REMOTENESS OF DAMAGE

CHAPMAN v. *HEARSE*[1]

SMITH v. *LEECH BRAIN & CO. LTD. & ANOR*[2]

The vexed question of how far one is responsible for remote consequences of one's acts raises problems for the sociologist, the moralist and the lawyer. For the latter, the law was drastically revised by the *Morts Dock Case*[3] in 1960. This case has been generally accepted as overruling *Re Polemis*[4] and laying down that the test for determining whether the consequences of an act are too remote for the purposes of the law of negligence, is whether the result was reasonably foreseeable, in place of the older test of whether it was a direct result. But since the decisions in *Chapman* v. *Hearse* in Australia and *Smith* v. *Leech Brain & Co. Ltd.* in England, the position is somewhat different.

CHAPMAN v. *HEARSE—THE FACTS AND DECISION*

In *Chapman* v. *Hearse,* an accident occurred near Adelaide on a dark and stormy night due to the negligence of Chapman. Chapman was thrown out on to the road and Dr. Cherry, a medical practitioner who was passing, stopped and walked over to him to render assistance. While the doctor was stooping over Chapman, Hearse drove round a corner and failed to see him with the result that he knocked him down and caused him injuries from which he died. The doctor's executors sued Hearse under the Wrongs Act, 1936-56 (S.A.) and Hearse, besides denying liability and alleging contributory negligence, issued a third party notice against Chapman claiming that he was jointly responsible for the doctor's death. The South Australian Supreme Court found that Chapman was jointly responsible and ordered him to pay one-quarter of the damages. Chapman appealed to the Full Supreme Court in vain[5] and from that decision he appealed to the High Court on the grounds that he owed no duty of care to Cherry, that Cherry's death was caused solely by the negligence of Hearse and that in any case the damage was too remote.[6] The High Court did not accept any of these three grounds of appeal, and the appeal was therefore dismissed.[7]

The "Damage of the Same General Nature" Principle

With regard to the first ground, the High Court held that Chapman did owe a duty of care to Dr. Cherry. The appellant argued that none of the events which led to the final result was reasonably foreseeable but the High Court pointed out that it was "sufficient in the circumstances of this case to ask whether a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow a collision between two vehicles on a dark wet night upon a busy highway".[8] This proposition

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[1] (1961) 106 C.L.R. 112.
[2] (1962) 2 W.L.R. 148.
[3] *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* (1961) A.C. 388 (P.C.).
[4] *In re Polemis and Furness Withy and Co.* (1921) 3 K.B. 560.
[5] (1961) S.A.S.R. 51.
[6] There was also an appeal and a cross-appeal against the apportionment and an appeal by Hearse against the finding that the doctor was not guilty of contributory negligence.
[7] The appeal and cross-appeal against the apportionment were also dismissed as was the cross-appeal against the decision that Dr. Cherry was not guilty of contributory negligence.
[8] p. 120.

is probably the most significant contribution of *Chapman* v. *Hearse* to the law of negligence. The idea of responsibility to foreseeable *classes* of persons in foreseeable *classes* of circumstances had been foreshadowed in a number of earlier cases including *Carmarthanshire County Council* v. *Lewis*[9] and *Haynes* v. *Harwood*.[10] But what is significant in the present case is that, although the High Court is purporting to speak here of the rules determining the existence of a duty of care rather than of the rules relating to remoteness of damage, the fact that the High Court is here responding to an argument based on the *Morts Dock Case*, will inevitably lead to the High Court's proposition being treated as an interpretation of the foreseeability rule in relation to remoteness. The *Morts Dock Case* established that one is liable only for damage which one could reasonably have foreseen, but *Chapman* v. *Hearse* has broadly interpreted this so that one is liable also for all damage which is of the same general nature as damage which could reasonably have been foreseen.

The "Causation in Fact" Principle

The second ground of appeal was that the doctor's death was caused solely by Hearse's negligent driving. The High Court made two comments on this. The first was that where there are a number of causes of damage "there is no occasion to consider reasonable foreseeability on the part of the particular wrongdoer unless and until it appears that the negligent act or omission has *in fact*[11] caused the damage complained of".[12] Thus if the doctor's death was caused solely by the negligence of Hearse, the fact that this was reasonably foreseeable by Chapman at the time of his negligence would be irrelevant. However, the High Court also said that a wrongful intervening act would not, by virtue of its wrongfulness alone, break the chain of causation if the ultimate result was reasonably foreseeable.[13] Thus the intervening negligence did not prevent Chapman's negligence being a cause of the doctor's death and therefore the reasonable foreseeability test had to be applied.[14]

The second proposition is, therefore, that the requirement of reasonable foreseeability does not arise if the act or omission complained of did not *in fact* cause the damage to the plaintiff. What the High Court means when it says that something is "in fact" a cause is not that the conduct is one of the causal antecedents of the damage nor that the damage would not have occurred but for the conduct. It is referring to the concept of a relationship between two events as this has been conceived and explored in a large number of cases and as a result of which the courts have said that the former is "a cause" of the latter event. The test suggested by Fleming[15] for determining whether there is this so-called "causation in fact" is the "but for" test—the conduct is in fact a cause of the damage if, but for it, the damage would not have occurred. But Fleming argues[16] that this test has no application to the situation where there are what he calls "multiple independent concurrent causes", and in fact the courts themselves go beyond the "but for" test. In *Stansbie* v. *Troman*,[17] it was held that a criminal intervening act did not relieve the defendant from liability. In that case a housepainter left a house

[9] (1955) A.C. 549.
[10] (1935) 1 K.B. 146.
[11] My italics. See *infra*.
[12] p. 122.
[13] p. 124.
[14] The appellant also tried to rest his second ground on the last apportunity principle of *Alford* v. *Magee* (1952) 85 C.L.R. 537 but this was rejected by the High Court.
[15] Fleming, *The Law of Torts* (1 ed. 1957) at 196ff. This view is not repeated in the 2nd edition.
[16] *Ib.* 1 ed. 197; 2 ed. 181.
[17] (1948) 2 K.B. 48.

with the front door open and was held liable for the resulting burglary. The principle now laid down in *Chapman* v. *Hearse*, that a negligent intervening act by a third party does not of itself prevent the defendant's act from being in fact a cause of the damage, is but an application of the same general notion.

SMITH v. *LEECH BRAIN & CO. LTD.—THE FACTS AND DECISION*

"Causation in Fact" and the "Thin Skull" Exception

The law relating to remoteness has also received recent examination in *Smith* v. *Leech Brain & Co. Ltd.* In that case, due to a breach of statutory duty by his employers, a worker was struck on the lip by a piece of molten metal. The burn so caused was the promoting agent of cancer from which he died three years later. If the accident had not occurred, he might never have developed cancer but the lip had a pre-malignant condition and cancer could have been caused by a large number of promoting agencies, including sunlight, heat and cold, a scratch and trauma. As a result, it was very probable that at some stage in his life he would have developed cancer. His widow sued his employers under the Fatal Accidents Act, 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. The defendant denied negligence and alleged contributory negligence and that the damage was too remote. Lord Parker, C.J., sitting as a single judge of the Queens Bench Division, found against all three defences. It is with the rejection of the third defence that this note is concerned.

Counsel for the plaintiff argued that the court was bound by *Re Polemis* and that as the ultimate damage was a direct result of the defendant's omission, the defendant was liable. Counsel for the defendant, however, submitted that *Re Polemis* was wrongly decided and was overruled by the Privy Council decision in the *Morts Dock Case* and that in the result the foreseeability test should be applied. Lord Parker held that neither case was decisive on the facts before him as there was a distinction between cases in which the initial damage is a remote result of the defendant's act and cases in which, though some initial damage was the result of the defendant's act, the ultimate damage sued on is a remote result of the initial damage for which the defendant is admittedly liable. He went on to hold as to the latter that the "foreseeability" test laid down in the *Morts Dock Case* and the "directness" test laid down in *Re Polemis* were not applicable to what he loosely called the "thin skull cases", in which the rule had always been that a tortfeasor takes his victim as he finds him. In other words, Lord Parker said that when the remoteness is only as between initial damage and the damage sued on, the "thin skull cases" constitute an exception to the limits of liability set by either the "foreseeability" or "directness" principle.

Liesbosch Limitation on the "Thin Skull" Exception

Unfortunately no reference was made in the argument or the judgment to the *Liesbosch Case*[18] in which the House of Lords imposed a severe qualification on the principle that a tortfeasor takes his victim as he finds him. In that case the defendant negligently sank the plaintiff's dredger, which was engaged in work under a contract between the plaintiff and a harbour board. There were dredgers available for sale at the time but due to the impecuniosity of the plaintiff it was unable to purchase one and had to hire one at exorbitant rates. There was still a delay before it arrived and work did not recommence until its arrival. The House held the defendant liable for the plaintiff's delay in performing the contracts but not for the exorbitant

[18] *Liesbosch, Dredger* v. *S.S. Edison (Owners)* 1933 A.C. 449 (H.L.).

hiring charges because "the appellant's[19] actual loss insofar as it is due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort".[20] This presumably was not the case with the lost contracts.

There are three possible bases for distinguishing this case from the "thin skull" cases. The first is that financial weakness is different from physical weakness. Although this is the more obvious distinction on the facts of the cases, it does not appear to be the *ratio decidendi* of the *Liesbosch Case* in the light of the language quoted above. It could also be suggested, secondly, that the decision in the *Liesbosch Case* was based on an extension of the principle that the plaintiff is under a duty to minimise his damages but this, it is submitted, would be faulty characterisation. No one would suggest that a plaintiff who receives a blow on the head is under a duty to minimise his damages by having a thick skull and in the same way the plaintiff's impecuniosity in the *Liesbosch Case* could not reasonably be regarded as a failure to minimise his damages. The third possible basis is the one referred to in the quotation, that where the loss is due to a characteristic which amounts to a separate and distinct cause, the defendant is not liable for the loss. It is submitted that this is the correct basis for the distinction, but that the disinction in the light of authority to be mentioned shortly is one of degree rather than substance. If it is the correct basis, a case in which someone pricked a haemophiliac with a pin causing him to bleed to death could be distinguished from the "thin skull" cases on the ground that in that case the plaintiff's peculiar characteristic is so extreme as to amount to a separate and and distinct cause.

It is submitted, then, that the test thus laid down in the *Liesbosch Case* is the correct one and that had this case been raised in argument in *Smith's Case*, Lord Parker might, in the present view, have been expected to follow it. That is to say, he would have thought that the facts of *Smith's Case* provide a much stronger situation for the application of the *Liesbosch* principle than the facts of the *Liesbosch Case* itself, insofar as the pre-malignant cancer of the lip would appear to have been a much "greater" cause of the cancer in *Smith's Case* than the plaintiff's impecuniosity was of his loss in the *Liesbosch Case*. Denning, L.J. in *Minister of Pensions* v. *Channell*[21] called the *Liesbosch Case* a case of an "extraneous event being so powerful a cause as to reduce the rest to part of the circumstances in which the cause operates". On this basis it seems likely that the defendant in *Smith's Case* would have escaped liability. It would seem that Lord Parker was correct in refusing to apply the principle of the *Morts Dock Case* to the facts before him, but, it is respectfully submitted, incorrect in presuming that the exceptional rule that a tortfeasor takes his victim as he finds him has no limitations.

Quite apart from the criticism which has to be levelled at Lord Parker's judgment because of his failure to take account of the *Liesbosch* limit to the "thin skull" rule, it is submitted that he failed to deal satisfactorily with the *Morts Dock Case* itself. There is a principle that a tortfeasor takes his victim as he finds him and there is also a principle that a person is not liable for unforeseeable consequences of his act. If neither of these principles is qualified, or subordinate one to the other, both would be applicable in a case (like *Smith's Case*) where, due to an exceptional and unforeseeable characteristic of the plaintiff, the defendant's act caused him damage. If the "unforeseeability" principle is applied, the defendant escapes liability, but if the

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[19] The plaintiffs were the appellants.
[20] At 460.
[21] (1947) K.B. 250.

"thin skull" principle is applied, the defendant is liable unless he can rely on the limitation on it set by the *Liesbosch Case*. In *Smith's Case* Lord Parker evaded this conflict by limiting the "foreseeability" principle to cases of remoteness between the defendant's conduct and the immediate effect on the plaintiff, thus excluding from it cases where the remoteness is between the immediate effect on the plaintiff for which the defendant is liable and some ultimate effect on the plaintiff. The difficulty particularly for Australian courts with this approach is that it is in direct conflict with the language of the Privy Council in the *Morts Dock Case*. In that case their Lordships said:[22]

> There can be no liability until the damage is done. It is not the act but the consequence on which tortious liability is founded. Just as . . . there is no such thing as negligence in the air, so there is no such thing as liability in the air. . . . It is vain to isolate the liability from the context and to say that B is or is not liable and then to ask for what damage he is liable . . . 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 . . .

This language seems to indicate quite clearly that in their Lordships' view it is generally necessary that damage sued on be reasonably foreseeable. It is submitted that in order to give the greatest weight possible to the language of the highest authorities, it is proper to regard the rule that a tortfeasor takes his victim as he finds him as an exception to this general principle. On this view Lord Parker was right in refusing to apply the foreseeability test but this rightness was in fact counterbalanced by his failure to consider the limitation on the "thin skull" exception established by the *Liesbosch Case*. This failure, it is submitted, had the effect of causing him to come to an incorrect result on the authorities.[23]

Summary

In the result the present state of the law of remoteness in negligence cases may perhaps be summarised as follows.

A distinction must be drawn between remoteness of the defendant's act from the initial effect on the plaintiff and between remoteness of the initial effect on the plaintiff from the ultimate effect upon him. With respect to the first, the foreseeability test laid down in the *Morts Dock Case* applies with the corollary from *Chapman* v. *Hearse*, that as long as damage of the same general kind was reasonably foreseeable, the defendant is liable. With respect to the second, the defendant is similarly liable for the ultimate damage if damage of the same general kind was reasonably foreseeable (although this was denied by Lord Parker in *Smith's Case*); but the liability here also extends beyond

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[22] At 425.

[23] This analysis is supported by the judgment of Dixon, C.J. in the recent case of *Watts* v. *Rake* ((1960) 34 A.L.J.R. 186 at 187) where he said "if the injury proves more serious in its incidents and its consequences because of the injured man's condition, that does nothing but increase the damages the defendant must pay". His Honour then proceeded to give the familiar example of the defendant who severs the remaining leg of a one-legged plaintiff. It is submitted that the Chief Justice, by stating his principle in this way, was tacitly recognising the exception to the *Smith* v. *Leech Brain* principle which is found in the *Liesbosch Case* as he limited its operation to cases where the damage was one of the "incidents and consequences" of the injury. To some extent this formulation would seem to beg the question of whether the damage is one of the "incidents and consequences" of the injury within the legal meaning of those terms. On the other hand, however, it does appear to recognise the principle of Lord Wright in the *Liesbosch Case* concerning characteristics which amount to "separate and distinct causes" because where such characteristics are involved the damage is not one of the "incidents and consequences" of the injury. Thus the present analysis has received a measure of recent judicial support.

this to cases where the ultimate damage was partially caused by some exceptional characteristic of the plaintiff. In this exceptional class of cases, the rule is that a tortfeasor takes his victim as he finds him. If *Smith's Case* is correct, this exceptional rule is absolute. If, however, the present view of the bearing of the *Liesbosch Case* on this matter is correct, the defendant should not be liable if the plaintiff's characteristic is so powerful (that is, so exceptionally exceptional) a cause as to reduce the defendant's negligent act merely to one of the circumstances in which the cause operates.

Thus the principles expressed in the *Morts Dock Case*, which in 1960 were regarded as reforming the whole law of remoteness of damage, must in 1963 be read subject to severe qualifications. *Chapman* v. *Hearse* has elaborated the "reasonable foreseeability" requirement by including within it any damage which is of the same general nature as reasonably foreseeable damage. *Smith* v. *Leech Brain & Co. Ltd.* has suggested how at least one field of the law of remoteness may be exempt (but to an extent which remains problematical in the respects above examined) from the *Morts Dock Case* test.

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ASSESSMENT OF DAMAGES FOR LOSS OF "AMENITIES" OF LIFE*

WISE v. *KAYE AND ANOTHER*

The problems of assessing damages in personal injuries cases are constantly being encountered by members of a legal profession practising in a system where such cases constitute a considerable proportion of those coming before the courts. This means that any decision of an appellate court which seeks to provide solutions to some of those problems by laying down principles on which the assessment is to be based, is worthy of careful study.

Wise v. *Kaye*[1] is a decision of the Court of Appeal and is primarily concerned with the assessment of damages under the head of loss of "amenities" of life. The plaintiff was a young woman who sustained injuries in a car accident as a result of which she remained in a state of unconsciousness from the time of the accident to the date of appeal. For all practical purposes the situation was likely to be a permanent one. She had no purposeful movements of the limbs. Though her eyes were open there was no evidence of recognition.

> She had apparently established some sort of sleeping and waking rhythm, but she had to be fed by a tube and was in every elementary way completely helpless and could do nothing for herself. Her life was described

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* Following preparation of this casenote an article appeared in a Sydney newspaper (*Daily Telegraph*, 10th January, 1963) stating that the defendants intended appealing to the House of Lords from the decision of the Court of Appeal. Then, on 28th May, 1963, the *London Times* reported an appeal, in the case of *H. West and Son Limited and anor.* v. *Shephard*, to the House of Lords. Lord Devlin is reported as saying that "in effect this was an appeal from *Wise* v. *Kaye*". Their Lordships (Lord Reid and Lord Devlin dissenting) dismissed the appeal. The inference would appear to be that the appeal in *Wise* v. *Kaye* will not be proceeded with because the House of Lords has in effect upheld the decision of the majority of the Court of Appeal. In England, therefore, it appears that the award of large figures in damages for loss of amenities to a person who never recovers consciousness and in fact dies shortly after the trial (as the *Daily Telegraph* reports that the plaintiff in *Wise* v. *Kaye* did) has been given its final seal of approval. In the present note some reasons will be suggested why this is an unsatisfactory state of affairs.

[1] (1962) 1 All E.R. 257.