FORESEEABILITY AND THE "EGG-SHELL SKULL" CASES

Smith v. *Leech Brain & Co. Ltd.*

Ever since the Judicial Committee of the Privy Council handed down its decision in *The Wagon Mound,*[1] a judicial controversy has been raging over the merits and demerits of the foreseeability test as laid down in *The Wagon Mound vis-a-vis* the "direct consequence" doctrine enunicated by the Court of Appeal in *Re Polemis.*[2] The Judicial Committee, in giving *The Wagon Mound* decision, entertained the fervent hope that the foreseeability test would simplify the law of tortious liability and make it more consonant with our modern concept of justice and morality. However, as learned writers[3] were quick to point out, the foreseeability test, though simple in theory, may be difficult to apply in practice, and its strict application in certain complex cases may even result in palpable injustice. The hard fact is that the foreseeability test conflicts with certain well-established common law rules of tortious liability. The most significant of these rule is what is commonly known as the "egg-shell skull" rule which lays down that a tortfeasor must take the victim as he is.[4] The crucial question is whether the decision in *The Wagon Mound* overrules the "egg-shell skull" cases and, if not, how are we to reconcile the apparent conflict?

This was exactly the question posed and fully canvassed before Lord Parker C.J. in the recent case of *Smith* v. *Leech Brain & Co. Ltd.*[5] The facts of the case were as follows: Smith was employed by the defendants as a labourer and galvanizer, part of his work being to lower articles into a tank of molten matter and flux and subsequently removing them. While engaged in this operation a piece of molten matter spatted out and burnt his lips. The burn later developed into cancer which caused his death. It was found that the defendants had been negligent, and the burn was medically proved to be the promoting agency, which produced cancer in the lip tissues of the plaintiff who already had a pre-malignant condition. His widow brought the present action to claim damages under the Law Reform (Miscellaneous Provisions) Act, 1934[6], for loss of expectation of life, and under the Fatal Accidents Acts, 1846-1959', on the basis of the burn resulting in cancer causing Smith's death.

The learned Lord Chief Justice, while purporting to approve of *The Wagon Mound* as good law, was hard put to find a way out of the dilemma. He frankly stated that, but for *The Wagon Mound,* he was clearly of the opinion that, ". .. . assuming negligence proved, and assuming that the burn caused in whole or in part the cancer and the death, this plaintiff would be entitled to recover."[8] His Lordship

1. [1961] A.C. 388.
2. [1921] 3 K.B. 560.
3. See A.M. Honore, "Torts — Negligence — Foreseeable Damage — Right to be Careless at Others' Risk" (1961) 39 Canadian Bar Review 267 at pp. 269-271.
4. See *per* Scrutton L.J. in *The Arpad* [1934] P. 189 at pp. 202-203; *cf.* Kennedy L.J. in *Dulien* v. *White & Sons* [1901] 2 K.B. 669 at p. 679.
5. [1962] 2 Q.B. 405.
6. 24 & 25 Geo. 5 c. 41.
7. The Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93) as amended by the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), the Fatal Accidents (Damages) Act, 1908, the Fatal Accidents Act, 1959 (7 & 8 Eliz. 2 c. 65).
8. *Ibid,* at p. 413.

went on to examine *The Wagon Mound* decision, and finally arrived at the conclusion that *The Wagon Mound* is not really inconsistent with the "egg-shell skull" principle in so far as the type of damage, *i.e.* damage by burns, is foreseeable, although the extent of that damage is not foreseeable.

His Lordship said:

> "In other words Lord Simonds is clearly there [*i.e.* in *The Wagon Mound*] drawing a distinction between the question whether a man could reasonably anticipate a type of injury, and the question whether a man could reasonably anticipate the extent of injury of the type which could be foreseen.
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> "The Judicial Committee were, I think, disagreeing with the decision in the *Polemis* case that a man is no longer liable for the type of damage which he could not reasonably anticipate. 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. I think that view is really supported by the way in which cases of this sort have been dealt with in Scotland. ..."

In those circumstances, it seems to me that this is plainly a case which comes within the old principle. The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury which he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends on the characteristics and constitution of the victim.

> "Accordingly, I find that the damages which the plaintiff claims are damages for which defendants are liable." [9]

Perusing the learned Chief Justice's judgment as a whole , it is by no means clear whether his Lordship intended to distinguish *The Wagon Mound,* so that the "egg-shell skull" rule should be regarded as an exception to the foreseeability test, or to hold that the "egg-shell skull' rule is consistent with *The Wagon Mound,* in as much as the general type of damage is foreseeable though the extent of damage is unforeseeable. It is submitted that the latter is the correct proposition of law as laid down in *The Wagon Mound.* The logical corollary, there, is that *The Wagon Mound* does not affect the validity of the "egg-shell skull" principle which really deals with "the measure of damages" and not "the remoteness of damage".[10] In other words, *The Wagon Mound* strikes at unforeseeability as to the general kind or type of injury and not at unforeseeability as to the extent of the damage of a foreseeable type.

Lord Parker's C.J. interpretation of *The Wagon Mound* in its application to the type of problem posed before him certainly has the strong support of learned writers.[11] It must, of course, be mentioned that other learned writers,[12] however, hold views to the contrary. Should the decision go on appeal, it is hoped that the Court of Appeal or the House of Lords will make an authoritative pronouncement on this matter. In this connection it is worthy of note that the House of Lords has recently held in the Scottish case of *Hughes* v. *The Lord Advocate* [13] that the foreseeability test is satisfied if the type of injury suffered is generally foreseeable, even though the detailed manner in which the injury is incurred and the extent of the injury may not be foreseeable. This is surely in accordance with the Lord Chief Justice's decision in the instant case.

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9. *Ibid,* at pp. 414-415.

10. Salmond, *The Law of Torts* (12th ed., 1960) at p. 576. footnote 5.

11. Glanville Williams, "The Risk Principle" (1961) 77 L.Q.R. 179) at pp. 194-193; A.L. Goodhart, "Liability & Compensation" (1960) 76 L.Q.R. 567 at p. 577.

12. *E.g.* Hart & Honore, "Causation in the law" (London. 1959) R.G. Mckerron: "Foreseeability is all: A critical Note on *the wagon mound*" (78 S.A.L.J. 282 at p. 290.)

13. [1963] 2 W.L.R. 779.