THE DORSET YACHT CASE: CAUSATION, CARE AND CRIMINALS

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I. INTRODUCTION

Is the state under any civil liability for the damage perpetrated by criminals who through the negligence of its officers have escaped custody? This novel question was recently canvassed by the House of Lords in *Home Office v. Dorset Yacht Co.*[1] Seven youths from a borstal camp slipped away from their sleeping supervisors in the dead of night while on a training excursion to Brownsea Island. During their attempted escape they caused a yacht to be cast adrift and to collide with the yacht owned by the plaintiff company. In a move almost unprecedented in British legal history, the aggrieved company sought to recover in tort from the Home Office.

The immediate issue before the court was not the action itself but a preliminary question of law: did the Home Office owe the plaintiffs a duty of care regarding those undergoing sentence in borstal institutions? In a four to one decision (Viscount Dilhorne dissenting), the court answered in the affirmative, thereby confirming the unanimous opinion of the Court of Appeal. Apart from the specific decision reached, however, the case is significant for two reasons. First, the court essayed several new and important formulations in the two classic areas of perplexity and contention in the tort field, duty of care and proximate cause. Secondly, the case raised for the first time in a higher court the problem of the civil relationship between convicted criminals and the ordinary public under a liberal corrections regime.

II. PROXIMATE CAUSE

In his Court of Appeal decision in favour of the plaintiffs, Lord Denning remarked that in the past, suits of this sort may have been deterred by the difficulty in showing that the negligence of the state or its servants was the proximate cause of the injury suffered.[2] It was open to the defendants to plead on the "last wrongdoer" doctrine that the absconder's behaviour in committing the wrong was a *novus actus interveniens* which interrupted the causal sequence between the injury and the original negligence. This point was taken up in the House of Lords by Lord Reid who bravely attempted

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[1] [1970] 2 All E.R. 294 (H.L.).

[2] [1969] 2 All E.R. 564, at 566 (C.A.).

to define the circumstances under which the *novus actus interveniens* argument would fail.[3] Since the inquiry before the court was solely concerned with the duty of care, it might seem that any comments addressed to the causation issue are, strictly speaking, mere dicta. But it is not always easy to precisely demarcate the fuzzy boundary between causation and duty, and it is hardly surprising that the broadening of the duty concept in the decades since *Donoghue v. Stevenson*[4] should coincide with a more relaxed approach toward causation. Fleming has noted that, in some judicial decisions, one of the reasons that *novus actus interveniens* has lost its popularity is that it is being swallowed up by the emphasis on duty with its concomitant search for foreseeable risk.[5]

Stansbie v. Troman,[6] which had been adduced by Lord Denning as sufficient to refute a plea of no causation,[7] is an apt illustration of the trend. There a decorator left the plaintiff's house unlocked while he went to purchase wallpaper, and, in the interval of his absence, the unoccupied house was ransacked by a jewel thief. In that case the decorator argued that the theft by a third party snapped the chain of causation connecting him to the damage caused, but the court rejected this on the ground that "the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened. *The reason why the decorator owed a duty* to the householder to leave the premises in a reasonably secure state was because otherwise thieves or dishonest persons might gain access to them. . . ."[8] Duty and lack of intervening cause are inextricably interwoven, and they should probably be looked upon as alternate ways of stating the same point.

In dealing with this issue Lord Reid ignored *Stansbie v. Troman* and asked himself directly what was the criterion sufficient to dispose of the *novus actus interveniens* argument: "Is it forseeability or is it such a degree of probability as warrants the conclusion that the intervening human conduct was the natural and probable result of what preceeded it? There is a world of difference between the two. If I buy a ticket in a lottery or enter a football pool it is foreseeable that I may win a very large prize—some competitor must win it. But, whatever hopes gamblers may entertain, no one could say that winning such a prize is a natural and probable result of entering such a competition."[9] After a lengthy discussion Lord Reid's answer was that "mere foreseeable possibility" was not enough: what was required was an intervening action which was "likely to happen."[10]

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[3] [1970] 2 All E.R. at 298.
[4] [1932] A.C. 562.
[5] Fleming, *Remoteness and Duty: The Control Devices in Liability for Negligence*, 31 CAN. B. REV. 471, at 494 (1953).
[6] [1948] 2 K.B. 48 (C.A.).
[7] [1969] 2 All E.R. at 566.
[8] [1948] 2 K.B. at 52 (emphasis added).
[9] [1970] 2 All E.R. at 298.
[10] *Id.* at 300.

This displacement of foreseeability as the determining factor in tortious liability cannot fail to startle. Whence did Lord Reid derive his new touchstone of likelihood or "natural and probable result"? Of all the many cases on *novus actus interveniens*, Lord Reid relied on only two. In *Haynes v. Harwood* [11] Lord Justice Greer said that "[t]he whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale*, [12] the accident can be said to be 'the natural and probable result' of the breach of duty." But (it is submitted with respect) the adoption of a phrase which ultimately goes back to *Hadley v. Baxendale* as a standard in tort is open to objection. *Hadley v. Baxendale* has nothing at all to do with negligence in tort but was concerned with the measure of damages for breach of contract. The oddity of Lord Reid's new formulation will become readily apparent when it is recalled that it was Lord Reid himself in *The Heron II* [13] who cautioned most forcefully against the confusion of liability in these two areas of law. There he reasoned that liability in tort is wider than in contract because the injured party has no opportunity to protect himself in advance from unusual but foreseeable damage. [14] He accordingly urged that the concept of reasonable foreseeability be restricted to measure of damages in tort while a standard of probability be applied to damages for breach of contract. [15] He adverted to old tort cases which tried to limit damages by assimilating tort to contract and declared these opinions to be ill-considered and erroneous. [16] In view of all this, it is unsatisfactory to find Lord Reid in *Dorset Yacht* using the concept of probability originating in contract law in order to replace foresight with a narrower standard for tortious liability.

The other case relied on by Lord Reid was the Scottish case of *Scott's Trustees v. Moss*. [17] There the defender was an entertainment promoter on whose land a crowd of spectators had gathered to watch the descent of a balloon. Instead the balloon descended into the cultivated land of the pursuer who suffered damage when the crowd rushed on to his property to view the spectacle. It is true that the court, in disposing of the defender's argument that it was not he but the crowd that was the proximate cause of the damage, used phrases such as "natural consequence" and "natural and probable consequence." But that the court did not mean thereby to enshrine probability rather than foreseeability as the exclusive criterion appears readily from the fact that in the same breath the court speaks of what the defender "ought to have foreseen." [18] But even if the words "natural and probable

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[11] [1935] 1 K.B. 146, at 156 (C.A.).
[12] 9 Exch. 341, 156 Eng. Rep. 145 (1853).
[13] [1967] 3 All E.R. 686, at 694 (H.L.).
[14] *Id.* at 692.
[15] *Id.* at 694.
[16] *Id.* at 692.
[17] 17 Sess. Cas. 32 (Ct. of Sess. 1889).
[18] In the same case, Lord Inglis says:
[T]here was no doubt that the *natural consequence* of the descent taking place there was that all the crowds of people in the neighbourhood immediately rushed to the field in order to see what had happened or was going to happen. . . . [T]he case made against Mr. Moss is that *he ought to have*

consequence" had alone defined the scope of liability in *Scott's Trustees v. Moss*, a conclusion such as Lord Reid's would still have been questionable. As Viscount Simonds explained in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound)*, [19] the "probable consequences" test has no force of its own: it derives its efficacy from the consideration that a probable consequence is always one that ought to have been foreseen.

Why did Lord Reid formulate this test for the *novus actus interveniens*? He himself offers the following explanation: [20]

> There is an obvious difference between a case where all the links between the carelessness and the damage are inanimate so that, looking back after the event, it can be seen that the damage was in fact the inevitable result of the careless act or omission, and a case where one of the links is some human action. In the former case the damage was in fact caused by the careless conduct, however unforeseeable it may have been at the time that anything like this would happen. At one time the law was that unforeseeability was no defence (*Re Polemis and Furness, Whithy and Co. Ltd.*). [21] But the law now is that there is no liability unless the damage was of a kind which was foreseeable (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*). [22]
>
> On the other hand, if human action (other than an instinctive reaction) is one of the links in the chain, it cannot be said that, looking back, the damage was the inevitable result of the careless conduct.

The passage is mystifying. First it is difficult to perceive how what is seen to be inevitable through hindsight has any relation to the problem at all. Inevitability in itself has not been a concept of any significance in recent tort law. And as for hindsight, Viscount Simonds again has surely defined once and for all its role as a test for liability. "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." [23]

> *foreseen* that the descent would be made in some field adjoining the recreation grounds and that the *natural and almost inevitable* consequence of that would be that the crowd would break into the field and destroy the crops. No doubt *it could not easily be foreseen* that the descent would be made in that particular field—but, on the other hand . . . it *could be very easily foreseen* that the descent would take place on some piece of cultivated ground in the immediate vicinity.

Id. at 36 (emphasis added). Similarly, Lord Shand said: "I think the principle which ought to receive effect is that if the collection of the crowd, and the actings of the crowd, are the *natural and probable consequence* of the action of the defender—a consequence which the defender *ought to have foreseen*—then the case is relevant. . . ." *Id.* at 37 (emphasis added).

[19] [1961] A.C. 388 (P.C.): "For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any similar description of them), the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man, that he ought to have foreseen them." *Id.* at 423.

[20] [1970] 2 All E.R. at 298.

[21] [1921] 3 K.B. 560 (C.A.).

[22] [1961] A.C. 388 (P.C.).

[23] *Id.* at 414.

Moreover, cases "where one of the links is some human action" will also include those where the intervening action is perfectly innocent. As Lord Reid says in a later passage, "if the intervening action was likely to happen, I do not think it can matter whether that action was innocent or tortious or criminal." [24] But even cases like *Donoghue v. Stevenson* [25] involve intervening human action: the plaintiff drank the ginger-beer. Lord Reid's formulation would have far-reaching effects indeed.

Since *The Wagon Mound* [26] of 1961, the House of Lords has enshrined the criterion of foreseeability as the most consonant with fairness and justice in the determination of liability for negligence. This was also the test applied to instances of *novus actus interveniens.* [27] Why then did Lord Reid narrow the standard in *Dorset Yacht*? The answer may perhaps emerge from a comparison with another recent opinion of Lord Reid on the same issue. In *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [28] the defendant's negligence had caused the plaintiff to lose the control of his leg. The plaintiff tried to recover, not only for the original damage, but for a fractured ankle received in a fall when he tried to go unaided down a flight of stairs. In giving the opinion of the court Lord Reid admitted that the second injury was foreseeable by the defender but he explicitly denied that this was in itself a sufficient basis for recovery. [29] He declared that the plaintiff was unreasonable in attempting to descend the stairs unaided, and therefore the fall was not a natural and probable result of the original carelessness of the defendant. The plaintiff had committed a *novus actus interveniens* which was the proximate cause of his own injury.

Lord Reid thus applied the same test to the supposed *novus actus interveniens* in *Dorset Yacht* that he applied in *McKew*. But it might have been relevant to consider that these two cases typify different classes of intervening acts. In *Dorset Yacht* the intervening act caused the original damage, whereas in *McKew* it caused a second, new injury. In the second class, recovery from the original tortfeasor should probably be more restricted. There may be little justification in holding the first wrongdoer liable when, for instance, the injured victim of his negligent driving has his wallet stolen while lying unconscious [30] or when the victim takes his own life although he has physically been cured of the cut he received on the head. [31] In these cases, although the subsequent damage is foreseeable, it is not this damage

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[24] [1970] 2 All E.R. at 300.

[25] [1932] A.C. 562.

[26] Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., [1961] A.C. 388.

[27] See the comments of Lord Denning in the Court of Appeal judgment in *Dorset Yacht*, [1969] 2 All. E.R. at 566-67. *Compare also* Iron & Steel Holding & Realisation Agency v. Compensation Appeal Tribunal, [1966] 1 W.L.R. 480, at 492 (C.A.).

[28] [1969] 3 All E.R. 1621 (H.L.).

[29] *Id.* at 1623.

[30] Patten v. Silberschein, [1936] 3 W.W.R. 169 (B.C. Sup. Ct.).

[31] Pigney v. Pointers Transp. Servs. Ltd., [1957] 2 All E.R. 807 (Norwich Assizes).

the foresight of which would have deterred the tortfeasor. It is otherwise in cases like *Dorset Yacht* and *Stansbie v. Troman* [32] where the damage which the tortfeasor should have foreseen and acted upon is precisely that the intervening act would occur. Lord Reid's criterion of probability would not only deny recovery in the *McKew* type situation, where there is secondary damage, but would also negate liability in the *Stansbie* situation since a defendant would be able to argue that, even though it was foreseeable that a thief would enter the plaintiff's home if he left it unlocked, there was no great probability of this occurring.

If, as here surmised, Lord Reid was motivated by a desire to cut down liability for intervening acts causing ulterior harm, his formulation was not only too broad but perhaps superfluous. He could have reached the desired result merely by invoking *Hughes v. Lord Advocate* [33] and restricting compensable damage either to a foreseeable kind of damage or to foreseeable kinds of accident. [34] This would have allowed him to retain liability in the *Stansbie* situation, while he would have been able to dispose of the plaintiff's claim in *McKew* by postulating that the foreseeable type of damage was a benumbed leg, not a fractured ankle, and that the foreseeable kind of accident was the original employment mishap, not the fall down the stairs. Thus there was no need to discard foreseeability and inject a new criterion into tort law to deal with the *novus actus interveniens.* The existing law of negligence may already have contained within itself the resources both for distinguishing the *McKew* and *Dorset Yacht* situations and for restricting the liability for secondary damage.

III. Duty of Care

This was the immediate issue before the court, and here too the opinions of the court deserve close attention, not only for their conclusions but also for the judicial technique by which those conclusions were reached. The problem at hand penetrates to the very foundation of the law of negligence. In a famous pronouncement in *Donoghue v. Stevenson* [35] Lord Atkin stated that "[Y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour," [36] and he went on to define the last ambiguous word as "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." [37] There are two difficulties with this aphorism. On the one hand liability is sometimes imposed for consequences

[32] [1948] 2 K.B. 48.
[33] [1963] A.C. 837.
[34] *Id.* at 845 (Lord Reid). *See also* the statements by Lord Morris of Borth-y-Gest, *id.* at 853, and Lord Guest, *id.* at 855.
[35] [1932] A.C. 562.
[36] *Id.* at 580.
[37] *Id.*

which often are unforeseeable or demand an extraordinary amount of prevision. [38] Conversely, even when the damage is readily foreseeable liability cannot always be imposed, especially in cases of first impression. [39] *Dorset Yacht* falls into the latter category. It was unprecedented that a member of the public should be able to recover from the Home Office for damage committed by escaping criminals even though such damage could have been anticipated as a result of the carelessness of custodians. This in itself was deemed by Viscount Dilhorne to be a sufficient ground for finding no duty of care. As he wrote in his dissent: "[W]e are concerned not with what the law should be but with what it is. The absence of authority shows that no such duty now exists." [40]

This approach, if applied rigorously, would of course, stunt the ability of the law to develop, and the great cases of recent tort law have been very much concerned with the justifications for postulating a duty of care in such situations. Lord Diplock [41] indeed went so far as to bracket *Dorset Yacht* with *Donoghue v. Stevenson* [42] and *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [43] and his unusually theoretical disquisition on the subject of duty of care underlined the importance he attached to the case.

Two techniques are available to the court in resolving the duty issue in any particular case, and both were employed by the House of Lords here. The first is to concentrate on the elucidation of overreaching principles of public policy. Both the courts and academic writers have been aware that at the heart of the duty issue lie outright judgments of value as to the social desirability of certain kinds of conduct. [44] When *Dorset Yacht* was before the Court of Appeal, Lord Denning had been characteristically forthright about the need to grasp boldly the nettle of public policy: "It is I think, at bottom, a matter of public policy which we as judges must resolve. This talk of 'duty' or 'no duty' is simply a way of limiting the range of liability." [45]

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[38] Outstanding examples are the rescue cases. See Fleming, *Remoteness and Duty: The Control Devices in Liability for Negligence*, 31 CAN. B. REV. 471, at 486 (1953).

[39] Deyong v. Shenburn, [1946] K.B. 227, at 233 (C.A.).

[40] [1970] 2 All E.R. at 313. Viscount Dilhorne dismisses Lord Atkin's neighbour test as irrelevant on the ground that it only determines to whom a duty is owed and not whether a duty exists to begin with. *Id.* at 311. But surely negligence cannot be fragmented in this way. As was pointed out in Bourhill v. Young, [1943] A.C. 92, a duty of care cannot exist in the abstract but only with reference to each person to whom a duty is owed.

[41] [1970] 2 All E.R. at 324.

[42] [1932] A.C. 562.

[43] [1964] A.C. 465, [1963] 2 All E.R. 575.

[44] Fleming, *supra* note 38, at 486: "Recognition of a duty of care is the outcome of a value judgment that the plaintiff's interest, which has been invaded, is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. Thus stated in terms of a theory of interests, the basic policy question arising in negligence cases is brought to the surface." *And see* Nova Mink v. Trans-Canada Airlines, [1951] 2 D.L.R. 241, at 256 (N.S. Sup. Ct.); Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. at 536, [1963] 2 All E.R. at 615.

[45] [1969] 2 All E.R. at 567.

The second technique is to search for previous decisions, the facts of which are analogous to the facts in the case at bar.[46] By winnowing out circumstances in the previous decisions which he deems inessential, the judge of the new situation will be able to reformulate the *rationes* of the old cases so as to cover the circumstances confronting him. Theoretically this method is not completely distinct from the first, since the very process of deciding which situations are analogous and which circumstances are inessential will be based on the judge's conception of public policy and the desirability of punishing or condoning certain types of behaviour. But the practical differences are vast. With the first approach the argument will usually flow from the broad principle perceived by the judge to the facts in the case at bar as embodying an example of that principle, and the conclusions will be correspondingly sweeping. Under the second technique the argument will usually flow from the individual cases to the conclusion, and the principle, if stated explicitly at all, will be stated in extremely restricted terms.

Lord Reid's notable opinion in *Dorset Yacht* illustrates the first approach. The crucial passage is worth quoting in full:

> In later years there has been a steady trend toward regarding the law of negligence as depending on principle so that, when a new point emerges, one should not ask whether it is covered by authority but whether recognized principles apply to it. *Donoghue v. Stevenson*[47] may be regarded as a milestone, and the well-known passage in Lord Atkin's speech[48] should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.[49]

These welcome words, if applied in the future, will mark almost the final apotheosis of Lord Atkin's "neighbour test" as the background principle against which, in the absence of any countervailing consideration, the law of negligence should be applied. In cases such as *Dorset Yacht* where the facts do not seem to present a duty situation which has been adjudicated on before but which nevertheless fall within Lord Atkin's words, the side disclaiming liability will face a more difficult task. No longer will the lack of previous decisions in itself be a sufficient ground for the courts' refusing to impose liability. And one can anticipate that even when adequate considerations are adduced for not applying Lord Atkin's aphorism, the conflicting aspects of public policy which are in issue will emerge more clearly than they have in the past.

The other approach to the duty issue, through the analysis of decisions

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[46] Aptly called "duty situations" in Morison, *A Re-examination of Duty of Care*, 11 MODERN L. REV. 9 (1948). The term is taken up by Lord Morris of Borth-y-Gest in *Dorset Yacht*, [1970] 2 All E.R. at 307.

[47] [1932] A.C. 562.

[48] *Id.* at 580.

[49] [1970] 2 All E.R. at 297. Lord Reid's approach was also accepted by Lord Pearson, *id.* at 321.

based on analogous facts, was taken in *Dorset Yacht* by Lord Diplock. Typically the conclusion reached by this method was a narrower one, that a duty of care was owed only to those whose property was situated in the vicinity of the place of detention.[50] It is easy enough to quarrel with this apparently artificial limitation on the grounds that damage by escapees to persons or property situated at a distance from the place of detention is also readily foreseeable.[51] But more important than the conclusion is the possibility that Lord Diplock has misapplied his case-centred method by being too eager to distinguish previous decisions merely on the basis of their divergent facts.

In *Carmarthenshire County Council v. Lewis*,[52] a four-year-old child left the school grounds, wandered on to the adjacent highway and caused the death of a truck driver who had swerved to avoid him. The House of Lords held the school board responsible for allowing the child to leave the school grounds by failing to keep all the gates closed. Similarly in *Holgate v. Lancashire Mental Hospitals Board*,[53] the hospital authorities were held liable when a lunatic who had been allowed to leave the lunatic asylum through the staff's negligence did damage. Lord Diplock denied that these cases could be used to postulate a general duty of care cast on the Home Office to keep borstal boys in custody. He felt he could distinguish *Dorset Yacht* from those cases on two grounds: "In neither case was the custody penal custody or the human being who did the act causing the damage one who was regarded in law as responsible for his actions."[54]

These are curious distinctions. Surely the fact that the custody in *Dorset Yacht* was penal strengthens the plaintiff's case rather than weakens it. The primary function of schools is to educate, and the duty to prevent injury to passing truck drivers is merely incidental. In contrast, one of the basic purposes of the penal system is to keep proven offenders isolated from general society in order to prevent them from harming third parties. If the type of custody in *Carmarthenshire County Council v. Lewis*[55] involved liability for the custodians, the penal custody in *Dorset Yacht* should do so a fortiori.

As for Lord Diplock's second distinction, one may, with respect, doubt that his outright denial that lunatics and children are legally responsible for their acts accurately represents the state of the law as it has been until now.[56]

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[50] *Id.* at 334.

[51] As Viscount Dilhorne pointed out, *id.* at 311. Lord Diplock's geographical restriction is reminiscent of comments in Bourhill v. Young, [1943] A.C. 92, confining recovery for nervous shock to the people in the area of danger. This was amply criticized by Goodhart, *Bourhill v. Young*, 8 CAMB. L.J. 265 (1944).

[52] [1955] A.C. 549.

[53] [1937] 4 All E.R. 19 (Liverpool Summer Assizes).

[54] [1970] 2 All E.R. at 328.

[55] [1955] A.C. 549.

[56] For the civil responsibility of lunatics, *see White v. White*, [1950] P. 39, at 58 (C.A.) (Denning, L.J.). Neither is there any automatic exemption from liability for infants, though the application of the special standard in McHale v. Watson, 39 AUSTL. L.J. 459 (High Ct. 1966), would probably make it impossible to find a four year old liable for negligence.

But conceding this, it is difficult to see how this distinction is a relevant one. There have been enough cases involving the *novus actus interveniens* doctrine where the original tortfeasor has been held liable for the forseeable acts of intervening third parties who could have been held liable themselves. The fact that children and lunatics purportedly lack responsibility goes to the question of *their* liability, not to that of their guardians. Lord Diplock's singling out of the presence or absence of responsibility would have been germane in the old days of the "last wrongdoer" doctrine, when the idea prevailed that "the law fulfilled its function as long as it offered *one* legally responsible defendant to the plaintiff". [57] There is no reason why this should be a significant factor today.

The problem with Lord Diplock's opinion is that he has not completely adhered to his own acknowledged methodology. He has outlined the factual differences between escaping borstal boys and escaping lunatics or children, but he has failed to state the considerations of public policy which make those differences essential or even relevant. There is no need to speculate whether a more policy-centred approach to previous decisions would have led to a broader conclusion. However that may be, it would certainly have made his argument seem less capricious.

IV. Tort and Liberal Penology

There are few observers who would disapprove of the result of *Dorset Yacht*, or who would uphold the overriding need for corrections officers to be left free to commit negligent acts. But the history of tort law is full of decisions which, while harmonizing with notions of justice current at the time, have had a stultifying effect on the long-range development of tortious liability. The basic issue at stake in *Dorset Yacht*, the relationship between compensation in tort and the corrections system, is of no small importance. The last decades have witnessed a gigantic shift in attitudes regarding the nature of criminal sanctions, and a growing tendency to discount the desirability of exacting simple retribution from the criminal offender. At present it is fashionable to think in terms of rehabilitation with the ultimate goal being that the convict should resume a productive and responsible position in society. Minimum security institutions, probation, parole, and the English borstals have been typical manifestations of this enlightened spirit. In Canada, the recent Report of the Canadian Committee on Corrections [58] has imaginatively recommended several devices whereby convicted offenders will be able to serve their sentences while almost fully integrated into normal society.

The impetus for penal reform has of course come from those concerned with the operation of the criminal law, and it is a tribute to their energy that far-reaching reforms continue to be proposed. But from one point of view

[57] J. Fleming, The Law of Torts 205 (3d ed. 1965).

[58] Report of the Canadian Committee on Corrections 201-04 (The Ouimet Report, 1969).

there has been a regrettable by-product. No one has yet attempted to deal in a systematic fashion with the ordinary tort liability that will accrue when the enlightened experiments in the use of the criminal sanction break down. The results are to a certain extent evident in the reasoning of *Dorset Yacht*. When assessing the responsibility of the administrators of the borstal system for damage done by absconding youths the court mentioned an Australian case of a prisoner escaping from custody, [59] an American case of a convict escaping from a minimum security farm, [60] an unreported lower court decision dealing with borstal boys, [61] and the two cases already noted concerning a lunatic [62] and a nursery school child. [63] Is there really, or should there be, a single formula that can be adjusted like a Procustean bed to fit all these situations?

One factor which may motivate the courts in dealing with cases involving escapes from liberal penal institutions has been the desire not to impede laudable experiments by the imposition of liability. An instructive case where an American court vindicated progressive penal principles at the cost of producing rather contorted reasoning is *Williams v. New York*. [64] In that case a man convicted of attempting a robbery with the aid of a toy pistol escaped from a minimum security camp through the carelessness of the custodial officers. He commandeered a truck driven by a local farmer, but when he threatened the farmer with a knife the frightened farmer suffered a brain haemorrhage and died. The New York Court of Appeal denied recovery to the estate on two grounds. Firstly, it was not foreseeable on the basis of the convict's record that he would use violence on the farmer. Therefore the farmer as an unforeseeable plaintiff was excluded from recovery on the principle of *Palsgraf v. Long Island Ry.* [65] But it is by no means obvious why it should be unforeseeable that a man who had used a toy pistol in attempting a robbery would try to effect his escape by intimidating a neighbour with a knife. Secondly, and more strangely, the court held that with respect to those who were incarcerated but not insane or criminally dangerous the state had only a duty to punish and no duty to restrain, and thus there was no breach of duty when the convict was allowed to escape. By having recourse to this weird and artificial distinction the court was attempting to avoid fettering the liberal penal apparatus with liability but was paradoxically using an archaic justification in treating punishment as the only purpose for confining those guilty of less serious offences. Since such prisoners are purposely being kept under restraint by the state, how can the

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[59] Thorne v. Western Australia, [1964] W. Austl. L.R. 147 (Sup. Ct.).

[60] Williams v. New York, 127 N.E.2d 545 (1955).

[61] Greenwell v. Prison Comm'rs, 101 L.J. Newspaper 486 (1951) (summary). The case is known to me only from CLERK & LINDSELL, ON TORTS 1483 n. 26 (13th ed. A. Armitage 1969), the case notes in 68 L.Q.R. 18 (1952) and 85 L.Q.R. 322 (1969) and comments in *Dorset Yacht*.

[62] [1937] 4 All E.R. 19 (Liverpool Summer Assizes).

[63] [1955] A.C. 549.

[64] 127 N.E.2d at 548-49.

[65] 162 N.E. 99 (N.Y. 1928).

state not have a duty to restrain? The rationale of minimum security is merely to lessen the harshness of punishment by removing its more disagreeable features, but not to lessen the duty to restrain. The court used the language of "duty" and "foreseeability" to provide a shaky underpinning in tort for laudable sentiments. Its real motivation, however, can be discerned in its pronouncement that "public policy also requires that the State be not held liable. To hold otherwise would impose a heavy responsibility upon the State, or dissuade the wardens and principal keepers of our prison system from continued experimentation with 'minimum security' work details—which provide a means for encouraging better-risk prisoners to exercise their sense of responsibility and honor and so prepare themselves for their eventual return to society." [66] Fortunately the House of Lords, although similarly recognizing the desirability of enlightened experimentation, was unwilling to strain both common sense and the usual criteria of tortious liability by granting the Home Office a licence to be negligent.

Nevertheless one can ask whether the House of Lords went far enough in the borstal case. Lord Pearson pointed out that borstal training often entails diminished supervision, "and there is then a risk, which is not wholly avoidable, that some of the boys will escape and may in the course of escaping or after escaping do injury to persons or damage to property." [67] The full extent of this risk might more easily be appreciated by reference to statistics: after rising to an alarming rate of forty-two per cent of the daily average population of open borstals in 1950, the rate of escapes dropped to a hardly comforting nineteen per cent in 1962. [68] As a result of *Dorset Yacht* those who are injured by youths escaping through the negligence of custodial officials will be able to recover. However, this will not help those who are injured by absconders who have escaped because of the unavoidable laxness of the security methods rather than through some custodian's negligence. In cases where a liberal penal institution such as a borstal is inherently dangerous, the imposition of strict liability may therefore be the most appropriate solution. Otherwise adherence to the principle of no liability without fault will in some cases force the victim to underwrite the cost of what is in effect a social experiment. If society as a whole benefits from a liberal corrections policy, surely society as a whole should bear the cost of damage resulting from unavoidable malfunctions in the system.

The most direct method of introducing some scheme of compensation without fault would of course be by legislation. This method is also the most suitable since it would allow for a comprehensive scheme dealing with the whole range of correctional devices. One would want to know, for instance, whether compensation should be restricted to the victims of lax detention methods such as borstals and minimum security prisons, or whether it should include institutions such as parole where detention is replaced by a super-

[66] 127 N.E.2d at 550.

[67] [1970] 2 All E.R. at 322.

[68] R. HOOD, BORSTAL RE-ASSESSED 77 (1965). I have unfortunately not been able to find statistics for later years.

vised integration into society.[69] This will require the balancing of complicated and conflicting social interests, the study of statistical and sociological evidence, and the introduction of innovations on a large scale—tasks which are more appropriate to the legislator than to the judge. As a model for legislative action, there already exists in many common law jurisdictions, including England and Ontario, machinery whereby the innocent victims of violent crimes can be compensated for personal injuries.[70]

But even in the absence of legislation the courts may not be completely helpless. One might reach the desired conclusion either by invoking the principle of *Rylands v. Fletcher*[71] by which strict liability is imposed for the escape of harmful things as a consequence of non-natural user of land, or by exploiting the analogy of the related rules governing *scienter* actions to recover for harm done by dangerous animals. Such an approach was apparently essayed in the unreported lower court decision of *Greenwell v. Prison Commissioners*,[72] a case which, like *Dorset Yacht*, dealt with damage caused by absconding borstal boys. The judge there held that *Rylands v. Fletcher* did not apply on the ground that since borstal camps are authorized by statute they do not constitute a non-natural user of land. But the pertinent sections of the statutes concerned, the Criminal Justice Act[73] and the Prisons Act[74] do not specify the locality in which the camps are to be situated nor do they make their creation mandatory. These factors should suffice to defeat the argument of statutory immunity and to throw the parties back to their positions in common law.[75]

Relevant also is *Attorney-General v. Corke*[76] which supplies an instance of a court's willingness to extend *Rylands v. Fletcher* to cover a dangerous collection of people. In that case the defendant licensed a vacant lot to be used as a camp-site by trailer dwellers whose loathsome habits outside the camp were a source of complaint by the neighbours. The rule in *Rylands v. Fletcher* was invoked to justify an injunction against the defendant. The decision has been acidly criticized,[77] and this might make one reluctant to use it as a precedent for applying *Rylands v. Fletcher* to the *Dorset Yacht* situ-

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[69] In the Court of Appeal, Lord Denning was willing to consider parole and borstals in the same breath, [1969] 2 All E.R. at 567.

[70] In England, the English Crimes of Violence Compensation Board has been in existence since 1964. The governing Ontario statute is The Law Enforcement Compensation Act, Ont. Stat. 1967 c. 45, *as amended* Ont. Stat. 1968-69 c. 59. Similar schemes exist in New Zealand, New South Wales, Northern Ireland, Saskatchewan, and several states in the United States.

[71] L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868).

[72] Greenwell v. Prison Comm'rs, 101 L.J. Newspaper 486 (1951) (summary).

[73] 11 & 12 Geo. 6, c. 58, § 48(c) (1948).

[74] 15 & 16 Geo. 6 & 1 Eliz. 2, c. 52, § 43(c) (1952).

[75] Managers of the Metropolitan Asylum Dist. v. Hill, 6 App. Cas. 193 (H.L. 1881); C.P.R. v. Parke, [1899] A.C. 535 (P.C.); *cf.* J. FLEMING, THE LAW OF TORTS 314 (3d ed. 1965).

[76] [1932] All E.R. Reprint 711 (Ch.).

[77] SALMOND, ON THE LAW OF TORTS 453 (14th ed. R. Heuston 1965); CLERK & LINDSELL, ON TORTS 1484 n. 26 (13th ed. A. Armitage 1969); Note, 49 L.Q.R. 158 (1933); Kennedy, Note, 11 CAN. B. REV. 693 (1933).

ation. But it should be noticed that the criticisms are much less suitable to *Dorset Yacht* than they were to *Corke* itself. Although trailer dwellers are not "things," and presumably neither are borstal boys, an American court has been prepared to argue that there is an analogy between a dangerous criminal and a dangerous animal, [78] and the fact that such reasoning is distasteful on humanistic grounds should not blind one to its analytic force. Moreover, it was suggested by *Corke's* critics that, whereas *Rylands v. Fletcher* imposes a duty not to allow the dangerous thing to escape, the application of this to adult human beings such as caravan dwellers would constitute a false imprisonment. But again this argument, cogent as it is, has no force with regard to the borstal boys of *Dorset Yacht*, since custodial officers cannot be liable for false imprisonment in detaining the convicts whom they have an obligation to detain.

Rylands v. Fletcher may provide a convenient category under which to find strict liability for the *Dorset Yacht* situation. Admittedly this solution has its difficulties from a purely technical point of view. But even if *Rylands v. Fletcher* itself is not strictly applicable, one should recall that that case itself ultimately represented a policy decision that the risk of keeping on one's property that which is inherently dangerous should not be borne by the innocent victim. Presumably the situations giving rise to that sort of policy decision have not been closed and crystallized forever. [79] A decision by analogy, based on considerations similar to those of *Rylands v. Fletcher*, might be the easiest way of attaining the desired end of strict liability in the operation of borstals.

It would be presumptuous to criticize the House of Lords in *Dorset Yacht* for arriving at a decision which is obviously just on the facts of that case. Moreover, since the question referred to the court was one of duty of care in a negligence suit, one could not really expect the court to pronounce on strict liability. But there is a danger that the form of reasoning in *Dorset Yacht* may preclude approaching the problem from different premises and may, almost inadvertently, establish an exclusive frame of reference for the discussion of the issues. As liberal penal institutions proliferate, the need to find a viable and fair solution to the conflicts of interest posed by the *Dorset Yacht* type of problem will become more acute. At some future time it may become feasible to consider the merits of the imposition of strict liability.

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[78] State *ex rel.* Davis Trust Co. v. Sims, 46 S.E.2d 90, at 95 (W. Va. 1947): "Though this Court recognizes the fundamental natural differences between the reasonably anticipated acts of a human being and those of a domestic animal, the undisputed facts of this case suggest a close analogy to cases in which the owner or the keeper of a dog or a horse, known to be of a vicious nature or to possess a particular propensity to cause injury, has been held liable for failure to anticipate and to guard against the conduct of such animal which causes injury or damage to another person."

[79] Goodhart, *The Third Man or Novus Actus Interveniens*, 4 CURR. LEG. PROB. 177, at 178 (1951), has complained that the rule in Rylands v. Fletcher has been interpreted and applied too narrowly so that in some cases it no longer conforms to the principle of allocation of risk which is the cornerstone of strict liability.