CAUSATION

Loss of Consortium and Child, Family Re-arrangement

In commenting on causation Denning J. (as he then was) in *W.* v. *Minister of Pensions*[1] stated:

> "The question of causation, as has been said in many cases is to be treated not in a metaphysical sense, but according to common-sense standards."

At the same time, however, it is often very difficult to determine what are these common-sense standards and to see how they have been applied in any particular case. Such a case is that of *Cameron* v. *Nottingham Insurance Company Limited*,[2] decided by Reed J. of the Supreme Court of South Australia.

The facts were as follows: the plaintiff had been injured in a traffic accident owing to the negligence of the driver of the motor cycle on which he had been riding as pillion passenger. The defendant company was sued pursuant to s. 70 d. (2) of the Road Traffic Act 1934-56 as the insurer of the motor cycle. Liability was admitted by the defendant company, the only matter left to be determined being the quantum of damages. The plaintiff as a result of his injuries had believed himself to be incapable of sexual intercourse to the extent necessary to cause his wife to conceive, had informed her of this belief, and she, believing it to be true, had thereupon left him, taking with her the child of the marriage. He claimed damages, *inter alia,* for loss of consortium with his wife, loss of custody of the child of the marriage, the re-arrangement of his life consequent upon the loss of his wife and child. It was contended for the plaintiff that the damages were recoverable, under the authority of *In re Polemis and Furness, Withy and Company Limited*[3] His Honour held that *In re Polemis* was binding on the Court, quoting the dictum of Asquith L.J. (as he then was) in *Thurogood* v. *Van der Berghs and Jurgens Limited*[4] which states:

> "Nor do I consider that the decision in *In re Polemis and Furness, Withy and Company Limited* has been overruled or its binding character so far as this court (Court of Appeal) is concerned in any degree shaken. The utmost that can be said is that certain of the Lords of Appeal in Ordinary have reserved the right to reconsider it if and when, before the House of Lords, its authoritative character should come directly in issue. Meanwhile it stands."

That being so,

> "foreseeability of the particular damage sustained is irrelevant to recoverability and directness of causation is the sole criterion."[5]

After reviewing the authorities, Reed J. held that there were two matters which could effect a break in the "chain of causation" (that is, that relationship between antecedent and consequent required by the law in a given fact situation for legal liability to be incurred) namely:

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1. [1946] 2 A.E.R. 501 at 502.
2. [1958] S.A.S.R. 174.
3. [1921] 3 K.B. 560.
4. [1951] 2 K.B. 537 at p. 555.
5. [1958] S.A.S.R. 174 at p. 182.

the belief formed by the plaintiff and the communication of it to his wife, and the wife's conduct in leaving her husband.

His Honour found that the plaintiff's belief was reasonable, but that the action of the wife in leaving her husband was clearly unreasonable and any loss sustained thereby was too remote. The result achieved is obviously fair and just but the reasoning used to arrive at it may well repay analysis.

It is difficult to see how *In re Polemis*[6] applied to this particular case. In the former case, negligence on the part of the defendant's servant in kicking a plank into the hold of a ship was held to render the defendants liable for the loss of the ship when the plank struck something in the hold, causing a spark which ignited the benzene vapour therein. There was an original negligent act – the workmen owed a duty not to cause a dent in the hold of the ship—and the defendants were liable for all direct physical consequences of this act although foreseeability was expressly negatived. In *Cameron's Case*,[7] however, the question to be answered was whether particular voluntary human conduct (i.e. intending the act or formation of intention if not the consequences thereof) was such as to negative causal relationship between the original negligent act and the damages claimed. *Re Polemis*[8] was not concerned with intervening causes arising after the occurrence of the original negligent act, but with a cause operating upon a pre-existent condition (the inflammability of the hold)—a case of "take your plaintiff (and his goods) as you find them". Thus in *Liesbosch Dredger* v. *S.S. Edison* (*Owners*)[9] the defendants negligently caused the loss of the plaintiff's dredger and the plaintiffs, owing to their lack of means were forced to hire a dredger rather than purchase a new one, involving them in wasteful expenditure: Lord Wright, commenting on the possibility of recovering damages for the hire of the dredger, said in reference to *In re Polemis*[10]

> "that case however was concerned with the immediate physical consequences of the negligent act and not with the co-operation of an extraneous matter such as the plaintiff's want of means. I think therefore that it is not material further to consider the case here."[11]

An analogy between the present case and *In re Polemis*[12] could only be drawn, it would seem, had the question decided in the latter case been whether a person, standing on the wharf at the time of the explosion, who had panicked and jumped into the water, could

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6. ibid.
7. [1958] S.A.S.R. 174.
8. ibid.
9. [1933] A.C. 449.
10. ibid.
11. [1933] A.C. 449 at p. 461. That the plaintiff's lack of means is not regarded as a mere condition in which the cause operates is probably best explained as judicial policy — the court will not take steps to "extricate parties from predicaments into which they would not have fallen but for their lack of means"—this would explain the apparent conflict between the decision and the general rule that abnormal circumstances existing at the time of the wrongful act will not negative causal connection — i.e. "take the plaintiff as you find him".
    See 72 L.Q.R. "Causation in the Law II" at p. 407 by Professor Hart and A. M. Honoré.
12. ibid.

recover damages for hospitalization due to pneumonia, caused by his immersion.

This attempt to widen the purview of *In re Polemis*[13] has its own precedents. Thus in *Pigney* v. *Pointer's Transport Services Ltd.*[14] the deceased had suffered injury owing to the negligence of his employers. As a result of neurosis induced by his injuries, not being insane at law at the time, he committed suicide. His wife sought recovery under *Lord Campbell's Act.*[15] Pitcher J., purporting to apply *In re Polemis*,[16] acceded to her request. Having established causation in fact, he equated this "causa sine qua non", with causation in law, rejecting the usual test as to the reasonableness of voluntary intervening human conduct as expounded by Lord Wright in *The S.S. Oropesa*[17], substituting the test of direct traceability.

> "Whilst the death of the deceased was not the kind of damage one would expect to result from the injury he received, I am satisfied that his death was . . . directly traceable to the physical injury which he sustained, due to the lack of care of the defendants for his safety."[18]

This decision, purporting to extend *re Polemis*[19]—a case of direct physical consequences resulting from abnormal concurrent conditions —to a situation of injury brought about by a voluntary act of an human being as a result of nervous disorder itself resulting from the original negligent act seems, with due respect, to be an unwise extension of the principle of *In re Polemis*[20] and has been severely criticised.[21]

It is difficult to see what test, other than that of the reasonableness of the human action can be applied to decide liability or non-liability in such cases. If the "causa sine qua non" test be applied then the wife of a person who is inordinately proud of his nose will be able to recover under *Lord Campbell's Act*[22] for the death of her husband whose nose is broken owing to the negligence of his employers and who forthwith commits suicide. This example may render obvious the inapplicability of the principle of *In re Polemis.*[23] Indeed, Reed J. in *Cameron's Case*[24] appears to have realized the inapplicility of *Re Polemis*[25] for after deciding that the decision therein bound the court, he appears to have consigned it, in fact, to the limbo of inapplicability, applying in its stead the test of reasonableness of action i.e. foreseeability—the "common-sense" principles of causation.[26] The common-sense principles on which causation is based would seem to include the rule that human

13. ibid.
14. [1957] 1 W.L.R. 1121.
15. Fatal Accidents Act 1846-1908 (U.K.).
16. ibid.
17. [1943] P. 32 at p. 37.
18. [1957] 1 W.L.R. 1121 at p. 1124.
19. ibid.
20. ibid.
21. See e.g. 31 Aust. L.J. p. 587 "Liability for Suicide" by J. G. Fleming.
22. Fatal Accidents Act 1846-1908 (U.K.).
23. ibid.
24. [1958] S.A.S.R. 174.
25. ibid.
26. [1958] S.A.S.R. at 185, 186.

conduct or intervention does not necessarily negative causal relationship between the negligent act and the ultimate consequences. If it be voluntary in the fullest sense then it will do so. If, however, it is non-voluntary in that it would not have occurred but for the defendant's original act, then it will not negative causal relationship unless it is unusual—that is something unreasonable or unwarrantable.[27] The wife's conduct in leaving her husband owing to his supposed injury could not be described as reasonable, if only on public policy grounds. Indeed one of the most interesting points about the case was the illustration it afforded of the way in which the law is formed by public policy—the judicial interpretation of what marriage means to the community—

> "If she thought about her matrimonial obligations at all, she probably regarded them . . . as imposing upon her no duty to stand by and support her husband in sickness and in health. I decline to hold that her conduct was reasonable as being such as would occur in an ordinary case and with ordinary persons acting according to the accepted standards of the community."[28]

A very similar case to the present was *W.* v. *Minister of Pensions*[29] where Denning J. (as he then was) held that a soldier who claimed that his chronic state of anxiety had been caused by his wife's misconduct while they were separated owing to his war service, could not demand compensation for his illness as being due to his war service. The misconduct of his wife, though it would not have occurred but for his absence was not what could reasonably be expected. The plaintiff's separation from his wife merely provided the conditions in which the cause operated.[30]

27. See, e.g. (1) The Orepesa [1943] P. 32 at p. 37 per Lord Wright.
(2) *Summers* v. *Salford Corporation* [1943] A.C. 283 at p. 296 per Lord Wright.
(3) 72 L.Q.R. "Causation in the Law", p. 58, 260, 398, by Professor Hart and A. M. Honoré.
28. [1958] S.A.S.R. at p. 186.
29. [1946] 2 A.E.R. 501.
30. [1946] 2 A.E.R. 501 at p. 502-3 per Denning J. See also *Lynch* v. *Knight* (1861) 9 H.L.C. 577, *Lambert* v. *Eastern National Omnibus Co. Ltd.* [1954] 2 A.E.R. 719—as to what is "reasonable" conduct by a spouse.

CONSTITUTIONAL LAW

Section 92: What is Essential to Interstate Trade and Commerce

The test of how far the protection of Section 92 extends has always been elusive. Recently the value of the distinction between what is essential and non-essential to inter-State trade and commerce has been discussed.[1] The High Court in *Russell* v. *Walters*[2] preferred a test of "practical reality": "The question of when and

1. See: P. H. Lane, 32 A.L.J. 335, and Prof. Ross Anderson, 33 A.L.J. 276 and 294.
2. (1957) 96 C.L.R. 177.