Privy Council Appeal No. 23 *of* 1960

Overseas Tankship (U.K.) Limited - - - - - *Appellants*

v.

Morts Dock & Engineering Company Limited - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JANUARY 1961.

Present at the Hearing:

VISCOUNT SIMONDS
LORD REID
LORD RADCLIFFE
LORD TUCKER
LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* VISCOUNT SIMONDS]

This appeal is brought from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal by the appellants. Overseas Tankship (U.K.) Ltd., from a judgment of Mr. Justice Kinsella exercising the Admiralty Jurisdiction of that Court in an action in which the appellants were defendants and the respondents Morts Dock & Engineering Co. Ltd. were plaintiffs.

In the action the respondents sought to recover from the appellants compensation for the damage which its property known as the Sheerlegs Wharf in Sydney Harbour and the equipment thereon had suffered by reason of fire which broke out on the 1st November, 1951. For this damage they claimed that the appellants were in law responsible.

The relevant facts can be comparatively shortly stated inasmuch as not one of the findings of fact in the exhaustive judgment of the learned trial Judge has been challenged.

The respondents at the relevant time carried on the business of ship-building, ship-repairing and general engineering at Morts Bay, Balmain, in the Port of Sydney. They owned and used for their business the Sheerlegs Wharf, a timber wharf about 400 feet in length and 40 feet wide, where there was a quantity of tools and equipment. In October and November, 1951, a vessel known as the "Corrimal" was moored alongside the wharf and was being refitted by the respondents. Her mast was lying on the wharf and a number of the respondents' employees were working both upon it and upon the vessel itself, using for this purpose electric and oxy-acetylene welding equipment.

At the same time the appellants were charterers by demise of the s.s. "Wagon Mound", an oil-burning vessel which was moored at the Caltex Wharf on the northern shore of the harbour at a distance of about 600 feet from the Sheerlegs Wharf. She was there from about 9 a.m. on the 29th October until 11 a.m. on the 30th October, 1951, for the purpose of discharging gasolene products and taking in bunkering oil.

During the early hours of the 30th October, 1951, a large quantity of bunkering oil was through the carelessness of the appellants' servants allowed to spill into the bay and by 10.30 on the morning of that day it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The appellants made no attempt to disperse the oil. The "Wagon Mound" unberthed and set sail very shortly after.

When the respondents' works manager became aware of the condition of things in the vicinity of the wharf he instructed their workmen that no welding or burning was to be carried on until further orders. He enquired of the manager of the Caltex Oil Company, at whose wharf the "Wagon Mound" was then still berthed, whether they could safely continue their operations on the wharf or upon the "Corrimal". The results of this enquiry coupled with his own belief as to the inflammability of furnace oil in the open led him to think that the respondents could safely carry on their operations. He gave instructions accordingly but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil.

For the remainder of the 30th October and until about 2 p.m. on 1st November work was carried on as usual, the condition and congestion of the oil remaining substantially unaltered. But at about that time the oil under or near the wharf was ignited and a fire, fed initially by the oil, spread rapidly and burned with great intensity. The wharf and the "Corrimal" caught fire and considerable damage was done to the wharf and the equipment upon it.

The outbreak of fire was due, as the learned Judge found, to the fact that there was floating in the oil underneath the wharf a piece of debris on which lay some smouldering cotton waste or rag which had been set on fire by molten metal falling from the wharf: that the cotton waste or rag burst into flames: that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and that after the floating oil became ignited the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf.

He also made the all important finding, which must be set out in his own words. "The raison d'etre of furnace oil is, of course, that it shall burn, but I find the defendant did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water." This finding was reached after a wealth of evidence which included that of a distinguished scientist Professor Hunter. It receives strong confirmation from the fact that at the trial the respondents strenuously maintained that the appellants had discharged petrol into the bay on no other ground than that, as the spillage was set alight, it could not be furnace oil. An attempt was made before their Lordships' Board to limit in some way the finding of fact but it is clear that it was intended to cover precisely the event that happened.

One other finding must be mentioned. The learned Judge held that apart from damage by fire the respondents had suffered some damage from the spillage of oil in that it had got upon their slipways and congealed upon them and interfered with their use of the slips. He said "The evidence of this damage is slight and no claim for compensation is made in respect of it. Nevertheless it does establish some damage which may be insignificant in comparison with the magnitude of the damage by fire, but which nevertheless is damage which beyond question was a direct result of the escape of the oil." It is upon this footing that their Lordships will consider the question whether the appellants are liable for the fire damage. That consideration must begin with an expression of indebtedness to Mr. Justice Manning for his penetrating analysis of the problems that to-day beset the question of liability for negligence. In the year 1913 in the case of *H.M.S. London* (reported in [1914] Prob. 72 at p. 76), a case to which further reference will be made, Sir Samuel Evans, P., said "The doctrine of legal causation, in reference

both to the creation of liability and to the measurement of damages, has been much discussed by judges and commentators in this country and in America. Vast numbers of learned and acute judgments and disquisitions have been delivered and written upon the subject. It is difficult to reconcile the decisions; and the views of prominent commentators and jurists differ in important respects. It would not be possible or feasible in this judgment to examine them in anything approaching detail." In the near half-century that has passed since the learned President spoke those words the task has not become easier, but it is possible to point to certain landmarks and to indicate certain tendencies which, as their Lordships hope, may serve in some measure to simplify the law.

It is inevitable that first consideration should be given to the case of *In re Polemis & Furness Withy & Company Ltd.* [1921] 3 K.B. 560 which will henceforward be referred to as "Polemis". For it was avowedly in deference to that decision and to decisions of the Court of Appeal that followed it that the Full Court was constrained to decide the present case in favour of the respondents. In doing so Mr. Justice Manning after a full examination of that case said "To say that the problems, doubts and difficulties which I have expressed above render it difficult for me to apply the decision in In re Polemis with any degree of confidence to a particular set of facts would be a grave understatement. I can only express the hope that, if not in this case, then in some other case in the near future the subject will be pronounced upon by the House of Lords or the Privy Council in terms which, even if beyond my capacity fully to understand, will facilitate for those placed as I am, its everyday application to current problems." This cri de coeur would in any case be irresistible but in the years that have passed since its decision Polemis has been so much discussed and qualified that it cannot claim, as counsel for the respondents urged for it, the status of a decision of such long standing that it should not be reviewed.

What then did Polemis decide? Their Lordships do not propose to spend time in examining whether the issue there lay in breach of contract or in tort. That might be relevant for a tribunal for which the decision was a binding authority: for their Lordships it is not. It may however be observed that in the proceedings there was some confusion. The case arose out of a charter party and went to arbitration under a term of it and the first contention of the charterers was that they were protected from liability by the exception of fire in the charter party. But it is clear from the pleadings and other documents, copies of which were supplied from the Record Office, that alternative claims for breach of contract and negligence were advanced and it is clear too that before Mr. Justice Sankey and the Court of Appeal the case proceeded as one in which, independently of contractual obligations, the claim was for damages for negligence. It was upon this footing that the Court of Appeal held that the charterers were responsible for all the consequences of their negligent act even though those consequences could not reasonably have been anticipated. The negligent act was nothing more than the carelessness of stevedores (for whom the charterers were assumed to be responsible) in allowing a sling or rope by which it was hoisted to come into contact with certain boards, causing one of them to fall into the hold. The falling board hit some substances in the hold and caused a spark: the spark ignited petrol vapour in the hold: there was a rush of flames and the ship was destroyed. The special case submitted by the arbitrators found that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. They did not indicate what damage might have been so anticipated.

There can be no doubt that the decision of the Court of Appeal in Polemis plainly asserts that, if the defendant is guilty of negligence, he is responsible for all the consequences whether reasonably foreseeable or not. The generality of the proposition is perhaps qualified by the fact that each of the Lords Justices refers to the outbreak of fire as the

direct result of the negligent act. There is thus introduced the conception that the negligent actor is not responsible for consequences which are not "direct" whatever that may mean. It has to be asked then why this conclusion should have been reached. The answer appears to be that it was reached upon a consideration of certain authorities, comparatively few in number, that were cited to the Court. Of these three are generally regarded as having influenced the decision. The earliest in point of date was *Smith* v. *London & South Western Railway Co.* Law Rep. 6 C.P. 14. In that case it was said that "when it has once been determined that there is evidence of negligence the person guilty of it is equally liable for its consequences whether he could have foreseen them or not" see per Baron Channell at page 21. Similar observations were made by other members of the Court. Three things may be noted about this case: the first, that for the sweeping proposition laid down no authority was cited: the second, that the point to which the Court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind: and the third that so little was the mind of the Court directed to the problem which has now to be solved that no one of the seven Judges who took part in the decision thought it necessary to qualify in any way the consequences for which the defendant was to be held responsible. It would perhaps not be improper to say that the law of negligence as an independent tort was then of recent growth and that its implications had not been fully examined. The second case was "*H.M.S. London*" which has already been referred to. There the statement in Smith's case was followed, Sir Samuel Evans citing Blackburn J. "What the defendants might reasonably anticipate is only material with reference to the question whether the defendants were negligent or not and cannot alter their liability if they were guilty of negligence." This proposition which provides a different criterion for determining liability and compensation goes to the root of the matter and will be discussed later. It was repeated by Lord Sumner in the third case which was relied on in Polemis, namely *Weld-Blundell* v. *Stephens* [1920] A.C. 956 at p. 983. In that case the majority of their Lordships of whom Lord Sumner was one held, affirming a decision of the Court of Appeal, that the plaintiff's liability for damages in certain libel actions did not result from an admitted breach by the defendant of the duty that he admittedly owed to him. Lord Dunedin (another of the majority) decided the case on the ground that there was there no evidence which entitled the jury to give the affirmative answer that they did to the question as put to them that the actions of libel and damages recovered were the "natural and probable consequences" of the proved negligence of the defendant. Lord Wrenbury (the third of the majority) summed up his view of the case by saying "I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty". Lord Sumner whose speech their Lordships, like others before them, have not found in all respects easy to follow said "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is of want of due care according to the circumstances. This however goes to culpability not to compensation." But this observation followed a passage in which his Lordship, directing his mind to the problem of causation, had asked what were "natural probable and necessary consequences" and had expressed the view that "direct cause" was the best expression. Adopting that test he rejected the plaintiff's claim as too remote. The question of foreseeability became irrelevant and the passage cited from his speech was unnecessary to his decision. Their Lordships are constrained to say that this dictum (for such it was) perpetuated an error which has introduced much confusion into the law.

Before going forward to the cases which followed Polemis, their Lordships think it desirable to look back to older authorities which appear to them to deserve consideration. In two cases in 5 Exchequer Reports *Rigby* v. *Hewitt* at p. 240 and *Greenland v. Chaplin* at p. 243, Pollock C.B. affirmed at p. 248 (stating it to be his own view only and not

that of the Court) that he entertained "considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise and in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated." It was not necessary to argue this question and it was not argued.

Next, one of many cases may be cited which show how shadowy is the line between so-called culpability and compensation. In *Sharp* v. *Powell* Law Rep. 7 C.P. 253 the defendant's servant in breach of the Police Act washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer about 25 yards off. In consequence of the extreme severity of the weather the grating was obstructed by ice and the water flowed over a portion of the causeway and froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse while being led past the spot slipped upon the ice and broke its leg. The defendant was held not to be liable. The judgment of Bovill C.J. at p. 258 is particularly valuable and interesting. "No doubt", he said "one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom: but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act unless it be shewn that he knows or has reasonable means of knowing that consequences not usually resulting from the act are by reason of some existing cause likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action." Here all the elements are blended, "natural" or "ordinary consequences", "foreseeability", "proximate cause". What is not suggested is that the wrongdoer is liable for the consequences of his wrong doing whether reasonably foreseeable or not, or that there is one criterion for culpability, another for compensation. It would indeed appear to their Lordships that, unless the learned Chief Justice was making a distinction between "one who commits a wrongful act" and one who commits an act of negligence, the case is not reconcilable with Polemis. In that case it was not dealt with except in a citation from *Weld-Blundell* v. *Stephens*.

Mention should also be made of *Cory & Son Ltd.* v. *France Fenwick & Co. Ltd.* (1911) 1 K.B. 114. In that case Lord Justice Vaughan Williams citing the passage from the judgment of Pollock C.B. in *Greenland* v. *Chaplin* which has already been read, said at p. 122 "I do not myself suppose that although, when these propositions were originally laid down, they were not intended as positive judgments but as opinions of the learned Judge, there would be any doubt now as to their accuracy". And Kennedy L.J. said of the same passage "with that view of the law no one would venture to quarrel". Some doubt was expressed in Polemis as to whether the citation of which these learned Judges so emphatically approved was correct. That is irrelevant. They approved that which they cited and their approval has high authority. It is probable in any case that it had not occurred to them that there was any such dichotomy as was suggested in Polemis. Nor, clearly, had it at an earlier date occurred to Lord Wensleydale in *Lynch* v. *Knight* 9 H.L.C. 577, nor to Cockburn C.J. in *Clark* v. *Chambers* 3 Q.B.D. 327. The impression that may well be left on the reader of the scores of cases in which liability for negligence has been discussed is that the Courts were feeling their way to a coherent body of doctrine and were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.

Before turning to the cases that succeeded it, it is right to glance at yet another aspect of the decision in Polemis. Their Lordships, as they have said, assume that the Court purported to propound the law in regard

to tort. But up to that date it had been universally accepted that the law in regard to damages for breach of contract and for tort was, generally speaking, and particularly in regard to the tort of negligence, the same. Yet *Hadley* v. *Baxendale* was not cited in argument nor referred to in the judgments in Polemis. This is the more surprising when it is remembered that in that case, as in many another case, the claim was laid alternatively in breach of contract and in negligence. If the claim for breach of contract had been pursued, the charterers could not have been held liable for consequences not reasonably foreseeable. It is not strange that Sir Frederick Pollock said that Blackburn and Willes J.J. would have been shocked beyond measure by the decision that the charterers were liable in tort: see Pollock on Torts 15th Edn. p. 29. Their Lordships refer to this aspect of the matter not because they wish to assert that in all respects to-day the measure of damages is in all cases the same in tort and in breach of contract but because it emphasises how far Polemis was out of the current of contemporary thought. The acceptance of the rule in Polemis as applicable to all cases of tort would directly conflict with the view theretofore generally held.

If the line of relevant authority had stopped with Polemis, their Lordships might, whatever their own views as to its unreason, have felt some hesitation about over-ruling it. But it is far otherwise. It is true that both in England and in many parts of the Commonwealth that decision has from time to time been followed: but in Scotland it has been rejected with determination. It has never been subject to the express scrutiny of either the House of Lords or the Privy Council, though there have been comments upon it in those Supreme Tribunals. Even in the inferior Courts judges have, sometimes perhaps unwittingly, declared themselves in a sense adverse to its principle. Thus Lord Justice Asquith himself, who in *Thurogood* v. *Van den Bergh & Jurgens* [1951] 2 K.B. 537 had loyally followed Polemis, in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 Q.B. 528, holding that a complete indemnity for breach of contract was too harsh a rule, decided that " the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach ". It is true that in that case the learned Lord Justice was dealing with damages for breach of contract. But there is nothing in the case to suggest, nor any reason to suppose, that he regarded the measure of damage as different in tort and breach of contract. The words " tort " and " tortious " have perhaps a somewhat sinister sound but, particularly where the tort is not deliberate but is an act of negligence, it does not seem that there is any more moral obliquity in it than in a perhaps deliberate breach of contract, or that the negligent actor should suffer a severer penalty. In *Minister of Pensions* v. *Chennell* [1947] 1 K.B. 253 Denning, J. (as he then was) said " Foreseeability is as a rule vital in cases of contract; and also in cases of negligence, whether it be foreseeability in respect of the person injured as in *Palsgref* v. *Long Island Rly.* (discussed by Professor Goodhart in his Essays p. 129), *Donoghue* v. *Stevenson* and *Bourhill* v. *Young* or in respect of intervening causes as in *Aldham* v. *United Dairies (London) Ld.* and *Woods* v. *Duncan.* It is doubtful whether in *re Polemis and Furness Withy & Co.* can survive these decisions. If it does, it is only in respect of neglect of duty to the plaintiff which is the immediate or precipitating cause of damage of an unforeseeable kind." Their Lordships would with respect observe that such a survival rests upon an obscure and precarious condition.

Instances might be multiplied of deviation from the rule in Polemis but their Lordships think it sufficient to refer to certain later cases in the House of Lords and then to attempt to state what they conceive to be the true principle. In *Glasgow Corporation* v. *Muir* [1943] A.C. 448 at p. 454 Lord Thankerton said that it had long been held in Scotland that all that a person can be bound to foresee are the reasonable and probable consequences of the failure to take care judged by the standard of the ordinary reasonable man while Lord Macmillan said that " it was still left to the judge to decide what in the circumstances of the particular

case the reasonable man would have had in contemplation and what accordingly the person sought to be made liable ought to have foreseen." Here there is no suggestion of one criterion for determining culpability (or liability) and another for determining compensation. In *Bourhill* v. *Young* [1943] A.C. 91 at p. 101 the double criterion is more directly denied. There Lord Russell of Killowen said "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double rôle. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation". This appears to be in flat contradiction to the rule in Polemis and to the dictum of Lord Sumner in *Weld-Blundell* v. *Stephens*.

From the tragic case of *Woods* v. *Duncan* [1946] A.C. 401, the facts of which are too complicated to be stated at length, some help may be obtained. There Viscount Simon analysed the conditions of establishing liability for negligence and stated them to be (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 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. To Lord Russell of Killowen in the same case the test of liability was whether the defendants (Cammell Laird & Coy. Ltd.) could reasonably be expected to foresee that the choking of a test cock (itself undoubtedly a careless act) might endanger the lives of those on board; Lord Macmillan asked whether it could be said that they, the defendants, ought to have foreseen as reasonable people that if they failed to detect and rectify the clogging of the hole in the door the result might be that which followed, and, later, identifying, as it were, reasonable foreseeability with causation, he said "the chain of causation, to borrow an apposite phrase, would appear to consist of missing links".

Enough has been said to show that the authority of Polemis has been severely shaken though lip-service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that in some cases at least palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in Polemis. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable

man, that he ought to have foreseen them. Thus it is that over and over again it has happened that in different judgments in the same case and sometimes in a single judgment liability for a consequence has been imposed on the ground that it was reasonably foreseeable or alternatively on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in Polemis. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible —and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the "direct" consequence) be substituted which leads to nowhere but the never ending and insoluble problems of causation. "The lawyer" said Sir Frederick Pollock "cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause". Yet this is just what he has most unfortunately done and must continue to do if the rule in Polemis is to prevail. A conspicuous example occurs when the actor seeks to escape liability on the ground that the "chain of causation" is broken by a "nova causa" or "novus actus" "interveniens".

The validity of a rule or principle can sometimes be tested by observing it in operation. Let the rule in Polemis be tested in this way. In the case of the "Liesbosch" [1933] A.C. 448 the appellants whose vessel had been fouled by the respondents claimed damages under various heads. The respondents were admittedly at fault: therefore said the appellants, invoking the rule in Polemis, they were responsible for all damage whether reasonably foreseeable or not. Here was the opportunity to deny the rule or to place it secure upon its pedestal. But the House of Lords took neither course: on the contrary it distinguished Polemis on the ground that in that case the injuries suffered were the "immediate physical consequences" of the negligent act. It is not easy to understand why a distinction should be drawn between "immediate physical" and other consequences nor where the line is to be drawn. It was perhaps this difficulty which led Lord Denning in *Roe* v. *Minister of Health* ([1954] 2 Q.B. 66 at p. 85) to say that foreseeability is only disregarded when the negligence is the immediate or *precipitating* cause of the damage. This new word may well have been thought as good a word as another for revealing or disguising the fact that he sought loyally to enforce an unworkable rule.

In the same connection may be mentioned the conclusion to which the Full Court finally came in the present case. Applying the rule in Polemis and holding therefore that the unforeseeability of the damage by fire afforded no defence, they went on to consider the remaining question. Was it a "direct" consequence? Upon this Mr. Justice Manning said "Notwithstanding that, if regard is had separately to each individual occurrence in the chain of events that led to this fire, each occurrence was improbable and, in one sense, improbability was heaped upon improbability, I cannot escape from the conclusion that if the ordinary man in the street had been asked, as a matter of common sense, without any detailed analysis of the circumstances, to state the cause of the fire at Mort's Dock, he would unhesitatingly have assigned such cause to spillage of oil by the appellant's employees". Perhaps he would and probably he would have added "I never should have thought it possible". But with great respect to the Full Court this is surely irrelevant, or, if it is relevant, only serves to show that the Polemis rule works in a very strange way. 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. The Polemis rule by substituting "direct" for "reasonably foreseeable" consequence leads to a conclusion equally illogical and unjust.

At an early stage in this judgment their Lordships intimated that they would deal with the proposition which can best be stated by reference to the well known dictum of Lord Sumner "This however goes to culpability not to compensation". It is with the greatest respect to that very learned Judge and to those who have echoed his words that their Lordships find themselves bound to state their view that this proposition is fundamentally false.

It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. Suppose an action brought by A for damage caused by the carelessness (a neutral word) of B, for example a fire caused by the careless spillage of oil. It may of course become relevant to know what duty B owed to A, but the only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from its context and to say that B is or is not liable and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. If, as admittedly it is, 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? And, if that damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable?

But, it is said, a different position arises if B's careless act has been shown to be negligent and has caused some foreseeable damage to A. Their Lordships have already observed that to hold B liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary. For the same fallacy is at the root of the proposition. It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he had trespassed on Blackacre. Again suppose a claim by A for damage by fire by the careless act of B. Of what relevance is it to that claim that he has another claim arising out of the same careless act? It would surely not prejudice his claim if that other claim failed: it cannot assist it if it succeeds. Each of them rests on its own bottom and will fail if it can be established that the damage could not reasonably be foreseen. We have come back to the plain common sense stated by Lord Russell of Killowen in *Bourhill* v. *Young*. As Lord Denning said in *King* v. *Phillips* [1953] 1 Q.B. 429 at p. 441 "There can be no doubt since *Bourhill* v. *Young* 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.

Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct". In doing so they have 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 accords with the general view thus stated by Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 580 "The liability for negligence whether you style it such or treat it as in other systems as a species of culpa is no doubt based on a general public sentiment of moral wrongdoing for which the offender must pay". It is a

departure from this sovereign principle if liability is made to depend solely on the damage being the " direct " or " natural " consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was " direct " or " natural ", equally it would be wrong that he should escape liability, however " indirect " the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done ; cf. *Woods* v. *Duncan* [1946] A.C. at p. 442. Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth* v. *Birmingham Waterworks Coy.* (1856) 11 Ex. 784.

It is proper to add that their Lordships have not found it necessary to consider the so-called rule of " strict liability " exemplified in *Rylands* v. *Fletcher* and the cases that have followed or distinguished it. Nothing that they have said is intended to reflect on that rule.

One aspect of this case remains to be dealt with. The respondents claim, in the alternative, that the appellants are liable in nuisance if not in negligence. Upon this issue their Lordships are of opinion that it would not be proper for them to come to any conclusion upon the material before them and without the benefit of the considered view of the Supreme Court. On the other hand having regard to the course which the case has taken they do not think that the respondents should be finally shut out from the opportunity of advancing this plea, if they think fit. They therefore propose that on the issue of nuisance alone the case should be remitted to the Full Court to be dealt with as may be thought proper.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the respondents' action so far as it related to damage caused by the negligence of the appellants be dismissed with costs but that the action so far as it related to damage caused by nuisance should be remitted to the Full Court to be dealt with as that Court may think fit. The respondents must pay the costs of the appellants of this appeal and in the Courts below.

(39371) Wt. 8109—53 150 2/61 D.L.

In the Privy Council

OVERSEAS TANKSHIP (U.K.) LIMITED

v.

MORTS DOCK & ENGINEERING COMPANY LIMITED

[DELIVERED BY VISCOUNT SIMONDS]

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