"OUT OF THE MAZE": TOWARDS A "CLEAR UNDERSTANDING" OF THE TEST FOR REMOTENESS OF DAMAGES IN NEGLIGENCE

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Both academics and judges share the general opinion that the question of remoteness of damages cannot be resolved in a rule-governed manner, that is to say by the applications of a test. We disagree with this conclusion. We propose a test in terms of foreseeability of damages which reconciles the leading decisions of The Wagon Mound (No. 1), The Wagon Mound (No. 2) *and* Hughes v. Lord Advocate. *We have analyzed almost all the remoteness issues and have found that the test conforms with ninety percent of the past decisions, consequently we should be able to predict the outcome of remoteness issues with only a ten percent error. If courts consciously adopt our version of the foreseeability test, the margin of error could drop even further.*

Tant les universitaires que les juges partagent l'opinion générale que la question des dommages indirects ne peut être résolue par une règle, c'est-à-dire en appliquant un critère. Nous ne partageons pas cette conclusion. Nous proposons un critère de prévisibilité des dommages qui concilie The Wagon Mound (No. 1), The Wagon Mound (No. 2) *et* Hughes v. Lord Advocate, *qui sont des décisions faisant jurisprudence. Nous avons analysé presque toutes les question relatives aux dommages indirects et nous avons constaté que le critère rencontre 90 pour cent des décisions rendues, ce qui fait que nous devrions être en mesure de prévoir seulement 1 pour cent d'erreur sur l'issue des questions touchant aux dommages indirects. Si les tribunaux adoptaient consciemment notre critère de prévisibilité, le marge d'erreur pourrait diminuer encore plus.*

> "This doctrine of remoteness of damage is one of very considerable obscurity and difficulty." So wrote the editor of Salmond on the Law of Torts (17th Edn, 1977, p. 38). If I did not consciously share that opinion previously from a fairly long acquaintance with the subject, I have, since hearing the able submissions made to this court, to confess to feelings of apprehension of never emerging out of the maze of authorities on the subject of remoteness into the light of a clear understanding of it. On my way to providing an answer to the question raised in this appeal I have sometimes felt like Sir Winston Churchill must have done when he wrote:
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> "I had a feeling once about mathematics—that I saw it all. Depth beyond depth was revealed to me—the byss and abyss. I saw—as one might see the transit of Venus or the Lord Mayor's Show—a quantity passing through an infinity and changing its sign

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> from plus to minus. I saw exactly how it happened, and why the tergiversation was inevitable—but it was after dinner and I let it go."
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> Watkins L.J. in *Lamb* v. *London Borough of Camden*, [1981] 2 All E.R. 408, at p. 419.

Introduction

"Once upon a time . . ." this, at least, is how fairy tales start, and the case of *Falkenham* v. *Zwicker*[1] is so much like a fairy tale that this phrase seems quite appropriate and so this is how we will begin. Once upon a time a lady was driving along the highway when a cat ran across the road. She negligently lost control of her vehicle when she slammed on her brakes to avoid hitting the cat. Her car ran off the road and into a wire fence with the impact popping out the staples for a fair distance in either direction. This all happened on the first of February. In the middle of May, the farmer noticed the missing staples and found several on the ground. About two weeks later he put dairy cows into the field to pasture. The cows eventually ate some of the staples and contracted "reticulitis" or what is more commonly known to those to whom such things are common knowledge, as "hardware disease", with the result that several valuable milking cows ended up at the meat packing plant rather than contentedly producing milk as was their habit. Thereafter, according to the facts of the case, cattle pastured in this field had to have magnets placed in their stomachs to protect them from their lack of discretion in the selection of their food.

Those familiar with the law of negligence will not be overly shocked to know that the judge found that "the damage was of the kind which a reasonable person might foresee",[2] even though the farmer himself did not foresee it, having had two weeks to think about it before putting the cows in the pasture, unlike the defendant who had only a split second between the time she first saw the cat and the time she slammed on the brakes of the car.

It is no news to practitioners, judges, academics, and law students who sometimes have to struggle with the niceties and fine distinctions of remoteness cases that often what judges say about foreseeability bears little resemblance to the reality of ordinary people. Not because judges do not know what they are doing. In fact we think that in general they do know, because, at least in our opinion, most remoteness cases are correctly decided. Rather the difficulty lies with the set of concepts available to justify the decision.

Ascertaining a rational basis for prediction of judicial decisions in remoteness cases continues to be a problem which plagues negligence practitioners. Noted academics[3] have registered dismay that despite the

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[1] (1978), 93 D.L.R. (3d) 289 (N.S.S.C.).

[2] *Ibid.*, at p. 292.

[3] See Sir R. Cooke, Remoteness of Damage and Judicial Discretion (1978), 37 Cambridge L.J. 288; R.W.M. Dias, Policy Differences in Remoteness of Damage (1976),

pronouncement of a definitive 'test' for determining recovery by the Privy Council in *The Wagon Mound (No. 1)*[4] no sound rules have emerged to guide us in this area. The foreseeability test set out in *Wagon Mound (No. 1)* has been whittled,[5] varied,[6] and even gutted.[7] Do courts follow a set of rules in determining when and whether damage is too remote to place liability for it on a negligent defendant, and if so, what are these rules? On what basis are such decisions made?

In this article we will propose a test for remoteness which can account for the outcome of approximately ninety per cent of all decided remoteness cases (excluding purely economic loss), irrespective of whether the court purported to use a foreseeability or a direct causation test. The ten percent it cannot explain we assume to be wrongly decided in terms of our test and in terms of consistency with the majority of decided cases. Assuming that judges continue to decide remoteness issues in much the same way as in the past, the test should allow us to predict the outcome of remoteness issues in new cases with about the same degree of accuracy. Further, our proposed test can be shown to be consistent with the jurisprudence of the recent authoritative decisions in this area of the law of negligence.

I. *The Reason for "the Considerable Obscurity and Difficulty".*

It will be helpful first to review briefly the landmark decisions on, and tests for, remoteness in the law of negligence to examine why they failed to resolve the issue and what the result of this failure is. The proposed test is then stated and the concepts incorporated within it are explained. A framework used for analysis is set out and remoteness cases are then analyzed in accordance with the theory. Finally, the conclusions drawn from the results of the analysis are discussed. The keynote cases of *Polemis*[8] and *Wagon Mound (No. 1)* display the classic moral dichotomy intrinsic to the issue of remoteness. The first school of thought, represented by *Polemis*, is that of broad liability based on causation: once an actor is found culpable of negligence he is then liable for all of the consequences which flow from his negligent act, for it is more just that as between the innocent plaintiff and the negligent defendant, the loss should fall on the shoulders of him who committed the wrong.

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1 Acta Juridica 193; H.J. Glasbeek, Wagon Mound II: Re Polemis Revived, Nuisance Revised (1967), 6 W. Ont. L. Rev. 192; A.M. Linden, Foreseeability in Negligence Law, [1973] Law Society of Upper Canada Special Lectures 55.

[4] *Overseas Tankship (U.K.) Ltd* v. *Mort's Dock and Engineering Co.*, [1961] A.C. 388 (P.C.), hereinafter referred to as *Wagon Mound (No. 1)*.

[5] *Smith* v. *Leech Brain*, [1962] 2 Q.B. 405.

[6] *Hughes* v. *Lord Advocate*, [1963] A.C. 837, [1963] 1 All E.R. 705 (H.L.).

[7] *Overseas Tankship (U.K.) Ltd* v. *The Miller Steamship Co.*, [1967] 1 A.C. 617 (P.C.), hereinafter referred to as *Wagon Mound (No. 2)*.

[8] *In Re an Arbitration Between Polemis and Furness, Withy & Co. Ltd*, [1921] 3 K.B. 560 (C.A.), hereinafter referred to as *Polemis*.

The facts of *Polemis* were that servants of the defendant charterers dropped a plank into the hold of a ship while unloading cargo. The cargo included petrol and the falling plank caused a spark which ignited petrol vapour resulting in an explosion which completely destroyed the ship. The defendants argued that the damages were too remote on the ground that it was unforeseeable that a falling plank would result in an explosion. The Court of Appeal rejected the argument that liability for damage is limited to the foreseeable consequences of an act. Instead they asserted the view that foreseeability of damage is relevant only to the initial question of negligence, and once negligence is determined the actor is liable for all loss *directly* caused by his negligent act.

The *Wagon Mound (No. 1)* is a perfect example of the second, and opposite school of thought, that of very restricted liability: that is, the liability which attaches to a negligent actor should bear a close relationship to the nature of the actor's fault; or in other words, the risk defines the extent of liability. Proponents of this school argue that where an actor has committed a very small misdemeanour which results in unforeseen and catastrophic consequences, it is unfair and unjust to place all of the loss that flows from the wrong onto his shoulders. The question then becomes whether there is sufficient fault to justify the imposition of liability.[9]

In the *Wagon Mound (No. 1)* fuel oil, carelessly spilled into the harbour by the defendants, floated around the plaintiff's wharf and was ignited by spatters of molten metal from welding operations carried out by the plaintiffs on the dock above, which landed on cotton waste in the water. Both the wharf and the two ships there docked were extensively damaged in the ensuing fire.

The Supreme Court of New South Wales felt bound by *Polemis* to hold for the plaintiff but on appeal to the Privy Council that decision was reversed. The direct cause test of *Polemis* was damned as palpably unjust and the test of foreseeability was substituted. The foreseeability test limits the liability of a negligent actor to those consequences which are reasonably foreseeable at the time the act is committed. Viscount Simonds stated: "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."[10] The degree of foresight required ". . . is the foresight of the reasonable man which alone can determine responsibility".[11]

The direct cause test was attacked because it furnished no guidelines

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[9] J.C. Smith, Requiem for Polemis (1965), 2 U.B.C. L. Rev. 159, at p. 182.

[10] *Wagon Mound (No. 1)*, at pp. 422, 423.

[11] *Ibid.*, at p. 424.

for monitoring liability once negligence was proved. There is no apparent attempt in the statement of the test to tie the nature of the risk of harm created by the negligent actor to the type of consequence which results from the act. It is irrelevant, according to the direct cause test, that the loss is totally outside of a class of possible damage which might be foreseen as a risk of harm created by the actor. If negligence is proven, and the loss directly follows, then liability as well follows. But without a clear criterion of directness the limits to be placed on liability are purely arbitrary.

The foreseeability test, on the other hand, creates more confusion than it resolves. When are remote consequences forseeable to the reasonable man? Almost by definition the remote consequence is one which is weird, unexpected, unpredictable, or in sum, unforeseeable. In explaining the foreseeability test, "the word consequence might be qualified by *any* description from 'almost certain' to 'remotely possible'".[12] Many other problems were left unsolved by the foreseeability test defined in *Wagon Mound (No. 1)* which almost at once, the courts began to address. The effect of dealing with the shortcomings of the decision was to considerably weaken the impact of the foreseeability test.

In the case of *Smith* v. *Leech Brain*[13] a small burn from a spatter of molten metal developed into cancer in an employee of the defendants. It was discovered in evidence that the victim had a pre-malignant condition of cancer, which was, of course, unforeseeable. Lord Parker C.J. stated: "I am quite satisfied that the Judicial Committee in the *Wagon Mound* case did not have what I may call, loosely, the thin skull cases in mind. It has always been the law of this country that a tortfeasor takes his victim as he finds him."[14] Thus the unforeseeable egg-shell skull is made an exception to the foreseeability test, or if one wishes to stay within the jargon of the test, is made a foreseeable consequence.

In *Hughes* v. *Lord Advocate*[15] the House of Lords broadened the scope of liability to include damage which is of a *type* which should have been foreseeable. A small boy played with a paraffin lamp that had been left near an open manhole, finally knocking it into the hole where it caused a violent explosion which severely burned the boy. The defendants argued that the foreseeable consequence, or danger, of leaving a paraffin lamp about was that someone might be burned, but that injury by explosion was totally unforeseeable. Lord Jenkins stated that liability is not necessarily escaped "because the danger actually materialising is not identical with the danger reasonably foreseen. . ."[16] and Lord Reid agreed that a defender "can only escape liability if the damage can be regarded as differing in kind

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[12] 12 Halsbury's Laws of England (4th ed., 1975), p. 1130.

[13] *Supra,* footnote 5.

[14] *Ibid.,* at p. 414, per Lord Parker C.J.

[15] *Supra,* footnote 6.

[16] *Ibid.,* at p. 850.

from what was foreseeable''.[17] The effect of this decision was twofold: on the one hand, *Hughes and Lord Advocate* eliminated a major flaw in the *Wagon Mound (No. 1)* test which had appeared to limit recovery for damage to the exact type of damage foreseeable as a result of the negligence. On the other hand, it created further confusion by providing no analysis for determining when, or whether, damage is of a similar ''kind'' to that which is foreseeable.

The decision of the Privy Council in the *Wagon Mound (No. 2)*[18] case had the greatest impact on the foreseeability test enunciated in *Wagon Mound (No. 1)*. The action arose out of the same set of facts as *Wagon Mound (No. 1)*. The owners of the second ship which had also been burned in the fire brought their action after the *Wagon Mound (No. 1)* had been decided. They argued that the danger of the oil igniting was a foreseeable possibility which should have been in the mind of the defendant's engineer when he carelessly allowed so much oil to be released into the harbour. The Privy Council found that there was no justification for the release of the oil, and that a chief engineer of reasonable experience should have known that a real risk of fire existed. The court defined the word foreseeable to mean foreseeable as possible,[19] and recovery was granted to the plaintiffs.

There is some dispute as to the real effect of the *Wagon Mound (No. 2)* decision. One theory is that it would ''for all practical purposes restore the *Re Polemis* test, for surely all direct consequences must be regarded as possible if the ordinary man is not required to foresee how they are to eventuate''.[20] On the facts of the case however, it has been argued that the *Wagon Mound (No. 2)* test is limited to conduct which is unlawful, unjustifiable and which lacks any social utility.[21] There is no doubt however that the courts have adopted the *Wagon Mound (No. 2)* test as a ''technique for avoiding the application of the strict foreseeability rule''.[22]

The result of the assaults made on the foreseeability test is that no clearly defined or definable test now seems to exist. The current confused state of the law is vividly shown in the obfuscation presented by this paragraph from *Halsbury's Laws of England*:[23]

> In the tort of negligence the degree of likelihood relevant to the measure of damages is the same as the degree of likelihood relevant to the existence of a duty. A plaintiff recovers damage in respect of a foreseeable accident, even though only an accident of

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[17] *Ibid.*, at p. 845.

[18] *Supra*, footnote 7.

[19] *Ibid.*, at p. 641.

[20] H.J. Glasbeek, *op. cit.*, footnote 3, at p. 200.

[21] L. Green, The Wagon Mound No. 2 — Foreseeability Revised, [1967] Utah L. Rev. 197.

[22] J.C. Smith, Negligence Foreseeability of Injury—The Passing of Wagon Mound (1967), 45 Can. Bar. Rev. 336, at p. 348.

[23] *Op. cit.*, footnote 12, p. 1139.

> that type and not the precise circumstances were forseeable, for an unforeseeable form of a forseseeable type of injury, and for the unforeseeable consequences of a foreseeable type of injury.

Lord Upjohn, in *The Heron II, Koufos* v. *C. Czarnikow Ltd* combined the *Wagon Mound (No. 1)* and *(No. 2)* versions of the foreseeability test into the proposition that:[24]

> . . . the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach, however unlikely it may be, unless it can be brushed aside as far fetched.

The irritation felt by legal writers at the apparent lack of a clear set of guidelines has led to a stream of argument that remoteness decisions are necessarily based on policy considerations. By "policy" it is ostensibly meant that the courts have (and should have) broad discretionary powers to consider a variety of moral, social and economic factors to aid in the decision-making process.[25] One author submits that the *Wagon Mound (No. 1)* was a policy decision in itself motivated by the courts' desire to lay down a just, clear and defensible decision as well as an ongoing rule.[26] Another states "that however stable and predictable we may wish the law to be in this area the realities of the problems posed by injury-bearing activity in an increasingly complex society work in the opposite direction[27]. . . . [T]he Court has not only to decide whether a person is guilty of negligent conduct but also whether the case is ripe for the imposition of negligence liability. . . . This particular question clearly involves an *ought*; it is within the realm of legal policy".[28] A third suggests that the court must be left "sufficient discretionary powers"[29] to "control the findings of liability by a jury"[30] and notes that this means the correct determination of policy "for the circumstances" will be left "to our trial judges".[31] Yet another argues that courts should approach each remoteness case with a view to deciding the issue based on a number of policy considerations, including the nature of the injury, the identity of the defendant, that is, whether a corporation or a person, the factors of insurance coverage and the potential for deterrence and education.[32] He maintains, "it is hard to escape the conclusion that the best we can ever do is to rely on the common sense of the judge and jury" and concludes that

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[24] [1969] 1 A.C. 350 (H.L.), at p. 422.

[25] A.M. Linden, *op. cit.*, footnote 3.

[26] J.G. Merrills, Policy and Remoteness (1973), 6 Ottawa L. Rev. 18.

[27] J.P.S. McLaren, Negligence and Remoteness—The Aftermath of Wagon Mound (1967), 32 Sask. Bar Rev. 45, at p. 46.

[28] *Ibid.*, at p. 47.

[29] Glasbeek, *op. cit.*, footnote 3, at p. 200.

[30] *Ibid.*, at p. 201.

[31] *Ibid.*

[32] Linden, *op. cit.*, footnote 3, pp. 68-69.

"all future attempts to resolve this issue with an automatic formula are doomed".[33]

Undoubtedly, there is sufficient reason to warrant such argument, and that is the inadequacy of the tests offered by the courts to solve remoteness issues. The direct or proximate cause test for remoteness enunciated in *Polemis* became a blunt and clumsy tool in a sophisticated society. The foreseeability test offered in *Wagon Mound (No. 1)* as a replacement for a modern community in order to be "consonant with current ideas of justice or morality"[34] proved unworkable or unjust in a number of instances and had to be manipulated to such an extent that it lost much of its validity.

After *Wagon Mound (No. 2)* was decided, it seemed, at least superficially, that a judge had a choice of tests: if he "wanted" to hold for the defendant, he used the *Wagon Mound (No. 1)* test; for the plaintiff he used the *Wagon Mound (No. 2)* test. It is not surprising then that argument arose to the effect that the decisions were, and perhaps had to be, based on policy.

However, as many, or perhaps more, problems flow from a reliance on policy as a tool for decision making. If a finding of liability, once a remoteness issue is discerned, is left entirely to judicial discretion, similar cases will no doubt have dissimilar results. Policy considerations concerning the financial ability of defendants to pay damage, or their capacity for education or deterrence may lead to utterly different holdings depending on the nature of the defendant, regardless of the similarity of the negligence which gave rise to the injury in each case.

A variation in result based on considerations such as these can only lead to a distrust of, and disrespect for the legal process. Social order demands both a uniform application and an ongoing constancy in the application of the law. Without this continuity of uniformity we lack certainty, and a legal system cannot persist without some stability of expectations. We have to believe that the same set of legal rules will be applied to people in similar situations or our faith in the legal system itself is eroded. Policy, in truth meaning *public* policy, may be the underlying purpose or motive behind a particular rule, but cannot be a justification for discriminating judgments which may vary from case to case.

It is of course accepted that public policy does have a part to play in remoteness decisions as it does in all legal decisions. If an overturned lantern should result in the burning of all Chicago, no one would suggest that Mrs. Murphy who carelessly placed the lantern too near her cow's hoof should be held liable for the loss of the city, and this conclusion is based on policy. There must be some limitation on the liability of defendants, or otherwise it would be impossible for people to insure against potential liability, and consequently to plan one's economic affairs, or to prevent

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[33] *Ibid.*, p. 66.

[34] *Supra*, footnote 4, at p. 422.

economic ruin. As a matter of policy courts avoid imposing "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[35] A cut-off point may be arbitrary, but nevertheless necessary. Liability for economic loss is an example where arbitrary limitations have been evolved by the courts as a matter of policy. But it is submitted that the line where policy tools are needed is placed far distant from the initial question of liability in remoteness cases and exists only where the scope of damage is vastly beyond the ability of the ordinary man to compensate, or where certain other factors of scope must be considered.

II. *The Theoretical Foundation of the Remoteness Problem.*

It is argued in this article that a rational, systematic basis for predicting recovery in remoteness cases can be formulated which allows us not to have to swing between the poles of the direct causation or foreseeability test, or between the poles of the "foreseeable as probable" test of *Wagon Mound (No. 1)* and the "foreseeable as possible" test of *Wagon Mound (No. 2)*. What is needed is a development of the theoretical basis for legal liability from which a test can be formulated which will conform to the historical evolution of the law of remoteness in terms of explaining past decisions, and will also be consistent with the present leading authorities. The test which has emerged can be described as a synthesis of the landmark decisions which have dealt with the shortcomings of *Wagon Mound (No. 1)*, including *Hughes and Lord Advocate* and *Wagon Mound (No. 2)*, together with the ruling case of *Wagon Mound (No. 1)* itself.

The fundamental principle upon which the law of torts rests is that agents are held to be responsible for the natural and probable consequences of their actions. "Natural and probable" are given meaning in terms of foreseeability. Foreseeability of harm is therefore a necessary condition for culpability and consequently for the liability derived therefrom.

The clearest case of foreseeability and therefore culpability is where the harm caused is the very intent of the actor. "Intent" might be defined as the state of mind which directs a person's actions toward a specific object and an "intentional act" may be described as a voluntary act directed by the conscious mind with the desire to bring about certain consequences. Our law makes actors liable for the intentional causing of harm, and the intentional wrongdoer may well be held liable for unintended consequences. That is, remoteness is seldom a defence in the intentional torts. If you intend to cause some harm you are generally liable for all of the consequences.[36]

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[35] *Ultramares Corpn* v. *Touche* (1931), 255 N.Y. 170, at p. 179, 74 A.L.R. 1139.

[36] *Wilkinson* v. *Downtown*, [1897] 2 Q.B. 57, 66 L.J.Q. B. 493, 13 T.L.R. 388, 76 L.T. 493 (Q.B.).

Absence of intention, however, is in itself a defence: lack of intention reduces or eliminates culpability. An actor can show that an act was not intentional by showing that what occurred was not matched in intention owing to an accident, mistake, inadvertence or carelessness.[37] An unintentional act might be a negligent act, however, and negligence assumes the defence of no intent. The element of negligence is introduced by considering what the actor ought to have foreseen as a result of his action, that is he ought to have foreseen the intervening event which caused the action, he ought to have known the true facts, he ought to have foreseen the consequences of his action, or he ought to have taken care in acting.

Even though harm has been caused by an actor's negligent act, it can be a defence to say that its consequences were not foreseeable, and therefore that in regard to them there can be no culpability, and consequently no liability.

For any negligent act there are certain harmful effects which are foreseeable. These effects constitute the risk, and determine the standard of care to be applied. When these effects materialize as a result of an action, remoteness is not a defence. These effects cannot be too remote because they are the very things which the actor ought to have had in mind in acting.

There are other effects, however, which could not be said to be reasonably foreseeable. It is in regard to these that the defence of remoteness of damage might be raised. While these effects may not be reasonably foreseeable in and of themselves, they may, nevertheless, belong to a *class* of effects which is foreseeable. You can have foreseeability in terms of a singular description of events, and you can have foreseeability in terms of a general description of events.

Take, for example, the category of highly dangerous or intrinsically dangerous activities such as the handling of highly inflammable or explosive chemicals, or highly toxic substances. While certain particular effects are reasonably foreseeable, there is a set of other effects of which any particular one is not reasonably foreseeable, although the class as such is reasonably foreseeable. Thus if you negligently drop a plank into the hold of a loaded ship it is reasonably foreseeable that you will do damage to the cargo. It is the reasonable foreseeability of this particular risk which is the basis of judging the act to be negligent. There is, moreover, a set of other possible consequences, no particular one of which is foreseeable as probable. They may not even be nameable beforehand. The plank might hit a person working within the hold with the cargo, or the plank might strike a spark and cause an explosion if the cargo is inflammable, or the plank might dislodge cargo which later falls on a crewman passing by. It is specifically foreseeable if you spill oil on the water that damage will be

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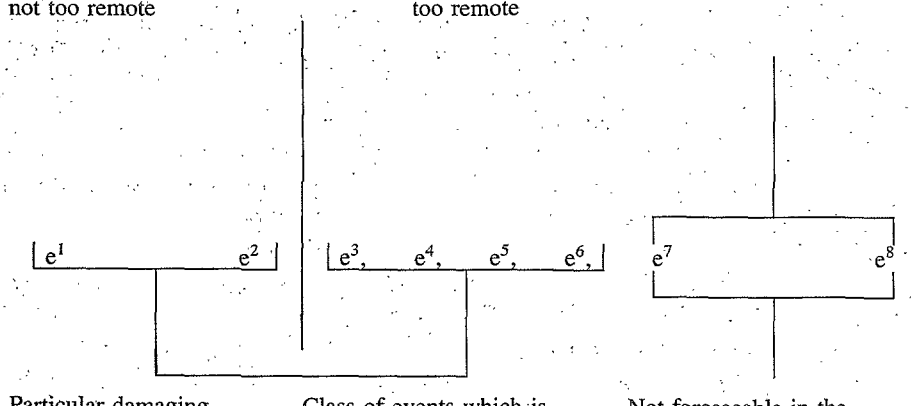
[37] S. Coval, J.C. Smith, Peter Burns, The Concept of Action and its Juridical Significance (1980), 30 U. of T. L.J. 199.

caused to the foreshore. But there is a further set of "possible" ways in which the oil might cause damage, including its ignition by a series of improbable but possible events.

If a person drives while intoxicated at ninety miles an hour down the wrong side of the street and sideswipes an oncoming car, he will be found culpable and liable to pay for the damage. If he strikes an oncoming car in a head-on collision and kills six passengers, we would find him equally culpable, and liable for the full amount of the damage. There is no difference in degrees of culpability in a case where the driver merely sideswiped an oncoming car, or destroyed it, killing a carload of passengers. The amount of damage done is a matter of bad or good luck. Equally if the intoxicated driver careened off the road, hit a fence and popped out the staples, which were then eaten by cattle resulting in their loss due to contracting hardware disease, that concatenation would also be a matter of chance. Whether or not a negligent dangerous act results in other "possible" damaging events which are not reasonably foreseeable in the particular, is purely a matter of luck. The culpability is the same because of the likelihood of a wide unspecified variety of similar events the set of which is foreseeable.

Thus a negligent action will have particular consequences which are foreseeable, and it may also have a set of other consequences which are foreseeable as a set, but no particular member of the set may be reasonably foreseeable. The latter consequences will not be too remote where the foreseeability condition is satisfied for the set. Only a particular consequence which is not foreseeable, and which does not belong to a reasonably foreseeable set would be too remote. The following diagram will illustrate a remoteness issue:



These distinctions can be illustrated by the following set of facts.[38] A city constructs in one of its parks a tower from which a flag is flown. The tower is made up of four pieces of angle iron joined by strips of metal, and coming together at the top to support a single metal pole from which the flag is flown. The construction of the tower at the particular site in the park is negligent because a particular damaging event is foreseeable, that is, young children will likely climb up the tower using the metal strips as a ladder, and some of them may fall and injure themselves.

There is a further set of risks, however, which are not nearly as foreseeable as an injury to a child as a result of a fall, but are forseeable as a class. A child might fall and injure a person who might happen to be at the foot of the tower at the time. A mother might suffer nervous shock seeing her child in danger. A child may climb to the top of the tower and become too frightened of the height to come back down, and a rescuer may fall in trying to bring the child back down.

Let us assume, however, that a child climbs the tower and his weight causes the whole tower to fall over causing serious injury to a person underneath. Let us also assume that the tower was properly built but that the reason it fell was because the bolts holding it to the concrete were made of defective metal, and that there was no way the city could or should be aware of this defect. This particular damaging event would not be foreseeable either in the particular or as a member of a class.

The injury of a person by the falling of the tower would be too remote because it was neither foreseeable in terms of either a singular or a general description. In regard to this kind of risk the city had met the standard of care. If the tower had been constructed in such a way that children could not climb it, it could still fall by other means such as a high wind, or a workman repairing or painting the tower, given the defective bolts. An injury from a child falling on a person below, however, would not be too remote because it would be preventable by complying with the standard of care regarding the safety of children.

In the case of *Gilchrist* v. *A. & R Farms Ltd*[39] the defendant employer company failed to repair the track and rehang a heavy barn door which had to be lifted or slid to open, and which from time to time blew over and had to be lifted and leaned against the barn in an upright position. The plaintiff employee suffered a severe back injury caused when he found the door lying on the ground and proceeded to lift it into an upright position. The plaintiff argued that the defendants were negligent in that the loose door created a risk of harm to children and others of injury which could be caused by the door falling on them. Counsel for the plaintiff invited the

[38] The example is drawn from the fact pattern of *Booth* v. *City of St. Catherines*, [1948] S.C.R. 564.

[39] [1966] S.C.R. 122, 54 D.L.R. (2d) 707 (S.C.C.).

court to apply the direct causation test of *Polemis* and to reject the foreseeability test of *Wagon Mound (No. 1)*. The trial judge and a unanimous Court of Appeal declined this invitation and found the back injury too remote as it was not reasonably foreseeable.

That someone could be hurt by the door falling on them was reasonably foreseeable. The probability of someone being hurt by lifting the door was far less because, as it came out in evidence, lifting things of equal or greater weight such as bags of feed was a normal part of the plaintiff's job.

Negligent actions, however, can result in damage in a variety of ways. The fact that by chance the damage actually occurred in a less probable way should be no defence if the particular way in which the damage occurred is a part of a set of foreseeable possibilities of injury.

A back injury is not a part of the kinds of injuries or damage which could be caused by a door being blown over. If the negligence was the creation of a risk of injury from a falling door, an injury from lifting is too remote to that particular risk. There could be liability only if the risk from lifting was in itself reasonably foreseeable or was actually foreseen. If this is the case then we do not have a remoteness case at all, but the issue relates to standard of care. The Supreme Court of Canada upheld the appeal on the basis that the evidence disclosed that a conversation had taken place between the plaintiff and the defendant's manager in which the possibility of a person being hurt by lifting the door was specifically mentioned. Given this finding of facts, any risk of the door being blown over is irrelevant.

It is a fact of life that damage can materialize from dangerous or damaging events in a variety of ways, and that these damaging events can lead to other damaging events. The fact that we judge an action to be negligent in terms of the risks which have the highest probabilities should not be allowed to free negligent actors from liability for damage of a lower probability in the particular, if the class of which it is a member has a fair degree of probability in terms of foreseeability.

III. *Examples of Foreseeable Classes of Injury.*

Some classes of injury are only foreseeable in regard to specific kinds of negligent actions, while others are foreseeable for any damage-causing event. The clearest examples of the latter are the following:

A. *The Thin Skull Cases.*

It is clearly foreseeable that people have different susceptibilities to damaging events, both physically and mentally. These may be the result of genetic abnormalities, illness, physical handicaps, or disease. Although no particular susceptibility will be foreseeable, the reasonable possibility of some kind of susceptibility clearly is. Consequently the law provides that the negligent actor must "take his victim as he finds him". Damage due to

the existence of a particular physical or mental susceptibility is thus not too remote.

B. *Medical Complications.*

The potential for unforeseen medical complications as the result of an injury is clearly reasonably foreseeable. The complications may arise in the natural course of the illness. They might be the result of the treatment for the injury, whether or not the treatment itself was properly or negligently carried out. Complications also can arise as a result of further injury brought about by the initial damaging event such as where a person who has his leg broken, breaks his other leg because of the handicap of the first break. While no single such event may have been foreseeable, the possibility of complications of this nature are entailed by any risk of serious physical harm.

C. *Rescue.*

Whenever any person is put into a dangerous situation as a result of a negligent act, it is reasonably foreseeable that people will come to his aid, if given the opportunity, and in doing so will put themselves under a risk of harm. It is not foreseeable that on a particular occasion a particular person may stop to render aid to people injured in a motor vehicle accident, but it is reasonably foreseeable that persons do come to the aid of others under such circumstances, and in doing so will be in danger or injury. Injury invites rescue, and some rescues invite injury.

D. *Nervous Shock.*

The suffering of nervous shock as the result of witnessing an injury to another or arriving upon the aftermath of an injury, is the kind of thing which is reasonably foreseeable in general, but not necessarily so in any particular case. It is not so frequent as can be said to be reasonably foreseeable in each particular case, but happens often enough so that it is a distinct foreseeable possibility in general.

IV. *Foreseeable Classes of Risks and the Privity of Fault Doctrine.*

The problem with the foreseeability test for remoteness of damages, in its classical form in cases such as *Bourhill* v. *Young*,[40] *Palsgraff* v. *Long Island Railroad Co.*[41] and *The Wagon Mound (No. 1)*, is that it is based on the privity of fault doctrine. That doctrine has been defined elsewhere by one of the authors as follows:

> The privity of fault doctrine means that if the defendant negligently creates a risk of harm to A, and as a result B suffers damage as well as, or instead of, A, B can only recover if the defendant was negligent to him because there was also a foreseeable risk

[40] [1943] A.C. 92 (H.L. (Sc.)).

[41] [1928] 248 N.Y. 339, 162 N.E. 99 (N.Y.C.A.).

> that he as well as A would be harmed. B can only recover if he has his own independent negligent action. Fault with regard to A won't do for liability for B. This kind of reasoning can be taken one step further. It is sometimes the case that a risk of one kind of injury can result in a different kind of damage. The defendant could create a risk of harm x to A and A could instead, or as well, suffer y. It could then be argued that not only must each plaintiff be treated as a separate action in negligence, but each specific kind of damage must be treated separately as well. A can only recover for damage y if there is a foreseeable risk of harm of y. A risk of harm of x won't do for liability for y. The same arguments would apply.[42]

Thus in *Bourhill* v. *Young* the defendant, on driving his motorcycle was negligent by creating a particular risk of harm by collision to those in the near vicinity. He was held to owe no duty of care to the plaintiff who was out of the range of the risk of physical harm by contact with the vehicle, because no risk of particular harm was created to her in that no particular damaging event regarding her was foreseeable. In *Palsgraff* v. *Long Island Railroad Co.* the defendant created a particular risk of harm to the package of a train passenger whom he pushed on to the train in a negligent manner, but was held to owe no duty of care to the plaintiff because the particular event of scales falling on her as a result of an explosion of fireworks in the package when the package fell under the wheels of the train, was not reasonably foreseeable. In the *Wagon Mound (No. 1)* the defendants were found to be negligent because their servant created a risk of the particular harm to the occupiers of foreshore property by oil being washed up, but owed no duty of care in regard to damage by fire because the particular chain of events by which the oil would become ignited was not reasonably foreseeable.

The traditional foreseeability test for remoteness of damages, based on the privity of fault doctrine, draws no distinction between the foreseeability required to establish fault, or a departure from the standard of care of the reasonable man in regard to a particular action, and foreseeability necessary to establish responsibility for a particular effect of that action. Culpability is established in terms of the primary or more obvious risks foreseeable as a result of one's own actions. When we assess culpability, we generally look at the obvious particular risks. These risks, however, are not the only foreseeable results of an action. There are actions which *predictably have harmful unpredictable consequences,* and there are therefore set of ancillary risks entailed by primary or obvious particular risks.

Agents have a right not to be injured by the negligent actions of other agents; and all agents have a duty to other agents to meet certain minimum standards of care in their actions. Agents, therefore, owe not only a duty of care in regard to particular risks to particular people, but also in regard to classes of risks to classes of people. Privity of fault between the defendent and plaintiff, if it is deemed to be a necessary condition for liability, must be taken to include classes of kinds of risks to classes of people as well as

[42] J.C. Smith, The Mystery of Duty, in L. Klar (ed.), Studies in Canada Tort Law (1977), p. 32.

particular risks to particular people. Defining culpability in these wider terms thus is consistent with a privity of fault doctrine.

The *Wagon Mound (No. 1)* test required us to treat each unique damage in terms of particular foreseeability. Once negligence has been established, the onus is on the negligent actor to show that the particular results were not foreseeable. It is not sufficient to show that it was not foreseeable in the particular, it must also be shown that it was not foreseeable in general in order to deny culpability.

V. *The Restatement of the Foreseeability Test.*

The test we propose can be stated as follows: *Recovery should be granted for "remote" damage when the damage falls within a class of possible damages, which class satisfies the foreseeability condition, although any particular event falling within the class may not satisfy that condition.* This test for recovery uses the concept of reasonable foreseeability as expressed in *Wagon Mound (No. 1)*, that is, foreseeable as probable, but allows it to apply to a class with members of merely possibly foreseeable particular damaging events.

The test is relatively easy to apply. If the damage in question was foreseeable in particular as the result of the negligent action, no question of remoteness even arises. Liability is clear. If the damage was not foreseeable in particular but was a member of a class of damage foreseeable as a result of the negligent act, then the damage is not too remote, and the defendant would be liable.

We have taken the negligence decisions from the latter part of the nineteenth century up to the present, from England, Canada, Australia, and New Zealand, and have isolated those cases where the courts have discussed remoteness issues or used or referred to direct causation or foreseeability tests of remoteness. We have eliminated from these those cases which did not give rise to a true issue of remoteness, or were decided upon the basis of doctrines which are no longer legally relevant. In the cases involving negligent activities, there are generally some very obvious risks of specific injury to persons or damage to property. A remoteness issue arises when something else occurs as well as, or instead of, the specific risk. We have eliminated from our analysis those cases where the very presence of negligence at all is in issue, or where the issue is one merely of standard of care.[43] We have eliminated those decisions where remoteness

[43] In *Wood* v. *C.P.R.* (1879), 30 S.C.R. 110, the plaintiff became entangled in long grass while attempting to couple cars together, and was seriously injured by another train when he fell. The injury was held not to be reasonably foreseeable. This constitutes a finding of no departure from the standard of care of the reasonable man, and consequently no negligence. It is a remoteness issue if in a hot and dry season the long grass constituted a risk of fire as in *Smith* v. *London and South Western Railway Co.* (1870), L.R. 6 C.P. 14, 40 L.J.C.P. 21 (C.C.P. Ex. Ch.), and the plaintiff was injured not by fire, but by being hit by a train when he became entangled in the long grass and fell.

cases setting out the foreseeability test are cited as authority for the risk principle. When used in this manner, the foreseeability test of *Wagon Mound (No. 1)* becomes equivalent in meaning with the good neighbour principles of Lord Atkin in *Donoghue* v. *Stevenson*. We have also eliminated from our analysis those cases involving the intervening acts of third parties where those acts were the very particular risk, the creation of which is the basis of a finding of negligence while retaining in the analysis those cases where the intervening act of the third party was merely an ancilliary risk, or a part of a wider class of risks which were created by the initial negligence.[44]

From the set of cases remaining, which we felt raised true remoteness issues, we separated those classes of injury or risks which could follow from any damage-causing event. These we divided into the categories of thin skull, medical complication, rescuers, and nervous shock. On our test, any damage falling into the first three categories should never be too remote. Nervous shock, for policy reasons, has to be treated differently. The remaining cases were divided into dangerous and non-dangerous activities. Dangerous activities are classified as such precisely because they can give rise to a wide class of possible injuries. Therefore we conclude that almost anything which results from a negligent dangerous activity is, on our test, not too remote. If a particular injury or damage resulting from a non-dangerous activity falls within a foreseeable class of harm then it is not too remote; if it does not, then it is too remote. From the analyses we are able to reproduce the following chart:

	Total Cases	Held for Plaintiff	Held for Defendant	Correctly Decided	Wrongly Decided
Dangerous Activity					
Motor Vehicle	45	39	6	43	2
Other	63	53	10	55	8
Non Dangerous Activities	17	12	5	15	2
Mental or Physical Susceptibilities (Thin Skull)	81	75	6	75	6
Medical Complications	31	27	4	28	3
Rescuers	26	25	1	25	1
Nervous Shock suffered by Third Parties	49	30	19	43	6
Totals	312	261	51	284	28

Percent Correctly Decided: 90%

[44] For example, in *McKenna* v. *Stephens*, [1923] 2 I.R. 112 (K.B.), the defendant company negligently failed to construct a walkway around one of its construction sites. The plaintiff was forced to walk on the roadway where he was struck by a negligent motorist and injured. This was the very risk which the defendant ought to have foreseen and to have guarded against. The issue is one of whether or not the defendant was negligent. No remoteness issue is involved.

VI. *Dangerous Activity.*

In the famous case of *Palsgraf* v. *Long Island R. Co.* Mr. Justice Andrews stated in his dissent that courts must draw the "uncertain and wavering line" of the limits of liability as best they can, taking into account all the relevant factors in the circumstances. He argued that out of a "rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point".[45] In fact, the reasoning which in some cases will trace an extended and improbable series of events in order to impose liability, as we have seen in *Falkenham* v. *Zwicker*, and which in other cases will not do so, is not actually arbitrary. The analysis of the cases shows that a clear relationship exists between the nature of the activity and the resulting decision regarding the imposition of liability.

Where an activity is highly dangerous, it is foreseeable that negligence may result in various kinds of damage. In other words, the foreseeable class of risks of harm surrounding negligence when engaged in dangerous activity is broad and varied. As a general rule, the more intrinsically dangerous the activity involved, the greater the likelihood of a finding that the damage is not too remote.

This result accords with the general principle of maintaining proportionality between the fault on the part of the defendant and the liability imposed for the resulting damage. Where a person is engaged in an extremely dangerous activity, society exacts a very high standard of care. If the person is negligent in such a situation he is rightfully culpable for all of the harm emanating from his negligence, whether foreseeable or not, as long as the actual damage falls within a class of risks created by the negligence. The more dangerous the activity, the wider will be the class of risks. Where the person is engaged in a reasonably non-dangerous activity then the standard of care governing his behaviour is lower and negligence will attract a lesser degree of culpability and thus the range of consequences for which he will be liable will be much more narrow.

Driving a motor vehicle is an example of an activity which is highly dangerous and which requires the utmost standard of care to be exercised. One need only consider the appalling statistics on death and injury resulting from motor vehicle accidents to ascertain the truth of this premise. Because of the intrinsically dangerous nature of driving, the reasonably foreseeable class of risks created by negligent driving is extremely broad. Therefore, where causation is proven in a remoteness case involving a motor vehicle accident the defendant should, with few exceptions, be found liable for all of the damage which stems from his negligence. Damage should only be deemed to be too remote where it is clearly outside of the class of risks created by negligent driving. A few of the cases which held for the defendant will be used to demonstrate when such a situation might arise.

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[45] *Supra*, footnote 41, at pp. 103 and 104.

It is clear from the strange and varied series of events revealed in the cases that almost any form of damage can happen as a result of a motor vehicle accident. Naturally, all of the particular categories of remote damage can happen — the victim may have a thin skull, medical complications may set in, a rescuer may intervene, and so forth. Aside from these, a wide variety of other unforeseeable consequences may arise out of negligent driving. The facts of *Zwicker* have already been cited as one example. But domestic animals have not only eaten staples after car accidents; also they have inadvertently been released onto the highway causing other drivers to hit them,[46] and they have been frightened by car accidents into running across railroad tracks where they have been hit by oncoming trains.[47] Fowl, as well as beasts, have suffered unforeseeable damage through negligent driving. In *Heeney* v. *Best*[48] the defendants negligently backed their truck into hydro electric wires, interrupting the flow of electricity to the plaintiff's farm. The loss of power cut off the oxygen supply to baby chicks, suffocating them.

Humans have experienced all manner of unexpected injury by reason of motor vehicle accidents. In *Lauritzen* v. *Barstead*[49] the intoxicated defendant negligently pulled at the steering wheel forcing the car off the road, and later hopelessly mired it in a hole while attempting to drive it. The plaintiff was forced to walk to town for help, suffered frostbite, and ultimately had to have parts of both feet amputated. A similar injury was the fate of the plaintiff in *Bradford* v. *Robinson Rentals Ltd*[50] who was required by his employers to make a long journey in an unheated vehicle in severe weather conditions. In *Patten* v. *Silberschien*[51] the plaintiff was robbed of $80.00 while he was lying unconscious on the road after being struck by the defendant's car. The plaintiff in *Ichard* v. *Frangoulis*[52] recovered for loss of enjoyment of a holiday when injuries inflicted in a car accident prevented him from completing his vacation. All the above losses were found by courts to be not too remote.

Judges have found remarkable series of events arising out of car accidents to be foreseeable. In *Lynch* v. *Mitchell*[53] the Queensland District Court found it entirely foreseeable that a car collision would force open the trunk of a car and that the tools in the trunk would be thrown out, injuring the plaintiff who was standing on a nearby footpath. The decision is correct although the analysis is questionable. To say that the particular injury was

[46] *Buchanan* v. *Oulton* (1965), 51 D.L.R. (2d) 383 (N.B.C.A.).

[47] *Sneesby* v. *Lancashire and Yorkshire Ry Co.* (1875), 1 Q.B. 42 (C.A.).

[48] 94 D.L.R. (3d) 451, [1979] 1 A.C.W.S. 7 (Ont. H.C.).

[49] (1965), 53 D.L.R. (2d) 267, 53 W.W.R. 207 (Alta S.C.).

[50] [1967] 1 All E.R. 267 (Devon Assizes).

[51] [1936] 3 W.W.R. 169, 51 B.C.R. 133 (B.C.S.C.).

[52] [1977] 2 All E.R. 461, [1977] 1 W.L.R. 556 (Q.B.D.).

[53] (1963), 57 Q.J. P.R. 125 (Q. Dist. Ct).

foreseeable, in this case the injury caused by flying tools, is a fiction. But the injury does fall within a foreseeable broad class of damage. Where the defendant has been negligent in an activity which is dangerous in nature then any form of damage ensuing which is within the same large class of foreseeable injury is recoverable.[54]

Those cases concerning motor vehicle accidents in which the remote change falls within one of the particular categories such as the "thin skull" cases were analyzed separately from the balance of the motor vehicle negligence cases. Forty-five cases were considered in which the facts did not designate the case as falling into one of the other noted categories and thirty-nine of these cases held for the plaintiff.[55] Negligent driving has constantly attracted a far-reaching burden of culpability.

Two of the six cases which held for the defendant are true counter-examples to our test for recovery. That is, in terms of our test, they are wrongly decided. In *Seymour Sawmills Ltd* v. *Singh*[56] the defendant driver backed his truck into a power pole and caused a short circuit, destroying a switch box located several miles away. The court applied a *Wagon Mound (No. 1)* test, and found the damage too distant to be foreseeable. According to our test the fact of proximity to the scene of an accident should be irrelevant to the question of recovery if the damage falls within a class of foreseeable risks. In this case it seems a particularly narrow view to demand that damage resulting from negligence be in the immediate vicinity of the act in order to be foreseeable. The second counter-example, *Knightley* v. *Johns*,[57] is a recent decision of the English Court of Appeal. The defendant negligently caused a car accident in a tunnel. A police inspector at the scene sent two police bikes against the flow of traffic to avert oncoming cars. The plaintiff, one of the bike drivers, was hit by an approaching car. The trial judge held the defendant wholly liable for the second accident, but this decision was overturned by the Court of Appeal who found the inspector entirely liable since the order he gave to the plaintiff was contrary to standing policy on road accidents. The Court of Appeal took the position that the negligence of the inspector acted as an intervening event which broke the chain of causation between the defendant's negligence and the injury to the plaintiff. Such metaphysical abstractions, or subtleties of thought, should not really be a part of a rational approach to the subject of remoteness. There was a clear chain of causation

[54] A second policy is at work here as well. It is the usual case that drivers carry insurance. Where additional persons are negligent in a series of events following a motor vehicle accident, the fact that a driver has insurance where the second party may not becomes particularly important.

[55] All of the cases analyzed for the purpose of this article will be cited and classified according to the categories here used in a set of appendices to a soon to be published book on duty in the law of negligence by J.C. Smith.

[56] (1964), 48 W.W.R. 129 (B.C. Co. Ct).

[57] [1982] 1 All E.R. 851 (C.A.).

between the negligence and the remote damage; if the accident had not occurred, no one would ever have been ordered to avert oncoming traffic. The difficulty a court is faced with is that it does not want to subject the defendant to broad liability when a second person has contributed to the harm. This problem should be resolved by an apportionment of liability between the first defendant and the second defendant (who will have been joined as a third party by the first defendant). The court should have the opportunity to determine which actor contributed most to the occurrence of the unforeseen consequence and be able to apportion liability accordingly.

The four remaining motor vehicle cases which held for the defendant are examples of cases where the injury falls entirely outside of a class of harm associated with the negligence and so no recovery is granted. In *Antell and Ozolins* v. *Simons*[58] a married woman was injured in a car accident to the extent that sexual relations became physically impossible for her. Her husband deserted her because of her incapacity, and eventually the couple were divorced. In both *Admiralski* v. *Stehbens*[59] and *Cameron* v. *Nottingham Insurance Co. Ltd*[60] the plaintiff's wives left them because car accidents had rendered them physically or psychologically impotent. The British Columbia court and the Australian courts all held that the desertion was too remote to be recoverable. The courts have consistently agreed that remoteness is a proper defence in an action for loss of consortium after an accident. The loss of a spouse through desertion does not fall within a class of foreseeable injury caused by motor vehicle accidents — it can happen as a result of any serious physical injury. There is nothing unique about this type of accident which would cause a spouse to leave, and the fact that driving is highly dangerous is irrelevant to the question of whether the plaintiff would foreseeably suffer this type of damage. Any kind of injury which had the physical or psychological effect of impotency might make a spouse leave, regardless of whether the activity which caused the injury was dangerous or non-dangerous. Desertion by a spouse is neither reasonably foreseeable in the particular, nor does it belong to a class of reasonably foreseeable injury, and therefore it is too remote an injury to be recoverable.

The fourth case is *Laurie* v. *Godfrey*,[61] a curious New Zealand case. The plaintiff was doing washing at the defendant's house. She had fastened a clothes line across a laneway at right angles to a wire line fastened to a chimney. The defendant drove down the lane and, without waiting for the plaintiff to hoist up the line, he slowly drove through. The car pulled down the clothesline, which in turn pulled down the wire line, which brought the chimney bricks down on the plaintiff. The Supreme Court of New Zealand

[58] [1976] 6 W.W.R. 202 (B.C.S.C.).

[59] [1960] Qd R. 510 (Q.S.C.).

[60] [1958] S.A.S.R. 174 (S.A.S.C.).

[61] [1920] N.Z.L.R. 231 (N.Z.S.C.).

found the injury unforeseeable. In this case the only apparent risk of harm of the plaintiff nudging his way past the clothes lines was that he might dirty the clothes. His driving presented no obviously dangerous risks. If he had carreened through the clothesline at fifty kilometres per hour he would probably have been liable for any injury he might have caused. Drivers, as a rule, are liable for extended consequences of negligence because driving at high speeds is dangerous. Where the driving presents no obvious risks, or is not dangerous according to any reasonable definition, then no broad class of risks exists, and liability for unforeseen consequences of negligence is confined to the narrow set of risks presented by the negligence. The damage caused in *Laurie* v. *Godfrey* was not reasonably foreseeable in the particular, nor did it belong to a class of reasonably foreseeable harm.

Other categories of dangerous activity include the handling of toxics, heavy or dangerous equipment, electricity and explosives or flammables. Apart from motor vehicle accidents, which form the largest single category under the heading of dangerous activity, sixty-three cases were considered in which the activity the defendant was engaged in can be described as dangerous. The courts granted recovery to the plaintiff in fifty-three of these cases, representing eighty-four percent of the total.

Of the ten cases which held for the defendant, eight are counter examples to our test; we would argue that they are wrongly decided. Generally these counter-examples are cases where the court has concluded that some intervening force, human or otherwise, has performed an intervening act thereby breaking the chain of causation between negligence and damage. The fact of an intervening force should not be a reason in itself to withhold the imposition of liability on the defendant if the type of damage which ensues falls within a class of foreseeable damage. In *Bradford* v. *Kanellos*[62] the Supreme Court of Canada, Laskin J. (as he then was) and Spence J. dissenting, held for the defendant, a restaurant-owner who had negligently caused a flash fire in the restaurant kitchen. A patron who heard the hiss of the fire extinguisher and mistakenly thought it was escaping gas, shouted an alarm. In the stampede that followed the plaintiff was injured. The court decided that the action of the patron constituted an intervening act which was unforeseeable and not within the risk created by the defendant's negligence. Had the facts been only slightly different, however, the court would no doubt have reached the opposite conclusion. If the patron had seen the flames and shouted "fire" rather than "gas" it would be difficult to argue that such a reaction was unforeseeable. One risk of negligently causing a fire is that people will try to escape from it. Whether a patron is frightened by the fire itself or by the noise of the extinguisher makes no real difference since the resulting injury falls within the same class of risks.

[62] (1973), 40 D.L.R. (3d) 578 (S.C.C.).

In the other seven cases, an emergency circuit breaker inexplicably failed to work,[63] a roof unexpectedly collapsed under a man's weight,[64] and generally the forces of nature worked in strange and mysterious ways.[65] Employing the device of intervening act to place the burden of the unexpected onto the plaintiff rather than the defendant does seem inequitable in the case where the ultimate injury, regardless of what *causa finalis* provoked the denouement of the sequence of events, is within the class of risks created by the original negligence.[66]

Of a total of 108 cases considered under the majority heading of dangerous activity only ten are counter-examples to the proposed theory. Based on this analysis, ninety percent of the cases are correctly decided. These numbers indicate that, to a certain extent, judges do follow a set of guidelines when presented with remoteness cases. Despite the often propounded view that no clear means of decision-making exists for remoteness cases, it would appear that courts, for the most part, implicitly employ just such a theory as the foreseeable class test to reach their verdicts.

VII. *Non-Dangerous Activity.*

Actions which would normally be classified as non-dangerous generally give rise to specific risks of harm rather than to broad classes of risks when carried out negligently. There are examples of non-dangerous actions carried out in a negligent manner which do give rise to a foreseeable class of possible or probable harm, many of which in particular could not be said to be reasonably foreseeable. Such classes of potential harm causing events are much more limited in range than those associated with dangerous activities. If, for example, a horse is left unattended it is foreseeable that the horse could be frightened in a number of different ways, bolt, and cause a variety of possible injuries. In *Lynch* v. *Nurdin*[67] the horse was set in motion by a child, and another child who had jumped up on the cart was injured. In *Harris* v. *Mobbs*[68] the defendant left a horse and plough unattended on a road, which caused another horse to bolt and injure the plaintiff. In *Dorsett* v. *Adelaide Corporation*[69] an unattended horse and dray backed over the plaintiff tram conductor who was walking on a

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[63] *Harsim Construction Ltd* v. *Olsen, Hough et al.* (1972), 29 D.L.R. (3d) 121 (Alta S.C.); *Morris* v. *Fraser* (1966), 55 D.L.R. (2d) 93 (B.C. Co. Ct).

[64] *Macdonald* v. *David Macbrayne Ltd,* [1951] S.C. 716 (Ct of Sess., 2nd Div.).

[65] *Doughty* v. *Turner Manufacturing Co. Ltd,* [1964] 1 All E.R. 98 (C.A.); *Fillion* v. *N.B. International Paper Co.,* [1934] 3 D.L.R. 22 (N.B.C.A.); *The "Singleton Abbey"* v. *"The Paludina",* [1927] A.C. 16 (H.L.).

[66] *Weld-Blundell* v. *Stephens,* [1920] A.C. 956 (H.L.).

[67] (1841), 1 Q.B. 29, 10 L.J.Q.B. 73, 4 P. & D. 672, 5 Jur. 797, 55 R.R. 191 (Q.B.).

[68] (1878), 3 Ex. D. 268, 39 L.R. 164, 42 J.P. 759 (C.C.P.).

[69] [1913-14] S.A.L.R. 71 (F.C.).

footpath alongside the tram car. In *Aldham* v. *United Dairies*[70] the defendant left a horse attached to a milk cart unattended. Rather than being frightened and bolting and running over someone, the horse bit and pawed the passing plaintiff. In all four cases the damage was found not to be too remote given the initial negligence in leaving the horse unattended. While any one of these injuries might not be sufficiently probable to be reasonably foreseeable, the class of such possible injuries is reasonably foreseeable.

In *Lathall* v. *Joyce*,[71] a bullock being transported to a butcher was negligently allowed to escape. It was foreseeable that the frightened animal might run into or over someone in its escape. Rather, it attacked the plaintiff passing on a bicycle. The court held the injury to be too remote because it was unforeseeable that a bullock would attack someone. On our test, and when compared with the four cases involving horses, cited above, *Lathall* v. *Joyce* is wrongly decided because while an attack on a person was not probable, it is clearly a member of a class of potential ways in which injury could be caused.

It is reasonably foreseeable that if an intoxicated person was ejected from a place of safety such as a train or a beverage room where his presence was not unlawful, he could get himself into a situation where he could be injured by being hit by a car on a highway, by another train or by falling down stairs. In four such cases the injury was held not to be too remote.[72] Contrast with these the case of *Glover* v. *London and South Western Railway Co.*[73] The defendant was wrongfully ejected from a railway carriage and sued for the loss of a pair of racing glasses left behind. The loss was not recoverable, and rightly so, since it was not reasonably foreseeable in itself, nor did it belong to a reasonably foreseeable class of injury.

In seventeen cases of damages resulting from the negligent carrying out of a non-dangerous act, fifteen were correctly decided according to the revised foreseeability test. Of those fifteen, twelve held for the plaintiff and three for the defendant. Two were wrongly decided in terms of our test.[74]

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[70] [1940] 1 K.B. 507 (C.A.).

[71] [1939] 3 All E.R. 854 (K.B.).

[72] *Canadian Northern Ry* v. *Diplock* (1916), 53 S.C.R. 376; *Howe* v. *Niagara, St. Catherines Ry*, [1925] 2 D.L.R. 115 (Ont. C.A.); *Menow* v. *Honsberger*, [1970] 1 O.R. 54 (O.H.C.); aff'd [1971] 1 O.R. 129 (Ont. C.A.); *Sherwood* v. *Hamilton Corporation* (1875), 37 U.C.R. 410 (U.C.Q.B.). In *Delahanty* v. *Michigan Central Railway* (1905), 10 O.L.R. 388 (Ont. C.A.) the ejected intoxicated plaintiff wandered onto a bridge, fell off and drowned. The court found no negligence as the evidence disclosed that the plaintiff was not sufficiently intoxicated to be physically impaired. The finding of no negligence precludes a remoteness issue, and thus the case is not included in our analysis.

[73] (1867), L.R. 3 Q.B. 25, 37 L.J.Q.B. 57, 17 L.T. 139, 32 J.P. 39 (Q.B.).

[74] *Mckinnon* v. *DeGroseilliers*, [1946] O.W.N. 110 (Ont. H.C.); *Lathall* v. *Joyce*, [1939] 3 All E.R. 854 (K.B.D.).

VIII. *Thin Skull.*

No prior test for remoteness of damage has disturbed the general principle that the defendant takes his victim as he finds him. What is commonly known as the "thin skull" principle is in accordance with our test as well: the foreseeable class of risks flowing from a negligent act always encompasses the possibility that a plaintiff will have a predisoposition to physical or mental frailty. In fact, recovery is almost invariably given in these cases, whether the precondition is heart disease,[75] haemophilia,[76] schizophrenia[77] or even bad teeth.[78]

Although ninety thin skull cases were analyzed, and nine of these were eliminated. Included in this group are cases of physical as well as mental or nervous predisposition in the plaintiff who was exposed to the risk of harm. Cases where a second person suffers nervous shock on witnessing or learning of a threat to another are considered separately.

Four cases[79] were eliminated because a causal connection was not shown to exist between the negligence of the defendant and the injury suffered by the plaintiff. Evidence of causation is a necessary condition to recovery in the thin-skull cases. In *Foran* v. *Kapellas and Smith*[80] the plaintiff sought to have the damage award increased to compensate for deteriorating health after a car accident. The Supreme Court of Canada refused recovery for this head of damage on the basis that it had not been shown that the accident was the cause of the deteriorating health.

An anomaly in the older cases concerning nervous shock was caused by the decision of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*[81] which held there could be no recovery for nervous shock unless it was accompanied by physical injury. The case has long since been disapproved[82] and abandoned as a wrong decision. Therefore a further four of the older cases[83] which followed the *Coultas* decision have been eliminated from consideration as well.

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[75] *Barnaby* v. *O'Leary* (1956), 5 D.L.R. (2d) 41 (N.S.S.C.).

[76] *Bishop* v. *Arts and Letters Club of Toronto* (1978), 83 D.L.R. (3d) 107 (Ont. H.C.).

[77] *Elloway* v. *Boomars* (1968), 69 D.L.R. (2d) 605 (B.C.S.C.).

[78] *Smith* v. *Maximovitch* (1968), 68 D.L.R. (2d) 244 (Sask. Q.B.).

[79] *Danjanovich* v. *Buma,* [1970] 3 O.R. 604 (Ont. C.A.); *Foran* v. *Kapellas and Smith,* [1975] S.C.R. 46; *Negretto* v. *Sayers,* [1963] S.A.S.R. 313 (S.A.S.C.); *Strutz* v. *Ellingson* (1977), 2 A.R. 485 (Alta S.C. (T.D.)).

[80] *Supra,* footnote 79.

[81] (1888), 13 A.C. 222 (P.C.).

[82] *Coyle (or Brown)* v. *Watson (John) Ltd,* [1915] A.C. 1, [1914-15] All E.R. 461 (H.L. (Sc.)); also not followed in *Dulieu* v. *White and Sons,* [1901] 2 K.B. 669.

[83] *Geiger* v. *Grand Trunk R.W. Co.* (1905), 10 O.L.R. 511 (Div. Ct); *Henderson* v. *Canada Atlantic Ry Co.* (1898), 25 O.A.R. 437 (C.A.); *Miner* v. *C.P.R.* (1910), 3 Alta L.R. 408 (Alta S.C., App. D.); *Penman* v. *Winnipeg Electric Ry,* [1925] 1 D.L.R. 497 (Man. K.B.).

Of the remaining eight-one cases, seventy-five held for the plaintiff and six held for the defendant. Regardless of which test for remoteness was used in the case, the courts have consistently found the possibility of particular abnormoal physical and mental susceptibility to be reasonably foreseeable.

All six of the cases which found for the defendant deal with the category of nervous shock. In the vast majority of nervous shock cases recovery is given. Out of fifty-one cases where the plaintiff suffered nervous shock as a result of the defendant's negligence, recovery was given in forty-five. However in some cases there is still a slight tendency to discount injury of a psychological nature as an acceptable head of damages. For example, in *Swami* v. *Lo*[84] the plaintiff's husband was seriously injured in a car accident. He suffered unrelenting pain from which no medication gave him respite. He developed a severe depression and ultimately committed suicide. The British Columbia Supreme Court found for the defendant on the basis that depression and death were not foreseeable eventualities.

Surely this decision is wrong. Clearly some people are more prone than others to nervous disorders just as some are more prone than others to arthritis. There is no rationale to support a differentiation between physical and mental preconditions. The cases which demand a higher degree of proof that the negligence caused a mental or nervous injury that if the predisposition was physical are anomalies and must be considered to be wrongly decided.

As a general rule, a victim who suffers aggravated damage because of a physical or mental precondition will always recover, and his extended injuries will never be too remote, because the possibility of a predisposition to injury is foreseeable as a class of harm. The few counter-examples cannot be distinguished in any rational manner. The weight of authority confirms this argument, as the courts have followed this pattern in more than ninety-two percent of the thin-skull cases.

Prima facie the strict application of the "thin skull" rule might seem overly harsh in that a person responsible for very slight negligence, which would foreseeably bring about only minor damage, could be liable for enormous and disproportionate consequences. This result is contrary to the accepted principle that some degree of proportionality must be maintained between the fault of the defendant and the harm caused by his act. The courts have solved this problem through the assessment of damages. Where the plaintiff has a particular susceptibility which is likely to be triggered by a variety of causes the damage awarded will be decreased significantly on the basis that the same losses would likely be suffered in any event.

The leading case on this issue is *Smith* v. *Leech Brain* where a small

[84] [1980] 1 W.W.R. 379 (B.C.S.C.).

burn on the lip of a man with a pre-malignant condition led to cancer, and ultimately death. The court considered the evidence that a burn was only one of the agents which could have promoted malignancy, and, therefore, cancer to develop. Lord Parker C.J. wrote: "I am told that sunlight, heat and cold, weather, certain scratches, certainly trauma, can be the promoting agent, ..."[85] The court found that although the burn was in fact the agent, "there was a strong likelihood that at some stage in his life he would develop cancer".[86] Accordingly, there was a substantial reduction in the amount of damages awarded to the widow.

An interesting Canadian example is the case of *Bates* v. *Fraser*.[87] The plaintiff suffered from Parkinson's disease but was in a period of remission at the time of the accident. The remission had occurred when a bump on her head had caused amnesia which in turn resulted in the loss of the psychological conditions responsible for the debilitating symptoms. She again fell victim to the symptoms of Parkinsonism after another small bump in a minor car accident caused by the defendant's negligence, restored her memory. Although her physical injury from the accident was very slight, the returned symptoms were so severe as to once again render her an invalid. Mr. Justice Grant, in awarding a mere $3,000.00 damages, wrote, "if her condition were entirely due to the collision she would be entitled to very extensive compensation".[88] However, the plaintiff was "affected very readily" and "[t]he slightest reason might well have brought about emotional distress which would aggravate distresses and pains of her Parkinsonism".[89]

These cases show that while a strict adherence to the thin skull rule might appear to work an injustice, in fact proportionality between the degree of wrong and the degree of liability imposed is maintained by the court's assessment of damages. Where it is legally correct to impose liability, but morally unjust to exact complete compensation, the courts can correct this imbalance through their ability to decrease the amount of damages by taking into account the probabilities of other events causing the same loss in the absence of negligence.

IX. *Medical Complications.*

In principle, there is no reason to distinguish the cases of medical complication from the thin skull cases. As a general rule, all medical complications resulting from an injury are recoverable. This principle obtains regardless of whether the complication arises because of the former injury itself, as where one illness leads to another, or whether a second injury occurs

[85] *Supra*, footnote 5, at p. 412.

[86] *Ibid.*, at p. 413.

[87] (1963), 38 D.L.R. (2d) 30 (Ont. H.C.).

[88] *Ibid.*, at p. 36.

[89] *Ibid.*, at p. 37.

because the plaintiff is rendered awkward by the first injury, or whether the plaintiff is forced to seek medical treatment which causes or creates further injury. Thus, recovery was granted where chronic asthmatic bronchitis developed after a lung injury,[90] where a woman who could not see properly over the neck brace she had to wear after the injury, fell again,[91] where the plaintiff was using crutches after an accident and fell down the stairs,[92] and where the plaintiff's ulnar nerve was damaged when he was being treated in hospital for unrelated injuries suffered in a car accident.[93]

Thirty-six cases were analyzed where injury was aggravated due to medical complication.[94] Four of these[95] were eliminated from consideration because causation was not proved. Similarly, within the thin skull cases, a clear causal connection between negligence and injury is a necessary condition to recovery for medical complication. One other case was eliminated because it was based on a doctrine of law which has since been abandoned.[96] Out of the thirty-one remaining cases, twenty-seven held for the plaintiff and four for the defendant. One of the four cases finding for the defendant is correctly decided,[97] and the other three, according to our theory are wrongly decided.

The three cases which provide counter-examples to the general rule are all based on a rationale of intervening cause. Some courts have accepted the argument that liability for medical complication should not be imposed where the defendant can show negligence on the part of the hospital staff, as this constitutes an intervening act which breaks the chain of causation.[98]

In the case of *David* v. *Toronto Transit Commission*[99] the defendant, Toronto Transit Commission, was able to show negligence on the part of

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[90] *Lukasta* v. *Sawchuk*, [1975] W.W.D. 98 (Alta D. Ct).

[91] *Wieland* v. *Cyril Lord Carpets Ltd*, [1969] 3 All E.R. 1006 (Q.B.D.).

[92] *Goldhawke* v. *Harder* (1976), 74 D.L.R. (3d) 721 (B.C.S.C.).

[93] *Papp* v. *LeClerc* (1977), 77 D.L.R. (3d) 536 (Ont. C.A.).

[94] Not included among these is *Ostrowski* v. *Lotto* where the Supreme Court of Canada found no negligence on the part of the doctor accused: [1973] S.C.R. 200 aff'ing [1971] 1 O.R. 372; rev'ing (1968), 2 D.L.R. (3d) 440 (Ont. H.C.).

[95] *Gordon* v. *Canadian Bank of Commerce*, [1931] 3 W.W.R. 185 (B.C.C.A.); *Hawley* v. *Ottawa Gas Co.* (1919), 15 O.W.N. 454, aff'd 16 O.W.N. 106 (Div. Ct); *Oakes* v. *Spencer* (1964), 43 D.L.R. (2d) 127 (Ont. C.A.); *Robinson* v. *Englot*, [1949] 2 W.W.R. 1137 (Man. K.B.).

[96] In *Walker* v. *Gt Northern Ry* (1891), 28 L.R. Jr. 69 (Q.B.D.), the plaintiff was *en ventre sa mère* and was injured by the defendant's negligence together with her mother who was a paying customer on the train. The court found no cause of action to exist as the only duty owned was to the mother.

[97] *Best* v. *Samuel Fox & Co. Ltd*, [1952] A.C. 716, [1952] 2 All E.R. 394 (H.L.), is another case on the issue of partial loss of consortium. This is a form of damage which is unforeseeable in the particular or as part of a class of damage. A more complete discussion of the issue is found, *supra*, under "Dangerous Activities".

[98] *Papp* v. *LeClerc* (1977), 77 D.L.R. (3d) 536 (Ont. C.A.), in dicta.

[99] (1976), 77 D.L.R. (3d) 717 (Ont. H.C.).

the surgeon and therefore liability for aggravated injuries was not imposed on the Commission. Arguably, the fact of negligence on the part of the physician should not influence a court to deny recovery to a plaintiff for aggravated injuries. If risks of medical complications are foreseeable generally, then medical negligence cannot be an unforeseeable possibility. In the case of medical malpractice which produces further injury the defendant should be made jointly and severally liable with the doctor or hospital, and the court can apportion liability.

The class of foreseeable injury in the event of medical complication is defined by determining whether the further injury would have been possible but for the negligence of the defendant. If the accident had never occurred, the plaintiff would never have been exposed to the risk of further injury by medical treatment. In the case of *McKiernan* v. *Manhire and St. Margaret's Hospital*[100] a woman convalescing in hospital after a car injury fell off a step further injuring herself. The court held for the defendant, endorsing even in 1977 the direct cause test of *Polemis*.[101] According to our test, *McKiernan* is wrongly decided. Owing to the negligence of the defendant, the plaintiff was necessarily hospitalized and subject to all the class of attendant risks which attach to hospitalization. She might have been exposed to a severe infection, such as staphylococcus, or undergone an unnecessary operation by some mistake. Liability should follow for any of these, since all fall within the class of foreseeable risks of medical complication created by the negligence of the defendant.

Intervening cause is not a proper rationale for denying recovery in these cases. Where a cause-effect relationship exists, no medical complication is too remote. The confirmation of this principle is again found in the weight of authority as almost ninety percent of the cases have been decided in favour of the plaintiff.

X. *Rescuer.*

The rescuer should always recover. When a person negligently imperils himself or another, the foreseeable class of risks created includes the possibility that a rescuer will intervene. The advent of a rescuer is foreseeable because, under normal circumstances, it is human nature to try to save others from harm.

At one time the courts—particularly the English courts—adhered to a harsher rule. Where a person voluntarily placed himself in the way of danger in order to rescue another the courts would invoke the doctrine of *volenti*. No recovery was granted to a volunteer. An example of this is the case of *Cutler* v. *United Dairies*[102] where the plaintiff was injured while

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[100] (1977), 17 S.A.S.R. 571 (S.C.).

[101] *Ibid.*, at p. 576; see also, P.J. Rowe, The Demise of the Thin Skull Rule (1977), 40 Mod. L. Rev. 377.

[102] [1933] 2 K.B. 297 (C.A.).

attempting arrest a runaway horse in response to cries for help from the driver. The dicta in *Cutler* was later questioned by the English Court of Appeal[103] and the principle applied in the case is now considered to be wrong. The Canadian courts were not so strict in this regard, and very early Canadian decisions rejected the *volenti* doctrine in rescuer cases.[104] Four of the rescuer cases analyzed were based on the outmoded principle that a volunteer does not recover, and therefore these four have been eliminated from consideration.[105]

Of the remaining twenty-six rescuer cases,[106] twenty-five, or ninety-six percent held for the plaintiff. Rescuers of people, animals[107] and even property[108] have recovered. In *Videan* v. *British Transport Commission*[109] the rescuer of a young trespasser was awarded compensation although it was denied the child himself. Rescuers have recovered when the rescue attempt may have been unnecessary,[110] or was entirely mistaken,[111] if it was a natural reaction in the situation. The rescuer will recover for mental or nervous injury as well as for physical injury.[112] The maxim that rescuers always recover is valid for two reasons. Not only are rescuers foreseeable as a class, but also there is a strong policy consideration underlying the rule in that recovery to rescuers encourages rescue. In the single rescue case decided in favour of the defendant, *Dupuis* v. *New Regina Trading Co. Ltd,*[113] this policy consideration is vividly illustrated. An employee of the defendant negligently imperiled herself, becoming pinned upside-down from an elevator. The plaintiff's husband went to the woman's rescue, fell down the elevator shaft, and was killed. The Saskatchewan Court of Appeal denied recovery to the widow, holding that there had not necessarily been any danger present in the rescue attempt, and notwithstanding

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[103] *Haynes* v. *Harwood*, [1934] 2 K.B. 240; aff'd [1935] 1 K.B. 146 (C.A.).

[104] *Love* v. *New Fairview Corporation* (1904), 10 B.C.R. 330 (C.A.).

[105] *Anderson* v. *Northern Ry of Canada* (1976), 25 U.C.C.P. 301 (C.C.P.); *Cutler* v. *United Dairies*, [1933] 2 K.B. 297 (C.A.); *Kimball* v. *Butler Bros* (1910), 15 O.W.R. 221 (C.A.); *The "San Onofre"*, [1922] P. 243, 92 L.J.P. 17 (C.A.).

[106] Not included with these is *Horsley* v. *MacLaren*, [1972] S.C.R. 441, 22 D.L.R. (3d) 545, where a man drowned in a rescue attempt, although the dicta in the case with respect to rescuers is frequently cited, because the Ontario Court of Appeal, in a decision affirmed by the Supreme Court of Canada, found no negligence in the defendant's handling of the boat.

[107] *Connell* v. *Town of Prescott* (1893), 22 S.C.R. 147.

[108] *Hutterly* v. *Imperial Oil* (1956), 3 D.L.R. (2d) 719 (Ont. H.C.); *Steel* v. *Glasgow Iron and Steel Co. Ltd*, [1944] S.C. 237 (Ct of Sess.); *Hyett* v. *G.W. Ry*, [1948] 1 K.B. 345 (C.A.).

[109] [1963] 2 All E.R. 860 (C.A.).

[110] *Morgan* v. *Aylen*, [1942] 1 All E.R. 489 (K.B.D.).

[111] *Ould* v. *Butler's Wharf*, [1953] 2 Lloyd's Rep. 44 (Q.B.D.).

[112] In *Chadwick* v. *British Transport Commission*, [1967] 2 All E.R. 945, the plaintiff recovered from an attack of anxiety suffered after he helped victims of a train wreck.

[113] [1943] 4 D.L.R. 275 (Sask. C.A.).

the danger, the company itself had not been negligent—only its employee had been negligent. The outcome of *Dupuis* would certainly tend to discourage rescue attempts! Undoubtedly the case is wrong. Rescuing a person from a possible fall down an elevator shaft is plainly a dangerous task, and companies are indeed liable for the negligent acts of their employees within company premises. Also, in terms of policy, it would be a sad comment on the legal system if a person had to consider the possible impairment of his legal position before endeavoring to rescue another.

In *Urbanski and Firman et al.* v. *Patel*[114] a father who volunteered a kidney for transplant, after the defendant doctors had negligently removed his daughter's only kidney by mistake, was compensated for the operation. Mr. Justice Wilson rejected the argument that the father had knowingly and wilfully accepted the risk by offering his kidney for transplant, or that the operation was unforeseeable. He found the father's act of donating his kidney to be a foreseeable consequence in accordance "with the principle developed in the many rescue cases".[115] This principle is the view that, whatever the circumstances, a rescuer is always foreseeable and should never be denied recovery. It would be manifestly wrong to penalize a person for a selfless act of humanity.

XI. *Nervous Shock.*

Recovery for nervous shock suffered by third parties has been an issue of extreme difficulty for courts. Judges from all jurisdictions have struggled with the determination of the outer limits of liability for nervous shock and have frequently insisted that an arbitrary cut-off point is necessary for reasons of policy. In fact, there is probably no other remoteness issue more frequently discussed in vague terms of policy. Notwithstanding this insistence on arbitrary policymaking, an analysis of the cases shows that the courts have moved progressively, albeit haltingly, towards a principle for determining the scope of recovery in nervous shock cases.

The recent decision of the English House of Lords in *McLoughlin* v. *O'Brian*[116] reviews this progression and states the general principle for recovery quite succinctly: recovery for nervous shock should be granted to a near family relative who witnesses injury to a loved one or who comes upon the immediate aftermath of the accident. The events must be perceived through the senses of the third party, or in other words, nervous shock suffered on being informed of injury to a relative is not recoverable. The facts of *McLoughlin* were than the plaintiff's husband and children were injured, one child fatally so, in a car accident. On learning of the accident the plaintiff rushed to the hospital where she saw her husband and children begrimed and bloody and where she was told of her daughter's

[114] (1978), 84 D.L.R. (3d) 650 (Man. Q.B.).

[115] *Ibid.*, at p. 671.

[116] [1982] 2 W.L.R. 982 (H.L.); rev'ing [1981] 1 All E.R. 809 (C.A.).

death. As a result of witnessing this calamity the plaintiff suffered severe nervous shock. The English Court of Appeal accepted the argument that it was foreseeable that the plaintiff would suffer nervous shock under these circumstances, but denied recovery to Mrs. McLoughlin. The court decided that, for reasons of policy, a limitation on liability was necessary and the court chose presence at the scene of the accident as the limiting factor.

In the Court of Appeal decision the term "policy" is used in the sense attributed it by authors who argue that judges make, rather than follow, the law. Public policy is not availed by limiting the scope of recovery quite so arbitrarily.

The House of Lords overturned the Court of Appeal decision and granted Mrs. McLoughlin damages for nervous shock. The court reasoned that justice is not served by allowing damages to the mother who witnesses her child's death and suffers shock, but withholding recovery from the mother who immediately after the accident comes upon the scene of destruction, or from the mother who, almost like a rescuer, rushes to the hospital to attend her family and witnesses a more horrific scene than she had anticipated. The court agreed that the defendant's liability must be limited to a certain class but the limit must not be arbitrarily set—it must emerge from the legal principles enunciated in the cases.

Lord Wilberforce found three principles, or tests, to exist. A test of proximity should be used by the courts, but the test should not be restricted to actual presence at the scene of an accident. It should be expanded to include the relative who very soon after an accident comes upon its aftermath or consequences. A test of consanguinity should also be applied although the court has the ability to consider the nature of the relationship. A very dear friend will possibly be awarded damages for nervous shock, but a mere bystander will never recover. Finally, the way in which the shock occurs must be considered. The shock must be caused by the actual sight or sound of the accident or its aftermath and not by a communication from a third party. Lord Wilberforce concluded that this set of principles represented no new departure or arbitrary cut-off point for recovery but rather was a statement of the existing law. The cases from all jurisdictions would appear, for the most part, to support his opinion.

Fifty-two nervous shock cases were considered. Of the thirty cases which held for the plaintiffs twenty-six are cases in which a close family relative was either present at the scene or came upon its immediate aftermath, and in another two cases recovery was given to close friends present at the scene. In the remaining two cases which held for the plaintiff, the nervous shock victim recovered despite not having been present at the scene of the accident. According to the test set out in *McLoughlin* these two cases are wrongly decided.[117]

[117] *Brown* v. *Mount Barker Soldiers Hospital, Inc.*, [1934] S.A.S.R. 128; *McCarthy* v. *Walsh*, [1965] I.R. 246.

Twenty-two cases were decided in favour of the defendant. Three of these were eliminated because they were decided at a time when nervous shock was not considered a proper head of damage, especially in the absence of any physical injury to the plaintiff.[118] In eight cases the plaintiff did not actually witness the event but was informed of the injury later. In three cases the plaintiff was not a near family relative and in another the plaintiff suffered shock on reading an erroneous report of injury to her family. In one case a mother was denied recovery when she over-reacted to her children's illness where the injury was neither permanent nor very serious. Altogether four cases are wrongly decided.[119] In these four the plaintiff was present at the accident or its immediate aftermath and witnessed the events but the court denied recovery for nervous shock. Forty-three out of forty-nine cases, or eighty-seven percent, have been correctly decided according to the test prescribed in *McLoughlin*. In many of the judgments the courts have arrived at the proper conclusion either without clearly stating the reasons for their decision or by justifying the decision in terms of an unexplained policy. Clearly the same principles that Lord Wilberforce delineated have been at work at a subliminal level in other decisions.

The three principles that Lord Wilberforce extracts from the existing law in nervous shock cases describe classes of people and classes of risks. One risk of negligence which causes injury is that a near relative of the victim will be present and will suffer shock. The risk does not include every bystander who is without sufficient fortitude to endure the calamities that ordinarily occur in daily life or, as Lord Porter characterized the type in *Bourhill* v. *Young*, "who does not possess the customary phlegm". Nor can the class of persons extend to every relative who is told of tragedy but does not witness it. Every grievor has no doubt suffered some shock due to the loss of a loved one, but that differs in form from the shock of witnessing injury. The foreseeable class of persons and types of injury is circumscribed by the nature of the relationship and by the form in which the shock is inflicted. The results of the cases substantially reinforce this conclusion.

Conclusion

We propose that the foreseeability test for remoteness be applied to classes of injury or damage rather than to the particulars of the specific cases. The recent decision of the English Court of Appeal in *Lamb* v. *London Borough of Camden*[120] graphically demonstrates the problems which can arise when

[118] *Baker* v. *Bolton* (1808), 1 Camp. 493, 170 E.R. 1033 (Campbell Assizes); *Campbell* v. *James Henderson Ltd*, [1915] 1 S.L.T. 419 (Outer House); *Flemington* v. *Smithers* (1826), 2 C. & P. 292 N.P. (K.B.).

[119] *Chester* v. *Council of Municipality of Waverley* (1939), 62 C.L.R. 1 (A.C.A.); *Finbow* v. *Domino* (1957), 11 D.L.R. (2d) 493 (Man. Q.B.); *Griffiths* v. *C.P.R.* (1978), 6 B.C.L.R. 115 (B.C.C.A.); *Kernested* v. *Desorcy*, [1978] 3 W.W.R. 623 (Man. Q.B.).

[120] [1981] 2 All E.R. 408.

the test used is the foreseeability of the particular damaging event. The plaintiff in that case let her house to a tenant and moved to New York. The local council, while replacing a sewer, broke a water main close to the foundations of the plaintiff's house. The water washed out the soil from under the foundation causing subsidence and extensive damage to the structure, necessitating the termination of the lease and storage of the plaintiff's furniture. The plaintiff had the house secured and boarded up awaiting repairs. Squatters broke in and extensively damaged and vandalized the interior of the house. The council admitted liability of $50,000.00 damage to the structure arising from the subsidance. They disclaimed liability for a further $30,000.00 damage caused by the squatters on the grounds that this damage was too remote.

This case raises all the problems of distinguishing between degrees of foreseeability which are inherent in using the traditional forms of the foreseeability test, and can be used to demonstrate how these can be avoided by using our restatement.

The official referee held that although squatting was at the time a reasonably foreseeable risk, it is not enough to demonstrate that the damage was reasonably foreseeable, it is necessary to go further and to show that the act was *likely* to occur. In this particular neighbourhood, according to the referee, squatting was not likely to occur; even though it was reasonably foreseeable that it could occur. Lord Denning rejected the various forms of the foreseeability test cited in argument and held the damage to be too remote on grounds of policy. Lord Justice Oliver found the damage to be not reasonably foreseeable, and Lord Justice Watkins found the damage to be too remote even though he said that he would regard, "that damage or something like it as reasonably foreseeable in these times".

All three judges of the Court of Appeal agreed that if the house had been in a different area of London, where there was a higher probability of squatters breaking in, this danger could not be too remote.

In certain areas of a city, vacant premises are in damage of vandalism not just from squatters, but a variety of people in a number of different ways. The plaintiff's house was not located in such an area and thus not subject to this class of risk.

The *Lamb* case is not a difficult one. The referee and all three judges of the Court of Appeal were in agreement that the damage was too remote. The difficulty came about when the judges attempted to justify their decision in terms of the reasonable foreseeability of this particular event.

Lord Justice Watkins clearly articulated what most judges feel when dealing with an issue of remoteness. He stated:[121]

> A robust and sensible approach to this very important area of the study of remoteness will more often than not produce, I think, an instinctive feeling that the event or act

[121] *Ibid.*, at p. 421.

> being weighed in the balance is too remote to sound in damages for the plaintiff. I do not pretend that in all cases the answer will come easily to the inquirer. But that the question must be asked and answered in all these cases I have no doubt.

It probably is the instinctive feeling of judges which is the bottom line in remoteness cases. The fact that, as we have shown, the instinctive feeling of judges has a ninety percent conformity would indicate that some basic moral principles about responsibility and blame are at work at an unconscious level. It has been our object to articulate that principle in the form of the following restatement of the foreseeability rule.

> *Damages resulting from a negligent action are not too remote if they are one of a reasonably foreseeable class of injuries.*

In particular it is reasonably foreseeable that dangerous activities when carried out negligently create a wide variety of particular kinds of risks of harm.

It is reasonably foreseeable that injury to persons can also result in further damage from particular susceptibilities or medical complication to the injured person or to others.

It is reasonably foreseeable that the creation of a risk invites rescue.

Therefore we can conclude that as a general rule:

1. No physical injury or property damage caused by a motor vehicle accident is too remote.
2. No physical injury or property damage caused by a highly dangerous activity such as that involving the handling of explosives, highly inflammable or toxic substances, or high voltage electricity is too remote.
3. No increased physical or emotional injury resulting from an unusual or particular susceptibility of a person suffering damage as a result of a negligent act is too remote.
4. No medical complications resulting from an injury to a person whether or not the complications are due to an act of a third party, whether negligent or not, is too remote.
5. No physical or emotional injury suffered by a rescuer is too remote.
6. Nervous shock inflicted on a near family relative as a result of witnessing or coming upon the immediate aftermath of an accident causing injury or death is not too remote.

No test can avoid hard cases or difficult decisions, but at least we can be clear about our concepts. If we are unclear in the concepts and tests we apply to the facts then we will inevitably produce a high degree of indeterminancy in that area of the law. If we become clear about our concepts and tests we may never be able to accurately predict the outcome of every case, but at least we ought to be able to achieve at least a ninety percent accuracy.

The revised foreseeability test is consistent with the existing leading authorities, the *Wagon Mound (No. 1)*, *Wagon Mound (No. 2)* and *Hughes* v. *Lord Advocate*. In fact, it is the only interpretation of the foreseeability rule which allows us to reconcile *Wagon Mound (No. 1)* which found the damage in issue too remote, and *Wagon Mound (No. 2)* which found the same kind of damage, arising out of the same accident not too remote. The test of foreseeability articulated and applied by the Privy Council in *Wagon Mound (No. 1)* is not the same as the test articulated and applied by the Privy Council in *Wagon Mound (No. 2)*. The version of the foreseeability test as applied to classes of events as well as to particular events is consistent with both versions. Furthermore it is consistent with and like the version of the foreseeability test articulated by the House of Lords in *Hughes* v. *Lord Advocate* in which the test was stated in terms of similar kinds of damage. Kinds of damage is a class of similar damages. *Hughes* v. *Lord Advocate* is authority for using a class interpretation for the foreseeability test. A foreseeability test in terms of reasonably foreseeable classes of damaging events gives us a convergence of the three leading authorities. Thus there is a way of "emerging out of the maze of authorities on the subject of remoteness into the light of a clear understanding of it".