CASE SECTION

REMOTENESS RULES IN TORT

OVERSEAS TANKSHIP (U.K.) LTD. v. *MORTS DOCK & ENGINEERING CO. LTD.*

In the recent case of *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.*[1] the Privy Council has held that "the essential factor in determining liability (for negligence) is whether the damage is of such kind as the reasonable man could have foreseen".[2] This authoritative statement as to the criterion by which remoteness of damage in negligence actions is to be determined will in large measure satisfy the pleas of many juristic writers for a review of the law[3] and accord with *dicta* in several cases[4] over the forty years which have passed since the Court of Appeal delivered its controversial judgment in *Re Polemis*[5].

In *Re Polemis* the direct but not reasonably foreseeable result of the failure of the defendant's servants to stop the falling of boards into the hold of a ship was a fire which caused the total destruction of the ship. The Court of Appeal was required to determine whether the damage fell within the purview of a claim for damages brought on behalf of the shipowners. It was held that "given the breach of duty which constitutes the negligence and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage (are) . . . irrelevant".[6] *Re Polemis* thus purported to be authority for the proposition that the question whether damage could reasonably have been anticipated is relevant only on the question whether the act is or is not negligent and that a defendant could assume responsibility for the direct consequences of his act.[7]

The doctrine propounded in *Re Polemis* has provoked caustic criticisms relating both to the Court of Appeal's assessment of the value of previous judgments and to the various social and policy aspects of the theory of causation. Nevertheless in *Thorogood* v. *Van Den Berghs & Jurgens Ltd.*,[8] one of the few

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[1] (1961) 1 All E.R. 404.

[2] *Id.* at 415.

[3] A. L. Goodhart, (1929-30) 39 *Yale L.J.* 449; *id.*, "The Imaginary Necktie and *Re Polemis*" (1952) 68 *L.Q.R.* 514; *id.*, "Liability and Compensation" (1960) 76 *L.Q.R.* 567; D. J. Payne, "The Direct Consequences of a Negligent Act" (1952) 5 *Current Legal Problems* 189 at 194; *cf.* W. L. Morison, "The Victory of Reasonable Foresight" (1960-61) 34 *A.L.J.* 317 at 323; W. L. Prosser, "Palsgraf Revisited" (1953-54) 52 *Michigan L.R.* 1, 24-25.

[4] *Glasgow Corpn.* v. *Muir* (1943) A.C. 448, 454; *Hay (or Bourhill)* v. *Young* (1943) A.C. 92, 101; *Woods* v. *Duncan* (1946) A.C. 401.

[5] *Re Polemis and Furness, Withy & Co. Ltd.* (1921) 3 K.B. 560.

[6] *Id. per* Bankes, L.J. at 572.

[7] J. G. Fleming, *Law of Torts* (2 ed. 1960) 191, sought to limit the *Polemis* principle to "cases where the harm falls broadly within the hazard that made the actor's conduct negligent but where, because the stage is set for it, its *extent* passes the bounds of reasonable anticipation".

[8] (1951) 2 K.B. 537. *Cf. Pigney* v. *Pointers Transport Services Ltd.* (1957) 1 W.L.R. 1121.

cases which has posed the issue fairly and squarely as to whether *Re Polemis* was good law, the Court of Appeal followed its own prior decision. In *Thorogood's Case* it was held that since the injury for which the plaintiff claimed damages, that is, catching his fingers in an electric fan, was a direct consequence of the defendant's negligence, foreseeability of the particular damage actually sustained was irrelevant to recoverability, directness of causation being the sole criterion in that connection.

In *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* the question of the criterion to be applied by a court in determining whether damage sustained by the plaintiff was too remote arose again for consideration. In this case furnace oil was spilt into Sydney Harbour from a ship, the "Wagon Mound", chartered by the defendants. About six hundred feet away from the "Wagon Mound" stood the plaintiff's wharf, where repairs to another ship, the "Corrimal", were in progress. The oil interrupted the plaintiff's operations by making the plaintiff's slipways unusable for a short time and also over a period of two days spread to molten metal which had fallen from the plaintiff's wharf on to floating cotton waste. The furnace oil on the water was ignited by the then smouldering cotton waste (which acted as a wick) and the resultant fire caused substantial damage to the wharf.

The plaintiff brought an action for nuisance and negligence in the Admiralty jurisdiction of the Supreme Court of New South Wales which came for hearing before Kinsella, J. His Honour dealt only with the negligence aspect of the case and in this connection found that the oil escaped through lack of reasonable care on the part of the defendant, that is, that the defendant was in breach of the duty which he owed to the plaintiff to use reasonable care and skill not to allow the oil to escape. As to the question of remoteness of damage, Kinsella, J. considered that, in the light of expert evidence given at the hearing, it was clear that the damage for which compensation was claimed, namely that caused by the fire, was not, and could not have been, reasonably foreseen by the defendant. Yet the fact that some damage was caused which was in His Honour's opinion foreseeable, that is, the fouling of the plaintiff's slipways due to the escape of the oil, meant that the defendant's careless act became "impressed with the legal quality of negligence". Failure to press a claim for the trivial damage to the slipways was held not to constitute an admission that such damage was not actionable. Since His Honour felt himself bound by the decision in *Re Polemis*, and since the fire was, in his opinion, a direct consequence of the defendant's breach of duty, he accordingly found the defendant liable.

The defendant's appeal from the decision of Kinsella, J. was dismissed by the Full Court of New South Wales. Manning, J. in delivering the judgment of the court mentioned[9] that he found "considerable difficulty . . . in appreciating the effect of the decision" in *Re Polemis*, and that he entertained doubts, firstly, as to whether from the point of view of logic the fire was a direct result of the spillage of oil, and, secondly, whether in a moral sense it was fair that the defendant should be required to make good the loss. Nevertheless His Honour considered that he was bound by the Court of Appeal decision.

An appeal was brought by the defendant direct to the Privy Council where the decision of the New South Wales Full Court was reversed. Their Lordships had little hesitation in disapproving the decision in *Re Polemis* which they said[10] could not claim "the status of a decision of such long standing that it should not be reviewed", due to the many qualifications imposed upon it over the years which had passed since its decision.[11] In its judgment the Privy Council makes

[9] (1959) 2 Lloyds List Law Reports 697.
[10] *Supra* n. 1 at 408.
[11] *Supra* n. 4.

it clear that the views of Pollock, C.B. in *Rigby* v. *Hewitt*[12] and *Greenland* v. *Chaplin*[13] and of Bovill, C.J. in *Sharp* v. *Powell*,[14] to the effect that the negligent tortfeasor is not liable for damage which no reasonable person would have anticipated, are to be preferred to the dubious interpretation by the Court of Appeal in *Re Polemis* of *dicta* in *Smith* v. *London & South Western Ry. Co.*,[15] *H.M.S. London*,[16] and *Weld Blundell* v. *Stephens*.[17]

The judgment in the present case at the very least endeavours to settle two inter-related but hitherto unsatisfactory points. Firstly, their Lordships leave no doubt that the proposition accepted by the Court of Appeal in *Re Polemis* to the effect that different criteria were applicable in the determination of culpability and compensation in the law of negligence should no longer be regarded as having a valid foundation.

> It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air . . . To hold B (the defendant) liable for consequences, however unforeseeable, of a careless act, if, but only if, he is at the same time liable for some other damage, however trivial, appears to be neither logical nor just . . . It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he had trespassed on Blackacre.[18]

This statement would appear effectively to dispose of any difficulties arising from Kinsella, J.'s finding at first instance that the damage caused by fire was within the concept of reasonable foreseeability since other reasonably foreseeable damage had been caused.[19]

Secondly, the judgment states in unequivocal terms that the test of directness of causation can no longer be applied in determining whether the consequences of a negligent act are too remote. Viscount Simonds in delivering the judgment of the Privy Council, expressed their Lordships' views on this aspect of the decision as follows:[20]

> It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial unforeseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct" . . . Why should that test (i.e. the foreseeability test) be rejected which since he (the negligent actor) is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind and a test (the "direct" consequence) be substituted which leads to nowhere but the never-ending and insoluble problems of causation.

In the light of this statement it may be interesting to speculate as to whether former advocates of the *Polemis* doctrine will persist in their views

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[12] (1850) 5 Exch. 240.
[13] (1850) 5 Exch. 243, 248, approved in *Cory & Son Ltd.* v. *France, Fenwick & Co. Ltd.* (1911) 1 K.B. 114, 122 *per* Vaughan Williams, L.J. and at 133 *per* Kennedy, L.J.
[14] (1872) L.R. 7 C.P. 253, 258.
[15] (1870) L.R. 6 C.P. 14, 21.
[16] (1914) P. 72.
[17] (1920) A.C. 956, 984 *per* Lord Sumner.
[18] *Supra* n. 1, at 414-415.
[19] *Cf. Thorogood* v. *Van Den Berghs & Jurgens Ltd.*, *supra* n. 8, where it was held that the plaintiff should recover on the ground that, if he had worn a necktie, a reasonable man could have foreseen that he might suffer some injury.
[20] *Supra* n. 1, at 413.

that the courts would have no less severe a task in determining whether a consequence is foreseeable than they had in applying the direct causation test,[21] and that the decision in *Re Polemis* was in accordance with earlier decisions. It is to be noted in the latter regard that in reasserting reasonable foreseeability as the basic principle underlying the tort of negligence, Viscount Simonds said that[22] "their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Alderson, B. in *Blyth* v. *Birmingham Waterworks Co.*".[23]

At the conclusion of the judgment their Lordships state [24] that none of their previous remarks in the case was "intended to reflect" on the "so-called rule of 'strict liability' exemplified in *Rylands* v. *Fletcher*[25] and the cases that have followed it." This comment may have been aimed at preventing hasty conclusions being drawn with regard to the following passage from the judgment:

> 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.[26]

A general remark, to the effect that to demand more of a person than a minimum standard of behaviour goes beyond the general requirements of English law, might be regarded by some people as an invitation to attack the rule in *Rylands* v. *Fletcher* itself. All that was intended, therefore, by their Lordships in their reference to *Rylands* v. *Fletcher*, may have been that primary liability may in some circumstances still not depend on the foreseeability test. This would mean that a plaintiff who relies on the rule in *Rylands* v. *Fletcher* can, as formerly, recover notwithstanding that the defendant proves that he took all precautions to prevent the escape, or that the defendant could not have foreseen the escape or the facts *leading up to* the escape. This would leave open to the defendant only the pleas which he might have raised before the *Morts Dock Case*, e.g. act of God, act of a stranger.[27] If this is the correct interpretation to be placed upon their Lordships' mention of strict liability, the problem still remains as to the applicability of remoteness criteria to damage *resulting from* the escape. In this regard there seem to be three main lines of argument.

1. *That the only recoverable items of damage are those within the hazard which led to the imposition of the strict liability.* Professor Goodhart has asserted[28] that strict liability torts are based on the principle of allocation of risk rather than of negligence, and that when the defendant creates a dangerous situation there is such a degree of foreseeability of harm that the escape is at his risk. Accordingly, since the risk which the defendant created was in regard to a foreseeable consequence, he should not be held liable for an unforeseeable con-

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[21] J. F. Wilson & C. J. Slade, "A Re-examination of Remoteness" (1952) 15 *Mod. L.R.* 458; Fleming James Jr., "Legal Cause" (1951) 60 *Yale L.J.* 761; W. L. Prosser, *supra* n. 3, at 17.

[22] *Supra* n. 1, at 416.

[23] (1856) 11 Exch. 781.

[24] *Supra* n. 1, at 416.

[25] (1868) L.R. 3 H.L. 330.

[26] *Supra* n. 1, at 413.

[27] *Cf.* the incongruous decision of the Privy Council in *Northwestern Utilities Ltd.* v. *London Guarantee & Accident Co.* (1936) A.C. 108 where gas escaping from the defendant's main caused a fire which destroyed the plaintiff's hotel. It was held that the plaintiff could not recover under the principle in *Rylands* v. *Fletcher*, since the defendant came within the exception thereto relating to acts of a stranger: but the plaintiff could recover in negligence for the defendant's failure to foresee and guard against a third party's wrongful act. Thus when an act of God or an act of a stranger is in question the doctrine in *Rylands* v. *Fletcher* may be narrower in scope than the principle of negligence.

[28] "The Third Man or *Novus Actus Interveniens*" (1951) 4 *Current Legal Problems* 177; "Liability and Compensation", (1960) 76 *L.Q.R.* 567.

sequence. The risk theory is wider than the direct causation test in that if the defendant's act comes "within the risk", he is liable notwithstanding that his act would not be regarded under the direct causation test as being the cause of the injury complained of. The theory seems to be generally accepted by American jurists on the ground of its greater predictability and certainty as opposed to the "proximate cause" formula which they describe as "mere rationalisation".[29] The American view links the risk theory with the principle of social insurance which regards the main function of the law of torts as that of assuring accident victims of compensation and of distributing the losses involved over society as a whole or some very large portion thereof.

English courts, however, are somewhat sceptical as to the value of these doctrines. Thus Scott, L.J. in *Read* v. *Lyons*[30] said:

> I know of no generic rule of English law which imposes on a person carrying on a dangerous activity whether it be positively comparatively or superlatively dangerous a liability to all and sundry who happen to be damaged in person chattels or land merely because the activity was dangerous. I believe that in every recorded case where the plaintiff has been able to recover without proof of negligence there will be found some definite ground of liability over and above that of "dangerous activity".

This view was reinforced by Devlin, J. in *Behrens* v. *Bertram Mills Circus Ltd.*[31] who considered that it could well be the case that "once the rule is made the reason for making it is dissolved and all that then matters are the terms of the rule."

It may be argued that the Privy Council's adoption of Professor Goodhart's analysis of the relevant case law leading to the overruling of *Re Polemis,* would imply that they also preferred his opinion as to the applicability of the risk theory to torts of strict liability. The better view, however, would appear to be that the risk theory can be discounted in this area of the law at least.

2. *That the defendant is responsible for all the natural and probable consequences of the escape.* The main proponent of this test seems to be Sir Frederick Pollock[32] who considered that liability for cattle trespass extended only to the natural and probable consequences thereof. In this context he cited four cases, none of which could be dogmatically asserted as binding authority for the proposition stated by him, since in all but *Theyer* v. *Purnell*[33] the remoteness rule for cattle trespass or for other torts of strict liability was not directly in point. In *Theyer* v. *Purnell* it was held that the plaintiff suing in cattle trespass could recover all such damages as were the natural consequence of the presence of the defendant's sheep on the plaintiff's land. This case, however, does not deal with the major question at issue, which is the recoverability or otherwise of losses which are direct but not foreseeable results of the defendant's wrongdoing. In *Theyer* v. *Purnell,* since the judges considered that the damage claimed was in fact foreseeable, this problem did not arise. In *Cox* v. *Burbidge*[34] the plaintiff, who sued in negligence, was kicked on a highway by the defendant's horse which was not proved to have been accustomed to kick. It was held that

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[29] W. L. Prosser, *Selected Topics of the Law of Torts* (1953) "The Principle of *Rylands* v. *Fletcher*" 135 at 189; H. H. Foster, "The Risk Theory and Proximate Cause—a Comparative Study" (1953) 32 *Nebraska L.R.* 72, 73-74, 101; Fleming James, Jr., "Accident Liability Reconsidered: The Impact of Liability Insurance" (1948) 57 *Yale L.J.* 549.

[30] (1945) K.B. 216, 230. Scott, L.J.'s attitude is criticised by J. Stone, *The Province and Function of Law* (1946) 456 n.

[31] (1957) 2 Q.B. 1 at 17. But Denning L.J. in *White* v. *White* (1950) P. 39 at 59 said that "recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom the risk should fall. Notable examples occur . . . in the escape of dangerous things".

[32] *Law of Torts* (14 ed. 1939) 396.

[33] (1918) 2 K.B. 333.

[34] (1863) 13 C.B. (N.S.) 430.

the plaintiff could not recover because even if negligence had been proved, the owner of the animal could be liable only for such damage as was likely to arise from the animal and the owner knew this. Williams, J. said[35] that in the absence of evidence of *scienter*, the owner would not be liable beyond the consequences of ordinary trespass. The decision seems to confuse the *scienter* principle with the "natural and probable" rule of remoteness of damage, when these two notions should be kept quite distinct, as the *scienter* requirement is an essential ingredient of the tortious act itself,[36] in cases where a plaintiff is suing in respect of the defendant's strict liability for keeping the animal. Dr. Glanville Williams has observed[37] that all that the rule in *Cox* v. *Burbidge* may have been intended to do was to separate the two propositions that "(i) cattle trespass lies for wrongs of depasturing and trampling down . . . and (ii) in other cases the action of scienter has to be used." If this is so, it is hard to see how *Cox* v. *Burbidge* can support Pollock's argument. The other cases he cites, *White* v. *Steadman*[38] and *Hadwell* v. *Righton*,[39] are both negligence cases and also have little direct bearing on the point in question. Seemingly opposed to Pollock's view are Professors Hart and Honoré,[40] who consider that although references to this test are to be found in the context of strict liability, they are "apparently out of place."

3. *That the defendant is responsible for all the direct consequences of the act complained of.* C. J. Slade and J. F. Wilson, [41] who considered that the decision in *Re Polemis* was well founded in law, seemed to think that the direct causation test would apply to torts of strict liability, since it was "well nigh impossible" to apply the foreseeability test to such torts. But they also observed that it was "inconceivable that the rule as to remoteness varies from tort to tort and we may assume that the true test must be capable of covering them all". In view of the decision in the *Morts Dock Case*, it is impossible to predict which of these two now conflicting attitudes will be preferred by those who previously subscribed to the line of reasoning adopted by these writers. *Dicta* in *Baker* v. *Snell*,[42] *Read* v. *Lyons*[43] and *Behrens* v. *Bertram Mills Circus Ltd.*[44] suggested that damages are recoverable for "all damage" consequent upon the commission of a tort of strict liability. Moreover, in their textbooks on the law of tort, both Salmond[45] and Street,[46] having recognised that the direct causation test applied to other torts, were content to say that "the ordinary rule" as to remoteness of damage applied to torts of strict liability. It may be arguable therefore that the express reference by the Privy Council to torts of strict liability as not having been reflected upon by the "alteration" of the law effected by the *Morts Dock Case*, would imply that the direct causation test had hitherto applied to such torts and should accordingly be deemed to continue to apply thereto. If this be the case, adherents of the foreseeability principle may consider that it would have been wiser for the Privy Council not to have adverted to this aspect of the law of

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[35] *Id.* at 439.
[36] Glanville Williams, *Liability for Animals* (1939) 163.
[37] *Id.* at 161.
[38] (1913) 3 K.B. 340.
[39] (1907) 2 K.B. 345.
[40] *Causation in the Law* (1959) 230.
[41] "A Re-examination of Remoteness" (1952) 15 *Mod. L.R.* 458, 469.
[42] (1908) 2 K.B. 352 and (on appeal) *id.* at 825.
[43] (1947) A.C. 156, 171 *per* Lord Macmillan.
[44] (1957) 2 Q.B. 1, 19. J. G. Fleming, *Law of Torts* (2 ed. 1960) 280, appears to proceed upon the assumption that the causation test is so applicable, but expresses some doubt (314) as to whether strict liability resting on keepers of animals *ferae naturae* extends to any injuries they may cause or only to those injuries due to their vicious propensity; he explains the finding in *Behrens* v. *Bertram Mills Circus Ltd.* (that liability was not limited to the latter) on the ground that the harm there caused was "broadly within the forseeable risks of the situation".
[45] *Salmond on Torts* (12 ed. 1957) at 604.
[46] *The Law of Torts* (1955) at 277.

torts at all on the ground that the express refusal of the Privy Council to commit themselves on this point constitutes an indirect *dictum* to the effect that the direct causation test remains applicable to such torts.[47]

It would seem that no definite conclusion can be reached from prior cases or from the ambiguous statement in the *Morts Dock Case* as to whether the foreseeability test or the direct consequence test will now be applied to injuries resulting from torts of strict liability. To avoid further inconsistencies in the law, future courts may prefer to adopt the contention of Sir Frederick Pollock, which, although it does not seem to be well substantiated by the authorities relied on by that writer, may nevertheless be regarded as highly persuasive in view of the influence which he seems to have had on the Privy Council in the present case.

The judgment of the Privy Council in the *Morts Dock Case*, in replacing the foreseeability principle upon its pedestal as the major concept in the tort of negligence, must be regarded as a landmark in the law of torts, despite the restriction of the principle on which the case was decided to actions in negligence. One may only express the hope that a "loose interpretation as to the degree of definiteness in the foreseeability required", as predicted by J. A. McLaughlin, will not occur so as to result in a "transcendent elasticity in the conception of foreseeability which really leaves the court without any guide but its conscience and leaves the bar with none."[48]

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PROBLEMS OF CONSTITUTIONAL AMENDMENT IN NEW SOUTH WALES

CLAYTON v. *HEFFRON*

I

In November, 1959, the New South Wales Government introduced in the Legislative Assembly a Bill for the abolition of the State's Upper House, the Legislative Council, a body which has been the centre of some of the liveliest controversies in the political and constitutional history of the State. The Bill was twice passed by the Assembly (in December, 1959, and in March, 1960) but each time was returned by the Council with a message to the effect that the Upper House had resolved "as a matter of precedence and privilege" that the Bill be sent back to the Assembly without consideration since it had not originated in the Council itself.[2] Despite this refusal on the part of the Council to consider the Bill, the Government was determined to press for its adoption as law.

According to s.7A of the New South Wales Constitution Act, 1902, a Bill for the abolition of the Legislative Council requires the approval of a majority

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[47] But Professor W. L. Morison, *supra* n. 3, at 320, considers that the criticisms which the Privy Council advanced as to the undesirability of problems of closeness of causation obtruding themselves into the law of torts at all would apply to torts of strict liability.

[48] J. A. McLaughlin (1925-26) 39 *Harvard L.R.* 149, 191.

[1] (1960) 34 A.L.J.R. 378 (H.C.); (1960) N.S.W.R. 592 (S.C.).

[2] The message stated that the Legislative Council, "in accordance with long established precedent, practice and procedure, and for that reason, declines to take into consideration a bill which affects those sections of the Constitution Act providing for the constitution of the Legislative Council unless such Bill shall have originated in that House and returns the Bill without deliberation thereon, and requests that the Legislative Assembly deem this reason sufficient". For a full account of the facts see (1960) N.S.W.R. at 603-05.