at p. 128.

⁸⁴ This has been notable in nuisance, vicarious liability (through re-interpretation in terms of an independent duty resting on the master) and most of all in the opinions in *Read v. Lyons*, [1947] A.C. 156.

⁸⁵ Prosser, p. 184.

⁸⁶ S. L. Porter (now Lord Porter), *The Measure of Damages in Contract and Tort* (1935), 5 Camb. L.J. at p. 184.

⁸⁷ As Lord Wright does in his article, *Re Polemis* (1951), 14 Mod. L. Rev. 393.

⁸⁸ [1943] A.C. 92.

has involved so radical a departure from the earlier approach in terms of remoteness that the retention of the *Polemis* rule entails not just inelegance but contains the seeds of inevitable conflict which must ultimately be resolved. One may be pardoned for a bias in favour of the risk-duty approach as more consistent with the underlying theory of negligence.

The virtual elimination of the *Polemis* rule could be accomplished, without resorting to the drastic step of overruling, by continuing the process of erosion by which the duty concept has already to a large extent encroached upon the province of remoteness. Cardozo C.J.'s tentative distinction in the *Palsgraf* case between interests of the plaintiff with respect to which the defendant owed a duty and others as to which he did not,⁸⁹ dependent upon the imputation or denial of foresight as to each, has found an echo in Lord Wright's emphatic statement that the *Polemis* rule "must be understood to be limited to 'direct' consequences to the particular interest of the plaintiff which is affected. *Liesbosch v. Edison* illustrates this limitation."⁹⁰ If this suggestion were adopted, little would be left of that controversial decision. It could then be regarded as no more than an illustration of the "thin skull" type of case, that is, of the generally accepted rule that the defendant takes his victim as he finds him.⁹¹ The issue is still in the melting-pot.⁹²

VII

Negligence cases are of absorbing interest to the student of the judicial process because in this field of law, more than any other, courts have employed such a variety of verbal mechanisms and techniques to explain through the inadequate means of language decisions which they have been impelled to reach. The real factors controlling judgments are but rarely fully disclosed. Whether the concept to which the court resorts in expressing its decision be remoteness, duty, negligence, standard of duty, foreseeability, risk, or any of these in combination, matters little to the outcome of the action. They constitute the accepted mechanism for dealing with the infinite variety of fact situations encountered in litigation, but whether preference is accorded to one rather than another is usually of small functional importance. They are the means of formu-

⁸⁹ (1928), 248 N.Y. 339, at pp. 346-7.

⁹⁰ *Bourhill v. Young*, [1943] A.C. 92, at p. 110.

⁹¹ Cf. Seavey, Mr. Justice Cardozo and the Law of Torts (1939), 52 Harv. L. Rev. 372.

⁹² See *Thorogood v. Van den Berghs*, [1951] 2 K.B. 537, on which Goodhart (1952), 68 L.Q.Rev. 514, and J. D. Payne, 1952 Current Legal Problems 189.

lating conclusions but do not often dictate them. Their respective suitability can be assessed only by reference to the degree to which they impair or assist forthright adversion to the real issue before the court. This, however, is an important consideration because analysis is susceptible to the influence of deceptive connotations of the verbal formulas employed. From that point of view, as has been indicated, some of the concepts, particularly remoteness, have shown themselves by experience as less acceptable than others. Criticism, however, cannot be pushed further. To regard any particular approach as right and condemn another as wrong in categorical terms serves little purpose. The judicial approach in the handling of negligence cases has varied considerably, not only at different periods but also at any given stage, among individual judges facing the same or similar problems. Here as elsewhere in human behaviour there are fashions and, in a sense, the selection of any particular formula is no more than "a matter of taste and finesse".⁹³

Thus it is largely left to uncontrolled choice whether a given question be subsumed to the category of duty or standard of duty. The latter is the necessary complement to the former⁹⁴ and both are questions of law for the judge. If the case is tried with a jury, the court may feel inclined to substitute its own judgment for that of the jury on whether reasonable care has been taken, by a legal determination of the standard of prudent conduct to be observed in the particular situation with which it is dealing. This is the explanation of *Campkin v. Bishop*⁹⁵ where it was held that a headmaster was under no duty of care to ensure that his charges were under supervision while assisting in organized farm work. As Dr. Stallybrass observed: "It might equally well have been held that the defendant was under a duty to take reasonable precautions for the safety of his pupils, but that there was no evidence to submit to a jury of a failure to perform that duty. Cf. *Ricketts v. Erith B.C.*⁹⁶ where in the case of a child injured in a playground, Tucker L.J. held that the duty of the school authority was that of a 'reasonably careful parent'.⁹⁷ Another course open would have been to leave the decision to the jury on the issue of negligence. The structural analysis of negligence cases and the division of functions between judge and jury are thoroughly indefinite and cannot be

⁹³ Green, *Judge and Jury*, p. 19.

⁹⁴ Prosser, p. 281.

⁹⁵ (1941), 165 L.T. 246.

⁹⁶ (1943), 169 L.T. 396.

⁹⁷ Salmond (11th ed.), p. 500, n (h).

other as long as we employ a complex of indeterminate categories which maintain a desirable flexibility in administration. It has been observed that "carried to its logical conclusion, [the approach in *Campkin v. Bishop*] would eliminate the jury's function altogether"⁹⁸ but is it not equally apparent from a survey of the operation of the various devices that "courts by one technique or another have endeavoured to substitute their views of 'ought' for those of the jury?"⁹⁹ The juries' fact-finding function is not here in jeopardy, but their participation in the determination of policy questions is controlled solely by the discretion of the judge.¹⁰⁰

There are numerous reported cases illustrating the interchangeability of duty, remoteness, causation and negligence (breach of duty). What is particularly significant for the present purpose is that the varying approaches adopted by different judges in one and the same case usually do not prevent unanimity of decision. This is to some extent owing to the fact that most of the concepts associated with negligence liability revolve around the formula of foreseeability, but it equally demonstrates that the factors which actually control judgment are not to be found in those concepts themselves. The best-known example is probably *Woods v. Dun-can*,¹⁰¹ where a wide variety of techniques was employed in the several opinions in order to absolve the manufacturers from responsibility for the loss of life caused by their failure to inspect the work of their sub-contractors, who had negligently blocked a test cock with bitumastic paint.¹⁰² Lords Simon, Russell, Macmillan and Simonds, in varying degrees of preciseness seem to have decided for the defendants on the ground that their negligence was too remote a cause of the disaster. Lord Russell gave it as an alternative ground that there was no duty owed in the circumstances, while Lord Porter relied on absence of duty or breach thereof.¹⁰³ All were agreed that the extraordinary combination of events placed the loss of life outside the range of reasonable prevision. Even among the majority group, however, there was no identity of structural analysis. Lords Simon and Simonds alone specifically relied on Lieutenant Woods' action in opening the inside door while the bow cap was also open as an *actus interveniens*

⁹⁸ W. L. Morison (1948), 11 Mod. L. Rev. at p. 27.

⁹⁹ C. A. Wright (1948), 26 Can. Bar Rev. at p. 48.

¹⁰⁰ See my correspondence with Dr. W. L. Morison in (1953), 1 Syd. L. Rev. 69-77.

¹⁰¹ [1946] A.C. 401.

¹⁰² This aspect of the decision forms the starting-point of Dr. W. L. Morison's inquiry in, *A Re-examination of the Duty of Care* (1948), 11 Mod. L. Rev. 1.

¹⁰³ It is not easy to say which.

which was outside the foreseeable risk created by the defendants and, therefore, in the traditional language a "supervening" cause. For Lord Macmillan "the chain of causation" appeared to be "composed of missing links", and in Lord Russell's view the defendants' negligence was not the cause because the disaster was produced by a double event. But, as Lord Porter pertinently points out, though the blocking of the test cock was not the sole cause, it was *a* cause. The causal sequence was not in doubt because, unless the test cock had failed to flow, Woods would not have opened the rear door. Moreover, it has never yet been seriously maintained that the co-operation of other causes, whether innocent or wrongful, will of itself exempt from liability.¹⁰⁴ The question was one of responsibility to be determined on grounds of policy, not arbitrary rules of thumb.

In addition, there were profound differences of view as to the ambit of the duty question. For Viscount Simon a duty of care towards the deceaseds was established because they were invitees and the defendants were at the material time "in control" of the submarine notwithstanding that an officer of the Royal Navy had taken command for navigational purposes. This contrasts with the view taken by Lords Russell and Porter that, whether the applicable principle be *Donaghue v. Stevenson* or *Bourhill v. Young*, there was no duty owed in this *particular* situation because it could not have been contemplated that the choked test cock might endanger the life of those aboard. The function conceded to the duty concept is obviously more far-reaching in the latter than in the former of these opinions. The discrepancy was by no means novel but can be detected already in *Hambrook v. Stokes Bros.*¹⁰⁵ where, it will be remembered, Atkin L.J. reasoned in terms of a *general* duty to *all* road users, while Sargant L.J. denied recovery on the ground that there was no *specific* duty of care towards the mother because it was outside the range of reasonable foresight that she would sustain nervous shock by apprehension of danger to her children. The latter approach is clearly more compatible with the reasoning in *Bourhill v. Young*, which eliminated talk of "remoteness" by the fullest exploitation of the potentialities of "duty" and "risk". The abstract idea of duty, thought of in terms of wide categories of "duty-situations",¹⁰⁶ may easily involve a more comprehensive

¹⁰⁴ See Carpenter, *Concurrent Causation* (1935), 83 U. of Pa. L. Rev. 941, and cf. Denning J. in *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719, at p. 721.

¹⁰⁵ [1925] 1 K.B. 141.

¹⁰⁶ This seems to be regarded as the "correct" view by Dr. Morison, *op. cit.*

range of legal responsibility because it leaves a wider opening for the "direct consequence" rule. Such is the lesson which emerges from the decisions in *Hambrook v. Stokes* and *Owens v. Liverpool Corpn.*,¹⁰⁷ unless this tendency is counteracted by some other competing device drawn from the inexhaustible store of "causation".¹⁰⁸

Another instructive case is the decision of the Supreme Court of Nova Scotia in *Nova Mink Ltd. v. Trans-Canada Airlines Ltd.*¹⁰⁹ An aircraft, while preparing for landing, diverted its course from the normal route in order to avoid a cloud formation. In doing so, it passed at low altitude over the plaintiff's mink ranch, the existence of which was unknown to the pilot. This occurred during the whelping season and the mink, frightened by the noise of the aircraft, devoured their young. The owner sued the airline for damages in negligence, but the jury's verdict in his favour was unanimously set aside on appeal, though on a variety of different grounds. According to MacDonald J.,¹¹⁰ in the absence of knowledge as to any special susceptibility to harm, there was no duty to refrain from making a kind or degree of noise which would otherwise be harmless. A duty can arise only out of harm to be expected in respect of a normal farm. It may be mentioned passing that this conclusion need not be based on absence of foreseeability. The statistical spread of abnormality is quite irrelevant.¹¹¹ The better explanation is that one must be prepared to bear the ordinary risks incident to modern living and can complain only of abnormal hazards unreasonably created. If the defendant's activity is such that a person of ordinary resilience and powers of resistance would not have been harmed, the plaintiff cannot unilaterally impose a greater restriction on the defendant's freedom of action, unless the existence of the special facts are within the actor's knowledge.¹¹²

The argument that, even if a proper look-out had been kept, the farm could not have been seen in time for it to be avoided, was adopted in all the opinions of the court as fatal to the plaintiff's claim, but was given legal significance in terms of absence of

¹⁰⁷ [1939] 2 K.B. 394. See the interpretation put upon this case by Latham C.J. in *Chester v. Waverly Corpn.* (1939), 62 C.L.R. 1, at pp. 8-9.

¹⁰⁸ As in *Woods v. Duncan* itself, by reference to the doctrine of *novus actus interveniens*. But was this not a case of concurrent causes operating simultaneously?

¹⁰⁹ [1951] 2 D.L.R. 241.

¹¹⁰ In whose opinion Currie J. concurred.

¹¹¹ Cf. Evatt J. in *Chester v. Waverly Corpn.* (1939), 62 C.L.R. at pp. 24-9.

¹¹² See Goodhart, *Bourhill v. Young* (1944), 8 Camb. L. J. at p. 270. For cases of knowledge of abnormality see *Mason v. Grandell*, [1951] 3 W.W.R. 536; *MacGibbon v. Robinson*, [1952] 4 D.L.R. 142.

duty, failure to show breach of duty and lack of necessary causation. Ilsley C.J. thought that, in general, there was a duty during the whelping season to keep a careful look-out for mink ranches properly marked, but that here there existed none because it would have been ineffective to avoid the farm. Somewhat less strained was his alternative reason that there was no evidence to show that failure to conform to that duty *caused* the loss.¹¹³ This seems a perfectly legitimate instance of denial of causal relationship. The question here was not, Did the noise of the aircraft cause the damage? but, Was the alleged act of negligence a causal factor in producing the loss? There is no liability if the damage suffered by the plaintiff would not have been avoided if the defendant had adopted the precaution which he unreasonably failed to take; in other words, if the injury would have been sustained just the same had the defendant not failed to observe the standard of reasonable care. In such an event, the defendant's negligence lacks the necessary "operative quality"¹¹⁴ to be capable of being regarded as a "cause".¹¹⁵ Lastly, MacDonald J. interpreted this aspect of the case as showing that there was no evidence from which the jury could reasonably have inferred a breach of duty.

It would not be difficult to glean from the reports other cases which illustrate the variety of techniques and reasons adopted by different judges in formulating their decisions within the exceedingly flexible framework of this cause of action.¹¹⁶ The conclusion I seek to commend is the relative unimportance of formalizing the structural analysis of negligence cases. The particular method adopted by the court is of as little consequence to the actual decision reached as the verbal formula through which it finds expression. Neither could be of substantial significance unless we were employing "self-determining words with fixed content, yielding their meaning to a process of inexorable reasoning".¹¹⁷ But, as we need hardly remind ourselves, the reality behind law-making through the judicial process lies elsewhere.

¹¹³ This was the sole ground for decision in the opinion delivered by Parker J., in which MacQuarrie J. concurred.

¹¹⁴ Salmond (10th ed.) p. 452.

¹¹⁵ See also Prosser, p. 322.

¹¹⁶ For reasons of space, the discussion has been confined to 'original negligence, but similar problems arise in connection with defences to an action for negligence. On the relationship between assumption of risk and duty, see *Insurance Commr. v. Joyce* (1948), 77 C.L.R. 39; *Roggenkamp v. Bennett* (1950), 80 C.L.R. 292; and articles thereon in 24 Aust. L.J. 351, 444. On remoteness and contributory negligence, see the astounding judgment by Denning L.J. in *Jones v. Livox Quarries*, [1952] 1 T.L.R. 1377.

¹¹⁷ Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions* (1923), 36 Harv. L. Rev. 909, at p. 912.