Errington ([1952] 1 K.B. 290) and *Cobb v. Lane* ([1952] 1 All E.R. 1199) as instances. The High Court, on the other hand, had treated exclusive possession as much more decisive. See especially the judgment of Windeyer J. It is probably true that *Isaac v. Hotel de Paris Ltd.* could have been decided without approval of the broad principles laid down in the Court of Appeal decisions, just as *Raidich v. Smith* could have been decided without dissenting from them. But it seems clear that the Privy Council has in fact endorsed them, and actually decided on the basis of these principles and not on any narrower principle. This being so it is difficult to see how the older view favoured by most of the members of the High Court can be regarded as holding the field in Australia.

W. N. HARRISON

TORTS

Demise of Re Polemis

Some 44 years ago an Arab stevedore, engaged in the work of discharging cargo from a ship in Casablanca harbour, carelessly allowed a plank to fall into the hold of the vessel. From the unprepossessing character of this act there followed consequences of alarming magnitude. For the plank that fell caused a spark which ignited the vessel's cargo of petrol and in the ensuing fire the entire ship was destroyed.

In the claim which followed these events, the legal problem, in the form in which it finally reached the Court of Appeal, was this: Were the charterers liable to the owners for loss of their ship when all that could reasonably be foreseen as the result of dropping the plank was that *some* damage would be caused to the vessel, but not the damage (destruction by fire) which in fact occurred? The Court of Appeal were unanimous in holding the charterers liable: the fire, it was said, was the "direct" consequence of negligence for which the defendants were responsible. The fact that such a consequence was unforeseeable was irrelevant, for a consideration of this kind "goes to culpability, not to compensation".[1] Or as Holmes later put it, "the tort once established the tortfeasor takes the risk of the consequences".[2]

The principle thus established and known as the rule in *Re Polemis*[1] has troubled lawyers ever since. Its antecedents were few and doubtful;[3] its progeny in the years that followed were

1. [1921] 3 K.B. 560 at p. 571 per Bankes L.J., citing Lord Sumner's dictum in *Weld-Blundell v. Stephens* [1920] A.C. 956, 984.
2. Holmes-Pollock Letters, vol. II, 88.
3. Chiefly *Smith v. London & S.W. Ry. Co.* (1870) L.R. 6 C.P. 14, which can be explained on other grounds.

equally rare and sometimes illigitimate.[4] Amongst its supporters it could number Lords Porter and Wright; but its detractors were many and in their ranks might be found names such as Pollock, Salmond, Goodhart, Denning, Glanville Williams, Wright, and Fleming. It is to this controversy, which has for so long rived the common law world, that the recent decision of the Privy Council in *The Wagon Mound*[5] has at last brought relief.

The facts of this important case were as follows. Defendants (appellants) were charterers of an oil-burning ship *The Wagon Mound*, which at a date in October, 1951, was in the process of taking in bunkering oil at Caltex Wharf in Sydney Harbour. On October 30th a large quantity of bunkering oil was, through the carelessness of defendants' servants, allowed to spill into the water, whence it spread 600 feet to the northern shore of the harbour. There the oil congealed upon the slipways of a 400 foot wooden wharf owned by the plaintiffs and interfered with their use of the wharf's slipways. Plaintiffs' employees were engaged at the time in repair operations involving the use of oxy-acetylene welding equipment, and when the presence of the oil became known these operations were suspended. Plaintiffs then communicated with the manager of the Caltex Oil Co. and as a result of inquiries, coupled with their own belief that there was no danger of fire, work was again continued. On November 1st oil on the water near the wharf caught alight and the ensuing fire destroyed both the wharf and the equipment upon it.

It was for damages for loss of this property that plaintiffs now sued defendants. At the trial Kinsella J. made the all-important finding of fact, namely, that the defendants "did not know and could not reasonably be expected to have known that [the oil] was capable of being set afire when spread on water".[6] This finding was based on a generally accepted belief at the time, which was later confirmed by the experiments of a distinguished scientist, Professor Hunter. He showed that floating oil of this kind would not ignite even when molten metal was dropped upon it, but that the fire might have begun when smouldering cotton waste, set alight in this manner and floating in the water, burst into flames and so acted as a wick to raise the temperature of the oil to its ignition point. Whatever the actual cause, the judge's finding of fact excluded the possibility of reasonable foresight of the fire. But since *some* damage to plaintiffs' wharf[7] was a foreseeable consequence

4. As in the case of *Thurogood v .van den Berghs and Jurgens* [1951] 2 K.B. 587.
5. To give it its full title, *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd.* [1961] 2 W.L.R. 126, P.C.; [1961] 1 All E.R. 404.
6. See [1961] 2 W.L.R. at p. 131.
7. *i.e.*, by fouling the slipways.

of spilling the oil, and since the fire was a "direct" consequence of that spillage, the Full Court of New South Wales was constrained by the rule in *Re Polemis* to hold the defendants liable for the destruction of the wharf by this unforeseeable fire.

The defendants in due course appealed to the Privy Council who, faced with the choice either of affirming the decision of the court below, and with it the rule in *Re Polemis*, or of reversing and so disapproving the rule, unhesitatingly took the latter course. Although technically incapable of overruling the Court of Appeal decision their Lordships of the Board[8] despatched it in language which can leave no doubt as to their intention. "In their Lordships' opinion," said Viscount Simonds, "it should no longer be regarded as good law".[9] Having disposed of that troublesome case the Privy Council had little difficulty in finding for the defendants: for, said Viscount Simonds, "the essential factor in determining liability is whether the damage is of such kind as the reasonable man should have foreseen".[10] The fact that some foreseeable damage to the wharf would be caused by the presence of the oil was irrelevant, since "the only liability in question in a case of this kind is liability for damage by fire".[11]

It is respectfully submitted that the decision is correct and can be fully supported by the considerations of logic and authority advanced in its favour. The problem, as Viscount Simonds rightly perceived, is relevant mainly to the "breach of duty" element of the tort of negligence, *i.e.*, to the factual question whether, in the given circumstances, the defendant's conduct conformed to that of a reasonable man placed in a similar situation. The conduct of a reasonable man is determined by two factors: (i) whether he would foresee consequential damage as likely to result from his act, and (ii) what precautions he would take to avoid that damage. Since the foreseeable damage in different situations may vary from (at one end) a remote possibility of damage of a trivial kind, to (at the other end) a grave probability of serious harm, the reasonable man will regulate his conduct accordingly by taking the appropriate precautions in each case.[12] This is no doubt a complicated way of stating what is, after all, simply a principle of common sense conduct, but it is to this principle that the decision in *Re Polemis* obliged an artificial construction to be given. For the effect of the rule there laid down is to require that the precautions taken by the defendant should be those appropriate to damage of a serious

8. Viscount Simonds, Lords Reid, Radcliffe, Tucker, and Morris.
9. At p. 138.
10. At p. 142.
11. At p. 141.
12. Cf. 56 C.L.R. 580, 601, per Dixon, J., and compare *e.g.*, *Bolton v. Stone* [1951] A.C. 850, with *Paris v. Stepney B.C.* [1951] A.C. 367.

and even different kind *if such damage in fact occurs* even though all that is foreseeable is trivial damage in some different form.[13] As Viscount Simonds himself observes, "the rule in Polemis works in a strange way. 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".[14]

This may help to indicate that the question of "remoteness" in *Polemis* was really one of culpability and not, as is inferentially suggested by Lord Sumner's dictum, simply one of compensation. "It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. 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 the damage which in fact happened—the damage in suit. And if that damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable".[15]

In place, therefore, of the *Polemis* principle (the test of foreseeability of any damage, plus consequences which are direct and physical) his Lordship now proposes a new test, or, rather, a reversion to the old. This test, as has already been stated, embodies the principle that in determining liability the question is whether the damage is of such a *kind* as the reasonable man would have foreseen.[10] It is thought that in applying this principle the courts must still be asked to give to the problems before them a somewhat pragmatic solution. In *The Wagon Mound* itself the damage actually suffered by the plaintiffs was, in one sense, of the same kind as that foreseen—in both instances damage to property in the form of the plaintiffs' wharf. It is clear therefore that the division of damage in kind into "damage to property" and "damage to the person" is insufficiently refined. On the other hand it is most improbable that his Lordship intended to relieve from liability the defendant who foresees harm but who cannot foresee its precise extent or the exact manner in which it takes place. This brings us back to the problem which perhaps initially precipitated the whole difficulty, the case of the man who dies from a slight injury because of his abnormally fragile skill. A sufficient answer can consistently be given to these questions by saying that death by injury is (legally, at least) damage of the same kind as an injury short of death.[16] The distinction may in some cases be a fine one

13. Some of the difficulty may have been created by confusing "carelessness" with "negligence".
14. [1961] 2 W.L.R. at p. 140. 15. At p. 141.
16. Compare Salmond on *Torts:* 1st Edition (1907) at p. 107. The position is otherwise where, apart from the abnormality, the injury would not have happened at all: *Pritchard v. Post Office* [1950] W.N. 310.

but his Lordship was prepared to accept that it exists in the case of nervous shock: "the test of liability for shock is foreseeability of injury by shock".[17]

Perhaps the problem can be partly solved by the application of a further criterion implicit in the test of foreseeability. What one can foresee depends upon the state of one's knowledge at the relevant time. "Knowledge", as Lord Asquith has told us, "is of two kinds, one imputed, the other actual".[18] The law of torts is concerned chiefly with the former: it embodies the experience common to mankind and is therefore possessed by the reasonable man. If his experience tells him that damage is the probable consequence of certain conduct then that consequence is foreseeable. Nervous shock, our experience tells us, is (like death) a common consequence of physical impact, but is this so where the shock proceeds simply from vision or oral report of the injury and not from the injury itself? This problem has already faced the courts for over half a century and it seems unlikely that generalizations can be made. *Actual* knowledge has a similar operation: it seems highly likely that the defendants would have been liable in the instant case had they actually known that their oil might be fired in the manner suggested by Professor Hunter. But they did not know this and in the then existing state of scientific knowledge could not have been expected to know it, for "who knows or can be assumed to know all the processes of nature?"[19]

So much for culpability. The above is not, however, intended to suggest that the decision has no relevance to compensation. Relevance it has, but in a sphere more limited than *Polemis* formerly allowed us to believe. Here we are concerned primarily with questions of causation, for which a single, intelligible test now exists—the test of reasonable foreseeability of the consequence. The "direct cause", and its uncouth companions, the "chain of causation", the *nova causa* and *novus actus interveniens*, which lead "nowhere but to never-ending and insoluble problems of causation"[20] are henceforth no more. This, though it cannot avoid, ought at least to simplify the task of the courts in those acutely complicated cases.

In conclusion it may be said that the Privy Council's decision has fulfilled the long-felt need of placing the tort of negligence on a logical and intelligible footing. That it conforms with the

17. [1961] 2 W.L.R. at p. 141.
18. *Victoria Laundry v. Newman Industries* [1949] 2 K.B. 528, 539. The test for measure of damages is now the same for contract and tort.
19. [1961] 2 W.L.R. at p. 142. Will the answer in the present case be the same if those facts ever arise again?
20. At p. 139.

recent tendency [21] not to extend the area of tortious liability without fault is, for the present writer, a source of small regret. "For it does not seem consonant with current ideas of justice or morality that for an act of negligence however slight or venial . . . the actor should be liable for all consequences however unforseeable and however grave."[22]

B. H. McPherson, *

Occupiers and Trespassers.

The decision of the High Court in *Commissioner for Railways v. Cardy*[1] in recognizing the existence of a duty of care on the part of occupiers towards persons who on the traditional approaches of the common law would clearly be trespassers has done much to dispel the fog of unreality which has hung round the judicial approach to the question of entrants whose presence has not been licensed by the occupier but whom he has not been energetic enough to repel. It also contains a considerable assault on the view which by inferring a licence which did not exist treated persons as licensees who were really in fact trespassers.

The facts were not complicated. The New South Wales Commissioner for Railways owned and occupied a large area of about five hundred acres in the Sydney industrial suburb of Clyde. Part of this area was used as a dump on which was tipped among other debris ashes from the fire boxes of locomotive engines. In some cases the ashes would contain live and burning coals. The ashes had banked up but below the surface much of the material would remain in a smouldering condition. There was a road and certain tracks in the area which were open to pedestrians and led from streets on one side of the area to streets on the other. There was also evidence that people particularly children would diverge from the road and track to visit and fossick round the dump. There was also evidence of sporadic and intermittent warnings given by railway officials to keep off the dump and of occasions when officers would warn persons whom they found on the dump, such as children, to leave.

The plaintiff, a boy aged fourteen and a half years, wandered over the dump area and was severely injured when, going down a bank of ashes, his feet went through the surface and contacted the hot ashes underneath. The boy had played on the site years ago but had gone to live in the country and the day of the accident

21. Manifested in *Read v. Lyons* [1947] A.C. 156; *Fowler v. Lanning* [1959] 1 Q.B. 426.
22. [1961] 2 W.L.R. at p. 139.

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1. (1960) 32 A.L.J.R. 134, [1951] A.L.R. 16.