# CASE NOTES

## HABER v. WALKER[1]

*Damages—Negligence—Injuries resulting in suicide of injured husband—Causation—Foreseeability—Novus actus interveniens—Wrongs Act 1958 (No. 6420), s. 16.*

This was an action brought by the plaintiff under Part III of the Wrongs Act 1958 as administratrix of the deceased's estate, on behalf of herself as the widow and the eight infant children of the deceased, to recover damages resulting to them from his death. Briefly, the facts of the case were that the plaintiff's husband, after having received serious injuries in a motor-car accident caused by the defendant's negligence, became mentally deranged and subsequently committed suicide allegedly as the result of injuries incurred in the accident.

The judgment of Gowans J. in favour of the plaintiff rested upon findings by the jury that the husband's death was a direct result of the accident caused by the defendant's negligence, but that the death of the deceased by hanging himself was something which the defendant could not reasonably be expected to have foreseen. The jury also found that when the deceased committed suicide, he was labouring under such a defect of reason from disease of the mind as not to know it was wrong and further, that the death of the deceased was not an act of his own volition.

The defendant appealed from this judgment to the Full Court of the Supreme Court of Victoria, a majority of which upheld the judgment in favour of the plaintiff and dismissed the appeal.

The action itself was brought under section 16 of the Wrongs Act 1958 which, in employing the terms 'death . . . is caused', clearly establishes that it is incumbent upon the plaintiff to prove, as a condition precedent to recovery, that the defendant's wrongful act actually *caused* the death of the person in respect of whom the action is brought. In eliciting the various factors which govern this requirement, Smith J. points out 'that, at least in its main principles, the legal doctrine of causation based on commonsense considerations has now been made reasonably clear'.[2] His Honour then proceeds to discuss some of these principles, the most important of which can be summarized as follows: If something intervenes between the wrongful conduct and the harm, which is necessary for the production of the harmful consequence, such intervening occurrence is sufficient in law to sever the causal connection if it is either human action which can be characterized as voluntary, or the coincidental conjunction of the wrongful act with a causally independent event.

The critical question then, was whether the deceased's act of suicide could properly be regarded as a voluntary act so as to 'break the chain

[1] [1963] V.R. 339. Supreme Court of Victoria; Lowe, Smith and Hudson JJ.
[2] *Ibid.* 358.

of causation' between injury and death. After a lengthy consideration of the relevant authorities, the court arrived at some very interesting conclusions which merit careful consideration. At the outset, it was declared settled law that if the deceased was 'legally' insane when he committed suicide, and if the insanity was produced as a direct consequence of injuries inflicted by the defendant, then the causal connection between injury and death remained unbroken.[3] Although there are conflicting authorities on this point, the better view would seem to be that the deceased need not have been 'legally' insane in the strict sense prescribed by the *M'Naghten* rules,[4] for as was stated by the High Court in *Chapman v. Hearse*,[5] whether the intervening act is such as to sever the chain of causation must 'be very much a matter of circumstance and degree'.[6] On the same principle, even 'brooding' over the consequences of an accident will fail to sever the causal connection if the accident directly caused the brooding which resulted in insanity and ultimately, suicide.[7] It is Smith J. however, who really touches on the heart of the problem when he observes that

> for an act to be regarded as voluntary it is necessary that the actor should have exercised a free choice. [This involves a] question of degree [and] if his choice has been made under substantial pressure created by the wrongful act, his conduct should not ordinarily be regarded as voluntary.[8]

The majority of the court,[9] after applying these principles of law to the findings of the jury, held that on the facts of the case it could properly be said that the defendant *caused* the death of the deceased. Hudson J. dissented purely on the ground that he did not think the jury's finding of insanity was justified by the evidence.

Viewed in a wider perspective, the observations made by the Court in relation to this issue seem to be in full accord with current notions of social justice, while at the same time representing a satisfactory development in an important field of tort law. The Court was unanimously of the opinion that the technical requirements of the *M'Naghten* rules

[3] The authorities relied on for this proposition were *Murdoch v. British Israel World Federation* [1942] N.Z.L.R. 600 and certain observations made by Devlin J. in *Cavanagh v. London Transport Executive* (*The Times*, 23 Oct. 1956). It was also held to be in accordance with the views expressed by Pilcher J. in *Pigney v. Pointer's Transport Services Ltd.* [1957] 2 All E.R. 807; [1957] 1 W.L.R. 1121, 1124: 'If the deceased had been rendered insane in law, as judged by the standard laid down in the *M'Naghten* rules, and had then committed suicide, no difficulty would arise on the assumption that his state of insanity was attributable to the accident. The chain of causation would then be complete.'

[4] In *Cavanagh's case* and *Pigney's case* an 'irrational state of mind' and 'acute depression neurosis' were both respectively considered sufficient to maintain intact the causal connection between injury and death. The latter case is criticized by Fleming: 'Liability for Suicide', 31 *Australian Law Journal* 587. Note that these observations were made *obiter* since the jury found the deceased to have been insane within the second branch of the *M'Naghten* rules when he committed suicide.

[5] (1962) 106 C.L.R. 112. [6] *Ibid.* 122.

[7] It will obviously be otherwise in circumstances where the deceased has freely chosen to sink himself in worry and depression.

[8] [1963] V.R. 339, 359.

[9] Lowe and Smith JJ.

should not be imported into the civil law, especially where problems of causation are at issue. The *M'Naghten* rules themselves have not altogether escaped criticism and it would seem strange that highly technical enquiries, delving into the meaning of such phrases as 'defect of reason' or 'disease of the mind', should be applied to problems of causation where the only real question to be determined is whether the act of the deceased in committing suicide was of a voluntary character.[10] Surely it is preferable that this question be approached in the light of flexible commonsense considerations rather than by the introduction of technical, and perhaps even outdated requirements which, in the opinion of the writer, should be strictly confined to the area of criminal law.

The second major issue coming under the cognizance of the Court was resolved by the majority in the form of a decision that once the necessary elements of causation have been established, the requirement of reasonable foreseeability of damage in negligence actions as laid down by the Privy Council in *The Wagon Mound*[11] was not applicable to an action brought under section 16 of the Wrongs Act 1958. As Lowe J. observes in the course of his judgment,

> the action has no counterpart at common law and owes its existence and extent to the statute. . . . It is independent of the nature of the action the deceased (if he had survived) might have brought.[12]

The majority argue, therefore, that the statute lays down its own conditions for the imposition of liability on the defendant: namely, proof of causation and the right of the deceased, had death not occurred, to maintain a hypothetical cause of action. Consequently, even though section 16 contains the phrase 'an action for damages', no scope is provided for the implication of any such principle as enunciated in *The Wagon Mound*.[13]

Hudson J., taking objection to this line of argument, points out that the conditions enumerated in the relevant section do not constitute an exhaustive account of the requirements which must be satisfied before the action will lie. His Honour states that it is of the essence of every 'action for damages' based on negligence that the consequences of the wrongful act be reasonably foreseeable, and there is much force in his contention that section 16 creates 'an action for damages such as the deceased person himself might have brought had he lived but with a different measure of damages'.[14]

From the standpoint of precedent, the situation was found to be some-

[10] The true principle is stated by Slesser L.J. in *Dixon v. Sutton Heath Colliery Co.* (1930) 23 B.W.C.C. 135, 142: 'I do not think that any particular importance can be attached to the word "insanity" as such. If there were mental instability, psychoneurosis or insanity and if these things would in fact dethrone the power of volition of the injured man, the suicide is a direct consequence of the accident. When the principle is looked at, therefore, the nice questions as to whether this would be equivalent to insanity or not seem to me irrelevant.'

[11] *Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co. Ltd* [1961] 1 All E.R. 404; [1961] A.C. 388.

[12] [1963] V.R. 339, 348. This view is supported by the High Court judgment in *Victorian Railway Commissioners v. Speed* (1928) 40 C.L.R. 434, 440-441.

[13] [1961] A.C. 388.

[14] [1963] V.R. 339, 370.

what confused. The majority of the Full Court relied chiefly on several cases decided in relation to English Workmen's Compensation legislation and a number of later authorities decided before *The Wagon Mound*.[15] However, as is shown in the dissenting judgment of Hudson J., the English Workmen's Compensation Act in no sense involves an 'action for damages' and further, there is an essential fallacy in relying on cases which were decided when the rule in *Re Polemis*[16] still governed the outcome of most negligence actions.

In addition, the Full Court had to consider the effect of the High Court's decision in the recent case of *Chapman v. Hearse*[17] which also involved an action under legislation modelled on Lord Campbell's Act. The proposition enunciated in the above case that reasonable foreseeability 'is not, in itself, a test of "causation" [but rather] marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act',[18] was held to involve the obvious and valid conclusion that the words 'death . . . is caused', mentioned in the relevant section did not, *in themselves,* import any limitation by reference to reasonable foreseeability. However, in another crucial passage it is stated, *inter alia*, by the High Court that 'since . . . some casualty of that character was within the realm of reasonable foreseeability, the judgment against Chapman should stand'.[19] Although the natural meaning of this passage is in accord with the views expressed in the dissenting judgment of Hudson J., the majority advocated an unlikely and highly artificial interpretation which enabled them to argue that the passage cited did not refer to foreseeability of damage but rather related to the original 'duty of care' situation discussed earlier in the judgment. Yet, if this were the case, then 'the court might well have disposed of the argument founded upon *The Wagon Mound* simply by stating that it has no application to a claim founded on the statute'.[20]

It would seem therefore, that the commonsense notions to be found in the dissenting judgment of Hudson J. are preferable to the forced and unnatural interpretations on which the conclusions of the majority of

[15] In particular, reliance was placed on the well known dictum of Collins M. R. in *Dunham v. Clare* [1902] 2 K.B. 292 and several other authorities discussed by Lowe and Smith JJ. in the course of their judgments. A number of American cases which upheld a contrary view were rejected out of hand by a majority of the Full Court.

[16] *Re Polemis and anor. and Furness, Withy and Co. Ltd* [1921] 3 K.B. 560. In this case the Court of Appeal established the 'direct consequences' test as determining the extent of liability for damage caused by negligent conduct.

[17] (1962) 106 C.L.R. 112.

[18] *Ibid.* 121-122. Note that there is some difficulty in reconciling this statement with a further observation by the High Court at 121 that 'since reasonable foreseeability is the test the fact that a later act is culpable does not necessarily preclude the conclusion that the earlier act was a "proximate" or "legal" cause'.

[19] *Ibid.* 125.

[20] [1963] V.R. 339, 366 per Hudson J. Note that in *Chapman v. Hearse* Dixon C.J. pointed out, *in arguendo*, that it 'would be the first enquiry to see whether that damage would be caused by them. It would not be an enquiry as to whether it was foreseeable or anything of that sort. And then if you found that in fact it was caused by them, would you not then proceed to consider simply the negligence?' On the basis of this comment and several observations noted earlier, a good case could be made out to the effect that the majority in *Haber v. Walker* completely misinterpreted the judgment of the High Court in *Chapman v. Hearse*.

the Full Court are based. It only remains now to examine the various policy considerations underlying the conflicting views held by members of the Court.

Smith J. seems to be expressing the sentiments of the majority when he contends that serious injustice would result unless the requirement of reasonable foreseeability is modified to deal with the problem of 'ulterior harm'. Professor Goodhart, however, while stressing the importance of foresight as 'a fundamental element in the tort of negligence', is of the opinion that the application of the foreseeability test to the ulterior consequences of a wrongful act presents no problems if it is borne in mind that 'The foresight . . . required to establish negligence need not be exact foresight for that is never possible'.[21] Similarly, according to Professor Glanville Williams, 'the test of reasonable foresight . . . in relation to ulterior harm . . . has to be pushed far beyond the type of event to which ordinary foresight relates'.[22]

It would seem that the majority in *Haber v. Walker* were correct in suggesting that had the direction to the jury pertaining to reasonable foreseeability been framed in wider terms, then the finding on this point would probably have been in favour of the plaintiff. It is therefore perhaps unfortunate that the Court, whilst refusing to apply a modified version of the foreseeability test in order to achieve the same result, has instead totally denied the relevance of the foreseeability principle to actions brought under section 16 of the Wrongs Act 1958.[23] The decision itself is thus clear evidence of the fact that the rule laid down in *Re Polemis*[24] has not been rendered entirely superfluous and still finds favour in the Courts.[25] It is suggested, however, that the rigid test of liability established by the *Polemis* rule is highly unsatisfactory in that it denies the very element of flexibility which is essential in a modern dynamic society. In contrast, the uniform application of the foreseeability test to actions of negligence would probably introduce a greater degree of simplicity and flexibility into an important area of tort law which at the present is in somewhat of a flux.

From the foregoing, it becomes apparent that many aspects of the foreseeability test are still obscure and uncertain. What is its exact relationship to problems of causation? What is the scope of the principle laid down in *The Wagon Mound* and how should it be applied to the so-called 'special sensitivity' rule?[26] While it is hoped that many of these

[21] Goodhart, 'Liability and Compensation', 76 *Law Quarterly Review* 567, 582.

[22] Glanville Williams, 'The Risk Principle', 77 *Law Quarterly Review* 179, 198.

[23] It is suggested that in *Chapman v. Hearse* the High Court has impliedly given recognition to this modification of the foreseeability test. It is stated at 120-121 that 'it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence'.

[24] [1921] 3 K.B. 560.

[25] *E.g. Smith v. Leech Brain & Co.* [1961] 3 All E.R. 1159 where Lord Parker C.J. distinguished the test laid down in *The Wagon Mound*.

[26] *E.g.* how would cases such as *Pollard v. Makarchuk* (1959) 16 D.L.R. (2d) 225 (collision of two motor vehicles) and *Levi v. Colgate-Palmolive Pty Ltd* (1941) 41 S.R. (N.S.W.) 48 (defective products) be decided today in the light of the foreseeability test of *The Wagon Mound?*