*Puzzles*

1. The defendant carelessly injures the plaintiff, causing him to lose 30 per cent. of the use of his left leg. Three years later gangsters shoot the plaintiff in the same leg and it has to be amputated. Does the defendant have to pay for 30 per cent. of the leg for life or only 30 per cent. of the leg for three years? *Baker* v. *Willougby* ([1970] A.C. 467) said for life.

2. A person who might have been expected to work until 1985 had an accident in 1973 owing to his employer's fault. This reduced his earning capacity by 50 per cent. In 1976 a disease quite unconnected with the accident incapacitated him totally. Does he get 50 per cent. of his lost earnings for three years or for twelve? *Jobling* v. *Associated Dairies* ([1982] A.C. 794) said for three.

In that case Lord Wilberforce drew "the conclusion that no general, logical, or universally fair rules can be stated which will cover, in a manner consistent with justice, cases of supervening events, whether due to tortious, partially tortious, non-culpable or wholly accidental events."

3. A school is under a duty not to let children out till 3.30 p.m., since that is when their mothers fetch them. One day the school lets a child out at 3.25 p.m., and at 3.29 p.m. the child is run over in the street. It is proved that on that day the mother would have been 15 minutes late. Is the school liable for causing the death of the child?

4. George is injured when Henry runs him over in the street. Henry wasn't looking where he was going and didn't apply the brakes at all. If he had been paying attention he could have braked and if the brakes had worked he would not have hit George. The brakes would not have worked, however, because Ian, a mechanic, had failed to fix them properly. Has either Henry or Ian contributed to George's injuries? Have both?

5. The final puzzle takes some explanation.

Swiss banks lent loads of money to a developer who turned out to be a crook. Because he was a crook, the banks could not claim on their insurance when he defaulted. These policies had been taken out by Lee, the banks' broker, in negotiation with the insurer's man, Dungate. Dungate knew that Lee was dishonest (Lee had told the banks that there were policies in force when there weren't), but Dungate didn't tell the banks this. If the banks had been told, they wouldn't have made the loans. (*Banque Financière* v. *Westgate Insurance* [1990] 2 All E.R. 947, noted 107 L.Q.R. 24 (1991)).

When the banks sued, Lee's employers paid them £10.5 million, and Dungate's employers appealed. The House of Lords held that Dungate had committed no breach since there was no common law duty to speak and the insurer's duty of disclosure, which did not sound in damages anyway, related only to matters relevant to the risk insured. So far so good. But then Lord Templeman said that even if Dungate had been in breach and even if the banks would never have made the loan had they known of Lee's dishonesty, the breach did not cause the loss, in as much as the loan would have been lost even if the insurance had been in place, as asserted by Lee.

Supposing, then, that the banks would not have lent the money if either (i) Lee had told the truth (namely "there is no insurance cover") or (ii) Dungate had told the truth (namely "Lee is a liar"), but would have lost the money lent even if what Lee said had been true (namely "the insurance is in place"),

(a) Were Lee's employers right to pay rather than appeal?;
(b) Was Lord Templeman right to say that breach by Dungate did not cause the loss of the amount lent?

(On the latter point, consider Lord Goff's remark in *Bank of Nova Scotia* v. *Hellenic Mutual* [1991] 3 All E.R. 1, 19E.)

*Further Note:*

The *Hotson* and *Baker/Jobling* questions came together in an Australian case, *Malec* v. *J.C. Hutton* (1990) 65 A.L.J.R. 316, 92 A.L.R. 545. Owing to the defendant's fault, the plaintiff contracted brucellosis and this led to a disabling neurotic condition. So far so good. But this disabling neurotic condition would probably have occurred in 1982 anyway as a result of a pre-existing back complaint. The trial court followed *Jobling* and gave the plaintiff nothing for loss of employment after 1982. Still so far so good. The High Court, however, distinguished the probability that the neurotic condition *was* due to the brucellosis from the probability that it *would have occurred* anyway, and made a percentage, rather than a total, deduction for the latter probability, even though it exceeded 50 per cent. (See J. Fleming, 70 Can. Bar. Rev. 136, 140 (1990), postscript to 68 Can. Bar. Rev. 661 (1989)).

This is probably (in another sense) incorrect. It is true that as a matter of positive law we do presently award discounted damages for the less-than-evens chance that a victim who has suffered actual harm may suffer further harm in the future, for example, for the possibility that he may be at a disadvantage should he have to look for a new job (though his existing job seems quite secure) or that he may yet develop epilepsy in consequence of the accident, or even Alzheimer's disease, though the odds are against it. In addition to the difference between the physical and economic spheres which we have already noted, there is a difference between what will result in the future on the one hand (as to which our predictions may be falsified) and what results did occur or would have occurred in the past on the other (as to which neither a crystal ball nor a time machine are of assistance).



## Section 2.—Directness and Foreseeability

### RE AN ARBITRATION between POLEMIS and FURNESS, WITHY & Co.

Court of Appeal [1921] 3 K.B. 560; 90 L.J.K.B. 1353; 126 L.T. 154; 37 T.L.R. 940; 27 Com.Cas. 25; 15 Asp.M.L.C. 398; [1921] All E.R.Rep. 40

*Claim by owners against charterers in respect of destruction of ship*

This was a dispute between the charterers and owners of a ship which was destroyed while under charter. At Casablanca, the charterers had employed Arab stevedores to unload the cargo. One of them dropped a heavy plank into the hold, which was full of petrol vapour. On impact, the plank caused a spark, the spark ignited the vapour, and the ship was destroyed. The arbitrator found that it was careless to drop the plank, that some damage to the ship was foreseeable, but that the causing of the spark and the ensuing fire were not. He awarded the owners damages of £196,165 odd (the equivalent of 20 months' hire). Sankey J. confirmed the award, and so did the Court of Appeal.

**Bankes L.J.:** . . . In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendant's servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellants' junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote. . . .

**Warrington L.J.:** . . . The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Sufficient authority for the proposition is afforded by *Smith* v. *London and South Western Ry.* ((1870) L.R. 6 C.P. 14), in the Exchequer Chamber, and particularly by the judgments of Channell B. and Blackburn J. . . .

**Scrutton L.J.:** . . . The second defence is that the damage is too remote from the negligence as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well-known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. And as to many cases of fact in which the distinction has been drawn, it is difficult to see why one case should be decided one way and one another. Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that someone finding the cheque should commit forgery: *London Joint Stock Bank* v. *Macmillan* ([1918] A.C. 777); while if someone negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled: *Weld-Blundell* v. *Stephens* ([1920] A.C. 956). In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer Chamber in *Smith* v. *London and South Western Ry.*, and by the majority of the Court in Banc in *Rigby* v. *Hewitt* and *Greenland* v. *Chaplin* ((1850) 5 Ex. 240, 243; 155 E.R. 103, 104), and approved recently by Lord Sumner in *Weld-Blundell* v. *Stephens* and Sir Samuel Evans in *H.M.S. London* ([1914] P. 76). In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused. . . .

*Questions*

1. A borrows a car from B. When the day comes for returning it, A says, "Oh, I'm very sorry, I haven't got it. My chauffeur was getting into the car with a heavy picture I had just bought, and he rather carelessly struck the cigar-lighter on the dash-board. This must have set up some kind of electrical trouble, for the next thing we knew was that the car was on fire, and we were lucky to escape before the whole thing blew up. As to the car, it was just an unfortunate accident, I'm afraid." Is this a satisfactory answer to B's claim for the car?

2. If, under *Hadley* v. *Baxendale* ((1854) 9 Exch. 341; 156 E.R. 145), there is implied in a contract of carriage a term that the carrier will not be liable for more than the value of the thing to be carried, what is the limit of liability in a contract whereby one person contracts for the use of another person's chattel (*e.g.* a ship)?

3. The charterparty in question in this case exempted the charterers from liability for "act of God, the King's enemies, loss or damage from fire on board, etc.," and all the judges agreed that this did not cover fire caused by the charterer's negligence. Does the presence of this clause suggest which party agreed to bear the risk of loss not covered by the exemption clause?

4. Suppose the cause of the fire were wholly unknown. Would the charterers pay (a) in the absence of the exemption clause, (b) when it is present?



## OVERSEAS TANKSHIP (U.K.) LTD. v. MORTS DOCK & ENGINEERING CO. THE WAGON MOUND

Privy Council [1961] A.C. 388; [1961] 2 W.L.R. 126; 105 S.J. 85; [1961] 1 All E.R. 404; [1961] 1 Lloyd's Rep. 1

*Action by frontager against highway user in respect of property damage*

A large quantity of oil was carelessly allowed to spill from *The Wagon Mound*, a ship under the defendant's control, during bunkering operations in Sydney Harbour on October 30, 1951. This oil spread to the plaintiff's wharf about 200 yards away, where a ship, *The Corrimal*, was being repaired. The plaintiff asked whether it was safe to continue welding, and was assured (in accordance with the best scientific opinion) that the oil could not be ignited when spread on water. On November 1, a drop of molten metal fell on a piece of floating waste; this ignited the oil, and the plaintiff's wharf was consumed by fire.

Kinsella J. found that the destruction of the wharf by fire was a direct but unforeseeable consequence of the carelessness of the defendant in spilling the oil, but that some damage by fouling might have been anticipated. He gave judgment for the plaintiff [1958] 1 Lloyd's Rep. 575. The Full Court of the Supreme Court of New South Wales affirmed his decision [1959] 2 Lloyd's Rep. 697. The defendant appealed to the Judicial Committee of the Privy Council, and the appeal was allowed.

**Viscount Simonds:** . . . 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 trival 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