CAUSATION IN THE LAW: A COMMENT ON 'THE WAGON MOUND'

I. The Wagon Mound and Re Polemis

Until 1961 the unjust and much criticized rule in *Re Polemis*[1] was held, by the courts, to be the law in both England and Australia. But, on 18 January 1961, the Judicial Committee of the Privy Council handed down its judgment in *Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd*[2] and thus introduced a complete change in form and a partial change in substance to the principles relating to causation in the law of tort in Australia.

As yet *Re Polemis* has not been expressly overruled within the English jurisdiction, and the path is still open for English courts to follow that decision though, perhaps, such a course of action is highly improbable.[3]

The appellants were charterers of a ship taking in bunkering oil in Sydney harbour. Due to the carelessness of the appellant's workmen a large quantity of this oil was spilt into the harbour and was carried beneath the respondent's wharf where their servants were using oxy-acetylene welding equipment. Some cotton waste was floating on a piece of debris in the oil under the wharf and it was set on fire by molten metal falling from the wharf above. This, in turn set fire to the oil floating on the water and the fire caused damage to the wharf itself. The trial judge found that the appellant did not know and could not reasonably be expected to know that the furnace oil was capable of being set on fire when spread on water. Some damage, however, to the wharf was reasonably foreseeable and in fact occurred: the oil had congealed on the respondent's slipway and interfered with its use. The judge found himself bound by the rule in *Re Polemis* to hold the appellants liable for all the damage to the wharf. An appeal to the Full Court of the Supreme Court of New South Wales was dismissed, but a further appeal to the Privy Council was allowed.

The judgment of the Privy Council raises a number of important questions for discussion, but it is proposed to avoid covering ground which has already been canvassed.[4] The aim of this article is to discuss the effect of this decision on the law of negligence and also on some other fields of civil liability, as well as to make some general observations.

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

[2] *Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd (The Wagon Mound)* [1961] 2 W.L.R. 126. Judicial Committee of the Privy Council; Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker, Lord Morris of Borth-y-Gest. Hereinafter referred to as *'The Wagon Mound'*.

[3] A. L. Goodhart, 'Obituary: Re Polemis' (1961) 77 *Law Quarterly Review* 175.

[4] Morison 'The Victory of Reasonable Foresight' (1961) 34 *Australian Law Journal* 317; Glanville Williams, 'The Risk Principle' (1961) 77 *Law Quarterly Review* 179.

It is essential to make a preliminary distinction between two distinct areas of law: causation and remoteness of damage. It is both an obvious and basic distinction but it is one often confused and one sometimes deliberately neglected. Causation is something which must be determined at the outset of a case: did the defendant's conduct in fact cause the plaintiff's injury? If it had no relation to it then that is the end of the matter. This is obvious, but it is often confused with the next question: was the damage, though actually caused or contributed to by the defendant's conduct, too remote for him to be held responsible for it? *The Wagon Mound* relates to the latter question and does not affect the former. The first is a question of fact; the second is a problem subject to many extraneous questions of social policy.

When this distinction was not made by the courts the confusion was often beneficial. Judges could fill their judgments with phrases such as *'causa causans'* or statements that 'the defendant's conduct was not a cause of the plaintiff's harm but only a circumstance on which a concurrent or later cause has operated',[5] and could come to the conclusion that the plaintiff was not liable. They did this to avoid the question of remoteness and the rule in *Re Polemis*; if they had established that the defendant's negligent conduct had caused the plaintiff's injury, they would be bound to hold the defendant liable for all the direct consequences of his act. If a judge felt that the defendant was liable for the damage suffered and that it was just so to hold, then he did not have to confuse the two questions.

There is no need for such confusion now. Instead of weighing up the justice of the matter, the judges need have no fear of holding that the defendant's conduct caused the plaintiff's injury, because the nature of the remoteness test established by the Privy Council means that questions of justice and social policy can be considered at a later stage. This is more beneficial for it puts an end to the need for courts to use unsatisfactory, unnecessary and often formalized reasoning to hold that the defendant's conduct did not cause the plaintiff's injury.

The rule as to the remoteness of damage established in *Re Polemis* was that if some damage could be reasonably foreseen as a result of the defendant's conduct then the defendant would be liable for all the direct consequences of his act. There was thus a distinction between the rules applying to culpability and compensation[6] and it was just this distinction that the Privy Council questioned in its judgment.[7]

[5] Such phraseology can be seen extensively throughout the judgment of Denning J. in *Minister of Pensions v. Chennell* [1947] K.B. 250, and may be discerned in the judgment of Goddard L.J. in *Haseldine v. C. A. Daw and Son, Limited* [1941] 2 K.B. 343.

[6] This distinction was made by Lord Sumner in *Weld-Blundell v. Stephens* [1920] A.C. 956, 983-984.

[7] [1961] 2 W.L.R. 126, 134, 140.

The Wagon Mound is strict authority for the proposition that a man is not liable for any damage of a type that he would not reasonably foresee; but their Lordships also discussed the positive question—for what is a defendant liable? He can only be 'responsible for the probable consequences of his act'.[8] 'Probable' as their Lordships later explained means reasonably foreseeable. This is the general standard of behaviour required by the law of negligence but in each particular case 'there can be no liability until damage has been done'[9] and their Lordships then say 'liability is in respect of that damage and no other . . .'. Here, however, the central problem arises: what exactly must be reasonably foreseen?

II. Interpretations of the Decision in The Wagon Mound

The old rule was that only some damage had to be reasonably foreseeable for a duty of care to be established; it appeared that the damage that was reasonably foreseeable did not actually have to occur.[10] But their Lordships discounted this duty of care-breach of duty approach for an all inclusive application of the foreseeability test to each question.[11] *The Wagon Mound* judgment however, is open to two interpretations as to the form in which the damage actually suffered must be reasonably foreseen. The first interpretation is simply whether the damage *actually* suffered was reasonably foreseeable. 'If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of damage which in fact happens—the damage in suit?'[12] The second possible interpretation is based on a passage in the judgment which is a purported summing up of their Lordships' views and the result of their reasoning. They say that 'the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen'.[13] The test of reasonable foresight of 'the kind of damage' seems to suggest division of probable damage into groups, for example: personal physical injury, injury by nervous shock, injury by fire to property; whereas the former test particularizes more and makes a plaintiff's task much harder.

Before proceeding, it is necessary to stress that it is not denied that the damage actually suffered must be reasonably foreseeable. The question is whether it is to be reasonably foreseeable on its own, or reasonably foreseeable because it is a part of a general category of damage.[14]

[8] *Ibid.* 139. [9] *Ibid.* 141.
[10] *Thurogood v. Van Den Berghs and Jurgens Ld* [1951] 2 K.B. 537.
[11] [1961] 2 W.L.R. 126, 141. [12] *Ibid.* [13] *Ibid.* 142.
[14] Professor Glanville Williams supports the former of these two interpretations—(1961) 77 *Law Quarterly Review* 179. See, however, W. L. Morison, 'The History of

The importance of reaching a decision as to which test should be applied can be shown from an example: the defendant drives a truck loaded with road metal along a street at a high speed and some of the metal spills off the truck covering the road. The plaintiff starts to cross the road and the wheels of a passing car throw up a piece of the metal striking the plaintiff on the knee shattering his knee cap. Asking oneself whether the damage is of such a *kind* as is reasonably foreseeable entails classifying the injury actually suffered. If one classifies it as personal physical injury then the question is whether personal physical injury was reasonably foreseeable by the defendant acting as a reasonable man, to be the result of his conduct. If the test concerns the damage actually complained of, that is the shattered kneecap, it is not the same question. Some sort of personal physical injury might be quite foreseeable, because of the generality of the injury within that group; injury to a knee cap might not be nearly so foreseeable because of its particularity.

If the test is reasonable foresight of damage of such a kind as the reasonable man should have foreseen—remembering that 'kind' refers to a general type of damage—then it may be inconsistent with earlier statements in the case.

Thus it is suggested that in several cases at least, the result will depend on the extent of the particularity of foresight required. The question is whether reasonable foresight of the category, which includes the damage actually suffered, is enough (the wide interpretation) or whether reasonable foresight of the actual damage itself is always essential (the narrow interpretation).

A court, it is submitted, will probably tend to the wider interpretation of the decision as explained in the latter section of the judgment.

Such an interpretation will have the definite advantage of providing the law with a flexible and workable rule in determining questions as to remoteness of damage. The circumstances and fact situations that can arise in this area of law are so varied that to be tied down by strict and narrow rules of law can only lead to a decision that would not be consonant with current views of justice and morality. In fact, situations could arise whereby, if the courts adhered to the narrower interpretation of *The Wagon Mound* decision, they would be furthering the wrong that the Privy Council attempted to rectify (that is preventing an undue burden falling on one of the litigants), the only difference being that it would be the injured plaintiff (and not the defendant) who would now suffer, as the burden would be on him to show that his particular damage was reasonably foreseeable. This may

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Reasonable Foresight' (1961) 34 *Australian Law Journal* 317, 318; R. W. M. Dias, *Cambridge Law Journal* 23, 24-26.

often be very difficult especially in situations which arise in the 'egg-shell skull' type of case.[15] Also, a flexible rule does allow for a court's ultimate decision to be influenced by policy notions to ensure that justice is done between the litigating parties. This will be noticeably beneficial in those border-line cases where the judge may ask himself if the plaintiff should be able to recover to the full extent of his injuries. It will be on the answer to this question of morality as well as law, that the case's ultimate outcome will depend.

It could, however, be argued that such a rule is too wide. An extreme example of the potential limits to its application would be, that one could justify the decision in *Re Polemis* by applying the *ratio* of *The Wagon Mound*. This may seem ridiculous especially in view of the Privy Council's *dictum* that *Re Polemis* 'should no longer be regarded as good law'.[16] But it can be argued that in *Re Polemis*, a reasonable man could foresee that a destructive type of physical damage could occur from a heavy plank falling into the hold of a ship. Thus, when this type of damage did occur (that is, the physical destruction of the ship), the plaintiff recovered for all the damage of the type which was reasonably foreseeable. This argument can be supported by an analogy with the 'egg-shell skull' type of case, which is in accordance with the principle that one is liable for all damage if the general category of damage could be foreseen, even if its extent was not foreseeable. *Re Polemis* and *The Wagon Mound* can be distinguished on their facts, thus justifying the different decisions reached in each case. In *The Wagon Mound*, the damage that was reasonably foreseeable was to the working of the slipway and was not necessarily of the physically destructive type that did finally occur. Thus, the defendant was successful. In *Re Polemis*, the damage that was foreseeable was of a physically destructive type and this did in fact occur so that the plaintiff was successful. However, it is felt that a court would not apply the rule to this extreme, and the use of common sense practicable classifications would dispense with the above complaint concerning the excessive width of the rule.

The wider interpretation does provide a measure of consistency between the respective rules for determining culpability and compensation, by providing them with the one criterion—reasonable foreseeability. But more important still, this interpretation allows a middle path to be taken between the two conflicting arguments that:

(a) the defendant should be responsible only to the extent of his fault, and thus any unforeseeable injury is excluded, and that

(b) the defendant committed a wrong and thus should be respon-

[15] *E.g. Love v. Port of London Authority* [1959] 2 Lloyd's Rep. 541; *Levi v. Colgate-Palmolive Pty Ltd* (1941) 41 S.R. (N.S.W.) 48.

[16] [1961] 2 W.L.R. 126, 138.

sible for all the damage which the plaintiff incurred as a direct result of that wrong. Strict consistency between the rules determining culpability and compensation does not seem to be essential. In the field of intentional torts, and even with some unintentional torts (for example, the 'egg-shell skull' type of case), the existence of liability and the extent of that liability are governed by different factors.[17] To prevent artificiality and injustice there should, however, be some reasonable connection between the two rules, and this is exactly the result which the wider interpretation of the Privy Council's decision provides.

'The law of tort tries to do two things at once: compensate the injured plaintiff, and penalize the wrong-doing defendant.'[18] It would seem that *Re Polemis* is a decision based more on a principle of compensation rather than of punishment, as the extent of the defendant's liability would seem to be completely out of proportion to his fault. The narrow interpretation of *The Wagon Mound* judgment would result in a situation whereby liability would be more punitive than compensatory as it would be determined strictly according to defendant's fault with little or no regard being had to the actual damage which the plaintiff incurred, if that damage was not foreseeable. Such a situation could leave an injured plaintiff without a remedy for much of the damage he suffered (that is, all unforeseeable damage). The best answer would probably be found in the use of the wider interpretation, as this allows damage to be determined on the basis of both punitive (defendant's responsibility is reasonably correlated to his fault) and compensatory (plaintiff can recover for that damage which is of a reasonably foreseeable type) factors. This solution has the clear advantage of fairness to both parties as the plaintiff gains reasonable compensation and the defendant's liability is not disproportionate to his wrong-doing, as was the case in *Re Polemis*.

It would also seem that some difficulties would arise in the application of the narrow interpretation. This narrow view savours strongly of test of hindsight rather than foresight, because of its particularity. Their Lordships strongly criticized this hindsight test as a basis for determining liability.[19] If one looks to the specific damage that does occur, and then enquires as to whether it was reasonably foreseeable, surely this is to some extent an application of the criticized hindsight test. Also, the narrow interpretation would deny responsibility for unforeseen harm. Finally, there is the point that there is a trend

[17] Two American cases clearly show this: *Wyant v. Crouse* (1901) 127 Mich. 158; 86 N.W. 527, and *Vandenburgh v. Truax* (1847), 4 Denio N.Y. 464.

[18] Glanville Williams, *op. cit.* 180.

[19] 'After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility'. [1961] 2 W.L.R. 126, 140.

in modern law, which operates in a society where social security plans are becoming more widespread, and where insurance schemes are playing a more significant role in compensation for injury (for example third party car insurance)—a trend which shows much less reluctance in imposing the burden of legal responsibility on plaintiffs in matters of this type.

Again, if the court decides on the latter test (that is, the wider interpretation), then the problem arises as to the means whereby probable damage can be divided into categories for this test. The courts have, however, already started this process. In *King v. Phillips*[20] Denning L.J. said 'there can be no doubt since *Bourhill v. Young*[21] that the test of liability for shock is foreseeability of injury by shock'. The Privy Council in *The Wagon Mound,* in creating another category, said that if 'fire' were substituted for 'shock' in this statement then they would endorse it.[22] Still, there are many other classifications to make, and the courts will have to face real problems if they adopt this test. It is to be anticipated, however, that they will create different categories according to the facts of each particular case, rather than bind themselves by making general rules as to categorization.

III. Possible Effects of the Decision

(i) *What is the effect of the Privy Council's decision on what is popularly known as the 'egg-shell skull' principle?*

This principle was stated by MacKinnon L.J. in *Owens v. Liverpool Corporation*[23] when he said

> . . . one who is guilty of negligence to another must put up with [the] idiosyncrasies of his victim that increase the likelihood or extent of damage to him; it is no answer to a claim for a fractured skull that its owner had an unusually fragile one.[24]

This rule is applied when a duty of care and a breach of that duty have been established, for then and only then, does the defendant take his victim as he finds him.[25] Thus, before the principle can be applied, negligence must be established.

Which test is the one to apply? If one takes the view that it is enough reasonably to foresee damage of such a kind as is suffered, then there is no great problem in the application of 'the egg-shell skull' principle. If a man is knocked over by a car carelessly driven and suffers greater damage because of his abnormality then on the wider view, the defendant would be liable for the greater damage suffered. If the correct view is that the damage actually suffered must be reason-

[20] [1953] 1 Q.B. 429, 441. [21] [1943] A.C. 92. [22] [1961] 2 W.L.R. 126, 141.
[23] [1939] 1 K.B. 394. [24] *Ibid.* 400-401.
[25] This is borne out by the statement of MacKinnon L.J. in *Owens v. Liverpool Corporation* [1939] 1 K.B. 394, 400-401, and supported by Professor Fleming in *The Law of Torts* (1st ed. 1957) 117.

ably foreseeable, then it appears that the fact that the plaintiff has some abnormality, must be reasonably foreseeable. It seems that the plaintiff would never be able to recover for greater damage suffered, because of his abnormality, for the reasonable man cannot be expected to provide for the abnormal.

Thus it can be seen that the real difficulty in this case is to establish just exactly what the reasonable man must be able to foresee. If the test is that the reasonable man must be able to foresee the damage actually suffered, then it is a test of hindsight, as well as being a test which makes it virtually impossible for the abnormal plaintiff to recover for the greater damage suffered because of his abnormality. If the test is that the damage actually suffered, is foreseen only because it is a particular instance of damage of such a kind as is foreseeable, then cases would arise when the defendant would be held liable for damage not reasonably foreseeable. Thus, the abnormal plaintiff could recover for greater damage which was caused by his abnormality. If the latter test is the one the courts decide on, then *The Wagon Mound* is not as radical a case as it might have been thought, for the law would be this: if some particular instance of damage within a special category of damage is reasonably foreseeable, then the defendant would be liable for all damage, which comes within that category, that is actually suffered. This rule seems to differ in form rather than substance from the rule in *Re Polemis*.

Also, it has been said that the 'egg-shell skull' rule 'is on the whole a justifiable exception to the risk principle'.[26] But, on the wider interpretation of *The Wagon Mound* this is not necessarily so, as in all but the most extreme circumstances (that is, those cases where the plaintiff's abnormality is so chronic that one could not reasonably foresee the type of damage that occurred, although one could reasonably foresee some damage to him),[27] it may be said that the ultimate type or kind of damage can usually be foreseen. If so, then these cases will be in accord with, and not exceptions to, *The Wagon Mound*. But nevertheless the clear rejection of *Re Polemis* would probably confine the 'egg-shell skull' type of case to that which concerned injury to the person. It seems that injury to property would probably be excluded and thus come within the risk principle.[28]

'The egg-shell skull' principle has a counterpart in the criminal

[26] Glanville Williams, *op. cit.* 196.

[27] *Bidwell v. Briant* 'The Times' 9 May 1956: this concerned an injury to a haemophilic who gained compensation to the full extent of his damage. *Koehler v. Waukesha Milk Co.* (1926) 190 Wis. 52; 208 N.W. 901: a chipped milk bottle, for which the defendants were liable, cut the hand of a customer who had an unusual blood condition which caused her to contract blood poisoning from which she died. The defendants were held to be liable for her death. *Pigney v. Pointer's Transport Services Ltd* [1957] 1 W.L.R. 1121: defendant caused injury to a neurotic plaintiff who then committed suicide. The defendant was held to be fully liable.

[28] Glanville Williams, *op. cit.* 197.

law, where the victim is taken as he is found.[29] But, on the other hand it may be in possible conflict with the *Hadley v. Baxendale*[30] approach in contract law. Such an approach would relieve the defendant of responsibility unless he knew of, or had reason to believe, that the plaintiff suffered from some peculiar condition at the time the contract was made.

(ii) *Does* The Wagon Mound *decision affect the 'unusual value rule' as stated by Blackburn J. in* Smith v. London and South Western Railway Company?[31]

The rule is that if the defendant in a negligence action is in receipt of a large income, then the plaintiff is liable for all financial loss incurred as a result of the injury, and he cannot plead that he could not have reasonably expected to injure anyone but a labourer. This rule would not appear to be impaired by *The Wagon Mound,* as it relates more to the *quantum* of damage rather than to the remoteness of damage.

(iii) *Does* The Wagon Mound *decision affect rules relating to strict liability, such as that expounded in* Rylands v. Fletcher?[32]

Probably it does not, since *Rylands v. Fletcher* is more a case of fault liability, in the sense that the defendant was responsible, due to the fact that he had brought on to his land 'a thing inappropriate to the place where it is maintained'.[33] As the defendant created a situation of potential danger he was at fault in regard to the consequences of that situation. Moreover the Privy Council expressly desired that nothing in *The Wagon Mound* judgment should reflect on the rule in *Rylands v. Fletcher.*[34] But it can be argued that *The Wagon Mound* is yet another decision on the line that one can be liable only if one is at fault, and thus the modern development of tortious principles relating to strict liability rules could be weakened as a result of this decision of the Judicial Committee.

(iv) *Does* The Wagon Mound *decision affect a* rapprochement *in the principles of causation as found in Contract and Tort?*

Academic lawyers have long engaged in the controversy over the proper relationship between the rules as to remoteness of damage in tort and contract.[35] The *locus classicus* of the law relating to remote-

[29] *Rex v. Hayward* (1908) 21 Cox 692; *State v. Frazier* (1936) 339 Mo. 966, 98 S.W. 2d. 707.
[30] (1854) 9 Exch. 341; 156 E.R. 145.
[31] (1870) L.R. 6 C.P. 14, 22-23.
[32] (1868) L.R. 3 H.L. 330.
[33] W. L. Prosser, *Selected Topics on the Law of Torts* (1953) 147. This is to adopt what Prosser calls 'a broad concept of fault': 'a deviation from social standards of conduct which will not be permitted with impunity', *ibid.* 181.
[34] [1961] 2 W.L.R. 126, 142.
[35] Porter, 5 *Cambridge Law Journal* 176; Wilson and Slade, 15 *Modern Law Review* 458; James, 13 *Modern Law Review* 36.

ness of damage in contract is to be found in *Hadley v. Baxendale.*[36] This rule was amplified by the Court of Appeal in *Victoria Laundry (Windsor) Ld v. Newman Industries Ld*[37] where Asquith L.J. stated that the basic rule was, 'In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting, as was at the time of the contract reasonably forseeable as liable to result from the breach'.[38] The Court further considered that reasonable foresight of the possibility of such occurrence was not sufficient, but that the damage must be foreseen as a likely result.

Such a rule accords with the general basis of contractual liability, for the reports abound with instances of the emphatic reliance on the 'intention of the parties' in questions of contract. This often elusive concept is thought to be best ascertained by asking what was reasonably in the contemplation of the parties at the creation of the contract.

Yet some aspersions may be cast on this concept as the basis of contractual liability. The formation of a contract depends on the intention of the parties as would appear to the hypothetical reasonable bystander; yet, in point of logic, why should the essence of formation be necessarily transferred to breach of contract since it may be said that in most cases the parties contemplate performance, and that breach does not come within the purview of their contemplation? The answer is that the law is really enquiring into what the parties would have contemplated in the circumstances had they so directed their minds, and that this approach is consonant with the fundamental basis of contractual liability.

In certain fields of contract law the concept of the hypothetical bystander's view of contractual intention has been discarded in favour of a set of arbitrary rules, for example, in the area of the 'ticket cases'; but such a substitution is the exception rather than the rule, and reasonable foreseeability may safely be regarded as the guiding principle of recompense in contract law.

The close connection between the origins of contract with the origins of the law of tort through *assumpsit* would indicate that tort in fact has not a different historical basis. But the extent of their similarity is no more than that of an undertaking of an obligation, and it is clear that such similarity *per se* is not sufficient in itself to warrant the application of the same rules as to remoteness or to any facet of the law applicable to both tort and contract.

Such being the underlying basis of contract, what now of tort? At a practical level, it has often been correctly asserted that the damages in a particular case should not depend on whether the action is framed in contract or in tort; this is sound because the alternative view would support the conclusion that the law concentrates on the

[36] (1854) 9 Exch. 341; 156 E.R. 145. [37] [1949] 2 K.B. 528. [38] *Ibid.* 539.

form to the exclusion of the substance of the matter. Lord Porter has said:

> One may add that to the practical lawyer it would be inconvenient, and to the layman, I imagine, incomprehensible, that the same act should give rise to a totally different measure of damages according to whether the cause of action could be founded in contract or in tort.[39]

It is interesting to notice that the suit in *Re Polemis* arose out of a clause in a charterparty, thus indicating that circumstances may arise in which the line of demarcation between these two branches of the law will be almost impossible to draw.

At a theoretical level, it is urged that similar rules need not necessarily prevail, because a contractual obligation is regarded as *self*-imposed whereas the *law* imposes liability in a tort suit, so that the resulting rule will to an extent be based on judicial policy as to the proper limits of liability for the consequences of negligent conduct. The law could impose strict liability for all the consequences of the conduct and the Court of Appeal in *Re Polemis* was moving in this direction when it excluded foreseeability from the test of remoteness. This is regarded as a relic of more ancient times when the law was primarily concerned with the prevention of intentional conduct in certain cases, and as being somewhat alien to the modern concept of tort liability connoting some degree of moral fault in the tort-feasor.[40]

Moreover, the reasonable man looms large in negligence, and it seems in accordance with general trends of tort liability to postulate that, to some extent at least, the liability for damage will depend on the reasonable foresight of the defendant in the circumstances of the case, as does the existence of the prior prerequisite of duty.

IV. General Considerations

One finds that, in the law of tort, courts when giving judgment often refer to questions of justice and morality as policy factors which underlie the decisions of law. Thus Lord Atkin was heard to say in *Donoghue v. Stevenson*[41] that 'liability for negligence . . . is . . . based upon a general public sentiment of moral wrongdoing for which the offender must pay'.[42] Also the Privy Council in *The Wagon Mound* gave, as one of the basic influences on its conclusion, the reason that the direct consequence test 'does not seem consonant with current ideas of justice or morality'.[43]

The basic question in any civil case relates to the problem of where

[39] (1934) 5 *Cambridge Law Journal* 176, 190.

[40] Even the modern trend towards strict liability betrays traces of Prosser's 'broad concept of fault' (*supra,* note 33). But the fault is broadly apportioned by means of comprehensive modern insurance so that the compensatory element is dominant.

[41] [1932] A.C. 562. [42] *Ibid.* 580. [43] [1961] 2 W.L.R. 126, 138.

shall the line of responsibility be drawn. Such a question usually raises the issue of moral blame or culpability, and to what extent the burden which is imposed on the unsuccessful defendant shall be proportional to his fault. It would seem that, as the wrongful act which is alleged to have caused the damage increases in moral obloquy, the courts more readily declare damage to be proximate which in other connections would be too remote.[44]

The degree of liability is usually proportional to the size of the part played by the defendant in the complex of causal factors, as is the case in *The Wagon Mound* which limits the defendant's responsibility to that class of damage which was reasonably foreseeable. But several exceptions to this can be seen in various spheres of the law of tort, such as the responsibility of an occupier for persons entering on his premises and the vicarious liability of a master for the acts of his servant where responsibility is not dependent on moral fault at all. Also mere moral blame is not in itself adequate to establish liability.[45]

Often foreseeability of harm is an important factor in morally blaming or excusing people for the occurrence of that harm,[46] for example where a father consents to the marriage of his daughter to a man who later treats her with cruelty. The father is blamed if he knows or ought to have known of the man's character and thus he could have foreseen the consequences. The father is excused if he had no reason to suspect the adverse character of his son-in-law.

Several legal writers[47] strongly favour the view that 'reference to general principles is perhaps a salutary part of judicial ritual' and that

> decisions of courts on the extent of a wrongdoer's liability are not and should not be reached by the application of any general principles but by the exercise of the sense of judgment, unhampered by legal rules on the facts of each case. . . . Instead . . . the judge . . . decides more or less intuitively what the extent of a wrongdoer's responsibility is to be. His sense of what is just or fitting may be relied on to guide him to a decision acceptable to society.[48]

It is felt that these views tend to under-estimate the power of legal rules in the mind of a court. A judge, when setting out to find a solution to a dispute probably does not immediately ask himself: 'Is it morally correct and just that the plaintiff should succeed in his claim?' But rather, he may well ask: 'Is the plaintiff's case supported

[44] T. A. Street, *Foundations of Legal Liability* i, 111.

[45] *Mayor of Bradford v. Pickles* [1895] A.C. 587, where the House of Lords held that there was no liability even though the malicious intent of the defendant was a factor in causing the plaintiff's damage, as no legal wrong had been done by the defendant.

[46] Hart and Honoré, *Causation in the Law* (1959) 230.

[47] Leon Green, *Rationale of Proximate Cause* and *Judge and Jury;* Fleming, *op. cit.* 195; Prosser 'Palsgraf Revisited' (1953) *Michigan Law Review* 1.

[48] Hart and Honoré, *op. cit.* 261.

by law and if so, to what extent?' It is only in the borderline disputes where a case, on the basis of inconsistent or ambiguous legal authority, may swing either way, that a judge resorts to 'policy' principles and then gives a decision influenced primarily by questions of justice and morality.

Thus, questions of morality probably do influence the judiciary and possibly are a significant factor in many judicial decisions concerning responsibility. The Privy Council admitted this in its judgment in *The Wagon Mound*.[49] No general rule has been or can be made out of these moral principles in determining the extent of legal responsibility. How can we establish rules based on immorality or relative wrongfulness when these questions are even vaguer, more disputable and more indefinite than those of causation? General notions of policy, such as a desire not to impose too much of a crushing liability on the defendants, not to limit the initiative of private individuals and an awareness of the social repercussions of the conclusion reached, are all relevant to judicial decisions.

A purely causal basis imposes a liability out of proportion to the act done and often well beyond the pecuniary means of most defendants, but nevertheless 'it can be no less out of proportion to the plaintiff's innocence'.[50] Such was the problem faced by the Privy Council in *The Wagon Mound*. The ultimate decision was a compromise between the two extreme viewpoints:

(a) that presented in *Re Polemis* claiming that, if a defendant committed a wrong then he is thus liable for all damage to the innocent plaintiff which arose as a direct consequence of his act, and

(b) the narrow interpretation of *The Wagon Mound* decision claiming that the defendant's liability is in direct proportion to his fault or his wrong-doing. Thus, the plaintiff is not compensated for any damage, no matter how specific, that was not reasonably foreseeable. The view accepted was that if a reasonable man could foresee the *type or kind* of damage then the defendant must compensate the plaintiff for all specific damage of that type, even if some of it was not reasonably foreseeable. This rule allows the judge to arrive at his own classification of the various types of damage and the resulting flexibility gives scope for the employment of both policy and morality factors.

Modern science and philosophy have strongly disapproved of the legal 'cause and effect' notion. What really occurs is that a certain person A by his actions B, which, when combined with special circumstances C, produce an ultimate result D. A, B and C each bear a functional relationship to the other, and when combined together bring about the resultant damage D.

[49] [1961] 2 W.L.R. 126, 138. [50] Prosser, *op. cit.* 217.

The legal approach is more on the lines that A sets a process of events into motion which ultimately causes damage for which he will be responsible. The law tends to disregard the special circumstances altogether when ascertaining the *causa sine qua non*. Thus, it is interesting to use an analogy with the statutory provisions relating to contributory negligence and joint tortfeasors,[51] where responsibility is apportioned strictly in accordance with the fault of each party and to apply to this analogy in accordance with the approach of the scientist and philosopher. We would thus have an apportionment, not between the two negligent parties (plaintiff and defendant or the joint tortfeasors), but between the defendant's negligent act and the other extraneous factors which, when combined with the defendant's act, brought about the plaintiff's damage. Neither the plaintiff nor the defendant is at fault in regard to the extraneous factors, (that is, C in the above example). The real difficulty arises when one can say that the negligent defendant is responsible for 60 *per cent* of the plaintiff's damage (as the defendant's act constituted 60 *per cent* of the factors bringing about that damage) and there is no one left over to be responsible for the remaining 40 *per cent* of the damage which the plaintiff suffered. Thus, the only way to arrive at a just, even if impractical solution would be for some scheme of social insurance to account for the 40 *per cent* of the damage for which the plaintiff was not compensated. The injured party would then gain full compensation whilst the tortfeasor's responsibility will be limited strictly in relation to his fault. But, unfortunately, the means which must be applied to arrive at this just and equitable end are purely theoretical, and, for the moment any way, would appear to be impracticable.

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[51] Wrongs Act 1958 Part IV and V.