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DOWN WITH FORESEEABILITY!
OF THIN SKULLS AND RESCUERS

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Introduction

We have made a mistake. We have let ourselves be seduced by the influential advocates of the foreseeability doctrine. We could not help ourselves. They informed us that, in order to be consistent and logical, foresight had to limit liability for negligence as well as create it. They asserted that the foresight doctrine was a "comparatively simple rule" which permitted an "empirical determination" of the scope of liability. They assured us that the principle was a just and fair one. It is not hard to understand why, after many years of resistance, these blandishments finally proved too much for us and we succumbed. In 1961 the Privy Council in the case of the Wagon Mound (No. 1) trumpeted the triumph of "simplicity, logic and justice" throughout the Commonwealth. Viscount Simonds, rejecting the authority of Polemis, declared that

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4 Seavey, op. cit., footnote 1.
6 Fleming, op. cit., ibid., at p. 422.
7 In re an Arbitration between Polemis and Furness, Withy & Co. Ltd., [1921] 3 K.B. 568.
“it is the foresight of the reasonable man which alone can determine responsibility”.

After eight years, however, it has become apparent that the proponents of the foresight principle were false prophets. Confusion, illogic and injustice still reign. According to *Wagon Mound (No. 1)* the defendant would not be held liable for consequences that he could not reasonably foresee. It did not take the House of Lords very long to dilute this principle by holding in *Hughes v. Lord Advocate* that it is necessary only to foresee the general type of accident that transpires and not the precise way in which it occurs. Needless to say, this distinction has spawned some remarkable decisions. For example, in *Stewart v. West African Terminals*, having one’s fingers crushed by a cable in a pulley has been held to be the same type of accident as tripping over the cable or straining oneself lifting it out of the way. On the other hand, in *Doughty v. Turner Manufacturing* being burned by hot cyanide as a result of a chemical change that caused an eruption was held not to have been the same type of accident as being splashed by it. Moreover, *Wagon Mound (No. 1)* was held not to affect the thin-skull rule that holds a defendant liable for all the physical injuries suffered by his victim, whether foreseeable or not. Finally, in *Wagon Mound (No. 2)* it was held that where the actual damage was not reasonably foreseeable, the defendant will still be held if there is a “possibility” of that damage (at least where the activity is devoid of social utility). There have also been some recent Canadian decisions which indicate that the foresight doctrine may generate confusion, inconsistency and injustice.

It could not have been otherwise for there are no easy answers to the excruciatingly complex matter of placing limits on the extent of liability. The *Polemis* rule which limited liability to the direct consequences of the negligent act, proved unsatisfactory. To be sure, some expressed their “faith in the capacity of our
judges to answer these questions" and others praised Polemis for its flexibility and its "appeal to common sense" which "allows scope for the intuitive judgment". For, after all, it was contended "the correct solution to a remoteness problem is felt rather than deduced from formulated principles". Moreover, "it would not occur to the ordinary man to question the justice of the rule that "the defendant must take the plaintiff and the consequences as he finds them". But the directness formula led to a "long period of baffling and sterile discourse amidst a labyrinth of pseudo-

logical and metaphysical controversy". The pages of the law reports were filled with impressive discourse about chains, links, gears, nets, immediate causes, precipitating causes, conditions, causa causans and causa sine qua non. It all sounded very scientific but it gave us no clue about the real reasons why the court was deciding the case as it did. Polemis did not deserve to survive and was rightly jettisoned in the Wagon Mound (No. I).

Earlier, the courts had flirted for a time with another concept to the effect that once a dependant was found to be negligent, liability would be imposed for all of the consequences of his act, whether or not they were foreseeable or direct. In some ways, this was an attractive doctrine that might well have won the day, but it was attacked from every quarter. Professor Fleming contended that it was "unthinkable to accept liability for all the consequences in its quite literal sense". Dr. Goodhart described it as a "startling doctrine" that leads to absurd results unless "all the consequences are limited in some way". Before very long, this theory of unlimited liability was also abandoned.

It seems, therefore, that liability for negligent conduct must be limited in some way. Polemis has failed. Wagon Mound (No. I) has failed. Other attempts have failed. And all future attempts will fail as long as we persist in our quest for one magic formula to solve all the varied problems raised by the proximate cause

15 Lord Wright, Re Polemis (1951), 14 Mod. L. Rev. 393, at p. 405.
17 Ibid., at p. 22. 18 Ibid., at p. 11.
19 Fleming, op. cit., footnote 5, at p. 491.
21 Fleming, op. cit., footnote 5, at p. 491.
24 For a list of different approaches to this problem see Prosser, Handbook of the Law of Torts (3rd ed., 1964), p. 282 et seq.
question. To achieve more satisfactory results, we must abandon our search for simplistic, pre-packaged solutions. We must instead define the problems of proximate cause or remoteness with more precision and devise an approach that will demand a frank consideration of all the relevant factors involved in each type of case. True, there is room for some discretion, for some feeling and even for some intuition here, but this should be harnessed in a rational way. The most important thing is not to forget what we are trying to accomplish with the foresight doctrine. It is being used (as we have used the concept of “proximateness”, remoteness, directness and others) to limit the extent of damages for which an admittedly negligent defendant is to be held accountable. The question to be answered is this: is it fair to hold the defendant responsible for the consequences about which the plaintiff is complaining?

It may be that the thin-skull cases should be treated differently than the mental suffering or economic loss cases. It may be that the rescue cases should not be handled in the same way as cases of other intervening forces. It may be that certain ulterior consequences should render the defendant liable while others should not. One word formula should not be expected to resolve satisfactorily all of these different types of problems. What is needed is a detailed analysis of the judicial treatment of each type of problem to determine the policy choices it presents, and the real reasons for the decisions. It is a laborious process, but it must be done. In this article, I shall examine the cases concerning the “thin skull” and the rescuer problem to discover what the courts are doing and why they are doing it. It will become apparent that the foresight doctrine alone is not enough. It is because of this that I say down with foreseeability!

I. The Thin-skull Problem.

Since the turn of the century, it has been accepted that a negligent defendant must take his victim as he finds him. The thin-skull rule was first enunciated by Lord Justice Kennedy in Dulieu v. White, even before Polemis was decided, in these words: “If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer’s claim for damage that he would

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26 [1901] 2 K.B. 669, at p. 679 (Plaintiff pregnant and driver “did not anticipate” that she was in this condition).
have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.”

Some years after the Polemis case, Lord Justice MacKinnon, without discussing Polemis, reiterated this view in Owens v. Liverpool in this way: “One who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him—it is no answer to a claim for a fractured skull that its owner had an unusually fragile one.” The court did not give any reasons for this decision but merely asserted that if the defendant’s negligence “in fact caused” this damage, he should pay.

In the warm afterglow of the Wagon Mound (No. 1), it was being contended that the thin-skull rule might have to be jettisoned on the ground that unusual susceptibility was not reasonably foreseeable. This was not to be, however. In Smith v. Leech Brain Lord Chief Justice Parker was faced with the case of a workman whose lip was burned by the spattering of some molten metal. This triggered the development of cancer where he had pre-malignant cancerous tissues. Three years later, he died and his widow sued the employer. The court had to decide whether it would retain the earlier thin-skull doctrine or whether it would invoke the new foresight approach to discard it. Lord Chief Justice Parker, in choosing to preserve the earlier rule, skirted around the problem by saying that the Wagon Mound “did not have . . . the thin-skull cases in mind. It has always been the law of this country that the tortfeasor takes his victim as he finds him”. He declared that “not a day . . . goes by where some trial judge does not adopt that principle . . .” and “if the Judicial Committee had any intention of making an inroad to that doctrine, I am quite satisfied that they would have said so”. He went on to rationalize his decision on the ground that one need not foresee the extent of the injury; one need foresee only the type of injury. “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 he suffered, namely the burn. What, in this 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.” He concludes by saying that he is following the Wagon Mound or the other cases prior to Polemis but not

[1939] 1 K.B. 394, at p. 400 (Funeral case in doubtful application).
Ibid., at p. 414.
Ibid.
Polemis in reaching his decision. Thus, the thin-skull man has been protected at the expense of the negligent wrongdoer whatever test has been applied by the court, which is the case in the United States as well. Although the courts have been loath to explain why they have acted in this way, their consistency has been rather remarkable.

One recurrent problem that must be overcome in the thin-skull cases is that of causation. Unless it is established that the conduct of the defendant caused the aggravated harm, then no liability will be imposed for the latter. This makes good sense, of course, and is consistent with general negligence principles. In one case, it was alleged that death ensued from an occlusion of an artery, that had been caused by an earlier occlusion that resulted from an injury negligently inflicted by the defendant. The court refused to allow the case to go to the jury on the ground that there was no evidence of causation. In another case, Enge v. Trerise, a dissenting judge argued that there was no evidence that the defendant's negligence caused the mental disorder alleged to have resulted from a scar. He contended that the only evidence given was that this mental disorder was "precipitated" by the scar, which was not the same as causing it. Justice Coady, who was in the majority that permitted recovery, declared that he could find no reason to deny liability so long as causation is established. Consequently, causation-in-fact is a necessary pre-requisite to liability.

(a) Pre-existing susceptibility.

Where an injury is aggravated or more severe because of a pre-existing susceptibility, the victim will recover damages for the extra losses suffered. Although the principle has been called the thin-skull rule, cases actually involving thin skulls are extremely hard to find. Perhaps the closest one can get to such a case is Hole v. Hocking, where an apparently minor bump on the head contributed to a sub-arachnoid haemorrhage that damaged the brain permanently. Despite a complaint about how he disliked trying to "calculate the incalculable", Chief Justice Napier held

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31 Ibid., at p. 415.
32 Prosser, op. cit., footnote 24, p. 300 et seq.
34 (1960), 26 D.L.R. (2d) 529.
35 Ibid., at p. 532, per Davey J.A.
36 Ibid., at p. 541; see also at p. 542.
the defendant responsible. In another case, *Wilson v. Birt Ltd.*, a man was hit on the head or neck by a pole that fell from a scaffolding. As a result of the blow and a pre-existing condition, the plaintiff contracted epilepsy and serious damage to the tissues under his brain in the sub-arachnoid space. He recovered for these losses on the reasoning that if the "variety of damage...is reasonably foreseeable the fact that the plaintiff is peculiarly prone to more excessive injury is not relevant to the defendant's liability". So too, if a man has a weak heart, he will be able to recover all the damages he suffered, even though they are more excessive than they would have been in a normal person. Justice Hutchison, in *Williams v. B.A.L.M. Ltd.*, sent the case to the jury and explained that an employer could anticipate that some of his workmen might have unsound hearts.

There are a number of cases where people negligently injured had weak backs that were aggravated. In *Pollock v. Mills and the City of Calgary*, the plaintiff had a pre-condition of disc degeneration which was aggravated in the accident. Although the court stated that the fact of pre-disposition is "an element to be taken into account in assessing damages", Porter J.A. increased the damages awarded at the trial. Similarly, in *Owen v. Dix* a defendant was held liable for an injury suffered by someone with a weak or "rotten" disc. Justice Holt said that when negligence "aggravates or brings into activity a dormant or diseased condition or one to which a person is predisposed", the defendant is liable to the full amount.

There are cases of plaintiffs suffering from other assorted maladies who incurred worse injuries and more suffering than ordinarily would be the case. When a person with polio virus in his body received an electric shock which produced poliomyelitis, he was allowed compensation. In *Watts v. Rake* the plaintiff suffered from a quiescent spondylitis which, after the plaintiff's leg was broken, developed into arthritis thirteen years earlier than it ordinarily would have. Justice Dixon concluded simply that: "If

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40 Ibid., at p. 519, per Harcourt J.
44 Ibid., at p. 629. The trial judge and the dissenter believed the defendant only speeded up what would have occurred anyway.
45 (1946), 210 Ark. 562, 196 S.W. 2d 913.
46 Ibid., at p. 915.
47 Sayers v. Perrin, [1966] Q.L.R. 89 (Full Ct.).
48 (1960), 108 C.L.R. 158 (H.C. Aust.).
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." Justice Dixon was of the view that to sever the remaining leg of a one-legged man or to put out the eye of a one-eyed man "is to do a far more serious injury" than if the person had two legs or two eyes.49 In fixing damages, however, Justice Dixon warned that the circumstances of the case, including the peculiar susceptibility, must be taken into account.

One of the best known cases in this area is Warren v. Scruttons Ltd.50 The plaintiff was suffering from an ulcer on his left eye. His finger was negligently cut by a wire in the defendant's equipment which had some kind of "poison" on it. The plaintiff contracted a fever and a virus, one of which caused further ulcers to appear on his eye. The defendant was held liable for the aggravated injury since "any consequence which results because the particular individual has some peculiarity is a consequence for which the tortfeasor is liable".51 No reason was offered. It was, however, flatly asserted that "that is the right principle". Here too, in assessing damages, the court took into account the fact that the injured eye was somewhat inferior and was subject to other injuries as well. In another case, Feldstein v. Alloy Metal Sales,52 the court was prepared to allow compensation for injury to a woman's neck, shoulder and arm that arose because she had suffered from a malignancy and had undergone radiation treatment nineteen years earlier. The court relied on the Polemis rule in doing so, after stating that this was damage "a reasonable man could not foresee". Despite this reasoning, the result would not differ by one iota today.

Females have been accorded full protection, even though they have a propensity to be more fragile than men. For example, if a pregnant woman miscarries or has a stillborn child as a result of the defendant's negligence, she will be able to recover additional compensation for this loss.53 In another case, a woman with ovaries weakened by an operation was held entitled to recover for injuries to those ovaries as a result of a sudden stoppage of a train.

49 Ibid., at p. 160.
51 Ibid., at p. 502.
52 [1962] O.R. 476, case dismissed. See also Smith v. Maximovitch (1968), 68 D.L.R. (2d) 244 (Sask. Q.B.) (All teeth lost because of pre-existing condition).
The court rationalized its decision by stating simply that "the weak will suffer more than the strong".\(^{54}\)

The thin-skull principle has even been extended to accord protection to obese people who, because of their large size, suffer more and take longer to heal than people of average size. When a "large, and somewhat fleshy" woman (to use Justice Thomson's diplomatic terms) slipped on a toy on the floor of the defendant's department store and sprained her ankle, she was entitled to recover for her aggravated injuries.\(^{55}\) A similar view prevailed where a negligent waitress spilled hot coffee on a fat lady, for the defendants "took her as they found her".\(^{56}\) There is a weird case of a "thin-skinned" automobile, to which the thin-skull rule has been applied. The plaintiff who was driving a Volkswagen automobile was speared and killed by a highway sign-post that ripped through the floor boards.\(^{57}\) The court rejected the defendant's contention that had the plaintiff's automobile not had an unusually thin skin he would have suffered less injury. If injury to a person is foreseeable, suggested the court, recovery is not limited to injuries that are "usual and commonplace".\(^{58}\)

Where death ensues as a result of a pre-existing susceptibility, liability also follows. In one case, a train brakeman struck his head, an abcess developed, a dormant cancerous condition was activated, and death from cancer of the brain followed. A jury decision for the plaintiff was affirmed.\(^{59}\) In another case, death ensued after poison entered the plaintiff's system when he cut his finger on a milk bottle top. The court stated that liability followed "whether such resulting damages were reasonably to be anticipated or not . . .".\(^{60}\) Where a person suffering from blood pressure and heart condition died three days after he was injured by athrown wheel, liability for the death was imposed on the tortfeasor.\(^{61}\)

(b) **Plaintiff rendered susceptible.**

The thin-skull principle applies to conditions that arise after

\(^{54}\) Linklater v. Min. for Railways (1900), 18 N.Z.L.R. 536, per Williams J., at p. 540.


\(^{56}\) Thompson v. Lupone (1948), 135 Conn. 236, 62 Atl. 2d 861.


\(^{58}\) Ibid.

\(^{59}\) Heppner v. Atchison T. & S.F.R. Co. (1956), 297 S.W. 2d 497 (Mo.).

\(^{60}\) Koehler v. Waukesha Milk Co. (1928), 190 Wis. 52, 208 N.W. 901, at p. 904, per Eachweiler J.

\(^{61}\) Barnaby v. O'Leary (1956), 5 D.L.R. (2d) 41, at p. 44, per Doull J.
an injury is inflicted upon an ordinary person. Put another way, if the negligence of the defendant renders the skull of the plaintiff thin, making him more susceptible to additional injury, the defendant will be held responsible for these further complications. In one case, a boy was hit by a pipe that fell from the defendant’s oil well. As a result, his spine and hip joint were made more susceptible to tuberculosis, for which consequence the defendant was held liable. In Oman v. McIntyre, the plaintiff’s leg was fractured as he worked in a ditch. A fat embolism and broncho-pneumonia developed. A lung tracheotomy was required as a result of which the plaintiff died. Lord Milligan contended that one need not foresee the “full effects of the injury”. If liability follows for “unforeseen complications”, liability should follow for death.

If a physical injury causes mental suffering to someone beyond which an ordinary person would incur, the defendant must compensate him for this. Although there were (and still are) many problems with the negligent infliction of mental suffering in the absence of contact, the courts have encountered less difficulty where there was a physical injury as well as mental suffering. As early as 1911, the Supreme Court of Canada recognized that the “nervous system is as much a part of a man’s physical being as muscular or other parts”. Although the Supreme Court was concerned about the “danger of simulation” and “self-deception”, it was prepared to rely on trial courts to distinguish real from phony claims. It allowed recovery to the plaintiffs for mental suffering incurred as a result of being thrown against a seat on a street car when it hit a train. In Canning v. McFarland & Gray, the injured plaintiff recovered for a “traumatic neurosis” that developed. Justice Schroeder articulated clearly the prevailing view that “medicine today recognizes traumatic neurosis as a real injury for which compensation must be given”. A similar case was Varga v. Labatt Ltd. where a plaintiff was made ill when he drank a bottle of beer with chlorine in it. Justice Wells (as he then was) awarded damages for mental suffering incurred as a result of an hysteria condition. He stated “if you injure a person

63 Champlin Refining Co. v. Thomas (1939), 93 F. 2d 133 (10th cir.).
64 Ibid., at p. 171.
65 See Williams, in Linden, op. cit., footnote 13, p. 139.
66 Toronto Railway v. Towns (1911), 44 S.C.R. 268, at p. 276, per Davies C.J.
68 Ibid., at p. 471.
who suffers from hysteria you must take him as you find him, and if the injury is out of all proportion to the event, if it is genuine, then the one who suffers is entitled to damages". So it is where the plaintiff has a "vulnerable personality" that flares up into an "hysterical neurosis". In Enge v. Trerise, a young girl was left with a scar after an accident. As a result of latent schizophrenic tendencies, she became schizoid, withdrawn, depressed, heard voices and worried about her scar. The court ordered a new trial and made it quite clear that these mental repercussions were compensable. The dissenting judge remonstrated in vain that wrongdoers should not be held for these "irrational" and "morbid" reactions that were "unforeseeable", not "direct", and not "caused by" the injury. The American law is in accord with these decisions.

(c) After Wagon Mound.

After Wagon Mound (No. 1) and the triumph of foresight, the courts did not vary their substantive decisions at all, except perhaps where they were hypnotized by the bewitching appeal of the word foresight. In Regush v. Inglis, the plaintiff suffered deep depression after an accident and was unable to carry on her business as a result. These losses were said to be compensable. In Negretto v. Sayers, a woman whose pelvis was fractured had a post-concussional psychosis as a result of a "pre-existing tendency to mental disorder". In deciding to cling to the thin-skull rule, the court attempted to explain that the principle is not inconsistent with foresight for the "consequences of even the simplest accident are unpredictable". One must foresee any consequence "between a negligible abrasion and permanent incapacity or death". Justice Chamberlain admitted that the defendant did not expect to run down anyone, let alone someone with a personality defect, yet one should foresee that a pedestrian might be hit with quite possible disastrous consequences of one sort or ano-

70 Ibid., at p. 349.
72 Supra, footnote 34; See also Elloway v. Boomars (1968), 69 D.L.R. (2d) 605 (B.C.H.C.); La Brosse v. The City of Saskatoon (1968), 65 W.W.R. 168 (Sask. Q.B.).
73 Ibid., at p. 550 et seq.
75 See, for example, Ostrowski v. Lotto, supra, footnote 14, discussed infra.
78 Ibid., at p. 317.
79 Ibid., at p. 318.
other". In *Leonard v. B.C. Hydro*, a woman fell on a bus and injured her buttocks slightly. This led to a psychotic condition. Although the court felt that she was simulating the pain, it stated in an *obiter* dictum that the defendants must accept the risk of a "frail skull or a weak heart . . .", as well as the risk of "aggravating the condition of a psychotic".82

One rather weird case is *Bates v. Fraser.*83 Many years ago the woman plaintiff had suffered from Parkinson's disease. Some time later she was hit on the head, got amnesia and the symptoms of Parkinson's disease appeared. When she was injured by this defendant she was dazed, began to cry and shake, suffered mental shock, and numerous other symptoms which led to the return of Parkinsonism with muscular rigidity. The court found that she was an "hysterical personality with hysterical susceptibility" and the defendant was liable to the extent that his conduct was the cause of the aggravation of her mental or physical disability. Justice Grant, in concluding his reasons, said that although a defendant might be expected to anticipate emotional stress and hysteria from an accident but not Parkinsonism, "they are nevertheless liable" if there is a "positive relationship".84 A rather similar case is *Richards v. Baker*85 where a mother suffering from a small adenoma of the thyroid developed a toxicosis and sub-acute neurasthenia as a result of shock suffered on the death of her child.

The only case that is out of step with these decisions is *Ostrowski v. Lotto.*86 It is unquestionably in error and I am certain it will soon be reversed by the Ontario Court of Appeal. The trial judge held that a medical operation was negligently performed on the plaintiff's leg and that she was entitled to damages, but he refused to allow her an amount for her mental suffering. Justice Keith stated that he had no doubt that it was "directly related to her reaction to the surgery performed on her".87 Nevertheless, relying on Lord Reid's beguiling language of foreseeability in *Hughes v. Lord Advocate*, he concluded that the damage suffered by the plaintiff "unquestionably differs in kind from what was foreseeable".88

*Ostrowski v. Lotto* is representative of the kind of error courts can fall into if they rely too much on word formulae. It is the

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81 *Supra*, footnote 37.
86 *Supra*, footnote 14.
term foreseeability which was the culprit here. Had any other approach been used, the result would probably have been different. What the court should have done was to ask whether it was fair in the circumstances to relieve the negligent doctor of the responsibility of paying damages for this result. In reaching a conclusion the court might well ask whether it was a foreseeable consequence, but it should not ask only this question. The court should also consider whether the mental injury was directly attributable to the accident. It should weigh the interest being infringed, that is, physical and mental well-being. It should look at whether the activity was an insurable one or whether it was being conducted by a business. It should assess whether the conduct of the defendant should be deterred. It should balance the administrative convenience of the alternatives. After assessing all of these factors—and only then—should it decide whether to relieve the defendant of responsibility for this result. Although the courts do not admit it, this is normally done anyway. It is because of this that the thin-skull rule has survived for so many years, and will continue to thrive whatever word formula is fashionable at the time.

Foreseeability does not help very much and may actually hinder a meaningful rationalization of the thin-skull problem. It is not because of foreseeability or directness that those with thin skulls collect; it is because the courts have felt it unjust to deny them recovery for their aggravated injuries in all the circumstances. It may be that one of the reasons for this is that it is foreseeable that anything can happen to a fragile human being who is injured in an accident, but there are other reasons too. The loss distribution and social welfare goals of tort law are relevant to the decision. Another factor is deterrence, both specific and general. Defendants should be more careful in their activities if they know that they are responsible not only for foreseeable injuries but also for unforeseeable ones. It is also better social cost accounting to make the activity that triggers these results bear the entire cost of the accidents it produces. It is terribly difficult administratively to sort out which injuries are foreseeable and which are not. To avoid this complex job, the courts may have decided to reimburse the plaintiff for all the physical and mental consequences of the injury. Foreseeability theory seems to curtail this kind of analysis. Therefore, I say down with foreseeability!
II. The Rescue Problem.

After a false start, the rescuer has become a favourite son of the common law in recent years. A negligent wrongdoer is liable to reimburse a rescuer for losses incurred during a rescue attempt. Foreseeability is now the catchword, but other tests have also been utilized at different periods to achieve the same result. Playing word games does not matter too much as long as no one is taken in by them. The trouble is that judges and lawyers sometimes take the ritual seriously and go astray.

The recent decision of the Ontario High Court in *Jones v. Wabigwan*90 illustrates the confusion that the foresight doctrine can create. The defendant "borrowed" the plaintiff's car without his consent. Both men had been attending a wedding reception together, when the defendant asked for the car. The plaintiff, his brother-in-law, refused, feeling that the defendant had imbibed too much alcohol to be trusted with the car. Later that evening, the plaintiff noticed that his car was missing. The plaintiff later drove toward town and saw his vehicle being driven along the road in the opposite direction. He gave chase but could not overtake the vehicle. He followed it up a side-road and then lost sight of it as it went over the crest of a hill. When the plaintiff passed over the top of the hill, he noticed the headlights of a car in a field, stopped his car and ran five or six steps into the field. Unfortunately, he came into contact with a hydro wire, was rendered unconscious, was severely burned and lost his leg by amputation. Justice Parker, although satisfied that the defendant was negligent in hitting the hyropole, denied the plaintiff recovery. Despite the evidence of the plaintiff that "as he entered the field his only concern was for his brother-in-law",91 Justice Parker stated that the "purpose of the pursuit was to recover his stolen vehicle and perhaps to punish the offender. When the plaintiff entered the field, I am not satisfied that he changed his intent from avenger to rescuer".92 Justice Parker invoked the magic words of foresight and suggested that "even if he knew that the plaintiff was pursuing him, it is difficult to imagine how the defendant would foresee that if he put himself in the position of danger the plaintiff might suffer injury in attempting to rescue him".93 Justice Parker then administered the finishing touches. He concluded that "the negligence of the defendant was spent long before the plain-

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90 Supra, footnote 14. per Parker J.
91 Ibid., at p. 838.
92 Ibid., at pp. 838-839. 93 Ibid., at p. 838.
tiff arrived on the scene.

"At the time the defendant was driving negligently, the plaintiff was not within the ambit of the risk", he asserted. The defendant could not reasonably anticipate that a person driving in a motor vehicle more than a mile behind would be injured if he drove off the main road because there was no one in the immediate area. The defendant owed no duty to the plaintiff, "the damages were not reasonably foreseeable and are too remote".

These phrases are merely words that explain nothing. There are numerous cases that say a rescuer is foreseeable. The idea of negligence being "spent" is ludicrous and cannot be taken seriously, at least after such a short lapse of time. To contend that a person driving a mile behind someone on a highway is not endangered by the latter's conduct, whether on or off the road, is to ignore the facts of modern highway travel. In addition, the words foresight and remoteness state a conclusion, and do not offer reasons for reaching that conclusion. Now there may very well have been appropriate reasons for denying the plaintiff recovery in Jones v. Wabigwan, but the fact is that they were not expressed by the trial judge. The foresight analysis helped to disguise the value choices involved in the decision and is, therefore, not worthy of our support.

Sometimes foresight analysis yields excellent results as in the recent decision of Justice Lacourciere, Matthews v. McLaren. Perhaps the most significant part of the case deals with the duty to rescue rather than the duty to the rescuer. The court held that there was an obligation upon the master of a boat to rescue an invited guest who fell overboard. Relying on the legislative policy enunciated by Parliament in the Canada Shipping Act, the court created a new duty to act. Justice Lacourciere brilliantly rationalized it thus: "Parliament reflecting the conscience of the community has seen fit to impose on the master a duty to render assistance to any stranger, including an enemy alien 'found at sea and in danger of being lost' (s. 526, Canada Shipping Act); the

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94 Ibid., at p. 839.
95 Ibid.
96 Ibid., at p. 140.
97 See, for example, Wagner v. International Railway Co. (1921), 232 N.Y. 176, 133 N.E. 437.
common law can be no less solicitous for the safety of an invited guest and must impose upon the master the duty to attempt a rescue, when this can be done without imperilling the safety of the vessel, her crew and passengers. The common law must keep pace with the demands and expectations of a civilized community, the sense of social obligation, and brand as tortious negligence the failure to help a man overboard in accordance with the universal custom of the sea.”

In dealing with the duty to the rescuer, Justice Lacourciere asked “was [the] voluntary rescue attempt within the ambit of risk created by the defendant’s negligence, in a reasonably foreseeable way”? After considering numerous authorities and the literature, he concluded that the rescue was “within the risk created by the defendant’s negligent conduct” and imposed liability. Again, although the opinion is clear and perfectly in accord with the received doctrine, it is difficult to glean from it the real reasons why rescuers are so favoured. To state that they are “foreseeable” and “within the risk” does not satisfy me completely. There is and should be more to it than that.

(a) Duty to the rescuer.

There was a time when rescuers fared badly in the courts. Sometimes causation rationale was used and other times the doctrine of voluntary assumption of risk was invoked to deny them compensation. In Anderson v. Northern Railway of Canada the causation approach was taken. Although a jury had found for the family of the plaintiff who was killed after leaping in front of a train to save a woman as she walked along tracks with her husband’s lunch, the Common Pleas Court reversed the decision and ordered a non-suit. This was affirmed by the Court of Appeal in a split decision. Two members of the Court of Appeal thought that the question of the foolhardiness of the rescue attempt should be decided by the jury, not by the court. However, the other two judges who won the day felt that the cause of the injury to the deceased was his own conduct, not the act of the defendant. Chief Justice Hagarty and Justice Gwynne in the intermediate Appeal Court had also rested their decision on causation. Chief Justice Hagarty explained that they could not permit “admiratio of his gallant self-sacrifice” to deter them from

100 Matthews v. MacLaren, supra, footnote 98, at p. 146.
101 Ibid., at p. 150.
102 (1876), 25 U.C.C.P. 301.
103 Burton, Patterson JJ. (Split decision 2-2).
holding that the injury was "self-sought" and "self-caused".\textsuperscript{106} Justice Gwynne agreed that it was a "noble exposure", but "his own sole act intentionally exposed self to danger".\textsuperscript{105} Although it is far from clear, one might rationalize the Anderson decision on the ground that there was no negligence on the part of the defendant or, alternatively, that the plaintiff was contributorily negligent and, therefore, barred absolutely from recovery.

In another case, Kimball v. Butler Bros.,\textsuperscript{106} the volunteer theory was invoked to deny compensation to the family of the deceased who suffocated during a rescue attempt when a fire broke out in the Detroit Tunnel as it was being built. Justice Garrow concluded that the rescuer had acted "solely as a volunteer" and with a "full comprehension of danger".\textsuperscript{107} Justice Meredith stated that there was no evidence of negligence by the defendant. Even if there were, he contended, someone who is not himself in danger and voluntarily goes into it, cannot be protected.

These cases were gradually eclipsed by more humanitarian ones. Seymour v. Winnipeg Electric Railway,\textsuperscript{108} an early Manitoba case decided in 1910, foreshadowing what was to emerge later in the United States and England, refused to follow Anderson and declared on a demurrer that a rescuer could recover from a negligent wrongdoer. Justice Richards opted for a bold approach. He recognized that "the promptings of humanity towards the saving of life are amongst the noblest instincts of mankind".\textsuperscript{109} Justice Richards then concluded that "the trend of modern legal thought is toward holding that those who risk their safety in attempting to rescue others who are put in peril by the negligence of third persons are entitled to claim such compensation from such third persons for injuries they may receive in such attempts",\textsuperscript{110} which is particularly the case if "those whom it is sought to rescue are infirm or helpless". As an afterthought, Justice Richards added that the company had "notice" that "some brave man is likely to risk his own life to save the helpless", which indicated that the idea of notice or knowledge (or foresight if you will) was a relevant consideration.

Twenty-three years after the Canadian courts had pretty well sorted out the problem of the rescuer, the English courts were still floundering around with the concepts of causation and volenti.

\textsuperscript{106} Ibid., at p. 307. \textsuperscript{105} Ibid., at p. 309.
\textsuperscript{106} (1910), 15 O.W.R. 221 (C.A.). \textsuperscript{107} Ibid., at p. 222.
\textsuperscript{108} (1910), 13 W.L.R. 566 (Man. C.A.). \textsuperscript{109} Ibid., at p. 588. \textsuperscript{110} Ibid., at p. 568.
For example, in *Cutler v. United Dairies,*\(^\text{111}\) the plaintiff was injured when he tried to hold the head of a runaway horse in response to the driver’s shout for help. The jury’s verdict for the plaintiff was overturned and the action dismissed on the ground that “the damage must be on his own head” because of *volenti* and because “a new cause has intervened”.\(^\text{112}\) Justice Slessor drew a distinction between a case where someone dashes out to save a child in danger, because “there is no *novus actus interveniens*. “However heroic and laudable may have been this act, it cannot properly be said that it was not in the legal sense the cause of the accident.”\(^\text{113}\) This discussion about cause and *volenti* is less than satisfactory because we do not learn why the court decided the case as it did. The confusion is confounded when one compares the *Cutler* case with *Brandon v. Osborne Garrett & Co.*\(^\text{114}\) Justice Swift avoided the problem raised in the *Cutler* case by categorizing as “instinctive” the rescue act of a wife who tried to pull her husband away from glass falling from a skylight. This sorry state of affairs could not continue.

In the United States, Justice Cardozo in *Wagner v. International Railway Co.*\(^\text{115}\) articulated the principle that was destined to be adopted throughout the common-law world. “Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.”

The English courts in 1938 finally saw fit to follow the Canadian and American lead and to recognize the claim of the rescuer. In *Haynes v. Harwood,*\(^\text{116}\) a police constable tried to push a woman out of the way of a runaway horse and was injured in the attempt. Distinguishing the *Cutler* case on the grounds (1) that “nobody was in any danger”\(^\text{117}\) there, and (2) that a policeman was “expected to” aid those in danger “in pursuance of a

\(^{111}\) [1933] 2 K.B. 297 (C.A.).  
\(^{112}\) *Ibid.,* at p. 303, per Scrutton L.J.  
\(^{113}\) *Ibid.,* at p. 306.  
\(^{114}\) [1924] 1 K.B. 548.  
\(^{115}\) Supra, footnote 97.  
duty",118 the trial judge, Justice Finlay, found for the policeman. The Court of Appeal affirmed. Lord Justice Greer accepted the reasoning of Justice Finlay and declared that "it would be a little surprising if a rational system of law . . . denied any remedy to a brave man".119

Lord Justice Maugham articulated very clearly the appropriate process of decision-making in this area. Is the act "so exceptional" that it should be treated as a novus actus?120 "The law has to measure the interests which he sought to protect and the other interests involved,"121 he explained. One must take into account the "energy and courage" of the reasonable man, the degree of danger involved and the response of the rescuer. If one approaches the problem in this way a more rational and understandable determination can be made. In Australia, the obligation to a rescuer was also recognized in Chester v. Waverly Corp.122 on the ground that "a reasonable person would have foreseen the possibility of rescue".123

Since the Haynes v. Harwood breakthrough, the English courts have showered much attention on the rescuer. In Videan v. British Transport Commission,124 the duty to the rescuer extended to cover even the rescuer of an unforeseeable trespasser. The mental gymnastics engaged in by the court in Videan were wondrous to behold. The risk doctrine was manipulated to the point of incredulity. Lord Justice Denning found that, although the child trespasser was himself not reasonably foreseeable, his rescuer was! He reasoned that one need not foresee the particular emergency, only that a stationmaster might attempt a rescue of someone125—in this case his child. Perhaps a better rationale, however, was Lord Justice Denning's statement to the effect that: "Whoever comes to the rescue, the law should see that he does not suffer for it."126 Two of the judges did not accept this reasoning and seem to have based their decision on the special duty of an employer to his stationmaster reserving judgment on whether an ordinary member of the public would be equally protected.127 In this case, the doctrine of foresight was an inappropriate instrument for the solution of this problem.

118 Ibid., at p. 250 (2 K.B.).
119 Ibid., at p. 152 (1 K.B.).
120 Ibid., at p. 161 (1 K.B.).
121 Ibid., at p. 162 (1 K.B.).
122 (1939), 62 C.L.R.1.
123 Ibid., at p. 38, per Evatt J.
125 Ibid., at p. 868.
126 Ibid.
127 Ibid., at p. 872.
So favoured is the rescuer today that he has been allowed reparation for mental suffering where an ordinary bystander would have had difficulty collecting. In Chadwick v. British Transport Commission,\(^{128}\) someone who took part in rescue operations after a train wreck suffered anxiety neurosis. He was permitted to recover, the court reasoning in terms of foresight. "The very fact of rescue must . . . involve unexpected things happening", and one need not foresee "every step".\(^{129}\)

(b) Duty of the rescued.

Not only is a negligent person liable to the rescuer who comes to help a third person that he endangers, but if he gets himself into trouble, he is responsible to a rescuer who comes to his rescue. One early Canadian case, Dupuis v. New Regina Trading Co. Ltd.\(^{130}\) encountered some difficulty with this issue. The deceased was killed when he fell down an elevator shaft trying to rescue a lady employee of the defendant who had been caught in the defendant's elevator. Although the case might be explained on the ground that there was no negligence on the part of the defendant, or any of its employees, there was some discussion of "derivative negligence", an idea that added needless complexity to the problem. The court indicated that unless there was liability to a third person who was endangered there could not be any responsibility to a rescuer. Relying on some language in Wagner v. International Railway, the court stated that liability to the "latter flows from or is based upon the former". Justice McDonald articulated the principle in this way: "[W]hen a person, in breach of a duty towards another, places the latter in danger, he, as a reasonable man, should foresee that anyone seeing such other in danger will react to the spectacle and attempt a rescue. It is thus the danger, actual or apprehended, to that other which brings the rescuer within the ambit of the negligent party's duty to take due care."\(^{131}\) Continuing, the court declared, "there being no original negligence there could be no derivative negligence; there being no 'primary', there could be no secondary negligence; the defendant not having through negligence caused physical injury to [the girl] could not cause consequent injury to the deceased". This seemed for a time to have ruled out the liability of the rescued in Canada, an unnecessary restriction.

\(^{129}\) Ibid., at p. 952.  
\(^{130}\) [1943] 4 D.L.R. 275.  
\(^{131}\) Ibid., at p. 284.
In spite of all this language, the court does not seem to have grasped the idea that there might be vicarious liability for the negligence of an employee who, by endangering himself negligently, attracts the attention of a rescuer. The court discussed a case that dealt with this issue, Butler v. Jersey Coal News, but seems to have missed the important point made by it. Instead, the court focussed on the issue of whether anyone was in danger and stated that “there was nothing that necessarily or obviously suggested danger in going to the aid of [the employee]” (despite the fact that she appears to have been hanging by her heel over an open elevator shaft).

The Dupuis case is a weird one in which we should not place too much confidence. The late Dean Cecil Wright, commenting on the case, criticized the courts for failing to extend “their humanitarian doctrine of rescue this far”. Foresight, he suggested, was not the only reason for deciding these cases; instead, he contended that “as between a careless man and the heroic rescuer the policy of the law favours shifting the loss from the latter to the former”. Although fault to a third person is the usual situation, “fault with respect to oneself should also suffice”.

Dean Wright’s plea did not fall on deaf ears and Dupuis has now been discredited. Since Baker v. Hopkins, it has been recognized that there is a duty to avoid negligently getting oneself in danger so as to attract a rescuer. The case concerned a doctor who was overcome by gas fumes while attempting to rescue a workman trapped in a mine. The action against the mine operators was successful. Because the workman being rescued was held ten per cent at fault, the court considered the duty of the rescued to a rescuer. In a dictum, Justice Barry disapproved of Dupuis and stated that, although no one owes a duty to preserve his own safety, “if by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid”. On appeal, the trial judge was upheld, but the judges did not feel it necessary to

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132 (1932), 109 N.J.L. 255, 60 Atl. 659. The employer of the negligent person rescued was held liable to the rescuer.
133 See supra, footnote 130, at p. 285.
135 Ibid., at p. 763.
136 Ibid., at p. 764.
137 Ibid., at p. 765.
comment on this point. In Australia a rescued person may be responsible to his rescuer. In *Chapman v. Hearse*, Dr. Chapman's family recovered from the defendant motorist who ran into him while he was helping someone on the highway. The person who was being helped by Dr. Chapman was added to the action as a third party by the defendant. The court was, therefore, faced with the question of whether a rescued person could be held responsible for injury to his rescuer. Without mentioning the *Dupuis* and *Baker* cases, the court held the person being rescued twenty-five per cent at fault, and stated that if support were necessary, "ample can be found in the analogous rescue cases". The Australian High Court, therefore, assumed that an individual bears an obligation to potential rescuers to keep himself out of positions of peril.

The notion of derivative rights is dead. This had to be because it made no sense, except as an interesting legal construct. It prevented the court from rewarding a class of rescuers no less deserving than those already being protected. Foreseeability theory at first was used to deny reparation and later to grant it, which indicates that it does not solve everything. Dean Wright correctly saw that, whatever theory was adopted, the court would favour a rescuer over a careless person, which is as it should be.

(c) *Rescuers of property.*

As one might expect, the law's concern over rescuers of property was not as intense as it was over rescuers of people. There was an early dictum in the leading American case of *Eckert v. Long Island Railway Co.* to the effect that if the rescue involved the "mere protection of property" there would be no tort recovery. By 1892, however, the Supreme Court of Canada in *Connel v. Prescott* had recognized that someone hurt attempting to protect endangered horses could recover from the negligent wrongdoer. In *Hutterly v. Imperial Oil*, the plaintiff tried to drive his car out of a burning garage and was injured in the attempt. The negligent

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140 Lord Justice Morris specifically avoids the question at p. 234 ([1959] 3 All E.R.).
145 See also *Wilkinson v. Kinneil, etc.* (1897), 34 S.L.R. 533, per Lord Young; *Love v. New Fairview Corp.* (1904), 10 B.C.R. 330, per Martin J. (Saved pants too).
defendant was held liable for the loss to the car and the injury to the plaintiff on the ground that the plaintiff's attempt to save his property was not unreasonable. This was so even though he could have escaped himself without being injured. There are also cases where people who were injured while helping to put out fires negligently caused were granted compensation.  

Not only is a person hurt while rescuing property allowed recovery, but compensation is permitted for the damage to property suffered in the attempt. In *Thorn v. James*, a servant tried to protect his employer's separator from a fire by hooking some horses to it and pulling it free. He failed to save the separator and the horses were burned. The original negligent defendant was held liable to pay for the horses because the rescue effort was reasonable in the circumstances.

(d) Foolhardy rescue and contributory negligence.

A rescuer will not be protected in every instance; there must be some reasonably perceived danger to person or goods and the conduct of the rescuer must be reasonable in the circumstances. This does not mean that there has to be actual danger, nor does it mean that perfection is demanded in the actor's conduct.

The early cases seemed to demand that there be actual danger to someone before a duty to the rescuer would be created. In *McDonald v. Burr*, the dismissal of a rescuer's claim was affirmed on appeal. His allegation that a team of runaway horses had endangered some children was not accepted by the court. It preferred to rely on the evidence of another witness to the effect that the children were farther away from the horses and not in any danger. As one of the requisites of recovery, apparently, the court required that the plaintiff show actual danger to the children. In another early case, *Brine v. Dubbin*, the court denied recovery to someone who had undertaken to warn oncoming traffic by lighting matches after an accident. The court was of the view that there was "no immediate peril" and "no emergency"; since the rear lights of the damaged vehicle were visible, there was "no certainty of injury to person or property", although perhaps there was a "possibility" or at most a probability of injury. The

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149 (1903), 14 Man. R. 373.
151 Ibid., at p. 827.
153 Ibid., at p. 30.
plaintiff’s conduct, reasoned the court, was not within the reasonable foresight of the original wrongdoer and liability was therefore denied. This principle was echoed by Lord Justice Maugham in *Haynes v. Harwood* when he stated that, if someone were injured trying to subdue a horse that bolted on a desolate country road, he would be denied recovery, since no one was endangered. This rule was too harsh. It served to impede rather than to encourage rescue attempts and, happily, is no longer the law.

It is now recognized that the duty to the rescuer does not depend upon actual danger to someone—it is enough if he reasonably believes that someone is in peril. A rescuer will now be compensated even if his attempt could not have been successful, as where the person being rescued was already dead. In *Ould v. Butler’s Wharf*, a rescuer, believing wrongly that a fellow workman was in danger of being hit by the hook of a crane, tried to push him out of the way. When he did this the endangered man dropped the case of rubber he was carrying on the rescuer’s foot. Although the rescuer may have been wrong in his assessment of the danger, Justice Gorman permitted him to recover because he felt there was an “imminent serious accident.” In other words, a futile rescue attempt may be compensated by tort law as long as it is a reasonable one. This is understandable because it is often difficult to judge whether a rescue will yield positive results as where children are lost in the woods or miners are buried in a mine. If there is a reasonable chance of saving a life or avoiding an injury, the common law should by an award of damages encourage rescue operations.

Not only must there be a situation of reasonably perceived danger, but the response of the rescuer must be reasonable. If someone standing on the Golden Gate Bridge sees a man drowning 1,000 feet below and leaps to the rescue, his widow will not be compensated. The courts have most frequently justified this result by holding that the rescuer was “foolhardy”, “rash”, or “needlessly reckless”. In other words, if someone conducts a rescue “with gross rashness and recklessness”, he will be denied

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154 Supra, footnote 116.
155 Wagner v. International Railway, supra, footnote 97.
157 Wagner v. International Railway, supra, footnote 97.
158 [1953] 2 L.R. 44. Ibid., at p. 46.
161 Seymour v. Winnipeg Electric, supra, footnote 108, at p. 571.
compensation. The currently popular doctrine explaining these cases is that a foolhardy rescue attempt is not foreseeable and, therefore, no duty is owed. This is no more satisfactory than the other theories, such as volenti and causation that have been advanced in the past for reaching this same conclusion. These verbal justifications disguise rather than illuminate what the courts are doing. Courts rightly feel that it is unfair to make the original wrongdoer pay for the additional losses of a foolish rescuer. It is true that such losses are rather unexpected or unusual consequences and thus could be termed unforeseeable, but there is more to it than that. Tort law seeks to encourage men to aid one another, but not to do so stupidly. By denying compensation to the foolhardy rescuer, tort law attempts to diminish the frequency of foolish and futile rescue efforts. And yet one cannot calibrate too precisely nor judge too stringently the humane conduct of a would-be-rescuer. The solution which the courts are groping for, therefore, must protect the rescuer but cannot promote foolish and wasteful exercises. The test of foolhardiness is not good enough because it is an all or nothing-at-all approach. A more delicate measuring rod is necessary.

Comparative negligence could offer more flexibility to the system, but there is little evidence so far of the courts using this device. There has been some unfortunate loose talk about denial of recovery to contributorily negligent rescuers. Foolhardiness and recklessness has been blurred with mere carelessness. For example, one court stated that if a rescuer "did something a reasonable person ought not to have done" he will be denied recovery. This may have been unavoidable prior to the advent of comparative negligence statutes, but today courts should apportion in these situations. Instead of having only two categories—foolhardy and less than foolhardy—several different evaluations can be made. Courts no longer have to refuse all compensation to the negligent (but not foolhardy) rescuer. Such a claimant should be able to recover a reduced award which would grant him recognition for his heroism without ignoring his carelessness.

The balancing process undergone is depicted in Baker v. Hop-
kins.\textsuperscript{167} despite the fact that the court ignored the possibility of split liability. It will be recalled that a doctor, who was overcome by gas during an attempt to rescue some miners, was permitted to recover from the mine-owners (even though the rescued miner was held ten per cent at fault). Lord Justice Ormerod felt that the circumstances of the risk to the rescuer might be so great and the chance of rescue so small that one might not expect a rescue to be tried.\textsuperscript{168} In the \textit{Baker} case, however, he held that the conduct of the doctor was "not foolhardy". I submit, there is no reason to jettison the ordinary tort principles in this situation. Comparative negligence is available for use here as it is elsewhere and could provide a wider range of solutions for these problems.

It has been held that the onus of showing a rescuer was foolhardy rests on the defendant.\textsuperscript{169} This is quite consistent with the ordinary onus of proof principles concerning contributory negligence. Moreover, where there is a jury, it must decide as a matter of fact whether the rescuer was needlessly reckless (and presumably if he was contributorily negligent).\textsuperscript{170} The courts have wisely refrained from judging too harshly the attempts at rescue. Thus, where a rescuer was injured trying to save a child in circumstances where it may have been unnecessary, he has been permitted recovery.\textsuperscript{171}

In these rescue cases the same decisions have been reached whatever formula was used. This is because the courts have decided to use tort law to encourage rescuers by rewarding them if they are injured. In addition, the courts are hopeful that they will deter, both specifically and generally, enterprisers who cause accidents. If someone knows that he will be liable not only to those he injures but to their rescuers, he may be more careful. It is also better for an activity to pay its way by being required to reimburse not only those injured by the activity directly but also the rescuers of those injured. Furthermore, the loss distribution and social welfare goals of tort law are served by spreading liability. Foreseeability disguises this analysis and, therefore, I say down with foreseeability!

\textit{Conclusion}

We have seen that the courts have compensated plaintiffs with

\footnotesize{\textsuperscript{167} Supra, footnote 138.} \\
\footnotesize{\textsuperscript{168} Ibid., at p. 237.} \\
\footnotesize{\textsuperscript{169} Baker v. Hopkins, \textit{ibid.}, at p. 244, per Willmer L.J.} \\
\footnotesize{\textsuperscript{170} Anderson v. Northern Ry., \textit{supra}, footnote 102, at p. 323, per Strong J. (2-2 decision for defendant).} \\
\footnotesize{\textsuperscript{171} Morgan v. Ayles, [1942] 1 All E.R. 489.}
thin skulls and rescuers. They have done this both under foreseeability doctrine and under its predecessor doctrines. Despite the high hopes engendered by the foresight rule, it has not made the solution of cases any juster, simpler or more logical. In fact, the very opposite may have been achieved. In cases like Ostrowski v. Lotto and Jones v. Wabigwan, the foreseeability doctrine actually renders us a disservice by confusing the judge and diverting his attention from what he should be considering.

If foreseeability is dead, however, what should replace it? We must return to the much-maligned approach of Justice Andrews, the dissenting judge in Palsgraf v. Long Island Railway. In analysing the proximate cause technique of limiting liability, Justice Andrews uttered heresy. "What we . . . mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." Although Justice Andrews believed that foresight should have "some bearing", no one consideration can solve the problem. "It is all a question of expediency. There are no fixed rules to govern our judgment." The court, he contended, must consider a variety of issues, for instance was there a "natural and continuous sequence between the cause and effect", was the conduct a "substantial factor" in producing the result, was there a "direct connection", was the result "too remote . . . in time and space"?

He concluded by confiding that "we draw an uncertain and wavering line, but draw it we must as best we can . . . It is all a question of fair judgment, always keeping in mind the fact that we endeavour to make a rule in each case that will be practical and in keeping with the general understanding of mankind". Foresight is relevant, therefore, but it cannot rule us. Other factors are relevant, but no one of them can rule us. Only intelligent balancing of all the relevant criteria and facts can save us from hypocrisy, on the one hand, and injustice, on the other.

We should attempt to fashion some guidelines for the recurring situations, but we cannot control by rules all the weird, freakish events that manage to transpire. We must recognize the limited

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172 Supra, footnote 14.
173 Ibid.
175 Ibid., at p. 104 (N.E.).
176 Ibid.
177 See the recent case of McKenzie et al. v. Hyde et al. (1967), 64 D.L.R. (2d) 362, at p. 375, aff'd (1968), 66 D.L.R. (2d) 655 (Man. C.A.) where the terms "freakish" and "one in a million" were used.
capacity of legal rules in this complex area and place our trust in the judge and jury. The question we are concerned with can be formulated quite simply—should this defendant, whose conduct has fallen below the standard of the community, be relieved of paying for the consequence of which this plaintiff complains? By asking the question in this way, we recognize the political nature of the choices that are open to us and encourage the honest, open assessment of competing policies in each type of case. "The judgment lies in the realm of values and what you choose depends on what you want." These decisions are not easy ones and we fool no one by insisting that they can be. Because of its illusory simplicity, the foresight test tends to discourage thoughtful analysis. Down with foreseeability!

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