POLICY AND REMOTENESS

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I. INTRODUCTION

It is difficult to imagine a clearer example of a policy decision than the judgment of the Privy Council in the *Wagon Mound No. 1.*[1] In 1961 when that case was decided the law on remoteness of damage in negligence was far from satisfactory. The directness test laid down by the Court of Appeal in *Re Polemis*,[2] though frequently criticized, had never actually been overruled. At the same time, the principle of that case had been steadily eroded by decisions on the duty of care, particularly in the field of nervous shock.[3] Into this confusion the *Wagon Mound* seemed to bring a much needed clarification of basic principles. The court in that case tried to set out the fundamental policies governing liability in negligence. From these it was held to follow that the test of remoteness of damage in negligence was foresight of consequences, not directness.

It is now over ten years since the *Wagon Mound.* In that period a number of other important judgments on remoteness have been delivered. Some of them, it is fair to say, appear to have reintroduced into this branch of the law some of the refinements which it was thought *Wagon Mound* had swept away.

The aim here is to examine how far the policies which lay behind *Wagon Mound* provided a satisfactory framework for deciding subsequent cases, how such policies have been applied and why they have required modification.

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[1] Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound), [1961] A.C. 388 (P.C.). Academic reaction to this case is collected in Dias's seminal article on policy and remoteness, *Remoteness of Liability and Legal Policy*, [1962] CAMB. L.J. 178, n2.

[2] *In re* An Arbitration between Polemis and Another and Furness, Withy and Co., [1921] 3 K.B. 560 (C.A.), [hereinafter cited as *Re* Polemis].

[3] *See* Hay or Bourhill v. Young, [1943] A.C. 92 (Scot.); King v. Phillips, [1953] 1 Q.B. 429 (C.A.), Dooley v. Cammell Laird & Co., [1951] 1 Lloyd's List L.R. 271; *but contrast* Schneider v. Eisovitch, [1960] 2 Q.B. 430.

II. THE WAGON MOUND

The *Wagon Mound*, an oil burning vessel chartered by the defendants, while taking on bunkering oil in Sydney harbour discharged some of the oil into the harbour. During that day and the next, the oil was carried by the wind and the tide to the plaintiffs' wharf, against which the plaintiffs were repairing a ship with electric and oxy-acetylene welding equipment. Molten metal falling from the wharf set fire to rag or cotton waste floating on the surface of the oil. The oil ignited and the ensuing conflagration seriously damaged the wharf.

It was found that the discharge of the oil was a result of the defendants' carelessness, but that the defendants neither knew nor ought to have known that the oil would burn on the water. It was also found that the oil had fouled the plaintiffs' slipways and that this was a direct result of the escape of the oil.

The Privy Council decided that the defendants escaped liability, holding that the test of remoteness of damage in negligence was foresight of the kind of harm incurred. Here as the kind of damage suffered, damage by fire, was not foreseeable the defendants were not liable.

The three policies used by the court to support this decision were the need to reach a just result, to lay down a clear rule and to establish a defensible line.

A. A Just Result

In remoteness cases the basic issue is whether the plaintiff or defendant is to bear an unexpected loss. What is the just result in this situation is a question which has given rise to much academic, as well as judicial, disagreement. Professor Glanville Williams, for example, has suggested that the issue is simply "between those who are moved by a feeling of sympathy for the plaintiff and those who aim to do justice to the defendant."[4] Professor Fleming, on the other hand, suggests that in remoteness cases the equities are evenly balanced; the argument that it is just that the defendant should bear the loss is no worse (and no better) than the argument that the loss should be on the plaintiff.[5] A third view, that the justice of the matter requires that the defendant pay, has been expressed by Professor Honoré.[6]

Some of this confusion stems from a failure to observe that in remoteness cases the justice issue can be approached in two quite different ways. The first approach is to compare the conduct of the two parties, with a view to placing the loss on the more blameworthy. If the justice issue is regarded in this way it is clear that Professor Honoré is correct. The plain-

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[4] Williams, *The Risk Principle*, 77 L.Q.R. 179, at 180 (1961).

[5] Fleming, *The Passing of Polemis*, 39 CAN. B. REV. 489 (1961).

[6] Honoré, Comment, 39 CAN. B. REV. 267 (1961). *See also*, Jolowicz, Comment, [1961] CAMB. L.J. 30, and the observations of Mr. Justice Walsh, in *The Wagon Mound* (No. 2), [1963] 1 Lloyd's List L.R. 402, at 412 (Sup. Ct. N.S.W.).

tiff in these cases has often done nothing; the defendant has at least done *something* reprehensible by falling below the standard of care the law demands, though with unforeseeably catastrophic results. The defendant should therefore pay.

Polemis is a good illustration. There, it will be recalled, Messrs. Polemis and Boyazides, owners of the Greek steamship Thrasyvoulos, chartered it to Furness Withy & Co. At Lisbon the vessel was loaded with cases of benzine and/or petrol and sailed for Casablanca. En route the cases leaked either on account of the way they had been handled or the roughness of the sea journey or both. Arab shore labourers, found to be servants of the charterers, while heaving a sling of cases from the hold, allowed the rope to contact loose boards across the top of the hatch. The board fell into the hold, causing a spark which ignited vapour in the hold and the conflagration destroyed the ship. The owners sued the charterers for £196,165-1-11d, the value of the ship. It was found by the arbitrators that the Arab stevedores had been negligent, that some damage to the ship could have been foreseen from the falling of the plank, but that the spark could not.

The Court of Appeal, treating the question as one of remoteness of damage in negligence, unanimously held the defendants liable, deciding that foresight of harm was relevant to the question whether the defendants had been negligent, but that once negligence had been found all "direct" consequences must be paid for, whether foreseeable or not.

Looking at the justice of the matter the defendants' conduct was surely reprehensible. The defendants were, after all, carrying leaking tins of a highly inflammable substance in the plaintiffs' ship. In these circumstances it is not obviously unjust that the consequences of the defendants' servants' careless act should be paid for by the defendants rather than the plaintiffs, whose conduct was blameless in every respect.

It is really no answer to this argument to say that the risk in respect of which the defendants were careless did not materialize and so their carelessness must be held to be irrelevant in determining liability for the unforeseeable risk which did arise. The fact is that had the defendants' servants not acted in the careless way they did the plaintiffs would have suffered no loss. Though the foreseeable risk did not materialize from this act an unforeseeable risk did. The defendants' conduct must be considered more blameworthy than the plaintiffs' and on these grounds justice would seem to require that the defendants be held liable. To assert the contrary is like saying that no moral distinction can be drawn between the conduct of one who drives his car along a pavement at ninety miles an hour and the conduct of pedestrians who are fortunate enough to escape from the maniac's path.

If, therefore, it is to be argued that justice favours the defendant in remoteness cases the relative merits of the parties must be displaced by considerations of justice of a rather different kind. Such consideration, it

is submitted, lay behind the decision in the *Wagon Mound*. For it can be argued that justice demands not a comparison between the conduct of the plaintiff and that of the defendant, but an examination of whether the defendant is morally responsible for the damage which has actually occurred. Considered in this way liability in remoteness cases follows moral responsibility. The most persuasive way of presenting the argument for this approach is to point to the fact that a broader test of remoteness, the directness test for example, violates the principle that the seriousness of the defendant's conduct ought to bear some relationship to the penalty the law requires him to pay. There is, of course, no question here of punitive damages; any damages awarded will be exclusively compensatory. Nevertheless underlying the whole concept of no liability without fault is to be found the idea that since a court's award of damages is in effect a penalty imposed on the defendant's conduct, such damages must be related in some way to the seriousness of that conduct.

In the *Wagon Mound* this aspect of the justice of the matter seems completely to have displaced any consideration of the parties' relative merits:

> [I]t does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.[7]

A number of powerful criticisms of this much quoted passage have been expressed.[8] But it is not difficult to see why this view was taken, nor why in *Polemis* the court was able without any consciousness of injustice to take a different view. The facts in *Polemis* were such as to emphasize the issue of justice as *between* the parties which, as has been explained, favoured the plaintiff. The facts in *Wagon Mound*, however, highlighted the second aspect of justice, the issue of moral responsibility for the damage which actually occurred.

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[7] *Supra* note 1, at 422-23. *Contrast* Weir: "So in this case it was apparently just that the plaintiff, whose wharf had been destroyed as the admittedly direct consequence of the admittedly careless act of the defendant, which admittedly threatened and caused damage to his wharf by another means, should leave the Courts of Law with nothing in his hands but an enormous bid for costs and the permission to pursue his claim in nuisance before the Full Court of the Supreme Court of New South Wales." *Compensability of Unforeseeable Damage Resulting Directly from Negligent Acts*, 35 TUL. L. REV. 619, at 626 (1961). Though this is a salutary reminder of the alternative way of presenting the justice issue, it should be noted that the directness issue was not conceded but strongly disputed.

[8] Two particularly cogent criticisms are that the court seemed to overlook the fact that conduct is not negligent simply because slight damage is a foreseeable consequence, the risk must always be balanced against the precautions required to avoid it; and that the foresight of the reasonable man was not, until the *Wagon Mound*, equated with the knowlege of the expert witness. *See* Jolowicz, Comment, [1961] CAMB. L.J. 30, at 31-32.

Consider the two situations. Unlike *Polemis* the damage in *Wagon Mound* was considerably separated both in space and in time from the defendants' careless act. Moreover, whereas in *Polemis* the defendants were closely involved in all aspects of the catastrophe since *their* servant ignited *their* leaking cargo, in *Wagon Mound* the defendants' involvement ceased with the careless discharge of the oil onto the water. What happened thereafter involved natural forces, the wind and the tide, and the plaintiffs' own welding operations. These various elements put the defendants' conduct in a much more favourable light than that of their counterpart in *Polemis* and serve to indicate why the moral responsibility aspect of justice rather than the relative merits aspect took the court's attention.

Later cases, however, suggest, as will be seen, that in dealing with the justice issue in this single minded way the court rendered almost inevitable departures from its rule by later courts confronted with cases which needed different handling, when the facts were such as to emphasize the first rather than the second aspect of the justice of the matter.

B. A Clear Rule

As well as the justice issue the court in the *Wagon Mound* based itself on what may be termed the "clear rule" policy, that is the idea that whatever rule the court adopted to govern remoteness in negligence should be clear, free from technicality and easy to apply.

Responding to counsel's invitation to hold that the directness test involved "linguistic niceties of a quasi-philosophical character."[9] Viscount Simmonds roundly condemned "scholastic theories of causation and their ugly and barely intelligible jargon,"[10] and saw the *Polemis* test as raising "never ending and insoluble problems and causation."[11] The *Liesbosch*[12] was taken as an example of the practical difficulties of the *Polemis* rule and the court had little difficulty in demonstrating that much erosion of the rule had already occurred, particularly in the nervous shock cases.

In view of this condemnation of the directness test it is not without interest to observe that in *Polemis* one of the factors that led the court to adopt the directness test was this self-same need for a clear and simple rule. The *Polemis* test can of course give rise to difficult problems. Lord Justice Scrutton, in his discussion of two earlier decisions,[13] showed himself to be aware of this, but observed that in the present case no such problems arose, there being no extraneous factors to break the chain of causation. Moreover, for all its difficulties, the direct consequences test was thought to be simpler than the test of reasonable foresight suggested by the defen-

[9] Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound), [1961] A.C. 388, at 400 (P.C.).

[10] *Id.* at 419.

[11] *Id.* at 423.

[12] Owners of Dredger Liesbosch v. Owners of Steamship Edison, [1933] A.C. 499.

[13] London Joint Stock Bank v. Macmillan, [1918] A.C. 777, Weld-Blundell v. Stephens, [1920] A.C. 956, discussed by Lord Scrutton, [1921] 3 K.B. 560, at 577.

dants. The defendants had relied upon earlier cases which put the foresight test in terms of "natural and probable consequences." Both Lord Justices Bankes and Scrutton thought this too obscure: "[I] cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable and other results which are probable but not natural. I am not sure what either adjective means in this connection...."[14]

In view of the arbitrator's findings, deciding the foresight issue would have posed no problems in *Polemis*. The rejection of this test by the court must therefore be seen as intending to establish a clear test for future courts deciding cases without the benefit of a preliminary set of arbitrator's findings.

In the *Wagon Mound* the Privy Council, with the benefit of hindsight, was able to appreciate the practical difficulties of the directness test and it is apparent from the harsh words of Viscount Simmonds quoted earlier that in opting for the foresight test the court saw itself as not only selecting a new and simple test, but also rejecting an old and very unsatisfactory one. It is however, worth noting how, as on the justice issue, the court's new perspective may have been influenced by the facts of the case.

Had the Privy Council accepted the *Polemis* test it would thereby have presented itself with the formidable task of applying the rule to the curious circumstances of the case. At least one commentator has suggested that on the directness test the damage in the *Wagon Mound* could have been found to be indirect and therefore too remote.[15] But counsel's discussion of this issue shows that a tenable contrary argument can be made.[16] Thus the Privy Council agreed with the Court of Appeal in *Polemis* that clarity in the chosen rule was important but made its decision in a different situation. Whereas in *Polemis* the application of whatever rule was decided upon was easy, in *Wagon Mound* choice of the directness test would have required a decision on the directness or otherwise of the harm suffered. The foresight test offered no such problems.

In remoteness cases the tendency is perhaps to see the chosen test, because it offers a simple solution to the immediate problem, as simpler than it really is. Certainly there is no hint in the *Wagon Mound* of the problems courts were soon to encounter with the foresight test; while no doubt critics of *Polemis* would be the first to suggest that the ease with which the directness test could be applied in that case may have led the court to underestimate its problems in other situations.

Whether the Court of Appeal had a clearer view of the difficulties of the foresight test is an interesting question in the light of the cases decided

[14] Weld-Blondell v. Stephens, [1921] 3 K.B. 560, at 576 (per Lord Scrutton).

[15] *See* Honoré, Comment, 39 CAN. B. REV. 267, at 274-75 (1961).

[16] *See* counsel's argument in [1961] A.C. 388, at 411. *See also* Stansbie v. Troman, [1948] 2 K.B. 48 (C.A.) and Goodhart, *Liability and Compensation*, 76 L.Q.R. 567, at 571 (1960).

since the *Wagon Mound.* It is, at any rate, clear that here, as on the justice issue, the Privy Council was not so much laying down a new policy as interpreting an old policy in a new way. It follows from this that future cases with different facts might require a further revision of view.

C. A Defensible Line

A third policy considered important in *Wagon Mound* may be termed the policy of the defensible line, that is the attempt to ensure that the test of remoteness should grant or deny recovery to cases of the same type, that the same legal consequences should attach to broadly similar situations.

One critic of *Wagon Mound* has questioned the relevance of this policy, at least in so far as it requires the court to consider the effect of its decision in hypothetical situations.[17] Such criticism is misplaced. Failure to consider hypothetical situations must violate one or both of the policies already discussed. Justice requires that like cases be treated alike and therefore demands that hypothetical situations be considered. In addition, if a rule is put forward without adequate discussion of its effects in other cases a likely consequence is that an inappropriate line will be chosen and future cases may then throw the law into confusion in an attempt to bend the line to a more appropriate configuration. Moreover, a consequence of drawing any line at all (and hence a good reason for not drawing unnecessary lines) is that the exact delineaments of the line drawn, however acceptable the line may be, can only be revealed by further litigation.

In the *Wagon Mound* the line the plaintiffs invited the court to draw divided plaintiffs who had suffered some foreseeable damage from plaintiffs who had not. The former, having established a breach of duty, could, it was argued, recover for all damage directly caused; the latter, having established no breach of duty, could not. To Viscount Simmonds such a distinction was "neither logical nor just."[18] "It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would be the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacre."[19] Where two claims arise from the same careless act, "Each of them rests on its own bottom."[20]

Once more it is interesting to note that in *Polemis* the court was led to a very different conclusion by an attempt to apply the very same policy. Counsel for the defendants had conceded that it was never necessary to show that the *extent* of the damage incurred was foreseeable. So long as damage of a particular *kind* could be foreseen all damage of that kind, foreseeable

[17] "[A] law suit takes place [nowadays] between an actual plaintiff and an actual defendant, and it is not clear why the nonliability of the defendant to a hypothetical plaintiff should make a conclusion of liability towards the actual one absurd and indefensible." Weir, *Compensability of Unforeseeable Damage Resulting Directly from Negligent Acts*, 35 TUL. L. REV. 619, at 626 (1961).

[18] [1961] A.C. 388, at 425.

[19] *Id.* at 425-26.

[20] *Id.* at 426.

or not, could be recovered. Lord Justice Bankes was not prepared to admit this distinction.[21] It is easy to see how anomalous such a distinction could be argued to be. The effect of accepting the distinction would have been to deny recovery in *Polemis*, but to allow it if through some unexpected weakness in the ship's bottom the falling plank knocked the bottom out of the ship, causing it to sink.

So in both the *Wagon Mound* and in *Polemis* the court sought to draw a line both clear and defensible. In neither case did the court discuss the possible objections to drawing the line in the place chosen, no doubt because these objections were not raised by the facts of the case. Viscount Simmonds's objection to the directness test, that a plaintiff needed only to point to some foreseeable loss to establish his claim would not have appeared as an obvious objection to the court in *Polemis* because a major variation in the facts of *Polemis* would have been needed to create a situation where no loss at all to the plaintiff was foreseeable. Carelessly dropped planks are always likely to damage something. Similarly in the *Wagon Mound* the objection to the foreseeability test raised in *Polemis*, that distinguishing between kind and extent of damage was unjustifiable, would have assumed prominence only in a very different fact situation.

The *Wagon Mound*, then, sought to implement three relevant policies: to achieve a just result, to put forward a clear rule and to draw a defensible line. All three policies, differently interpreted, could support the decision in *Polemis*. That the interpretation of the three policies was so different in the *Wagon Mound* is to be explained, at least in part, by the very different facts of that case. It would be reasonable to expect that in later cases involving further novel situations relevant policies might again appear in rather a different light. Such cases might be expected to modify in some degree the simple foresight test of remoteness which *Wagon Mound* laid down. This as we shall now try to show, is exactly what happened.

III. Hughes v Lord Advocate[22]

In this case the Post Office opened a manhole in an Edinburgh street to obtain access to underground telephone cables. When the workmen left for a fifteen minute tea break the hole was left covered with a tent and surrounded by paraffin lamps. The plaintiff, an eight-year old boy, accompanied by his ten-year old uncle, approached the unguarded workings and began to play with a lamp, swinging it on the end of a rope. He then descended into the manhole using a ladder left by the workmen. After emerging he knocked or dropped the lamp into the manhole, causing a violent explosion which threw him into the manhole. The plaintiff suffered burns from the explosion, from falling into the manhole and from attempting to climb out up the hot metal ladder. The explosion was found to have been

[21] [1921] 3 K.B. 560, at 572.
[22] [1963] A.C. 837.

caused by the lamp breaking when it fell into the hole, releasing paraffin which vaporised and was ignited by the lamp's naked flame. This explosion was found to be unforeseeable, though it was foreseeable that the plaintiff might be burned from interfering with the lamp.

The House of Lords held that the defendants were liable. They had caused the plaintiff a foreseeable kind of damage, damage by burns. The way in which the burns had been caused was unforeseeable but it was unnecessary for the defendants to have foreseen "the precise concatenation of circumstances which led up to the accident."[23] Nor was it relevant that the damage caused was more extensive than might have been foreseen.

If this decision is analyzed in the light of the three policies which underlay *Wagon Mound* several new facets of those policies will be found to have been revealed.

A. A Just Result

First and foremost *Hughes* shows how that aspect of justice neglected in *Wagon Mound*—consideration of the parties' relative merits—can assume prominence in a different fact situation. The fact that the cause of the accident was the defendants' carelessness is a recurrent theme in the judgments in the case. Lord Reid said: "I am satisfied that the Post Office workmen were in fault in leaving this open manhole unattended and it is clear that if they had done as they ought to have done this accident would not have happened."[24] Lord Jenkins summarized the defendants' conduct as follows: "In a word, the Post Office had brought upon the public highway apparatus capable of constituting a source of danger to passers-by and in particular to small and almost certainly inquisitive children."[25] Lord Morris said: "Exercising an ordinary and not an over-exacting degree of prevision the workmen should, I consider, have decided, when the tea break came, that someone had better be left in charge who could repel the intrusion of inquisitive children."[26] And Lord Pearce began by observing: "This dangerous allurement was left unguarded in a public highway in the heart of Edinburgh. It was for the defenders to show by evidence that, although this was a public street, the presence of children was so little to be expected that a reasonable man might leave the allurement unguarded."[27]

When, as in *Hughes*, the plaintiff's injury and the defendants' carelessness are closely linked both in space and in time, when, indeed, it is conceded that only the manner and not the type of the plaintiff's injury were unforeseeable and when above all, the plaintiff is a small child and the defendants a public corporation running a hazardous enterprise, it would be surprising if the court were not inclined to contrast the incompetence of the careless

[23] *Id.* at 853, Lord Morris quoting the phrase used in Harvey v. Singer Mfg. Co., [1960] Sess. Cas. 155, at 172.

[24] [1963] A.C. 837, at 845.

[25] *Id.* at 848.

[26] *Id.* at 851.

[27] *Id.* at 857.

defendant with the innocence of the vulnerable plaintiff and to decide that in some circumstances liability can exist independently of foresight.[28]

But even if we approach the justice issue in the way in which it was approached in *Wagon Mound* and ask whether the defendant was morally responsible for the damage caused, it is apparent that the simple test of foresight used to resolve this question in *Wagon Mound* is no longer adequate. In that case the court had decided that it was unjust for a defendant to be held liable for damage of an unforeseeable kind. In *Hughes* the kind of damage was foreseeable and the decision required was whether it was unjust to hold the defendant liable for damage caused in an unforeseeable way and to an unforeseeable extent.

Where there is a difference between what occurred and what might be expected to occur to allow the defendant to argue that it is unjust that he should be held liable can only be right if a clear and morally relevant distinction can be drawn between the actual and the foreseeable chain of events. If, as will often be the case, no such distinction can be made there can be no objection to holding that, despite the presence of unforeseeable elements, the defendant's moral responsibility subsists.

Hughes was a case of that kind, the situation, as the court saw it, was that the defendants had left unguarded a number of dangerous and alluring objects. A child had come upon the scene and had injured himself by playing with them in an unexpected way. The defendants, having created this dangerous situation, were not to be allowed to escape by seizing upon the fortuitous fact that the plaintiff had injured himself in an unusal way, instead of in a commonplace way. The dangerous situation having been established the unusual injury was morally irrelevant. This way of looking at the case is apparent in all five judgments delivered which stress the unpredictable nature of children's behaviour. For example, Lord Morris: "Though his severe burns came about in a way that seems surprising this only serves to illustrate that boys can bring about a consequence which could be expected, but yet can bring it about in a most unusual manner and with unexpectedly severe results."[29] Likewise Lord Guest (quoting Lord Carmont): "The defender cannot, I think, escape liability by contending that he did not foresee all the possibilities of the manner in which allurements the manhole and the lantern—would act upon the childish mind."[30]

Thus the facts of *Hughes* revealed that the defendant's moral responsibility for an accident cannot always be regarded as commensurate with what a court decides he could have foreseen. In some situations it will be obvious that, though some element in the accident may have been unforeseeable, when the defendant's carelessness and the unpredictable

[28] In another area of the law, Lord Reid has recently stressed the special responsibility of large organizations for the safety of child trespassers. *See* British Ry. Bd. v. Herrington, [1972] 2 W.L.R. 537, at 547 (H.L.)

[29] *Supra* note 24, at 851.

[30] *Id.* at 856.

nature of the plaintiff's possible response are taken into account it will not be unfair to define the risk broadly and hold the defendant liable. To acknowledge this is not to reject foresight of consequences as a useful test of moral responsibility but simply to recognise its limitations.

Similar reasoning will be found to justify a number of other decisions, both before and after *Hughes*, in which it has been held to be unnecessary for the plaintiff to show that the defendant ought to have foreseen the precise accident which occurred.[31] In these cases, as in *Hughes*, it is clear that, "to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable."[32]

This point has recently been taken further in a case concerning an employer's breach of statutory duty. In *Millard v. Serck Tubes Ltd.*[33] it was held by the Court of Appeal that once breach of the statutory duty to fence had been shown, the unforeseeable way in which the plaintiff injured himself was no bar to recovery. So broad an approach would probably not be adopted in a common law case. The interest of the decision lies in the use made of policy, here the protective policy of the Factories Acts, to override issues of foreseeability. *Hughes* and the other common law cases show the same factor operating at a different level.

B. A Clear Rule

In the *Wagon Mound* the court suggested that foresight of consequences was a clear test of remoteness of damage. In that case it was. But *Hughes* reveals its limitations in this respect too.

The foresight test is really a much cruder tool than the *Wagon Mound* suggests. Once it is realized that what was reasonably foreseeable is neither so narrow as what was actually foreseen, nor so broad as what was possible, but falls somewhere in between, it is apparent that there will always be a good deal of room for argument about where the foresight line is to be drawn in a particular case.

The application of the foresight test to a chain of events will often be especially difficult. In particular, any finding as to what children may be expected to do with alluring objects must have a hit and miss quality about it.[34] Presented with a strict foresight test to apply in a case like *Hughes*

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[31] *See* Haynes v. Harwood, [1935] 1 K.B. 146 (C.A. 1934); Carmarthenshire County Council v. Lewis, [1955] A.C. 549 (Lord Keith of Avonholm); Miller v. South of Scotland Electricity Board, [1958] Sess. Cas. 20; (H.L.); Harvey v. Singer Mfg. Co., [1960] Sess. Cas. 155; Wells v. Sainsbury, [1962] N.Z.L.R. 552 (C.A.); Bradford v. Robinson Rentals, [1967] 1 W.L.R. 337 (Exeter Assizes 1966). *But* in Chadwick v. British Ry. Bd., [1967] 1 W.L.R. 912 (Q.B.), Mr. Justice Waller interpreted *Hughes* too broadly. *See* Miller, *Mental Shock and the Aftermath of a Train Disaster*, 31 MODERN L. REV. 92 (1968).

[32] [1963] A.C. 837, at 857 (Lord Pearce).

[33] [1969] 1 W.L.R. 211 (C.A. 1968). In Evans v. Sanderson Bros. & Newbould, [1968] 4 K.I.R. 115 (C.A.), a similar question was raised but not discussed. *See* Hendry, *Limiting the Uncertainty of Foreseeability*, 32 MODERN L. REV. 438 (1969).

[34] "In the case of an allurement to children it is particularly hard to foresee with precision the exact shape of the disaster that will arise." *Supra* note 32, at 857-58 (Lord Pearce).

the judge would have to investigate all the events of the accident, the playing with the ladder and the lamp, the climbing into and out of the hole, the knocking over of the lamp, the falling into the hole and the attempt to climb out, as well as the explosion. No decision that all or any of these events were foreseeable (or unforeseeable) could pretend to simplicity or precision.

To substitute for the foresight test the broader requirement that an accident must be "a variant of the foreseeable"[35] or arise from "a known source of danger"[36] does not therefore replace a precise test with a vague one, but rather acknowledges the element of uncertainty which always attaches to attempts to predict accidents. This modification in the *Wagon Mound* rule may therefore be expected to assist future courts confronted with similar problems. Relieved of the impossible demand that they draw a line between foreseeable and not quite foreseeable events, they are left free to answer the rather easier (though by no means simple) question whether the events of the accident are to be categorised as a "variant of the foreseeable" or something more unusual.

A frustrated attempt to muddy the waters was the defendants' suggestion that the harm which the plaintiff suffered in *Hughes* should be characterized as different in kind from that which was reasonably foreseeable. As Lord Reid explained, the kind of damage suffered *was* foreseeable since it was damage by burns.[37] Owing to the explosion such burns were more extensive than could have been foreseen, but no useful purpose would be served by describing them as different in kind.[38] The question how far foresight of the degree of harm suffered should be a relevant consideration is dealt with in the discussion of *Smith* v. *Leech Brain* below.

C. *A Defensible Line*

This aspect of the case was specifically mentioned only by Lord Jenkins, though it is implicit in all five judgments that the line the court was invited to draw between burn damage caused by the unforeseeable explosion of the lamp, and burn damage caused in some more obvious way must be rejected. Lord Jenkins said:

> To my mind the distinction drawn between burning and explosion is too fine to warrant acceptance. Supposing the pursuer had on the day in question gone to the site and taken one of the lamps, and upset it over himself, thus setting his clothes alight, the person considered to be responsible for protecting children from the dangers to be found there would presumably have been liable. On the other hand, if the lamp, when the boy upset it, exploded in his face, he would have had no remedy because the explosion was an event which could not reasonably be foreseen. This does not seem to me to be right.[39]

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[35] *Id.* at 858.

[36] *Id.* at 845, 847 (Lord Reid).

[37] *Id.* at 845.

[38] For a successful attempt to raise this argument see Tremain v. Pike, [1969] 1 W.L.R. 1556 (Exeter Assizes), text accompanying note 46, *infra*.

[39] *Supra* note 32, at 850.

The proposed line separating burning by explosion from burning in some other way was rejected because the two types of accident were seen as similar in one essential respect. Both were the result of the defendants' creation of a dangerous situation. Once such a snare had been laid to attempt to distinguish between probable and possible hazards could not be justified.

The suggestion has been made[40] that because *Hughes* refused to draw this distinction, an English court would be bound to hold the defendants liable on the facts of *The Grandcamp*[41] in which over seventy million dollars worth of damage was caused by the unforeseeable explosion of carelessly handled nitrates. If such indeed was the effect of *Hughes*, then the decision could be neither defended nor reconciled with the *Wagon Mound.* But should such a disaster ever come before the English courts, the absence of a foreseeable plaintiff would surely operate to exclude the *Hughes* principle *in limine.*

IV. Doughty v. Turner Manufacturing Co.[42]

Here the defendants owned a factory equipped with cauldrons containing molten sodium cyanide. The cauldrons had loose asbestos covers. Asbestos was widely believed to be quite safe for this purpose and had been so used in England and the United States for over twenty years. Owing to the carelessness of a workman one of the covers was allowed to slip into the cauldron. After a short interval there was a chemical explosion which sprayed the plaintiff who was standing nearby with molten liquid. The plaintiff sued the defendant for damages for negligence, arguing *inter alia*[43] that although the explosion was unforeseeable, he had suffered a foreseeable kind of damage, namely chemical burns, since he might have been splashed by the cover falling in. Accordingly, it was argued, on the authority of *Hughes v. The Lord Advocate* he should recover.

The Court of Appeal found for the defendants, doubting whether a splashing risk had ever existed and holding that in any case the explosion that had occurred was too far removed from any splashing hazard. Each of the three judgments is rather short and the key passages in them rather tersely expressed. It is, however, suggested with respect that a policy analysis shows the correctness of the decision.

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[40] Dworkin, *Risk and Remoteness—Causation Worse Confounded,* 27 Modern L. Rev. 344, at 349-50 (1964).

[41] [1961] 1 Lloyd's List L.R. 504. The United States Court of Appeal held the defendants not liable.

[42] Doughty v. Turner Mfg. Co., [1964] 1 Q.B. 518 (C.A. 1963).

[43] The plaintiff also argued that the properties of the asbestos cover were unknown and the defendants, knowing that some substances reacted violently when immersed, should have foreseen that asbestos might be one of them. This argument, in effect an argument that there was a foreseeable risk of an explosion, was accepted by Mr. Justice Stable, at first instance, but rejected by the Court of Appeal.

A. A Just Result

The defendants' conduct was not nearly so open to criticism as that of his counterpart in *Hughes*. Whereas leaving the site unguarded was, as has been seen, a very dangerous thing to do, most (even perhaps all) of what the defendants' servants did in *Doughty* was quite blameless. Using the asbestos covers on the cauldrons was not careless in the absence of any knowledge that they were dangerous. So any breach of duty must stem from immersing the cover in the cauldron. By itself, however, this was again blameless for in the absence of knowledge that immersion was dangerous the defendants could, as Lord Pearce pointed out,[44] have deliberately immersed the covers without incurring liability. Everything therefore turned on the fact that the cover had dropped into the cauldron, supposedly creating the risk of a splash. But this risk was doubtful, as again Lord Pearce pointed out,[45] because the cover had slid into the liquid rather than dropping into it, the cover had fallen only a few inches and the plaintiff was probably not within the possible splash area at the relevant time.

Thus the argument for holding the defendants liable on what we have called the first aspect of the justice issue, comparison of the merits of plaintiff and defendant, was weak.

If we turn to the defendants' moral responsibility for the consequences of their action and assume that a splash was foreseeable, the situation can again be distinguished from *Hughes*. There, as has been seen, the defendants' moral responsibility arose from their having created a foreseeably dangerous situation which had resulted in foreseeable harm to the plaintiff. The way in which that harm had been caused, though unusual, did not relieve them of their moral responsibility for the accident because it was taken to be no more than an illustration of the unpredictability of children's reactions to a dangerous situation, in no way absolving those responsible for the danger. In *Doughty*, on the other hand, what occurred was quite different from anything that might have been foreseen. If the plaintiff had been injured by a splash the defendants would have been liable. But he was injured by the materialization of a different and unforeseeable risk. If at any time a splash was foreseeable and the plaintiff was within the area of that risk then the defendants had created a dangerous situation. To argue, however, that this imposed upon them moral responsibility when a quite different series of events happened is no more sensible than to argue that to leave the blades of a fan unguarded, so creating a foreseeable risk of physical injury to the plaintiff, is to be morally responsible for his injury if one day through some unforeseeable mechanical freak the fan flies across the room and seizes the plaintiff's fingers.

In the *Wagon Mound* the court, as has been seen, equated justice with the foresight test. The limitations of this approach have already been des-

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[44] *Supra* note 42, at 525-26.

[45] *Id.* at 527.

cribed. If such an approach is justifiable at all, however, *Doughty*, in which what happened was so very different from what might have been expected, would seem an obvious case for its application.[46]

B. A Clear Rule

The need for a simple test of remoteness is a prominent consideration in the judgements of both Lord Justices Harman and Diplock. The latter, in a passage reminiscent of Viscount Simmonds's observations in the *Wagon Mound* said: "There is no room for mystique in the law of negligence. It is the application of common morality and common sense to the activities of the common man."[47] The court's approach to the chain of events in *Doughty* was indeed a common sense one. The contrary view, that because *Doughty*, like *Hughes*, featured loss of a foreseeable kind caused by an unforeseeable explosion, the two cases should have been decided the same way, would seem to be conceptualism of the worst kind. If the House of Lords in February recognizes that it is unnecessary to speculate on the countless ways an eight-year old boy may burn himself with a paraffin lamp, is the Court of Appeal in November bound to hold that no distinction can be drawn between creating a splash and causing a chemical explosion?[48]

The clear rule policy may be put another way. Suppose the Court of Appeal *had* held that the accident in *Doughty* was merely a variant of the foreseeable perils of splashing, or a "magnified splash."[49] Such a decision, far from clarifying matters, could surely only have mystified future courts as to when (if ever) an unexpected event would not be a variant of the foreseeable.

It is true that this difficulty could have been avoided by the court deciding for the plaintiff on the ground that the cover together with the liquid in the cauldron was, on account of the splashing risk, a "known source of danger," as Lord Reid had characterised the lamp in *Hughes*. But such an approach would have produced a clear rule at a high price. For again a powerful criticism would be that so mechanical an approach, erected on a phrase torn out of context,[50] ignores those features of *Doughty* that demand a different result

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[46] An interesting borderline case is the decision of Mr. Justice Payne in Tremain v. Pike, [1969] 1 W.L.R. 1556. There the plaintiff was injured by contact with rats' urine on the defendant's farm. This was unforeseeable, but, he argued he should recover because injury from rat bites was foreseeable. The learned judge rejected this contention, observing that even if a biting injury had been foreseeable, the damage actually suffered was irrecoverable, being different in kind. A better approach, it is submitted, would have been to have treated the question as one of defining the risk, and to have asked whether assuming bites to have been foreseeable, what occurred was a "variant of the perils of biting" or something more unusual. A case can certainly be made out for treating this as a *Hughes*, rather than a *Doughty*, kind of case.

[47] *Supra* note 42, at 531.

[48] *Contrast* Dworkin, *Risk and Remoteness—Causation Worse Confounded*, 27 MODERN L. REV. 344, at 346, 347 (1964).

[49] A description of the accident rejected by Lord Justice Harman, *supra* note 42, at 529.

[50] In cases like *Hughes* and *Doughty* the fundamental question is whether the damage

Moreover, the effect of the court's decision in *Doughty* was to arrest a trend the dangers of which had been apparent ever since the Court of Appeal entangled itself in the plaintiff's imaginary necktie in *Thurogood v. Van den Berghs & Jurgens Ltd.*[51] This was the tendency of plaintiffs who had suffered damage in some unforeseeable way to argue that the defendant should be held liable on the grounds that his carelessness might have caused them some foreseeable injury. Clearly the argument in *Hughes* was of this kind. It has been suggested above that acceptance of the hypothetical damage argument is unexceptionable in so far as it merely represents a recognition by the courts that a minute investigation of the foreseeability of the events of the accident is both morally irrelevant and practically difficult. But *Doughty* puts the argument in a different light. It would seem from the evidence that had no accident to the plaintiff occurred no one would have given much thought to the possibilities of any splashing hazard. The plaintiff in that case, having suffered a very unusual and quite unforeseeable accident, seized upon the non-existent splash as a ground for his claim. Whereas in *Hughes* the dangers of the deserted excavation were obvious from the moment they were abandoned and the court was therefore justified in defining the risk broadly and refusing to investigate the details of the accident, in *Doughty* it is difficult to avoid the impression that the risks of a splash were a hopeful afterthought contrived to give some substance to an otherwise hopeless claim.

There seems every reason to discourage the hypothetical damage argument in this form. Not only is the moral basis of the defendant's liability totally absent when the risk which materializes is utterly different from the risk which might have been foreseen, but also, looking at the matter from the practical standpoint, the task of ascertaining the foreseeability of the events which have occurred is difficult enough, deciding the foreseeability of purely hypothetical events is, as *Doughty* shows, perplexing indeed.

C. A Defensible Line

Though no defensible line argument was advanced by the court in *Doughty*, the decision may be supported by such an argument. The only alternatives to distinguishing between events which are variants of the foreseeable for which recovery is permitted, as in *Hughes*, and events which are so unexpected as to bar recovery, as in *Doughty*, are either to bar recovery

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which occurred "was something which was reasonably foreseeable or was so different from what could have been foreseen that it must be put into a different category"; see counsel's argument in Hughes v. Lord Advocate, [1963] A.C. 837, at 840. Now if, as the court held, the burning accident in *Hughes* did not fall into a totally different category it is hard to envisage any burning accident with the lamp which would. But it does not follow from the court's description of the lamp as a "known source of danger" in the special circumstances of that case that it will suffice to point to a known source of danger in a case like *Doughty* where the damage suffered can aptly be described as falling into a "totally different category." Lord Pearce rejected the argument for another reason, *see* [1964] 1 Q.B. 518, at 526 (C.A. 1963).

[51] [1951] 2 K.B. 537 (C.A.).

whenever any departure from the foreseeable occurs, or to permit recovery whenever a foreseeable kind of damage is caused, however unusual the chain of events. The first alternative goes against *Hughes*, a decision for which, as has been seen, a cogent case can be made out. The second alternative goes against *Wagon Mound* by denying the relevance of foresight as a test of moral responsibility. Moreover, allowing recovery for all damage of a foreseeable kind, however unusual the chain of events by which it was caused, would draw a new dividing line between plaintiffs whose damage had been caused by a very unusual chain of events but happened to be of a foreseeable kind and therefore recoverable, and plaintiffs whose damage, caused by an identical chain of events, was of an unforeseeable kind and therefore irrecoverable. Such an arbitrary dividing line could scarcely be defended.

V. SMITH V. LEECH BRAIN[52]

In this case the plaintiff was employed in the defendants' factory as a galvanizer. Part of his work included lowering articles into a tank of molten metal. In August, 1950, while engaged on this work, he put his head outside the corrugated iron shield provided for his protection and was burned on the lip by a piece of molten metal spattering from the tank. The burn promoted cancer from which he died, the tissues of his lip being in a premalignant condition. There was a strong likelihood that even without the burn cancer would eventually have developed. His widow claimed damages under the FATAL ACCIDENTS ACTS 1846-1908[53] and the LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934.[54]

Lord Chief Justice Parker held that the defendants were in breach of their common law duty to provide the deceased with adequate protection, that the type of injury suffered, a burn, was foreseeable and that since the tortfeasor must take the victim as he finds him, the defendants were liable for the deceased's death, whether or not the cancer could have been foreseen. The case squarely raised the question whether it was necessary to foresee the extent as well as the type of injury suffered. The learned Lord Chief Justice, in deciding that it was not, did not discuss the policy aspects of the problem, but was content to decide that the *Wagon Mound* was not intended to change the existing law on this point. But as an important and now well established[55] exception to *Wagon Mound*, cases of this kind merit investigation from the policy standpoint.

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[52] Smith v. Leech Brain & Co., [1962] 2 Q.B. 405 (1961).

[53] Fatal Accidents Act 1846-1908, 8 Edw. 7, c. 7.

[54] Law Reform (Miscellaneous Provisions) Act 1934, 24 & 25 Geo. 5, c. 41.

[55] *See* Warren v. Scruttons Ltd., [1962] 1 Lloyd's List L.R. 497 (Q.B.); Bradford v. Robinson Rentals Ltd., [1967] 1 W.L.R. 337 (Exeter Assizes 1966); Wieland v. Cyril Lord Carpets Ltd., [1969] 3 All E.R. 1006 (Q.B.); Malcolm v. Broadhurst, [1970] 3 All E.R. 508 (Q.B.); Vacwell Engineering Co. v. B.D.H. Chemicals Ltd., [1969] 3 W.L.R. 927 (Q.B.); The outer limits of the principle were reached in McLaren v. Bradstreet, The Times, May 15, 1969 (plaintiff's neurotic mother, though worsening injury, not a relevant factor).

A. A Just Result

A literal reading of the *Wagon Mound* would suggest, as Lord Parker observed,[56] that the justice of the matter favours absolving the defendant from liability for unforeseen consequences. If in principle justice seems to require the foresight test why not apply it here? The reason is that a closer analysis of the issue reveals that, whatever the merits of the *Wagon Mound*, to equate foresight with fairness in *Leech Brain* would be quite facile. It was clear that the defendants' conduct was open to serious criticism:

> The protection that was afforded had been somewhat aptly described...as "Heath Robinson". Without going that far, it clearly was a system which, on the face of it, seems wrong. The dangerous process of lowering was done by remote control, and all that the operator had was the make-shift bit of corrugated iron which was put up and held by the operator himself by leaning against it...any reasonable employer must reasonably foresee that, men being what they are, the most natural thing in the world is that sooner or later the man will look round.[57]

Moreover, a much safer system of protection was in common use in the industry at the time of the accident and was indeed subsequently adopted by the defendants.

Here, then, as in *Hughes*, the defendants' conduct had created a dangerous situation. In these circumstances that aspect of justice which favours compensating the innocent plaintiff and penalizing the careless defendant whose act has caused his injury may be expected to overshadow the argument that an unforeseeably serious injury is not the defendant's moral responsibility.

This way of looking at the justice issue is even more attractive if the plaintiff's position is taken into account. In *Hughes*, as has been seen, the vulnerability of the child plaintiff highlighted the seriousness of the defendants' misconduct. In the *Leech Brain* type of case the plaintiff is vulnerable in a different way. If the plaintiff's damages are calculated as though he were an ordinary individual so that only foreseeable loss can be recovered, the result is that the protection of the civil law is denied to those who, on account of precancerous conditions or eggshell skulls are most in need of it. Such plaintiffs are already in a weaker position than their more robust fellows, because their special susceptibility will sometimes prevent them from establishing the threshold requirement of a breach of duty by the defendant. Therefore, once a breach of duty has been shown, there would seem every reason for placing any unexpected damage on the shoulders of the one who has caused the injury rather than upon the already disadvantaged plaintiff.

Moreover, the converse of *Leech Brain* must not be forgotten. If a plaintiff enjoys a special immunity of some kind, by reason of which the damage he suffers is much less than might be expected, he will, of course, only recover the small amount of damage he has suffered. If then, in these

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[56] *Supra* note 52, at 414.

[57] *Id.* at 410.

"iron skull" cases defendants can be negligent "on the cheap" it does not seem unreasonable that when the accident happens to involve one with a special susceptibility he should be compensated for his actual loss.

The above are, it is submitted, more persuasive reasons for rejecting the foresight test than the suggestion that "human bodies are too fragile, and life too precarious, to permit a defendant nicely to calculate how much injury he may inflict without causing more serious injury."[58] For it is really quite unreal to speak of defendants calculating anything in these cases. The fact that the foresight test is often acclaimed as enabling a defendant (in theory) to calculate his liability for any projected action, should not lead us to imagine that in cases like *Smith v. Leech Brain* such calculations are ever actually performed.

There are, in any case, other objections to applying foresight here, objections which relate not simply to the *Leech Brain* type of case where the plaintiff is specially susceptible in some way, but also the *Hughes* kind of case in which the plaintiff suffers unforeseeably serious injury for some other reason. In both cases it will often be difficult, if not impossible, to decide whether the injuries sustained were foreseeable. The *Leech Brain* case found the court grappling with medical evidence on matters on which the medical profession was itself divided. The learned judge was required to decide whether the cancer was caused by the burn alone, or whether the deceased's lip was already in a malignant condition, or whether it was in a pre-malignant condition. He also had to decide what were the chances that the deceased would have developed cancer even without the burn, as this was relevant to his award of damages. These decisions all concerned a disease about which, as the learned judge observed, little was known.[59] Moreover, the accident in question had occurred eleven years before the trial of which the victim had been dead for eight, a delay which, the learned judge drily commented, made things easier for no one.[60]

These difficult decisions were of course unavoidable. Short of abolishing tort liability altogether and replacing it with universal insurance against all illness, questions of causation such as whether the plaintiff would have developed the disease in any event will always have to be answered. There is, however, every reason for declining to add to the court's burden by posing taxing questions about the foreseeability of different degrees of injury.

Leech Brain was a case where assessment of the foreseeability of the degree of injury sustained would have turned on difficult medical evidence. In this respect *Hughes* was a case of the same kind. But similar considerations apply where, as in a recent case,[61] damage of an unforeseeable extent is

[58] Williams, *The Risk Principle*, 77 L.Q.R. 179, at 196 (1961).

[59] [1962] 2 Q.B. 405, at 411 (1961).

[60] *Id.* at 409. The observations on the difficulties caused by delay made by Lord Parker in Mace v. R. & H. Green and Silley Weir Ltd., [1959] 2 Q.B. 14, at 20, are particularly appropriate where medical evidence is in issue.

[61] Vacwell Engineering Co. v. B.D.H. Chemicals Ltd., [1969] 3 W.L.R. 927 (Q.B.). After argument in the Court of Appeal the action was settled on terms which included an agree-

caused by the chemical properties of a carelessly used substance. In such cases, fairness to the defendant cannot be a reason for asking questions about the foresight of degrees of harm when it is obvious that the answers, so far from being an assessment of moral responsibility, could be little more than guesswork.

B. A Clear Rule

The clarity of the *Leech Brain* rule can hardly be denied. By contrast, the difficulty of applying a rule which sought to distinguish between different degrees of damage by reference to foresight has already been touched upon. Similar objections would apply to any attempt to argue against recovery in the *Leech Brain* situation on the grounds that the plaintiff's injuries differed so markedly from those to be expected as to constitute a different kind of injury within the principle of the *Wagon Mound.*

Lack of simplicity excludes the approach to these cases suggested by Professor Goodhart.[62] To deem any special susceptibility to be foreseeable is, as Dias points out,[63] either to destroy the salutary rule that liability is determined on the assumption of normality, or to introduce a distinction between foresight as the criterion of duty and foresight as the criterion of remoteness of damage. If, as seems probable, the latter is the proposal then it is clear that in the *Leech Brain* type of case the new foresight test is no more than an empty shell. In so far as the *Wagon Mound* intended the foresight test to achieve a just result this will not do. While the aim of creating a clear and simple test of remoteness could only be frustrated by employing two concepts of foresight instead of one.

VI. McKew v Holland Ltd.[64]

In this case the plaintiff was injured by the defendants' admitted negligence. As a result of the injury he knew his left leg was liable to give way. In the normal course of events he would have fully recovered from this injury in a week or two. Unfortunately, however, a few days after the accident the plaintiff went with his wife, child and brother-in-law to inspect a flat the tenancy of which he had been offered. The flat was at the top of a flight of steep stairs which had no handrail. While attempting to descend the stairs unaided and without a stick the plaintiff felt his leg give way. In an attempt to save himself from falling he jumped, landing on his feet and severely fracturing his ankle.

The plaintiff argued that the defendants were liable for the damage resulting from both accidents. If they were, damages were assessed at

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ment not to challenge the findings of Mr. Justice Rees on the negligence issue. *See* [1970] 3 W.L.R. 67 (C.A.).

[62] Goodhart, *Liability and Compensation*, 76 L.Q.R. 567, at 577 (1960).

[63] Dias, *Remoteness of Liability and Legal Policy*, [1962] Camb. L.J. 178, at 186.

[64] McKew v. Holland & Hannan & Cubitts (Scotland) Ltd., [1969] 3 All E.R. 1621 (H.L. Scot.).

£4,915. If they were liable for the first accident only, damages were £200. The plaintiff's argument was that the second accident was caused by and was a foreseeable consequence of the first for which the defendants were admittedly liable.

The House of Lords held unanimously that the plaintiff's action in attempting to descend steep stairs unaided was an unreasonable act that broke the chain of causation and absolved the defendants, whether or not such an unreasonable act could have been foreseen. Lord Guest was prepared to go further and hold that the plaintiff's jump also broke the chain of causation, though the majority held that in the circumstances this was no more than an error of judgment.

Once more, then, the foresight principle was deployed in a plaintiff's cause and once more failed to impress the court. Another limitation of *Wagon Mound* had been exposed. What was the reason this time?

In the *McKew* type situation, as in *Smith v. Leech Brain*, a just result depends more on the parties' relative merits than on abstract considerations of foresight. The defendants were guilty of admitted negligence in causing the first accident and there was no doubt that without the first accident the second would not have occurred. The defendants' conduct, then, was hardly above reproach and there is little doubt that assuming, as the court was prepared to assume, that the second accident or something like it was foreseeable the plaintiff, had he been blameless, would have recovered. Indeed in such a case decided at first instance only six months before, the plaintiff had recovered damages for both accidents.[65] But the plaintiff in *McKew* was not blameless. Though prepared to condone his leap for safety as an error of judgement induced by the "agony of the moment," the majority saw his attempt to descend the stairs as foolhardy in the extreme:

> He knew that his left leg was liable to give way suddenly and without warning. He knew that this stair was steep and that there was no handrail. He must have realised, if he had given the matter a moment's thought, that he could only safely descend the stair if he either went extremely slowly and carefully so that he could sit down if his leg gave way, or waited for the assistance of his wife and brother in law. But he chose to descend in such a way that when his leg gave way he could not stop himself.[66]

In the same way in examining the plaintiff's jump Lord Guest observed that this "not inconsiderable acrobatic feat"[67] could not be regarded as reasonable conduct either.

Taking into account the conduct of plaintiff and defendant it is difficult to regard the outcome as unfair. It is true that the question of foresight

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[65] *See* Wieland v. Cyril Lord Carpets Ltd., [1969] 3 All E.R. 1006 (Q.B.). For an intermediate case *see* The Calliope, [1970] P. 172.

[66] *Supra* note 64, at 1624 (Lord Reid).

[67] *Id.* at 1625.

was regarded as irrelevant but Lord Reid was surely correct when he observed, "I do not think that foreseeability comes into this."[68] The usefulness of the foresight test is, as Lord Reid pointed out, to deny recovery in cases where the damage is unforeseeable. As has been explained, on one view of the justice of the matter this use of the foresight test can be defended. It is another matter entirely to argue that whatever is foreseeable is *ipso facto* recoverable, subject only to such defences as *volenti* and contributory negligence. This would be to overlook the fact that in the *Wagon Mound* the foresight test was introduced to do justice in the case. Just as in *Hughes* and *Leech Brain* foresight was discarded when a just result patently demanded some other approach, so in *McKew* when it was sought to make the defendants pay for the plaintiff's foolishness, a just result demanded that remoteness be tested in some other way.

Had there been evidence that the defendant was feeble minded or abnormally stupid, then naturally the balance of justice would have shifted to bring in the factors already discussed in relation to *Smith v. Leech Brain.* However, as Lord Reid explained,[69] there was no evidence that the plaintiff was abnormally stupid. It was therefore necessary to treat the plaintiff's act as the foolish act of a normal man rather than the normal act of a foolish one.

A. A Clear Rule

It has been suggested that by refusing to treat *McKew* as a case of contributory negligence the court confused the issue, so that now, "the courts may have to wrestle with the perplexing thought that an act which is reasonably foreseeable may yet be an unreasonable act."[70] But this thought is no more perplexing than the trite observation that foolish behaviour can often be anticipated. In any case it can hardly be a reason for treating the question in *McKew* as one of contributory negligence, since that analysis is open to exactly the same objection.

In *McKew* Lord Reid observed that the court could have preserved something of the foresight rule if it had been prepared, "to graft on to the concept of foreseeability some rule of law to the effect that a wrongdoer is not bound to foresee something which in fact he could readily foresee."[71] That way with the problem, said Lord Reid, "only leads to trouble."[72] It is easy to agree. Such an approach, like Professor Goodhart's suggestion that plaintiffs with eggshell skulls should be deemed to be foreseeable, shrouds a policy decision with a foresight test as vacuous as it is unnecessary.

By treating *McKew.* as a case of causation and not a case of foresight the court adopted the clearest and simplest approach. In the *McKew* kind

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[68] *Id.* at 1623.

[69] *Id.* at 1623.

[70] *See* Millner, *Novus Actus Interveniens: The Present Effect of Wagon Mound,* 22 N.IR. L.Q. 168 (1971).

[71] [1969] 3 All E.R. 1621, at 1623 (Lord Reid).

[72] *Id.*

of case, as in the field of economic loss,[73] foresight means exactly that. If in a particular situation recovery is to be denied the reason will not be because the law strangely deems certain entirely predictable events to be unforeseeable but because of a policy objection to recovery which the courts are now prepared to articulate. Such an approach has brought a much needed breath of fresh air into the difficult area of economic loss. Its adoption in the equally difficult field of remoteness of damage is no less welcome.

VII. Conclusions

1. In the *Wagon Mound* the Privy Council decided that the test of remoteness of damage in negligence was foresight and not directness of consequences. The three policies held to require this result were the need to lay down a just, clear and defensible rule.
2. Consideration of *Re Polemis* reveals that the same three policies can be argued to support the Court of Appeal's adoption of the directness test. This suggests that the court's interpretation of relevant policies depends to a great extent on the facts of the particular case before it.
3. This conclusion is borne out by the cases following *Wagon Mound.* In *Hughes v. Lord Advocate* it was apparent that strict application of the foresight test to the chain of events in that case would produce neither a just result nor a clear rule, but would require the drawing of an indefensible line. In *Doughty v. Turner Manufacturing Co.* the facts threw into relief the relevance of the chain of events in remoteness. There little blame attached to the defendants' general conduct, and, because a clear distinction could be made between the actual and the foreseeable chain of events, no moral responsibility for the accident which occurred attached to the defendant. Moreover, to have held the defendant liable would have created great uncertainty over what constitutes a "variant of the foreseeable," while inviting plaintiffs in remoteness cases involving unusual chains of events to invent hypothetical damage on which to base a claim.

   In *Smith v. Leech Brain* the facts showed how difficult it would be to apply the foresight test to the extent of damage suffered, threw doubt on the justice of so doing, and indicated the undesirability of characterizing as "different in kind" personal injuries unforeseeably serious in extent.

   In *McKew v. Holland* the plaintiff's own foolishness outweighed the defendants' misconduct and rendered foresight an irrelevant test if a just result was to be reached.
4. Thus recent cases on remoteness of damage in negligence have departed from the test of reasonable foresight laid down in the *Wagon Mound.* That test, though useful in some situations, has proved inadequate to resolve in a just, clear and defensible way the wide variety of problems which cases on remoteness raise.

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[73] *See* S.C.M. (United Kingdom) Ltd. v. W.J. Whittall & Son Ltd., [1971] 1 Q.B. 337 (C.A.).