# NOTES

## Remoteness of Damage in Tort: Penman v. Saint John Toyota Ltd.

The case of *Penman et al.* v. *Saint John Toyota Ltd. et al.*,[1] decided in the New Brunswick Supreme Court, Appeal Division, highlights the need for judges to keep separate in their minds the legal requirements for establishing initial liability in negligence and the rules which then come into play to determine the extent and measure of damages once liability has been established.

The facts of *Penman's* case were straightforward. The plaintiff's Buick automobile was damaged by the carelessness of one Hurd, an employee of the defendant. Due to a strike at the General Motors plant, delivery of parts was delayed and the automobile was not repaired for five and one-half months. For the first month the plaintiff used a taxi to get to and from work; for the following four and one-half months, he rented an automobile. The trial judge, in determining whether there could be recovery for the cost of the car rental, stated:

> There is only one question to be determined: 'Was the action of Mr. Penman in renting the car a reasonable step in the circumstances?' I cannot in any way state that it was unreasonable and I find as a fact that it was reasonable...[2]

The appellants however on appeal relied on the *Wagon Mound* (*No. 1*) case [3] and argued that since the delay in the repair of the automobile was not reasonably foreseeable, there should be no liability for the rental account incurred because of the strike.

At this point it becomes necessary, in order to deal with this argument, to clarify the function and the interpretation the Courts have accorded the *Wagon Mound* (*No. 1*) foreseeability test in the law of negligence. To create liability in negligence it is necessary to show that a legal duty exists, that the duty is owed to the particular plaintiff, that the conduct in question was careless and that the carelessness caused all the damage for which there is to be recovery.

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[1] (1973), 30 D.L.R. (3d) 88.

[2] *Ibid.*, 89.

[3] *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*), [1961] A.C. 388; [1961] 1 All E.R. 404 (P.C.).

In addition, since *Wagon Mound (No. 1)* was decided it is necessary to show that "the damage is of such a kind as the reasonable man should have foreseen".[4] If these requirements are met initial liability exists. One may then progress to ask for what extent of damage the defendant is liable and how should the damage be calculated in monetary terms bearing in mind the plaintiff's duty to minimize his damages.[5] At this later stage foreseeability is irrelevant. This follows from the leading English House of Lords decision in *Hughes* v. *The Lord Advocate,*[6] which lays down that the *Wagon Mound (No. 1)* requirement of foreseeability of the kind of damage in suit is relevant neither to the extent of damage nor to the precise manner of its infliction.

In *Penman's* case once the kind of damage in suit was shown to be foreseeable in the general sense (i.e. once it was proven that damage to the plaintiff's automobile resulting from a collision was foreseeable), the question whether the extent of damage in the shape of the inflated rental charge was foreseeable was irrelevant. There was no need for the majority in the Appeal Division to accept the appellants' argument and state as they did:

> Assuming the consequences for which a tortfeasor is liable in damages are limited to those which are foreseeable, I am of the opinion that delays due to strikes in automotive plants are foreseeable.[7]

That they entertained this argument is more remarkable because the same members of the New Brunswick Appeal Division had quoted and applied the interpretation given to the *Wagon Mound (No. 1)* case by the *Hughes* case the previous year. In *Stewart* v. *Levigne* [8] the court held that the kind of damage in suit was foreseeable after quoting the following passage:[9]

> I do not read the *Wagon Mound (No. 1)* as dealing with the extent of the original injury or the degree to which it has affected the plaintiff, still less do I regard it as requiring foreseeability of the manner in which that original injury has caused harm to the plaintiff.[10]

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[4] *Ibid.*, 426 *per* Viscount Simonds. On this aspect of the law of negligence see Dias, *Remoteness of Liability and Legal Policy,* (1962) Camb. L.J. 178 and *Trouble on Oiled Waters,* (1967) Camb. L.J. 62.

[5] See generally for this analysis of the tort of negligence *Clerk & Lindsell on Torts* 13th ed. (1969) and Dias, *The Duty Problem in Negligence,* (1955) Camb. L.J. 198.

[6] [1963] A.C. 837; [1963] 1 All E.R. 705 (H.L.).

[7] (1973), 30 D.L.R. (3d) 88, 95.

[8] (1972), 4 N.B.R. (2d) 452.

[9] From the judgment of Eveleigh,J. in *Weiland* v. *Cyril Lord Carpets Ltd.,* [1969] 3 All E.R. 1006, 1009 who in turn was approving *Hughes* v. *The Lord Advocate.*

[10] (1972), 4 N.B.R. (2d) 452, 464.

These two New Brunswick decisions, *Stewart* and *Penman*, serve to emphasize how little practical difference the introduction of the *Wagon Mound (No. 1)* foreseeability requirement has made to the actual decisions of the courts.

Assuming initial liability, it is clear that neither before nor after *Wagon Mound (No. 1)* was foreseeability relevant to the extent or to the quantum of damages.[11] Further, the foreseeability requirement has been so diluted by not requiring foreseeability of the extent or the precise manner of infliction that it is difficult to find examples of cases where recovery has been denied to a plaintiff who would have succeeded under the "directness test" of *Re Polemis*.[12] Nor are the cases where recovery has been denied in any way a fulfilment of the high ideals of logic and justice on which the Privy Council based the *Wagon Mound (No. 1)* test.[13] Two examples will suffice.

In *Tremain* v. *Pike*[14] a farm worker was denied recovery when he contracted leptospirosis from contact with rats' urine while working on a rat-infested farm. Payne, J. was prepared to hold that although it was foreseeable that the plaintiff would suffer personal injury from rat bites or rat contamination of food what actually happened was "entirely different in kind" and was unforeseeable.

In *Doughty* v. *Turner*[15] a workman was denied recovery after an asbestos lid fell into hot molten liquid and exploded causing the liquid to erupt and burn him. Only injury by splashing was held to be foreseeable and this was considered different in kind from what actually happened. Lord Pearce, a member of the unanimous Court of Appeal in *Doughty*, was moved to conclude his judgment by saying:

> I have great sympathy with the plaintiff who suffered injury through no fault of his own.[16]

Lord Pearce's remark is a recognition that although the *Wagon Mound (No. 1)* has achieved justice for the defendant, this is not

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[11] See eg. *Shulhan* v. *Peterson, Howell & Heather (Canada) Ltd.* (1966), 57 D.L.R. (2d) 491 (Sask. Q.B.), a case on identical facts which achieved the same result as the instant case by applying *Polemis*.

[12] *Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560.

[13] For an extravagant attack on the *Wagon Mound (No. 1)* test and on the other attempts of the courts to provide a workable rule which balances the interests of both plaintiff and defendant see Linden, *Canadian Negligence Law* (1972), 261-276.

[14] [1969] 1 W.L.R. 1556. For a penetrating discussion of this and the following case see Dias, *Kind and Extent of Damage in Negligence*, (1970) Camb. L.J. 28.

[15] [1964] 1 All E.R. 98; [1964] 2 W.L.R. 240 (C.A.).

[16] [1964] 1 All E.R. 98, 101.

synonymous with justice for the plaintiff. It is this factor which has led to the adoption of the solution in the *Hughes* case. That solution has been the adoption of a broad and imprecise definition of the *Wagon Mound (No. 1)* requirement of foreseeability of the kind of harm in suit so that although the results of individual cases are hard to predict the opportunity is present for the courts to do justice not only to the plaintiff (whom *Polemis* favoured) nor only to the defendant (whom *Wagon Mound (No. 1)* favoured) but to whomever is the more meritorious party.

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