SOME RECENT DEVELOPMENTS IN THE LAW OF TORTS.*

Without any doubt the most talked-about (if not potentially the most important) development in the field of torts since it was last my privilege to present a paper on this subject to the Society has been the decision of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.*,[1] a case more shortly cited as *The Wagon Mound*. The decision marks, certainly for Australia, and in all probability for England, the demise of the "direct consequences" test enunciated in *Re Polemis & Furness, Withy & Company Ltd.*[2] in cases in which the remoteness of the damage suffered is in issue, and substitutes for it the test: Were the damages in question a reasonably foreseeable consequence of the original negligence? In one class of case only is the "direct consequence" test likely to be retained. In *Smith v. Leech Brain & Co. Ltd.*,[3] Lord Parker L.C.J. has held that the Privy Council decision has not affected, and was never intended to affect, what are generally known as the "thin skull" cases, those (and there are curiously few in the law reports) in which the consequence of a negligent act causing physical injury to another turn out to be unexpectedly serious because of some unforeseen (and unforeseeable) antecedent physical condition of the plaintiff.[4]

But how much practical difference has *The Wagon Mound* really made? To assess this it is necessary to consider first of all the kinds of circumstances in which a question of remoteness of damage is likely to arise. Very broadly, the cases may be divided into three groups:—

(1) Cases in which the damage which occurs, following the negligent (or otherwise wrongful) act, is unexpected or is unexpectedly great because of some previously existent abnormal (*i.e.*, unforeseeable or unforeseen) condition of the plaintiff or of the plaintiff's property.

(2) Cases in which the damage which occurs, following the negligent or wrongful act, is unexpected or is unexpectedly great because

* A paper read at the 1963 Law Summer School of the University of Western Australia.

1 [1961] A.C. 388.

2 [1921] 3 K.B. 560.

3 [1962] 2 Q.B. 405.

4 Australian cases include Watts v. Rake, (1960) 34 Aust. L.J.R. 186, and Von Hartmann v. Kirk, [1961] Victorian R. 544; in these cases there was the further factor (not explicitly present in the Smith case) that the pre-existing condition would ultimately have brought about the disability or death by itself.

of the happening of some intervening event or human act—the so-called *nova causa interveniens* or *novus actus interveniens.*

(3) Cases in which the damage which occurs does so in an unexpected way because the situation created by the negligent or wrongful act turns out to be dangerous in an unexpected or unforeseeable way; these cases may be further subdivided into (a) cases in which damage of the kind foreseeable happens in an unforeseeable way, and (b) cases in which the unforeseeable way in which the damage occurs produces also damage of an unforeseeable kind.

The first group or class of circumstances clearly embraces the "thin skull" cases already referred to; to them (as the law stands at present) *The Wagon Mound* has made no difference. But it also includes *Re Polemis* itself; for it will be remembered that in that case the fire for which damages were awarded resulted from the dropping of a plank into a hold already full of inflammable vapour, whose presence, we must presume from the finding of the arbitrator, was unknown and unforeseeable. Can we then say that the effect of *The Wagon Mound,* in any future situation of the *Polemis* type, will be *nil*? That is to say, that although the expressed *ratio decidendi* has been declared to be bad law it is still possible to deduce from *Polemis* a *ratio decidendi* which is not in conflict with that of the Privy Council? Such an argument would be ingenious; but one is inclined to doubt whether it would succeed. In that case, however, what will be the basis for distinguishing between a *Polemis*-type case and a "thin skull" case? I submit that the "thin skull" principle will be confined to pre-existing physical (including nervous) conditions of the person; pre-existing physical conditions of property will require to be foreseeable if damage arising from the operation on them of an otherwise wrongful act is not to be too remote.[5]

For the second group or class of circumstances it is submitted that the decision in *The Wagon Mound* has made little difference to the existing law; it has at most made explicit what was formerly implicit. For example Heuston, in his discussion[6] of the problem of remoteness of damage, says, with reference to the well-known dictum of Lord

[5] In Liesbosch v. Edison, [1933] A.C. 449, a pre-existing financial condition of the plaintiff, impecuniosity, was regarded by Lord Wright as "extrinsic", "an independent cause", and thus to be distinguished from a physical condition of body or (presumably) of property. One may ask, is impecuniosity so abnormal as not to be readily foreseeable? If in any future case damages are increased by the plaintiff's foreseeable impecuniosity, will the result be different from that in the Liesbosch case?

[6] SALMOND ON TORTS (12th ed., 1957), at 731.

Sumner in *Weld-Blundell v. Stephens,*[7] "[T]here are undoubtedly many decisions to be found in the books which are expressed to rest upon the principle that damage which is the natural and probable consequence of a defendant's wrongdoing is imputable to him notwithstanding an intervening act." He follows this with a section[8] headed, "Liability where Intervening Act Foreseeable." Again, HART & HONORE, in CAUSATION AND THE LAW,[9] in examining the question whether certain harm is the consequence of a certain wrongful act, given the presence of a third factor, enunciate certain propositions which could be translated into the language of "reasonable foresight" —*e.g.*, "normal physical events, even subsequent to the wrongful act, do not relieve a wrongdoer of responsibility, but . . . an abnormal conjunction of events . . . negatives causal connexion, provided that the conjunction is not designed by human agency";[10] and "animal behaviour, if it is to negative causal connexion, must, in conjunction with the prior contingency, form an abnormal or 'very unlikely' sequence of events."[11]

Even where what HART & HONORE call "the general principle of the traditional doctrine" concerning the effect of voluntary human conduct—that "the free, deliberate, and informed act or omission of a human being, intended to produce the consequence which is in fact produced, negatives causal connexion,"[12]—is in issue it is doubtful if *The Wagon Mound* will make any difference; for there is already authority for the proposition that if the act or omission is one which should have been foreseen and guarded against it will not break the causal connexion.[13]

It is perhaps in circumstances falling within sub-class (a) of group (3) (of which there are relatively few examples in the reports) that the effect of the decision will be most apparent. This is the class of case into which *The Wagon Mound* itself falls. An earlier example in which the Court of Appeal took the opportunity to reaffirm the

7 [1920] A.C. 956, at 988: "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."

8 S. 215.

9 Oxford, 1959.

10 At 151-152.

11 At 167.

12 At 129.

13 An example is Stansbie v. Troman, [1948] 2 K.B. 48; although the duty in this case was founded in contract, the same principle applies in tort—see Davies v. Liverpool Corporation, [1949] 2 All E.R. 175.

Polemis doctrine is *Thurogood v. Van den Berghs & Jurgens Ltd.*[14] In this case a large fan had been removed from its mounting on the wall and set to revolve, unguarded, on the floor. In some unexplained manner the plaintiff's hand came into contact with the revolving blades (though he was apparently taking care to keep it away from them) and he was injured. Devlin J. found that this happening was unforeseeable,[15] but that to leave the fan operating on the floor unfenced was negligent because those testing the fan were likely to stoop over it and a tie or some other article of clothing might well catch in the revolving blades, with resulting physical injury to the person concerned. The injury, though arising in an unforeseeable manner from a negligent act, was held not to be too remote. It will be noted that this was a case in which physical injury, which could be foreseen as occurring in one way, occurred in quite another. But the facts in *The Wagon Mound* place it in sub-class (b) of group (3). It was found that careless discharge of the furnace oil was likely to foul, and did foul, dockyard installations and slipways in the vicinity, making them more difficult to use and imposing on the owners the burden of cleaning them. The unforeseeable consequence was that the furnace oil (whose flash-point was admittedly high) might ignite and damage or destroy slipways and dockyard installations, and the ships thereon or therein. Thus the unforeseeable damage was of a totally different kind from the foreseeable damage. Moreover, since the kind of damage which occurred was unforeseeable, the quest (even if successful) for some relatively minor damage, of a different kind, which might have been foreseen as likely to arise from the careless discharge of oil may have been regarded as attempting to take an unwarranted advantage of the *Polemis* doctrine, pushing it too far. Be that as it may, it will clearly now not be possible, in a case where unforeseen damage has occurred, to seek for some foreseeable damage (actual or potential) of a different kind in order to establish a duty of care and thus a peg on which to hang an action for the greater damage. This is perhaps the most significant practical effect of *The Wagon Mound.*

What will be the effect in cases (if any recur) of the type of *Thurogood's* case? It follows from the classification undertaken above

14 [1951] 2 K.B. 537.

15 It is, with great respect, difficult to see how he arrived at this conclusion; perhaps it was on the basis that no one could imagine that a workman might be foolish enough to get his hand into such a position that it could touch the unguarded blade. What he said (according to the judgment of Asquith L.J. (*ibid.*, at 552)) was: "It (the accident) happened in a way that is still unexplained; and since no one can do more than guess how he came to put his hand on the blades it is impossible to say that the defendants ought to have foreseen that he might." *Sed quaere.*

that that case could, if need be, be distinguished from *The Wagon Mound;* it is submitted with some confidence that that distinction is unlikely to be made. But it is possible that similar findings of fact will not recur. It seems that Devlin J. was persuaded by the apparent inexplicability of the accident to Thurogood to find that it was unforeseeable; but that, the *Polemis* doctrine being available to help him to give damages for the unforeseeable consequence, so long as it was direct, he was able to seize upon what Dr. Goodhart has called "the imaginary necktie"[16] to establish a duty of care. Since *The Wagon Mound* imaginary neckties and the like will no longer bear the weight of unexpected consequences. One might hazard the guess that it will be found a little more easy in such a case to find even the inexplicable consequence foreseeable, if not in precise detail, at least in general; and this is all that the foreseeability test requires.

Two further comments may be made on *The Wagon Mound.* The first is that it has been hailed in many quarters as bringing about a considerable simplification of negligence cases. The classical view of such cases has been that there are three questions to be answered before a defendant can be found liable to a plaintiff: (1) Was there a duty of care owed to that plaintiff (this being dependent upon reasonable foresight of some possible injury)? (2) Was there a breach of that duty (this being dependent upon the conduct in the situation, and at times the foresight again, of the reasonable man)? (3) Was the damage sufficiently proximate—or, not too remote (this being dependent partly upon "directness" and partly upon foresight of intervening events)? Strictly, of course, the first question was a question of law, to be answered by the judge as a judge of law; the second (once the necessary standard of care had been established as a matter of law) was a question of fact, to be answered by the jury (or the judge in his role as trier of fact); and the third, again, apparently, a question of law, though dependent upon certain findings of fact. Viscount Simonds pointed out that in the course of displacing the proposition that (*qua* remoteness of damage) unforeseeability is irrelevant if damage is "direct" the Board inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This suggests that in future the test of the existence of a duty of care must be, not whether any damage at all could be foreseen, but whether damage of the kind suffered can be foreseen. If this is answered in the affirmative

[16] *The Imaginary Necktie and the Rule in Re Polemis,* (1952) 68 L.Q. REV. 514. Goodhart points out (at 515) that there was no evidence to show that the plaintiff or any other workman ever wore a tie while working.

what would previously have been a question of remoteness of damage will not arise. There has been brought about, therefore, the simplification which Denning L.J. (as he then was) envisaged in the course of his judgment in *Roe v. Minister of Health.*[17] Discussing the three questions[18] which must be answered in every negligence case if a plaintiff is to be successful—the questions successively of duty, causation, and remoteness—he said: "In all these cases you will find that the three questions run continually into one another. Starting with the proposition that a negligent person should be liable, within reason, for the consequences of his conduct, the extent of his liability is to be found by asking the one question: Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it; but otherwise not. Even when the three questions are taken singly, they can only be determined by applying common sense to the facts of each particular case: . . . Instead of asking three questions, I should have thought that in many cases it would be simpler and better to ask the one question: Is the consequence within the risk? And to answer it by applying ordinary plain common sense."

The second comment is that, although (at any rate in the Australian law area) the decision is of the highest authority, and was (for good measure) pronounced by a very strong Board, there are not absent from it some elements of *incuria.* In the overthrow of *Polemis* reliance is placed on the decision of the House of Lords in *Woods v. Duncan.*[19] Viscount Simon is correctly quoted as saying that the three conditions for establishing liability for negligence are (1) that the defendant failed to exercise due care; (2) that he owed the injured man the duty to exercise due care; and (3) that his failure to do so was the cause of the injury in the proper sense of the term. He goes on to say, "He (Viscount Simon) held that the first and third conditions were satisfied, but inasmuch as the damage was due to an extraordinary and unforeseeable combination of circumstances the second condition was not satisfied. Be it observed that to him it was one and the same thing whether the unforeseeability of damage was relevant to liability or compensation." But this, with respect, is

17 [1954] 2 Q.B. 66, at 85.

18 These are of course not the same questions as the "classical" three mentioned above. Moreover, even the questions of "causation" and "remoteness" are not (upon the view of Denning L.J.) truly separate; for if the causation question is to be answered by the test of foresight it becomes a question not of so-called "scientific" causation but of attributability, and so ultimately the same question as that of "proximity" or "remoteness."

19 [1946] A.C. 401.

not correct. Viscount Simon did (though somewhat hesitantly) agree that negligence might be proved; he stated categorically that, though the circumstances were unusual, a duty of care was made out.[20] But he said that the negligence was not the "cause" of the disaster, because of the "extraordinary combination of circumstances" among which was the intervening act of Lieutenant Woods.[21] Lord Russell of Killowen[22] exonerated Cammell Laird & Co. on the ground that they were not in breach of duty to the men whose widows were plaintiffs; Lord Macmillan, it is true, uses the language of reasonable foresight to speak of the "chain of causation"; but both Lord Porter and Lord Simonds himself (as he then was) negatived negligence on the part of Cammell Laird and Co., and did not employ the language of causation; Lord Porter[23] expressly negatived any suggestion that the question which arose in *Woods v. Duncan* was one of remoteness of damage; and Lord Simonds invited the House to observe "how nicely this" (*i.e.*, the argument which he had just developed concerning reasonable foresight) "fits in with the law of negligence as it has been developed in *Donoghue's Case.*"[24] Thus for the majority of the House the case turned on the existence (or the breach) of a duty of care, and not on remoteness of damage; and it is submitted with respect that it can hardly be prayed in aid as a decision inconsistent with *Re Polemis.*

I should like to turn now from the Privy Council to the High Court of Australia, and to a decision with some bearing on a topic touched upon in the last paper which I presented,[25] the action *per quod servitium amisit.* When I last spoke it seemed that the ambit of that allegedly anomalous action had been narrowly confined to cases in which the services, the loss of which was the subject of complaint, were those of a "menial" or domestic servant. This is no doubt still the law in England. But the bounds of the action have been greatly extended for Australian jurisdictions by the decision in *Commissioner for Railways (N.S.W.) v. Scott.*[26] The injured man in that case was an engine-driver in the New South Wales Government Railways. He was injured when the respondent negligently rode his motor-cycle

20 *Ibid.*, at 420.
21 *Ibid.*, at 421.
22 *Ibid.*, at 426.
23 *Ibid.*, at 437.
24 *Ibid.*, at 443.
25 *Some Recent Developments in the Law of Torts,* (1958) 4 U. WEST AUST. ANN. L. REV. 209.
26 (1959) 102 Commonwealth L.R. 392.

across the railway line and was struck by the train; he was off work on sick pay for some weeks.[27] The plaintiff Commissioner succeeded in his action in the District Court, but that decision was reversed on appeal by the Full Court of New South Wales.[28] Street C.J., following *Inland Revenue Commissioners v. Hambrook,*[29] held that the action lay only in respect of services within the sphere of domestic relations—"domestic" meaning "appertaining to home or household or family affairs." Thus he suggested that a cause of action might conceivably arise if a cook in the Railway Refreshment Rooms was injured. Herron J. held that the engine-driver's relationship with the Commissioner was "wholly different in kind from the master and servant relationship upon which the action *per quod servitium amisit* rests."[30] In the High Court of Australia, however, Kitto, Taylor, Menzies, and Windeyer JJ. reversed the Full Court; and though Dixon C.J. dissented, along with McTiernan and Fullagar JJ., the force of his dissent is weakened by the fact that though he accepted *Hambrook's Case* and *Attorney-General for N.S.W. v. Perpetual Trustee Co. Ltd.*[31] as establishing that the action would lie only in respect of the loss of the services of a menial servant, he did so not uncritically but with a full recognition of the fact that the holding was historically unjustified, a point on which he allied himself with the majority.

It is now clear that, so far as Australian jurisdictions are concerned, the action will lie in respect of all "servants;" and the decision therefore lays open for consideration and argument the meaning for this purpose of "servant." The distinction drawn by the Privy Council

27 The facts of this case suggest that it might well have been argued and decided on other grounds. Although, as stated in 102 Commonwealth L.R. 392, at 393, the pleadings alleged negligence of Scott whereby the motor-cycle collided with the locomotive and carriages of the plaintiff and the engine-driver was "thrown down and suffered bodily injury", the facts as found by Furnell D.C.J. (quoted in the judgment of Herron J. in [1959] State R. (N.S.W.) 240, at 252) were that Scott's motor-cycle and side-car appeared suddenly on the line, turned parallel to the lines and to the train and was struck by a portion of the train; the driver "suffered considerable shock which made him unfit for duty for a protracted period." Dixon C.J. also states (102 Commonwealth L.R. 392, at 397) that "An engine-driver . . . suffered a breakdown after a level crossing accident had been averted, partly by his efforts." Could the risk of injury to an engine-driver reasonably have been foreseen by the motor-cyclist? If so, could the risk of nervous shock reasonably have been foreseen? And if not, what would have been the effect of *The Wagon Mound*?

28 [1959] State R. (N.S.W.) 240.

29 [1956] 2 Q.B. 641.

30 [1959] State R. (N.S.W.) 240, at 254.

31 [1955] A.C. 457.

in *Attorney-General for N.S.W. v. Perpetual Trustee Co. Ltd.* is between "the domestic relation of servant and master" and that of a holder of a public office and the State. The police constable, it was held, fell within the latter category because "his authority is original, not delegated, and is exercised at his own discretion by virtue of his office." Basing himself on this, Denning L.J., in *Hambrook's Case,*[32] enunciated a "narrower ground" on which the case could have been decided—that Mr. Bryning "was a tax officer appointed under statute with sufficient discretion to take him out of the category of a servant to whom this cause of action applies." Is the test to be statutory appointment together with discretion? In *Scott's Case* the engine-driver could be regarded as having been appointed under statute;[33] but this did not prevent him from being a servant. Is it then to depend upon the degree of discretion which the servant may exercise in the course of doing his work? If so, what is to be said of a University professor, a house surgeon or registrar employed by a large hospital, a solicitor employed by a firm of practitioners on a salary? Or will the test be the "organization" test enunciated by Denning L.J. in *Stevenson Jordan & Harrison Ltd. v. MacDonald,*[34] a test which would enable all of the persons last-mentioned to be categorized as servants? *Scott's Case* opens up some interesting vistas.

However widely the action now becomes available, there is always the limiting factor that it may be difficult, in many cases, even when the injured servant is (as in *Scott's Case*) on sick pay, to establish that the master has suffered much damage; and this will be the case especially where the organization is a large one. In his judgment in the *Perpetual Trustee Case* when it was before the High Court[35] Fullagar J. pointed out that the amount of wages paid to the injured servant during the period of his incapacity could not be regarded as even *prima facie* evidence of the damages suffered, which he described as limited to the pecuniary loss actually sustained through the loss

32 [1956] 2 Q.B. 641, at 666-667.

33 Government Railways Act 1912-1955 (New South Wales).

34 [1952] 1 Times L.R. 101, at 111. The point in issue in this case was whether a man was employed under a contract of service (which would make him a "servant" on one well-known test) or a contract for services (which would make him an independent contractor). Denning L.J. said, "One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

35 (1952) 85 Commonwealth L.R. 237, at 290.

of services of the servant. He returned to this point, and elaborated upon it, in *Scott's Case*. "[I]t does seem, from a practical point of view, a little absurd that a huge industrial organization like the New South Wales Government Railways, employing many thousands of persons, should claim that it has suffered damage to the extent of £149 because it has lost the services of an engine-driver who is off duty for a week or two. Such contingencies have, of course, to be met almost every day. They are met by adjustments of schedules or of rosters and in various other ways, and I should suppose it to be a matter of practical impossibility in most cases to say whether there has been a net loss or a net gain."[36] A further limiting factor, too, will be the effect of *The Wagon Mound* rule that the damage suffered must be reasonably foreseeable; it may be possible to claim the cost of employing a temporary substitute for the injured employee, but it is unlikely to be possible to claim loss of profit because it has been necessary to refuse certain contracts during the period of his incapacity, unless this can be shown to be a foreseeable consequence of the negligence. Finally, it seems that the action is likely to be successfully brought only by a master who is under an obligation—and probably a legal obligation—to pay the servant his wages or part thereof during incapacity. Again a dictum of Fullagar J. in *Scott's Case* indicates what is possibly the correct approach. Speaking of his opinion that medical, hospital, and nursing expenses incurred in consequence of injuries inflicted by a negligent defendant are recoverable from that defendant by any person who is under an obligation, contractual or otherwise, to pay them, he said:[37] "That person . . . recovers those expenses or damages . . . because their being incurred is the natural and probable consequence of the defendant's negligence and he must indemnify whoever has to pay them—. . ." This, it may be noted, is entirely consistent with *The Wagon Mound,* and received some support from *Schneider v. Eisovitch,*[38] though in that case it was the injured person who recovered money expended on her behalf (though without contractual obligation) by others which she was under at least a moral obligation to repay.[39]

[36] (1959) 102 Commonwealth L.R. 392, at 410.

[37] *Ibid.,* at 408.

[38] [1960] 2 Q.B. 430; *cf.* Gage v. King, [1961] 1 Q.B. 188, but see also Wilson v. McLeay, (1961) 35 Aust. L.J.R. 256.

[39] Since the above written the 11th Report of the Law Reform Committee (*Cmd.* 2017) has become available; it recommends, *inter alia,* (1) that the action for loss of services should be abolished (as should the actions for loss of consortium and for seduction); (2) that the employer who has incurred expense in consequence of a tortious injury to his employee should

For my third topic I return to that old warhouse—occupier's liability—and the movements in that branch of the law. Again the developments I want to note have taken place in Australia (and in one case in New Zealand); for in England the Occupiers' Liability Act 1957 has abolished the distinction between invitees, licensees, and persons entering under contract (whose remedies have generally been discussed under the rubric "Occupier's Liability" in the Law of Tort, though they stem from contract) and has substituted for the differently expressed categories of duties a "common duty of care." (In passing, it may be remarked that the English legislation has greatly reduced the amount of litigation, or at any rate of reportable litigation, for I have not noticed one case in the reports in the past three years turning on the provisions of the new legislation; perhaps one should not advocate its adoption here). But to some extent judicial developments in this quarter of the common law world have continued the process of blurring the old distinctions which was said (perhaps only prophetically) by Denning L.J., in *Slater v. Clay Cross Co. Ltd.*,[40] to be *fait accompli* by the common law without the intervention of statute.

Two recent cases, one in the Full Court of New South Wales and the other in the High Court of Australia, indicate that the duty of the occupier towards persons entering may be more extensive, and less easily satisfied, than has previously been thought on a strict reading of the rules. In *James v. Kogarah Municipal Council*,[41] the plaintiff (a boy) was injured when he fell off a diving-tower in a swimming-pool under the control of the defendant Council. The tower had been painted, to the knowledge of the Council, with a paint which was slippery, especially when wet (with water). The Full Court held that the plaintiff, who had entered a public swimming pool, was entitled to expect at least the standard of care owed to an invitee by an invitor; and further, that even if it could be shown that he knew and appreciated the dangerous condition of the diving-tower—indeed even if the Council had exhibited a notice warning of the slipperiness of the paint—he would not necessarily be debarred from recovering. This appears to be tantamount to saying that a body, such as a Municipal Council, which maintains a swimming pool and allows the public to use it, must take all reasonable steps to see that it is safe

be entitled to reimbursement from the tortfeasor to the extent that the tortfeasor's liability to the employee has been reduced in consequence of he employer's action.

40 [1956] 2 Q.B. 264, at 269.

41 [1961] N.S.W.R. 97.

to use and cannot discharge its duty after creating unsafe conditions, or allowing them to continue, by merely warning the public of them. There may, of course, be circumstances in which warning would be sufficient; but the duty is so phrased that it may in certain circumstances be no different from the general duty of care. Again, in *Commissioner of Railways (N.S.W.) v. Anderson*,[42] the High Court emphazised that, notwithstanding the famous formulation of Willes J. in *Indermaur v. Dames*,[43] an occupier may still owe a duty of care to a careless invitee, or to one who knows of the dangerous condition of the premises to which he is invited. Anderson was injured when, in hurrying to catch a train at the suburban station where he caught the train every morning, he came suddenly into a railed enclosure, at the entrance to the station, surrounded by crossbars on three sides at a height of about four feet, and, stooping a little too late, hit his head on the cross-bar, sat down violently, and injured his spine. Clearly he knew of the arrangements at the entry (though he may not have appreciated that there was a potential danger), but Fullagar J. asserted[44] that, even if it could be shown that the plaintiff appreciated the danger, appreciation followed by forgetfulness would not necessarily defeat an invitee. He put the case of a man who walks up a garden path in daylight, sees a deep hole, and walks around it; returning in the dark some time later, he forgets the hole, falls in, and is injured. Taylor J.[45] suggests that even the display of a warning notice may not necessarily constitute reasonable care to prevent injury in such circumstances, though Menzies J. says[46] that had there been an effective warning of the situation created by the cross-bars the case would have been different.[47]

The New Zealand case referred to, *Heard v. N.Z. Forest Products Ltd.*,[48] imposes liability on an occupier in a slightly different way. The plaintiff in this case was a member of a party which was on a conducted tour through the defendant's premises; he was a licensee rather than an invitee, but nothing turns on this distinction because the jury found that the danger was neither concealed nor unusual,

42 (1961) 35 Aust. L.J.R. 128.
43 (1866) L.R. 1 C.P. 274, at 288.
44 (1961) 35 Aust. L.J.R. 128, at 132.
45 *Ibid.*, at 135.
46 *Ibid.*, at 137.
47 "Effective warning" seems, with respect, to beg the question; had it been effective the accident would not have happened. Perhaps what Menzies J. means is a warning which would have been effective to prevent accidents to the "reasonable man."
48 [1960] N.Z.L.R. 329.

but was obvious to him. Nevertheless, the defendants were found to be liable to him (a liability mitigated only by a finding that he had contributed by 50% to his own injury) on the grounds that by undertaking to conduct and guide the plaintiff round the premises the occupier assumed a special relationship towards him, giving rise to a special duty of care beyond the normal relationships of occupiers to licensee. Whatever the implications for firms and business enterprises which undertake conducted tours (without first requiring the signature of documents indemnifying them against possible claims), the decision has alarming implications for garden-proud householders who like to take their guests round the garden pointing out the numerous beauties which, of course, were at their best during the preceding week!

Finally, the important case of *Commissioner of Railways (N.S.W.) v. Cardy*[49] indicated the possibility of a fresh approach to the question of the occupier's liability to trespassers who are injured while on his land. The plaintiff in this case was a fourteen-year-old boy who was injured while roaming over land belonging to the defendant (the appellant before the High Court). The land in question was readily accessible to the public, and was crossed by a formed road and several tracks which were constantly used by the public, though there were two employees of the Commissioner who from time to time warned strangers off the land. Part of the land was used as a tip for the deposit of rubbish, including quantities of ashes from locomotive fire-boxes and furnaces. The plaintiff walked on the heap on which rubbish had been tipped (the surface of which was apparently firm and cold); his feet went through the surface into hot ashes which lay underneath, and he suffered severe burns. The Commissioner was held liable in damages. Unfortunately, as is so common with multiple-decision cases, the *ratio decidendi* is not wholly clear. McTiernan and Windeyer JJ. held that the plaintiff was an implied licensee, as the defendant had not taken sufficient steps to exclude him or persons like him from the premises and must be taken to have assented to their presence: *Cooke v. Midland Great Western Railway Co. of Ireland*[50] is the classical authority for this approach. Dixon C.J. and Fullagar J., on the other hand, dealt with the matter on the footing that the plaintiff was a trespasser to whose presence on the land the defendant had not consented either expressly or by implication. The balance is held by Menzies J., but unfortunately he dissented from the dismissal of the appeal; however, on the point of the plaintiff's status

[49] [1961] Aust. Argus L.R. 16.
[50] [1909] A.C. 229.

he was of opinion that though the facts might have supported a finding that persons on the roadway and the tracks, using the land as a thoroughfare, were licensees, it could not be said that persons wandering over the refuse dump were licensees, and the finding was not open to the jury.

Most significant are the comments of Dixon C.J. Rejecting the fiction of "implied license" in cases such as the present (where, though the occupier does not wish persons (especially persons of tender years) to wander over his land he does not take effective steps either to exclude them or to remove sources of serious danger from the premises), he prefers to found the duty of the occupier on the following circumstances:—(1) That to his knowledge the premises are frequented by strangers or openly used by other people; (2) that he has actively created, or has continued in existence, a specific peril seriously menacing the safety of such persons (the seriousness of the danger is obviously a significant fact); (3) that he is aware of the likelihood of those persons coming into proximity with the danger; and (4) that he has means of preventing their so doing, or of bringing the danger to their notice. Referring specifically to the (English) Occupiers' Liability Act, 1957, with the higher duty of care which it imposes on the occupier *qua* licensor, as a distinct point of departure from Australian law, he asks,[51] "Why should we here continue to explain the liability which that law appears to impose in terms which can no longer command an intellectual assent and refuse to refer it directly to basal principle?"

That fertile progenitor of litigation, the Commissioner of Railways for New South Wales, had been involved in other litigation concerning a trespasser two years before—*Rich v. Commissioner for Railways (N.S.W.)*[52]—when it was held that the mere fact that the plaintiff was trespassing on the defendant's premises, by crossing a railway-line on the level in defiance of railway by-laws, did not discharge the defendant of its general duty of care to persons using the crossing. The plaintiff's failure to observe the by-lays and use the overhead bridge provided might be relevant to the question whether she were contributorily negligent, and the notification of the by-law, together with the provision of the bridge, might also be relevant to the question whether the defendant had taken steps to discharge the duty of care laid on him. It is becoming clear, then, that the trespasser may no longer be regarded as *caput lupinum,* exempt from penalties analogous

51 [1961] Aust. Argus L.R. 16, at 21.

52 (1959) 101 Commonwealth L.R. 135.

to those of outlawry only by the existence of a duty in the occupier not to do him wilful harm. At the same time, the occupier is not yet under a duty to make his premises absolutely safe for anyone who cares to stray onto them. But if he knows or has reason to know that the premises are frequented or openly used by others, and if he has created on the premises a specific source of serious danger to such persons, it appears that he must take effective steps to keep them off the premises or to keep them away from the danger or remove the dangerous condition. Failure to exclude trespassers, it is thought, will in future be relevant to the exercise of the occupier's duty of care, and not used to imply a nonexistent licence.[53] Though Dixon C.J. speaks also of the occupier continuing in existence a specific source of serious danger, it is not clear how far he would extend this duty if the source of danger arose from natural causes or from the act of a stranger; what, for example, would be the extent of the duty of a factory proprietor, whose buildings have been destroyed in a fire which had left dangerous piles of rubble, and heaps of ash cool on the surface but hot underneath, open to the inevitable curious trespassers of all ages; must he fence the whole property off, or is it sufficient to employ guards to keep trespassers away, or would his obligation be sufficiently discharged by posting warning notices?

For my fourth and final topic I would like to look at some recent decisions on the always vexed question of the measure of damages, and to offer some thoughts on the questions which arise from them. One fundamental problem in particular appears to be common to all the cases: What matters should be taken into account by a court in assessing damages, and what weight should be given to them in balancing one against the other? Two dicta in particular, from recent cases, appear to me to be relevant. The first is that of Holroyd Pearce L.J. in *Daniels v. Jones*.[54] Faced with an argument that the arithmetic of the trial judge, who had awarded a widow £14,800 in respect of the death of her husband, was at fault, and that if the calculations had been correctly done it could be shown that the widow had in fact lost nothing by her husband's death, he said that if this were so "arithmetic has failed to provide the answer which common sense demands."[55] The second comes from a recent judgment of Windeyer J.

53 So, it is thought, will be the "allurement" doctrine, according to which a person who maintains on his property a dangerous condition attractive to children is taken to have licensed their presence as a result of the attraction: See FLEMING, LAW OF TORTS (2nd ed., Sydney, 1961), 437-438.

54 [1961] 1 Weekly L.R. 1103, at 1109.

55 Willmer J. said: "The argument for the defendant, if it be sound, proves conclusively that the plaintiff and her family, so far from having suffered

in the High Court in *Bresatz v. Przibilla.*[56] Referring to the common practice in South Australia of subtracting 25% from any sum arrived at as compensation for loss of future earnings, "for contingencies", he said: ". . . the generalization, that there must be a "scaling down" for contingencies, seems mistaken. All "contingencies" are not adverse; all "vicissitudes" are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune?"

The first pair of decisions involve the question: What account is to be taken of payments such as superannuation and pension payments received by the injured person on account of his incapacity or inability to work? In *Paff v. Speed*[57] the plaintiff was a policeman who was forced to retire early as a result of the injuries he had received; he received a retirement pension of £783. 10. 4. In *National Insurance Co. of N.Z. Ltd. v. Espagne*[58] the plaintiff's injuries resulted in total and permanent blindness, and as a permanently blind person he received an invalid pension under the Social Services Act 1947-1959. In each case the High Court held that the pension entitlement was not to be taken into account in assessing damages for the incapacity brought about by the defendant's negligence.

The result is easy to state; less easy to state are the reasons. McTiernan J. in *Paff v. Speed* uses the criterion that the accident was not the *causa causans* of the payment of the pension but the *causa sine qua non,* a purported reason which Dixon C.J. criticised, in his judgment in *Espagne's Case,* as being "simply the expression of a voluntary preference for one of two essential factors which must combine in producing the result."[59] It is true that McTiernan J. reinforces this reasoning with a reference to the rule cited in MAYNE ON DAMAGES[60] that "Matter completely collateral and merely *inter alios acta* cannot be used in mitigation of damages"; again this is

a pecuniary loss, are actually better off as a result of the death of the deceased. Such a result is so repugnant to common sense as to cast a good deal of suspicion on the validity of the argument which leads to it" (*ibid.,* at 1112).

56 (1962) 36 Aust. L.J.R. 212, at 213. Since this paper was written Windeyer J. has made a second attack on this theme, this time in Teubner v. Humble, (1962-63) 36 Aust. L.J.R. 362, at 369 (which was also an appeal from the Supreme Court of South Australia).

57 [1961] Aust. Argus L.R. 614.

58 [1961] Aust. Argus L.R. 627.

59 *Ibid.,* at 628.

60 11th ed. (London, 1946), 151.

subject to criticism, for as Dixon C.J. also points out,[61] "[t]o say that it (the advantage of the pension) is *res inter alios acto* appears difficult when the very man injured is one of the parties between whom the thing is done; how can he come within the word *"alios"*?" Menzies J. stated his reasons for deciding both cases as he did in his judgment in *Espagne's Case;*[62] they appear to be a variant of the *"causa causans-causa sine qua non"* test, in that he described the loss of capacity (for gainful employment) or the blindness as only qualifying a person to receive a pension, so that the injury is "the occasion" rather than "the cause" of the pension payment. More cogent perhaps (in *Espagne's Case*) is the fact that the pension payment may not continue at the level at which it was originally granted, but may be reduced or cease; though it is not clear whether receipt of damages would be a ground for the reduction or cessation. Fullagar and Windeyer JJ., in *Paff v. Speed,*[63] use the concept put forward by Professor Parsons that damages are to compensate for "loss of earning capacity" rather than for "loss of wages"—for a claim for loss of wages may be reduced by showing that the monetary loss is being made up by receipts from some other source. But if an accident, such as happened to the two plaintiffs in question, deprived each of them of the physical capacity to earn, it did at the same time confer upon them the "capacity" to receive a pension. If money received from one source can be set off against the loss of money which might have been received from another, why cannot a new capacity to receive money from that source be set off against an incapacity to receive money from a former source? Perhaps the most satisfactory of the criteria is that enunciated by Dixon C.J. in *Espagne's Case*:[64] That while a benefit available to all injured people, such as hospital or pharmaceutical benefits from the Commonwealth, must be taken into account if it is availed of, a benefit which is conferred independently of the existence of the right to receive damages and is intended to be enjoyed in addition to that right, such as accident insurance or the product of private benevolence, is not to be taken into account. A further reason for this may be that benefits of the latter kind are intended to be in relief of the injured person and not of the person who injured him. But to construe the receipt of an invalid pension, even if granted in respect of permanent blindness, in this way demanded what appears, with respect, to be a somewhat heroic piece of statutory construction, for section

61 [1961] Aust. Argus L.R. 627, at 628.

62 *Ibid.*, at 635.

63 [1961] Aust. Argus L.R. 614, at 620 (Fullagar J.), and at 624 (Windeyer J.).

64 [1961] Aust. Argus 627, at 629.

25 (1) (d) of the Social Services Act 1947-1959 expressly states: "An invalid pension shall not be granted to a person . . . (d) if he has an enforceable claim against any person, under any law or contract, for adequate compensation in respect of his . . . permanent injury."[65]

The decision of the Court of Appeal in *Payne v. Railway Executive*[66] was, of course, cited in both *Paff v. Speed* and *Espagne's Case.* Since the above words were written (and this paper delivered) the report of the decision of the Court of Appeal in *Browning v. War Office*[67] has become available to the writer. In that case Lord Denning M.R. and Diplock L.J. (Donovan L.J. dissenting) held that the ratio decidendi (Diplock L.J.) or one *ratio decidendi* (Denning M.R.) of *Payne's Case* was inconsistent with the decision of the House of Lords in *British Transport Commission v. Gourley*[68] and should no longer be followed; it was said[69] that the principle flowing from *Gourley's Case* was that damages are awarded in order to compensate the sufferer for what he has actually lost, not to punish the wrongdoer, and therefore the plaintiff must give credit for all moneys which he receives in diminution of his loss.

The question now arises: What account (if any) is to be taken of *Browning's Case* in the Australian jurisdiction? It is submitted with confidence that the decision in *Espagne's Case* will stand, and, with only slightly less confidence, that the decision in *Paff v. Speed* will remain unaffected.

It should be observed that both cases are regarded by the learned judges of the High Court as interdependent, although there is some

65 Somehow or other, in spite of this provision, a pension was granted to Espagne; Windeyer J., in [1961] Aust. Argus L.R. 627, at 639, thought that the provision in question referred only to claims under statutory provisions such as workers' compensation and to contractual rights, and that the pension was lawfully granted. Menzies J. (*ibid.*, at 633) was substantially of the same opinion, because of the qualifying words "enforceable claim . . . under any law or contract"; but he also pointed out that damages are not awarded in respect of permanent incapacity or permanent blindness, but that these things are taken into account in assessing damages (an argument which, with respect, appears too fine-spun) and further that the phrase "adequate compensation" would be an unusual way to describe common law damages which might be reduced to the degree that the plaintiff was in fault. But in the latter case the innocent plaintiff would have an adequate claim, the negligent plaintiff not. Perhaps the difficulty is that the Social Services Board cannot itself foresee, and should not try to foresee, the decision of a Court on contributory negligence (or even on the existence of a claim in tort).

66 [1952] 1 K.B. 26.

67 [1963] 2 Weekly L.R. 52.

68 [1956] A.C. 185.

69 By Lord Denning M.R., in [1963] 2 Weekly L.R. 52, at 56-57.

slight ground for distinction between the two inasmuch as the invalid pension granted to the plaintiff Espagne depended upon a "means test" and was reviewable accordingly,[70] whereas that granted to the plaintiff Paff, though within the Government's discretion as to grant and, in some circumstances, as to rescission or variation, was not dependent on a means test.[71] In *Browning's Case* Lord Denning M.R. was prepared to regard *Payne's Case* as being correctly decided on an alternative *ratio decidendi,* namely, that it was a material fact that the pension might be cut off or cut down as soon as the court awarded compensation;[72] Diplock L.J. does not appear to have been prepared to commit himself on the question whether this was or was not an alternative *ratio decidendi,* though he remarks[73] that Singleton L.J. preferred to found his decision upon this fact, and Birkett L.J. merely said that he agreed both with this judgment and with that of Cohen L.J. If the High Court (and other Australian courts) are still minded, in spite of the trenchant remarks of Dixon C.J. in *Parker v. The Queen,*[74] to follow the "uniformity" policy laid down in *Waghorn v. Waghorn v. Waghorn*[75] and *Piro v. Foster,*[76] *Espagne's Case* may remain authoritative, as consistent with what is left of *Payne's Case,* and the fact that the discretion to reduce or withdraw the pension was based on a means test may be regarded as immaterial, so that *Paff v. Speed* may also survive.

But *Gourley's Case* was not overlooked by the High Court. In *Paff v. Speed* McTiernan J. said:[77] "In my opinion the question decided in that case is entirely different from that in the instant case." In *Espagne's Case* Windeyer J. refers to it on three occasions[78] in the

70 [1961] Aust. Argus L.R. 627, at 634 (*per* Menzies J.), and at 638 (*per* Windeyer J.).

71 [1961] Aust. Argus L.R. 614, at 616 (*per* McTiernan J.), and at 624 (*per* Windeyer J.).

72 [1963] 2 Weekly L.R. 52, at 58.

73 *Ibid.,* at 67.

74 (1963) 37 Aust. L.J.R. 3, at 11. ". . . I think it [the decision in *Director of Public Prosecutions v. Smith,* [1961] A.C. 290] forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy . . . I am authorized by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph."

75 (1942) 65 Commonwealth L.R. 289.

76 (1943) 68 Commonwealth L.R. 313.

77 [1961] Aust. Argus L.R. 614, at 618.

78 [1961] Aust. Argus L.R. 627, at 640, 641, and 647.

course of his judgment, and it is clear that he did not think that it obliged him to come to any conclusion other than that which he reached, which was in complete accord with the result in *Payne's Case*. His judgment was accepted by both Dixon C.J.[79] and Fullagar J.[80] The opinion of the majority of the High Court would appear therefore to be clearly opposed to the view taken in *Browning's Case* by the Court of Appeal. How far the remarks of Dixon C.J. in *Parker v. The Queen*[81] are to be taken as liberating Australian Courts from the shackles of uniformity remains to be seen, and it cannot be said that *Browning's Case* is as clearly wrong as professional opinion has thought *Smith* to be; but one may hazard with confidence the view that the Hight Court will not readily resile from the carefully elaborated views expressed in *Paff v. Speed* and *Espagne's Case*.

Two somewhat different problems (one involving loss of earning capacity) arose from the case of *Oliver v. Ashman*[82] in which the plaintiff, a boy of twenty months of age, was so severely injured in an accident that he became a low grade mental defective, dumb and barely educable and completely unemployable, with the prospect of spending his life in a State institution. Apart altogether from the difficult problem of assessing the potential earning capacity of a boy of 20 months, as well as the difficulty of determining the many contingencies which might prevent him from attaining maturity and earning a living, and the allowance which should be made for these, there was the fact that his expectation of life had been reduced by 50%, and the question arose whether this should be taken into account in determining compensation for loss of earning capacity. In *Pope v. Murphy*[83] Streatfield J., in assessing damages under this head, had disregarded the shortening of the plaintiff's expectation of life and had calculated the figure for "loss of earnings" over the whole of the period during which the plaintiff might be expected to earn, although as the result of the defendant's negligence he had lost the expectation of half of this. Lord Parker L.C.J. in *Ashman's Case* followed this, though he conceded that any figure for loss of earnings was in the circumstances largely speculative. The Court of Appeal,[84] however, held that the loss of wages during the "lost years" must form an element in damages awarded under the heading of "loss of expectation

79 *Ibid.*, at 630.
80 *Ibid.*, at 631.
81 *Supra*, note 75.
82 [1961] 1 Q.B. 337.
83 [1961] 1 Q.B. 222.
84 [1962] 2 Q.B. 210.

of life"—the wages forming only "one of the threads in the variagated tapestry of life." But it is regarded as well-established—see *Benham v. Gambling*[85]—that damages for loss of expectation of life must moderate in amount; in *Benham v. Gambling* itself the damages awarded under that head were limited to £200. If then this is all that can be claimed for the "lost years" the plaintiff will certainly not be compensated adequately for the loss of some years' earning capacity. So far as the plaintiff himself is concerned the approach of the Court of Appeal in *Oliver v. Ashman* does not seem unreasonable; and in the special circumstances of that case no injustice would appear to have been done. What has not been taken into account, however, is the fact that a man in the position of the plaintiff in *Pope v. Murphy* will most likely have dependants; and if the interest of the dependants is considered—or the expectation of the plaintiff that he will continue to be able to provide for his dependants—a curious anomaly becomes apparent. If a plaintiff whose expectation of working life before the accident is twenty years is killed, his dependants, in a Fatal Accidents Act claim, will recover damages based on the amount which he might have been expected to spend on their support over that period (discounted for contingencies). If, however, as a result of the accident he remains alive, with an expectation of life shortened to four years, he himself will recover damages based on the loss of four years' earnings, together with a very moderate sum for the loss of sixteen years' expectation of life. This implies that his family can expect a further four years' support from him (through the damages awarded) and then destitution. It is to be hoped that the High Court (or, for the benefit of English plaintiffs, the House of Lords) will have an early opportunity of re-considering the implications of this part of the decision in *Oliver v. Ashman,* in circumstances in which there will be a real (and not merely a speculative) interest in the injured plaintiff in being able to continue to provide for his dependants.[86]

The second problem which arose in *Oliver v. Ashman* was what use of the award of damages would be the injured plaintiff be likely to make. Lord Parker L.C.J. (in the court of first instance) said that the consideration that a large part of the money would never be expended by the plaintiff was entirely irrelevant. In the Court of

85 [1941] A.C. 157.

86 Professor Fleming has adverted to this problem in *The Lost Years: A Problem in the Computation and Distribution of Damages,* (1962) 50 CALIF. L. REV. 598, and has made some interesting suggestions. Since this paper was delivered Windeyer J. has referred critically to this aspect of the decision in Oliver v. Ashman, though he did not think it necessary to express any concluded opinion on it: Teubner v. Humble, (1963) 36 Aust. L.J.R. 362, at 369.

Appeal Pearce and Willmer L.JJ. disregarded the point, but indicated that there was a case pending in which the point was to be more fully argued. That case (which raised the point even more sharply) was *Wise v. Kaye*.[87] The plaintiff in that case had been in a coma for three and a half years since the date of the accident and was not expected ever to recover consciousness; she was under expert care in a public hospital and would be so for whatever of life remained to her. Nevertheless the majority of the Court of Appeal (Sellars and Upjohn L.JJ) held that the fact that the damages would not be personally enjoyed by the plaintiff, were unlikely to be used even to maintain her, and could not be disposed of by her, were all irrelevant, and sustained the award of £15,000 for general damages. But Diplock L.J. dissented. He would have taken into account, and balanced against the loss of all the joys and pleasures of life, the fact that the plaintiff was spared all the pains and sorrows of life. In a less unusual case, he pointed out, the bulk of the £15,000 would be awarded for physical pain, the mental anguish of complete dependence on others, and the consciousness of the loss of the pleasures of life but the continuing susceptibility to its sorrows.[88]

The problem is of course only one facet of the fundamental problem which arises when general damages are being awarded in personal injury cases: How an appropriate award of money can be arrived at in order to compensate for serious and permanent injury which is not really measurable in money terms at all. Arithmetic will not help at all; "common sense" is no guide. "Doing the best I can" is a common and familiar phrase prefacing the award in such cases. But there are other cases in which arithmetic appears more useful; and here the dictum quoted from *Daniels v. Jones* becomes relevant. How is it possible to arrive satisfactorily at damages "proportioned to the injury" resulting from the death of a person to the wife, husband, parent, or children who survive, especially to the wife and children? The *locus classicus* at present is of course the method of arithmetical calculation (with allowance for contingencies) enunciated by Viscount Simon in *Nance v. British Columbia Electric Railways Co. Ltd.*[89] Nevertheless,

87 [1962] 1 Q.B. 638.

88 Carried to its logical conclusion this would mean that the damages awarded to the person who as the result of an accident had become a "happy moron" would be substantially reduced. *Cf.* McGrath Trailer Equipment Pty. Ltd. v. Smith, [1956] Victorian L.R. 738; and see, on the general question, Hunt v. Johnson, [1962] West. Aust. R. 55. Since this paper was delivered the questions discussed in the text have been canvassed by the House of Lords in H. West & Son, Ltd. v. Shepherd, [1963] 2 Weekly L.R. 1359.

89 [1951] A.C. 601, at 615.

as *Daniels v. Jones*[90] and the Western Australian case of *Gillett v. Callagher*[91] show, there are occasions when arithmetical calculation reaches a result at which common sense revolts, by proving that the widow and children are as well off after the death of the husband as before and have suffered no compensable loss at all. But even in the less spectacular instances of the end-product of arithmetical calculation one wonders at times whether common sense is not being outraged. Let me take two examples to which I adverted in case notes in a recent number of this Law Review.[92] In *Tranchita v. Fiolo*[93] a widow of 29, with three children, was awarded £3,800 for the loss of a husband earning at the time some £20 a week. Disregarding for a moment the additional awards of damages to the children, to care for them until they reach the age of 16,[94] let us ask what she will be able to do with the £3,800. If she invests it at, say, 6%[95] this will yield £288 a year—£5. 10. 0. a week—an income whose value, we may confidently expect, will steadily decrease with the loss in value of money. We may with equal confidence say that her husband's wages would at least have maintained their purchasing power, and might well have increased as a result of basic wage and marginal adjustments. Again, take *Macfarlan v. Davies.*[96] In this case a widow of 21, with three children, whose husband was also receiving approximately £20 a week, received only £3,200; on the same basis this woman could expect an income for the balance of her life of just under £5 a week—out of which she must provide housing for herself and children (the plaintiff in *Tranchita v. Fiolo* owned a house). Can common sense approve these awards?

An examination of the cases indicates that the final figure in each case was arrived at after a substantial scaling-down for contingencies. 33 1/3% was deducted from the sum arrived at by taking the present value of the wife's dependency in *Tranchita's Case;* 40% was the deduction in *MacFarlan's Case.* But in *Shoobert v. Savory,*[97] in which the deceased left a widow aged 34 and three children, only 12½% was

90 [1961] 1 Weekly L.R. 1103.

91 (1962) 36 Aust. L.J.R. 72.

92 (1961) 5 U. WEST. AUST. L. REV. 47-48.

93 *Id.,* Case No. 47.

94 The three children, aged 9, 8, and 3, received respectively £800, £900, and £1,200.

95 For a woman aged 29 there is no point in discussing an annuity. Inquiries made from one insurance company show that annuity rates for women are not quoted (other than specially) until age 50; the rate then is just over 5%.

96 Case No. 46.

97 Unreported.

deducted for contingencies. Why the variation? It may be said that there is more likelihood of a widow of 21 remarrying than of a widow of 29 (both being of working or labouring class); but that there is even less likelihood of a widow of 34, of the professional class (as was Mrs. Shoobert) remarrying! This may be so; but is it any more than a stab in the dark (with the utmost respect to the learned judges who decided the three cases in question)?[98] Windeyer J., in *Bresatz v. Przibilla,*[99] referring to the 25% deduction for "contingencies" in respect of damages for loss of earning capacity, said: "I know of no reason for assuming that everyone who is injured and rendered for a period unable to work would probably in any event have been for a quarter of that period out of work, or away from work and unpaid. No statistics were presented to justify that assumption." This seems, with respect, a common sense approach to the matter. It may be asked, who is to provide the statistics? Perhaps they could not be made available at once. But we have a Commonwealth Bureau of Statistics, whose function it is to provide the community with useful information; and one would think that it would not be difficult to accumulate the necessary information if the appropriate steps were taken for ensuring that the right kind of questions are asked.

Of course, remarriage of a widow is not the only contingency taken into account in such percentage deductions. There is the possibility that the widow may die or that the working life of the deceased might have been cut short by death or illness. In this regard I would submit that these contingencies have already been taken care of, statistically speaking, by the mortality or expectation of life tables prepared by insurance companies. If it is assumed, on the basis of such tables, that the deceased had an expectation of life of 25 years, is it not taking "contingencies" into account twice to make a deduction on account of what might happen to this particular man?

Again, as Windeyer J. so pertinently asks: "Why count the possible buffets and ignore the rewards of fortune?"[1] No account appears to be taken, for example, of the inevitable increase in money wages as a result of inflation and wage adjustments; yet no "contingency"

98 In Savory v. Shoobert (on appeal to the Full Court), Jackson S.P.J. referred to some remarks of Wolff S.P.J. (as he then was) in Hinchcliffe v. Copeland (unreported, 16th November 1954): "It must be remembered that in all these cases the Court is dealing with an estimate and to some extent must employ conjecture. . . . While damages in these cases are based upon materialistic grounds, I personally deprecate making these awards a matter of precise mathematics."

99 (1962) 36 Aust. L.J.R. 212, at 213.

1 *Ibid.*

seems more likely in these days. It may be that this possibility is regarded—as Jackson S.P.J. regarded the possibility of the building-up of the family fortunes in *Gillett v. Callagher*—as "far too hypothetical and speculative." But is it any more so than the vicissitudes which are so readily allowed for?

It must be conceded that there are on the books cases in which the prospect of a considerable improvement in the earnings of the deceased husband and father are canvassed and taken into account. *Shoobert v. Savory* is one such. But even here, the application of "common sense" to the end result leaves one somewhat uneasy. The deceased was at the time of his death earning something like £2,500 a year; his prospects were of an ultimate income of £6,000 a year. Disregarding the fact that provision was made for the maintenance of the children until they reached the age of 17 and made on the footing that they would probably have received from the deceased an education at private schools, the widow of 34 was given an award of £16,000. Assuming an annuity or investment rate of 6%, this would yield £960 a year for the balance of her life. Out of this she must find a house for herself and the children. Does common sense suggest that she received damages "proportionate to the injury" she has suffered?

These final remarks of mine are really in the nature of a trial balloon, an expression of doubts that I have been feeling for some time as to the adequacy of our awards of damages, especially in fatal accidents cases, and as to the satisfactoriness of the methods by which the awards are reached. It is somewhat gratifying to note that there are coming to light occasional expressions of judicial misgivings, such as those I cited at the beginning of this section. But whether a simple increase of the lump sum awards in personal injury and fatal accidents cases is the answer to my misgivings is another matter entirely. My own feeling is that it is time that all concerned—and this includes the profession and the insurance companies, who, after all, are concerned with the bulk of the awards—took another look at the fundamental principles underlying the award of damages—and this includes a look at economic principles as well as legal ones. From a legal point of view much of the trouble seems to stem from the "once for all" rule enunciated two and a half centuries ago in *Fetter v. Beal.*[2] My own feeling is that we could well consider a scheme by which damages are awarded, not in a lump sum, but by way of periodic payments which can be varied, on application to the Court, either if a change

2 (1699) 1 Ld. Raym. 339, 91 E.R. 1122.

in the general circumstances of wage-earners (which would have affected the financial position of the deceased man had he been alive) takes place, or if a change in the circumstances of the dependants—of which the most obvious is the re-marriage of the widow—renders the periodical payments unnecessary.[3]

E. K. BRAYBROOKE.*

COMMENT.

Mr. Braybrooke has given precedence in his paper to a discussion of the decision in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.*,[1] better known somewhat curiously as *The Wagon Mound.*

In questions of the remoteness of damage precedents and formulas are to a large extent unhelpful and often misleading, and as Scrutton L.J. said in *The San Onofre*[2] . . . "the question whether damage is sufficiently direct consequence of negligence to be recoverable, . . . is rather a question of first impression". Perhaps this explains why, when reading through the vast quantity of literature on the subject, one feels rather like Baron Bramwell's blind man looking for a black hat in a dark room.

When referring to *The Wagon Mound*[3] in his opening address, His Honour the Chief Justice said that in connection with remoteness of damage questions the tendency of the courts had been in the past to put up idols only to knock them down. It is time that it was recog-

[3] A valuable brief account of the principles according to which, in Germany, periodical payment of damages, instead of a lump sum, may be awarded, and the amount of such award reviewed in the light of changed circumstances, is given by Baeck, *Some Questions Concerning the Law on Damages for Torts in Germany*, (1959) 12 OKLA. L. REV. 265.

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1 [1961] A.C. 388.
2 [1922] P. 243.
3 [1961] A.C. 388.

nised that in determining questions of remoteness a court will inevitably take a particular view of the facts and that, whatever the verbal formulae by which that view is expressed, a policy decision is involved by which the court limits liability. The court decides that under the circumstances the plaintiff should bear a certain proportion of his own loss, or that the liability fixed will be limited to particular heads of damage. What the court is really doing is apportioning the loss between plaintiff and defendant. . . . "because of convenience, of policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point".[4]

The course of decisions dealing with *causa causans,* proximate cause, direct consequences, foreseeability and the rest merely illustrate the verbal formulae which lawyers or judges use to express the determination they have made in a particular case. These are the weapons of persuasion and expression. Their significance lies in the skill of the advocate in convincing the court, and the skill of the judge in justifying his conviction.

This is not to say, however, that *The Wagon Mound*[5] is a decision without practical significance. It is important to determine precisely what its scope is. The Privy Council held that so far as the tort of negligence is concerned a defendant's liability in damages is limited to cases where some damage of the particular kind which occurred was reasonably foreseeable, and it has been suggested that this decision has sounded the death knell of *Re Polemis.*[6]

It is submitted that the direct consequence test is more appropriate than the foreseeability test to cases where the stage has been set, and the defendant's act precipitates "unique unexpected happenings of the Polemis type" but nonetheless that act was an "immediate or precipitating cause of the damage."[7] In such a case the defendant must take the situation as he finds it.[8] It is my submission that this should be so whether the situation was that the plaintiff had an egg-shell skull or a ship full of inflammable vapour.

Mr. Braybrooke has contended that what he calls the thin skull principle, which Lord Parker C.J. conceded was outside *The Wagon Mound* principle in *Smith v. Leech Brain & Co. Ltd.,*[9] will be confined to a pre-existing *physical* condition of the person, and that pre-

4 Palsgraf v. Long Island R. Co., (1928) 162 N.E. 99, *per* Andrews J. at 103.
5 [1961] A.C. 388.
6 [1921] 3 K.B. 560.
7 Roe v. Minister for Health, [1954] 2 K.B. 66, *per* Denning L.J. at 85.
8 Hay or Bourhill v. Young, [1943] A.C. 92, *per* Lord Wright at 106-112 *passim.*
9 [1962] 2 Q.B. 405.

existing physical conditions of property will require to be foreseeable if damage arising from the operation on them of an otherwise wrongful act is not to be too remote.

It is odd that Mr. Braybrooke should confine the thin skull cases to those dealing with a *physical* condition of the body. He apparently does not think very much of the distinction which he attributes to Lord Wright between the physical and financial condition of a plaintiff.[10] With respect, it is suggested that the distinction made by Lord Wright in *The Edison*[11] was rather more sophisticated. In that case the learned Lord was concerned with a claim for loss of profits partially incurred through the plaintiffs' inability to hire a replacement dredger because of impecuniosity. Lord Wright distinguished:

(1) Cases of physical delicacy or weakness which aggravated physical damage, as these dealt with the *extent* of physical damage.

(2) Cases where the possibility that the injured man was either a poorly paid labourer or a highly paid professional man affected an award of damages, as these dealt with the *extent* of the interference with his profit-earning capacity.

(3) The impecuniosity of the plaintiff in the case before him was something extrinsic.[12]

Lord Wright 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 cause of causes," or consequences of consequences . . . In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons."[13] In other words, . . . "damages must be assessed as if the appellants had been able to go into the market and buy a dredger to replace the *Liesbosch*",[14] because he was saying that eventually from the exercise of a rough sense of justice one gets to a stage where the plaintiff must bear a portion of his own loss.

Further support for the view that the so-called thin skull principle is not confined to the physical condition of the person appears in the judgment of Lord Justice Scrutton in *The Arpad*,[15] when he said,

10 See text and next note.
11 [1933] A.C. 449.
12 *Ibid.*, at 461.
13 *Ibid.*, at 460.
14 *Ibid.*, at 462.
15 [1934] P. 189, at 202-203. The second example given by Scrutton L.J. would, however, appear somewhat hastily conceived.

"In the cases of claims in tort, damages are constantly given for consequences of which the defendant had no notice. You negligently run down a shabby-looking man in the street, and he turns out to be a millionaire engaged in a very profitable business which the accident disables him from carrying on; or you negligently and ignorantly injure the favourite for the Derby whereby he cannot run. You have to pay damages resulting from the circumstances of which you have no notice. You have to pay the actual loss to the man or his goods at the time of the tort . . ."

It is difficult to see the distinction which Mr. Braybrooke submits will now be made. What difference is there between a case where

(1) A motorist failing to keep a proper lookout knocks down a man with an egg-shell skull, or a weak heart; and that where

(2) A motorist failing to keep a proper lookout crashes into a van load of priceless Dresden china which is smashed, or into a petrol tanker worth £15,000 which explodes and is completely destroyed?

In each case the stage has been set for very serious consequences of the *Polemis* type.

These were the very cases for which the direct consequence test was designed and would appear to work well. It would be strange indeed that the Privy Council should find that it had affected to overrule *Re Polemis,*[16] substituting the foreseeability test *except* where the foreseeability test had not been applied, *i.e.,* in cases where the stage for damage of an unforeseeable nature to occur was set, thus restoring the authority of *Re Polemis*[17] in all those cases to which it was meant originally to be confined.

Thurogood v. Van den Berghs & Jurgens Ltd.[18] was within the original conception of *Re Polemis.* In that case Asquith L.J. found that damage of some kind (*i.e.,* physical injury) might reasonably be anticipated to result from placing the fan on the floor. Despite the criticism of this case by Dr. A. L. Goodhart,[19] it is submitted that this was a case in which the application of the direct consequence test was both just and justified. Damages were awarded for physical injury which could have been foreseen although the precise manner in which that injury occurred was not foreseen.

16 [1921] 3 K.B. 560.
17 *Ibid.*
18 [1951] 2 K.B. 537.
19 *The Imaginary Necktie and the Rule in Re Polemis,* (1952) 68 L.Q. Rev. 514.

The Wagon Mound[20] involved unforeseen damage of an entirely different kind from that foreseen, and it is doubtful whether damages should have been recovered even if *Re Polemis*[21] had been applied.

In my respectful submission it is certainly arguable that *Re Polemis*[22] is still authority for the proposition that where the stage has been set by reason of the condition of the plaintiff or his property a defendant will be liable for all the direct consequences of an initially negligent act, provided that the kind of damage which has occurred was reasonably foreseeable.[23]

It seems that the Privy Council erected *Re Polemis*[24] into the status of a panacea in order to reject it. With the greatest respect, it is submitted that the assumption that *Re Polemis* was an attempt to provide a universal answer to the problem of the limitation of liability was unjustified.

It will be regrettable if the effect of *The Wagon Mound*[25] is to prevent the courts from following the approach which seemed to be developing in cases invoking the *Polemis* principle, that is: (1) Whether or not a *duty* is owed to a particular plaintiff who depends upon the defendant's foresight of *some harm* to a person in the position of the plaintiff, (2) once a breach of this duty is established, the defendant is liable for the *direct consequences.*

Everyone agrees that a defendant's liability should include all harm that is reasonably foreseeable. Once we are out of this area and into that covered only by "direct consequences" the line must be drawn of necessity in a somewhat arbitrary fashion. The principle is really loss-distribution or *apportionment.* The defendant as the perpetrator of the negligent act should bear at least some of the unforeseen consequences, but not all as the law does not make him an insurer. On the other hand Dr. Goodhart's reasonable foresight theory (which is inappropriate to many of the nominate torts and to cases applying the rule in *Rylands v. Fletcher*[26]) seems unduly to favour the defendant.

The advantage of the direct consequence test is that it allows "rough justice" to come into play in a fashion that is really apportion-

20 [1961] A.C. 388.
21 [1921] 3 K.B. 560.
22 *Ibid.*
23 Subject to the limitations imposed by applying the concept of apportionment implicit in Lord Wright's remarks in The Edison, [1933] A.C. 449, at 460-462.
24 [1921] 3 K.B. 560.
25 [1961] A.C. 388.
26 (1868) L.R. 3 H.L. 330.

ment. This is what happened in *The Edison*,[27] although in the circumstances it fell somewhat hardly on the plaintiff, as he had to bear a considerable part of his own loss. In *Pigney v. Pointer's Transport Services Ltd.*[28] there was no apportionment as the defendant was made an insurer. However, *Schneider v. Eisovitch*[29] shows how justice can be done by applying the "direct consequence" test.

The loss of *Re Polemis* to the tort of negligence would be a grave one. However, it still survives for the nominate torts[30] and there is, in my submission, room to argue that where the stage has been set by reason of the condition of the plaintiff or his property a defendant will be liable for all the direct consequences of an initially negligent act, provided that the kind of damage which has occurred was reasonably foreseeable.

D. K. MALCOLM.*

27 [1933] A.C. 449.
28 [1957] 1 Weekly L.R. 1121.
29 [1960] 2 Weekly L.R. 169.
30 So held by Walsh J. in Miller Steamship Co. Pty. Ltd. v. Overseas Tankship (U.K.) Ltd., [1963] N.S.W.R. 772.

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