THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. XXXIX DECEMBER 1961 DECEMBRE NO. 4

THE PASSING OF POLEMIS

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When the bunkering crew aboard the tanker *Wagon Mound*, lying in Mort's Bay in Sydney harbour, made ready one early morning in October 1951 to take on furnace oil, they might well have been forgiven for failing to anticipate their imminent historical role of projecting themselves and their good ship into the motley company of Mr. Polemis,[1] Mrs. Palsgraf[2] and that colourful Glasgow fishwife Mrs. Young[3]—wayward characters all whose personal misfortunes a kind destiny has sought to mitigate by perpetuating their memory wherever the vagaries of common law tort liability are being debated. Nor, for that matter, could Mort's Dock and Engineering Co. Ltd., shortly to go into voluntary liquidation, have reasonably entertained the consoling reflection that their name, if disappear it must from the call list of the Sydney stock exchange, would at least find an honoured niche in the footnotes of future editions of tort treatises by Salmond and Street, Prosser, and perhaps Fleming.[4]

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[1] *In re Polemis and Furness Withy & Co.*, [1921] 3 K.B. 560.

[2] *Palsgraf* v. *Long Island R. Co.* (1928), 248 N.Y. 339, 166 N.E. 99, 59 A.L.R. 1253.

[3] *Bourhill* v. *Young*, [1943] A.C. 92.

[4] *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*), [1961] A.C. 388, [1961] 2 W.L.R. 126, [1961] 1 All E.R. 404.

I. *The Problem.*

Soon after negligence emerged in the earlier nineteenth century as an independent basis of tort liability from misty, and still rather obscure, beginnings,[5] the Great Debate was joined over the extent of responsibility for the consequences of negligent conduct. As early as 1850, Pollock C.B. sensed the making of future controversy when, conscious of failure to commit his brethren, he flung down the initial challenge by affirming that liability should not reach beyond consequences which the defendant could reasonably have anticipated as likely to occur.[6] From the viewpoint of historical perspective, it is hardly surprising that this limiting formula would gain an ascendancy for some time to come over competing "causal" theories whose acceptance would have involved a more far-reaching measure of liability. For, apart altogether from its apparent theoretical attraction[7] in subsuming the twin issues of culpability and extent of responsibility—the question of "whether" and "how far"?—to the same criterion of foreseeability, its practical effect was to lighten the burden which the expanding concept of negligence was fastening upon a rapidly developing, but still vulnerable, economy. Many was the occasion when in the next half century this formula would be pressed into service to ward off the impact of liability in situations where contemporary judicial policy felt the need for a halt, or at least a pause.

We need only recall such well-known landmarks as the refusal to countenance recovery for nervous shock in *Victorian Railway Comrs.* v. *Coultas*[8] on the avowed ground that such an injury, suffered as the result of fear for one's personal safety but unaccompanied by actual impact, was a consequence which "in the ordinary course of things would not flow" from the negligent operation of a train at level crossings; and the dismissal of a wife's claim for loss of consortium in *Lynch* v. *Knight*[9] because her expulsion from the marital home was not a reasonably expectable reaction by her (admittedly credulous and understandably irate) husband to a slanderous reflection on her morals; besides many a less dramatic occasion when a genuine fear of "imposing too heavy a burden on enterprise" or "opening the floodgates of litigation" could be reinforced by an accommodating denial of

[5] See Winfield, The History of Negligence in the Law of Torts (1926), 42 L.Q. Rev. 184; Fifoot, History and Sources of the Common Law (1949), Ch. 8.

[6] *Greenland* v. *Chaplin* (1850), 5 Ex. 244, at p. 248; See also *Rigby* v. *Hewitt* (1850), 5 Ex. 240.

[7] See *infra*, footnote 74, where this assumption is challenged.

[8] (1888), 13 App. Cas. 222. [9] (1861), 9 H.L.C. 577.

"foreseeability". Significantly, throughout this period the formula served a restrictive function in the double sense of not only ensuring a more limited range of responsibility than causal theories might have entailed, but also because it was in general linked to an exceedingly narrow judicial estimate of what human intelligence and experience could fairly entertain as within the ambit of reasonable prevision.

Yet the pattern of legal development was not then, or ever, wholly uniform. Just as the even flow of the law of torts, in the process of being reconstituted on the basis of the fault principle and shedding one by one the last vestiges of strict liability,[10] came to be deflected by the freshet of *Rylands* v. *Fletcher*,[11] so we encounter about the same time the first articulate resistance to foreseeability as the criterion for defining the extent of liability for negligence. For in *Smith* v. *London & South Western Ry.*,[12] the interest of plaintiffs gained the support of three members[13] of the Court of Exchequer Chamber who, admittedly *obiter*, declared themselves in favour of the view that, once negligence had been established against a defendant, liability would attach for all its consequences, regardless of whether they were foreseeable or not. As applied to the facts of that case, the suggestion went to the length of holding a defendant responsible, even though no injury whatever to the particular plaintiff could reasonably have been envisaged. But so far-reaching a proposition had to be harnessed in some manner, since it would clearly have been unthinkable to accept "liability for *all* the consequences" in its quite literal sense. Having discarded the anchor of foresight, recourse to some other stabilizing device became imperative.

This was eventually found in the formula of "directness" which committed English law to a long period of baffling and sterile discourse amidst a labyrinth of pseudo-logical and metaphysical controversy—a source alike of envy to the mediaeval schoolmen and of despair to modern-minded critics, for long almost wholly confined to the universities, who deplored this unfortunate departure as an obstacle to realistic reasoning, if not an affront to their intelligence. The chief blame for this disastrous development may fairly be laid at Lord Sumner's door who, in *Weld-Blundell*

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[10] The development is traced by Goodhart and Winfield, Trespass and Negligence (1933), 49 L.Q. Rev. 359; Fleming on Torts (2d ed., 1961), pp. 19-24.

[11] (1868), L.R. 3 H.L. 330. [12] (1870), L.R. 6 C.P. 14.

[13] Kelly C.B., Channell B., and Blackburn J. See further *infra*, footnote 118.

v. *Stephens*,[14] lent his powerful prestige to the twin-formula which has come to be associated with the decision of *In re Polemis:*

> The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are direct consequences of the act.[15]

Henceforth, foresight was to be admitted in audience only on the first question of "culpability"; the second, falsely designated "compensation", being cast to the vagaries of causal theory.

Not the least perplexing feature of this reorientation was that the new test was introduced in order to shield a defendant from the impact of the foreseeability principle, for it enabled Lord Sumner to deny the plaintiff recovery for expectable harm on the ground, as questionable as it is difficult to refute objectively, that it lacked the necessary quality of "directness". Thus for once the usual roles were here reversed. The foresight test which experience had shown to be generally more favourable to defendants than the competing theory of causation was jettisoned because it failed to accomplish its desired purpose of forestalling recovery. It is, of course, susceptible to speculation only whether Lord Sumner, a judge of considerable perspicacity and experience in trial practice, may have entertained the belief that the new dispensation offered a more efficacious handle for controlling juries. This much, at any rate, may be said from the vantage point of additional observation in the intervening years—and I shall have occasion to return to this matter later—that the foreseeability test has indeed proven a broken reed for those who perhaps hoped that it would continue to serve as the talisman of defendants. But this coming phenomenon was to be attributable to a deep shift in social philosophy, associated with the modern welfare state, in which judges have on the whole collaborated with juries to ensure a much wider range of loss distribution than would have been acceptable forty years ago. In any event, the question whether "directness" might have done better than "foreseeability" in protecting defendants was never fairly put to the test, partly because the latter could not withstand the influence of more fundamental changes in social policy which moulded that malleable concept to its own purpose, partly because the life cycle of the former was destined to be so short as to rule out any meaningful comparison.

[14] [1920] A.C. 956, at p. 983. Lord Sumner stuck to his guns in *Singleton Abbey* v. *S.S. Paludina*, [1927] A.C. 16.

[15] *Supra*, footnote 1, *per* Warrington L.J. at p. 574.

Within little more than a year, Lord Sumner's formula was in fact applied, in the celebrated case of *In re Polemis*, in a manner which seemed to many contemporary observers to have committed English law to the most extravagant compass of legal responsibility. As was almost inevitable, the rule of liability for all direct consequences was ready to be exploited for an end diametrically opposed to that which it was originally designed to promote. Henceforth, with but few negligible exceptions, it was to give succour to plaintiffs, not defendants. Fashioned with the intent of restricting liability to an even narrower radius than the foresight test, it became the open door for allowing it to escape beyond. Or, at least, so it appeared when the Court of Appeal extended liability for the total loss of a ship due to an explosion of petrol vapour set off by the negligent dropping of a plank into the hold, despite the arbitral finding that the hapless stevedore could not reasonably be credited with foreseeing more than some superficial damage to the structure.

Yet when Lord Atkin opined in 1924 that "the full effect of the decision in *In re Polemis* has not yet . . . been fully realized",[16] he was in effect committing a rare miscalculation because the course of future decisions was rapidly falsifying the impression that it had introduced a startling change of direction. Several antidotes were soon at work to counteract its sting. In the first place, the foreseeability criterion was imperceptibly restored to its erstwhile role of defining the extent of liability for *indirect* consequences.[17] Thus, by a curious twist, not wholly unprecedented in the dialectics of legal evolution, the "Sumner episode" received its quietus. The postulate of "No liability for other than direct consequences, however foreseeable" was replaced by "Liability (at least) for all foreseeable consequences, whether direct or indirect". Aided by the inherent indeterminacy of the verbal term "direct", there were few occasions when causal problems were not so classifiable as to fall for decision on the basis of the foresight test because they involved the *subsequent* intervention of new factors between the defendant's "original" negligence and the eventual harm. The second eroding force, closely linked to the first, was a fairly persistent trend to attach an increasingly restrictive gloss to the meaning of "direct consequences". In *The Edison*, for example, Lord Wright interpreted the *Polemis* rule as confined to "*immediate physical* consequences", thereby disposing of the plaintiff's pre-

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

[17] See J. D. Payne, The "Direct" Consequences of a Negligent Act (1952), 5 Current Legal Problems 189.

existing impecuniosity as an "extrinsic" cause.[18] Likewise, Lord Denning after a temporary flirtation with the elusive distinction between "causes" and "conditions" or "circumstances in or on which causes operate"[19] eventually made the suggestion that foreseeability could be excluded only when the defendant's negligence was the "*immediate or precipitating*" cause of the damage.[20]

Finally, cis-Atlantic influence made itself felt when, inspired by Judge Cardozo's famous analysis in the *Palsgraf* case,[21] the House of Lords unequivocally committed itself in *Bourhill* v. *Young* to the so-called "duty approach".[22] This meant, in its narrowest connotation, that a plaintiff, however "direct" his injuries, could claim recovery only if he or his legally protected interests were within the range of foreseeable harm. In Lord Wright's memorable phrase, he could not "build on a wrong to someone else"[23] or, in Cardozo's, sue as "the vicarious beneficiary of a breach of duty to another".[24] Thence, whatever the disposition of claims for unforeseeable consequential *harm*, the unforeseeable *plaintiff* faced dismissal.

Two brief observations regarding this latest development may be conveniently interjected at this point before proceeding with the story. First, Mrs. Young's failure to recover for the nervous shock she suffered in consequence of hearing the noise of a collision which she neither witnessed nor which could foreseeably have threatened her personal security in any other way, does not necessarily furnish a telling precedent for situations involving other than mental trauma. Such criticism as the decision has provoked has been mainly confined to doubts whether it did not postulate too narrow an estimate of foreseeability on the facts.[25] If the proper question was foreseeability of shock, their Lordships' recurring emphasis on the "area" of foreseeable harm was thought to offer undue encouragement to the outmoded notion that recovery be

[18] [1933] A.C. 449, at p. 461. In *Bourhill* v. *Young*, *supra*, footnote 3, at p. 110, he confined it further "to 'direct' consequences to the particular interest of the plaintiff which is affected". The "interest theory" is discussed *infra*, footnote 102.

[19] *Minister of Pensions* v. *Chennell*, [1947] K.B. 250, at p. 255; *Jones* v. *Livox Quarries*, [1952] 2 Q.B. 608, at p. 616.

[20] *Roe* v. *Minister of Health*, [1954] 2 Q.B. 66, at p. 85, [1954] 2 W.L.R. 915, at p. 925, [1954] 2 All E.R. 131, at p. 138.

[21] *Palsgraf* v. *Long Island R. Co.*, *supra*, footnote 2, discussed *infra*, footnote 31.

[22] *Supra*, footnote 3. [23] *Ibid.*, at p. 108.

[24] *Palsgraf* v. *Long Island R. Co.*, *supra*, footnote 2, at pp. 342 (N.Y.), 100 (N.E.).

[25] See especially C. A. Wright, Negligence—Duty of Care—Nervous Shock (1943), 21 Can. Bar Rev. 65; Goodhart, *Bourhill* v. *Young* (1944), 8 Camb. L.J. 265.

artificially confined to those within the range of foreseeable impact. Significant it certainly is that the *Bourhill* v. *Young* limitation has been successfully invoked in but few instances, the most notable being *King* v. *Phillips*,[26] another nervous shock case; and that this remarkable experience is fairly matched on the American scene, as attested by my distinguished colleague, Professor Prosser, in his recent account of "Palsgraf Revisited".[27] For short, it is as well to recognize that in the special area of nervous shock, judicial insistence on maintaining the closest control continues to involve distortions either in the form of categorical limitations, such as the waning "impact rule",[28] or manipulations of "foreseeability" which openly or surreptitiously are still exerting a marked influence in most Anglo-American jurisdictions.[29] In other situations, however, involving external injuries, the contemporary trend of giving the loosest rein to imagination in fixing the outer limits of reasonable prevision has not been significantly impaired.

Although their Lordships in *Bourhill* v. *Young* declined the invitation to pronounce upon the *Polemis* rule, their express *caveat* that it was open for future reconsideration at the highest level[30] was anticipating the inevitable. It was, of course practically feasible to maintain both rules side by side—the one dealing with the problem of the unforeseeable plaintiff, the other with unforeseeable

[26] [1953] 1 Q.B. 429; and see the extensive comment thereon by Goodhart, Emotional Shock and the Unimaginative Taxicab Driver (1953), 69 L.Q.Rev. 347, and The Shock Cases and the Area of Risk (1953), 16 Mod. L. Rev. 14.

[27] (1952), 52 Mich. L. Rev. 1, and Selected Topics on Torts (1953), Ch. IV.

[28] This limitation was discarded in England as early as 1901 in *Dulieu* v. *White*, [1901] 2 K.B. 669 and, despite the theoretically binding force of the Privy Council decision in *Vict. Ry. Comms.* v. *Coultas*, *supra*, footnote 8, is no longer regarded as good law in any Commonwealth jurisdiction, even where not specifically abrogated by statute: see Fleming, *op. cit.*, *supra*, footnote 10, p. 169. In the United States, a small minority of courts still adheres to it, although its recent rejection in the former stronghold of New York may well lead to its total disappearance in the next few years: see *Battalla* v. *State* (1961), 10 N.Y. 2d 237; 219 N.Y.S. 2d 34; 176 N.E. 2d 729, overruling *Mitchell* v. *Rochester Ry.* (1896), 151 N.Y. 107, 45 N.E. 354.

[29] Most important of all is the decided tendency to deny recovery to a plaintiff who was not within the area of physical danger from impact, usually a mother or wife witnessing the accident from a position of safety. In some jurisdictions, this limitation has been raised to the status of a dogmatic rule (see *Waube* v. *Warrington* (1935), 216 Wis. 603, 258 N.W. 497; *Read* v. *Moore* (1957), 156 Cal. App. 2d 43, 319 P.2d 80); in others, it masquerades in the garb of "unforeseeability" (see *King* v. *Phillips*, *supra*, footnote 26). A notable exception is the recent English decision in *Schneider* v. *Eisovitch*, [1960] 2 Q.B. 430, where a wife, herself injured in the accident, suffered shock when told upon recovering consciousness that her husband had been killed. Insofar as this ruling was based on *Polemis* reasoning, its value as a precedent is now further reduced.

[30] *Supra*, footnote 3, at pp. 100, 106, 113.

consequences—without thereby subjecting the administration of the law to undue stress, but their combined effect committed English law to a posture which was as inelegant as it was pregnant with the seeds of capriciousness. For, apart from their theoretical inconsistency in both approbating and reprobating the fundamental premise that the reason for treating a defendant's conduct as culpable (namely, foreseeability of some particular harm) was irrelevant in meting out the bounds of his responsibility, their juxtaposition was capable of producing results which did little to disabuse each succeeding freshmen class in torts of the popular assumption that the law was indeed an ass.

Suppose, for example, that in the *Polemis* case a claim had been advanced by the owners of cargo stowed in the hold of the gutted *Thrasyvoulos*. Would it not have been incongruous to reject their demand, whilst admitting that of the shipowner, on the tenuous ground that no interest of theirs was foreseeably threatened in contrast to him whose door to recovery for equally unforeseeable and identical loss was opened ajar by the adventitious circumstance that some unspecified and quite unrelated damage might have been anticipated as the result of dropping the ill-fated plank? Or, to take another pertinent classroom example, it will be recalled that in the celebrated *Palsgraf* case[31] a railroad guard pushed a passenger somewhat brusquely into a departing train, thereby dislodging an innocent looking parcel from his arm which happened to contain fireworks. Upon falling under the train, an explosion occurred which caused a pair of scales, some considerable distance along the platform, to topple upon Mrs. Palsgraf. A majority of the New York Court of Appeals, speaking through Cardozo C.J., dismissed her claim against the railroad on the ground that the guard's negligence "did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else".[32] "The risk reasonably to be perceived defined the duty to be obeyed";[33] and the only individual whose interests were unreasonably exposed to hazard was the entraining passenger, at the very least with reference to the safety of his package. Mrs. Palsgraf, however, being outside the range of foreseeable danger, was therefore also beyond the pale of legal protection. Unfortunately, one's admiration for this seemingly impeccable course of reasoning is apt to be dispelled by Prosser's embarrassing inquiry:

[31] *Palsgraf* v. *Long Island R. Co.*, *supra*, footnote 2.
[32] *Ibid.*, at pp. 342 (N.Y.), 99 (N.E.).
[33] *Ibid.*, at pp. 344 (N.Y.), 100 (N.E.).

"Put Mrs. Palsgraf on the train beside the passenger with both of them injured by the explosion. Should recovery turn on which of them owns the parcel?" [34]

Surely, not even the English lawyer's penchant for indulging in "nice" distinctions—at once a testimony to his analytical subtlety and the bane of a pseudo-Austinian tradition [35] which all too often masquerades as a paltry excuse for neglecting urgent tasks of judicial reform—could justify such capricious conclusions. But on the other hand, might it not merely have been a reflection of that attitude of ambivalence which finds its analogue in American jurisdictions no less than those of the British Commonwealth? Apprehensive lest adoption of a universal solvent curtail the range of manoeuvre for achieving fair and acceptable results in the protean fact situations which call for adjudication, courts have characteristically shunned any rigid commitment to a specific formula or, if so committed, sought escape by manipulating it with ingenuity and discrimination. This facet is strikingly borne out, as I seek to demonstrate from the welter of American precedents to succeeding torts classes in Berkeley, by the perplexing identity in the legal disposition of cases regardless of whether the acknowledged criterion for "proximate cause" be foresight or direct causation. The adoption of competing rules within one and the same jurisdiction, therefore, however unpalatable to those placing a high premium on consistency and imaginary simplicity, did not in practice impose a noticeable strain on the process of adjudication, mitigated as it was in any event by the virtual disappearance of juries in England which at least removed the problem of reviewable jury instructions and thereby lessened the need for precise formulations of the appropriate legal "rule".

II. *The Wagon Mound.*

With this brief introduction we can now turn to the recent pronouncement by the Judicial Committee of the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.*, more conveniently referred to hereafter by its subsidiary title *The Wagon Mound.*[36] To assist the following analysis, a short account of the fact situation must be prefaced. In the course of refuelling the tanker *Wagon Mound*, moored to the Caltex wharf

[34] Palsgraf Revisited, *op. cit., supra*, footnote 27, at p. 23; and see Machin, Negligence and Interest (1954), 17 Mod .L. Rev. 405.

[35] See W. L. Morison, Some Myth about Positivism (1958), 68 Yale L.J. 212.

[36] *Supra*, footnote 4.

on the northern shore of Sydney harbour, a considerable quantity of furnace oil was carelessly allowed to overflow from one of its bunkers into the water whence it spread and was carried by wind and tide to the plaintiff's wharf, some 600 feet away, where another vessel *The Corrimal* was undergoing extensive repairs. Although alerted, neither Caltex nor the charterers of the *Wagon Mound* made any attempt to disperse the oil, in the belief supported by expert testimony at the trial that there was no recognizable fire hazard because of the high flash point of 170°F. which oil floating on water could not fairly attain. An inspector of the Maritime Services Board, who was called in for advice, confirmed this opinion, and the repair work aboard the *Corrimal* involving the use of electric and oxy-acetylene welding equipment was accordingly resumed. Two days later, however, the oil which had in the meantime remained in an unchanged condition around and fouling the plaintiffs' wharf suddenly burst into flames and severely damaged the wharf and vessel moored alongside. Subsequent scientific experiments supported the hypothesis, accepted as a fact by the trial judge, that the fire must have been set off by a "wick" when molten metal fell from the dock upon cotton waste or a rag floating beneath and ignited the surface oil. Thus, a rare and unlikely combination of circumstances which could well be ascribed to "coincidence"[37] falsified the previously-held and apparently reasonable belief[38] that the noxious discharge of the fuel oil, fraught though it might have been with the foreseeable hazard of fouling jetties and the like, was not attended by a fire risk sufficiently real to warrant precaution.

Despite these findings, the trial judge Kinsela J. and the Full Court of New South Wales, in an opinion delivered by Manning J., allowed the plaintiffs' claim for their loss which, on the accepted view of the evidence, was concededly unforeseeable.[39] Regretfully

[37] The notion of "coincidence" is meaningfully explored by Hart and Honoré, Causation in the Law (1959), pp. 72-6, 153-160. The learned authors define it in terms of the following four criteria which must be met: "... (1) the conjunction of two or more events in certain spatial or temporal relations is very unlikely by ordinary standards and (2) is for some reason significant or important, provided (3) that they occur without human contrivance and (4) are independent of each other." (p. 74).

[38] The relevence of a not dissimilar disaster, which occurred a few years before in Fremantle Harbour (see *Eastern Asia Navigation Co. Ltd.* v. *Fremantle Harbour Trust Comrs.* (1950), 83 C.L.R. 353), was somewhat lightly dismissed by the trial judge on the ground that he was not satisfied that "the incident was, in 1951, known generally in the mercantile world, or, in particular, to the defendant or its agents" (78 W.N. (N.S.W.) 163, at p. 169). The case was tried in Admiralty without a jury.

[39] (1959) 78 W.N. (N.S.W.) 163; [1958] 1 Lloyd's Rep. 575, [1959] 2 Lloyd's Rep. 697.

finding recourse to *Bourhill* v. *Young* precluded by the fact that some expectable damage to the plaintiffs (namely, the fouling of their wharf) had actually occurred, the Australian courts felt constrained to bow to the authority of *In re Polemis* and hold that the "threshold tort" committed by the defendants carried with it responsibility for all direct consequential harm, whether foreseeable or not. The slim escape hatch, of conceivably characterizing the sequence of events as "indirect", did not command sufficient appeal, although a comparison with the *Polemis* case disclosed at least this significant difference that the defendants, instead of—as it were—putting a torch to a powder barrel, had this time merely rolled it to where it was subsequently set off by others. Yet baffled by the evident conflict of precedents and sincerely expressing his own want of confidence, Manning J.'s anxious plea[40] for authoritative guidance from House of Lords or Privy Council was providentially answered when the defendants took the unusual step of by-passing the High Court of Australia and appealing directly to Downing Street.[41] Their strategy received its due reward as the Privy Council resolved the long-standing controversy by an unqualified acceptance of the foresight test in relation to the claim for negligence, though remitting without consideration the disposition of the nuisance count to the court *a quo*.[42]

III. *The Foresight Test in General Perspective.*

The apotheosis of the foresight or risk theory will be welcomed by some jurists, most of all Dr. Goodhart, as the vindication of a

[40] "This cri du coeur": *Supra*, footnote 4, at p. 415 (A.C.).

[41] This idiosyncrasy of Australian procedure is very occasionally exploited by appellants who fear that the High Court would deem itself bound by precedent to give an adverse ruling, but hope that the Judicial Committee will consider their submission on its merits. In view of the High Court's recent attitude of independence vis-à-vis the English Court of Appeal (see, *e.g.*, *Comr. for Rys.* v. *Scott* (1959), 33 A.L.J.R. 126 (employer's action for loss of services), *Comr. for Rys.* v. *Cardy* (1960), 34 A.L.J.R. 134 (trespassers), it is a matter for intriguing speculation what it would have made of *In re Polemis*.

[42] No consideration is given in this article to the question of remoteness of damage in relation to claims other than for negligence. It is significant, however, that the Privy Council lent no countenance to the view, so assiduously fostered in certain English textbooks, that the same criterion controls the whole field of torts. Indeed, in an aside, Viscount Simonds made light of the argument, consistently propounded by Dr. Goodhart over the years, that *In re Polemis* was objectionable if only because of its inconsistency with the contract rule in *Hadley* v. *Baxendale* (1845), 9 Exch. 341 (see *supra*, footnote 4, at pp. 419-420). Surely, the policies in dealing with bargains on the one hand and involuntary harms on the other are rather different. The arguments canvassed in this section of my article, for example, are not particularly relevant to a discussion of contract problems.

lifetime's dedicated advocacy.[43] Others will wistfully bow to it as yet another triumph of new-fangled theory over the ancient verities of the common law.[44] Finally, there are those of us, less partisan, whose scepticism concerning the role of rule-formulas has so sapped their capacity for sanguine reaction as pardonably to incline to a less magnified estimate of the decision's likely effect.[45] Indeed, their Lordships themselves made no higher claim than the modest prognosis that, "it is not probable that many cases will for that reason have a different result, though it is hoped that the law will thereby be simplified, and that in some cases, at least, palpable injustice will be avoided".[46] The following analysis will attempt to test the accuracy of this prediction.

Perhaps the most striking general impression conveyed by Viscount Simonds' opinion is the disclaimer of speculative theory in justifying the Board's conclusion. In a sense this is, of course, a familiar feature of English judicial technique which prefers the elegant façade of undramatic case-law analysis, interspersed with a few generalizations, to the Australian frankness of acknowledging the agonizing quest for principle and the candid adversion to policy by some of the more distinguished American judges.[46A] Yet the conspicuous avoidance of any commitment to the theories of

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[43] Goodhart's writings in this area have been voluminous: see Liability for the Consequences of a "Negligent Act", in Essays in Jurisprudence and the Common Law (1926, 1931), Ch. VI; The Unforeseeable Consequences of a Negligent Act (1930), 39 Yale L.J. 449, reprinted *sub tit.* The Palsgraf Case, in Essays *etc, ibid.*, Ch. VII; The Imaginary Necktie and The Rule of Re Polemis (1952), 68 L.Q. Rev. 514; Liability and Compensation (1960), 76 L.Q. Rev. 567.

Of similar tenor is Seavey, Mr. Justice Cardozo and the Law of Torts (1939), 52 Harv. L. Rev. 372 and Principles of Torts (1942), 56 Harv. L. Rev. 72.

[44] Curiously, among these must be counted both counsel for the unsuccessful charterers in *In re Polemis:* Lord Porter, Measure of Damages in Contract and Tort (1934), 5 Camb. L. J. 176 and Lord Wright, Re Polemis (1951), 14 Mod. L. Rev. 393. Hart and Honoré also appear to have unquestioningly accepted *In re Polemis* in their erudite monograph, *op. cit., supra*, footnote 37, but see Honoré's comment on *The Wagon Mound* (1961), 39 Can. Bar Rev. 267.

[45] For other comments on the instant decision see W. L. Morison, The Victory of Reasonable Foresight (1961), 34 Aust. L. J. 317; Glanville Williams, The Risk Principle (1961), 77 L.Q. Rev. 179.

The question whether the decision will be considered binding by English courts is the subject of an extended note by Goodhart (1961), 77 L.Q. Rev. 175. Its effect in Canada, prior to a pronouncement by the Supreme Court, was mooted but not decided in *Munshaw Colour Service Ltd.* v. *Vancouver (City)* (1961), 35 W.W.R. 696, 29 D.L.R. 2d 240.

[46] *Supra*, footnote 4, at p. 422 (A.C.).

[46A] See Roger J. Traynor, No Magic Words could do it Justice (1961), 49 Calif. L. Rev. 615; but *cf.* K. Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

Cardozo,[47] Seavey[48] and Goodhart,[49] who variously sought to impress the foresight solution with the stamp of logical inevitability, may well be evidence of a conscious reservation regarding these ambitious claims to intellectual rectitude. Whether this is attributable to the impact of modern criticism by Hart and Honoré,[50] among others, who have laboured assiduously in the vineyards to expose these pretensions, or simply to an understandable preference for the pragmatic approach must perforce remain in the realm of speculation, no debt to living authors being customarily acknowledged. Significant it is however that Viscount Simonds, apart from repeatedly stressing the administrative weaknesses of the competing causal theory, confined himself merely to the brief positive assertion that:

> It does not seem consonant with current ideas of justice or morality that for an act of negligence, however, slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.[51]

This declaration should be accepted for what it is: not as an inexorable conclusion derived by a process of logical reasoning from a rigid premise concerning the "true nature" of negligence, but as a conscious choice of policy between competing ideals. It does not, because it cannot, purport to deny the *validity* of the opposing standpoint that, as between one who unjustifiably created an unreasonable risk and his innocent victim, the balance of equities should favour the latter rather than him who by his own negligence has set the whole thing in motion, even if it means that the sanction may sometimes be incommensurate with his original fault. True it is that, to the extent of this disparity, liability would assume an element of "strictness", but this is not (as Goodhart seems to be earnestly claiming) *logically* incompatible with linking it to merely

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[47] In the *Palsgraf Case*, *supra*, footnote 2. The fascinating story of his persuasion as the result of participating in the deliberations of the Council of the American Law Institute on the Restatement of Torts is related by Prosser in Palsgraf Revisited, *op. cit.*, *supra*, footnote 27.

[48] *Op. cit.*, *supra*, footnote 43.

[49] *Ibid.*

[50] *Op. cit.*, *supra*, footnote 37, especially Ch. IX (Foreseeability and Risk).

[51] *Supra*, footnote 4, at pp. 422-423 (A.C.).

negligent conduct.[52] Even if we concede that negligence is a "term of relation",[53] in the sense at least that an act does not assume the quality of negligence except by reference to foreseeably harmful consequences, it does not necessarily follow that liability should be restricted to such consequences alone. Conduct, once labelled negligent because fraught with risk of some particular harm, may well be thought to carry with it deserved responsibility for other or additional loss it caused, whether it was foreseeable or not. The question is one of policy, not logic; its resolution lies in the realm of values, and "what you choose depends on what you want".[54]

In terms of kerb-stone morality, there is as much (and no more) to be said in favour of the innocent plaintiff as the hapless defendant. Who would gainsay that the harshness of burdening the actor with potentially far-reaching responsibility for a mere trivial lapse does not find its counterpart in the injustice of denying his victim redress and letting the loss lie where it happened to fall? Quite frankly, both arguments appear to cancel out, and this notwithstanding Viscount Simonds' seeming indifference to the latter. If depart we must then from the authoritative script and venture into the market place of ideas, are there any other pertinent factors which might fairly claim to influence our choice? Most relevant, clearly, in the context of contemporary tort law, are those bearing upon accident prevention and loss distribution.

The element of deterrence has traditionally played, and will undoubtedly continue to play, a vital role in the formulation of legal norms. Its influence has not surprisingly been strongest in the area of intentional wrongs which are most closely akin to conventional crimes. One such manifestation, of peculiar interest to the present inquiry, is the unsympathetic response to pleas by trespassers and others guilty of intentional aggression that they be excused for unexpected harm following in the wake of their transgressions. Indicative of the general approach is the well-known case of *Wilkinson* v. *Downton*[55] where, it will be recalled, a woman suffered a nervous shock upon being told by a practical joker that her husband had been severely injured in an accident. In disposing of the argument that the defendant had wanted only to scare, not hurt, her, Wright J. retorted that it was "no answer in law to say

[52] Fleming, *op. cit.*, *supra*, footnote 10, p. 191; Hart and Honoré, *op. cit.*, *supra*, footnote 37, pp. 236-237.

[53] It was Cardozo J. who gave currency to this expression in the *Palsgraf* case, *supra*, footnote 2.

[54] Gregory, Proximate Cause in Negligence — A Retreat from Rationalization (1938), 6 U. Chi. L. Rev. 36, at p. 47.

[55] [1897] 2 Q.B. 57.

that more harm was done than was anticipated, for that is commonly the case with all wrongs".[56] Somewhat related is the doctrine of "transferred intent" by which a defendant, who intending to commit an assault or battery on one person accidently injures another, is treated as if he had intended to hit the latter all the while. Though supported on the crutch of a bare-faced fiction and lacking modern authority outside the United States in its application to civil claims,[57] it is a telling example of how far the law is occasionally prepared to reach in order to deter and penalize reprehensible conduct. Perhaps more germane is the continuing trend to hold a trespasser strictly responsible for damage caused by his presence on the land, regardless of any inquiry into fault.[58] Thus, if the occupier were by chance to collide with him in the dark and injure himself in falling, the intruder would apparently be held accountable, though innocent of carelessness and however unrelated the harm to the recognizable risks of the invasion.

Enough has been said, I believe, to carry the point that, for the sake of more effective deterrence, courts have not shrunk in appropriate cases from imposing the most far-reaching liability and subordinating the "equities" of defendants to the demands of a more exacting policy.[59] Nor is there any warrant in the *Wagon*

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[56] *Ibid.*, at p. 59.

[57] I know of no modern decision or dictum by a Commonwealth court favouring this doctrine, except an isolated remark by Latham C.J. in *Bunyan* v. *Jordan* (1937), 57 C.L.R. 1, at p. 12, that "if A, intending to hit B unlawfully, in fact hits C, there is no doubt as to A's liability to C". Emulating Lord Campbell's treatment of certain Ellenborough decisions, I have previously exercised an author's privilege of suppressing all reference to it in my textbook. Modern American authority is likewise far from impressive, though Prosser (On Torts (2 ed., 1955), pp. 33-34) and the Restatement of Torts (§§ 16, 20) acknowledge its existence.

[58] *Wormald* v. *Cole*, [1954] 1 Q.B. 614, per Goddard L.C.J. at p. 625: *Turner* v. *Thorne*, [1960] O.W.N. 20, (1959), 21 D.L.R. 2d 29; *Wyant* v. *Crouse* (1901), 127 Mich. 158, 86 N.W. 527 and other American decisions cited by Prosser, *ibid.*, p. 57; Restatement of Torts §163, comment *f*.

[59] One of the most extreme illustrations of recent vintage is *Tate* v. *Canonica* (1960), 180 Cal. App. 2d 898, 5 Cal. Rptr. 28, which overruled a demurrer to a complaint alleging that the defendant had wrongfully caused the deceased's death by intentionally subjecting him to serious mental distress in consequence of which he committed suicide. The court rejected as inapplicable decisions denying recovery for suicide consequent upon negligent injury and invoked Restatement of Torts §279 which makes the actor liable for all harm of the "type" intended by him, provided his conduct was a causally relevant factor. (Although Council Draft No. 3 of Restatement 2d proposes deletion of §§279, 280, the matter seems to be covered in the same sense by §870). In doing so, the court misapplied §279 which does not purport to deal with unintended consequences of intentional torts, but with liability for intended consequences. It should have realized its error when forced into the position of holding the suicide to be harm of the "type intended". More appropriate would have been §916 (§435B of Restatement 2d according to Prelim. Draft No.

Mound for anticipating a reversal of this trend; for, as already mentioned, it expressly refrained from any commitment with respect to torts other than negligence.[60] The question persists, however, whether our contemporary scale of social values would accord to accident-prevention a weight corresponding to deterrence of intentional wrongdoing. It is of course hardly open to serious debate that this policy has exerted an influence, more vital and pervasive probably than any other, on the progressive development of our accident law. The vast proliferation of duties of care which has today reached a point in Anglo-American law where few, if any, islands of immunity remain;[61] the noticeable rise in the standard of care, supplemented by the judicial doctrine of statutory negligence which has the effect of requiring "strict" conformity with an ever-increasing volume of legislative safety standards; and not least the statutory and common-law extensions of strict liability, so poignantly illustrated by the contemporary American trend of discarding the privity requirement in warranty actions in relation to food, drugs and other highly dangerous commodities, like automobiles[62]—none of these dramatic changes in the reallocation of risks incident to modern life in the highly complex societies of the Western world can be adequately accounted for except on the basis of a growing awareness of the need to conserve our human and material resources by applying the pressure of liability at those strategic points where accident-prevention can be most effectively promoted.

But after all this is said, it still remains highly problematical

7) which does not eliminate all proximate cause limitations but suggests a more stringent range of responsibility then in cases of mere negligence.

[60] *Supra*, footnote 4, at p. 427 (A.C.).

[61] In English law, this has been due to the impetus of *Donoghue* v. *Stevenson*, [1932] A.C. 562 whose far-flung progeny has ensured us today of almost universal protection against physical injury caused by the negligence of others (including, it would seem, negligent misstatements: see the recent decision of *Clayton* v. *Woodman & Son*, [1961] 3 All E.R. 249; *cf. Guay* v. *Sun Publishing Co.*, [1953] 2 S.C.R. 216, [1953] 4 D.L.R. 577). Many American courts have pushed further and crossed the boundary into the area of economic loss: see *Biakanja* v. *Irving* (1958), 49 Cal. 2d 647, 320 P. 2d 16, 65 A.L.R. 2d 1358 (attorney liable to disappointed legatee for negligently preparing will).

[62] Our law, though retaining the privity requirement, achieves the same result in most cases through a series of indemnity claims, placing the ultimate burden on the manufacturer. But this process of going up the ladder is stultified, if perchance the person injured cannot reach someone along the line of distributors in the first place.

In the United States, a substantial majority of courts now permit tort actions regardless of privity in cases of deleterious food, and are gradually expanding this liability to other highly dangerous commodities (see especially *Henningsen* v. *Bloomfield Motors* (1960), 32 N.J. 358, 161 A. 2d 69; *Greenberg* v. *Lorenz* (1961), 9 N.Y. 2d 195, 173 N.E. 2d 773; and Prosser, The Assault upon the Citadel (1960), 69 Yale L.J. 1099).

whether the policy of accident prevention can claim to make a serious contribution to the debate of where to stake the outer boundaries of liability for admitted negligence. Its proper function revolves primarily around the question whether a particular type of activity or conduct should be discouraged by the spectre of legal liability, and seems to be near exhaustion once that decision has been made. It is, of course, arguable that the prospect of more extensive liability may exert a correspondingly greater deterrent pressure on the would-be actor, but the force of this exceedingly speculative claim is in any event reduced to vanishing point by the fact that we must assume such additional liability to be *ex hypothesi* unforeseeable and therefore, presumably, beyond the range of practical calculation.

Though we are reluctantly forced, therefore to discount the relevance of accident-prevention, the policy of loss-distribution has a more obvious claim to attention in the present inquiry. Its advocates[63] set out to re-emphasize that traditionally one, if not the most important, aim of the law of torts has been to afford compensation to those who have suffered harm at another's hands. True it is that this policy has always had to compete with countervailing considerations, especially the anxiety lest the impact of liability exert an undue deterrence on human activity and enterprise. In certain periods of the past, particularly during the nineteenth century, these apprehensions were accorded the fullest recognition in the interest of an acquisitive society bent on expansion and inclined to make light of the incidental cost to human and material assets. The subordination of the individual's security was deemed a necessary toll for achieving the more valuable goal of rapid industrial development and exploitation of the seemingly inexhaustible store of available resources. If injuries went without redress, it was but the victim's admission fee to participation in the larger benefits secured by advancing civilization. The current philosophy of laisser-faire, aligned to these economic tenets, lauded

[63] The "father" of this modern philosophy is probably my colleague Ehrenzweig whose monograph, Negligence without Fault (1951), has had an immense impact on the younger generation of torts teachers, although the idea is already encountered in Y. B. Smith, Frolic and Detour (1923), 23 Col. L. Rev. 444. It has been systematically applied in the treatise by Harper and James, on Torts (1957) and, to some extent, in my own book. Among other exponents, mention should be made of Gregory, Trespass to Negligence to Strict Liability (1951), 37 Vir. L. Rev. 359; Leflar, Negligence in Name Only (1952), 27 N.Y.U.L. Rev. 564; Parsons, Individual Responsibility versus Enterprise Liability (1956), 29 Aust. L.J. 714; whilst C. R. Morris, Jr. thoughtfully cautions against occasional excesses in Enterprise Liability and the Actuarial Process — The Insignificance of Foresight (1961), 70 Yale L.J. 554.

the virtues of individualism and self-reliance and viewed the task of tort law as primarily confined to its admonitory, rather than compensatory, function. But with the passage of time, these social postulates have undergone a drastic revision. The individualistic fault dogma is being eroded by the mid-twentieth century quest for social security, the welfare state replacing an outmoded order where man was expected and encouraged to fend for himself. Enhanced social consciousness has today led to the broad acceptance of the view that society can no longer afford to turn its back on the hapless victims of disaster or accident, leaving us only with the practical task of devising the economically least burdensome methods for redressing or mitigating their misfortune.

In promoting this object, the law of torts has its own part to play, and an important one at that; for to the extent that it ensures compensation for the injured, it is participating in the process of welfare economics and performing a task that would otherwise fall to social security. This renewed emphasis on the compensatory function of tort law has been aided by a growing recognition that an award of damages will result not merely in the shifting of a loss from plaintiff to defendant but in its further distribution, if the latter is either insured or otherwise in a position to pass it on as a small fraction of the cost of his goods or services. In this manner an adverse verdict, far from spelling likely ruin to the defendant, will be painlessly absorbed and its cost eventually spread over a large segment of the community so thin as to be barely noticed. Acceptance of this viewpoint naturally focusses attention more on a defendant's loss-bearing capacity and less on conventional considerations of fault. Indeed, even its most sanguine opponents are generally prepared to make at least the reluctant concession that it disposes convincingly of those heart-rending pleas by defendants which have often in the past persuaded courts to distort the law by creating special privileges and immunities (including the negation of duties of care) in the belief that the impact of ordinary responsibility would expose them to intolerable burdens.[64] Its advocates, on the other hand, would go further and strive towards an eventual replacement of the fault criterion by strict liability in all those areas of accident law where defendants offer a suitable focus for channelling off and distributing the losses

[64] The first-fruits of this recognition are already apparent in the increasing abandonment by American courts of the once-widespread doctrines of charitable and governmental immunity and the recent abolition of marital immunity by the legislature of South Australia with respect to claims against insured drivers (see Fleming, *op. cit.*, *supra*, footnote 10, p. 643).

incident to their enterprise. The doctrine of vicarious liability, the modern trend pronounced in most jurisdictions of postulating standards of care from motorists and employers which often strain the verbal link with negligence to breaking point, the proliferation of safety statutes in industry combined with the judicial doctrine of negligence *per se* which at least in England and Australasia have rewritten in large measure the law of employers' liability,[65] the concurrent weakening of the traditional defences of voluntary assumption of risk and contributory negligence—all these developments in our time have contributed their share in giving some substance to the claim that the fault dogma is already far on the path of decline in many significant areas of accident law.

Viewed from this perspective, the Privy Council's opinion in the *Wagon Mound* may seem a retrograde step, ill-attuned to general trends in the law of torts. For, if it is to have any practical effect on the future course of adjudication at all, it will be by setting somewhat narrower limits to the range of recovery than heretofore, and to that extent impairing the process of shifting and distributing losses. It is therefore at least open to argument whether Viscount Simonds correctly gauged the tenor of "current ideas of justice or morality" in expressing the belief that it would be "out of consonance" and "too harsh" to countenance liability beyond the ambit of foreseeable risks.[66] On the face of it, at any rate, it is a trifle paradoxical that the apotheosis of foresight had to await a moment of decision when the very notion of fault liability was already under the lengthening shadow of decline and, as happens not infrequently, the acceptance of a rule is so long deferred that its destined role is merely to impede the next stage of legal progress. However that may be, the Board's opinion does not seem to have been uninfluenced by the noticeable trend towards stricter liability, and its sympathetic reference to the predicament of defendants who are held responsible for an "act of negligence, however slight or venial", involving the risk of but "trivial foreseeable damage", rather suggests an inclination to temper a little the wind to the shorn lamb.[67] But previous experience in the judicial handling of the foresight test, both in relation to the issue of initial culpability

[65] Where, unlike in Canada and the United States, an injured employee is not relegated to workmen's compensation. The effect of this option on the over-all pattern of social security in the United Kingdom, Australia and New Zealand seems to be barely appreciated in North America.

[66] *Supra*, footnote 4, at pp. 422-423 (A.C.). Since writing this article, I have found that Dean C. A. Wright arrived at substantially the same position in The Adequacy of the Law of Torts, [1961] Camb. L.J. 44, at pp. 56-57, 6 J. of S.P.T.L.(N.S.) 11, at pp. 21-22.

[67] *Ibid.*

(breach of duty) and remoteness of damage in cases involving "indirect" consequences, lends scant support to sanguine expectations of any appreciable change in the future direction of the law. This impression is reinforced by the fact that, as already noted, very few cases indeed ever fell to be decided on the basis of the defunct *Polemis* rule[68]—a telling index of the very limited practical effect to be anticipated from the decision under review. The following analysis of foresight will, it is believed, add further confirmation to this prediction.

IV. *An Anatomy of Foresight.*

Viscount Simonds' repeated aversion to the indeterminacy of the "direct consequence" test strongly suggests that the Board's decision was not uninfluenced by a belief that "reasonable foreseeability" provided a more meaningful and, from the viewpoint of practical administration, more workmanlike yardstick. There is

[68] In England, the rule exerted an influence in *Hambrook* v. *Stokes*, *supra*, footnote 16, *Thurogood* v. *Van den Berghs & Jurgens Ltd.*, [1951] 2 K.B. 537 and *Jones* v. *Livox Quarries Ltd.*, *supra*, footnote 19, but, as will appear from the following discussion, none of these cases would probably have been decided otherwise on the basis of the foresight test. Only in *Pigney* v. *Pointers Transport*, [1957] 1 W.L.R. 1121, [1957] 2 All E.R. 807 does it appear to have led to a decision which, extravagant at the time, has become all the more indefensible today (suicide of accident victim in despair a "direct" consequence of tortfeasor's negligence: see my criticism in (1957), 31 Aust. L.J. 587).

In Canada, it was applied in *F. W. Jeffrey & Sons Ltd.* v. *Copeland Flour Mills Ltd.* (1922), 52 O.L.R. 617, [1923] 4 D.L.R. 1140 (discussed *infra*, footnote 120) and *Patten* v. *Silberstein*, [1936] 3 W.W.R. 169 which was not followed on almost identical facts in *Duce* v. *Rourke* (1951), 1 W.W.R. (N.S.) 305 (accident victim exposed to theft of belongings). In the analogous American case of *Brower* v. *New York Central etc., R. Co.* (1918), 91 N.J.L. 190, 103 A. 166 liability was imposed as in *Patten* and this result is approved by Restatement of Torts §302 and Tentative Draft No. 4 of Restatement 2d, §302B and ill. 7.

In Australia, the *Polemis* rule furnished alternative support for the decision in *Malleys Ltd.* v. *Rogers* (1955), 55 S.R. (N.S.W.) 390 (otherwise based on the ambit of the recognizable risk) and *Richards* v. *Baker*, [1943] S.A.S.R. 245 (a case somewhat like *Hambrook* v. *Stokes*, *supra*, footnote 16, that would probably have been decided in favour of the plaintiff anyway).

In New Zealand, it has been occasionally invoked but not so as to affect the decision: see *Barrett* v. *Hardie & Thompson Ltd.*, [1924] N.Z.L.R. 228 (a straightforward case of foreseeable risk), *Cervo* v. *Swinburn*, [1939] N.Z.L.R. 430 (loss of earnings), and *Williams* v. *B.A.L.M.* (*N.Z.*) *Ltd. No. 3*), [1951] N.Z.L.R. 893 (latent heart condition).

Scots law miraculously escaped the taint altogether and consistently adhered to the formula of "reasonable and probable consequences": see *The Wagon Mound*, *supra*, footnote 4, at p. 420 (A.C.) ("rejected with determination"); *Blackie* v. *British Transport Commission*, 1961 S.L.T. 189; *Cowan* v. *National Coal Board*, 1958 S.L.T.(N.) 19. This view is questioned, though not persuasively, by D. M. Walker, Remoteness of Damage and Re Polemis, 1961 S.L.T. 37.

This is a far from impressive record for a life cycle of nearly forty years.

certainly no reason for cavil that the categorical repudiation of "causal" theories[69] will have the wholesome effect of discouraging future speculation into the abstruse mysteries of "legal" causation which for so long disfigured and obscured the analysis of remoteness problems.[70] Banished henceforth will be such beguiling casuistry as the fancied distinction between *conditions* (which merely provided the occasion for harm) and "real", "effective", "dominant" or "precipitating" *causes* (which deserved the attribution of legal responsibility); disowned also the addiction to metaphors culled from the physical sciences, like "snapping the chain" of causation, "active and passive" forces which might either be "in motion" or have come "to rest", "conduit pipes", "transmission gears" and other frightening images of the boiler room that were once allowed to cast the illusion of scientific reasoning, but were really nothing but rank obscurantism and obstacles to realistic analysis.[71] Strange indeed that its worst manifestations were as often as not accompanied by an earnest caution that "the lawyer [could] not afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause",[72] when in truth it was the lawyers who were vying for the tarnished trophies of scholasticism which philosophers had long ago abandoned in quest for more fruitful insights into the vagaries of language. It is only fair to record, however, that those dismal days when the law seemed to be "living in fantasies of its own"[73] were happily receding into the memory of the past, even if there was not wanting an occasional reminder that the tradition was far from defunct. Since the middle thirties, at any rate, judicial opinions evinced an increasing disillusionment with the sterile discourse of "legal cause", replacing it by the more meaningful inquiry into the scope of the foreseeable risk. Though, as already noted,

[69] *Supra*, footnote 4, at pp. 419, 421, 423, 424 (A.C.).

[70] Hart and Honoré's valiant attempt (*op. cit., supra*, footnote 37) to rescue the causation theory from the trough of disrepute suffers, with respect, from the weakness that their "common sense" notions of causation seem to a large extent to reflect "artificial" legal rules, rather than vice versa, if they are not actually inconsistent with them. In addition, their approach makes too little allowance for policy and, thereby, quite unintentionally, fosters the naive belief that decisions in actual cases are controlled by rules to the exclusion of a host of extra-legal factors.

[71] The prize must, however, go to an American court for the pontifical, and singularly inane, pronouncement that "proximate cause is a rule of physics and not a criterion of negligence": *Collier* v. *Citizens Coach Co.* (1959), 330 S.W. 2d 74, at p. 76 (Ark.).

[72] The wording is Pollock's, but it is nonetheless representative of the type.

[73] A spectre against which Devlin L.J. recently uttered a warning in another context: *Berry* v. *British Transport Commission*, [1961] 3 All E.R. 65, at p. 75.

this trend became dominant primarily in relation to the problem of "intervening causes", it was nonetheless of crucial importance, since all but a handful of reported decisions raised this rather than the issue of "direct" consequences. Not the least positive contribution of the Board's opinion in the *Wagon Mound*, therefore, is that it has set the seal of approval upon this modern reorientation and extended its benefits to the whole area of remoteness of damage.

Yet it would be indulging a delusion of another kind to regard foreseeability as a test endowed with anything like clarity or precision. Indeed, its very appearance of simplicity masks a host of inherent ambiguities which only progressive interpretation may eventually dispel. Right at the threshold, for example, lies the ingenuous belief that the limitation of responsibility to foreseeable consequences has the advantage of subsuming the two questions of initial culpability and extent of liability to one and the same legal test. But as Hart and Honoré have convincingly demonstrated,[74] this widely prevalent claim, apparently shared by Lord Simonds himself,[75] is in reality more plausible than true, for it rests on nothing but an ambiguous use of the term "foreseeable". Much encouragement has been lent by English judicial opinions to the notion, which is all the same fallacious, that a decision whether given conduct is negligent depends simply, no more and no less, on the answer to the question whether a reasonable man in the defendant's position would have foreseen the likelihood of injury. In addition, a good deal of attention has been devoted to the debate whether the requisite foresight postulates a "probability" or mere "possibility" or "likelihood" of damage.[76] Both are misleading, the first because the elliptical form of expression used conceals the very complex characteristics of the legal notion of negligence; the second because it accords undue prominence to the relative imminence of the risk. In truth, a determination of negligence involves a balancing of various factors: on the one hand, the gravity and imminence of the recognizable risk; on the other, the utility of the challenged conduct.[77] Clearly, the question cannot be reduced to one of mathematical probability alone, because the

[74] *Op. cit., supra,* footnote 37, p. 238 *et seq.*

[75] *Supra,* footnote 4, at p. 423 (A.C.).

[76] See for instance, *Bolton* v. *Stone,* [1951] A.C. 850 (the cricket-ball case which was perhaps as much influenced by a desire to deal leniently with a national sport as are certain decisions of the U.S. Supreme Court creating a "baseball" exemption from anti-trust legislation).

[77] Fleming, *op. cit., supra,* footnote 10, p. 124; Prosser, *op. cit., supra,* footnote 57, p. 123; Restatement of Torts §291; *Conway* v. *O'Brien* (1940), 111 F.2d 611, at p. 612, per Learned Hand J. (2d Cir.).

seriousness of the injury risked must at the very least be taken into account as well. Thus, as the gravity of possible injury increases, so the apparent likelihood of the risk materializing need be correspondingly less. The resulting estimate must then be weighed against the social value, if any, attaching to the defendant's conduct. There are occasions when, in order to promote a worthwhile object like getting an injured person speedily to hospital, a greater risk of exposing oneself or others to injury may justifiably be taken than in merely indulging one's ennui or caprice. Negligence, in short, consists of much more than foreseeability of damage, and the latter element is in any event an exceedingly variable factor.

When this is borne in mind, it becomes clear at once that the foreseeability predicated for recovery of consequential harm is something rather different from the determination whether the defendant was negligent or not. Besides, even if we were to confine consideration to such consequences alone the foreseeable risk of which prompted the conclusion (in combination with the other above-mentioned factors) that the defendant's conduct was unreasonable, we would be committing ourselves to the questionable proposition that there can be no recovery for harm which was not *the*, or at least *a*, reason for calling the defendant's conduct negligent. Yet such a restrictive gloss would not be consonant with long-established precedent, nor should it be readily imputed to their Lordships who were obviously quite unconscious that their seemingly innocuous generalizations might be interpreted as a warrant for so drastic a change in the future direction of the law. At least with respect to harm that has been conveniently described as "ulterior", recovery has oft-times been allowed in recent years for consequences which survived a challenge of foreseeability and yet could not have "figured intelligently"[78] among the reasons for condemning the defendant of negligence. To take a recent example, decided but a few weeks prior to the *Wagon Mound* and involving a by no means unprecedented situation:[79] A negligently collided

[78] Hart and Honoré, *op. cit.*, *supra*, footnote 37, p. 239.

[79] *Dwyer* v. *Southern* (1961), 78 W.N. (N.S.W.) 706. See also *Executor Trustee & Agency Co.* v. *Hearse*, [1961] S.A.S.R. 51 (doctor attending victim of road collision, caused by A, killed by negligent driver B. A held liable for wrongful death). A leading American decision reaching the same conclusion on similar facts is *Marshall* v. *Nugent* (1955), 222 F.2d 604 (1st Cir.). See also the striking case of *In re Guardian Casualty Co.* (1938), 253 App. Div. 360, 2 N.Y.S. 2d 232 where a negligent driver was held responsible not only for the original collision but also injury to a bystander who was killed by falling masonry dislodged when a wrecking crew freed the damaged vehicle from a building in which it had become wedged. At the opposite pole of the spectrum is *Mauney* v. *Gulf Ref. Co.* (1942), 193 Miss. 421, 9 So. 2d 780 which took the absurdly narrow view

at night with an oncoming truck, leaving both vehicles astride the highway. B, a passenger in the car behind the truck, got out and commenced assisting those imprisoned in A's automobile. Within minutes, C negligently ran into it from the rear, causing it to strike B and knock her down. A sought to disclaim responsibility for B's injuries, but failed on the ground that the second accident was a "not uncommon", "rather familiar" and "not nearly extraordinary" concomitant of the dangerous situation created by him.[80] But only by an abuse of language or fallacious reasoning, could this second accident be supposed to have entered into the considerations of the reasonable man as a reason for driving carefully so as to avoid the first. This is so because the prospect of the first would have been sufficient to deter him from driving carelessly, and to ask him whether he would have been deterred by the further harm is to put a question he cannot answer.[81]

It seems to be common ground, therefore, among commentators that, in cases of ulterior harm at least, like the foregoing or those involving rescuers[82] and improper medical treatment of accident victims,[83] the foreseeability requirement may well be satisfied, although the particular harm could not fairly be regarded as a relevant factor in passing upon the defendant's initial culpability. All that appears to be required in this type of case is that the subsequent incident was not a wholly abnormal or unprecedented eventuality, though its likelihood be so remote that, *standing alone*, it would not have influenced a reasonable man in deciding upon his future course of action. This inference from prevailing case-law is confirmed by the postulate of the *Restatement of Torts* that the recognizable likelihood of such an event need not be "enough in itself to make the actor's conduct negligent, the conduct being negligent because of other and greater risks which it entails".[84]

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that a mother's stumbling over a chair in seeking to reach her infant child and get it to safety was an unforeseeable consequence of negligently causing an explosion of a tank car across the road. The court reasoned that the defendants could not have "foreseen from across the street and through the walls of a building on another corner what appellant did not see right at her feet"!

[80] *Ibid.*, at p. 710.

[81] Hart and Honoré, *op. cit.*, *supra*, footnote 37, pp. 239-240.

[82] *Wagner* v. *International R.R.* (1921), 232 N.Y. 176, 133 N.E. 437; *Baker* v. *Hopkins*, [1959] 1 W.L.R. 966, [1959] 3 All E.R. 225; *Haynes* v. *Harwood* [1935] 1 K.B. 146.

[83] See *R.* v. *Smith*, [1959] 2 Q.B. 35, in the light of which the distinction drawn in *Mercer* v. *Gray*, [1941] O.R. 127, [1941] 3 D.L.R. 564 and *Black* v. *Martin*, [1951] 4 D.L.R. 121 (Alta.) between negligent and non-culpable treatment may require reconsideration. The weight of American authority unquestioningly supports liability in either case: *Thompson* v. *Fox* (1937), 326 Pa. 209, 192 A. 107; Restatement of Torts §457.

[84] §447, comment *a*.

Indeed, I would go further and make bold to assert that this is true not only of "ulterior" harm, as that term is generally understood, but of all injurious consequences resulting from a defendant's negligent conduct; in other words, that it is a valid statement of general application to the whole problem of remoteness of damage in the law of negligence. For, if recovery is henceforth allowed only for any *particular* harm that was foreseeable—and, *a fortiori*, if credence is to be given to the more drastic suggestion that even the sequence of intervening events must be foreseeable[85]—it would be placing an unduly narrow restriction on the scope of recovery if it were also necessary to show that such particular harm, besides being foreseeable in the somewhat diluted sense of something that is not unfamiliar, unprecedented or beyond the range of human calculation, was also *the*, or at least *a*, reason for labelling the defendant's conduct negligent.[86] Not infrequently, an actor's conduct is deemed unreasonable only because of the aggregate of risks which it entailed. Should a plaintiff's chance of recovery be conditioned by his ability to prove that the particular risk which eventuated would have been sufficient, standing alone, to warrant a finding of negligence? Or that the risk of that particular harm, and all the more the sequence of intervening events, was so much as a factor in reaching that conclusion? To take another illustration, suggested by Prosser in a related context: "Suppose that the defendant operates a railroad train without a proper lookout. There is some likelihood that he will collide with an automobile or a cow, or derail his train and injure his passengers; rather less that he will endanger a child on the track and in-

[85] *Infra*, footnote 112.

[86] This restrictive test is controlling only in cases of statutory negligence where recovery is limited to harm of the kind which it was the object of the legislature to prevent; in other words, to harm the risk of which made the defendant's violation negligent: *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125. The distinction is well illustrated by a recent California case where the defendant disobeyed a city ordinance which prohibited the sale of gasoline in other than closed cans not exceeding a capacity of two gallons. Having sold five gallons in an open container, the purchasers threw it into a bar, set it alight and thereby caused an explosion which killed and injured several customers. The District Court of Appeal, unmindful of the abovementioned distinction, ruled for the plaintiffs on the ground that it was not unforeseeable as a matter of law that the recipients might either intentionally or accidentally endanger and injure others. The Supreme Court reversed because the injury did not fall within the risk contemplated by the statute, as there was "nothing about purchasing gasoline in an open five-gallon can that makes it more likely that it will be used intentionally to injure others than that purchased in a closed two-gallon can": *Gonzalez* v. *Derrington* (1961), 363 P. 2d 1.

Might not the omission of any reference to this doctrine suggest that their Lordships did not intend to make it the controlling rule for all cases of negligence?

jure its rescuer; still less that the cow will be thrown against a man a hundred feet from the track and break his leg, or that the train wreck will start a forest fire and burn a distant village, or twist a power line pole and electrocute a man ten miles away. . . ." [87] It will be generally conceded that the rescuer could almost certainly recover today; nor is it altogether idle to conceive of a court reaching a similar result in the case of the man struck by the cow.[88] Yet, while neither of these events can be dogmatically excluded from the range of anticipation, it would be quite unrealistic to regard either as a factor which the hypothetical, reasonable bystander would have taken into account in counselling the engineer to maintain a proper lookout.

This conclusion is, moreover, reinforced by a, perhaps often unconscious, dual standard in judicial formulations of the appropriate test of foreseeability. As previously observed, many courts have been at pains to discourage references to "possibility", as distinct from "probability", of harm as the correct criterion for passing upon the negligence issue. In contrast, the lesser standard appears to conform not only with what courts actually do, but also with what they not infrequently say with respect to remoteness of damage. An unusually frank, but all the more realistic, assessment is found in the observation by Fitzgibbon L.J., in a well-known Irish case, that responsibility depended on whether "a man of ordinary prudence . . . ought to have anticipated the injury as a not improbable—'likely' is too strong—consequence of his action".[89] With equal candour, the *Restatement of Torts* contemplates liability for all but "highly extraordinary" consequences.[90]

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[87] Prosser, *op. cit., supra*, footnote 57, p. 259, where he adds the wise observation: "But while it is comparatively easy to say that the aggregate of all possible consequences amounts to a risk against which he should guard, it is a much more difficult thing to determine the importance of a particular result as a material part of that risk".

[88] In 1896, the Pennsylvania court could not bring itself to regard it as a "natural and probable" consequence (only "remotely possible"), but in 1925 it viewed a very similar accident as "natural and probable such as might or should have been foreseen as likely to result": *Wood* v. *Penn. R. Co.* (1896), 177 Pa. 306, 35 A. 699; *Mellon* v. *Lehigh Valley R. Co.* (1925), 282 Pa. 39, 127 A. 444. Applying the "directness" test, recovery was allowed in *Alabama Gt. So. R. Co.* v. *Chapman* (1886), 80 Ala. 615, 2 So. 738. The same result ensued in *Farr* v. *Chicago R. Co.* (1955), 131 N.E. 2d 120, without any clear indication of the theory adopted.

[89] *Sullivan* v. *Creed*, [1904] 2 I.R. 317, 339.

[90] §435(2), added in 1948. The learned Reporter of Restatement 2d has recommended its retention, though commenting that "some forty or fifty cases" actually go beyond it.

The cases may be classified into four groups: (1) a few courts adhere to the *Polemis* test, many of the older cases basing themselves on *Smith* v. *London & S.W.Ry.*: see, *e.g., Alabama Gt. So. R. Co.* v. *Chapman*, *supra*, footnote 88; *Penn. R. Co.* v. *Hammill* (1894), 29 A. 151 (N.J.); *Isham*

No less relevant in this context, though more ambiguous, is a passage in Viscount Simonds' opinion which deserves more than passing reference. Seeking to conjure a semblance of doctrinal continuity between foreseeability and such time-honoured *clichés* as "natural or necessary or probable consequences", he observed that "the two grounds have been treated as coterminous, and so they largely are", with this reservation, however, that "if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought

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v. *Dow's E.* (1898), 127 A. 444 (Vt.); *E.T. Ide Co.* v. *Boston R. Co.* (1909), 74 A. 401 (Vt.); *Perkins* v. *Vermont Hydro-Electric Corp.* (1934), 177 A. 631 (Vt.); *Bunting* v. *Hogsett* (1890), 21 A. 31 (Pa.); *Osborne* v. *Montgomery* (1931), 234 N.W. 372 (Wis.); *Pfeifer* v. *Standard Theatre* (1952), 55 N.W. 2d 29 (Wis.); *Christianson* v. *Chicago etc. R. Co.* (1896), 69 N.W. 640 (Min.); *Dellwo* v. *Pearson* (1961), 107 N.W. 2d 859 (Min.); *Hoepper* v. *Southern Hotel* (1897), 44 S.W. 257 (Mo.); *Wolfe* v. *Checker Taxi Co.* (1938), 12 N.E. 2d 849 (Mass.).

(2) Some courts still pay lip-service to the "natural and probable" test which most regard as satisfied if there was a mere likelihood of injury: see, *e.g.*, *Mellon* v. *Lehigh Valley R. Co.*, *supra*, footnote 88; *Shideler* v. *Habiger* (1952), 243 P. 2d 211 (Kan.); *Brown* v. *Travelers Indemnity Co.* (1947), 28 N.W. 2d 306 (Wis.). In the last twenty years or so, there has been a marked tendency for this test to be absorbed in the more modern formulation suggested by the Restatement of Torts: (4) *infra*.

(3) Only a small minority interpret the preceding formula as predicating a "probability" that the harm would occur: see *Tampa Elec. Co.* v. *Jones* (1939), 190 So. 26 (Fla.); *Cone* v. *Inter County T. & T. Co.* (1949), 40 So. 2d 148 (Fla.); *Rep. of France* v. *U.S.* (1961), 291 F. 2d 395 (5th Cir.), (applying Texas law).

(4) Finally, the overwhelming majority of modern cases evinces a decided preference for the formula of Restatement §435, *infra*, footnote 113, according to which "harm of a like general character" alone need be foreseeable, but not the "precise" harm or its extent or manner of occurrence: see, for instance, *Walmsley* v. *Rural Tel. Ass.* (1917), 169 P. 197 (Kan.); *Engle* v. *Director of Railroads* (1921), 133 N.E. 138 (Ind.) ("a possibility so remote as to be beyond the realm of events reasonably to be anticipated"); *Chase* v. *Wash. Water Co.* (1941), 111 P. 2d 872 (Ido.); *Biggers* v. *Continental Bus Co.* (1957), 303 S.W. 2d 359 (Tex.); *Ferrogiaro* v. *Tipri* (1957), 315 P. 2d 446 (Cal.); *Pruett* v. *State* (1953), 62 So. 2d 686 (Fla.); *Coatney* v. *Southwest etc. Corp.* (1956), 292 S.W. 2d 420 (Tenn.); *Figlar* v. *Gordon* (1947), 53 A. 2d 645 (Conn.); *Sullivan* v. *Flores* (1939), 132 S.W. 2d 110 (Tex.); *Carey* v. *Pure Distr. Corp.* (1939), 124 S.W. 2d 847 (Tex.); *Thornton* v. *Weaber* (1955), 112 A. 2d 344 (Pa.); *Burkland* v. *Ore. etc. R. Co.* (1936), 58 P. 2d 773 (Ido.); *Pulaski Gas Co.* v. *McClintock* (1911), 134 S.W. 1189 (Ark.). Occasionally, a court misconstrues Restatement of Torts §435, as a warrant for adopting the *Polemis* solution on the ground that the "extent" need not be foreseeable: see, for instance, *Lynch* v. *Fisher* (1947), 34 So. 2d 513 (La.). This is of little moment, however, because in any event, the conclusions reached under theories (1), (2) and (4) are for all practical purposes indistinguishable.

See, generally, Prosser, *op. cit.*, *supra*, footnote 57, §§48, 49; and Palsgraf Revisited, *op. cit.*, *supra*, footnote 27.

to have foreseen them".[91] The tenor of this remark does seem to support the view that liability is by no means confined to probable consequences; but whilst asserting this negative proposition, it fails to furnish unequivocally a positive one, since "reasonably foreseeable" is not a meaningful substitute for "probable". The chances of an event occurring range—in so far as our vocabulary is capable of expressing at least the major gradations—from the "fantastically remote", through "likely" or "possible" to "probable", culminating in "substantial certainty". The imminence of a risk therefore varies greatly, and to speak of "risks which a reasonable man ought to have foreseen" fails to furnish an index of the appropriate degree of imminence. Since this expression, as we have already had occasion to notice, cannot be synonymous with "consequences the risk of which made the defendant's conduct negligent" (because this would unduly limit the range of legal responsibility), it should be recognized as yet another ellipsis, omitting a vital piece of information. This defect is brought out clearly when we compare it with Pollock C.B.'s, original formula, deprecating the imposition of liability "in respect of mischief which could *by no possibility* have been foreseen and which no reasonable person would have anticipated".[92] In view of the Privy Council's implicit endorsement of this dictum, it may perhaps be safe to infer that a similar standard should be imported to resolve the ambiguity lurking in its own, less precise, formulation. None of this is to imply, of course, that such qualitative adjectives or phrases as "likely" or "by no possibility" are endowed with a high degree of precision or that subjective factors may not influence, and on occasion even distort, their application; but some measure of clarification is nonetheless desirable as long as we maintain the pretence that they might serve as a general guide for trial judges and juries rather than be passed on as mere ritualistic incantations.[93]

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[91] *Supra*, footnote 4, at p. 423 (A.C.).

[92] *Greenland* v. *Chaplin*, *supra*, footnote 6.

[93] A certain measure of indeterminacy is, of course, a desirable attribute of any formula employed in this area as a safety valve for "individualizing" decisions. The legal penchant for ever-more inclusive propositions must, therefore, be curbed in order to accommodate this practical need. On the one hand, the law cannot afford to dispense with generalizations, formulas or rules, because this is what clothes our administration of justice with the mantle of legality and distinguishes it from arbitrariness. On the other, it has been recognized at least ever since Aristotle that this desire for the appearance of generality or impartiality must not involve an undue sacrifice of the competing value of keeping the law sufficiently flexible to take account of the "particular" features of the individual case. "Foreseeability" is a formula which, on the whole, serves well in striking a desirable balance between these competing ideals.

V. *Particular Harm.*

Let us turn now to the critical postulate in the *Wagon Mound* that the *particular* harm for which recovery is being sought must have been a foreseeable consequence of the defendant's negligence. This obviously represents the clearest break with the received doctrine of the immediate past. Whereas *In re Polemis* countenanced recovery for the total loss of the ship by fire when, at most, superficial damage to the floor of the hold from impact with a falling plank could have been foreseen, the Privy Council dismissed the claim for fire damage to the wharf although some fouling of its understructure from the floating oil was clearly within the range of realistic prevision.

The *Polemis* case, like any other legal decision, was of course susceptible to a series of ever-higher legal abstractions, but as already intimated subsequent judicial exegesis significantly failed to agree upon an authoritative selection of its acceptable *ratio decidendi.* The plaintiffs in the *Wagon Mound* vouched it to warranty for the relatively modest proposition alone that, once some foreseeable damage to their legally protected interests had actually come to pass, it drew to itself further responsibility for all *additional* direct harm sustained by them in consequence of the defendants' negligence. This so-called "threshold tort" doctrine was explicitly repudiated by the Privy Council on the ground that each claim for a particular item of damage rested "on its own bottom" and that it was therefore irrelevant whether or not another claim arising out of the same careless act could be successfully maintained. "It would surely not prejudice his claim if that other claim failed: it cannot assist if it succeeds."[94] The measure of this reorientation may be the more fully apprehended by recalling that *In re Polemis* had on occasion been invoked in support of the much more drastic assertion that any foreseeable damage, whether it had actually eventuated or not, furnished a sufficient hook upon which to hang a claim to recovery for unforeseeable loss. Thus, whilst the "hypothetical plaintiff" had been banished to the wilderness by *Bourhill* v. *Young* ("the plaintiff cannot build on a wrong to someone else"),[95] the spectre of "hypothetical damage" remained a source of apprehension to potential defendants.

On at least two occasions had this pretentious doctrine received encouragement from the English Court of Appeal. Most notable was *Thurogood's* case[96] where a factory maintenance worker had

[94] *Supra*, footnote 4, at p. 426 (A.C.). [95] *Supra*, footnote 3.
[96] *Thurogood* v. *Van den Berghs & Jurgens Ltd.*, *supra*, footnote 68.

sustained injury from contact with an unguarded fan which had been placed on the floor for testing, but remained unable to establish the precise manner in which this occurred. The court in affirming his employers' liability reasoned, however, that even if the defendants could not have foreseen as a serious risk that a skilled man would get his hand caught, it was nonetheless culpable to permit the fan being operated in such a position because anyone working in its vicinity was exposed to the unreasonable risk of his necktie being caught in the revolving blades. From this followed that the defendants were liable for the plaintiff's injury, because the *Polemis* test postulated merely that "damage of some kind (for instance, the 'necktie' kind) could have been reasonably foreseen; though the actual damage [might] be wholly different in character, magnitude, or the detailed manner of its incidence, from anything which could reasonably have been anticipated".[97] Again in *Jones* v. *Livox Quarries*,[98] the same reasoning was invoked to convict of contributory negligence a workman who was riding on the tow-bar of a traxcavator in disobedience of orders when a dumper knocked into it from behind and injured him. The prohibition had been issued against the danger of falling off or being entrapped in some part of the machine rather than being crushed by a following vehicle; but in Denning L.J.'s opinion, that was irrelevant, because "once negligence is proved, then, no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences. The consequences do not depend on foreseeability but on causation".[99] The other members of the court, however, preferred to reach the same conclusion by the less controversial route that the specific reasons behind the employer's order did not preclude a finding that the plaintiff's conduct was dangerous also because of other foreseeable risks, including the hazard which actually occurred. For, clearly, it would be a mistake to assess the scope of the apparent risk with overdue refinement even when analysing a *plaintiff's* conduct, at any rate in jurisdictions which permit apportionment of damages and thus no longer justify resort to subterfuge in order to mitigate or evade the common law bar to recovery for contributory negligence.

It is only fair to add, however, that the preceding applications of the extreme *Polemis* doctrine seemed to have remained isolated; in all other cases, which I have been able to trace, arguments based

[97] *Ibid.*, at p. 552, per Asquith L.J.
[98] *Supra*, footnote 19.
[99] *Ibid.*, at p. 615.

on the presence of a hypothetical risk encountered a negative response. Most of these, it is true, involved the problem of the unforeseeable plaintiff, but it is not wholly without significance that no encouragement was ever offered to the plea that an imaginary person within the area of foreseeable risk could support a case for recovery by a plaintiff who was injured outside it. Typical is a recent example of a speeding driver being exonerated for colliding with a cyclist who suddenly darted into his path, despite the argument that he should have slowed down in any event because of the presence of little children in the area.[100] Even prior to the *Wagon Mound*, therefore, there seemed scant support for a doctrine of hypothetical risk, but any lingering doubts have now been emphatically dispelled as a corollary of the wider proposition that it is incumbent on the plaintiff to establish that each and every particular item of damage for which he is seeking redress was individually within the range of imputable foresight.

In future, interest will therefore be focussed primarily on the concept of "particular damage". The elasticity, not to say indeterminacy, of "foreseeability" to which it is linked has been already adverted to in comparing it with the competing causal theory. Suffice it then to record only this additional observation. From one point of view, almost everything is foreseeable in the sense of not being entirely unprecedented, and it is no secret that familiarity with the flood of reported accident cases tends to imbue personal-injury lawyers and especially torts professors with a certain measure of insensitivity to what a man in the street would without fail regard as unusual or abnormal. On the other hand, hardly any fact situation is ever quite duplicated in all its details, so that undue attention to the minor features of an event would encourage facile conclusions that a particular accident was in that sense unforeseeable. Again, to the dull-witted almost everything may appear extraordinary, whilst those endowed with a lively fancy would make light even of a veritable freak. Obviously, any conclusion concerning foreseeability is therefore largely influenced by one's range of experience and imagination, and is for that reason wisely entrusted to the arbitrament of the jury whose collective, but unspecialized, knowledge of the world is widely regarded as more representative of community attitudes than the professionally trained reaction of a single judge.

[100] *Jolly* v. *Hutch*, [1960] Western Aust. R. 172. In the same sense are *J. Eva Ltd.* v. *Reeves*, [1938] 2 K.B. 393, and the interesting Scots case of *Blackie* v. *British Transport Commission*, *supra*, footnote 68 (employee negligently exposed to the risk of explosion, but died of coronary thrombosis because of a heart condition unknown to his defendant employer).

This much is well understood, but what is not equally appreciated is that any estimate of foreseeability is influenced to no lesser extent by the manner of describing the risk when comparing it with the harm that has occurred. Thus, the more specific the description of the expectable hazard, the less likely that it will correspond with what has actually happened. By way of illustration, let us recall the "fan case" previously mentioned.[101] If the foreseeable risk in that situation were defined as personal injury from contact with the revolving blades, the plaintiff's accident would have readily met the requirement of foreseeable harm. Yet, if it were described with somewhat greater particularity as the necktie risk, recovery would have been denied, unless the accident had happened precisely in that manner. It was with this problem in mind that, elsewhere, I ventured to assert that: "It is clearly a matter of judgement where to draw the line, and in marginal cases this will depend largely on what outcome the court wishes to achieve. On the one hand, the hazard must not be defined with over-much particularity, lest the unique features inherent in every case disqualify the harm from falling within the description of the apprehended risk. On the other hand, it should not be defined too broadly, since otherwise a defendant would be liable for all resulting harm of which his default was a cause-in-fact." [102]

It is the more regrettable, therefore, that their Lordships' apparent unconcern with the potential difficulties of this issue, coupled with its relative simplicity in relation to the facts of the *Wagon Mound*, caused them to miss an opportunity of furnishing more than elementary guidance on the techniques to be employed in the future. Indeed, for all that appears from the opinion, this question seems to have been too plain for extended discussion: the *particular* harm complained of by the respondents being "fire damage" to their wharf and the apparent risk mere fouling of their slipways, no correspondence between them existed and their claim accordingly failed. This approach is significant only for disposing of the possible contention that all "property" damage, at least to the same physical object, is the same "kind" of harm for purposes of applying the foreseeability formula; just as another passing reference in the opinion contemplated a corresponding fragmentation of personal injuries by drawing distinction between nervous shock and other forms of bodily harm.[103]

[101] *Thurogood* v. *Van den Berghs & Jurgens*, *supra*, footnote 68.
[102] Fleming, *op. cit.*, *supra*, footnote 10, p. 196.
[103] *Supra*, footnote 4, at p. 426 (A.C.). This puts at rest a long standing doubt in English law concerning the proper formulation of the issue in

In this context, it is worth recalling Cardozo C.J.'s, pregnant observation in the *Palsgraf* case that: "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of *another order*, as, e.g., one of bodily security. Perhaps other distinctions may be necessary . . . ."[104] Of similar tenor was Lord Wright's emphasis in *Bourhill* v. *Young* that the fishwife's interest "in her bodily security was of a *different order* from the interest of the owner of the car".[105] In general, the distinction thus envisaged seems to have been the broad dichotomy between interests in property and personal security, corresponding with the approach to the question of "splitting" a single cause of action.[106] Dr. Goodhart, however, otherwise a staunch protagonist of the risk or foreseeability test, deprecated at an early stage the introduction of such fine-spun distinctions, confessing himself "[terrified by] the prospect of a whole new series of cases in which it will be necessary to consider whether or not a person has the same interest in his foot and his eye, in his two adjoining houses, in his ship and the cargo which it carries. [But] obviously a single distinction between bodily security on the one hand and property security on the other hand would be too broad".[107] Evidently, then, his own criteria were highly pragmatic, depending perhaps on that much-vaunted "common sense of the matter" which in practice often turns out to be far from susceptible to common agreement. To push the

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nervous shock cases, implicitly repudiating the view espoused by certain textwriters that the question in these cases was one of proximate cause rather than duty. The proper approach is to ask whether there was an unreasonable risk of "injury by shock". It deals the coup de grâce to *Owens* v. *Liverpool Corporation*, [1939] 1 K.B. 394 and casts a doubt on the correctness of *Schneider* v. *Eisovitch*, *supra*, footnote 29.

[104] *Supra*, footnote 2, at pp. 346-7 (N.Y.), 101 (N.E.). Italics added.

[105] *Supra*, footnote 3, at pp. 108, 110. Italics added.

[106] *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; *The Oropesa*, [1943] P. 32. The great majority of American jurisdictions does not permit a splitting between personal injury and property loss incurred simultaneously, on the ground that the conduct, i.e. breach of duty, founds the cause of action, not the damage: see annotation (1958), 62 A.L.R. 2d 977.

[107] Essays in Jurisprudence and the Common Law (1931), p. 149. Of the same view are Prosser, *op. cit.*, *supra*, footnote 57, pp. 173, 264-5, and Payne, Negligence and Interest (1955), 18 Mod. L. Rev. 43; whereas the thesis is defended by Tilley, The English Rule as to Liability for Unintended Consequences (1935), 33 Mich. L. Rev. 829, at pp. 848-851 and Machin, *op. cit.*, *supra*, footnote 34. The Restatement of Torts §281 likewise adopted it, but the Reporter (Professor Prosser) has persuaded the A.L.I. to omit it from Restatement 2d (see Tentative Draft No. 4 which proposes deletion of sub-paragraph (b) as being unsupported by the weight of authority).

problem under the carpet, as it were, can at best provide a temporary respite, since it cannot in the long run be withheld from the process of appellate review and relegated to the vagaries of whatever arbitrary estimate a judge and jury chooses to make in each individual case.

To take one further example which, perhaps more than any other, throws into high relief the uncertainties besetting this task of classification. In a recent case,[108] a motorist proceeding at rapid speed along a deserted country highway in the small hours of the morning caught in his headlights a largish object which bore all the appearance of an abandoned bundle or, perhaps, a dead animal struck by a passing car. Without making the slightest effort to avoid it, he ran over the object which turned out to be a man asleep on the road, probably in alcoholic stupor. Under the *Polemis* rule, liability would have ensued as certainly as day follows night[109] because "the tort once established, the tortfeasor takes the risk of consequences".[110] But was the "particular" damage foreseeable? Damage to the "particular object" clearly was, but injury only to an interest in property which is "of a different order" from an interest in personal security. The court unanimously held that the defendant could not disclaim responsibility by pleading that he did not know the nature of the object. *He took his chance* that it turned out to be more valuable than he thought[111] or be, in fact, a human being. This comes close to saying that it is irrelevant whether he was careless in not anticipating the likelihood of the bundle being a man. Perhaps, then, the "distinction between bodily security on the one hand and property security on the other" is not only too broad, but also too narrow?

Closely enmeshed with the instant problem of categorizing harm is that of the weight to be attached to the manner in which it has occurred. Seemingly, the decision in the *Wagon Mound* was primarily influenced by the fact that the damage to the dock was due to fire rather than the unforeseeable extent of the damage wrought. This impression is reinforced by a casual observation

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[108] *Law* v. *Visser*, [1961] Queensland Rep. 46. See also *Edwards* v. *Litster*, [1960] S.A.S.R. 173 where the defendant failed to see the plaintiff asleep in high grass next to his tractor parked by the roadside. He was held liable because, if he had proceeded more cautiously, he would have seen "an object the size of a man".

[109] See *Barker* v. *City of Philadelphia* (1955), 134 F.Supp. 231 (applying the *Polemis* rule as a matter of Pennsylvania law). Contributory negligence was eliminated in *Law* v. *Visser* on the basis of the "last clear chance" rule, and in *Barker* because the plaintiff was an infant of tender years.

[110] Holmes J. in Holmes-Pollock Letters (1941), Vol. 2, p. 88.

[111] See *infra*, footnote 122.

that it would be wrong to excuse a defendant who "foresaw or could reasonably foresee the *intervening events* which led to its being done".[112] Are we to infer that, conversely, recovery will henceforth be conditional on foreseeability both of the particular harm and the particular manner, or sequence of events, in which it occurred? If this suggestion were accepted literally and vigorously exploited, the *Wagon Mound* might truly involve a major departure from the previous course of Anglo-American precedent and belie the becalming tone of an opinion which purported to rationalize and simplify rather than effect a drastic break with the past. For, hitherto, it has never been seriously questioned that, even if the particular harm or "accident" must be foreseeable, it would be altogether too prejudicial to plaintiffs' chances of recovery to insist that the precise manner of its occurrence be also within the range of reasonable foresight.[113] Like any other generalization, of course, this proposition is not entirely unqualified, because in cases involving a freakish or quite abnormal sequence of events there has been a decided tendency to deny recovery, even though

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[112] *Supra*, footnote 4, at p. 426 (A.C.).

[113] Representative are such cases as *Malleys Ltd.* v. *Rogers*, *supra*, footnote 68 (worker exposed to unreasonable hazard of being crushed by falling bar. He avoided being hit, but stumbling backwards over an obstruction sustained concussion); *Dwyer* v. *Southern*, *supra*, footnote 79 (according to Collins J. the question was whether the defendant "could reasonably have foreseen that an accident, not in the precise way in which this accident happened but in a general way, could have eventuated as a result of his negligence". In Herron J.'s view, it was "not necessary to show that this particular accident and this particular damage were probable. It is sufficient that the accident was of a class which might well be anticipated as one of the reasonable and probable results of the wrongful act"); *Byrne* v. *Wilson* (1862), 15 Ir. C.L.R. 332 (bus crashed into canal and passenger drowned when lock-keeper let in water). See also *John Mill & Co.* v. *Public Trustee*, [1945] N.Z.L.J. 347 where, in the course of loading operations aboard a ship, the negligent operation of a winch caused a noise which temporarily distracted the plaintiff's attention, with the result that he was hit by a sling and fell into the hold. According to Myers C.J., it was sufficient that "the possibility of danger in *any* form to *any* person working on the deck should reasonably have been foreseen". Although this statement may now require some modification, the conclusion reached by the court is quite compatible with the foresight formula of the *Wagon Mound*.

In American law, the principle is too well recognized to bear citation. It is expressed in Restatement of Torts §435(1) in these words: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." This principle is liable to be put to a severe test by the disaster which befell the aircraft carrier *Constellation* in the Brooklyn Naval Yard on December 19th, 1960, when a lift truck struck open the valve of a gasoline tank and the fluid escaped down an elevator shaft where a welder was at work. The resulting fire cost 48 lives, many personal injuries and an estimated $75 million of damage. (N.Y. Times, Dec. 20th, 1960).

the harm itself was of the kind one could have expected. For example, if a defendant were to leave an unguarded hole in a public thoroughfare, he would be liable to anyone who broke his leg by stumbling into it or even being jostled by strangers, but not if his enemy pushed him from motives of hostility or spite.[114] Otherwise, however, there has not been an inclination to inquire too minutely into the foreseeability of the way in which the harm did occur. Most striking perhaps among English decisions is the case of *Philco Radio* v. *Spurling*[115] where a carrier who had mistakenly deposited some highly inflammable film scrap in a factory yard was held responsible for an explosion set off by a typist, although she touched the material deliberately albeit without fully appreciating the danger. A verbal distinction might of course be drawn between the "general" and the "precise" manner in which the harm occurred, but this is open to the criticism of introducing yet another criterion of highly indeterminate reference. Clear it is in any event that, if foreseeability is theoretically required for the way in which the loss actually happened, it may pass an even less exacting test in practice than that applied in relation to the harm itself. Hence, there may be three levels of foreseeability, appropriate respectively for the issues of culpability, actual injury and, finally, the manner in which it came about. Could we not avoid this unpalatable prospect by seeking refuge behind the more elegant and accommodating language of risk, and inquire merely whether the harm fell broadly within the recognizable scope of the risk engendered by the defendant's conduct?

In all probability, however, their Lordships viewed the category "damage by fire" as descriptive of the harm rather than its manner of occurrence, as one should avoid attributing to them an intention to effect a major reform of the law which they themselves went out of their way to disclaim.[116] Even so, there remains much uncertainty for future resolution because, as already pointed out, any division of interests or harms must inevitably proceed upon a subjective or intuitive basis which may well be influenced by the result a given court wishes to attain rather than any more impartial factor. How difficult, and yet decisive upon the outcome of a case, this process of characterization may become is well illustrated by an opinion recently handed down by the United States Court of Appeals for the Fifth Circuit, dealing with the aftermath of the

[114] *Alexander* v. *Town of New Castle* (1888), 115 Ind. 51, 17 N.E. 200; Fleming, *op. cit.*, *supra*, footnote 10, p. 196.
[115] [1949] 2 K.B. 33.
[116] *Supra*, footnote 4, at p. 422 (A.C.).

Texas City disaster in 1947.[117] That unparalleled catastrophe in which more than 500 persons perished and some 3000 were injured resulted from an explosion aboard a French freighter whilst loading a cargo of ammonium nitrate fertilizer. In the instant proceedings, the United States as assignee of their claims sought to pin responsibility for the holocaust upon the owner and charterer of the vessel, but encountered the difficulty that, whilst the master had been negligent in relation to the outbreak and containment of the initial fire, the subsequent explosion itself was found to be unforeseeable because the chemical, though known to be highly inflammable, had not before been credited with explosive properties in the absence of close confinement and considerable pressure as in a bomb. The court, perhaps not unmindful of the equities of the case, dismissed the claim by drawing the vital distinction between (foreseeable) "fire damage" and (unforeseeable) "explosion damage". This conclusion seems wholly consonant with the Privy Council's approach in the *Wagon Mound*, but raises a doubt whether such refinements might not be exploited to undesirable ends. Suppose, for example, that the effects of the explosion had been confined to the culpable vessel. Should the defendants be allowed to disclaim responsibility to cargo owners on the facile plea that such damage (foreseeable "property loss") did not result from the foreseeable fire, but the unforeseeable detonation?

No less perturbing is the question of how to deal with cases where the particular damage, but not its extent, was within the range of reasonable anticipation. In a sense, this was the dilemma posed in the old case of *Smith* v. *London & South Western Ry.*[118] There the defendant company had been negligent in failing to guard against sparks setting alight heaps of dried grass cuttings piled up in close proximity to its lines. The fire spread over an adjoining stubble field and eventually destroyed the plaintiff's cottage beyond it. The decision favouring recovery has become a landmark owing to the opinion expressed by three judges, including no less a master of the common law than Blackburn J.,[119] that the

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[117] *Rep. of France* v. *U.S.*, *supra*, footnote 90. In earlier proceedings, the Supreme Court of the U.S. exempted the United States from liability under the Federal Tort Claims Act on the ground that the shipment, under the auspices of the Office of War Mobilization and Reconversion, involved the exercise of a "discretionary function": *Dalehite* v. *U.S.* (1953), 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956.

[118] *Supra*, footnote 12. See Viscount Simonds (at p. 46): "The point to which the court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind."

[119] The others were Kelly C.B. and Channell B.

defendant could not disclaim responsibility even on the hypothesis that damage beyond the stubble field was unforeseeable. This view has engendered much stimulating classroom debate, not least over such variants as the ownership of the intermediate field. If it belonged to a third person, as seems to have been the case, the issue confronting the court was that of the "unforeseeable plaintiff" and, on that basis, the minority opinion has clearly become unsupportable since *Bourhill* v. *Young*. If it belonged to the defendant, the same conclusion followed *a fortiori*, since it is difficult to postulate that a person can so much as owe a duty to himself. A real difficulty, however, arises if we hypothesized that it belonged to the plaintiff. Under the *Polemis* rule, he would certainly have recovered, as some damage to his legally protected interests was both foreseeable and actually occurred, and the boundary fence could not fairly be deemed to constitute a break interrupting the "direct" spread of the fire to his adjoining cottage. This result would seem to be in full accord with generally accepted notions of fairness, since the random selection of a boundary post between adjoining plots of land belonging to the same owner would strike most observers as a highly capricious determinant of liability.[120] Yet it is no idle thought that the foreseeability formula might well lead to that very conclusion. It would all depend once again on how we described the harm in question: if as "fire damage to the cottage" it would be beyond the scope of the apparent risk; if more generally as "fire damage to the plaintiff's property" it would be within.[121]

[120] But once this conclusion is accepted, would it not be equally capricious to condition liability upon the ownership of the stubble field so as to deny the cottage owner recovery, if perchance the field belonged to a third person? This thought might well have swayed the three members of the court to the conclusion that the defendant should be liable in any event. One cannot imagine a clearer illustration of the inept results to which undeviating adherence to any single formula can lead. In practice, of course, this deficiency is largely mitigated by the fact that any sensible judge or jury will manipulate the foresight test so as to avoid such unpalatable results. This in fact is exactly what happened in the *Smith* case where the jury returned a general verdict for the plaintiff which was unanimously upheld by the Exchequer Chamber against a motion for a non-suit.

[121] No less pertinent an example is the Ontario case of *F. W. Jeffrey* v. *Copeland Flour Mills*, *supra*, footnote 68, where, in the same street running from north to south, A owned lot 18, B lot 17 (consisting of the Brisbin building and various shops) and C lot 16. With B's permission, A excavated underneath the north wall of lot 17, but owing to his negligence caused a subsidence which exerted a pull on the buildings situated on lots 17 and 16 due to their being connected by tie-rods whose existence was unknown to A. It was argued that B might recover for the damage to the Brisbin block, but no more; but the contention failed on the ground that the duty broken by A was owed, not the Brisbin building, but to B. Now that the *Polemis* rule, on which the court relied, is defunct, should the foreseeable risk be described as "damage to the Brisbin block" or

The preceding distinction between cottage and field merely adds a touch of poignancy to the more general issue whether the term "particular damage" has a quantitative as well as qualitative denotation. An alternative reference to the "kind of damage"[122] does lend verisimilitude to the impression that their Lordships did not necessarily associate "particular" with the notion of magnitude. Besides, the very elasticity of the concept should perhaps be welcomed as providing scope for manoeuvre to attain results in individual cases which would conform with prevailing views of social policy and fairness more nearly than a formula of greater precision might allow. For example, it will not impair the cardinal principle, long unquestioned in all common-law jurisdictions regardless of whether the general criterion be "foresight" or "directness", that responsibility for personal injury from impact encompasses also injurious physiological consequences which were unforeseeable.[123] The thin skull and bleeder cases provide, of course, the classical illustrations of this pervasive policy, whilst by contrast the countervailing notions regarding psychosomatic injuries may be conveniently accommodated by continuing insistence on foreseeability of "injury from nervous shock".[124]

Nor is there any warrant for anticipating any different disposition in the future of the related question raised by the exceptional earning capacity of the accident victim or the unusual value of property damaged or destroyed. One who disables a highly successful surgeon or lawyer is not permitted to limit his liability to the "value" of the average individual encountered in the street, any more than another who carelessly knocks over a Ming vase will

"damage to adjacent buildings"? Should it matter, since *Bourhill* v. *Young*, that one of the buildings was owned, not by B, but by C or D?

[122] *Supra*, footnote 4, at p. 426 (A.C.). Certain it is in any event that the *Wagon Mound* does not prescribe any geographical limitation. Thus, in the recent case of *Edwards* v. *Blue Mountains City Council* (1961), 78 W.N. (N.S.W.) 864, recovery was allowed for fire damage to a house over a mile from the defendants' rubbish tip.

[123] "If a man is negligently run over, it is no answer to the sufferer's claim of damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart": *Dulieu* v. *White*, *supra*, footnote 28, at p. 679. Dicta to the same effect are found in *Owens* v. *Liverpool Corporation*, *supra*, footnote 103, at pp. 400-401 and *Bourhill* v. *Young*, *supra*, footnote 3, at pp. 109-110. The principle has been applied in such cases as *Love* v. *Port of London Authority*, [1959] 2 Lloyd's Rep. 541; *Varga* v. *Labatt Ltd.*, [1956] O.R. 1007, 6 D.L.R. 2d 336; *Watts* v. *Rake* (1960), 34 Aust. L.J. Rep. 186; *Richards* v. *Baker*, *supra*, footnote 68; *Williams* v. *B.A. L.M. (N.Z.) Ltd. (No. 3)*, *supra*, footnote 68. The leading American cases are *McCahill* v. *New York Transp. Co.* (1911), 201 N.Y. 221, 94 N.E. 616; *Koehler* v. *Waukesha Milk Co.* (1926), 190 Wis. 52, 208 N.W. 901; and see Prosser, *op. cit.*, *supra*, footnote 57, pp. 260-261.

[124] See *supra*, footnote 103.

be heard to plead in exoneration that he had no reason to think that it was anything other than a cheap imitation from Japan.[125] A more discriminating compensation system might well proceed upon the basis that exceptional risks of this kind should more properly be borne or insured against by the person concerned — and this standpoint is implicit in legislation setting upper limits to recovery, as in Saskatchewan's motor compensation plan, Australia's regime of strict liability for aircraft accidents and most, if not all, social security schemes — but the common law has, with but peripheral exceptions,[126] made no allowance for refinements of this sort. Yet, in this connection, the disapproval of *In re Polemis* suggests a difficulty; for in one sense that decision, as distinct from the principle there announced, could well be interpreted as expressing the same axiom that a tortfeasor must "take his victim as he finds him". The total destruction of the *Thrasyvoulos* may have been unforeseeable, but was not the gasoline vapour in her bowels analogous to an individual's latent disease, pregnancy or peculiar susceptibility to aggravated injury? Now, a distinction between personal injury and property damage could conceivably be drawn in the present context on the ground that an individual's interest in his personal security merits more generous legal protection.[127] But this solution looks all too sophisticated to command the assent of English courts, and we may well therefore have to face the possibility that the actual decision of *In re Polemis* has mysteriously survived the amputation of its accompanying opinion.

Altogether, then, it will largely rest with the courts of the future how to implement the mandate from on high. But if my own hunches are right, the oracular pronouncement in the *Wagon Mound* will come to be regarded less as a starting point for new

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[125] "If a person fires across a road when it is dangerous to do so and kills a man who is in receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not reasonably have expected to have injured anyone but a labourer": *Smith* v. *London & S.W. Ry.*, *supra*, footnote 12, at pp. 22-23. A policy exception, in tort cases at least, seems to be the refusal to allow recovery for any loss due to the unknown impecuniosity of the accident victim: *The Edison*, *supra*, footnote 18.

[126] Such as the rule in *The Arpad*, [1934] P. 189.

[127] Such a distinction is advocated by Glanville Williams, *op. cit.*, *supra*, footnote 45, at p. 197, if only on the ground that the "thin skull" rule should not be extended. As the same learned author points out in another article, Causation in the Law, [1961] Camb.L.J. 62, at pp. 81-82, any extension of this principle to property damage would, consistently with the *Wagon Mound*, have to be confined to the "internal" sensitivity of the property affected, as distinct from sensitivity resulting from external conditions.

adventures than an authoritative approval of prevailing trends. Compared with *Donoghue* v. *Stevenson* which so dramatically thrust our law of torts into the twentieth century, the *Wagon Mound's* destined role promises to be more modest.