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The Wagon Mound in Canadian Courts

R. D. GIBSON*

The Judicial Committee of the Privy Council, by its decision in *The Wagon Mound*,¹ has purported to substitute a new standard of remoteness of damage in tort for the controversial standard laid down in *Re Polemis*.² Strictly speaking, the decision affects only Australian law, but it has attracted a great deal of attention all over the common law world.³ In England, the case has been approved in several *dicta*,⁴ and in Scotland it has been judicially noticed without

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¹*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* [1961] A.C. 388; 2 W.L.R. 126; 1 All E.R. 404.

²In *Re Polemis and Furness, Withy & Co.* [1921] 3 K.B. 560.

³The literature on the case is already voluminous. I have found the following selection of articles particularly useful: A. L. Goodhart, *Obituary: Re Polemis*, (1961) 77 L.Q.R. 175, and *The Wagon Mound Followed by the Lord Chief Justice*, (1962) 78 L.Q.R. 160; Glanville Williams, *The Risk Principle*, (1961) 77 L.Q.R. 179; R. W. M. Dias, *Negligence-Remoteness-The Polemis Rule*, (1961) C.L.J. 23, and *Negligence-Remoteness-The Wagon Mound Rule*, (1962) C.L.C. 20; P. S. James, *Polemis: The Serpent in Eden*, (1961) J.B.L. 252, and *Polemis: The Scotch'd Snake*, (1962) J.B.L. 147; Douglas Payne, *Foresight and Remoteness of Damage in Negligence*, (1962) 25 M.L.R. 1; Leon Green, *Foreseeability in Negligence Law*, (1961) 61 Col. L.R. 1401, and *The Causal Relation Issue in Negligence Law*, (1962) 60 Mich. L.R. 543; G. H. L. Fridman, *Negligence and Remoteness*, (1961) 111 L.J. 609 and 624; A. M. Honoré, *Torts-Negligence-Foreseeable Damage*, (1961) 39 Can. Bar Rev. 267; J. G. Fleming, *The Passing of Polemis*, (1961) 39 Can. Bar Rev. 489.

⁴The cases in which they appear are discussed at a later stage of this article. Professor Goodhart suggested, in *Obituary: Re Polemis, supra*, footnote 3, that the Court of Appeal, or even a court of first instance in England, would be justified in refusing to follow *Re Polemis* in spite of its re-affirmation by the Court of Appeal in *Thurogood v. Van Den Berghs & Jurgens Ltd.* [1951] 2 K.B. 537; 1 All E.R. 682, because of the confused state of the authorities. Lord Parker, C.J., adopted this suggestion in *Smith v. Leech Brain & Co. Ltd.*, *infra*, footnote 73, where he said, *obiter dictum*, ". . . I would follow, sitting as a trial judge, the decision in the *Wagon Mound* case; or rather, more accurately, I would treat myself, in the light of the arguments in that case, able to follow other decisions of the Court of Appeal prior to the *Polemis* case itself . . . However, as I have said, that does not strictly arise in this case." See *infra*, p. 429.

express disapproval.⁵ In Canada, there have been a number of *dicta* expressing, not only agreement with the *Wagon Mound* principle, but also the opinion that Canadian courts are free to adopt it in preference to the *Polemis* rule.⁶ The object of this article is to examine the validity of these *dicta*.

Re Polemis was a 1921 decision of the English Court of Appeal. It concerned liability for the destruction of a ship by a fire which took place when a wooden plank, negligently dropped into the hold, somehow produced a spark which ignited accumulated gasoline vapour. One of the defences raised was that the fire was too remote a consequence of the negligent act to be the basis of liability, since it could not reasonably have been foreseen that a falling plank could cause a spark. The Court of Appeal held that the proper standard for determining remoteness of damage in negligence is not "reasonable foresight" but "directness." As Scrutton, L.J., put it:

To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act . . .⁷

Since it had been found as a fact that *some damage* to the ship (a dented hull, perhaps) could reasonably have been foreseen, and since the Court of Appeal felt that the fire was a direct consequence of the dropping of the plank, the "remoteness" defence was rejected, and the defendant was held liable for the destruction of the ship.

The Wagon Mound was a 1961 decision of the Judicial Committee of the Privy Council, on appeal from the Supreme Court of New South Wales. The action arose from an unusual accident which took place in Sidney harbour in 1951. While the "Wagon Mound" was taking on fuel oil at a wharf in the harbour, its crew negligently allowed a large quantity of oil to spill into the water. This oil spread to the vicinity of the plaintiff's wharf about 200 yards away, where it caused some slight damage by fouling the plaintiff's slipways. Two and a half days later, sparks from welding operations on the plaintiff's wharf ignited a piece of waste which was floating

⁵ *Oman v. McIntyre* [1962] S.L.T. 168, and the cases referred to therein. See *infra*, p. 431.

⁶ See, for example, the remarks of Miller, C.J.M., in *Munroe Equipment Sales Ltd. v. Canadian Forest Products Ltd.*, (1961) 29 D.L.R. (2nd) 730, at p. 739, and Ferguson, J., in *A. R. Williams Machinery Co. Ltd., v. Muttart Builders Supply (Winnipeg) Limited* (1961) 35 W.W.R. 132, at p. 137. The writer commented at more length on the latter case in *Remoteness of Damage in Tort*, (1962) 34 Man. B.N. 33. Davey, J.A., displayed some doubt about the possibility of applying *The Wagon Mound* without the sanction of the Supreme Court of Canada in *Munshaw Colour Service Limited v. Vancouver City* (1961) 35 W.W.R. 696, at p. 702 [affirmed without reference to this problem in (1961) 38 W.W.R. 335].

⁷ [1921] 3 K.B. 577.

on the oil beneath the wharf. This burning waste acted as a "wick" to ignite the oil which, according to expert evidence, could not have been ignited directly by the falling sparks. The resulting fire caused considerable damage to the plaintiff's wharf and to a nearby ship. The Supreme Court of New South Wales, finding that the fouling of the slipways could reasonably have been foreseen, but that the fire could not, held for the plaintiff. The court stated that the defence of remoteness was ruled out by *Re Polemis*, although it made it quite clear that it was not happy with the decision which it felt precedent forced it to make. Manning, J. said:

I can only express the hope that, if not in this case, then in some other case in the near future, the subject will be pronounced upon by the House of Lords or the Privy Council . . .⁸

The Privy Council, speaking through Viscount Simonds, responded to what it called "this cri de coeur"⁹ by overruling *Re Polemis* and allowing the defendant's appeal. The true test for remoteness of damage in negligence, said the Privy Council, is the same as that which *Hadley v. Baxendale*¹⁰ established long ago as the test for contract: reasonable foreseeability of the particular injury suffered. Since the fire was an unforeseeable, and therefore remote, consequence of the spilling of the oil, the defendant could not, in the Privy Council's opinion, be held liable for it.

It is the writer's thesis that Canadian courts should remain loyal to the principle of *Re Polemis*, and refuse to follow *The Wagon Mound*. It is submitted that this conclusion is dictated both by precedent and by considerations of policy.

PRECEDENT

The authorities on which the Court of Appeal relied in *Re Polemis* were, as Viscount Simonds pointed out in *The Wagon Mound*, far from conclusive.

The strongest was probably *Smith v. The London & South Western Railway Co.*¹¹ This was the case in which the plaintiff's cottage, which was a considerable distance from the defendant's railway line, was burned when sparks from a locomotive fell on heaps of dry grass along the railway, causing a fire which spread to a hedge, then to a stubble field, and eventually across a road to the cottage. Most of the seven Exchequer Chamber judges who heard the case seemed to feel that although some damage by fire was foreseeable, the burning of the plaintiff's cottage was not. Nevertheless, they were unanimous in holding the railway company liable for the destruction of the cottage. Three judges specifically stated that once an act is negligent there is liability for all consequent loss, whether foreseeable or not. Kelly, C.B., stated:

⁸ Quoted in [1961] A.C. at pp. 414-5.

⁹ *Ibid.*

¹⁰ (1854) 9 Exch. 341.

¹¹ (1870) L.R. 6 C.P. 14.

It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it.¹²

Similar statements were made by Channel, B.,¹³ and Blackburn, J.¹⁴ The other judges did not specifically refer to the problem, but Martin, B., with whom Bramwell, B., concurred, said he was "of the same opinion" as Kelly, C.B. Piggott, B., said he was "of the same opinion" as Blackburn, J., although he seems to have felt that the destruction of the cottage was reasonably foreseeable. Lush, J., expressed no opinion on the matter.

Viscount Simonds, in *The Wagon Mound*,¹⁵ pointed out four facts which he felt undermined the strength of the *Smith* case. First, not one of the judges cited authority to support the principle they enunciated. Second, the problem facing the court involved a greater *extent* of damage than was foreseeable; not, as in *Re Polemis*, a totally different *kind* of damage than could have been anticipated.¹⁶ Third, he said that not one judge saw fit to mention any limitation (such as the "directness" requirement referred to in *Re Polemis*) to the "sweeping proposition" that a negligent person is liable for all the consequences of his wrongful act. This is not entirely correct. In the passage quoted above, Kelly, C.B. referred to "natural consequences." The term "natural" is often used as a synonym for "direct" in this context, as Viscount Simonds himself acknowledged by using the phrase ". . . 'direct' or 'natural' consequence . . ." at a later point¹⁷ in his opinion. Viscount Simonds' fourth point, one which is related to the first, was that, ". . . the law of negligence as an independent tort was then of recent growth and . . . its implications had not been fully examined."¹⁸ A fifth point, which Viscount Simonds did not mention, is that the report of the case does not indicate who owned the stubble field. If it were not owned by the plaintiff, he would have been an "unforeseeable plaintiff", and the case would not be compatible with *Bourhill v. Young*.¹⁹

Neither of the other principal cases cited in *Re Polemis* can be regarded as overwhelming authority, either. In *H.M.S. London*²⁰ the President of the Probate Division, purporting to apply the state-

¹² *Ibid.*, p. 20.

¹³ *Ibid.*, p. 21.

¹⁴ *Ibid.*

¹⁵ [1961] A.C. 416.

¹⁶ Is it not possible, however, for a difference as great as that between the burning of a stubble field (which could conceivably be to the advantage of the landowner) and the burning of a house to be regarded as one of substance or kind? See *infra*, p. 436.

¹⁷ [1961] A.C. 426.

¹⁸ *Ibid.*, p. 416.

¹⁹ [1943] A. C. 92. Professor Green criticized this argument in "*Foreseeability in Negligence Law*, *supra*, footnote 3. His criticism is based on his own variation of the "risk theory." See *infra*, footnote 93.

²⁰ [1914] P. 72.

ments I have referred to from the *Smith* case, held that the owners of a ship which negligently collided with another at sea were responsible not only for the cost of repairing the other ship and the loss of profits for the time during which the ship could reasonably be expected to be out of service for repairs, but also for the loss of profits occasioned by the repairs being delayed by a strike of workmen. However, the "directness" requirement, and the decision in *Owners of Liesbosch Dredger v. Owners of Edison*²¹ might cause even some supporters of *Re Polemis* to wonder whether this case was correctly decided. And a further shadow of doubt is cast on the case by the strange statement that:

It is settled law that the rule as to remoteness of damage is the same whether the damages are claimed in actions of contract or of tort. . . .²²

In *Weld-Blundell v. Stephens*²³ the House of Lords held, in a three to two majority decision, that a person who, in breach of a contractual duty of secrecy owed to the plaintiff, carelessly disclosed to a third party a letter in which the plaintiff defamed the third party, with the result that the third party successfully sued the plaintiff for libel, was not liable to the plaintiff, since the libel action was not the direct result of the disclosure. Lord Sumner, who agreed with the majority, made the following statement, for which he cited the *Smith* case as authority:

What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation.²⁴

This comment was, however, purely *obiter dictum*, since the case involved contractual, rather than tortious obligations. And to the extent that the *dictum* asserts that a defendant is not liable for the indirect, though foreseeable consequences of his wrongful act, it is wrong.²⁵

²¹ [1933] A.C. 449.

²² [1914] P. 77. *Hadley v. Baxendale*, *supra*, footnote 10, was apparently overlooked.

²³ [1920] A.C. 956.

²⁴ *Ibid.*, p. 984.

²⁵ It is really inaccurate to speak of the "directness" test of remoteness, since directness has never been the sole criterion. The foreseeable consequences of the defendant's wrongful conduct have always been actionable, even if indirect. *Haynes v. Harwood*, [1935] 1 K.B. 146, is a good illustration of this. Greer, L.J., said at p. 156 of that case:

"If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. . . ."

Directness has, therefore, always been relevant only with respect to unforeseeable consequences. It is true that *Re Polemis* contains language which could be interpreted as meaning that directness is the sole test, and Viscount Simonds indicated that he so interpreted the case when he said:

". . . it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done. . . ." ([1961] A.C. 426).

If this is what the Court of Appeal intended in *Re Polemis*, however, it is clearly *obiter dictum*, and inconsistent with cases like *Haynes v. Harwood*, in which the point has actually arisen and been settled.

It must be admitted, then, that the authorities relied upon by the Court of Appeal in *Re Polemis* were weak. But were those which Viscount Simonds cited in *The Wagon Mound* much stronger? I submit that they were not.

In support of his attack on *Re Polemis*, Viscount Simonds referred to cases decided both before and after that decision. Of those which preceded *Re Polemis*, the key cases seem to be the twin decisions of *Rigby v. Hewitt*²⁶ and *Greenland v. Chaplin*,²⁷ delivered on the same day by Pollock, C.B. Both cases contain *dicta* expressing cautious approval of the "reasonable foresight" test of remoteness:

I am . . . disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances from such misconduct. . . .²⁸

. . . I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur.²⁹

Viscount Simonds admitted that these statements were pure *obiter dicta*, since the problem of remoteness of damage did not arise in either case, and that Pollock, C.B. was merely expressing his own views, not those of the majority of the court.³⁰ In addition, two of the same objections could be made to the cases that he made with respect to *Smith v. The London & South Western Railway Co.*: age (these cases were decided twenty years before the *Smith* case) and lack of supporting authorities. Much more important in my opinion, however, is the fact that the language used by Pollock C.B. makes it very clear that he was not himself convinced that reasonable foresight is necessarily the proper test for remoteness. All that he seemed sure of was that *some* consequences would be too remote, and with this no one would disagree. It is true that he then expressed tentative approval of the "reasonable foresight" test, but his hesitation in doing so is obvious from his language. No other test for remoteness

²⁶ (1850) 5 Exch. 240.

²⁷ *Ibid.*, p. 243.

²⁸ *Rigby v. Hewitt*, at p. 243.

²⁹ *Greenland v. Chaplin*, at p. 248. There is some doubt about whether these passages accurately report what Pollock, C.B. said. The *Law Journal* report of the case omits the words, "of his negligence" from the first passage (19 L.J. (Ex.) 292) and "who is guilty of negligence" from the second passage (*Ibid.*, p. 295).

³⁰ He did not mention that the majority of the court was, in fact, *opposed* to these views. See the comment to that effect in (1850) 5 Exch. 243.

had been suggested to him. His chief concern was, it seems to me, simply to point out that there are *some* consequences of wrongful conduct for which the defendant cannot be made liable.

Of the five other pre-*Polemis* cases relied on by Viscount Simonds, three were, I believe, based on these *dicta* of Pollock C.B. In two of the cases, *Cory & Son, Ltd. v. France, Fenwick & Co., Ltd.*³¹ and *Clark v. Chambers*³² the court expressed approval of the Chief Baron's words, but since in both cases the consequence complained of by the plaintiff was found to be foreseeable, the question of liability for unforeseeable consequences was not relevant, and the statements of approval were, like the remarks they approved, pure *obiter dicta*. In the third case, *Sharp v. Powell*,³³ the court did not expressly refer to the Pollock decisions (or to any other cases, for that matter) but it is likely that they influenced the court, since they were cited in argument. This case (to which only passing reference was made in *Re Polemis*) seems to me to be the strongest authority offered by those who support the "reasonable foresight" test of remoteness. It involved the question of whether a man who washed his van in a public street contrary to statute was liable for injuries to the plaintiff's horse, incurred when it slipped on ice formed by the spilled water, which would have run safely away down a sewer had it not been unforeseeably plugged with ice. The three judges of the Court of Common Pleas who tried the action³⁴ were unanimous in dismissing it on the ground that:

The damage in question, not being one which the defendant could fairly be expected to anticipate as likely to ensue from his act, is . . . too remote.³⁵

This cannot, like most of the judicial pronouncements cited by Viscount Simonds, be disposed of by the label "*obiter dictum*"; it is undeniably the *ratio decidendi* of all three opinions. But its meaning is not entirely clear. There are some, for example, who have suggested that the court felt the breach of this particular statute could give rise to civil liability only if the defendant were negligent in having disobeyed it, and that the court was simply holding that since *no harm* could reasonably have been foreseen, there was no duty owed to the plaintiff, and could therefore be no negligence.³⁶ I don't think this is a correct interpretation. The judges referred repeatedly to the defendant's "wrongful" conduct, indicating, I think, that they were satisfied on the question of "culpability", and were directing their minds to "compensation." However, since the finding of culpability was not based on negligence, but on either a breach of statutory duty

³¹ [1911] 1 K.B. 114.

³² (1878) 3 Q.B.D. 327.

³³ (1872) L.R. 7 C.P. 253.

³⁴ Bovill, C.J., Grove, J., and Keating, J.

³⁵ *Per* Keating, J., at p. 261.

³⁶ See, for example, the Payne article (*supra*, footnote 3, at p. 11), the Weir article (*Ibid.*, at p. 623), and the comments of Lord Sumner in *Weld-Blundell v. Stephens* [1920] A.C. 984.

or public nuisance, the case is not strictly binding authority with respect to remoteness of damage in negligence actions.

The two cases which cannot be traced back to the Pollock *dicta* shed very little additional light. In *Lynch v. Knight*,³⁷ Lord Wensleydale commented favourably on the "reasonable foresight" test in connection with a woman's claim for loss of her husband's consortium due to slanderous remarks about her made to the husband by the defendant. Lord Wensleydale's comment was *obiter dictum* for two reasons: the action failed primarily because it was held that the action for loss of consortium is not available to a wife, and in any event, the court found that the husband's leaving the wife as a result of the slander was foreseeable. In *Hadley v. Baxendale*³⁸ "reasonable foresight" was established as the standard for remoteness of damage in contract. Viscount Simonds argued, rather ingeniously, that the case was also an implied authority on remoteness of damage in tort. The plaintiff had made an alternative claim based on tort, and Viscount Simonds asserted that the court's failure to discuss the tort claim after dismissing the contract claim for remoteness indicates that the contract and tort tests are the same. I submit, however, that a more likely explanation of the court's silence with respect to the tort question, and one which is borne out both by the facts of the case and by the language in which the judgment was couched, is that the court felt that there was no justification for a claim in tort; the problem was strictly one of contract.

Of the post-*Polemias* cases cited by Viscount Simonds the most important are three well-known House of Lords decisions: *Glasgow Corporation v. Muir*,³⁹ *Bourhill v. Young*,⁴⁰ and *Woods v. Duncan*.⁴¹ Not one of these cases involved the problem of remoteness of damage. Each was decided either on the question of whether there was foreseeability of *any* harm to the plaintiff, so as to establish a duty of care, or on the question of whether the defendant had acted reasonably in the circumstances. It is true that Lord Russell of Killowen stated in *Bourhill v. Young* that reasonable foreseeability is relevant to compensation as well as to culpability,⁴² but this was clearly *obiter dictum*, since the decision was based on lack of a duty of care. It is also true that the rule in *Bourhill v. Young* is logically incompatible with that in *Re Polemis*, but the cases are clearly reconcilable in law,⁴³ which seldom allows itself to be intimidated by logic.⁴⁴

³⁷ (1861) 9 H.L.C. 577.

³⁸ *Supra*, footnote 10.

³⁹ [1943] A.C. 448.

⁴⁰ [1943] A.C. 92.

⁴¹ [1946] A.C. 401.

⁴² [1943] A.C. 101.

⁴³ *Thurogood v. Van Den Berghs & Jurgens Ltd.*, *supra*, footnote 4.

⁴⁴ I must frankly confess that, for the same reasons I support *Re Polemis*; I believe that the *Bourhill* decision was wrong, and that its effect should be limited by every device possible, however illogical. Such judicial devices have, of course, a long and honourable history. See, for example, *Best v. Fox* [1952] A.C. 716.

I think it can fairly be concluded that the English precedents on remoteness of damage in negligence were in a chaotic state prior to the *Wagon Mound* decision. Neither "directness" nor "reasonable foresight" could claim impeccable credentials. The Canadian authorities, however, though perhaps not decisive, are much less confused. The "directness" test has been applied in this country by trial courts, by provincial courts of appeal, and by the Supreme Court of Canada, while the "reasonable foresight" test has scarcely ever been referred to. I intend to deal only with the Supreme Court decisions on the point.⁴⁵

The Supreme Court seems to have accepted the "directness" doctrine as long ago as 1895, when, in *The Toronto Railway Company v. Grinstead*,⁴⁶ King, J. said for the majority of the court:

When one, whether in performance of a contract or not, takes charge of the person or property of another, there arises a duty of reasonable care. . . . And if by his own act he creates circumstances of danger and subjects the person or property to risk without exercising reasonable care to guard against injury or damage, he is responsible for such injury and damage to the person or property as arises as the direct or natural and probable consequence of the wrongful act.

and awarded damages to a man who had become ill as a result of exposure to very cold weather after being wrongfully ejected from a street-car by an employee of the defendant. King, J. seems to have held that the illness was the "direct" result of the wrongful act, but not the "natural and probable" result.⁴⁷ However, the fact that he later reverted to the concept of "natural and probable" result,⁴⁸ together with the fact that the case involved contractual obligations, casts some doubt on the strength of its authority.

Probably the strongest Canadian authority in support of the "directness" test is *Bartlett v. Winnipeg Electric Railway Company and Canadian Northern Railway Company*,⁴⁹ decided two years before *Re Polemis*. The action arose from a tragic accident which occurred at a level railway crossing in the city of Winnipeg. A street car, proceeding along Portage Avenue, came to a halt a few feet before crossing the C.N.R. tracks. Street railway regulations required the motor-men of all street cars to stop at railway crossings, and not to proceed until the conductor gave the signal to go ahead. The conductor of this street car walked ahead to see whether the track was clear. It was not; a C.N.R. freight train was approaching slowly, about 75 feet from the crossing. At this point, the motor-man, who also saw the train, decided not to wait for the conductor's signal, but to cross the tracks in front of the train. As the street car began

⁴⁵ For the treatment of the problem by trial courts and courts of appeal, see the exhaustive survey of cases in *Duce v. Rourke* (1951) 1 W.W.R. (N.S.) 305. See also *Honan v. McLean* (1953) 8 W.W.R. (N.S.) 523, and *Terminal Warehouses Ltd. v. J. H. Lock & Sons Ltd.* (1958) 12 D.L.R. (2d) 12.

⁴⁶ (1895) 24 S.C.R. 570, at pp. 573-4.

⁴⁷ *Ibid.*, p. 574.

⁴⁸ *Ibid.*, p. 575.

⁴⁹ (1919) 59 S.C.R. 352.

to move, the plaintiff's wife, who was a passenger, ran to the rear platform of the car, apparently fearing a collision. When the train was about 50 feet from the crossing, a brakeman riding on the front of it shouted to the motor-man to hurry up and get over the tracks. At this, the motor-man applied extra power, and the street car jerked ahead, crossing safely in front of the train. The plaintiff's wife, however, was either thrown from the rear platform by the jerking motion of the car, or jumped in panic, and fell onto the tracks, where she was run over and killed by the oncoming train. The action was settled, so far as the plaintiff's claim was concerned, but it proceeded to trial and appeal on the issue of whether the C.N.R. was jointly liable with the street railway company, or whether, as the Manitoba Court of Appeal held,⁵⁰ the latter company was solely responsible. The Supreme Court of Canada held, by a majority of three judges to two, that the C.N.R. was jointly liable. Duff, J., one of the majority, found that the acts of the C.N.R. employees were negligent, and then raised the problem of whether the death of the plaintiff's wife was nevertheless too remote a consequence of that act. He dealt with the problem as follows:

Are the damages too remote? Was the running down of Mrs. Bartlett in the circumstances a consequence for which in law the respondent company was responsible? The rule as regards remoteness of damage was recently discussed by the President of the Probate and Divorce Division in *H.M.S. London* (1914) P. 72, and, with respect, I concur in the view there expressed that where the harm in question is the direct and immediate consequence of the negligent act then it is within the ambit of liability. Here the injury complained of was the direct and immediate consequence of the failure to stop the train.

Moreover, it is sufficient in this case to say that the railway company being under an obligation to take precautions to obviate the risk of harming the passengers in the electric car through the instrumentality of its train moving across the car track and the wrongful neglect of this duty having resulted directly in the very harm it was the duty of the company to avoid, remoteness of damage is out of the question. . . .

Where there is a duty to take precautions to obviate a given risk the wrongdoer who fails in this duty cannot avoid responsibility for the very consequences it was his duty to provide against by suggesting that the damages are too remote, because the particular manner in which those consequences came to pass was unusual and not reasonably foreseeable.⁵¹

Anglin, J., made clear his rejection of the "reasonable foresight" test of remoteness by quoting with approval the following passage from *Smith v. The London & South Western Railway Company*:

. . . where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . ; but when it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.⁵²

⁵⁰ (1918) 43 D.L.R. 326.

⁵¹ (1919) 59 S.C.R., at p. 367.

⁵² (1870) L.R. 6 C.P. 14, at p. 21, quoted in the *Bartlett* case at p. 369.

The third majority judge, Mignault, J., did not deal with the problem of remoteness; he restricted his discussion to the problem of whether the acts of the C.N.R. employees were negligent. Both dissenting judges, Idington, J., and Brodeur, J., based their opinions purely on what they felt to be the lack of negligence attributable to the C.N.R.; neither dealt with remoteness of damage. At one time the writer held the opinion that this case compelled Canadian courts to apply the "directness" test.⁵³ I now believe, however, that it can be reconciled with the "reasonable foresight" test by adopting a restricted interpretation of "foresight."⁵⁴ Nevertheless, the case constitutes an acceptance by the Supreme Court (or at least by a "majority" thereof) of the principal authorities on which the decision in *Re Polemis* was based two years later.

Subsequent decisions of the Supreme Court display a similar tendency to favour the "directness" approach. In *Regent Taxi & Transport Co. v. La Congregation des Petits Freres de Marie*,⁵⁵ Anglin, C.J.C., expressed approval of the *Polemis* decision, although the case was reversed on other grounds by the Privy Council,⁵⁶ and in any event it concerned Quebec civil law. In *The King v. Canadian Pacific Railway Company*⁵⁷ Rand, J., applied a statement from an earlier case *Lumley v. Gye*^{57a} that the law will redress only ". . . the proximate and direct consequences of wrongful acts . . .", but other members of the court reached the same conclusion for different reasons. In *Booth et al. v. St. Catharines*⁵⁸ Estey, J., purported to apply the *Polemis* test, but it probably was not applicable, since the facts were such that it seems likely that the defendant's employees could reasonably have been expected to foresee the actual injuries which occurred. In *Harding v. Edwards and Tatisich*⁵⁹ the Supreme Court of Canada unanimously affirmed a decision of the Appellate Division of the Ontario Supreme Court⁶⁰ in which *Re*

⁵³ (1962) 34 Man. B.N., at p. 37 ff.

⁵⁴ See *infra*, p. 429 ff.

⁵⁵ [1929] S.C.R. 650, at pp. 660-1. The plaintiff was a religious organization which claimed to have suffered loss as a result of one of its members being negligently injured by the defendant.

⁵⁶ [1932] A.C. 295.

⁵⁷ [1947] S.C.R. 185, at p. 196. The defendant's employees left a gate open, so that it projected over the plaintiff's railway tracks, and caused injury to an employee of the plaintiff who was riding on the front of a train. An action for recovery of compensation which the plaintiff was required by statute to pay to its injured employee failed on the ground of remoteness.

^{57a} (1853), 22 L.J. (Q.B.) 463 at 479.

⁵⁸ [1948] S.C.R. 564, at pp. 583-4. At a "V.-J. Day" celebration in a public park a flag tower collapsed from the weight of several boys who had climbed onto it, and injured several persons who were standing beneath it. The city, whose employees had made some boys get off the tower earlier in the day, was held liable for not exercising greater care in keeping them away.

⁵⁹ [1931] S.C.R. 167. When the defendant's automobile turned out of a heavy stream of traffic in a passing manoeuvre, an oncoming car was forced to turn onto the shoulder of the road, where it went out of control, crossed the road, and collided with the car of the plaintiff, who had been driving behind the defendant. The plaintiff's action succeeded.

⁶⁰ [1929] 4 D.L.R. 598.

Polemis was applied, but unfortunately the Supreme Court of Canada did not give written reasons for its decision.

Although each of these cases contains some feature which prevents it from being regarded as a conclusive authority in itself, I submit that their total effect, coupled with the lack of any Supreme Court approval of the "reasonable foresight" test of remoteness, amounts to extremely weighty authority in favour of the "directness" test.

POLICY

It may be asked why, with the English authorities in so inconclusive a state, the Privy Council felt compelled to overrule the long standing decision of *Re Polemis*. A clue to the answer can, I believe, be found in the language used by Viscount Simonds. Phrases like "palpable injustices",⁶¹ "current ideas of justice and morality,"⁶² and "the common conscience of mankind"⁶³ occur with sufficient frequency throughout his opinion to indicate that the Privy Council was really much more concerned with the adequacy or justice of the *Polemis* rule than with its legal pedigree. I am not suggesting that the Privy Council was wrong in paying heed to policy considerations. My criticism is that it erred in deciding that the "directness" test is less just than the "reasonable foresight" test.

Three principal complaints about the justice of the *Polemis* rule can be extracted from the *Wagon Mound* judgment: that the vagueness of the "directness" concept makes it impossible to apply in practice, that there is no good reason for the tort and contract remoteness tests to be different, and that the *Polemis* rule is unduly harsh to defendants. I propose to examine each of these objections in turn.

DIFFICULTY IN APPLYING POLEMIS RULE

Viscount Simonds' belief that the "directness" test is unworkable was very forcibly stated. He referred to:

. . . consequences which are not 'direct', whatever that may mean . . .⁶⁴
 . . . the never-ending and insoluble problems of causation,⁶⁵
 . . . scholastic theories of causation and their ugly and barely intelligible jargon,⁶⁶

and so on. In his opinion, if the "reasonable foresight" test were substituted;

" *it is hoped that the law will be thereby simplified.*"⁶⁷
 I disagree both that "directness" is unworkable, and that "reasonable foresight" would be easier to apply.

⁶¹ [1961] A.C. 422.

⁶² *Ibid.*, p. 422.

⁶³ *Ibid.*, p. 423.

⁶⁴ *Ibid.*, p. 416.

⁶⁵ *Ibid.*, p. 423.

⁶⁶ *Ibid.*, p. 419.

⁶⁷ *Ibid.*, p. 422.

I do not pretend that the task of assigning a "direct" or "proximate" cause to a particular event is an easy one, but it is a type of task which the courts have shown themselves capable of performing in the past. And, generally speaking, the standard laid down by *Re Polemis* has been applied intelligently by the courts. It cannot be denied, however, that there have been many questionable interpretations of the concept over the years. A striking illustration of this is provided by the *Wagon Mound* decision itself. To me,⁶⁸ it is a strained interpretation of the term to hold, as both the Australian courts and the Privy Council did, that the spilling of the oil was the direct cause of a fire which occurred more than two days later, when a piece of waste happened to float into a position to catch a spark falling from welding operations that happened to be carried on above by free-willed human beings. I believe that these inconsistent interpretations can be attributed to three factors, two of which are capable of remedy, and one of which is inherent in the nature of the judicial process.

In the first place, many courts have attempted to formulate a logical test for "directness", and have become hopelessly enmeshed in the sophistry of causation. Their basic error has been to assume that "directness" is a logical concept. It is an arbitrary standard, and arbitrary standards must be applied arbitrarily. What is called for is not a finding of fact, but a value judgment. The task is not to trace a causal connection between the defendant's act and the plaintiff's injury (this is a relatively simple preliminary factual matter); it is to decide whether the defendant's act, if a cause in fact, should, in view of all of the circumstances, be regarded as closely (proximately, directly) enough related to the injury to be the basis of liability. The problem is not to determine *the* cause; it is to select *which* causes *ought to be* treated as relevant to liability. The guide must be, not logic, but common sense.

Secondly, a great deal of the confusion can be blamed on the bewildering vocabulary that has grown up in this area. Terms like "proximate cause", "*causa causans*", "unbroken chain of causation", "last clear chance", "immediate cause," "lack of a *novus actus interveniens*", and the other phrases which Viscount Simonds described as "ugly and barely intelligible jargon," are all intended to express a single idea: direct cause. But the profusion of labels has led to the belief that there are a number of distinct concepts involved. An authoritative pronouncement acknowledging the unity of these various terms and expressing a preference for one of them would do much to clear away the smoke, and make it easier for the courts to get down to the job of applying the concept which the terms describe.

⁶⁸ And to others. See, for example, the *Honoré* article (*supra*, footnote 3, at p. 274 and 275) where it is pointed out that the defendant could have been relieved of liability, under the *Polemis* rule by a finding (which in Professor Honoré's opinion would have been completely justified) that the spilling of the oil was not the direct cause of the fire.

Finally, some discrepancies will always exist between the interpretations given by different judges to similar language. What is "direct" to one judge may not always be regarded as "direct" by other judges. This, however, is a difficulty that exists with respect to all general language, including the concept of "reasonableness," yet has seldom prevented the courts from doing substantial justice. On the contrary, it is the latitude afforded by such relatively vague standards which largely accounts for the high proportion of "just" decisions in these cases.

I submit, then, that "directness" is not an inherently unworkable standard. Freed of some of the confusion which presently surrounds the idea, I believe that the courts are capable of applying it as meaningfully as they have applied the concept of "reasonableness."

It is Viscount Simonds' assertion that adoption of the "reasonable foresight" test for remoteness would simplify the law, to which I take the greatest exception. As soon as a court attempts to apply the *Wagon Mound* rule, it finds itself faced with the question, "What is it that must reasonably have been foreseen?" The Privy Council has not provided an adequate answer. It did state that the "consequences"⁶⁹ of the defendant's act must have been reasonably foreseeable, and that:

. . . the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.⁷⁰

But words like "kind" and "consequences" are open to various interpretations. In fact, three distinct meanings are possible: the *extent* of the plaintiff's injury, the *nature of the interest interfered with*, and the *manner* in which the injury occurred. Yet not one of these interpretations is wholly satisfactory.

Viscount Simonds distinguished *Smith v. London & South Western Railway*⁷¹ on the ground that it dealt with a mere difference between the extent of the injury suffered and that foreseeable.⁷² Clearly, then, he did not intend "kind" to mean "extent". This view was confirmed by the first English case to give extensive consideration to the *Wagon Mound* doctrine, *Smith v. Leech Brain & Co. Ltd.*⁷³ A metal worker was, as a result of the defendant's negligence, burned on the upper lip by a piece of molten metal or flux. Ultimately, cancer developed in the area of the burn, and finally resulted in the man's death more than 3 years after the burn was sustained. It was found that:

. . . the burn was the promoting agency, promoting cancer in tissues which already had a pre-malignant condition as a result of his having worked at gas works, where he would have been in contact with tar or tar vapours from 1926 to 1935.⁷⁴

⁶⁹ [1961] A.C. 422-3.

⁷⁰ *Ibid.*, p. 426. Emphasis added.

⁷¹ *Supra*, footnote 11.

⁷² *Ibid.*, p. 416.

⁷³ [1962] 2 W.L.R. 148; [1961] 3 All E.R. 1159.

⁷⁴ [1961] 3 All E.R. 1160.

Lord Parker, C.J., of the Queen's Bench Division, held the defendant liable for the man's death. In doing so, he distinguished *The Wagon Mound* on the ground that it did not concern the problem of the injury sustained being greater *in extent* than that which was foreseeable. He held that the case before him was governed instead by the "thin skull" cases,⁷⁵ for which the rule is that the defendant must take the plaintiff as he finds him:

If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.⁷⁶

I have no quarrel with the outcome of this case, but I don't believe that it is reconcilable with *The Wagon Mound*. Surely death by cancer is not the same type of injury as a burn on the lip. The difference is more than one of extent. And even if it were only a question of extent, I submit that vast differences in extent of damage (such as the difference between burning a stubble field and burning a house) should, if the law is to maintain contact with common sense, be treated in the same way as a difference in kind.

Injuries could be classified according to the *nature of the interest interfered with* (damage to land, damage to eyesight, damage to automobile, loss of life, etc.). But how broad or narrow are the categories to be? The fundamental distinction between personal injury and property injury is clearly too broad. Yet any attempt to create more limited categories meets with difficulties. Consider, for example, *Warren v. Scruttons Ltd.*⁷⁷ As a result of the defendant's negligence, the plaintiff suffered a minor injury to his finger from a strand of wire projecting from a wire rope. Several years before, the plaintiff had suffered from an eye illness, which left him with blurred vision in one eye, and the danger of developing eye ulcers and further loss of vision if the body temperature were raised, or certain viruses were introduced into the system. The injury to his finger became infected, and this resulted in the development of eye ulcers and loss of vision. Paull, J., purporting to follow *Smith v. Leech Brain & Co. Ltd.*, awarded the plaintiff damages for all of his injuries, including the loss of vision. The case may perhaps be explained on the ground that the "thin skull" rule is an exception to the *Wagon Mound* rule, but it illustrates the problems of trying to classify injuries in narrower categories than "personal" and "property."⁸⁰ To what single category do pricked fingers and ulcerated eyes belong? And, of course, if it is the nature of the interest

⁷⁵ See *infra*, p. 432.

⁷⁶ [1961] 3 All E.R. 1161, quoting from *Dulieu v. White & Sons* [1901] 2 K.B., at p. 679.

⁷⁷ [1962] 1 Lloyd's Rep. 497.

⁷⁸ *Supra*, footnote 73.

⁷⁹ *Infra*, p. 432.

⁸⁰ See also *Singh v. Corporation of Glasgow* [1962] S.L.T. 6, where Lord Milligan awarded damages with respect to a neurosis developed after inhaling fumes from an explosion caused by the defendant's negligence.

affected that is relevant, then *Re Polemis* was correctly decided, even by the *Wagon Mound* rule, since the type of injury which was reasonable foreseeable and the type suffered were the same: damage to the plaintiff's ship.

Perhaps, then, it would be better to classify the injuries according to the *manner* in which, or agency through which, they occurred (damage by fire, damage by impact, damage by vibration, etc.). This seems to be the type of classification that Viscount Simonds had in mind when he stated that "injury by fire"⁸¹ was involved in *The Wagon Mound*. Here again we encounter the perplexing problem of where to draw the lines. If liability depended on detailed foresight of the exact physical processes which resulted in the injury, there would be few successful personal injury actions. For example, in *Oman v. McIntyre*,⁸² an employee of the defendant was working in a trench, which caved in due to the negligence of the defendant. The cave-in fractured the employee's right leg. The plaintiff alleged that the fractures resulted in a fat embolism, which in turn resulted in pneumonia and the death of the employee four days after the accident. Lord Milligan, of the Scottish Outer House, held, on a preliminary motion, that the facts alleged by the plaintiff disclosed a cause of action.⁸³ Few supporters of *The Wagon Mound* would disagree with this decision, though they could hardly contend that the exact way in which the death occurred could reasonably have been foreseen. It has been suggested that such difficulties could be overcome by distinguishing between the "general" manner of occurrence (injury by collapse of the trench), which would have to be foreseeable, and the "specific" manner of occurrence (death by pneumonia, caused by fat embolism, resulting from a fracture of the leg by collapse of the trench), which would not.⁸⁴ But how

⁸¹ [1961] A.C. 426.

⁸² [1962] S.L.T. 168. In *Burden v. Watson* [1961] S.L.T. 67 the same judge held that a person whose negligence caused an automobile accident was liable with respect to coronary thrombosis suffered five days later by a person involved in the accident. See also *Oke v. The Queen, Weide Transport Ltd., & Carra*, *infra*, footnote 104.

⁸³ The rationale of the decision appears to be that the case is governed by the "thin skull" rule and *Smith v. Leech Brain & Co. Ltd.*, *supra*, footnote 73. However, Lord Milligan also offered an interesting interpretation of *The Wagon Mound*:

When considering the *Overseas Tankship (U.K.) Ltd.* it should I think be noted — and Lord Simonds puts this in the forefront of his advice — that there was in that case a finding that the defendant did not know and could not reasonably be expected to have known that the furnace oil was capable of being set afire when spread on water. The case was, accordingly, concerned primarily with culpability than with compensation. Having held that the appellants could not reasonably be expected to have known that the oil would catch fire, the judicial committee did not have to consider the extent of the appellant's liability had they been found negligent. (p. 171).

Lord Milligan seems to have overlooked the finding that *some* damage from the oil was foreseeable.

⁸⁴ See the Fleming article, *supra*, footnote 3, at p. 524. Professor Fleming did not recommend the approach, however.

general is the classification to be? If the damage suffered in *The Wagon Mound* were described as "damage by oil", rather than "damage by burning oil", it would be reasonably foreseeable. Another suggested approach would be to adopt as the standard for compensation purposes foresight that the damage could *possibly* have occurred in the manner it did (a standard which the courts have rejected for the purpose of establishing culpability⁸⁵):

We all know that it is *possible* that people may have premalignant cancer and it is within the reasonable anticipation of the doctors that a burn may activate it (*Smith*). It is known that it is *possible* that a nail or a piece of flint may lie embedded in a plank and if such a plank were to fall into a metal hold full of petrol vapour an explosion may be generated by the causing of a spark (*Polemis*). But before experiments had been conducted during preparation of the trial it was *not known* (according to the evidence) to the scientific world that fuel oil on water could possibly ignite. So that the ulterior harm in *Wagon Mound* could by no possibility have been anticipated when the defendants let the oil loose from the ship.⁸⁶

Such an approach could hardly be said to "simplify" the law, however.

Given sufficient time, and litigants on whom to experiment, the courts will probably solve most of these problems, and develop an expedient method of classifying injuries by type, but I suggest that they would be able to solve the problems surrounding the meaning of "directness" much more easily.

And, of course, the work of the courts will not be finished, even when the catalogue of injuries is complete. Many other problems will remain to be solved. For example, is the *Wagon Mound* rule to be restricted to negligence cases, or is it to be applied as well to cases involving intentional wrong-doing or strict liability?⁸⁷

One of the most perplexing problems, how to reconcile the *Wagon Mound* and "thin skull" rules, has already reared its head. *Smith v. Leech Brain & Co. Ltd.*⁸⁸ involved a classic "thin skull" situation. Lord Parker C.J., applied the "thin skull" rule, after holding that the Judicial Committee did not have the rule in mind in *The Wagon Mound*. There seems little doubt that the decision will be followed,⁸⁹ even though a satisfactory method of distinguishing the *Wagon Mound* and "thin skull" situations has yet to be advanced.⁹⁰

⁸⁵ *Fardon v. Harcourt-Rivington* (1932) 146 L.T. 391.

⁸⁶ P. S. James, *Polemis: The Scotch'd Snake*, *supra*, footnote 3, at pp. 152-3.

⁸⁷ The applicability of the rule to actions based on *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, is discussed in R. Jones, *Remoteness Rules in Tort*, (1962) 4 Sydney L.R. 99, and the Fridman article, *supra*, footnote 3, at p. 626.

⁸⁸ *Supra*, footnote 73.

⁸⁹ It has already been followed in *Warren v. Scruttons Ltd.*, *supra*, footnote 77, and (in less obviously applicable circumstances) in *Oman v. McIntyre*, *supra*, footnote 82. See also *Feldstein v. Alloy Metal Sales Ltd. et al.*, *infra*, footnote 107.

⁹⁰ Lord Parker, C.J., seemed to base the distinction chiefly on the questionable finding that death by cancer differs from a burned lip only in extent. However, *Warren v. Scruttons Ltd.*, clearly involved more than a difference of extent.

The better view is probably that the "thin skull" rule will simply be treated as an exception to the *Wagon Mound* principle if *The Wagon Mound* finds favour with posterity. But how widely will the exception be allowed to apply? Some writers have suggested that it should be "limited" to the realm of personal injuries.⁹¹ Such a "limitation" would, of course, severely restrict the operation of the *Wagon Mound* rule itself. And one might well ask why "current ideas of justice and morality" require a different standard for assessing property damage than for personal injuries.

Even when all of the ramifications of the Privy Council's decision have been settled, the courts will not have been relieved of the need to wrestle with the "directness" concept, since it is central to so many other areas of law, such as trespass, joint tortfeasors and contributory negligence.

DESIRED UNIFORMITY BETWEEN TORT AND CONTRACT

Viscount Simonds' second complaint about the *Polemis* rule was its incompatibility with the rule laid down in *Hadley v. Baxendale* for determining remoteness of damage in contract. Surely, however, there is good reason to distinguish between tort and contract. The essence of the contractual obligation is consent, and, since you cannot consent to that which you cannot foresee, it is understandable that "reasonable foresight" should be the standard for remoteness of damage. But tortious obligations exist quite independently of consent. Therefore "reasonable foresight" loses the appropriateness that it has in the contractual context.

POLEMIS UNFAIR TO DEFENDANTS

The third objection to *Re Polemis* (and probably, in the last analysis, the most fundamental one) was that it places an unduly onerous burden on defendants. Viscount Simonds said:

. . . 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 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'.⁹²

I share the Privy Council's sympathy for the person who acts carelessly in a situation where the foreseeable risk of some slight damage is involved, and finds that he has caused some serious and totally unforeseeable injury. But surely the law would be acting at least equally as harshly toward the totally innocent plaintiff by following *The Wagon Mound's* lead and requiring him to bear the entire cost of his injuries. Neither case represents a really just

⁹¹ See, for example, the Williams article, *supra*, footnote 3, at p. 197.

⁹² [1961] A.C. 422.

solution to the problem.⁹³ As long as the plaintiff's right to compensation for his injuries is necessarily correlative to the defendant's duty to pay damages, a situation of injustice will exist in this type of case. Insurance helps, of course, but neither liability insurance nor disability insurance is in wide enough use to afford adequate protection. Only the legislatures can provide a really suitable solution. An act apportioning responsibility for the unforeseeable consequences of negligent acts between the plaintiff and the defendant would be of some assistance, although the parties would continue to be seriously burdened by the consequences of events with respect to which they were totally or substantially blameless. A far better solution, in my opinion, would be for the state to step in and compensate the injured plaintiff. Cases of this nature occur so infrequently that the cost of such protection would not be unduly great.

In the meantime, however, the courts face the problem of applying the common law rules so as to create the least possible injustice. Given the necessity of fixing the entire responsibility for unforeseeable consequences on one party or the other, it seems to me that the more just solution is to make the defendant liable, as the Court of Appeal did in *Re Polemis*. The plaintiff, after all, is totally innocent. The defendant is not; he has acted carelessly in a situation where *some* resulting harm to the plaintiff was reasonably foreseeable. Surely, if one party has to be made solely responsible, it should be he who was blameworthy, not he who was innocent.⁹⁴

⁹³ Professor Leon Green, in the articles referred to in note 3, takes the position that both the directness and foresight theories are wrong. He asserts that it is fallacious to describe the problem in "either-or" terms; that the directness-foresight dichotomy is not an inevitable one. The test which he prefers to both of these standards is the "risk theory": does the harm incurred fall within the risk created by the defendant's conduct? As it is understood by many, the risk theory would produce the same answer to the remoteness problem as the foresight theory, since the scope of the risk is thought to be determined by what is reasonably foreseeable. In Professor Green's view, however, the task of defining the risk is a matter of judicial discretion; a decision guided, of course, by factors such as reasonable foresight and previous decisions, but based fundamentally on policy considerations. By this theory the decisions in *Smith v. The London & South Western Railway Co.*, *Re Polemis*, and *The Wagon Mound* are all compatible (or at least capable of having been reached by the same judge, if he had shared Professor Green's view of the facts). The difficulty with such an approach (apart from the practical one of persuading the courts to adopt it) is that it sets up a standard which is not a standard at all; it simply invites the court to let its decision be governed by the equities of the situation. It is true that a good judge is influenced by the equities, whatever standard he chooses to invoke, but Professor Green's approach overemphasizes the importance of this discretionary factor. Moreover, Courts of Appeal are more likely to abdicate their supervisory function, (which is essential to the effective application of judicial standards) if they feel that trial decisions are purely discretionary.

⁹⁴ The fact that the "fault" theory has been discredited by the strict liability cases as a *limitation* on liability is no reason to reject it as a basis for *imposing* liability.

CONCLUSION

It is the writer's opinion that neither precedent nor policy compels the courts to follow the lead of *The Wagon Mound*. To date, the British courts appear, by their deeds though not by their words, to concur in this view. In *Smith v. Leech Brain & Co. Ltd.*⁹⁵ *Warren v. Scruttons Ltd.*,⁹⁶ *Oman v. McIntyre*,⁹⁷ *Burden v. Watson*⁹⁸ and *Singh v. Corporation of Glasgow*⁹⁹ liability was imposed with respect to injuries with unforeseeable aspects. It is true that the first two decisions contain *dicta* expressing approval of *The Wagon Mound*, and that the other decisions contain no express disapproval of it. However, from the conduct of the courts it would appear that if the *Wagon Mound* principle is to be given any effect at all, its scope will be severely restricted.

How has the principle been received by Canadian courts? In addition to the *dicta* referred to earlier,¹⁰⁰ *The Wagon Mound* has been judicially noticed in several Canadian cases.

It was applied by Schroeder, J.A., in a dissenting judgment, in *Foster v. Registrar of Motor Vehicles*.¹⁰¹ And in *Lafarge Cement v. C.N.R.*¹⁰² it was also applied, though in a situation (which also had contractual aspects) in which the actual damage suffered was reasonably foreseeable, and would, therefore, have been resolved the same way prior to the *Wagon Mound* decision.¹⁰³

A recent Manitoba decision, *Oke v. The Queen et al.*¹⁰⁴ confirms that the plaintiff does not have to establish reasonable foresight of the exact manner in which the injury occurred. A truck, operated by one of the defendants, knocked down a highway sign, and caused the steel sign post to be bent, so that it protruded over a portion of the road, with one end a foot or two from the ground, and the other still embedded in the ground. The accident was not reported to highway authorities. The next day a motorist, who was attempting to pass a truck, collided with the post, which punctured the automobile and speared the driver, killing him. An action by the driver's widow succeeded. On the question of remoteness of damage, Tritschler, C.J.Q.B. stated:

. . . the imposition of liability on defendant . . . will not revive *Polemis* nor conflict with the principle stated in the *Wagon Mound* case. . . . The reasonably foreseeable, the probable consequence of the absence of the signs and the presence of the posts was that a vehicle would

⁹⁵ *Supra*, footnote 73.

⁹⁶ *Supra*, footnote 77.

⁹⁷ *Supra*, footnote 82.

⁹⁸ *Ibid.*

⁹⁹ *Supra*, footnote 80.

¹⁰⁰ *Supra*, footnote 6.

¹⁰¹ [1961] O.R. 551, at p. 564.

¹⁰² (1962) 34 D.L.R. (2d) 154.

¹⁰³ *Supra*, footnote 25.

¹⁰⁴ Decided Jan. 12, 1963. Not yet reported.

collide with the posts. . . . The foreseeable consequence of such a collision was injury to the vehicle and its occupants. If the collision with the post had arrested the forward progress of Oke's car, or caused its upset so that Oke had been injured by his head striking the windshield, or when the automobile overturned, the argument for "unforeseeable consequences" would probably not have occurred to the defendants. . . . Where injury to persons is foreseeable, the foreseeability rule does not extend to limit recovery to injuries which are usual or commonplace.

In *Regush v. Inglis* (No. 2),¹⁰⁵ the *Wagon Mound* rule was actually stated as the reason for finding certain of the plaintiff's injuries too remote. The plaintiff, who had been negligently injured by the defendant, was forced by her injuries to sell a nursing home which she had operated. When she learned that she had been cheated by the purchaser of the nursing home, the mental depression which she had experienced as a result of the accident was considerably deepened. Collins, J., found the defendant liable, but held that the deepening of the state of depression after the sale could not be taken into account in assessing damages. In arriving at this decision, Collins, J. acknowledged that ". . . substantial and respectful consideration has been given . . . to the reasons for judgment in the *Wagon Mound* case . . ."¹⁰⁶

However, the situation was clearly one in which the *Polemis* rule would have produced the same answer, since there was no "direct" relationship between the original wrongdoing and the aggravation of the state of depression.

The view that the "thin skull" rule has not been altered by *The Wagon Mound* was confirmed by a *dictum* of Ferguson, J., in *Feldstein v. Alloy Metal Sales Ltd. et al.*¹⁰⁷ The plaintiff suffered injuries when an automobile in which she was a passenger was involved in an accident. One of her injuries occurred because radiation treatment years before had left certain of her neck and shoulder muscles in a weakened condition. Although he dismissed the action because of the "gratuitous passenger" section of the Highway Traffic Act, Ferguson, J., assessed damages, and in doing so included the aggravated injuries to the neck and shoulder. On this point he stated:

This last branch of damage is clearly damage which a reasonable man could not foresee. Nevertheless it is assessable damage under the rule laid down in *Re Polemis*. . . .

The general trend of the post-*Wagon Mound* Canadian decisions appears to be similar to that of the English decisions: to pay lip service to the principle, without giving substantial effect to it. Moreover, there is still nothing to prevent Canadian courts from taking the bold step, which the writer feels is dictated by both precedent and policy, of rejecting the rule absolutely.

¹⁰⁵ (1962) 38 W.W.R. 245.

¹⁰⁶ *Ibid.*, at p. 247.

¹⁰⁷ [1962] O.R. 476, at pp. 488-489.