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# THE ENGLISH RULE AS TO LIABILITY FOR UNINTENDED CONSEQUENCES

*George C. Tilley* *

THE question how far a defendant is liable in tort for the unintended consequences of his wrongful act, generally supposed to have been settled for England by the case of *In re Polemis and Furness, Withy & Co., Ltd.*,[1] has recently been reopened by the House of Lords decision in the case of *Liesbosch Dredger v. S. S. Edison.*[2] Defendants, owners of the *Edison*, negligently sank the plaintiffs' dredger *Liesbosch* while the latter was being used by the plaintiffs in performance of a profitable contract to construct a harbor at Patras, Greece. There was evidence that, had the plaintiffs had the necessary capital at their disposal, they could have purchased another dredger in Holland. Unfortunately all of plaintiffs' resources were tied up, and to continue work on the contract, which contained severe penalty clauses for failure to complete performance within a specified time, plaintiffs entered into negotiations to hire another dredger. Several months elapsed, during which all work on the harbor had to be suspended, before they succeeded in hiring the *Adria*, a somewhat larger dredger, at an admittedly high rate of hire. After operating the *Adria* for a year, the plaintiffs found the cost of hire so burdensome that they prevailed upon the Patras harbor authorities to purchase the *Adria* for cash and resell her to them on the installment plan.

Defendants having admitted their negligence in sinking the *Liesbosch*, the plaintiffs presented their claim for damages under five heads: (1) the cost of replacing the *Liesbosch* with the *Adria*, based upon the purchase price of the *Adria* with suitable adjustments for differences between the two vessels, (2) overhead expenses and loss

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[1] [1921] 3 K. B. 560.

[2] [1933] A. C. 449; *vide* leading article, "Remoteness of Damage," 175 L. T. 246 (1933).

of interest on capital during suspension of the work, (3) cost of hiring the *Adria* prior to arranging for her purchase, (4) extra cost of operating the *Adria* as compared with the smaller *Liesbosch*, and (5) loss of profits on the contract due to delay in completion of performance. The Admiralty registrar, having found that the plaintiffs acted reasonably under the circumstances, regard being had to the time clauses of their contract and their lack of liquid resources, allowed substantially their whole claim.[3]

On objections by defendants to all items except (1), the purchase price of the substitute dredger, the case came before Langton, J., sitting as a court of first instance in the Division of Probate, Divorce, and Admiralty.[4] He took the view that plaintiffs were entitled to replace their lost dredger at defendants' expense, and that the cost of doing so ought to be none the less recoverable though aggravated by plaintiffs' lack of resources:

> "the real gravamen of his [defendants' counsel's] objection . . . was that the defendants were being called upon to pay not only for the replacement of what they had destroyed, but for a chain of remote consequences which sprang from the commercially indecent poverty of the plaintiffs and not from the wrongdoing of defendants. . . . If I may venture to summarize and paraphrase his argument, it was that damages are awarded by way of restitution and not in relief of destitution." [5]

Ordinarily a wrongdoer's liability is not limited to what the average man might have suffered from his act: a wrongdoer must take his victim as he finds him, strong or weak, rich or poor. The law does not permit a defendant to say to a plaintiff "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," [6] or, as Langton, J., would add, "an unusually thin pocketbook." The learned justice, whose opinion is good reading if not good law, affirmed the registrar's report.

The Court of Appeal, hearing the case a year later, struck out items (2), (3), (4), and (5) on the ground that the court below had adopted an erroneous measure of plaintiffs' damage.[7] What defendants had done was to sink a somewhat elderly dredger. If ships were

[3] Item (5) was struck out as duplicating item (2).
[4] The Edison, [1931] P. 230.
[5] [1931] P. 230 at 236.
[6] Dulieu v. White & Sons, [1901] 2 K. B. 669 at 679, per Kennedy, J.
[7] The Edison, [1932] P. 52.

fungible chattels like automobiles, plaintiffs' recovery would be limited to the market value of the lost ship. The fact being, however, that no two ships are the same, and there being no ready market for them, the courts have adopted another basis for computing the owners' damage. The rule is, as laid down by Lord Gorell (then Barnes, J.) in *The Harmonides*,[8] that the proper measure of damage is the ship's value to her owners, as a going concern, at the time of her loss. On this basis it is submitted that the Court of Appeal might well have considered the amount that plaintiffs were willing to spend to replace the lost *Liesbosch* as evidence of her value to them. The court was not minded, however, to take into account the special circumstances which gave the *Liesbosch* a peculiar value to her owners. "The value of a ship," they said, "is an estimate, or rough capitalization, of the earning power of the ship for its life." [9] This method of computing her value takes into account, so far as it is practicable for the law to do so, the fact that her loss involves her owners in a loss of profits under contracts upon which she might be employed. To give any further consideration to such contracts would violate the rule of damages which excludes "everything in the nature of uncertain and speculative profits." [10]

The bearing of this argument may be clarified by supposing that the plaintiffs had placed their claim in litigation immediately upon the sinking of the *Liesbosch*, and had contended, in view of their poverty and their contract, that their damages should include overhead expenses during the delay in securing another dredger and the cost of hiring such dredger until they could arrange to purchase her. Such damages would clearly have been too uncertain and speculative, and plaintiffs would have recovered only the capitalized value of the *Liesbosch*. It seems pertinent to observe, however, that plaintiffs could have pocketed the amount recovered and bought another dredger at once if the course of litigation had been thus ideally swift. The delays of litigation were not of plaintiffs' making, and when their case finally came on for hearing, the harm was already done. The damages asked were no longer uncertain and speculative: plaintiffs could prove the exact cost of replacing the *Liesbosch* and that it was reasonably incurred.

Sensing this flaw in its argument, the Court of Appeal strove des-

[8] [1903] P. 1.

[9] [1932] P. 52 at 65, per Scrutton, L. J.

[10] [1932] P. 52 at 74, per Greer, L. J.

perately to justify its conclusion by citing a line of contract cases [11] in which plaintiffs had been deprived of various chattels and the courts had held that items of damage were not recoverable which flowed from special or peculiar circumstances of which defendants could not be expected to know. The ground of decision was thus shifted. Plaintiffs were denied recovery of their expenses in hiring the *Adria,* not because such damages were too uncertain or speculative, but because defendants could not reasonably have foreseen them.

The House of Lords adopted the result but not the reasoning of the Court of Appeal.[12] Forewarned by the confusion of the Court of Appeal over the proper measure of damages, the House of Lords, per Lord Wright, elected to treat the case in the following manner:

> "The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of those acts. . . . In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on the grounds of pure logic but simply for practical reasons. . . . The case of *In re Polemis and Furness, Withy & Co.,* a case in tort of negligence, was cited as illustrating the wide scope possible in damages for tort; that case, however, was concerned with the immediate physical consequences of the negligent act, and not with the co-operation of an extraneous matter such as plaintiff's

[11] Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854); Gee v. Lancashire & Yorkshire Ry., 6 H. & N. 211, 158 Eng. Rep. 87 (1860); British Columbia Sawmill Co. v. Nettleship, L. R. 3 C. P. 499 (1868); Horne v. Midland Ry., L. R. 8 C. P. 131 (1873).

The relevance of these contract cases in an action of tort for negligence was sought to be established by quoting two dicta of Bowen, L. J., that tort damages for deprivation of a chattel do not differ from contract damages for non-delivery of a chattel. Cobb v. Great Western Ry., [1893] 1 Q. B. 459 at 464; The Argentino, 13 P. D. 191 at 200 (1888).

These dicta are undoubtedly erroneous. Contract damages are limited by implied agreement between the parties to those results of a breach which are foreseeable or "in contemplation of the parties" at the time of making the contract. Hadley v. Baxendale, supra. Tort damages are limited by no such mutual agreement between the parties. See BEVEN, NEGLIGENCE, 4th ed., 109 (1928): "Damages that could not be antecedently anticipated are not recoverable in contract: in tort they can to the fullest extent to which they flow in the ordinary course of their actual, not their probable, sequence from the originating force."

[12] [1933] A. C. 449.

> want of means. I think, therefore, that it is not material further to consider that case here. Nor is the appellants' financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor laborer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic." [13]

With all respect, this language of Lord Wright cloaks the *ratio decidendi* of the case in almost unfathomable obscurity. First, it is open to the interpretation that plaintiffs were denied recovery of their expenses in hiring the *Adria* because of their own negligence in undertaking so large an enterprise with so little working capital. Second, it may be taken to mean that the plaintiffs' expenses in hiring the *Adria* were items of damage too remote to be recoverable. Third (and this is the explanation preferred by the writer), Lord Wright's language may record, albeit imperfectly, a new development in the concept of duty. It is now familiar learning that an act which is negligent as to one person gives no right of recovery to another who happens to be injured by it, provided that other is outside the orbit of duty, that is, the orbit of foreseeable harm.[14] The instant case seems to draw a similar distinction between various interests of the same person. An act which is negligent as to a person's property interests, for example, gives no right of recovery in respect of an incidental injury to some other interest, such as his reputation or his profit-earning capacity, provided that other interest is outside the orbit of foreseeable harm.

The aim of this commentary is to probe in turn these possible interpretations of Lord Wright's opinion.

[13] [1933] A. C. 449 at 460-461.

[14] Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928). In England the case usually cited for this proposition is Thomas v. Quartermaine, 18 Q. B. D. 685 (1887). The precise point seems never to have been raised in litigation, but pending an authoritative determination, it is tacitly assumed. *Vide contra*, however, the dicta of Kelly, C. B., Channell, B., and Blackburn, J., in Smith v. London & South Western Ry., L. R. 6 C. P. 14 (1870); severely criticized by Goodhart, "The Unforeseeable Consequences of a Negligent Act," 39 YALE L. J. 449 (1930), reprinted in GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 129 (1931).

## I

### PLAINTIFFS' CONTRIBUTORY NEGLIGENCE

The first of the paragraphs quoted from the judgment of Lord Wright reveals his conviction that the plaintiffs had themselves to blame for the damage in question. Their impecuniosity was "a separate and concurrent cause" of the damage, and it "was not traceable to respondents' acts." Lord Wright does not describe plaintiffs' impecuniosity, in the picturesque language of Mr. Justice Langton, as "commercially indecent," but he sufficiently intimates that he looks upon it as a fault. By reading between the lines we may infer his opinion that it was not the act of ordinarily prudent businessmen to plunge into a big contract, as plaintiffs did, with no capital beyond their immediate working needs. Ordinary prudence in financing their enterprise would have dictated, seemingly, a margin of capital to meet precisely such emergencies as the accidental loss of the dredger. It would not have been difficult, especially in the boom times when the project was conceived, to attract more capital to a profitable contract. Plaintiffs must be regarded as having elected to run the risk of financial disaster in order to increase their profits, and before the law they must accept the status of those who run risks and lose.

Then why did Lord Wright hesitate to find for defendants on the ground of plaintiffs' contributory negligence? So far as the doctrine of contributory negligence reflects a policy of compelling persons to guard their own safety, it was here peculiarly apposite. Recent events have taught that the state has as great an interest in the financial security of its subjects as in their physical security. In the same spirit that it tells the driver of a car not to venture on railroad tracks without looking for trains, it should also tell business men not to venture on construction contracts without protecting themselves against analogous disaster.

Against such an argument, however, two main objections present themselves: (1) the political impolicy and the administrative inconvenience of requiring the courts to pass upon the prudence of financial dealings, and (2), in a more technical vein, the doctrine of "last clear chance." For more than a century, now, the Benthamite teaching of free competition has held sway in our courts of common law. No rules have been laid down for the conduct of business except honesty and good faith. On the one hand every man shall be free, within the bounds of honesty and good faith, to practice his trade or calling as he sees fit, and on the other it shall be his own responsibility that he do so

with sufficient acumen to earn a living. So far as the state has an interest in his financial security, it has been felt that the urge of individual initiative and the instinct of self-preservation are sufficient safeguards, without translating the precepts of sound business into positive law and requiring them to be obeyed on peril of losing access to the courts. Consistently with this philosophy of individualism, the courts have never presumed to dictate how much capital a man must amass before venturing on a given enterprise.

There are, to be sure, visible signs that this individualism does not serve as the arcanum of economic well-being that Bentham and his followers have supposed. There is a decided trend to state socialism in England as elsewhere. It is significant for the present discussion, however, that the social machinery is being made over, not by the imperceptible erosion and alluvion of the common law, but by legislative fiat and the erection of administrative tribunals. These changes cannot wait for the accidents of litigation to raise the issue of Socialism versus Individualism. They cannot wait for the gradual triumph of a new philosophy over the traditional conservatism of the bench. There is need, moreover, for more precise control of business than the common law could achieve with the reasonable man as its accepted standard and the jury as its only instrument of research. Life insurance companies, to take an obvious example, must be told exactly what investments are permissible, and public utilities must be told exactly what rates are chargeable, rather than left to discover for themselves, by endless litigation, what rates and investments will be deemed "reasonable." By the same token, if the capitalization of business enterprises is to be made a matter of governmental regulation, the nature and administration of this regulation will have to be determined and imposed by statute, and not by the more cumbersome processes of the common law.

Apart from these paramount considerations of policy, a finding of contributory negligence in the instant case would have to overcome the awkward retort that defendants had the "last clear chance" to avoid the injury. The law does not permit an "open season" on persons who happen to be caught in a negligent position. Though plaintiffs balanced themselves precariously on the verge of financial disaster, defendants could still have avoided the injury by navigating the *Edison* with due care. The case seems to come squarely within the doctrine of "last clear chance" as announced by Salmond:

> "although both plaintiff and defendant may have been guilty of negligence causing the accident, yet if at some point of time before

> the accident the plaintiff has ceased to have any power to prevent it — the issue having passed beyond his control — and nevertheless the defendant still retains the power of preventing it by due care, the whole responsibility passes to the defendant." [15]

When all is said and done, however, one senses that the factors decisive of this case cannot be cast up in simple terms of contributory negligence and last clear chance. Our jurisprudence has reserved these terms for less complicated cases. Defendants admitted their negligence and their liability for the *immediate* consequences of their negligence, that is, the loss of the dredger. Plaintiffs' contributory negligence entered the picture only at a later stage when the spotlight was turned on defendants' liability for the *remoter* consequences of their negligence, namely, the cost of hiring a substitute dredger. Therefore, though it be conceded that the decision must take account of the plaintiffs' own responsibility for their loss, juristic tradition demands that this factor be evaluated in terms of the larger and vaguer concept of proximate causation, or in the phrase of the English jurists, "remoteness of damage."

## II

### REMOTENESS OF DAMAGE

After noting defendants' liability for the value of the lost dredger, Lord Wright's opinion speaks of plaintiffs' further losses, arising from their impecuniosity, and deems them "outside the legal purview of the consequences of those [defendants'] acts." "In the varied web of affairs," he goes on to say, "the law must abstract some consequences as relevant, not perhaps on the grounds of pure logic, but simply for practical reasons." [16]

[15] SALMOND, LAW OF TORTS, 7th ed., 43 (1928).

[16] It is noteworthy that Lord Wright's language is a paraphrase of the dissenting opinion delivered by Andrews, C. J., in the Palsgraf case, supra, n. 14. Speaking of proximate cause, he said (248 N. Y. 339 at 352 and 354):

> "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . .
>
> "It is all a question of expediency. There are no fixed rules to govern our judgment. . . . it is all a question of fair judgement. . . ."

This passage has been characterized by Professor Green as "the high water mark of judicial expression explanatory of the proximate cause concept." GREEN, JUDGE AND JURY 247 (1930).

No words could be fraught with more cheerful significance. They suggest that henceforth the House of Lords, and therefore all the English courts, will refuse to descend into the bog of logic and verbiage which courts and commentators have made of proximate causation. They will avoid the epithets, such as "foreseeable," "probable," "natural," "direct," and their opposites, with which consequences have been variously labeled in order to place them within or without the scope of liability.[17] They will not review the career of the force launched by defendant and seek to determine, by some mysterious system of mechanics, at what point its potency for harm was so dissipated as to relieve defendant of liability for its further consequences.[18] In large

[17] The unsatisfactory nature of these epithets is most clearly demonstrated by the difficulty experienced in defining them. Following Greenland v. Chapin, 5 Ex. 243 at 248, 155 Eng. Rep. 104 at 106 (1850), a "foreseeable consequence" has commonly been defined as one which a reasonable man in the circumstances of the wrongdoer would have foreseen. But "it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen." Hill v. Winsor, 118 Mass. 251 at 259 (1875). A consequence is still foreseeable, therefore, if a reasonable man would have foreseen a consequence of that general kind, and no one has had the hardihood to define what consequences are of the same general kind.

Disputes have raged as to the exact meaning of "natural and probable." Most commonly it is deemed equivalent to "foreseeable." SALMOND, LAW OF TORTS, 7th ed., 152 (1928); CLERK AND LINDSELL, LAW OF TORTS, 8th ed., 125 (1929). The word "natural" seems to add nothing. "Everything that happens, happens in the order of nature and is therefore natural." Per Lord Sumner in Weld-Blundell v. Stephens, [1920] A. C. 956 at 983. Goodhart has attempted a distinction between "probable" and "foreseeable": it is improbable, he says, that a book thrown out of the window will strike any one, but it is not unforeseeable. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 126 (1931).

"Direct" has little more to say for itself, though Lord Sumner, adopting it in Weld-Blundell v. Stephens, supra, ventured to think it the most satisfactory. "Direct cause," he said (at p. 984), "excludes what is indirect, [and] conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate. . . ." These latter terms, however, have long been rejected as useless in discussions of proximate cause. *Causa causans* suggests a dynamic cause, carrying with it liability, while *causa sine qua non* suggests the static condition upon which the active cause operates. But if defendant has left an obstruction in the highway over which plaintiff stumbles at night, defendant is clearly liable though the obstruction is but a *sine qua non* of the accident.

"Effective cause" — Engelhart v. Farrant & Co., [1897] 1 Q. B. 240 — and "substantial cause"— Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 223, 303 (1912) — are equally unsatisfactory. All causes are effective, or they could not produce consequences. Each of several causes is "substantial" in the sense that the event could not have happened without it.

[18] *Vide* Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633 (1920). His suggestions have been adopted by SALMOND, LAW OF TORTS, 7th ed., 164 (1928). For an interesting attempt to apply these suggestions, see Henningsen v. Markowitz, 132 Misc. 547, 230 N. Y. S. 313 (1928); the court emerged with distinction, but Beale's formula suffered a severe blow.

measure they will be relieved from discussion of the part played by intervening actors, whether criminal, willful, negligent, insane, irresponsible, unconscious, or simply indifferent.[19] In other words, they now have high authority for referring their decisions, not to the doubtful magic of ritual words and formulas, but to "practical reasons," i.e., those factors in a given case which should and usually do control judgment.

Professor Green has suggested that there are five fundamental factors which control the decision of every case: (1) the administrative factor, (2) the moral or ethical factor, (3) the preventive factor, (4) the economic factor, and (5) the justice or "capacity-to-bear-loss" factor.[20] In easy cases the tendency of these factors will be so clearly in one direction that it will be found to have crystallized into an acceptable rule of law. In difficult, border-line cases, of which the *Edison* is a fair example, these factors will tend in opposite directions, and they will differ from one another in the urgency with which they call for recognition. Here enters the skill and personality of the judge,

[19] Cobb v. Great Western Ry., [1893] 1 Q. B. 459, [1894] A. C. 419 (criminal); Weld-Blundell v. Stephens, [1920] A. C. 956 (willful); S. S. Singleton Abbey v. S. S. Paludina, [1927] A. C. 16 (negligent); Speake v. Hughes, [1904] 1 K. B. 138 (innocent); Scott v. Shepherd, 2 W. Bl. 892, 96 Eng. Rep. 525 (1773) (irresponsible); to cite but a few of the leading cases.

The quality of the intervening act has assumed great importance since the decision of Weld-Blundell v. Stephens, supra. After laying down the general rule that an intervening act will break the chain of causation, Lord Sumner announced five exceptions (at p. 985): the acts (1) of children and other irresponsible persons, (2) of persons in a state of excusable ignorance, (3) of persons in a state of excusable alarm produced by the wrongful acts of defendant, (4) of persons acting in the exercise or defense of their rights without intention to injure others, and (5) of persons acting as defendant meant them to act, or acting as defendant must have foreseen they would act, in consequence of things done by him for his own purposes or in a state of indifference as to the result to others.

[20] GREEN, JUDGE AND JURY 19 (1930). He states further:

> "Doubtless judgment is sometimes affected by the selection of the means of articulation, because the factors which control judgment are clouded by such means. In such instances, the integrity of the particular theory, doctrine, formula, or rule may seem to be impaired, with the result that doubt is frequently thrown upon the validity of the decision itself. But in most instances, probably the employment of a particular theory, doctrine, formula, or rule as against another is of small significance. The selection of the means of articulation is believed to be largely a matter of taste and finesse."

In proximate cause cases there is always a sixth factor controlling the judgment which is difficult to classify under any of the five heads suggested by Professor Green. It is the notion that, as between an innocent plaintiff and a wrongdoing defendant, the loss should be borne by the wrongdoer. This may be the "rough-sense-of-justice" factor mentioned by Chief Justice Andrews, supra, n. 16.

whose task it is to give each factor that weight which will best serve contemporary society.

In giving judgment in the *Edison* case, Lord Wright chose to emphasize only the administrative factor. He said:

> "The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the causes of causes,' or consequences of consequences. Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer." [21]

The suggestion is that the court must somewhere draw a line beyond which it will not trace the interminable consequences of a wrongful act, and for convenience of administration this line should be drawn so as to exclude from consideration as many consequences as possible. This attitude of the courts is not the product of indolence, but of necessity. They are faced constantly with the danger of becoming so generous with their remedies that a glut of litigation will stop the wheels of justice.[22] In all cases of proximate causation, therefore, the administrative factor operates against the plaintiff. This was particularly true of the instant case. Here was a type situation in which a successful plaintiff might set a hopeful example to innumerable other litigants: he complained of a wrongful deprivation of a chattel, whereby he suffered not only the loss of the chattel, but also certain further losses due to his lessened ability to meet his obligations.

In cases of ordinary negligence, as distinguished from criminal or wanton or gross negligence, the moral factor looms small, and particularly so in a case like the *Edison*, where the contest concerns only

[21] [1933] A. C. 449 at 460.

[22] *Cf.* "We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions." Abinger, C. B., in Winterbottom v. Wright, 10 M. & W. 109 at 113, 152 Eng. Rep. 402 at 404 (1842).

The same argument has frequently been made in the so-called "mental suffering" cases. *Cf.* "It would seem therefore that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule." Spade v. Lynn & Boston R. R., 168 Mass. 285 at 288, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393 (1897). "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection." Mitchell v. Rochester Ry., 151 N. Y. 107 at 110, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604 (1896).

the unforeseeable consequences of a negligent act. What daubs a negligent act with a touch of immorality, and awakens the punitive mission of the courts, is the foresight of harmful consequences. Where unforeseeable consequences ensue, we not only attach no moral blame to the actor but actually tend to sympathize with his misfortune. So with the preventive factor. There is little gain in seeking to prevent what cannot be foreseen. Men are not so constituted that their conduct will be much affected in the direction of carefulness by a decision to impose liability for unforeseeable consequences, nor in the direction of carelessness by a contrary decision. Therefore these two factors, the moral and the preventive, which are the backbone of most tort actions, were of little or no avail to the present plaintiffs.

On the other hand, the economic factors behind the decision tended strongly to weight the balance in favor of defendants. Had their vessel been a yacht engaged on a pleasure cruise, or perhaps a racing craft employed to thrill its owners by its speed, the result of the case might have been different. The *Edison,* however, was a cargo boat engaged in the useful task of transporting freight by sea. Collisions are one of the normal concomitants of such enterprise and should not be penalized too severely.[23] Of equal weight was the fact that a substantial cause of plaintiffs' loss was their own foolhardy lack of resources. For reasons we have seen, this fact could not be seized upon to formulate a judgment in terms of contributory negligence, but undoubtedly it disposed the court to decide for defendants. In the interest of economic stability such blundering finance should be discouraged.

Of all the factors in the case, the most obvious and striking was the justice factor, or the capacity of the parties to bear the loss. Plaintiffs' poverty was their trump card. Nine persons out of ten, being told the sequence of events leading to plaintiffs' loss and asked for a snap judgment of the case, would answer that plaintiffs ought to recover. At the root of their decision would be found an instinctive sympathy for the poor man struggling against financial adversity. Such sympathy is not unworthy. It is Christianity's supreme gift to the world, and it found an eloquent advocate in Mr. Justice Langton when, in the first instance, he classified poor plaintiffs with physically weak plaintiffs. In the Court of Appeal, however, and in the House

[23] This type of argument has been made familiar by the cases dealing with a manufacturer's liability for injuries caused by defects in his product to persons with whom he has not contracted. Liability has long been resisted on the ground that manufacturers might be crippled. See the leading case, MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

of Lords, the fact stood out that, despite the temporary hardship of losing their dredger, plaintiffs had been able to bring their enterprise to a successful and presumably profitable conclusion. To award them the damages asked would only swell their profits and vindicate their judgment in electing, with a greedy eye to profits, to run the risks incurred by undercapitalization. In short, they were as well able as were defendants to absorb the loss.

These, then, are some of the "practical reasons" upon which the decision rests. Stated in its simplest form, the question before the court was whether to deny or impose liability for the consequences in question. Liability was denied, "not on grounds of pure logic," but because that result seemed better to serve the purposes for which the law is designed.[24] It seemed socially more advantageous, as promoting the more important of the competing social and individual interests involved.[25] Lord Wright, with commendable courage and implied contempt for the dialectics of the old school, was willing to leave it at that, without attempting, as he might easily have done, to articulate his judgment in conventional verbiage and square it with the precedents.

He might have explained the decision, for example, on the ground that the consequences in question were unforeseeable. Until quite recently, as Salmond says, speaking of liability for the unintended consequences of a wrongful act:

> "there was much apparently good authority for formulating the principle as follows: That a wrongdoer is liable only for the damage which . . . was the natural and probable consequence of his wrongful act. . . . And a consequence is for this purpose natural and probable when it is so likely to result from the act that a reasonable man in the circumstances of the wrongdoer, and with his knowledge and means of knowledge, would have foreseen it and abstained from the act accordingly." [26]

This view has the support of Sir Frederick Pollock, who finds that

[24] "We see then why so much of the discussion of proximate cause in case and in commentary is mystifying and futile. There is a striving to give absolute validity to doctrines that must be conceived and stated in terms of relativity. . . . The truth which the law seeks in tracing events to causes is truth pragmatically envisaged, truth relative to jural ends." CARDOZO, THE PARADOXES OF LEGAL SCIENCE 85-86 (1928).

[25] "A legal cause is a cause which stands in such a relation to its consequence that it is just to give legal effect to the relation: meaning by 'just,' not simply fair as between the parties, but socially advantageous, as serving the most important of the competing individual and social interests involved." Edgerton, "Legal Cause," 72 UNIV. PA. L. REV. 211, 343 at 348 (1924).

[26] SALMOND, LAW OF TORTS, 7th ed., 152 (1928).

"the accepted test of liability for negligence is . . . also the proper measure of liability for the consequences of proved or admitted default," by which he means, of course, foreseeability.[27] And to this chorus may be added, among others, the voice of Professor Edgerton, who writes: "Except only the defendant's intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result as its foreseeability." [28] Despite general acceptance of the decision of the Court of Appeal in the *Polemis* case, expressly rejecting foreseeability as the test of liability for unintended consequences, there remains a vigorous school of lawyers who would have welcomed a return by the House of Lords to this formula, which has at least the appearance of precision and simplicity.[29]

The fact is, however, that the foreseeability formula is not entirely adequate. Despite a tendency throughout the nineteenth century to establish tort liability upon a basis of moral fault, the law still retains many traces of the medieval principle of absolute liability for all harmful activity. Though moral fault in cases of negligence seems to be coextensive only with the foresight of harm, liability has never been limited strictly to the consequences that might have been foreseen. "It is not necessary," as Colt, J., said in the often-quoted case of *Hill v. Winsor*,[30] "that injury in the precise form in which it in fact resulted should have been foreseen." So if a man negligently strikes another a trifling blow on the head, which happens to fracture his skull due to its extraordinary thinness, there is no doubt that he is liable, not simply for what might have been foreseen, to wit, a minor scalp wound, but for the full extent of the injury.

Advocates of the foreseeability formula explain this quite acceptable result on the ground that the specific harm need not be foreseeable, but only the general kind of harm — in this case, bodily injury. It is somewhat curious, therefore, that, having so far qualified their

[27] Pollock, "Liability for Consequences," 38 L. Q. REV. 165 (1922).

[28] Edgerton, "Legal Cause," 72 UNIV. PA. L. REV. 211, 343 at 352 (1924).

[29] See Goodhart's strenuous argument for the foreseeability test, "The Unforeseeable Consequences of an Act," 29 YALE L. J. 449 (1930), republished in his ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 129 (1931).

"If we are basing liability upon a negligent act, and if negligence consists in a failure to foresee results which ought reasonably to have been foreseen, it would seem that the negligent person ought only to be made liable to the extent to which he ought to have foreseen those results." 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 463 (1922).

[30] 118 Mass. 251 at 259 (1875).

principle, they should balk at the *Polemis* case.[31] From the negligent dropping of the plank it was found that one could not foresee the specific harm, destruction of the ship, but one could foresee the general kind of harm, to wit, some injury to the structure of the ship.

The upshot seems to be that the advocates of the foreseeability formula, so qualified, and those who accept the Court of Appeal's decision in the *Polemis* case, though they claim to be poles apart, are actually in close agreement. They both feel, as Professor McLaughlin has put it, that "the idea is that the man who 'starts something' should be responsible for what he has started," [32] or if you prefer the equally vague generality of the Court of Appeal, that a negligent actor is liable not only for the foreseeable consequences, but for all the "direct" consequences. Reviewing this wordy dispute, leading as it does only to vague generalities, one must conclude that the disputants are deciding the cases at large by striking a balance of the factors which control judgment, and then, having made up their minds whether or not to impose liability for a given consequence, they are labeling it "foreseeable" or "direct," or "unforeseeable" or "indirect," as the case may be.

Eschewing these labels as intellectually unsatisfactory if not actually deceptive, Lord Wright had another course open to him, had he felt that his decision needed some more conventional justification than "practical reasons." He might have invoked the doctrine of *novus actus interveniens*. The gist of plaintiffs' complaint was that they had been compelled to spend an extraordinary amount of money in order to replace their dredger. Denying recovery of this sum from defendants, the court might have held that the spending of this money was an intervening act, not of defendants' doing, which broke the causal chain between their act and the loss.

Intervening acts are a well-recognized explanation of causal remoteness. Two theories have arisen as to their defensive efficacy, either of which Lord Wright might have espoused to the end of defeating plaintiff's claim. (1) The "probability" theory postulates that an intervening act will break the causal chain if it is improbable, or what seems to be the same thing, if it is unforeseeable that it will follow upon defendant's act. On this theory the instant plaintiffs could readily have been defeated. (2) The so-called "isolation" theory postulates that any intervening act of a responsible agent will insulate the

[31] For attacks upon the Court of Appeal's decision in the *Polemis* case, see the articles of Pollock and Goodhart, cited above in notes 27 and 29.

[32] McLaughlin, "Proximate Cause," 39 HARV. L. REV. 149 at 164 (1925).

defendant from liability. This latter theory, which is found by Salmond's editor to be supported by the weight of recent authority,[33] derives from a dictum of Lord Sumner in *Weld-Blundell v. Stephens*:[34]

> "That a jury can finally make A. liable for B.'s acts, merely because they think it antecedently probable that B. would act as he did apart from A.'s authority or intention seems to me to be contrary to principle and unsupported by authority."

Citing a plethora of authority,[35] Salmond's editor remarks upon this dictum:

> "It would not appear that in principle it matters whether the *novus actus* be justifiable, lawful, negligent or criminal or whether it be the act of the plaintiff or of a third party." [36]

It remained, then, only for Lord Wright to apply the "isolation" theory and dodge the exception, especially that exception which has been dubbed "the doctrine of alternative danger." A number of cases hold that the causal chain is not broken by an intervening actor who has been placed in peril by the defendant's act. If he acts reasonably in an effort to escape the peril, the damage which he does will be laid at the door of the defendant.[37] A difference of opinion exists, however, as to how far the "doctrine of alternative danger" extends. One school would have it apply only where the danger is personal and the intervening actor takes "instant action on the first alarm," while the other would have it apply also where the danger is merely to property and the act is, in view of the peril, "not unnatural." [38] The House of Lords seemed to prefer the latter view in *Canadian Pacific Ry. v. Kelvin Shipping Co., Ltd.*, where Lord Haldane said: [39]

[33] Sir John Salmond inclined to favor the "probability" theory, together with the editors of SMITH'S LEADING CASES (see the note to Vicars v. Wilcocks, Vol. II, 501), but Salmond's editor prefers the "isolation" theory. SALMOND, LAW OF TORTS, 7th ed., 166 ff. (1928).

[34] [1920] A. C. 956 at 988. *Cf.* the dissenting judgment of Viscount Finlay, at p. 962, based upon the "probability" theory.

[35] Ward v. Weeks, 7 Bing. 211, 131 Eng. Rep. 81 (1830); Weld-Blundell v. Stephens, [1920] A. C. 956; Cobb. v. Great Western Ry., [1893] 1 Q. B. 459, [1894] A. C. 419; S. S. Singleton Abbey v. S. S. Paludina, [1927] A. C. 16; Speake v. Hughes, [1904] 1 K. B. 138; Harnett v. Bond, [1925] A. C. 669; The San Onofre, [1922] P. 243; Admiralty Commissioners S. S. Amerika, [1917] A. C. 38.

[36] SALMOND, LAW OF TORTS, 7th ed., 167 (1928).

[37] Scott v. Shepherd, 2 W. Bl. 892, 96 Eng. Rep. 525 (1773); Jones v. Boyce, 1 Starkie 493, 171 Eng. Rep. 540 (1816).

[38] See the contrasting judgments of Lord Sumner and Lord Phillimore in S. S. Singleton Abbey v. S. S. Paludina, [1927] A. C. 16.

[39] 138 L. T. 369 at 370-371 (1927).

"what those in charge of the injured ship do to save it may be mistaken, but if they do whatever they do reasonably, although unsuccessfully, their mistaken judgment may be a natural consequence for which the offending ship is responsible, just as much as is any physical occurrence. Reasonable human conduct is part of the ordinary course of things. . . .

"The burden of showing that the chain of causation started by the initial injury has been broken lies on the defenders. In order to discharge this burden they must prove that the breach in the chain was due to unwarrantable action, and not merely to action on an erroneous opinion by people who have *bona fide* made a mistake while trying to do their best. . . ."

By adopting the first of these views, against the weight of authority, Lord Wright could have defeated the plaintiffs. The sinking of their dredger did not imperil their persons, nor could their hiring of the substitute dredger be described as taking "instant action at the first alarm." Had Lord Wright felt bound by the *Canadian Pacific* case, he must have exercised a little ingenuity. He could not label plaintiffs' act of spending the money "unwarrantable" because he was bound by the registrar's finding that under the circumstances, regard being had to the time clauses of their contract and their lack of liquid resources, plaintiffs had acted reasonably. What he might have done, and readily been forgiven, would have been to develop a distinction, already adumbrated in the cases, between intervening acts inspired on the one hand by peril to person or property, and on the other hand by peril of a less immediate kind to a mere business speculation. Remoteness of damage is a department of legal learning which has always lent itself, at the whim of any puzzled judge, to distinctions and refinements upon distinctions.[40]

[40] The litigation of the past fifty years is littered with attempts to distinguish between such epithets as "foreseeable," "natural," "usual," "ordinary," "probable," "necessary," "immediate," "direct," and the like, as applied to consequences, and "immediate," "direct," "effective," "substantial," "active," and the like, as applied to causes.

Where an intervening act has complicated the situation, the initial tendency was to hold that it broke the causal chain if it was "illegal." Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (1806). "Illegality" gave way to "improbability" or "unforeseeability." Bowen v. Hall, 6 Q. B. D. 333 (1881). In Lynch v. Knight, 9 H. L. Cas. 577, 11 Eng. Rep. 854 (1861), Lords Campbell, Brougham, and Cranworth thought the damage would not be too remote if a reasonable man would have foreseen that it would *probably* result, while Lord Wensleydale thought it sufficient that a reasonable man would have foreseen that it *might possibly* result. See 2 SMITH'S LEADING CASES 508. Then Lord Sumner laid down the rule in *Weld-Blundell v. Stephens*, [1920]

The significant thing is that Lord Wright resorted to none of these logical expedients to justify his decision. These *novus actus* formulas, proceeding upon the medieval assumption that a man is absolutely liable for all harm occasioned by his activity, seek to calibrate the causal relation between the intervening activity and defendant's original activity. A certain amount of causal impulsion is sought to be established as the norm for liability. The fact is that these generalizations about intervening acts are much too broad and vague to assist very much the solution of a new case. Their function in the legal scheme has not been to solve cases, but to rationalize solutions already reached by balancing the factors which control judgment. Their use to this end can be justified only on grounds of convenience. They save the judge a laborious exposition of the complicated adjustment, perhaps largely subconscious, by which his mind was made up, and permit his judgment to appear as something inevitable, demanded by law, and not merely the caprice of an individual.

A. C. 956, that any intervening act would break the causal chain, but added a list of exceptions that all but swallowed the rule. Supra, n. 19. And controversies have since raged as to the extent of these exceptions. S. S. Singleton Abbey v. S. S. Paludina, [1927] A. C. 16.

The field has been further confused by the use of analogies. "Causation is not a chain but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely," per Lord Shaw, Leyland Shipping Co. v. Norwich Fire Ins. Society, 118 L. T. 120 at 126 (1918). "It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B. snaps the chain of causation; that he is no mere conduit pipe through which consequence flow from A. to C., no mere moving part in a transmission gear set in motion by A.; that, in a word, he insulates A. from C." Per Lord Sumner, Weld-Blundell v. Stephens, [1920] A. C. 956 at 986. To Andrews, C. J., proximate cause is neither a chain, net, conduit pipe, transmission gear, nor insulation. "Should analogy be thought helpful, however, I prefer that of a stream. . . . The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three remain for a space sharply divided." Palsgraf v. Long Island R. R., 248 N. Y. 339 at 352, 162 N. E. 99 at 103 (1928). Goodhart gives up in despair: to him proximate cause "is neither a chain nor a net nor a river, but a labyrinthine maze." Goodhart, "The Unforeseeable Consequences of a Negligent Act," 39 YALE L. J. 449 at 452 n. (1930), reprinted in his ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 129 at 132 n. (1931).

The courts seem to have despaired of dragging with them this accumulated mass of subtlety. In re Polemis, [1921] 3 K. B. 560, and the House of Lord's opinion in the Edison case, [1933] A. C. 449, are remarkable for their paucity of cited authority.

## III

### ABSENCE OF DUTY IN RESPECT OF INTEREST INVADED

There are hints in Lord Wright's opinion that, despite his impatience with remoteness of damage formulas, he is not willing that liability for unintended consequences of a negligent act should be left wholly to the judges' discretion. Certainty in the law, and hence ease of administration, are worth purchasing at some sacrifice. It is desirable that certain types of consequences should be removed *en bloc* from the sphere of liability if, in general, such removal corresponds with the policy of the law. We have seen that this purpose is very imperfectly served by the traditional concept of "remoteness of damage." There is another device which has been more successful. It is the "duty" concept. In its present stage of development it eliminates from consideration all those unintended consequences which result to persons outside "the orbit of duty," which is to say, the orbit of foreseeable harm.[41]

Thus in one direction a fixed limit is set to a man's liability for the consequences of his wrongful act. It will be noted that, as to consequences which happen to a person outside the orbit of duty, foreseeability is relied upon as the test of liability. At first blush this may seem curious, in view of the discredit which the *Polemis* case cast upon the foreseeability test. It should be remembered, however, that the foreseeability test has the unique merit of serving three of the factors which control judgment: it satisfies the requirement of easy administration, it adjusts the severity of defendant's punishment to the degree of his moral fault, and since no preventive can be designed which is proof against the unforeseeable, it provides the maximum serviceable deterrent to negligence in other persons. But the foreseeability rule

[41] This duty concept has been evolved independently of the proximate cause or remoteness of damage concept by arguing that tort recovery depends on the wrongfulness of defendant's act, and that a negligent act is not wrongful as to a person to whom no harmful consequences could have been foreseen. Thus the duty concept seems to be firmly rooted in morality and to stand upon independent grounds of its own. Much has been written of the importance of distinguishing between the two questions: did defendant owe plaintiff a duty? and, assuming a duty and a breach thereof, was this breach the proximate cause of plaintiff's damage?

It is submitted that these questions are historically the same, and despite their verbal differences, they are still directed to the same problem. That problem is to fix a just limit to defendant's liability for the infinity of consequences that may follow his wrongful act. This used to be fixed in all cases by foreseeability. When foreseeability began to be rejected as a universal test, the duty concept was evolved to preserve as much of that test as was deemed serviceable.

breaks down as a universal test of liability for unintended consequences if strictly applied. The requirement that the specific consequence to the specific person be foreseen is clearly too narrow.[42] On the other hand, once the specific consequence need not be foreseen, but only "the general kind of harm," it is idle to say that foreseeability is still the test: the question what consequences are recoverable has passed into the court's discretion, to be decided, as outlined above, upon a variety of considerations. The problem is less delicate where a line is to be drawn, not between consequences of more or less the same sort to the same person, but between consequences to different persons. A rougher and readier test is feasible, and foreseeability has proved itself adequate.

Lord Wright suggests that the distinction here taken between different persons be likewise taken between different interests of the same person. In other words, just as an act which is negligent as to one person gives no right of recovery to another who happens to be injured by it, so an act which is negligent as to a person's property interests, for example, gives no right of recovery in respect of an incidental injury to his trade relations, provided the latter are outside the orbit of foreseeable harm. This seems to be the sense of the passage in which Lord Wright says:

> "The case of *In re Polemis and Furness, Withy & Co.*, a case in tort of negligence, was cited as illustrating the wide scope possible in damages for tort; that case, however, was concerned with the immediate physical consequences of the negligent act. . . . Nor is the appellants' financial disability to be compared with that physical delicacy or weakness which may aggravate the damages in the case of personal injuries, or with the possibility that the injured

[42] "The harm which was foreseeable and the specific harm which actually resulted need not be absolutely identical." Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 223 at 238, 305 (1912), reprinted in SELECTED ESSAYS ON TORTS 649 at 690 (1924), published by the Harvard Law Review Association.

Goodhart comments:

> "Judge Smith was stating an obvious truism. There is no reported case, so far as the writer knows, which has ever required absolute foresight as to the specific harm. If there were such a rule then the law of negligence would be unworkable and meaningless. If a man driving down the street at a furious pace runs down a pedestrian he will be held liable because a reasonable man under the circumstances would have foreseen that he might injure some one on the street. The foresight required here is not the foresight that a specific person will be injured in a specific way, viz., by being struck by the left wheel and having his right arm broken, but that someone will be struck in some way and suffer some bodily injury." Goodhart, "The Unforeseeable Consequences of an Act," 39 YALE L. J. 449 at 460 (1930), reprinted in his ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 129 at 141 (1931).

> man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic." [43]

Lord Wright is here classifying the various interests in which a man may be injured: his person, his property, his profit-earning capacity, and his financial position or trade relations. With respect to the *Polemis* case Lord Wright points out that the defendant's act was negligent only as to plaintiff's interest in the physical integrity of his ship, and that recovery was had only in so far as that particular interest was invaded. So with "that physical delicacy or weakness which may aggravate the damages in the case of personal injuries": these unforeseeable items are recoverable because they represent an invasion of that same interest, integrity of the person, as to which defendant's act was negligent. Profit-earning capacity is so intimately connected with integrity of the person that it may be classified for the present purpose as an aspect of the same interest: interference with one inevitably connotes interference with the other. The same cannot be said, however, of a person's interest in the physical integrity of his property and his interest in his trade relations: interference with the former does not inevitably connote interference with the latter. These two interests are sufficiently distinct so that we may say that an act which is negligent only as to a man's property does not of itself give a right of recovery in respect of an incidental and unforeseeable injury to his trade relations. Recovery may be had in respect of the injury to trade relations only if such injury was foreseeable, or in other words, if defendant owed a duty to the plaintiff in respect of both his property and his trade relations.

This idea is not wholly novel with Lord Wright, though he seems to be the first to make it, even tentatively, the *ratio decidendi* of a case. Discussing foreseeability as a test of remoteness of damage, Judge Jeremiah Smith has written: [44]

> "the harm which was foreseeable and the specific harm which actually resulted need not be absolutely identical. *Undoubtedly they must both relate to the same persons or class of persons, and*

[43] [1933] A. C. 449 at 461.

[44] Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 223 at 238, 305 (1912), reprinted in SELECTED ESSAYS ON TORTS 649 at 690 (1924), published by the Harvard Law Review Association.

> *to the same subject matter, i.e., to an infringement of the same right in the plaintiff* [our italics]; but these requirements are consistent with wide variations as to the mode of bringing about the harm, and the precise nature and extent of the harm."

In the italicized passage Judge Smith points out that a plaintiff cannot recover unless defendant ought to have foreseen some harm to him or to the class of which he is a member (i.e., the duty concept as it is understood today), and further, he cannot recover unless some harm was foreseeable to that right or interest which he asserts to have been infringed (i.e., the extension of the duty concept suggested by Lord Wright).

Mr. Justice Cardozo takes up this thought by way of dictum in the *Palsgraf* case. Speaking at large upon the subject of proximate cause (remoteness of damage), he says: [45]

> "We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary."

In his next breath, however, he recognizes that this doctrine of liability for any and all consequences may be too broad, and that it may not apply where there is a diversity of interests: [46]

> "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e.g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now."

Professor Goodhart has criticized this dictum as opening up "the terrifying prospect of a whole new series of cases in which it will be necessary to consider whether or not a person has the same interest in his foot and his eye, in his two adjoining houses, in his ship and the cargo which it carries." [47] This is the usual cry of the reactionary when faced with a new development. Undoubtedly the classification of interests

[45] 248 N. Y. 339 at 346, 162 N. E. 99 (1928).

[46] 248 N. Y. 339 at 346, 162 N. E. 99 (1928).

[47] Goodhart, "The Unforeseeable Consequences of a Negligent Act," 39 YALE L. J. 449 at 467 (1930), reprinted in GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 129 at 149 (1931).

will have to be hammered out laboriously upon the anvil of litigation, but scholars have already pointed the way.[48] The obstacles are no more formidable than those which have faced many a recent development in the law of torts.

If this is a correct analysis of the *Edison* case, then the vexed problem of liability for unintended consequences has been settled for the English courts as follows. First, it must be found as a matter of fact whether it was foreseeable that the defendant's act would harm the plaintiff. Second, it must be found as a matter of law whether the defendant's act has harmed more than one interest of the plaintiff. If so, then third, as to each interest, it must be found as a matter of fact whether it was foreseeable that defendant's act would harm that interest.

Since it is believed that Lord Wright decided the *Edison* case on the ground that defendant owed no duty to that interest as to which plaintiff claimed invasion, his other remarks have the authority only of dicta. It is not yet settled, therefore, that "practical reasons" are to supplant the old rigamarole of remoteness of damage. There is high and hopeful authority, however, that once an interest of the plaintiff has been found to which harm could have been foreseen, then the extent of defendant's liability will be determined, not by wordy formulas, but by balancing the factors which control judgment.

[48] Professor Green has analyzed interest as follows: (1) Personality—Integrity of the Person; (2) Property—(a) Physical Integrity, (b) Use and Enjoyment; (3) Relations with Others—(a) Family Relations, (b) Social Relations, (c) Professional Relations, (d) Political Relations, (e) Trade Relations. GREEN, JUDGE AND JURY 3 (1930). Dean Pound has made a similar contribution. See, Pound, "Interests of Personality," 28 HARV. L. REV. 343, 445 (1915), reprinted in SELECTED ESSAYS IN THE LAW OF TORTS 86, 110 (1924), published by the Harvard Law Review Association.