

THIRD PARTY INTERVENTION IN TORT

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“It has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness. The convenient phrase *novus actus interveniens* denotes those cases where such action is regarded as breaking the chain and preventing the damage from being held to be caused by the careless conduct. But every day there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty in holding that the defendant’s conduct caused the plaintiff’s loss.”¹

The judgment of Lord Reid in *Home Office v Dorset Yacht Co.*, from which the above quotation is taken, has since become a pivotal feature of cases involving a defence of *novus actus interveniens* - a claim that the plaintiff’s injury was the result of the action of an intervening third party rather than a consequence of the plaintiff’s own negligence. In particular, these cases have sought to apply the principles from *Dorset Yacht Co.* to fact situations where the intervening third party was an absolute stranger, over whom the the defendant had, and could have had, no control. In so doing, two problems have emerged : first, as to whether *novus actus* is a question which goes to remoteness, or to the existence of a duty (or even whether there is any difference between these two), and secondly as to the precise test which should be applied to the questions “is there a duty?” and “is the damage too remote?”. In respect of the latter area, most of the cases indicate some dissatisfaction with the test laid out by Lord Reid, yet none is particularly clear as to the way in which the principles enunciated by his Lordship should be modified.

II THE TEST FOR DUTY

The facts of *Home Office v Dorset Yacht Co.* are well known. Borstal trainees were working on an island under the supervision of three officers. Due to the alleged negligence of these officers, seven of the boys escaped, causing extensive damage to the plaintiff’s yacht in their efforts to get off the island.

The issue before the House of Lords was whether any duty was owed by the Home Office (as the employers of the officers) to the plaintiff. A majority of the House held that there was a duty.

It should be stressed that the duty in this case was a duty to take care in the exercise of control over the boys. This is significant in that, in the oft-quoted words of Dixon C.J.:

The general rule is that one man is under no duty of controlling another to prevent his doing damage to a third.²

However, as the Chief Justice recognised, there are “special relationships” which are the source of a duty of this nature. The House of Lords held such a special relationship to exist in the case of the borstal boys and the officers - and two of their Lordships expressly founded this relationship

¹ Lord Reid in *Home Office v Dorset Yacht Co.* [1970] 2 All E.R. 294.

² *Smith v Leurs* (1945) 70 C.L.R. 256 at 262.

on the legal right of control which the officers had over the boys.³

However, in the absence of a "special relationship" of this sort, there will seldom be a duty to control a third party. Does this mean that, outside "special relations" cases there can never be liability for third party actions? Or is it possible to hold a person responsible for the intervening act of a stranger, notwithstanding the absence of a duty to control him? It is at this point that we should turn to consider the subsequent case-law.

One of the first cases to discuss Lord Reid's judgment was *Lamb v London Borough of Camden*.⁴ This case arose out of the actions of a council contractor who had breached a water main outside the plaintiff's house while excavating the road. The water which had escaped had undermined the foundations of the house to such an extent that the tenant was forced to move out, and the owner to remove all furniture. While the house was unoccupied, squatters moved in. Despite being evicted by the owner's agents once, they returned, and on this second visit caused extensive damage to the house. The owner, Mrs Lamb, sued the council.

The discussion in the English Court of Appeal focused almost entirely on the question of remoteness. This is important, in that it implies acceptance of the idea that a duty was owed to Mrs Lamb. What then is the nature of this duty? Clearly there was no special relationship on which to base a duty to control, since the council and the squatters were two entirely separate entities. Instead, the duty which was owed was in respect of the council's operations in digging ditches - it was a duty to take care not to pierce water mains which might, if burst, cause foreseeable damage to the plaintiff's house. It is significant that this duty makes no reference to the prevention of the third party involvement, yet it is clearly possible to regard the damage caused by the third party as, to some extent, consequent on the breach of the duty.

On the facts, the court held that the council was not liable, since the damage was too remote.

The judgment of Lord Denning differed slightly in approach from that of both Oliver L.J. and Watkins L.J. Although his Lordship began with the statement that this was a question of remoteness, his judgment later shifts its emphasis by asking the question "whose job was it to keep the squatters out?". This is the language of duty, and expressed in these terms, it seems clear that Lord Denning was thinking in terms of a duty to control. With respect, this is an unnecessary confusion. While it may validly be asked whether there is a need to control in this situation, this should be kept as a logically separate issue, and should not be run into the question of whether third party intervention is a foreseeable consequence of a breach of *some other duty*. The point which is being made here is that a person may do a number of things which will increase the likelihood that some third party will intervene and cause damage to a plaintiff, and for which recovery should be allowed. Failure to exercise control is only one of these. The fact that it is absent in any given case need not automatically lead to the conclusion that there can be no claim - provided some other duty

³ "The boys were under the control of the officers, and control imports responsibility", per Lord Pearson at 322. See also Lord Morris at 304. The notion of control over people as a basis for a duty can be seen also in: *Smith v Leurs* (1945) 70 C.L.R. 256 (parents over a child); *Carmarthenshire County Council v Lewis* [1955] A.C. 549 (school over pupils).

⁴ [1981] 2 All E.R. 408.

exists. In *Lamb* there was such another possible duty, in the form of the obligation to take care while excavating. Although both Oliver L.J. and Watkins L.J. found that the damage was too remote a consequence of the breach of that duty in this case, neither contemplated that the duty was incapable of ever giving rise to liability for the act of a third party. In other words, neither of the two appears to regard a duty to *control* as the sole possible basis for liability of this sort.

The argument that liability for third party intervention may be founded on some duty other than a duty to control can be developed by reference to *P. Perl Exporters Ltd. v Camden London Borough Council*⁵ in which the plaintiffs and defendant owned adjacent flats, the basements to which were separated by an eighteen inch thick common wall. The plaintiffs used their basement for storing stock. The defendant's flat was never kept locked, despite the fact that tramps and vagrants had frequently been seen around the building. Thieves gained access to the defendant's basement via the unlocked door, and from there knocked a hole in the wall into the adjacent basement, from which they stole over 700 garments belonging to the plaintiffs. The only issue before the court was whether any duty was owed. The Court of Appeal was unanimous in holding that there was not.

Waller L.J. began by asking in what circumstances a defendant could be liable for the acts of a third party. He answered this by citing the passage of Dixon C.J. in *Smith v Leurs* referred to above, to the effect that there could only be a duty to control where there was a special relationship between the defendant and the third party. In the present case, he said there was no special relationship - and this was what distinguished *Perl* from the *Dorset Yacht* case. Proceeding from this, his Lordship observed that:

no case has been cited to us where a party has been held liable for the acts of a third party when there was no element of control over the third party.⁶

While his Lordship did not exclude the possibility that such a case may exist, he did state that the absence of control must make the court approach the suggestion that there is liability for a third party's actions with caution. Thus, his Lordship appears to consider a duty to control the third party a necessary element, in most cases, before there can be any liability for the act of that third party. With respect, this is an unnecessary conclusion. Indeed, the very authority on which Waller L.J. relies to establish the need for a special relationship before a duty to control can exist contains a clear refutation of the proposition that such a duty is the only kind which can give rise to liability for the act of a stranger. Dixon C.J. in *Smith v Leurs* prefaced the quotation given by Waller L.J. with the following statement:

Apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own default or breach of duty. There is more than one description of duty, the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving a special danger.

⁵ [1983] 3 All E.R. 161; and see *King v Liverpool City Council* (1986) 1 W.L.R. 890 C.A.

⁶ *Ibid.*, at 164.

It may even be a duty of care with reference to the control of actions or conduct of the third person. It is however exceptional to find in the law a duty to control another's actions⁷.

Thus Dixon C.J. regarded a duty to control as only *one* possible way in which liability could be imposed for the act of a third party.

The emphasis in *Perl* on the need for a duty of control arises, it is submitted, out of the absence in that case of any other duty recognised in tort law on which the damage could be described as consequent. However, to move from this to the proposition that there can be no liability even where there is such an alternative duty - which is substantially the approach taken by Waller L.J. - is misconceived.

In *Perl*, the only possibility other than a duty to control the thieves was a duty to keep the door to the apartment locked - in other words, a duty to take positive steps to keep the thieves out. It is in the denial of *this* duty, it is argued, that the real reason for the decision in *Perl* is found, as can be demonstrated by an examination of the judgment of Oliver L.J. In the most detailed analysis of the case offered by any of the three judges, his Lordship examines the case from the point of view of liability for omissions.

The general approach of tort law is that there is no liability simply for a failure to act. Although Lord Atkin's classic dictum referred to the need to avoid "such acts *or omissions* as are likely to injure [a] neighbour", the principle in *Donoghue v Stevenson*⁸ has been more readily applied to positive wrongs, or acts of misfeasance, rather than simple nonfeasance. Thus, while I have a duty not to drive my car dangerously, I have no duty to stop my neighbour from driving his car dangerously, even though I can foresee that damage will ensue if he is allowed to do so. It is inconsistent with the freedom of the individual to insist that he take positive steps to avert a foreseeable harm for which he is in no way responsible. Also, in terms of causation, there is some reluctance to describe something as a cause simply because it failed to prevent the dangerous occurrence.

This is not to say that nonfeasance can never give rise to liability; it frequently can, as is evidenced by the *Dorset Yacht* case. However, whereas simple foreseeability of harm will suffice in order to impose liability for an act of commission, the courts have generally required something more before imposing a duty to take positive steps to prevent harm. Instances where liability has been imposed for negligent failure to act include cases where the defendant has voluntarily assumed responsibility for acting; where the defendant has been responsible for the creation of a prior risk, necessitating further action to remove the danger;¹⁰ and cases where the defendant is in a unique position by virtue of his power of control - be it over chattels,¹¹ persons¹² or land.

⁷ (1945) 70 C.L.R. 256 at 261-262.

⁸ [1932] A.C. 562.

⁹ *Knight v Sheffield Corporation* [1942] 2 K.B. 411; *Morash v Lockhart & Ritchie* (1978) 95 D.L.R. (3d) 647. The duty in this case is closely linked to the reliance induced by its assumption. See also *O'Rourke v Schacht* (1975) 55 D.L.R. (3d) 96 (S.C.C.) in which police officers were held to be under a duty to act.

¹⁰ *Newton v Ellis* 119 E.R. 424. Moreover, this duty is owed irrespective of fault in the creation of the risk - see *Oke v Weide Transport* (1964) 41 D.L.R. (2d) 53.

¹¹ *Samson v Aitchison* [1912] A.C. 844 (P.C.).

¹² *Home Office v Dorset Yacht Co.* [1970] 2 All E.R. 294. See also the cases listed above, fn.(3).

It was argued in *Perl* that a special relationship existed, giving rise to a duty to control. The bases of this alleged duty were geographical propinquity, the council's knowledge that the plaintiffs used their premises to store goods which might be attractive to thieves and that trespassers were frequently on the premises, and the simple steps required to impede entry by fitting locks to the door. Oliver L.J. denied, correctly it is submitted, that these could found any special relationship.

In the absence of any special factor, the only possible foundation for a positive duty to act was the foreseeability of damage *simpliciter*. Indeed as Oliver L.J. noted:

the foreseeability of damage is, by itself, being treated as the basis of the duty.¹³

As noted above, this has never been sufficient to establish a positive duty to act in the past. One reason why this should be so is explained by Oliver L.J. as follows:

It cannot be asserted that the omissions, by themselves, caused injury to anyone. They merely enabled some unknown third party over whom the defendant had no control to effect an unlawful entry onto the defendant's premises ... It would in fact be more accurate to say that the omissions failed to impede such an entry rather than that they enabled it to take place, for it is by no means certain that even an effective lock would have prevented an incursion by a really determined gang of thieves.¹⁴

However, if simple failure to prevent harm will not found a claim, there is no reason why a positive wrong might not be sufficient.

That the basis of Oliver L.J.'s judgment is that the alleged negligence was in the nature of an omission, and not that it involved a third party intervention can be demonstrated by his Lordship's approach to the Scottish case *Evans v Glasgow District Council*.¹⁵ The defendants in *Evans* had demolished premises adjacent to the plaintiff's building. In so doing, they had damaged the plaintiffs locks and replaced them with inferior ones. Thieves broke in and caused considerable damage. In refusing an application to have the action struck out, Lord Wylie held that a duty was owed to the plaintiffs.

Noting that *Evans* case was decided before *Lamb* and without reference to *Dorset Yacht*, Oliver L.J. distinguished the case on the ground that:

The defendant had actually altered the state of the adjoining premises in a way which rendered these premises more vulnerable than they would normally have been.¹⁶

If this distinction is to have any validity, it can only be on the basis that a duty *is capable* of being owed in respect of damage caused by a stranger (even in the absence of a duty to control), and that such damage is not *per se* too remote. The damage in either case is comparable. What distinguishes the two is the absence in *Perl* of any recognised duty on which the damage can be called consequent. This problem was solved in *Evans*, in that there is already a recognised and existing duty not to damage property.

¹³[1983] 3 All E.R. 161 at 168.

¹⁴*Ibid.*, at 167.

¹⁵[1978] S.L.T. 17.

¹⁶[1983] 3 All E.R. 161 at 170.

Most cases involving third party intervention will be cases of omission, and will therefore need something other than mere foreseeability of damage before a duty can be imposed. However, *Evans* is an exception to this, in that a positive wrong had been done in breaking the locks on the plaintiff's door. What happens when there is no such positive wrong, and we have a case of a pure omission? What sort of "other factor" can give rise to a positive duty to act?

The first possibility is that already discussed - a duty to control arising from a special relationship.

Secondly, there is that referred to by Dixon C.J. in *Smith v Leurs*¹⁷: care of things involving a special danger. A good illustration of this is found in the Canadian case *Holian v United Grain Growers*.¹⁸ The United Grain Growers stored dangerous chemicals in a shed which was not, on the occasion in question, locked, despite the fact that children were known to pass the shed quite regularly. Four young boys stole a canister from the premises and, believing it to be a stink bomb, left it in the back of the plaintiff's car. The plaintiff suffered phosgene poisoning as a result. The court held that the defendants were under a special duty to keep the chemical out of harm's way, and to avoid just this type of interference.

It may be on this basis that the recent New Zealand case *Patel v de Boer*¹⁹ can be explained. The defendant in *Patel* was a coach driver who regularly took the company bus home, and parked it on the hill outside his house. The window on the driver's side of the bus had no locking device, and gave ready access to the controls, including the handbrake. While the bus was parked in this manner, an unknown third party released the brake, causing the bus to roll down the hill, where it came to rest in the plaintiff's dining room. The plaintiff sued the bus driver, alleging negligence in allowing the the coach to be parked on a downhill slope when it was not sufficiently secured against intruders. Quilliam J. held the plaintiff was entitled to succeed.

Although a bus is arguably not dangerous *per se*, it becomes so by virtue of the fact that it is parked on a hill. As Quilliam J. observed:

The danger which would result from the parked coach being able to run downhill uncontrolled was both obvious and serious.²⁰

A third factor which might justify the imposition of a positive duty to act is a voluntary assumption of the responsibility. An instructive example of this (in that the facts are similar to those of *Lamb*, but the conclusion quite different) is found in *Ward v Cannock Chase District Council*.²¹

Mr Ward lived in a property which was part of a row of terraced houses. The property next door was owned by the council, who let it fall vacant, with the result that it was frequented by vandals and thieves. Over a period of time they caused considerable damage to the house. The extent of this

¹⁷(1945) 70 C.L.R. 256.

¹⁸(1980) 112 D.L.R. (3d) 611. See also *McCarthy v Wellington City Council* [1966] N.Z.L.R. 481 (C.A.).

¹⁹Unrep. H.C., Wellington, 19 June 1985.

²⁰See Prosser *Law of Torts* 4th ed. for a discussion of cases where cars have been left with keys in the ignition, and the plaintiff has subsequently been injured by the negligent driving of the thief when the car is stolen.

²¹[1985] 3 All E.R. 537.

damage eventually became such that the rear wall of the house collapsed, bringing with it part of Mr Ward's roof. The council agreed to repair this damage, but failed to do so. The condition of Mr. Ward's house consequently deteriorated to the extent that it was declared unsafe, and Mr. Ward was ordered to vacate the property. The house remained in a state of disrepair throughout the following year, during which thieves broke in, damaging the building still further, and removing many of the chattels. The house was later demolished.

In *Ward*, therefore, the main damage was caused by a third party; but this had been made possible by the council's failure to repair, which had necessitated the evacuation of the premises, opening up the way for the vandals to enter.

The judgment addresses the issue of third party intervention as a question of remoteness. The breach of duty on which the damage was said to be consequent was the failure to repair. Although this was an omission, rather than an act of misfeasance (and would therefore not attract a duty on a *Perl* based argument), there is a reason for imposing a duty to act on the council in this case in that they had voluntarily assumed the responsibility for doing the repairs. Scott J. placed considerable emphasis on the council's representation that they would repair the damage, and indeed it was on this ground that he distinguished the remarks of Lord Denning in *Lamb* to the effect that the responsibility in that case for keeping the squatters out lay with Mrs Lamb, and not the council. His Lordship said:

It is pertinent to wonder what Lord Denning's view on policy would have been if, as here, the council had accepted responsibility for doing the repairs, and had required and forced Mrs Lamb to vacate the property and to leave it unoccupied.²²

The voluntary assumption of duty will often be as a matter of contract, as was expressly recognised by Oliver L.J. in *Perl*.²³ This was the basis on which his Lordship explained the decision in *Stansbie v Troman*,²⁴ where a decorator who left the door to the house which he was decorating unlocked was held liable when the home was burgled. The duty of care, Oliver L.J. said, was an implied term of the defendant's engagement to decorate the plaintiff's house.

Thus far, we have been looking for factors which might justify the imposition of a positive duty to act. This should not obscure the central fact that third party intervention may well arise, not just out of a failure to act, but also out of the breach of some other duty which is already recognised by the common law, as for example in the case of *Evans*. The argument which is being put forward here is that *any* such duty is capable of founding an action for damage done by a third party, as long as that damage can be described as consequent on the breach of that duty. The need to establish a special factor only arises in the absence of a recognised duty, so that the plaintiff is effectively arguing for a duty of affirmative action.

If this argument is correct, then the possibility of establishing liability is greatly increased. One example of the potential is the inclusion of liability

²²Ibid., at 550.

²³[1983] 3 All E.R. 161 at 170.

²⁴[1948] 2 K.B. 48.

for a *Hedley Byrne v Heller*²⁵ type negligent misrepresentation which gives rise to third party intervention, as in the case of *Williams v Wormald Vigilant*.²⁶ Here, the defendants had installed a burglar alarm in the plaintiff's shop. During an abortive break-in attempt, the alarm system had been damaged. The defendants made makeshift repairs to the system, intending to complete the work at a later date. However, they represented to the plaintiff that the temporary repair was adequate, and that the shop was safe once again. In reliance on this, the plaintiff took no further steps to safeguard the premises. Some three months later, when the plaintiff was still waiting for the permanent repairs to be done, the shop was again broken into. On this occasion, the alarm system failed.

The action was framed as a *Hedley Byrne v Heller* case of negligent misrepresentation. Davison C.J. accepted that the defendant's statement that the shop was secure gave rise to a duty of care, and that there could consequently be liability when the breach of that duty gave rise to the damaging intervention of the burglars. Thus, it is submitted that the question of duty arises independently of the fact that the damage may be caused by a third party; that this latter aspect goes only to remoteness. Nonetheless, there is still a need to establish a duty. Where there is a positive wrong, as in *Lamb* or *Evans*, this is easily accomplished. Where the alleged negligence is in the nature of an omission, something more than mere foreseeability will be required. Examples of cases where that necessary extra factor may be found include :

1. A duty to control, arising from a special relationship;
2. An assumption of the risk;
3. Care or control of a dangerous chattel.

If this analysis is correct, then the next logical step is to decide the basis on which to determine whether the damage in any given case is too remote.

II THE TEST FOR REMOTENESS

The test usually adopted in order to determine whether damage is too remote is reasonable foreseeability : *The Wagon Mound (No.2)*²⁷

However, where third party intervention is concerned, the cases indicate that something more than mere foreseeability is required if the damage is to be treated as proximate ("proximate" is here being used simply as an antonym for "too remote").

In *Home Office v Dorset Yacht Co.*, Lord Reid was of the opinion that:

Where human action forms one of the links between the original wrongdoing and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens*, breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening action can more properly be regarded as a new cause than as a consequence of the original wrongdoing.²⁸

²⁵[1964] A.C. 465.

²⁶Unrep., H.C., Wellington, 16 Aug. 1982.

²⁷[1967] 1 A.C. 617.

²⁸[1970] 2 All E.R. 294 at 300.

The test of “likely” or “very likely” has had a mixed reception. Aside from the difficulties in determining precisely what it means, there have been several indications that it is inadequate as the sole test of remoteness.

The first, and arguably strongest criticism has come from Lord Denning who in *Lamb* expressed the view that Lord Reid’s “very likely” test was wrong. The reasoning behind this was that, on the facts in *Dorset Yacht*, Lord Reid’s test would have covered almost any damage the boys could have done, anywhere in England - hundreds of miles away from the scene of the original negligence. This was a proposition which Lord Denning found untenable.²⁹

Lord Denning was of the view that remoteness was ultimately a question of policy - simply one of several devices which could be used to restrict potential liability, but which could not always be relied on to furnish the answer. However, his Lordship gives little guidance as to the rules on which the broader policy decisions are to be based.

Oliver L.J. was less critical of Lord Reid’s test, although clearly not entirely satisfied with it. In one of the few attempts to clarify the “very likely” requirement, Oliver L.J. expressed the view that Lord Reid was merely distinguishing things which were foreseeable from those which were *reasonably* foreseeable. Where third party intervention is concerned, mere foreseeability of risk is not enough - after all “every society has its proportion of idiots and criminals” and therefore “it cannot be said that you cannot foresee the possibility that people will do stupid or criminal acts, because people are constantly doing stupid or criminal acts”.³⁰

Instead Oliver L.J. felt that, if a person is to be expected to guard against the actions of a third party, then those actions must first be *reasonably* foreseeable, and all that Lord Reid had meant in *Dorset Yacht* was that the behaviour of a stranger would not be regarded as reasonably foreseeable unless it was very likely to occur. This is not an easy distinction. One is forced to ask whether the differences between “likely” and “very likely”, “foreseeable” and “reasonably foreseeable” are realistic, or are so slight as to be illusory.

Nonetheless, his Lordship considered this a “sensible and workable” test, subject only to one qualification - that Lord Reid may have understated the degree of likelihood required. There may, he said, be cases where the court would require a degree of likelihood amounting almost to inevitability before a defendant could be made responsible for the act of a third party. As to when this might happen, his Lordship was silent. Even so, it was a suggestion which was greeted with approval in *Perl*, where Waller L.J. agreed that “to impose liability for the acts of some independent third parties requires a very high degree of foreseeability”.³¹

The third of the judges in *Lamb*, Watkins L.J., began with the observation that Lord Reid’s test did little to simplify the test for remoteness. Watkins L.J. thought that the “crisply stated test” which emanated from *The Wagon*

²⁹[1981] 2 All E.R. 408 at 412-413. Other members of the House in *Dorset Yacht Co.* avoided this problem by placing a geographical limitation on the extent of liability. The Home Office would only be liable for damage done in the near vicinity. While the motive behind this - the desire to cut down a potentially limitless class of plaintiff - is understandable, a limitation based solely on physical proximity is difficult to defend in theoretical terms.

³⁰*Ibid.*, at 418.

³¹[1983] 3 All E.R. 161 at 166.

Mound should not be "festooned with additional words" such as "likely" or "very likely", and that "*The Wagon Mound* test of foreseeability should be applied without any of the gloss which is from time to time being applied to it".³²

Having brushed aside any attempts to qualify *The Wagon Mound*, Watkins L.J. then immediately went on to say that the test was not always adequate, that it "cannot in all circumstances conclude consideration of the question of remoteness", since "the very features of an event or act for which damages are claimed themselves suggest that the event or act is not on any practical view of it remotely connected with the original act of negligence".³³ In other words, a qualification has been reintroduced to the *Wagon Mound* test. Once again, the qualification is not defined. Instead, his Lordship relied on an "instinctive feeling" that the damage was too remote on the facts before him.

This really leaves us just as much in the dark - we have a choice between a "policy" decision based on unarticulated principles; a "practical view" based on "instinctive feeling"; and the notion that a very high degree of probability may be required in some unidentified circumstances. The only thing which can be said with any assurance is that all three judges felt that the test advocated by Lord Reid was too broad, and needed some form of restriction.

One New Zealand authority which is potentially relevant here is *Patel v de Boer*,³⁴ the case of the runaway bus. Quilliam J's judgment is interesting in that it contains no reference to the debate over the "very likely" test which had dominated the judgments in both *Lamb* and *Perl*. Instead, His Honour simply observed that it ought reasonably to have been anticipated that the lack of security represented by the unlocked window was likely to lead to interference by some person.

It is a matter of everyday public knowledge that any vehicle parked in the streets overnight is at risk. No one can be expected to secure his vehicle against a determined intruder who is prepared to commit damage in order to gain entry. I think however that he is under an obligation to ensure that the doors and windows are locked if the result of not doing so can be seen to be likely to result in damage to others. Plainly that was the case here.

Although elsewhere in his judgment, Quilliam J. refers to a danger which was "both obvious and serious", for the most part he seems content with the simple likelihood of damage as a sufficient basis for remoteness. This is clearly a lower standard than that favoured by any of the English cases mentioned above. Given the lack of discussion of the doubt over Lord Reid's test, it is difficult to say how *Patel* will be received. Certainly, the other New Zealand authority referred to above, *Wormald Vigilant*,³⁵ indicated that the correct principles to be applied in the case of third party intervention were those laid down in *Lamb's* case. If this is so, then we are still left searching for the elusive "other factor" which is being used to qualify Lord Reid's test.

Is there then some other element, which is not simply a variant of the foreseeability test, which is required before the damage will be treated as

³²[1981] 2 All E.R. 408 at 421.

³³*Idem*.

³⁴Unrep., H.C., Wellington, 19 June 1985.

³⁵Unrep., H.C., Wellington, 16 Aug. 1982.

proximate? One suggestion which has received attention recently is the notion of the "ambit of the risk"³⁶.

The "ambit of the risk" approach entails asking the purpose behind the rule which has been infringed, in order to ascertain the kind of consequence which should have been avoided. If the rule is specifically aimed at avoiding the very kind of damage which has occurred, this is a strong indication that the damage may be recovered.

A commonly cited example of this is the situation where a pedestrian is knocked over by a negligent driver, and has his wallet stolen while he lies unconscious in the road. The driver may well be liable for the personal injury, but not for the theft of the wallet, because the risk at which the duty to drive carefully is aimed is the risk of injury, not the risk of theft. If on the other hand the pedestrian is run over a second time by a following car, the negligent first driver may well be liable for this second injury³⁷.

Although not expressly mentioned in that case, the "ambit of the risk" approach can be seen at work in *Williams v Wormald Vigilant*, the case of the faulty burglar alarm system. Having accepted that a duty of care was owed by the defendants, Davison C.J. went on to examine the question of remoteness. This he did quite briefly: citing *Lamb* as the source for the general principles governing the case, the Chief Justice simply observed that:

In the present case the exclusion of third persons in the form of burglars was the very purpose for which [the defendants] did the repair, and against whom it was intended that the repair should render the premises safe. [The] assurance to [the plaintiff] was specifically directed to the safety of the premises against burglars.

In other words, the immediate risk created by a breach of duty in this case was that the system would fail, allowing burglars to gain entry to the shop.

On the other side of the coin, one could consider the judgment of Oliver L.J. in *Lamb*, where His Lordship said:

If one asks, was a duty owed not to break the pipe so as to cause the house to be invaded, the tenuousness of the linkage becomes apparent.³⁸

The immediate risk caused by bursting the water pipe was undermining of the house and consequent structural damage. Invasion by squatters was not the original reason for labelling the actions of the council "negligent", and therefore should not be included in the recoverable damage.

The "ambit of the risk" line of reasoning could equally be applied to the release of the handbrake in *Patel v de Boer*. The immediate risk created by anyone gaining access to the controls of the bus was that the vehicle would roll down the hill, and collide with something on the way. Therefore to classify such damage as too remote is senseless - it was the most direct sort of damage which could be imagined.

The difficulty is in knowing how stringently the "ambit of the risk" rule should be applied. Fleming³⁹ indicates that it should not disqualify as

³⁶ Fleming, *Law of Torts*, 6th ed. p. 192; Todd [1982] *Canta* L.R. 422; Murdoch (1982) 98 L.Q.R. 23.

³⁷ Or for those suffered by a doctor attending the victim at the roadside: *Chapman v Hearse* (1961) 106 C.L.R. 112.

³⁸ [1981] 2 All E.R. 408 at 418.

³⁹ *Law of Torts* 6th ed. p. 192.

recoverable a particular consequence merely because the primary purpose of the rule is to guard against some other hazard. Indeed, this can be seen from the case law: it can hardly be said that the primary purpose of the duty in *Ward* was to keep thieves out; rather, it was to render the premises weatherproof and habitable. If the risk argument is applied strictly to *Ward*, then in principle recovery should have been disallowed in the same way as it was in *Lamb*. In fact, the grounds for distinguishing *Lamb*'s case were quite removed from the "ambit of the risk" approach: Scott J. differentiated *Lamb* on the grounds, firstly that the council here had assumed the responsibility for the repairs, and secondly on the ground that the neighbourhood in the present case was known to have a higher crime rate than Camden, and that the likelihood of intervention was therefore higher.

Thus, the first problem with the risk concept is, if some risks, which are not the immediate or primary risks, can still be proximate enough, where does one draw the line?

A further problem is that even if the damage does fall within the risk some cases indicate that liability is still not automatic. These are most often cases where the intervention of the third party is itself a negligent act. The illustration cited by Todd⁴⁰ is the case of *Knighley v Johns*,⁴¹ in which the defendant's negligent driving caused an accident in a road tunnel. A police inspector arriving on the scene realised that he had forgotten to close the tunnel and, contrary to police standing orders for accidents in the tunnel, instructed two officers, one of whom was the plaintiff, to drive down the tunnel against the flow of the traffic in order to do this. A collision resulted, and the officer sued the defendant.

In disallowing the claim, Stephenson L.J. agreed that a motorist ought to foresee that if he is negligent and causes an accident, then police, fire or ambulance officers are likely to take risks to rescue him or other victims of the accident. In other words, on a broad view, the damage was foreseeable and within the risk created by the original negligent driving. However, in this case Stephenson L.J. said that "too much had happened, too much went wrong, the chapter of accidents and mistakes was too long and varied for the defendant to be held liable to the plaintiff".⁴²

Stephenson L.J.'s judgment is interesting in that it focuses not on the variants of the likelihood test, but on the authority prior to *Home Office v Dorset Yacht Co.* The approach taken by his Lordship to the question of third party intervention was drawn from the cases of *Hadley v Baxendale*⁴³ and *Haynes v Harwood*⁴⁴, where the test enunciated for remoteness was whether the damage was the "natural and probable" result of the breach of duty. Because he equated this with reasonable foreseeability, Stephenson L.J. felt able to conclude that subsequent cases such as *Dorset Yacht* did not affect this test, which was therefore still binding.

In applying *Hadley v Baxendale*, his Lordship observed that while it was natural and probable that police would come to the aid of the accident

⁴⁰ [1982] *Canta L.R.* 422 at 427.

⁴¹ [1982] 1 *W.L.R.* 349.

⁴² *Ibid.*, at 366-368.

⁴³ (1854) 9 *Exch.* 341.

⁴⁴ [1935] 1 *K.B.* 146. This approach was applied in *McCarthy v Wellington City Council* [1966] *N.Z.L.R.* 481 (C.A.).

victims, and also natural and probable that “some steps would be taken in controlling the traffic ... that might be more courageous than sensible”, no reasonable observer would anticipate so many departures from the common sense procedure. Consequently, a defence of *novus actus* was established.

Although Stephenson L.J. equated the natural and probable test with that of reasonable foreseeability, it is possible that the two are not quite the same. However hard it may be to define, there is implicit in the notion of “natural and probable consequence” a closer causal nexus than can be captured by simple foreseeability, or even likelihood. Both likelihood and foreseeability tend to focus on the eventual outcome, without too much emphasis on the path by which that outcome is reached. Hence, both have the capacity to allow a greater temporal or spatial gap (or a longer chain, if you will) between the first mover and the final result. One way of reducing this gap is to require not only foreseeability of the type of damage, but also of the way in which that damage will occur. This admittedly runs contrary to the decision in *Hughes v Lord Advocate*⁴⁵; but this may well be justified, given the general agreement that third party intervention demands a more stringent test than other cases.

In the final analysis, it is difficult, if not impossible, to pin down any one precise formula which will yield an answer in every case; and this article makes no attempt to do so. In the absence of any clear solution, the best that can be done is to outline, as has been done above, the approaches taken by the courts to date. From these, some broad conclusions can be drawn. Clearly, mere foreseeability of the intervention or damage is not enough. Some higher degree of likelihood is required. Yet even this may not suffice, for it seems that even if the damage was of a type which could have been foreseen, it may still be irrecoverable if the way in which it arose was too far removed from the initial breach of the duty. Features such as temporal or spatial distance from the original negligence will be relevant to this, as will the combination of events which led to the eventual intervention, and the risk at which the duty to take care was aimed.

III THE RELATIONSHIP BETWEEN DUTY AND REMOTENESS

The writer of this article has frequently been troubled by the question whether duty and remoteness in this context are really one and the same thing. Certainly the two are frequently confused, and the case law is full of indications that there is really nothing to distinguish them. So for example, Lord Denning noted in *Lamb* that “the three questions causation, duty and remoteness run continually into one another”, and that “the truth is that all these three... are devices by which the courts limit the range of liability for negligence or nuisance”. The devices are “all useful in their way, but ultimately it is a question of policy for the judges to decide”.⁴⁶

Similarly, Oliver L.J. in *Perl* said:

The question of the existence of a duty and that of whether the damage brought about by the act of a third part is too remote are simply two facets of the same problem; for if there be a duty to take reasonable care to prevent damage being caused by a third party,

⁴⁵[1963] A.C. 837.

⁴⁶[1981] 2 All E.R. 408 at 412, 414.

then I find it difficult to see how damage caused by a third party on the failure to take such care can be too remote a consequence of the breach of duty.⁴⁷

There is a certain attraction in the conclusion that it is just a question of terminology; that where the duty relied on as the foundation for an action to recover damage caused by a third party is not a duty to control, but takes some other form such as a duty not to damage property, or a duty to repair, then the language of remoteness is the simplest way of dealing with the intervening act; but that where there is no such other duty, it makes no sense to talk about remoteness unless one can first show a duty which has been breached, and that the issue of third party intervention is therefore encompassed in the language of duty - a duty to control. The distinction between these, it could be said, is purely fortuitous; it hinges solely on the circumstances which give rise to the damage and involves nothing more than choosing the more convenient form of notation to analyse those circumstances.

However, the approach eventually outlined in this article runs counter to this, in that it treats remoteness and duty as logically distinct. In so doing, it is fair to admit that it oversimplifies the issue. Nonetheless, it is submitted that the distinction is still a valid one. By way of justification, the following tentative analysis is offered.

Duty is usually expressed in terms of an obligation to avoid foreseeable harm. Indeed, it is the very foreseeability of the harm arising from one's actions which furnishes the reason for imposing a duty to avoid those actions - because one can foresee that doing x might injure someone, one ought to take care to ensure that this does not happen. Insofar as the test of remoteness is also foreseeability, it is, as Oliver L.J. suggests, difficult to conceive of a duty in respect of any particular damage, where that damage can be too remote. If it is too remote, it will usually be unforeseeable; if it is unforeseeable, there can be no duty to avoid it. Simplified, this produces the seemingly self-referential proposition that there is only a duty to avoid damage which is not too remote. At this point, the identification between duty and remoteness is close. However, it is submitted that it is still not absolute. Merely because there can be no duty when the damage is too remote, this does not mean that duty automatically follows where the damage is proximate. Indeed, as argued above, mere foreseeability of damage is not of itself a reason for imposing a duty to act where omissions are concerned; there are other factors which may negate the existence of a duty. This can be rephrased in terms of Lord Wilberforce's two stage test, where the existence of foreseeable (or proximate) damage raises a prima facie inference of duty, but this can be rebutted by policy factors such as the fact that this is a case of omission. Hence, remoteness is only one component of a duty.

It is acknowledged that this analysis involves an inversion of the usual order in which courts approach the issue of liability, insofar as it suggests that no duty can exist where damage is too remote (or certainly, that no duty can exist *in respect of that damage*), whereas one usually asks firstly, is there a duty? and secondly, if there is a duty, is the damage too remote? This implies that duty can exist independently of remoteness. The only answer this writer can produce to this is to say that the duty can only

⁴⁷[1983] 3 All E.R. 161 at 167.

exist in such a case if first there is some other damage which is foreseeable, and not too remote. In other words, the duty already exists because the question of remoteness has already entered the argument at some earlier stage, but in respect of that other, foreseeable kind of damage. Hence, remoteness has again preceded the establishing of a duty.

Whichever way one approaches it - whether one establishes a duty first before asking is the damage too remote, or whether one asks whether there is any proximate damage on which to base a duty - it is still possible to isolate the two issues, and avoid the confusion of terms which is found in the cases. It is hoped that this article may indicate one way in which this can be done.