FORESEEABILITY OF INJURY AND REMOTENESS OF DAMAGE

WELLS v. *SAINSBURY & HANNIGAN LTD.* [1962] N.Z.L.R. 552

The decision in *The Wagon Mound* [1961] A.C. 388, J.C., has probably been welcomed more enthusiastically by the majority of academic writers on the law of torts than any other decision since *Donoghue* v. *Stevenson* [1932] A.C. 562. On the face of it the law as to the extent of a negligent tortfeasor's liability is now both just and simple. The Judicial Committee of the Privy Council in *The Wagon Mound* treated *Re Polemis* [1921] 3 K.B. 560, C.A., as wrongly decided and laid it down that the test for determining the extent of liability for damages is the same as that which has long been applied to determine the existence of negligence. Both culpability and compensation are to be governed by the measuring rod of reasonable foreseeability.

That was the view of the Court of Appeal in *Russell* v. *McCabe* [1962] N.Z.L.R. 392, where it said (per North J. at 402):

> . . . so far as this country is concerned, it is now clear that in the law of negligence, the test whether the consequences were reasonably foreseeable is a criterion alike of culpability and of compensation, and therefore, it is insufficient for a plaintiff merely to establish that the negligent act was the 'direct' cause of the damage if that damage was not foreseeable. He must go further, and show that the damage itself was foreseeable.

Difficulties may, however, be experienced in applying the simple formula of reasonable foreseeability to particular cases. The Court of Appeal in New Zealand had to resolve one such difficulty, on appeal from a decision of Henry J., in *Wells* v. *Sainsbury & Hannigan Ltd.* [1962] N.Z.L.R. 552. [1] The facts were unusual. Wells and a fellow worker named Carey were both employed in the appellant's factory. Carey was handling a compressed air hose which was used for cleaning the body surfaces of motor vehicles. He walked round the front of a truck which he was cleaning to a place where Wells and some other employees were talking. There was a conflict of evidence as to what precisely happened then, but a few seconds later the air hose came close to Wells and a stream of air under a pressure of approximately 80 or 90lbs per square inch passed up Wells's rectum and into his intestines, causing him severe injuries. He claimed damages against the appellant as being vicariously liable for the negligence of his servant, Carey. At the trial the jury found that Carey had been negligent and that the negligence had occurred in the course of his employment. Judgment against Carey was entered accordingly. The principal argument

1. Discussed in one of the more recent articles on remoteness, R.W.M. Dias, "Remoteness of Liability and Legal Policy" (1962) Camb. L.J. 178, 183 - 184; see also a note by F.W. Guest, (1963) 1 N.Z.U.L.R. 113.

advanced by the appellant in the Court of Appeal was that Carey could not reasonably be expected to have foreseen as a consequence of his negligent act the injury which Wells in fact suffered. The Court of Appeal seemed prepared to accept the proposition that Carey could not be expected to have foreseen the particular injury Wells suffered. North J., delivering the judgment of the Court, stated (ibid., 560):

> It is quite true . . . that the likelihood of a stream of air passing through the respondent's rectum into his intestines might not have been foreseen by Carey. That is simply due to the fact that this particular kind of accident is comparatively rare.

The Court of Appeal, nevertheless, held that the appellant was liable for the full extent of the injuries suffered by Wells, and dismissed the appeal.

The judgment makes considerable reference to the Privy Council's decision in *The Wagon Mound* and emphasises that the damage which resulted in that case was of a different kind from what could have been reasonably foreseen (ibid., 559-560):

> In short, the damage in that case, in respect of which the action was brought, was of a different kind from that which would be reasonably foreseen by those responsible for the escape of the furnace oil. Secondly, nothing in our opinion was said in that case [*The Wagon Mound*] which would justify the view that the test of foreseeability requires that all the details of what happened should be foreseeable. It is sufficient if the wrongdoer should reasonably have foreseen the kind of injury which in fact occurred.

On the basis that the fellow-worker, Carey, should reasonably have foreseen that a stream of air under pressure could injure many of the soft parts of Wells's body if the hose was pointed towards him at close quarters, the Court of Appeal held the employer liable. The judgment concludes (ibid., 560) :

> The fact that it [the stream of air] entered his rectum and did this particular injury is irrelevant. It just happened that the hose was pointed in that direction. It was merely one of several possible injuries all of the same class or kind. The essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. We think it was.

This decision breaks new ground, for it applies the foresight criterion of remoteness in a manner which does not seem to have been contemplated by the Privy

Council in *The Wagon Mound*. It is significant that the Court of Appeal, while stating that it was applying the foresight criterion as expressed in *The Wagon Mound*, at the same time took pains to distinguish the facts of that case. And it seems that this distinction was a necessary one for nowhere in *The Wagon Mound* did the Privy Council suggest that a negligent tortfeasor is liable for all damage which, although not itself reasonably foreseeable, is of a class or kind which is foreseeable. The essence of their Lordships' advice appears to have been that no man should be liable for damage which he could not reasonably be expected to have foreseen. This was pungently summed up by Viscount Simonds ([1961] A.C. 388, 424) :

> After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility.

Later on, Viscount Simonds adopted the test applied by Denning L.J. in an earlier case (ibid., 426) :

> As Denning L.J. said in *King* v. *Phillips* [1953] 1 Q.B. 429, 441. 'There can be no doubt since *Bourhill* v. *Young* [1943] A.C. 92 that the test of *liability for shock* is foreseeability of *injury by shock*.' Their Lordships substitute the word 'fire' for 'shock' and endorse this statement of the law. (emphasis added by Viscount Simonds).

In spite of these apparently clear propositions of law the problem still arises: exactly what must have been foreseeable before liability will be imposed? The Privy Council was not directly concerned with this question in *The Wagon Mound* for in that case there was no question of foreseeing any damage even remotely similar to that which eventuated – damage by fire to the respondents' wharf and equipment. Only interference with the respondents' slipways was foreseeable. [2] In the *Wells* case, however, it was found that the worker Carey should reasonably have foreseen some injury to the soft parts of Wells's body. But was this sufficient to justify holding the employer liable for the intestinal injury which Wells, in fact, suffered? It is submitted that if the Privy Council's statement of the foresight principle of remoteness in *The Wagon Mound* had been applied literally the employer would not have been liable for the intestinal injury to Wells. Dealing with a case in which A was suing B for negligence, Viscount Simonds asked (ibid., 425) :

2. The trial judge, Kinsella J., expressly found that the fouling of the respondents' slipway and the consequent interruption to the respondents' operations were 'foreseeable to any reasonable person;' [1961] 1 All E.R. 404, 407, note (1). It is therefore difficult to follow Heuston's comment that he found that this damage was 'presumably, although he did not state it in terms, reasonably foreseeable by the defendants.' : *Salmond on Torts* (13th ed., 1961), 760.

> If . . . B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened – *the damage in suit* ? (emphasis added)

The damage in suit in the *Wells* case was the injury to the plantiff's intestines: but there was no finding that this precise injury ought to have been foreseen. Nevertheless, the appellants were held liable and the justice of the decision cannot be denied. An opposite conclusion would have been very odd.

How, then, is the test for determining the liability of a negligent tortfeasor for damages to be stated? The problem is to find the correct level of generality of description of the resultant injury. The test adopted by Denning L.J. in *King* v. *Phillips* and endorsed by Viscount Simonds in *The Wagon Mound* provides a helpful illustration. If, as stated by Viscount Simonds, the test of liability for fire is foreseeability of injury by fire, should not the test of liability for any sort of personal injury be foreseeability of any sort of personal injury ? This way of putting it describes the injury in the most highly abstract way possible. At the lowest level of abstraction, on the other hand, the test of liability for intestinal injury would be foreseeability of intestinal injury (assuming that to be the damage in suit).

In the *Wells* case, however, the Court of Appeal appears to have steered a middle course and to have sponsored the test that liability for injury to the soft parts of the body depends on the foreseeability of injury to the soft parts of the body. And in the *Wells* case the intestinal injury which in fact occurred was merely one type of such injury. It is abundantly clear that the Court could have come to the opposite conclusion, still applying the test of reasonable foreseeability, if it had elected to describe the injury that in fact occurred at a lower level of abstraction. The decision in the *Wells* case illustrates, therefore, the deceptiveness of the test of reasonable foreseeability as a guide to the prediction of the outcome of a case where the plaintiff is arguing that the damage suffered by him was reasonably foreseeable and the defendant is arguing the contrary.

A cognate problem came before Lord Parker C.J. in *Smith* v. *Leech Brain & Co. Ltd.* [1962] 2 W.L.R. 148. There the plaintiff's husband had received a burn on the lip owing to the negligence of the defendants, his employers. The burn eventually became cancerous and fatal. The widow sued for damage for negligence. Having found that the defendants had been negligent in allowing a drop of molten lead to land on the deceased, Lord Parker C.J. proceeded to consider whether or not they were liable for the death by cancer. Lord Parker was clearly of the opinion that under *Polemis* the plantiff would have been entitled to recover, for the death was a 'direct'

result of the burn. Although expressly recognising that it was not necessary for him to do so, the learned Lord Chief Justice went on to consider the effect of *The Wagon Mound* decision. He regarded himself as free to follow *The Wagon Mound* and to treat *Polemis* as bad law. It had been argued before him that the defendants could not reasonably be expected to have foreseen the deceased's death by cancer and Lord Parker accepted that argument but still found the defendants liable. He was quite 'satisfied that the Judicial Committee in *The Wagon Mound* case did not have what I may call, loosely, the thin skull cases in mind,' (ibid., 155). [3] Later in his judgment he said (ibid., 156) :

> The Judicial Committee were not, I think, saying that a man is only liable for the extent of damage which he could anticipate, always assuming the type of injury could have been anticipated.

This decision then, if on different facts and involving a different aspect of the foresight problem, is nevertheless consonant with our Court of Appeal's interpretation of *The Wagon Mound* in that it refuses to accept that the Privy Council intended to lay down an absolute rule that a negligent tortfeasor is never liable for particular damage which he could not reasonably have foreseen. Granted that the type of injury which the plaintiff has suffered ought reasonably to have been foreseen, the extent of liability for injury of this type will depend upon the degree of abstraction at which the injury is described by the Court. It appears from the *Wells* case and from *Smith* v. *Leech Brain & Co. Ltd.* that in choosing – although the choice is rarely made explicit – an appropriate level of generaltiy upon which to found the test of foreseeability the Court will be guided by considerations of practical justice. This becomes clear if both the *Smith* case and the *Wells* case are considered in the light of *Polemis*. The law as to remoteness of damage seems at first sight to have been greatly altered by the express disapproval in *The Wagon Mound* of the much-criticised 'directness of causation' test laid down in *Polemis*. The Privy Council in the former case appears to have radically altered the law by its decision that the test of 'foresight' of damage

3. This is merely a convenient, and graphic, label for cases where the particular plaintiff was abnormally sensitive to a particular kind of injury, e.g. a haemophiliac. The classic discussion is provided in *Dulieu* v. *White and Sons* [1901] 2 K.B. 669. See the discussion in *Salmond on Torts*, (13th ed., 1961), 756-757, and Clerk and Lindsell, *Torts* (12th ed., 1961), para 330. The weight of opinion favours the view that Lord Parker C.J.'s view is correct and that *The Wagon Mound* does not affect the validity of the 'egg-shell skull' rule which really deals in the 'measure of damage' rather than 'remoteness of damages'. In other words, the defendant must still take the victim as he finds him: cf. *Love* v. *Port of London Authority* [1959] 2 Lloyd's Rep. 541, 545, per Edmund Davies J.

must replace that of 'directness' . But it is significant that if the old test laid down in *Polemis* had been applied the results of the *Smith* and *Wells* cases would have been exactly the same. In the *Smith* case the death by cancer was certainly the direct consequence of the defendant's negligence. Similarly, in the *Wells* case the intestinal injury caused by Carey's negligence was the direct consequence of that negligence. Yet in the *Wells* case and, less conclusively because *obiter,* in the *Smith* case, the judges acknowledged that *Polemis* was now bad law. The number of cases in which the application of *The Wagon Mound* will result in a different decision from what would have been reached by the application of *Polemis* will probably be small. Lord Simonds himself remarked ([1961] A.C. 388, 422) :

> It is not probable that many cases will for that reason have a different result ....

What can be said, however, is that each individual court now has a much freer hand than formerly. The choice of an appropriate level of generality for describing the injury suffered will be a matter for each individual judge and will control his ultimate decision. This is not to imply, however, that the choice is one that will have to be made in the majority of negligence cases. After all, the argument that the plaintiff's damage was 'too remote' is raised very seldom.

The deceptiveness of the foresight principle of remoteness has been emphasized by many writers on the topic, but perhaps by none more forcibly than Douglas Payne:

> As a guide to the uninitiated to the law of negligence, Lord Atkin's 'neighbour' dictum is merely misleading. So, too, the foresight principle of remoteness, if adopted by English courts, will simply conceal from the student the actual operation of the law. It cannot be seriously contended that the foresight principle will make the outcome of disputes more predictable than in the past. [4]

This may cause despair to those who would have the law mathematically precise and exact. As Oliver Wendell Holmes said : "The life of the law is not logic; it is experience". The foresight principle of remoteness has already been and will continue to be, not only shaped by logic, but moulded by experience.

M. J. P.

4. "Foresight and Remoteness of Damage in Negligence" (1962) 25 M.L.R. 1, 21-22.