THE COMMONWEALTH v W L MCLEAN: DEVELOPMENTS INCONSISTENT WITH THE TRADITIONAL NATURE OF THE EGG SHELL SKULL PRINCIPLE.

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Abstract

This paper examines the operation of the rule that you must take your victim as you find them, in the context of determining questions of remoteness. Discussion is restricted to personal injury cases involving negligence. It is intended to highlight the friction between the *Wagon Mound* rule and the egg-shell skull rule. Subsequently analysis will range from *The Wagon Mound (No. 1)* to the present. The purpose is to highlight some recent developments in New South Wales that appear to be inconsistent with established law. At the centre of these developments is the decision in *Commonwealth v McLean* in which it was held that the egg-shell skull rule only applies to damage of a foreseeable kind. It is concluded that a new qualified approach to the rule which effectively requires foreseeability for consequential injury, is inconsistent with the traditional approach, and by emphasising the dominance of 'reasonable foreseeability', the relevant courts have effected a situation where the egg-shell skull rule would be practically ineffective.

INTRODUCTION

It is well known that the decision in the *Wagon Mound*[1] effectively established 'reasonable foreseeability' as the relevant test for determining questions of remoteness of damage. Additionally, it has been said that: "the term 'reasonably foreseeable'...marks the limits beyond which a wrongdoer will not be held

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[1] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co. Ltd. (The Wagon Mound (No. 1))* [1961] AC 388. (*"Wagon Mound"*)

responsible for damage resulting from [their] wrongful act."[2] Despite this, the continued existence of the rule that you must take your victim as you find them or the egg-shell skull rule ('the rule') has been a bastion of compensation in the remoteness area and has been seen to effectively allow liability for damage beyond what is foreseeable.[3] Recently in Australia there have been inconsistent statements as to the nature of the rule with pronouncements that there should be no liability for unforeseeable consequences. This development may have significant implications for personal injury cases involving some ulterior harm either due to a latent susceptibility or through the introduction of new harm causing factors.

It is proposed to outline and discuss the recent history of the principle that you must take your victim as you find them, in the context of determining remoteness questions in negligence law. A necessary aspect of this analysis will be discussion of the impact and ongoing effect of the Privy Council decision in the *Wagon Mound*. After discussing the impact of the decision, attention will turn, in Part 1, to the operation of the egg-shell skull principle after the *Wagon Mound*. Part 2 will review some recent cases in Australia, in which judicial reasoning dealing with the rule appears to be inconsistent with the traditional operation of the rule by supporting the dominance of foreseeability. The argument is that the principle that you must take your victim as you find them is traditionally an unqualified rule and was meant to operate as an exception to the foreseeability requirement within the area of personal injury. It is submitted that certain judgments in Australia are inconsistent with the established law in this area and that recent case law indicates that the egg-shell skull rule should be subject to foreseeability requirements. In light of this it is suggested that the qualified principle put forward in these cases is merely a restatement of the *Wagon Mound* rule[4] and if this is accepted then there is no longer any practical requirement for the rule, the question being limited to what will be the relevant kind of damage. Part 3 will focus on the problematic area of determining categories of damage and will highlight the inconsistency that has emerged in this process. Should the interpretation of the rule put forward in these handful of recent cases come to dominate then there may be some uncertainty as to recovery where egg-shell skull situations arise.

The decision handed down by the Privy Council in the *Wagon Mound* represented a fundamental shift in the way questions of remoteness were determined. The decision is well known and does not need to be repeated here. In overturning the so-called *Polemis*[5] rule the Privy Council effected a dramatic shift of focus away from compensation toward a greater concentration on liability regarding the remoteness issue. The *Polemis* rule, which embodied the 'direct consequences' test, was undeniably focused on compensation for the plaintiff and prompted criticism from both courts and academic writers.[6] Goodhart expressed such

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[2] *Chapman v Hearse* (1961) 106 CLR 112

[3] *Smith v Leech Brain & Co. Ltd* [1962] 2 QB 405; *Warren v Scruttons Ltd* [1962] 1 Lloyds Rep 497; *Robinson v Post Office* [1974] 2 All ER 737; *Sayers v Perrin and others (No. 3)* (1966) Qd R 89; *Stephenson v Waite Tileman* [1973] 1 NZLR 152; *Cotic v Gray* (1981) 124 DLR (3d) 641.

[4] The relevant test for remoteness of damages is 'reasonable foreseeability'.

[5] *Re Polemis & Furness Withy & Co. Ltd* [1921] 3 KB 540 (CA). (*"Polemis"*)

[6] See A L Goodhart, "Liability and Compensation" (1960) 76 *LQR* 567.

dissatisfaction with the direct consequences rule of *Polemis* that he suggested: "it would seem to be more logical to eliminate entirely the idea of fault from the law of tort so as to hold that the actor is always liable for all the consequences of his act."[7] In sweeping aside the *Polemis* rule and introducing 'reasonable foreseeability' as the new test, the Privy Council put questions of fault at the centre of the remoteness element. The importance of liability or culpability as determining factors can be uncovered in the reasoning of the court. The well known statement by Viscount Simonds is indicative of the reasoning and provides that: "it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be direct."[8] Similarly the court stated that damage would not be too remote if of a 'kind' that was reasonably foreseeable and this was said to be consistent with the general view stated by Lord Atkin in *Donoghue v Stevenson*[9]: "The liability for negligence, whether you style it such or treat it as in other systems as a species of *'culpa'*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."[10] The judgment given in the *Wagon Mound* marked the intention of the court to place questions of fault and culpability at the fulcrum of determining whether damage is too remote and represented a shift away from the compensatory-based test of 'direct consequences'.

Following the decision of the Privy Council in the *Wagon Mound* there was some speculation as to whether the long standing principle that you must take your victim as you find them, or the egg-shell skull rule, would continue to be part of the law of negligence.[11] It is important to consider what situations are included within this category and a relevant statement made by Richmond J shall be adopted for this purpose. He stated that:

> "the basic situation in the eggshell skull cases is that the accident operates on a pre-existing state of special susceptibility in some way latent in the injured person. Another possibility is that the occurrence of physical injury may expose the plaintiff to a new risk of further injury."[12]

Williams foresaw two possibilities for the survival of the rule post *Wagon Mound.* First, the principle could be reconciled with the reasonable foreseeability test (or the 'risk principle' as Williams called it) if a broad category of physical injury was adopted.[13] Williams also believed that: "the thin skull rule is on the whole a justifiable exception to the risk principle."[14] It was the latter possibility that seemed more acceptable to Williams although he felt that the rule should be carefully restricted, indicating that: "the most obvious way of restricting it would

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[7] *Id* at 584.
[8] *Supra* n.1.
[9] [1932] AC 562.
[10] *Donoghue v Stevenson* [1932] AC 562 at 580.
[11] For discussion see G, Williams, "The Risk Principle" (1961) 77 *LQR* 179.
[12] *Stephenson supra* n.3 at 161.
[13] Williams, *supra* n.11 at 195.
[14] *Id* at 196.

be to confine it to injury to the person, which is the context in which it has been judicially affirmed."[15]

Looking at the relevant case history it is obvious that the rule has been largely confined to personal injury. An early pronouncement of the rule in *Dulieu v White & Sons*[16] confirmed the link to personal injury stating: "it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."[17] Further analysis of later cases in England suggests that the rule is confined to personal injury although this has been held to include psychological injury as well as physical injury.[18] For all practical purposes personal injury will hereafter include physical and psychological damage. Several cases confirm that the rule does not cover consequential financial loss situations.[19] Similarly, in Australia the operation of the principle has been confined to personal injury cases, and as in England, it has been accepted that the rule operates in regard to both physical and psychological infirmities.[20]

The Rule post *Wagon Mound*

The first indication of the continued status of the rule came from *Smith v Leech Brain*[21] a case decided one year after the *Wagon Mound* decision was handed down. The plaintiff sought damages from the defendant employer for injuries (cancer and death) that were consequential on an initial injury (burn). At issue for the court was what effect the recent *Wagon Mound* decision should have on a case of this nature concerning personal injury. In the judgment, Lord Parker indicated that he was "...quite satisfied that the Judicial Committee in the *Wagon Mound* case did not have...the thin skull cases in mind."[22] Justification for this lay in the belief that it had always been part of English law that the tortfeasor takes their victim as they find them.[23] Therefore it was indicated in the present case that the egg-shell skull rule was to remain part of English law despite the existence of the rule set out in the *Wagon Mound*.

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[15] *Id* at 195.
[16] [1901] 2 KB 669.
[17] *Id* at 679.
[18] Cases involving use of egg-shell skull principle all involve personal injury: see *Smith v Leech Brain & Co. Ltd, supra* n.3; *Robinson v Post Office, supra* n.3 and this includes psychological infirmities as well as physical infirmities – *Malcolm v Broadhurst* [1970] 3 All ER 508.
[19] See *Liesbosch Dredger v Edison SS* [1933] AC (HL) 448; *Meah v McCreamer and other (No 2)* [1986] 1 All ER 943.
[20] Relevant cases include *Beavis v Apthorpe* (1962) 80 WN (NSW) 852; *Sayers v Perrine and Ors, supra* n.3; *Rowe v McCartney* [1976] 2 NSWLR 72 (CA); *Havenaar v Havenaar* [1982] 1 NSWLR 626 (CA); *Nader v Urbin Transit Authority of NSW* (1985) 2 NSWLR 501 (CA); *Commonwealth v McLean* (1996) 41 NSWLR 398 and all are concerned with personal injury.
[21] *Supra* n.3.
[22] *Id* at 414.
[23] *Ibid.*

More important was the pronouncement of how the rule should operate and it was held that the test of reasonable foreseeability would apply to the initial injury only and that any subsequent injury was merely an extension of the initial injury.[24] Further in the judgment, Lord Parker indicated:

> "the question is whether these employers could reasonably foresee the type of injury he suffered, namely the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim."[25]

This appears to indicate that the kind of damage relevant to the question of foreseeability was the burn. Considering that the subsequent damage was of quite a different nature to a burn, it is clear in this case that the extent of injury included damage of a different kind to the initial injury. Furthermore, "...it is conceivable that some degrees of injury may differ so widely from what could be expected as to differ in kind."[26] Some may suggest that damages were not too remote in this case because they were part of a broad category of physical injury to the person.[27] In adopting this position it is possible to reconcile the decision with the *Wagon Mound.* However, the court did not adopt this reasoning and it is clear in the judgement of Lord Parker that the egg-shell skull rule was to be considered an exception to the *Wagon Mound* rule. His Lordship further indicated: "if the Judicial Committee had any intention of making an inroad into that doctrine, I am quite satisfied that they would have said so."[28] With this in mind and considering that two different kinds of injury existed in this application of the rule when it was open to the court to adopt a broad category of physical injury (bringing the decision within the *Wagon Mound*), it seems that the intent of the court was to maintain an operation of the rule where foreseeability was not a necessary requirement in regard to consequential damage. This view is supported by comments made by Professor Jackson in his well-known article.[29] In discussing the varying methods of classification of kinds of damage, which is addressed later, Professor Jackson considers the decision in *Smith v Leech Brain.* He states that:

> "if the sole test of liability is foreseeability of cause, unless the predisposition cases are an exception, there would be no liability in regard to the cancer and death. However, a requirement of foreseeability of a broad heading of damage only, with foreseeability of cause required only until the area of the broad heading is reached would bring the predisposition cases within the general principle."[30]

Failure to establish broad categories at this earlier stage suggests that the principle was to continue operating as an exception to the 'reasonable foreseeability' test.

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[24] *Id* at 406.
[25] *Id* at 415.
[26] G Fridman and J Williams, "The Atomic Theory of Negligence" (1971) 45 *ALJ* 117 at 120.
[27] See *Beavis v Apthorpe*, *supra* n.20, where this interpretation of the case was accepted.
[28] *Smith v Leech Brain supra* n.3 at 414.
[29] D Jackson, "A Kind of Damage" (1965) 39 *ALJ* 3.
[30] *Id* at 8.

Smith v Leech Brain has become an influential decision and has been followed in numerous jurisdictions.[31] In England this operation of the rule has been affirmed in subsequent cases. In *Warren v Scruttons Ltd*[32] the plaintiff suffered a pricked finger which resulted in poison being spread throughout his body. Subsequently he developed an ulcer in his eye partly due to a latent susceptibility and suffered a deterioration of his eyesight. At first instance Paull J stated, relying on the decision in *Smith v Leech Brain*, "...the type of damage here is a pricked finger, and once it is found that that damage could have been reasonably anticipated then any consequence which results because the particular individual has some peculiarity is a consequence for which the tortfeasor is liable."[33] This application of the rule reinforces the belief that foreseeability was not relevant to the further harm. *Robinson v Post Office*[34] was a case involving injury consequential on an initial injury and *Smith v Leech Brain* was applied, the court holding that the defendant Post Office was liable for the initial injury and also the consequential injury, "...even though they could not have reasonably foreseen those consequences or that they could be serious."[35] There are some recent cases that have provided some discussion of the principle[36] and it appears as though the operation (reasonably foreseeable initial injury and causally link consequential injury) has been maintained especially considering there has been no recognisable rejection of the decision in *Smith v Leech Brain.*

The situation in Australia has not been so straightforward. In *Beavis v Apthorpe*[37] Herron CJ gives considerable attention to the operation of the principle and its existence along-side the *Wagon Mound* rule and states: "the real question is, is the extent of bodily damage to be limited [by the decision in the *Wagon Mound Case*] to foreseeable consequences."[38] Ultimately the Full Court was of the opinion that all physical injury should be confined to one category and thus the egg-shell skull principle could be reconciled with the 'reasonable foreseeability' test. As in *Smith v Leech Brain* the consequential injury was considered as going to the extent of the initial injury. However in this case the court openly adopted a broad category of physical injury thus holding that the consequential damage was not different in kind from the initial injury. In addition to this Herron CJ, with whom MacFarlan J concurred, was adamant that there must still be proof of factual causation through to the final consequences. He stated: "the plaintiff must still prove a causal connexion between the negligent act and his bodily injuries. Once there was evidence connecting the two, the question whether the consequent incapacity resulted from the fracture of the leg was in the present case a question of fact."[39] Further more, Herron CJ suggested with some caution as to over-simplification:

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[31] These include England, Australia and New Zealand.
[32] [1962] 1 Lloyds Rep 497.
[33] *Warren v Scrutton's Ltd, supra* n.3 at 502.
[34] [1974] 2 All ER 737.
[35] *Robinson v Post Office, supra* n.3 at 738.
[36] See *Malcolm v Broadhurst, supra* n.18; *Meah v McCreamer and or (No 2), supra* n.19.
[37] *Beavis v Apthorpe, supra* n.20.
[38] *Id* at 857.
[39] *Id* at 860.

"it could be said that as to personal injury cases, as distinct from property damage, all direct consequences will be treated as foreseeable and that in personal injury cases *Polemis* still prevails."[40] This indicates support for no requirement of foreseeability with regard to further harm although ultimately it was held that liability would depend on the further harm being of a type that was foreseeable. In considering *Smith v Leech Brain* the court here seems to equate Lord Parker's comments on extent of injury with a suggestion that they fall within the same category. With respect, this was not specifically stated and it was open to Lord Parker in that case to state that the type of injury was physical injury generally and not the burn as was indicated.

The reasoning in *Beavis v Apthorpe* was questioned in the New Zealand case of *Stephenson v Waite Tileman*[41] and it was suggested that although the case purported to follow *Smith v Leech Brain* it was in some respects inconsistent with the reasoning of Lord Parker.[42] Although *Beavis v Apthorpe* was applied in *Sayers v Perrin and others (No. 3)*[43], in this case there was no indication in the reasoning that the further harm should be part of a foreseeable kind. The case concerned an award of damages to a plaintiff who had polio virus present within the body and, following an electric shock, developed a paralytic form of poliomyelitis. In deciding that the consequential damage was not too remote to be recoverable the Full Court held "the liability of the defendants depended not upon the reasonable foreseeability of the actual result which ensued but upon whether they could reasonably foresee an injury of such a type which might directly result in the condition giving rise to the action."[44]

The reasoning in these cases was revisited and discussed in the previously mentioned case, *Stephenson v Waite Tileman*, of which it is said: "the modern status of the rule is fully considered."[45] The New Zealand Court of Appeal, particularly Richmond J, provides a lengthy discussion of previous application of the rule and again suggests that: "the central issue...is the correct application of the decision of the Privy Council in...(*The Wagon Mound No 1*)...to actions for damages for bodily injury."[46] In the judgment of Richmond J, with which Turner P concurred, consideration is given to decisions in various Commonwealth jurisdictions. Indeed, it can be suggested that the case represents the most current and in-depth analysis of the principle and its operation. Ultimately it was held, and this accords with the previous views discussed above: "in such cases the question of foreseeability should be limited to the initial injury...the necessary link between the ultimate consequences of the initial injury and the negligence of the defendant can be forged simply as one of cause and effect."[47] This indicates an unqualified expression of the rule supported by the court's analysis of authority

[40] *Id* at 855.
[41] *Supra* n.3.
[42] *Id* at 166.
[43] (1966) Qd R 89.
[44] *Sayers v Perrin and others (no. 3)*, *supra* n.3 at 89.
[45] H Luntz and D Hambly, *Torts: Cases and Commentary*, 4th ed, Sydney Butterworths, 1995, at 334.
[46] *Supra* n.3 at 153.
[47] *Id* at 152.

in relevant jurisdictions and it is argued here that this represents the traditional and intended operation of the rule.

Following the previous analysis, one could reasonably accept this pronouncement of the principle to be an operative part of the law in Australia as well as some other Commonwealth jurisdictions. Furthermore, its operation, which appears to be generally agreed upon, indicates that in these situations involving personal injury, compensation is dominant in determining the question of remoteness.

Contemporary Developments in Australia

Several recent cases in Australia have signalled what is a distinct restriction of the use of the egg-shell skull principle in the form discussed above and an adoption of the principle initiated in *Beavis v Apthorpe*. These developments have indicated a renewed focus on culpability rather than compensation and have assisted in a strengthening of a previously weakened *Wagon Mound* rule.

The developments in question were first evident around the mid 1980's when various judgments dealing with the issue suggested that foreseeability was relevant to consequential harm. A suggestion of a shift in focus could be detected in *Nader v Transit Authority of NSW*.[48] The case involved an initial physical injury followed by subsequent psychological injury and represented a perfect opportunity for use of the egg-shell skull rule as set out in *Stephenson*. McHugh J indicated that he would use the rule that you must take your victim as you find them as: "an independent ground upon which [to] hold that the defendant was liable for the damage" and that this should include physical, social and economic attributes.[49] Despite this acknowledgement, the rule was not ultimately applied. Instead the consequential psychological injury was held to be in itself a reasonably foreseeable kind of injury. It is reasonable to accept that physical and psychological injuries have generally been accepted as different kinds of damage.[50] If the egg-shell skull rule had been used in this case would it not have indicated an acceptance that different kinds of damage can come within the rule and that effectively only factual causation need link the final stage.

Alternatively McHugh J suggested:

> "it was certainly foreseeable that an accident to a ten year old boy would bring about a reaction from his parents. If the plaintiff's condition is attributable either in whole or in part to the attitude of the parents, ...it is one of the consequences of the defendant's negligence which was within its reasonable foresight."[51]

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[48] Nader, *supra* n.20.

[49] *Nader, supra* n.20 at 536-537.

[50] There are many judgments and articles supporting this division. Some include: *Smith v Leach Brain, supra* n.3; *Rowe v McCartney, supra* n.20; *Mt Isa Mines v Pusey* [1971] ALR 253; Fridman and Williams, "The Atomic Theory of Negligence" *supra* n.26; Jackson, *supra* n.29.

[51] *Nader, supra* n.20 at 536.

McHugh J based this on reasoning in the *Wagon Mound* case acknowledging that: "a defendant is liable even for indirect damage which is the product of consequences which can be reasonably foreseen."[52] Although the discussion was ultimately *obiter*, it is nevertheless significant because it further supports the contention that foreseeability is not required for the ultimate injury. It suggests that providing consequences of an initial injury are foreseeable, the result of those consequences namely the ultimate injury need not be foreseeable.

Although the egg-shell skull rule was not required in this case, as the subsequent psychological injury was itself said to be foreseeable, the failure to adopt the rule, and the failure of the majority to state the rule as applicable in the alternative, suggests a possible reluctance to accept its application where the consequential injury is of a different kind to the initial injury. This indicates that the court was not prepared to deviate from the primary requirement of reasonable foreseeability which is consistent with the ultimate decision.

Further moves away from what can be described as an unqualified rule are particularly evident in *Commonwealth v McLean*[53]. This case involved consequential harm of a physical nature that followed upon initial psychological injury. Although *Nader* was post *Stephenson* and thus provided an opportunity for reaffirming the unqualified rule, *McLean* represents the first obvious consideration of *Stephenson* in an Australian jurisdiction. At first instance the defendant argued that the subsequent damage was too remote and on this matter the single justice instructed the jury as follows:

> "I ... instruct you as a matter of law that no question of remoteness of damage arises in relation to the alleged consequences of the post-traumatic stress disorder as distinct from the occurrence of post-traumatic stress disorder itself ... if you find that those further items of damage have occurred and that they were caused or materially contributed to by the illness of post-traumatic stress disorder, no question of remoteness of damage arises to prevent damages being awarded for those consequential items of damage. That is because those consequences will have arisen, in this case, on those findings due to the plaintiff's psychological and physical makeup. The defendant takes the plaintiff as it finds him with all his strengths, his weaknesses, and idiosyncrasies, whether of body and mind. So there is no question that matters consequent upon post-traumatic stress disorder in this case are too remote".[54]

This direction became one of the matters of appeal. Counsel for the plaintiff contended: "once the plaintiff was entitled to recover for the initial damage, the only issue in relation to the further damage was causation" and he relied on statements in *Stephenson v Waite Tileman Ltd*...which support this submission.[55] If this operation of the rule was accepted then the defendant would have been liable for the consequential damage regardless of whether it was foreseeable and even though it was different in kind to the initial injury. It is submitted that the

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[52] *Ibid.*
[53] *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389. ("*McLean*")
[54] *Id* at 403.
[55] *Id* at 406.

direction by the trial judge at first instance was a correct representation of the principle. In considering *Stephenson* the NSW Court of Appeal said that the decision: "has not hitherto been considered by this court or the High Court, but is contrary to the approach adopted in *Rowe v McCartney, Havenaar v Havennar and Nader.* It also appears contrary to the statement by the Board in *The Wagon Mound (No 1)* at 425 that: 'It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage.'"[56] Ultimately the court held that the egg-shell skull rule only applies to damage of the same kind as that which is foreseeable and subsequently enforced a qualified operation of the rule.

The reasoning in *McLean* on this issue was accepted two years later in *Kavanagh v Aktar*,[57] by a differently constituted NSW Court of Appeal, and also in a number of other cases since then.[58] In spite of these developments there are recent cases in which the traditional form of the rule has been expounded. An analysis of recent judicial discussion on this principle reveals what appears to be a state of confusion. For example, in *Lisle*[59] Forde J cited *McLean* and the reasoning set out in that case that the egg-shell skull principle only makes a defendant liable for damage of a foreseeable kind.[60] However later in the judgement His Honour refers with approval to statements made in *Cotic's Case*[61] that stands for an opposing view. These include: "the concept that the wrongdoer takes his victim as he finds him has little to do with foreseeability. It was further stated that once liability for the accident is admitted, then the only issue in an 'egg shell skull' case is causation."[62] Ultimately in applying the legal principles to the particular case Forde J states: "given his vulnerable personality, any lack of foreseeability does not prevent the plaintiff from recovering"[63] This is clear support for the unqualified traditional operation of the rule. However as stated above the reasoning in *McLean* has now been applied in a number of cases in New South Wales. It is submitted that the reasoning in *McLean* is inconsistent with established law and its subsequent application in a number of cases has serious implications for the continued validity and operation of the traditional form of the egg-shell skull rule and the practical effect it was intended to secure in these cases.

The question is: If the reasoning in *McLean* is to prevail, what does this mean for the operation of the egg-shell skull rule in Australian law of negligence? The case clearly indicates that the unqualified approach, as put forward in *Stephenson,* is inappropriate and that foreseeability is relevant to consequential injuries. It may be suggested that this has always been the case if one regards the extent of the

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[56] *Id* at 407.
[57] [1998] NSWSC 779 (23 Dec 1998).
[58] These include *Beale v Meehan & Ors* [2000] NSWSC 282 (11 April 2000); *Morgan v* Tame [2000] NSWCA 121 (12 May 2000); *Lisle v Brice & MMI* [2000] QDC 228 (4 August 2000); *White v Malco* [2000] NSWSC 1165 (21 December 2000).
[59] *Lisle v Brice & MMI* [2000] QDC 228.
[60] *Id* at 16.
[61] *Cotic v Gray* (1981) 124 DLR (3d) 641.
[62] *Supra* n.59 at 22.
[63] *Id* at 24.

injury to be injury within a single category. However one can regard extent of injury as including consequences falling into different categories and this view is supported by a number of earlier authorities. Ultimately if the reasoning from *McLean* comes to dominate, outcomes will depend on the level of classification and, as will be discussed next, this is also an issue that needs some clarification. It is important to note that in earlier cases, the issue of foreseeability as it applies to secondary damage was not directly addressed. Perhaps this arises out of a belief that: "the "eggshell skull" or "psyche" rule is a rule of compensation, not of liability."[64] Nevertheless it could be argued that the obvious restriction of the rule and emphasis on the fundamental place of foreseeability, marks a renewed focus on culpability of the defendant as opposed to a compensatory outlook. This will ultimately depend on the level of classification applied to determining the relevant kind of damage. If the courts are to adopt broad categories in the personal injury area then compensation for plaintiffs who suffer some consequential injury will be ensured. In this situation, loss of the traditional unqualified egg-shell skull rule may not be very significant. However it is worth noting that broad categories of damage have not been guaranteed and the problem is briefly considered below.

The determining factor – Kind of damage

If according to these recent developments the egg-shell skull rule only applies to damage of the same kind as that which is foreseeable then for the plaintiff with some peculiar susceptibility adequate compensation may depend on the court adopting broad categories in regard to personal injury. One may question what is the relevance of maintaining the principle when the requirement is to satisfy what was initially set out in the *Wagon Mound*, namely that the damage be of a foreseeable kind. The failure of the Privy Council to specify categories of damage or methods of classification has led to comments that: "this comfortable latitudinarian doctrine has...the obvious difficulty that it leaves the criterion for classification of kinds or types of harm undefined and at large."[65]

Given that *Commonwealth v McLean*[66] has now been accepted in a number of subsequent cases it is possible that the egg-shell skull rule may remain restricted as that case has set out. It is important to note here that the issue was note tested by way of further appeal. Special leave to appeal to the High Court was sought by the Commonwealth on a different issue, but refused.[67] In light of this, the crucial factor in determining whether damage is or is not too remote, once again becomes what kind or category of damage is held to be relevant in each situation. As mentioned earlier, adopting broad categories in the area of personal injury will ensure recovery for damage that may have previously been recovered under the unqualified operation of the principle that you take your victim as you find them. While there is great support for the adoption of broad categories by result, several

[64] *Morgan v Tame* [2000] NSWCA 121 (12 May 2000) per Spigelman CJ.
[65] *Mount Isa Mines v Pusey* (1970) 125 CLR 383 at 51 per Windeyer J.
[66] *Supra* n.53.
[67] *Commonwealth of Australia v McLean* s15/1997 (5 February 1997).

decisions indicate a level of discretion in determining what is the relevant kind of damage in each case.[68]

Academic discussion concerning the problems associated with determining kinds of damage as required by the *Wagon Mound* rule began immediately following the decision. Professor Jackson contributed an article considering what should be the correct manner for determining categories of damage.[69] It was suggested: "that the courts should make up their collective mind whether the criterion of liability should be nature or cause of the damage or a combination of both."[70] Jackson also gives consideration to the possibility of sub-division of general categories, another factor that perpetuates confusion in the area. This problem was also alluded to in a later article by Fridman and Williams in which the authors discuss appropriate levels of abstraction for kinds of damage and insist that: "until such time as the law is prepared to tackle these questions and produce a settled answer, there will be differences in the acceptance and application of the doctrine propounded in *The Wagon Mound (No. 1).*"[71] Fridman and Williams indicate that "at the highest...level of abstraction injuries might be classified vaguely as personal or proprietary."[72] Similarly it was suggested that at a lower level of abstraction these categories would be sub-divided.

It is clear from observations in this area that the courts have been somewhat less than consistent in determining these categories of damage. For example, on the one hand, situations where the category of damage can be said to have been determined by causation include cases such as *Siwek v Lambourn*[73], *Doughty v Turner Manufacturing*[74], *Tremain v Pike*[75], and also *Rowe v McCartney*[76]. On the other hand, various decisions have approached the problem by categorizing on the basis of the nature of the damage and these include *Hughes v Lord Advocate*[77], *Chapman v Hearse*[78], *Beavis v Apthorpe*[79].

The trend in Australia seems to suggest that categorization by nature of damage is the preferred method.[80] Thus, assuming that the nature of the injury is the relevant factor there must still be a determination as to the level of abstraction. In

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[68] These include *Siwek v Lambourn* [1964] VR 337; *Doughty v Turner* Manufacturing [1964] 1 QB 518; Tremain *v Pike* [1969] 1 WLR 1556; *Rowe v McCartney* [1976] 2 NSWLR 72.
[69] Jackson, *supra* n.29.
[70] *Id* at 16.
[71] Fridman and Williams, *supra* n.26 at 124.
[72] *Id* at 120.
[73] [1964] VR 337.
[74] [1964] 1 QB 518.
[75] [1969] 1 WLR 1556.
[76] [1976] 2 NSWLR 72.
[77] [1963] 1 All ER 705.
[78] (1961) 106 CLR 112.
[79] (1962) 80 WN (NSW) 852.
[80] *Havenaar v* Havenaar [1982] 1 NSWLR 626; *Nader v Urban Transit Authority of NSW* (1985) 2 NSWLR 501; *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389; *Kavanagh v Aktar* [1998] NSWSC 779 (23 Dec 1998).

Australia the bulk of decisions seem to suggest that broad categories of injury, particularly in regard to personal injury, should be utilized when determining issues of remoteness.[81] Despite a recognisable consensus some possible tendency towards sub-categorisation has been evident in cases such as *Rowe v McCartney*[82] and *Havenaar and Havennar*[83]. Some observers of inconsistency in this area have tended to suggest: "it is a matter of judgment where to draw the line, and in problematic cases this will depend largely on what outcome the court wishes to secure."[84] So, inevitably questions of policy infiltrate the remoteness stage. Some discussion of the role of policy in determining relevant kinds of damage is given in *Rowe v McCartney* and indeed it is suggested in that case by Samuels J: "in the absence of more specific criteria regard must be had to what, for want of a more adequate rubric, may be called considerations of policy."[85] Here we saw a sub-categorisation of the general category of psychological injury on the basis that the injury was different in kind to other psychological injury because of the way in which it occurred. It may be said that this is contrary to the decisions in *Hughes v Lord Advocate*[86] and *Chapman v Hearse.*[87] However it was suggested that: "it [was] necessary and legitimate to penetrate the categories more closely."[88]

CONCLUSION

The lack of practical effect of a qualified rule?

If close attention is given to certain earlier decisions following the *Wagon Mound*, an intention to maintain an operation of the rule that you must take your victim as you find them, free from the restraints of foreseeability was clearly evident. It is likely that this arose out of the recognition that categories of damage had been left open for determination by individual courts.

Some recent decisions in Australia have proposed that: "the principle that a tortfeasor takes the victim as he or she is found is not absolute and unqualified."[89] If *McLean* continues to be followed then we must accept that the rule now only applies to damage of a foreseeable kind. What then distinguishes the new interpretation of the principle from the requirement set out in the *Wagon Mound* in which established: "the essential factor in determining liability is whether the damage is of such a kind as the reasonable [person] should have foreseen."[90] One may opine that the principle retains no real effect and compensation will only be

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[81] Some include: *Richards v State of Victoria* [1969] VR 136; *Mount Isa Mines v Pusey* (1970) 125 CLR 383; *Nader v Urban Transit Authority of NSW* (1985) 2 NSWLR 501; *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389.

[82] [1976] 2 NSWLR 72.

[83] [1982] 1 NSWLR 626.

[84] J Fleming, *The Law of Torts*, 3rd ed, The Law Book Company of Australasia Pty Ltd, Sydney, 1965, p 196.

[85] *Rowe v McCartney* [1976] 2 NSWLR 72 at 89.

[86] [1963] 1 All ER 705.

[87] (1961) 106 CLR 112.

[88] *Rowe v McCartney* [1976] 2 NSWLR 72 at 90.

[89] *Kavanagh v Aktar* [1998] NSWSC 779 (23 Dec 1998) at 14.

[90] [1961] AC 388 at 426.

secured for unlucky plaintiffs where courts adopt sufficiently broad categories of damage. Given the uncertainty evident in the history of cases that have adopted the classification of 'kinds' of damage, considerable attention and perhaps a more authoritative analysis of the situation is required. Certainly these recent Australian cases seem inconsistent with established law and any further scrutiny of the area would certainly be welcomed.