The Duty of Care in Negligence

James Plunkett

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Factual Duty

> Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question
>
> Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580.

I. Introduction

We saw in chapter three that an ever-increasing number of discrete issues are being dealt with under the duty rubric, with the result that explanations as to why a duty does or does not exist in a particular case are becoming more and more vague. In this chapter, we therefore try to isolate and better articulate some of these discrete issues in the hope of both simplifying the enquiry, at least to some degree, and providing guidance for future decisions. In particular, in the first part of this chapter we will see that the duty enquiry, in fact, involves both factual *and* notional elements. In the second part of this chapter we will explore the factual element in further detail and see that its presence in the negligence enquiry is unnecessary. The notional element of the duty enquiry will be explored in chapters five and six.

II. The Dual Function of Duty

A. The Attack on Duty

Lord Atkin's neighbour dictum provided that a duty was owed to all persons 'so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[1] As we saw in chapter three, this was widely seen to provide a test for the existence of a duty based on foreseeability alone.[2]

[1] *Donoghue v Stevenson* [1932] AC 562 (HL) 580 ('*Donoghue v Stevenson*').
[2] See the discussion in Section II of ch 3.

Whilst many objected that such a duty test, based on foreseeability alone, cast the duty net too wide, others had a more fundamental objection: that such an understanding of duty rendered the enquiry completely unnecessary. According to Winfield, for example, the duty concept, on this understanding, was 'superfluous',[3] 'unnecessary',[4] and 'in theory … might well be eliminated from the tort of negligence'.[5] Similarly, Buckland famously described the duty of care as 'an unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice'.[6] The basis of these criticisms was, essentially, that the function of the duty of care, which the critics saw as being to prevent liability in negligence extending to those who were not foreseeably affected by the defendant's conduct, was able to be satisfactorily performed at other stages of the negligence enquiry. As Stone explained:

> A duty towards the plaintiff then means that the defendant ought reasonably to have him in contemplation as likely to be affected by the conduct in question; in short, the defendant ought reasonably have anticipated injury to him. But is not that in any case one essential element of what is meant by the requirement of 'negligence' itself?[7]

The duty requirement was said to therefore be 'tautologous', or 'circuitous', with the 'negligence' (that is, 'fault', 'breach', or 'standard of care'[8]) requirement.[9] Similarly, if the focus were shifted from the foreseeability of some harm, a question of fault, to the foreseeability of the actual harm that materialised,[10] then, at least according to Buckland[11] and Price,[12] it became a question of remoteness, which already provided rules relating to a defendant's liability where 'the exact kind of damage' suffered by the claimant was unforeseeable.[13] According to the critics, then, *every* case decided on the grounds of duty could just as easily be decided on

[3] Percy Winfield, 'Duty in Tortious Negligence' (1934) Colum L Rev 41, 43, 66.

[4] ibid 59.

[5] ibid 66.

[6] WW Buckland, 'The Duty to Take Care' (1935) 51 LQR 637, 639.

[7] Stone, quite generously, attributes the idea to Holmes: J Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control; a Study in Jurisprudence* (Stevens 1947) 182, citing OW Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 457, 472. Prior to Stone, Green made exactly the same criticism in relation to Brett MR's duty formula: (Leon Green, 'The Duty Problem in Negligence Cases' (1928) 28 Colum L Rev 1014, 1029.) See also HT Terry, 'Negligence' (1915) 29 Harv L Rev 40; Winfield (n 3) 61–64.

[8] For reasons explained below, the 'fault' terminology is to be preferred to the 'breach' and 'standard' terminology, and so is used throughout this book.

[9] Stone (n 7) 182, 181. See also WL Morison, 'A Re-Examination of the Duty of Care' (1948) 11 MLR 9, 14, 15(22); and TW Price, 'The Conception of the 'Duty of Care' in the *Actio Legis Aquiliae*' (1949) 66 SALJ 171, 180.

[10] See, eg, *Smith v London and South Western Railway Co* (1870) 5 CP 98 (CP), 103; *Palsgraf v Long Island Railway Co* (1928) 248 NY 339; 162 NE 99; *Chester v Waverly Corp* (1939) 62 CLR 1; and *Bourhill v Young* [1943] AC 92 (HL).

[11] Buckland (n 6) 644.

[12] Price (n 9) 185–86, 288. Price even goes so far as to claim that despite what was said by the court, *Bourhill v Young* [1943] AC 92 (HL) was, in fact, a case of remoteness.

[13] *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560 (CA).

some other ground not depending on duty at all,[14] and so duty had little role to play, performing no function not already performed elsewhere in the negligence enquiry.

Many also pointed to the fact that there was no equivalent of a duty of care outside of the common law, and so argued if other legal systems could operate without a duty of care, surely the common law could live without it too. Winfield, for example, described the duty requirement as 'wholly alien to Roman Law and of which there is no trace in the modern Continental systems'.[15] Similarly, Stallybrass, the normally 'conservative'[16] editor of *Salmond's Law of Torts*, argued that the Roman method 'provided a simpler and better solution of the problems involved than English law with its reliance upon a duty to take care'.[17] Buckland, too, pointed to the fact that there was no mention of 'duty' in the definition of negligence provided in section 165 of the draft US *Restatement of Torts*,[18] whilst Price, who described the duty enquiry as 'manifestly undesirable',[19] a 'fetish',[20] 'totally unnecessary',[21] and a 'will-o-the wisp',[22] maintained that it was yet to make its way into the Roman-Dutch law of South Africa.[23]

A number of commentators therefore believed that the duty concept performed *no* valuable function at all, and that this was why no equivalent concept had developed outside the common law. Its only saving grace, according to Winfield, was that, despite having no 'practical value … it is now too deeply embedded in English law to remove it. It has been recognised by the House of Lords, and nothing but legislation can eradicate it.'[24] Of course, it is hard to believe that this could have been the only reason. Could the duty of care really have lasted so long if it were entirely superfluous, particularly at a time when juries had effectively been abolished in civil trials[25] and so the duty of care was no longer needed to

[14] Winfield (n 3) 64. It could, of course, be objected that *Re Polemis* did not, in fact, permit the materialisation of unforeseeable risks to be deemed too remote, but this is more of an objection to the law of remoteness than to the materialisation of unforeseeable risks being an issue of remoteness, and therefore *able to be* dealt with on grounds not depending on duty. This is discussed in further detail in Section IV below.

[15] ibid 58.

[16] RG McKerron, 'The Duty of Care in South African Law' (1952) 69 SALJ 189, 189–90.

[17] JW Salmond and WTS Stallybrass, *Salmond's Law of Torts*, 10th edn (Sweet & Maxwell, 1945) 431.

[18] Buckland (n 6) 644–45. The definition of negligence was eventually moved to §281 of the *Restatement of Torts* (1934).

[19] Price (n 9) 274.

[20] ibid 270.

[21] ibid 271.

[22] ibid. This characterisation of duty, or at least the search for a general duty formula, was later famously used by Lord Oliver in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL), 633 ('*Caparo*').

[23] ibid 275. *cf* McKerron (n 16) 189: 'It is clear, however, that the [duty] doctrine is just as firmly established in South African law as it is in English law.' Despite the subsequent commentary, as detailed below, Price's views remained unchanged 10 years later: TW Price, 'Aquilian Liability and the 'Duty of Care': A Return to the Charge' [1959] Acta Juridica 120.

[24] Winfield (n 3) 58. For a criticism of this rationale see: R Dale Gibson, 'A New Alphabet of Negligence' in Allen M Linden (ed), *Studies in Canadian Tort Law* (Butterworths, 1968) 215.

[25] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 1999) 188–89.

distinguish between the respective roles of judges and juries? Much of the criticism of 'duty' was also, in fact, attacking a straw man in the form of Lord Atkin's foreseeability-based neighbour dictum, which, as we saw in chapter three, was not an entirely accurate representation of the law; indeed, there were many cases that satisfied the neighbour dictum but did not give rise to a duty of care.[26] How did the critics explain these cases? By the late 1940s, it was therefore being objected that the foregoing critiques were fundamentally flawed. In particular, it was being argued that the duty enquiry, in fact, performed *two* functions, and that the critics of the duty concept focussed only on the first of these functions, and either overlooked or simply ignored the second function entirely.[27]

B. Factual and Notional Duty

The first person to explicitly suggest that the duty enquiry had a dual function appears to have been Lawson.[28] According to Lawson, the duty enquiry served two 'entirely separate purposes':[29]

> [First,] to decide whether the plaintiff was or was not too remote from the reasonable contemplation of the defendant for damage done to the former to be imputable to the latter, and, secondly, to mark off from each other the situations where a person is required to advert to the possibility of damage to other persons from those where he may act without any regard for others, except, perhaps, that he must not deliberately do them harm.[30]

In other words, the function of the duty of care was to determine whether harm to the plaintiff was a reasonably foreseeable consequence of the defendant's conduct, *and* whether the broad circumstances in which the plaintiff suffered the injury *ought* to be subject to the laws of negligence. Around the same time, Stone, too, made the comment that by reason of the apparent tautology between negligence and duty, 'it must be obvious again that there is some determinant of the actual decision other than can be drawn by deductive logic from the category ostensibly used',[31] which he later explained to be a reference to the existence of a second aspect of the duty enquiry not expressed in Lord Atkin's (foreseeability based) test.[32]

[26] For example, there was no liability for negligently causing injury to trespassers, for pure economic loss resulting from negligent misstatements, etc. See Section II of ch 3 for further detail.

[27] FH Lawson, 'The Duty of Care in Negligence: A Comparative Study' (1947) 22 TulLRev 111; McKerron (n 16) 193; RWM Dias, 'The Breach Problem and the Duty of Care' (1956) 30 TulLRev 377, 404.

[28] Lawson (n 27).

[29] FH Lawson, *Negligence in the Civil Law* (Clarendon Press, 1950) 34.

[30] ibid. This, in fact, was Lawson's later description of the dual role. In his original description of the separate purposes, the second function was confined to 'determining the *kinds* of injury which can be brought within the action of negligence …,' rather than the broad '*situations*' that come within the action for negligence: Lawson, 'The Duty of Care in Negligence: A Comparative Study' (n 27) 112. Lawson's later, and broader, description, however, is much more in line with the modern understanding of the second function of duty ('notional duty'), which is discussed in greater detail in ch 5, Section II.

[31] Stone (n 7) 182.

[32] Morison (n 9) 13 (fn 11), where Morison cites a personal note written to him by Stone.

McKerron[33] and Morison[34] made similar observations shortly thereafter. Dias later explained the distinction on the basis that the duty of care involved both a 'factual' question, since whether or not something is foreseeable will depend on the actual facts of the case,[35] and a question of law, or a 'notional' question, because whether or not the situation is one that falls within the law of negligence will depend on what has been decided in previous cases,[36] thereby coining the terminology of 'factual' and 'notional' duty. The 'notional' duty terminology in particular has since been criticised as unhelpful,[37] and arguably 'legal duty' would be more appropriate. Notwithstanding this, however, so as to avoid the introduction of new and potentially confusing terminology, the notional duty label will continue to be used.[38]

The criticisms of duty, then, focussed exclusively on the factual aspect, and ignored the notional aspect altogether. Indeed, the criticisms did not apply to the notional aspect at all: the notional aspect was in no way 'tautologous' with the fault or remoteness elements; nor was it 'wholly alien' to other systems of law, as the restriction of liability for negligence to a particular set of prescribed situations was present in both Roman law and other modern civil law systems.[39] Notional duty even explained the cases that satisfied Lord Atkin's neighbour dictum, but did not give rise to a duty of care; in particular, pecuniary loss caused by negligent misstatements, injuries suffered by trespassers, damage caused by omissions, etc, were irrecoverable not because the harm was not foreseeable, but because the law was not prepared to extend the law of negligence to permit recovery in those types of situations. In other words, there was a factual duty but no notional duty. Whilst, then, factual duty continued to be subject to the foregoing criticisms, and so widely believed to be a 'fifth wheel on the coach', notional duty soon came to be seen as obviously 'necessary',[40] 'indispensable',[41] and performing the 'primary function of the duty of care'.[42]

[33] McKerron (n 16) 190.

[34] Morison (n 9) 24.

[35] RWM Dias, 'The Duty Problem in Negligence' [1955] CLJ 198, 204.

[36] ibid 204. He refers to the second question as one of 'notional duty' at ibid 205.

[37] See, eg, (n 44).

[38] Indeed, the same could be said about the 'duty of care', which, as is explained below and in the following chapter, is not a helpful label at all. However, given it is well-known, it will continue to be used.

[39] For a detailed comparison see Lawson, who argues that that 'a comparison with Roman law and a number of systems largely derived from or strongly influenced by Roman law proves that such a duty of care, or some other requirement substantially identical with it, is hardly to be avoided …': Lawson, 'The Duty of Care in Negligence: A Comparative Study' (n 27) 113. See also WW Buckland, AD McNair and FH Lawson, *Roman Law and Common Law*, 2nd edn (Cambridge University Press, 1965) 367–70. A similar conclusion can be seen in Winfield's analysis of liability for carelessness in the medieval law of trespass: 'The question was not "Is there a duty?" but, "Was the defendant in fact a bailee, common carrier, or the like and, if so, what excuse has he to offer for the harm that has occurred' (Winfield (n 3) 49). A more detailed comparison with other legal systems is contained in Section III(C) of ch 6.

[40] Lawson, 'The Duty of Care in Negligence: A Comparative Study' (n 27) 112.

[41] Dias, 'The Duty Problem in Negligence' (n 35) 204.

[42] Lawson, *Negligence in the Civil Law* (n 29) 35. See also the discussion in MA Millner, *Negligence in Modern Law* (Butterworths, 1967) 230.

Despite the widespread criticism of factual duty, it nevertheless today remains an orthodox part of the negligence enquiry,[43] and, although the 'factual'/'notional' terminology is no longer popular,[44] the distinction continues to be widely recognised.[45] Nolan and Davies, for example, recently explained the distinction as follows:

> First, it answers the general question whether there can in principle be a right not to be subjected to damage by carelessness in the kind of situation to which the particular facts belong. Secondly, it addresses the question whether on the particular facts the defendant did indeed owe a duty to the claimant.[46]

Given the underlying importance of the factual/notional distinction to the structure of the duty enquiry, both factual and notional duty will be examined in further detail. Although there is a strong argument that the notional aspect of the duty enquiry is 'logically prior' to the factual aspect, as 'We must first ask whether the defendant could possibly owe a duty to anyone, and only if we answer this question in the affirmative can we ask the further question whether he owed a duty of care to this particular plaintiff,'[47] it is nevertheless convenient to examine the factual aspect first. We will therefore examine the factual aspect for the remainder of chapter four, and the notional aspect in chapters five and six.

III. Factual Duty, Fault, and Remoteness

Whether the defendant owed the claimant a factual duty, or a duty 'on the particular facts' of the case, is determined by asking whether harm to the claimant, *as opposed to harm to someone else*, was a reasonably foreseeable consequence of the defendant's conduct. A defendant is only liable for damage that results from

[43] See, eg: Prue Vines, Peter Hanford and Carol Harlow, 'Duty of Care' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts*, 10th edn (Thomson Reuters (Professional) Australia Limited, 2011) 160; H Luntz and others, *Torts: Cases and Commentary*, 7th edn (Lexis Nexis, 2013) 120; M Lunney and K Oliphant, *Tort Law: Text and Materials*, 5th edn (OUP, 2013) 126; EW Peel and J Goudkamp, *Winfield and Jolowicz on Tort*, 19th edn (Sweet & Maxwell, 2014) 5-010; AM Dugdale, M Simpson and MA Jones, *Clerk & Lindsell on Torts*, 21st edn (Sweet & Maxwell, 2014) 8-07; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, 7th edn (OUP, 2012) 104–105; D Nolan and J Davies, 'Torts and Equitable Wrongs' in AS Burrows (ed), *English Private Law*, 3rd edn (OUP, 2013) 17.35–17.38; Lewis Klar, *Tort Law*, 5th edn (Carswell, 2012) 179; David Howarth, 'Duty of Care' in Ken Oliphant (ed), *The Law of Tort*, 2nd edn (LexisNexis Butterworths, 2007) 12.12–12.14; and D Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559.

[44] See, eg, WVH Rogers, *Winfield and Jolowicz on Tort*, 18th edn (Sweet & Maxwell, 2010) 5-5 (fn 40). Though it continues to be used in some major works, most notably Dugdale, Simpson and Jones (n 43) 8-06, 8-07, M Lunney, D Nolan and K Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) 126, and academic commentary (eg Nolan (n 43)).

[45] Peel and Goudkamp (n 43) 5-010; Lunney and Oliphant (n 43) 134–35 (though notional duty is termed 'the legal aspect of the duty of care'); Deakin, Johnston and Markesinis (n 43) 104–105; Dugdale, Simpson and Jones (n 43) 8-06, 8-07; Klar (n 43) 169; Nolan and Davies (n 43) 17.26.

[46] Nolan and Davies (n 43) 17.26. See also Peel and Goudkamp (n 43) 5-010.

[47] Lawson, *Negligence in the Civil Law* (n 29) 34.

a breach of duty *to the claimant*, and not damage that results from the breach of duty to another. Lord Atkin's neighbour dictum, with its focus on foreseeability, is the classic formulation of the factual duty enquiry. As we have seen, early commentators were highly critical of the factual aspect of the duty enquiry (even if they thought it was the *only* aspect of the duty enquiry), believing it to be superfluous, on the basis that its function was already performed elsewhere in the negligence enquiry. Notwithstanding this, however, factual duty continues to remain an orthodox part of the duty enquiry.[48] Indeed, Dorfman recently wrote of the 'impossibility of a duty purged of any requirement of foreseeability',[49] whilst Robertson has noted that, based on a survey of 92 recent duty cases:

> [A]pproximately 10 percent of the decisions in which duties were denied were based on a lack of foreseeability. A lack of foreseeability operated as a basis for denying duties of care in a wide range of case cases including, for example, cases involving psychiatric injury to an employee, physical injury caused indirectly or by the criminal act of a third party, property damage caused indirectly, and pure economic loss caused by a third party.[50]

If the early critics were right, and factual duty *is* superfluous, then this would be very curious. Accordingly, in this section we will examine this criticism of factual duty in further detail; in particular, whether the fault and remoteness stages *really* perform the same function as the factual duty enquiry. In the next section we will examine whether, even if they do perform the same function, there is nevertheless some other justification for retaining it.

A. Factual Duty and Fault

The fault stage of the negligence enquiry requires that the defendant's conduct unreasonably created a risk of harm to another. In determining what was 'reasonable,' the court will rely on the 'reasonable person' test; that is, if the defendant did something the reasonable person would not have done, or did not do something the reasonable person would have done, they are deemed to have behaved unreasonably.[51] Like the factual duty enquiry, the fault enquiry therefore involves an element of foreseeability, as the reasonable person's behaviour will depend on what he or she can foresee. Where, then, the defendant's conduct does not create a foreseeable risk of harm to anyone (that is, *no* harm is a foreseeable consequence of the defendant's behaviour), not only will there be no factual duty, as a defendant does not owe a duty to those he cannot foresee will be affected by his actions, there will also be no fault, as the reasonable person will take no precautions against the

[48] See (n 43).

[49] Avihay Dorfman, 'Foreseeability as Re-Cognition' (2014) 59 Am J Juris 163, 167.

[50] A Robertson, 'Policy-Based Reasoning in Duty of Care Cases' (2012) 33 LS 119, 133–34 (footnotes omitted). For details of the study, see ibid 129–30.

[51] *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784; 156 ER 1047, 1049 (Alderson B).

materialisation of risks he or she cannot foresee. As Howarth puts it 'If there was no foreseeable risk at the time the defendant acted, it is impossible for the defendant to have been at fault and therefore impossible for the defendant to be liable.'[52] The question of liability is therefore determined at the fault stage, and the factual duty enquiry adds nothing.[53] Where, on the other hand, the defendant's behaviour does create a foreseeable risk of harm to the claimant, *and that risk materialises*, whilst there will clearly be a factual duty, as the defendant owes a duty to those he can foresee will be affected by his conduct, this is of little consequence, as liability will ultimately depend on whether the defendant's failure to take further steps to prevent the risk from materialising amounted to carelessness.[54] Where, then, the defendant's conduct creates no foreseeable risk of injury to anyone, or does create a foreseeable risk of harm to the claimant and that risk materialises, the ultimate question of liability is determined at the fault stage, and the factual duty enquiry is superfluous.

More problematic, however, is conduct that creates foreseeable risk A, but unforeseeable risk B materialises, such as in the case of the 'unforeseeable plaintiff'.[55] Clearly, in such a situation, there will be no factual duty owed to the plaintiff, as harm to the plaintiff (that is, risk B) was not a foreseeable consequence of the defendant's conduct. Equally clearly, the defendant has been at fault, as the reasonable person does not engage in behaviour that unreasonably creates a foreseeable risk of *any* harm; whether or not it is that harm or some other harm that materialises is irrelevant.[56] Of course, if there can be a situation in which the fault element is satisfied, and the factual duty enquiry is not, then it is wrong to say that factual duty is 'tautologous' with the fault enquiry.[57] However, before concluding that factual duty is therefore necessary, we must first examine the remoteness enquiry, which, like the factual duty enquiry, considers the extent to which a defendant will be held liable for the unforeseeable consequences of their otherwise careless behaviour.

[52] David Howarth, 'Many Duties of Care—Or A Duty of Care? Notes from the Underground' (2006) 26 OJLS 449, 458.

[53] A similar conclusion is reached in JC Smith, 'Clarification of Duty—Remoteness Probems through a New Physiology of Negligence: Economic Loss, a Test Case' (1974) 9 UBCLawRev 213, 218, 222; Jonathan Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 PN 206, 209–10; Howarth, 'Many Duties of Care—Or A Duty of Care? Notes from the Underground' (n 52) 458; W Jonathan Cardi, 'Purging Foreseeability' (2005) 58 VandLR 739, 744–47; W Jonathan Cardi, 'Reconstructing Foreseeability' (2005) 46 BCLRev 921; and Howarth, 'Duty of Care' (n 43) 12.12–12.14.

[54] See, eg, *Bolton v Stone* [1951] AC 850 (HL); *Paris v Stepney BC* [1951] AC 367 (HL); *Latimer v AEC Ltd* [1953] AC 643 (HL); *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA); *Tomlinson v Congleton BC* [2004] 1 AC 46 (HL).

[55] 'Unforeseeable plaintiff', rather than 'unforeseeable claimant' or 'unforeseeable pursuer,' etc, appears to be the preferred terminology, and so will be used throughout this book.

[56] To put it another way, if it is unreasonable to engage in certain behaviour on the basis that it creates foreseeable risk of harm A to person P, such behaviour will not retrospectively become reasonable on the basis that it actually (and unforeseeably) causes harm B to person Q.

[57] See (n 9).

B. Factual Duty and Remoteness

The present law of remoteness was outlined in the landmark 1961 Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd*,[58] better known as '*The Wagon Mound (No 1)*'. The defendant ship owners had allowed oil to be discharged from their ship, the Wagon Mound, which was moored in Sydney harbour. The oil then drifted along the water towards the plaintiff's wharf, some 600 feet away. The plaintiffs were carrying on welding work at the time, which they determined to continue, after being advised that the oil could not reach flash point (170ºF) and ignite whilst on the water from errant sparks alone. It seems, however, that one of the sparks nevertheless managed to ignite a rag or some cotton waste beneath the surface oil which acted as a wick, thereby allowing the oil to ignite and start a fire that eventually burned down the plaintiff's wharf. It was accepted in court that whilst the defendant could have foreseen the risk of damage to the wharf by fouling, and that the discharge of oil was careless in relation to that risk, they could *not* have foreseen the risk of damage to the wharf by fire. As the defendant was careless in relation to *a* risk, even if not the risk that materialised, the fault element of the negligence enquiry was therefore satisfied. On the question of remoteness, however, the court held:

> [I]t does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial … the actor should be liable for all consequences however unforeseeable and however grave …[59]

> [I]f it would be wrong that a man should be held liable for damage unpredictable by a reasonable man … equally it would be wrong that he should escape liability … if he foresaw or could reasonably foresee the intervening events which led to its being done … Thus foreseeability becomes the effective test.[60]

As the actual consequences of the defendant's conduct were unforeseeable, the defendant therefore escaped liability.

Lord Hoffmann has described this enquiry as 'limit[ing] liability to those consequences which are attributable to that which made the act wrongful.'[61] Similarly, Clark and Nolan argue:

> [W]hat makes the defendant's act wrongful is the fact that it creates unreasonable risks, and it follows that in general negligence liability is imposed only where the consequence in question was the materialization of one of the risks which made the defendant's conduct negligent in the first place.[62]

[58] [1961] AC 388 (PC) ('*The Wagon Mound (No 1)*').
[59] ibid 422–23.
[60] ibid 426.
[61] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL), 213.
[62] T Clark and D Nolan, 'A Critique of *Chester v Afshar*' (2014) 34 OJLS 659, 664.

Accordingly, if the risk that materialised was unforeseeable, being the risk that the particular plaintiff would suffer the particular kind of harm they in fact suffered, then the damage is too remote.[63]

The remoteness enquiry therefore encompasses the factual duty enquiry entirely, as the suffering of harm by an unforeseeable plaintiff is simply the materialisation of an unforeseeable risk. Where, then, the there is no factual duty, the harm suffered will necessarily also be too remote.[64] As Cardi notes:

> Whether a court considers the defendant-plaintiff nexus in the context of proximate cause [i.e. remoteness]—'was this plaintiff within the scope of the risk created by the defendant's breach?' … or as a matter of duty—'did the defendant owe a duty to this plaintiff?' … the underlying issue is the same: '[S]hould the court hold the defendant liable to this plaintiff?' … the inquiry is identical.[65]

This observation is hardly new, and Nolan describes it as 'academic orthodoxy'.[66] Lord Denning, for example, has said that remoteness and duty are simply 'different ways of looking at one and the same question which is this: Is the consequence fairly to be regarded as within the risk created by the negligence',[67] whilst Oliver LJ has stated, 'Speaking for myself, I think that the question of the existence of a duty and that of whether the damage … is too remote are simply two facets of the same problem.'[68] Numerous cases have also reached the same outcome via the two different paths; some judges deeming the damage too remote, others finding an absence of a duty.[69] Within academe, Weinrib describes the two issues as 'frequently interchangeable',[70] Beever says they are 'virtually identical',[71] whilst Prosser wonders whether remoteness is nothing more than duty 'under another name',[72]

[63] This is known as the 'risk theory of remoteness.' For more on the 'risk theory,' see: G Williams, 'The Risk Principle' (1961) 77 LQR 179; and M Stauch, 'Risk and Remoteness of Damage in Negligence' (2001) 64 MLR 191. As Hart and Honoré note, however, the risk theory of remoteness has difficulty explaining certain aspects of the law, including recovery where neither the extent of the harm nor the way it occurred was foreseeable, and recovery by those who were injured rescuing primary victims of the defendant's negligence (see, eg, *Chapman v Hearse* (1961) 106 CLR 112): HLA Hart and Tony Honoré, *Causation in the Law*, 2nd edn (Clarendon Press, 1985) 263–64. Such difficulties, however, apply equally to factual duty and so, notwithstanding that they pose problems for the risk theory of remoteness, do not affect the overall argument here that the remoteness enquiry encompasses the factual duty enquiry. See also (n 143).

[64] Compare the comments of Glass JA in *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd* [1983] 2 NSWLR 268, 295–96, Vines, Hanford and Harlow (n 43) 152, and Rachael Mulheron, *Principles of Tort Law* (Cambridge University Press, 2016) 50, who argue that the foreseeability enquiry at the duty and remoteness stages raise different issues, the former being an abstract enquiry, the latter, more particular. Though see the response to this claim in Luntz and others (n 43) 118–19.

[65] Cardi, 'Purging Foreseeability' (n 53) 757 (footnotes omitted).

[66] Nolan (n 43) 572.

[67] *Roe v Minister of Health* [1954] 2 QB 66 (CA), 85 (Denning LJ). See also: Denning LJ's discussion of the difference between duty and remoteness in *King v Phillips* [1953] 1 QB 429 (CA) at 441–42. (Note that although Denning LJ is speaking of 'duty,' he is clearly referring to the factual aspect of duty.)

[68] *P Perl (Exporters) Ltd v Camden LBC* [1984] QB 342 (CA), 353 (Oliver LJ).

[69] See, eg, *Woods v Duncan* [1946] AC 401 (HL), *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139, and *P Perl (Exporters) Ltd v Camden LBC* [1984] QB 342 (CA).

[70] EJ Weinrib, *The Idea of Private Law* (rev edn, OUP, 2012) 158.

[71] A Beever, *A Theory of Tort Liability* (Hart, 2016) 190.

[72] W Prosser, 'Palsgraf Revisited' (1952) 52 MichLRev 1, 12.

such that the only difference between findings of no duty and findings that the damage suffered was too remote is merely 'one of terminology'.[73] It should therefore be unsurprising that in the United States, section 6 of the second discussion draft of the *Restatement (Third) of Torts: General Principles* confines the duty enquiry to notional questions only,[74] whilst section 7 of the *Restatement (Third) of Torts: Liability for Emotional and Physical Harm* explicitly states that questions of foreseeability of the risk that materialised are *not* matters for duty, but matters for proximate cause (that is, remoteness).[75]

Where, then, the defendant's conduct creates a foreseeable risk, but an unforeseeable risk materialises, the matter is able to be resolved as a question of remoteness, and so the factual duty enquiry is, again, superfluous.

IV. Factual Duty and the Problem of the Unforeseeable Plaintiff

It seems, then, that factual duty is superfluous, performing no function not already able to be performed by either the fault or remoteness enquiries. Despite this, however, there is an argument that factual duty nevertheless remains necessary in order to deal with the problem of the unforeseeable plaintiff. In particular, notwithstanding that the same *outcome* can be achieved by dealing with the problem of the unforeseeable plaintiff as part of the remoteness enquiry, it can be argued that it must nevertheless be dealt with in the factual duty enquiry because, first, causing harm to an unforeseeable plaintiff does not amount to a 'wrong,' and, second, the 'wrong' in the law of negligence is the breach of a duty of care, rather than the breach of a duty of care which causes damage that is not too remote. If both of these premises are accepted, then the problem of the unforeseeable plaintiff *cannot* be dealt with at the remoteness stage and so factual duty *is* necessary after all.

[73] ibid (fn 48). See also Smith (n 53) 225; Howarth, 'Many Duties of Care—Or A Duty of Care? Notes from the Underground' (n 52) 458; D Howarth, *Textbook on Tort* (LexisNexis UK, 1995) 116; Deakin, Johnston and Markesinis (n 43) 104.

[74] *Restatement (Third) of Torts: General Principles, Discussion Draft No 2* (2000) section 6: 'Findings of no duty … are based on judicial recognition of special problems of principle and policy that justify the withholding of liability.'

[75] *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010) section 7, Comment j: 'Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice …' For more on the US approach to duty, see: Cardi, 'Purging Foreseeability' (n 53); Cardi, 'Reconstructing Foreseeability' (n 53); W Jonathan Cardi and Michael D Green, 'Duty Wars' (2007) SCalLRev 671; D Owen, 'Duty Rules' (2001) 54 VandLRev 767; John CP Goldberg and Benjamin C Zipursky, 'The Moral of McPherson' (1998) 146 UPaLRev 1733; and John CP Goldberg and Benjamin C Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 VandLRev 657; B Zipursky, 'Foreseeability in Breach, Duty and Proximate Cause' (2009) 44 Wake Forrest L Rev 1247.

This argument first arose in the context of two famous cases, *Palsgraf v Long Island Railway Co*[76] and *Bourhill v Young*,[77] both of which involved the issue of how to deal with the problem of the unforeseeable plaintiff in light of the law of remoteness of the time, which was governed by another famous case, *Re Polemis*.[78] The argument is not straightforward, and so it is worthwhile examining these cases in order to better understand it.

A. *Palsgraf*, *Bourhill* and *Re Polemis*

Although the problem of the unforeseeable plaintiff had first been alluded to by Parke B in *Langridge v Levy*,[79] and later by Brett J in the trial decision of *Smith*,[80] it was first dealt with explicitly by Cardozo CJ in the famous New York case of *Palsgraf*, 'a law professor's dream of an examination question'.[81] Two train guards were assisting a passenger onto the defendant's train as it was pulling away from the station when they carelessly dislodged an innocuous-looking package from the passenger's arms. The package turned out to contain fireworks, which exploded upon falling onto the tracks and thereby caused some scales on the other side of the platform to fall on and injure the plaintiff. In his leading judgment, Cardozo CJ found for the defendant on the grounds that no duty had been owed to the plaintiff by the defendant's guard: 'The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.'[82] In other words, causing harm to an unforeseeable plaintiff was not a 'wrong'. The UK courts had to wait another 15 years before they were forced to confront the problem of the unforeseeable plaintiff, but eventually did so in *Bourhill.* The pursuer, a pregnant 'fishwife', suffered a serious shock after hearing, but not seeing, the defender negligently crash his motorcycle into oncoming traffic some 45 feet away. As a result of

[76] (1928) 248 NY 339; 162 NE 99 ('*Palsgraf*').

[77] [1943] AC 92. ('*Bourhill*').

[78] *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560 (CA) ('*Re Polemis*').

[79] (1837) 2 M&W 519, 530; 150 ER 863, 868: (rejecting the view that 'wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, anyone who is injured by the violation of it may have a remedy against the wrong-doer').

[80] *Smith v London and South Western Railway Co* (1870) 5 CP 98 (Brett J): 'But I am of opinion that no reasonable man could have foreseen … [damage] to *the plaintiff's* cottage … [Therefore] It seems to me that no duty was cast upon the defendants, in relation to *the plaintiff's* property …' (emphasis added). See also AL Goodhart, 'The Unforeseeable Consequences of a Negligent Act' (1928) 39 Yale LJ 449, 453 (later reprinted as 'Chapter VII: The Palsgraf Case' in Arthur L Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931) ('Brett, J dissented on the ground that the defendant had not been negligent in regard to this particular plaintiff, although the act of leaving the inflammable heaps might have been negligent in relation to others'); and JW Salmond, *The Law of Torts*, 6th edn (Sweet & Maxwell, 1924) 24 ('there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others.').

[81] William Prosser, *The Law of Torts*, 4th edn (West Publishing Co, 1971) 254.

[82] *Palsgraf* 341.

the shock, the pursuer suffered a stillborn child shortly thereafter. As the New York Court of Appeals had done in *Palsgraf*, the House of Lords denied the existence of a duty of care on the basis that, whilst the defender had been negligent in relation to someone, they had not been negligent in relation to the plaintiff:

> Thus, in the present case John Young [the defendant] was certainly negligent in an issue between himself and the owner of the car which he ran into, but it is another question whether he was negligent vis-a-vis the appellant. In such cases terms like 'derivative' and 'original' and 'primary' and 'secondary' have been applied to define and distinguish the type of the negligence. If, however, the appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else.[83]

Palsgraf and *Bourhill* essentially boil down to the idea that 'Proof of negligence in the air, so to speak, will not do;'[84] that is, negligence is not an abstract enquiry, and the question of whether certain behaviour is negligent cannot be considered in isolation from its consequences. The *same* behaviour may therefore be negligent (and so a 'wrong') in relation to one consequence (such as foreseeable harm to person A), but not negligent (and so not a 'wrong') in relation to another consequence (such as unforeseeable harm to person B).

But this all looks very familiar. To say that negligence in the air will not do is simply to say that the defendant can only be responsible for the materialisation of foreseeable risks, which, as we saw above, is able to be dealt with as a matter of remoteness. The immediate difficulty with classifying the unforeseeable plaintiff as a matter of remoteness, however, was *Re Polemis*, the leading case on remoteness at the time. In *Re Polemis* the defendant's employees negligently dropped a plank of wood into the hold of the plaintiff's ship as they were loading cargo. The dropped plank somehow created a spark which ignited petrol vapour in the hold, causing an explosion and the eventual destruction of the ship. In relation to the defendant's liability the court held:

> To determine whether an act is negligent, it is relevant to determine whether any reasonable man would foresee that the act would cause damage; if he could not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it actually causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act …[85]

Defendants were therefore liable for *all* the direct consequences of their negligence, whether those consequences had been foreseeable or not. If, then, the unforeseeable plaintiff were a matter for remoteness, on no sensible interpretation of *Re Polemis* could a defendant escape liability on the basis that the harm (directly)

[83] *Bourhill* 108 (Lord Wright). Lord Russell made similar comments at 102: 'Can it be said that [the defendant] could reasonably have anticipated that a person, situated as was the appellant, would be affected by his proceeding towards [the town of] Colinton at the speed at which he was travelling? I think not … In my opinion, he owed no duty to the appellant, and was, therefore, not guilty of any negligence in relation to her.'

[84] F Pollock, *The Law of Torts*, 11th edn (Stevens, 1920) 455.

[85] *Re Polemis* 577 (Scrutton LJ).

caused by their negligence was suffered by an unforeseeable plaintiff. Negligence therefore *would* be an abstract enquiry.

But this alone was hardly a sufficient reason to justify dealing with the problem of the unforeseeable plaintiff at the duty stage; if the court felt that *Re Polemis* implied that the law of negligence *was* an abstract enquiry, the obvious solution was surely to overrule the extremely unpopular[86] case, and to replace it with a remoteness test based on foreseeability. The defendant would therefore only be liable for the foreseeable consequences of their negligence, harm to an unforeseeable plaintiff would not be a wrong, and negligence would not be an abstract concept. The problem with this solution, however, at least according to the courts, was that remoteness merely concerned the measure of damages payable as a result of the defendant's 'wrong,' whilst duty concerned whether the defendant had committed a 'wrong' in the first place; that is, remoteness went to compensation rather than culpability.[87] As Cardozo CJ stated in *Palsgraf*:

> The law of causation, remote or proximate [ie remoteness], is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort.[88]

Lord Wright made similar comments in *Bourhill*: 'The question of liability is anterior to the question of the measure of the consequences which go with the liability … What is now being considered is the question of liability.'[89] In other words, the 'wrong' in the law of negligence was the breach of the duty of care *only*. Issues of causation, remoteness, and damage, on the other hand, were relevant to determining the *remedy* (or compensation) that was available as a result of the wrong. This reasoning has received considerable support elsewhere.[90]

Accordingly, if the problem of the unforeseeable plaintiff was relevant to the 'wrong' rather than the remedy, and the wrong was the breach of the duty of care only, then the problem of the unforeseeable plaintiff *did* have to be dealt with as part of the duty rather than remoteness enquiry. Factual duty was therefore necessary after all.

[86] Davies, eg, said that 'It is no exaggeration to say that during its 40-year life *Re Polemis* became one of the most unpopular cases in the legal world.' Martin Davies, 'The Road From Morocco: Polemis Through Donoghue to No-Fault' (1982) 45 MLR 534, 534. See also JG Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 Can Bar Rev 471, 481: 'Criticism of the decision *In re Polemis* has been more vocal and persuasive than its defence.'

[87] This is based on the famous wording of Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956 (HL), 984: 'What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence … This, however, goes to culpability, not to compensation.'

[88] *Palsgraf* 346.

[89] *Bourhill* 110. See also Lord Wright's comments in Wright, 'Re Polemis' (1951) 14 MLR 393, 399.

[90] See eg: *Bourhill* 101 (Lord Russell); *Woods v Duncan* [1946] AC 401 (HL), 437 (Lord Porter); OW Holmes and F Pollock, *Holmes-Pollock letters: the Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932*, vol II (M De Wolfe Howe ed, Harvard University Press, 1941) 83 (per Holmes); JF Wilson and CJ Slade, 'A Re-Examination of Remoteness' (1952) 15 MLR 458, 467.

To summarise, then, the argument that factual duty is *not* superfluous, went something like this:

(1) as negligence is not an abstract enquiry, negligently causing harm to an unforeseeable plaintiff does not constitute a 'wrong';
(2) the 'wrong' in the law of negligence is the breach of a duty of care, rather than the breach of a duty of care that causes damage that is not too remote;
(3) the problem of the unforeseeable plaintiff therefore *must* be a matter for duty rather than remoteness.

Although *Re Polemis* no longer represents the law, and so, as we have seen, this argument is now of little *practical* effect, if the syllogism is nevertheless valid, the factual duty element must nevertheless be a jurisprudentially necessary element of the negligence enquiry after all. Before we accept this conclusion, however, we will first explore the premises of the syllogism in further detail. It is most convenient to consider the second premise first.

B. Is the Duty of Care a 'Real' Duty?

The second premise of the claim that factual duty is necessary, is that the 'wrong' in the law of negligence is the breach of a duty of care, rather than the breach of a duty of care causing damage that is not too remote. In modern terms, this is said to mean that the duty of care is a 'real' duty. This belief stems from the idea that *all* civil 'wrongs' are based on breaches of a legal 'duty',[91] an idea that can be traced back to the Roman lawyer, Gaius.[92] So, for example, the 'wrong' in breach of contract cases is the breach of the 'duty' to perform the contract, and the 'wrong' in the law of nuisance is the breach of the 'duty' to not use one's land in a way that interferes with another's use and enjoyment of their land. In the same way, the 'wrong' in the law of negligence is said to be the breach of the 'duty' to take care.

That the 'wrong' in the law of negligence is the breach of the duty to take care *only*, is crucial to the claim that factual duty is necessary. If the 'wrong' were, instead, the breach of a duty to take care *to avoid causing damage that was not too remote*, then the problem of the unforeseeable plaintiff could simply be dealt with at the remoteness stage and so factual duty would *not* be needed to ensure that harm to an unforeseeable plaintiff did not amount to a 'wrong'.

On what basis, however, is it said that the wrong in the law of negligence is the breach of a duty to take care rather than the breach of a duty to take care to not cause damage that is not too remote? Despite the claim being crucial to the outcome in both *Palsgraf* and *Bourhill*, surprisingly, neither case offers any *actual* support for the proposition at all. Indeed, in a case note written on *Palsgraf*,

[91] P Birks, 'The Concept of a Civil Wrong' in D Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 33; R Stevens, *Torts and Rights* (OUP, 2007) 2.
[92] Gaius, Institutes, 3.88.

Prosser said of the reasoning: 'with due respect to the superlative style in which [the judgment is written] … [It] beg[s] the question shamelessly, stating dogmatic propositions without reason or explanation'.[93] More recently however, considerable support for the proposition has been offered by McBride. According to McBride, duties of care are indeed 'real' duties, and so the 'wrong' in the law of negligence is the breach of the duty to take care rather than the breach of a duty to take care not to cause damage that is not too remote, because if it were not the case we would encounter four problems. First, it would mean that, 'paradoxically', the law of negligence only protected claimants from defendants' carelessness *after* they had been harmed, effectively allowing defendants to behave as carelessly as they pleased prior to then.[94] Secondly, as the deliberate breach of a duty of care would not be a wrong, we could not explain why exemplary damages are routinely awarded against defendants for such breaches.[95] Thirdly, there would be no reason for the courts to ever award injunctions to prevent future carelessness if that carelessness were not a wrong in the absence of damage, yet there are cases, at least in the United States, where courts have done precisely this.[96] Fourthly, we would be unable to explain why the courts distort the law on causation, in cases such as *Reeves v Commissioner of Police of the Metropolis*[97] and *McGhee v National Coal Board*,[98] to impose liability on defendants who have not, on orthodox views, caused any harm.[99] In light of these problems, McBride concludes that the view that duties of care must be real duties is therefore the preferable one.[100]

The claim that duties of care are real duties is not, however, unproblematic. The biggest difficulty with the claim is that it deems a legal wrong to have been committed under the law of negligence without the claimant having suffered any actionable damage. Yet we know that this is simply not the law. In particular, whilst behaving in a manner that creates a risk of injury to another might be able to be legitimately described as a *moral* or *criminal* 'wrong', insofar as the law of negligence is concerned, provided that the 'wrongdoer' is fortunate enough to avoid injuring anyone, he has committed no 'wrong' at all. As Buckland explains:

> If I drive down Piccadilly at sixty miles an hour I am certainly careless, but if I get through without damaging anyone in any way I am under no liability at civil law to anyone. I may be a criminal, but that is another matter … So far as civil law is concerned my carelessness is without any legal result whatsoever.[101]

[93] Prosser (n 72) 7.
[94] N McBride, 'Duties of Care: Do They Really Exist?' (2004) 24 OJLS 417, 425.
[95] ibid 426.
[96] ibid 427.
[97] [2000] 1 AC 360 (HL).
[98] [1973] 1 WLR 1 (HL).
[99] McBride (n 94) 430.
[100] ibid 441. For general criticisms of McBride's argument, see Howarth, 'Many Duties of Care—Or A Duty of Care? Notes from the Underground' (n 52); and Dan Priel, 'Tort Law for Cynics' (2014) 75 MLR 703.
[101] WW Buckland, *Some Reflections on Jurisprudence* (Cambridge University Press, 1945) 114. See also Lawson, 'The Duty of Care in Negligence: A Comparative Study' (n 27) 112; Birks (n 91) 37; and Morison in JG Fleming and WL Morison, 'Duty of Care and Standard of Care' (1953) 1 SydLR 69, 70–71.

Indeed, that damage is an 'essential ingredient'[102] of the cause of action in negligence, rather than merely a requirement of recoverability, is 'not in doubt'.[103] As Fleming explains:

> Actual damage or injury is a necessary element (the gist) of tort liability for negligence. Unlike assault and battery or defamation, where violation of a mere dignitary interest like personal integrity or reputation is deemed sufficiently heinous to warrant redress, negligence is not actionable unless and until it results in damage to the plaintiff.[104]

Brennan J, too, has noted that, a 'duty of care is a thing written on the wind unless damage is caused by the breach of that duty',[105] whilst Lord Hoffman has been similarly clear that 'Proof of damage is an essential element in a claim in negligence'.[106] If, then, the tort of negligence requires actionable damage to be complete, then the breach of a duty of care *alone* cannot amount to a legal wrong, and the claim that the 'duty' in the law of negligence is the duty to take care, must be wrong.

Other difficulties with the claim are highlighted by Nolan:

> First, a 'duty' of care is normatively unconvincing, since a right not to be exposed to risk is both counter-intuitive (do we really believe that a motorist who careers down Piccadilly at 60 miles an hour has violated the rights of all those he could have hit?) and philosophically problematic. Secondly, examples can be given which show that the duty of care cannot be a duty owed to others, at least if we accept the Hohfeldian correlation of such duties with claim rights. Suppose that A, a baby of six months, falls ill after eating a tin of baby food negligently manufactured by B eighteen months previously. A has a claim in negligence against B in such a case, but how could B have breached a duty he owed A, and how could A's rights therefore have been violated, before A had even been conceived? Thirdly, there are cases which indirectly demonstrate that duties of care are not really duties. In *Spartan Steel and Alloys Ltd v Martin & Co. (Contractors) Ltd*, for example, the same act of negligence by B caused A both property damage and pure economic loss. Had the wrong in the case been the act of negligence itself, then all the loss A suffered as a result of that act should have been recoverable, but as it was the Court of Appeal allowed A to recover only for the property damage, and not the pure economic loss.[107]

[102] *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350 (CA), 375 (Oliver LJ). See also Nolan (n 43) 561.

[103] D Nolan, 'New Forms of Damage in Negligence' (2007) 70 MLR 59, 59. See also: J Stapleton, 'The Gist of Negligence, Part 1: Minimum Actionable Damage' (1988) 104 LQR 213; J Stapleton, 'The Gist of Negligence, Part 2: The Relationship Between "Damage" and Causation' (1988) 104 LQR 389.

[104] JG Fleming, *The Law of Torts*, 9th edn (Law Book Co, 1998) 216. An almost identical quote is reproduced in Margaret Beazley, 'Damage' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts*, 10th edn (Thomson Reuters (Professional) Australia Limited, 2011) 225.

[105] *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218, 241. See also, *Harriton v Stephens* (2006) 226 CLR 52, 115 (Crennan J); *Brookfield Multiplex v Owners—Strata Plan No 61288* (2014) 254 CLR 185 [124] (Bell and Keane JJ).

[106] *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281 (HL), [2]. See also the comments of Lord Hope in ibid at [47]: 'In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury.'

[107] Nolan, 'Deconstructing the Duty of Care' (n 43) 561-62 (footnotes omitted).

As Nolan notes, the evidence against the proposition that duties of care are real duties is 'overwhelming'.[108] Similar sentiments have been expressed by both Lawson[109] and Zipursky.[110] The second premise underlying the claim that factual duty is necessary is therefore flawed. The duty of care is not a 'real' duty at all (in the sense that a breach of it does not amount to a legal 'wrong'), but merely a label for an element of the negligent enquiry. The 'real' duty is the breach of a duty of care that causes damage which is not too remote, and the problem of the unforeseeable plaintiff can therefore be dealt with at the remoteness stage without implying that causing harm to an unforeseeable plaintiff is a wrong.

It also follows from this conclusion that the element of negligence enquiry typically known as the 'breach', or 'breach of duty', element is a misnomer, as there is no 'duty' being 'breached'. A more appropriate name for the stage is therefore the 'fault' or 'standard of care' stage, the former of which has been adopted in this book.

C. Is the Problem of the Unforeseeable Plaintiff Relevant to the Wrong or the Remedy?

If the argument above, that the duty of care is *not* a 'real' duty, is accepted, then the claim that factual duty is necessary must fail. However, if the argument is rejected, then the claim is still dependent on the validity of first premise, being that that the problem of the unforeseeable plaintiff is relevant to the 'wrong' rather than to the extent of the liability for the wrong; or alternatively, to wrong rather than the remedy.

Importantly, the claim that foreseeability of harm to the plaintiff is relevant to the wrong is not, *in itself*, overly problematic; after all, if it were otherwise, the question of negligence *would* be divorced from its consequences, and negligence in the air *would* be an abstract concept, which few seem to agree should be the case. What *is* problematic, however, is what it implies: that, whereas foreseeability of harm to the plaintiff is relevant to the wrong (and so need be dealt with as part of the duty enquiry), foreseeability of the *other* consequences of the defendant's carelessness is relevant *only* to the question of the extent of liability for the wrong (and so need be dealt with as part of the remoteness enquiry). The reason this implication is problematic is because, not only is it unclear how the

[108] ibid 562.

[109] Lawson, 'The Duty of Care in Negligence: A Comparative Study' (n 27) 112: 'the formulation of the doctrine [as a duty *to take care*] is objectionable on analytical grounds, and … it would be better to say that the duty is to avoid damaging the plaintiff by failing to take the requisite care rather than to take care to avoid damaging him.'

[110] Zipursky, 1272: 'The legal wrong in negligence is the negligent injuring of the plaintiff, not the failure of the defendant to conform his conduct to a standard of reasonable risk taking.'

different consequences of the defendant's carelessness are able to be isolated from one another and treated independently, but the basis for allocating the relevance of some of those consequences (that is, the foreseeability of harm to the plaintiff) to the question of the wrong and the relevance of others (that is, the foreseeability of everything else) to the question of the extent of liability for the wrong, is similarly unclear—such picking and choosing must have some rational basis underlying it.

One could, of course, object that the above implication is unnecessary, and that the problem can be overcome by accepting that the foreseeability of the kind of harm, the extent of the harm, and the way the harm occurred, are *also* relevant to the wrong, such that no distinction between the different consequences of the defendant's behaviour need be drawn, and all are treated in the same way. Such a response, however, would amount to little more than a relabelling of the 'remoteness' enquiry as 'factual duty', thereby contradicting the second premise and conceding that remoteness is relevant to the definition of the 'wrong' after all. Accordingly, if the claim that factual duty is necessary is to be maintained, there must be some justifiable distinction between foreseeability of harm to the plaintiff and foreseeability of the other consequences of the defendant's careless conduct, *and* some reason why the former is necessarily relevant to the wrong (and so a question of duty) whilst the rest are relevant to the remedy only (and so dealt with at the remoteness enquiry). There are, however, three reasons why this cannot be the case: the distinction is arbitrary, foreseeability of harm to the plaintiff and foreseeability of the kind of harm cannot be treated in isolation from one another, and it requires us to simultaneously adopt contradictory rationales.

i. The Distinction is Arbitrary

The first difficulty with treating foreseeability of harm to the plaintiff as relevant to the wrong, and foreseeability of the other consequences of the carelessness as relevant to the remedy only, is that it relies on an entirely arbitrary distinction. This is clearest in the case of foreseeability of harm to the plaintiff and foreseeability of the *kind* of harm suffered. Consider, for example, *Thorogood v Van Den Berghs and Jurgens Ltd*,[111] in which the plaintiff suffered an injury to his hand after it became caught in the revolving blades of a fan that had been placed on the ground for testing. It was found at trial that, whilst it was *not* foreseeable that a trained man standing nearby would suffer physical injury by allowing his hand to come in contact with the fan, as the plaintiff did, it *was* foreseeable that a trained man standing nearby would be at risk of suffering physical injury by having *his necktie* caught in the blades. In other words, *some* kind of injury to the particular plaintiff was foreseeable (that is, the 'necktie' kind), even though the kind actually suffered (the 'injured hand' kind) was not. Working from the basis that only foreseeability of harm to the plaintiff was relevant to the question of the wrong,

[111] [1952] 2 KB 537 (CA) ('*Thorogood's Case*').

Asquith LJ held the defendant liable for the damage, notwithstanding that it was unforeseeable:

> The foreseeability of the damage actually sustained is wholly irrelevant … The actual damage may be wholly different in character, magnitude, or the detailed manner of its incidence, from anything which could have reasonably be anticipated.[112]

It is completely unclear, however, why foresight of the kind of damage is 'wholly irrelevant' to the wrong, whilst foresight of risk to the actual plaintiff is, apparently, essential. Prosser described the position as 'a fundamental and foolish inconsistency',[113] whilst Goodhart objected:

> [I]f we once reject the idea that an act has a general quality of wrongfulness where different persons are concerned, it would seem to follow logically that we must also reject the idea that an act has a general quality of wrongfulness where different consequences are concerned …[If] A cannot be negligent to B 'in the air' [then] To hold A, who has been negligent to B in relation to certain foreseeable consequences, liable to B for unforeseeable consequences is no more reasonable than to hold A liable for such consequences if they happen to C.[114]

Fleming, too, objected that that such a distinction:

> introduces in to the law of negligence an element of stress which is difficult to justify on rational grounds. Both are aspects of the same problem of limitation of responsibility and cannot be divorced from each other by the verbal distinction between culpability on the one hand and compensation on the other.[115]

Accordingly, the claim that foreseeability of harm to the plaintiff is relevant to the wrong, whilst foreseeability of the other consequences of the defendant's carelessness are relevant to the remedy only, relies on an entirely arbitrary distinction and so has little normative attraction. If the distinction between the two is arbitrary, there can therefore be no good reason for treating one as relevant to duty, and the others as relevant to remoteness.

ii. Foreseeability of Harm to the Plaintiff and Foreseeability of the Kind of Harm cannot be Considered in Isolation from One Another

The second difficulty with treating foreseeability of harm to the plaintiff as relevant to the wrong, and the foreseeability of the other consequences of the defendant's

[112] *Thorogood's Case* 690.

[113] Prosser (n 72) 23.

[114] Goodhart (n 80) 465. See also Goodhart's comments in ALG, 'Obituary: Re Polemis' (1961) 77 LQR 175, 177: 'such a distinction [cannot] be supported on any obviously rational principle.'

[115] Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (n 86) 496. See also ibid: 'It is, of course, pragmatically possible to maintain both the duty approach and the *Polemis* rule, and indeed interpret the latter in terms of a duty to protect others against unforeseeable consequences of negligent acts, but the essential inconsistency remains holding that one who can foresee harm to A is liable for unforeseen consequences to A and refusing to hold him liable for unforeseen harm to B. Whether the unforeseen harm is suffered by A or B is entirely fortuitous. The difficulty is fundamental …'

carelessness as relevant to the remedy only, is that it requires them to be distinguished and treated in isolation from one another. This cannot, however, be done, as the problem of the unforeseeable plaintiff is less concerned with foresight of *some harm* to the particular plaintiff, than foresight of *the particular kind of* harm to the particular plaintiff. Why this is so is best illustrated by an example. Assume that the facts of *Palsgraf* and *Bourhill* were slightly different, and that the package of fireworks had belonged to Mrs Palsgraf, and the car with which Mr Young collided had belonged to Mrs Bourhill. In both examples, the plaintiffs would undoubtedly have been able to recover for the damage caused to their property by the carelessness of the defendants. Yet, if this is the case, *some* injury to the particular plaintiff *would* have been a foreseeable consequence of the defendant's carelessness, and so the defendant *would* have been negligent 'vis-a-vis' the plaintiff. Would it therefore follow that the plaintiffs could recover for their personal injuries as well? Surely not, or the actual results of *Palsgraf* and *Bourhill,* and the inability of the plaintiffs to recover for their personal injuries, would rest on the fortuitous and surely irrelevant fact that Mrs Palsgraf did not own the fireworks and Mrs Bourhill did not own the (presumably) damaged car.[116] But if that is not the explanation, then what is? Obviously, the results rest on the basis that it was unforeseeable that the particular plaintiff would suffer the particular 'kind' of injury; that is, whilst it may have been foreseeable on the hypothesised facts that the plaintiffs would suffer *property* damage, it remained unforeseeable that they would suffer *physical* injury. The result, then, is that the basis of the denial of the duty was not that harm to the particular plaintiff was unforeseeable, but that the particular *kind* of harm suffered by the particular plaintiff was unforeseeable. The problem of the unforeseeable plaintiff is therefore a misnomer; the *real* problem is the unforeseeability of the exact *kind* of harm to the plaintiff.

Of course, if it is not injury to the particular plaintiff that needs to be foreseeable, but injury of the particular *kind* suffered by the particular plaintiff that needs to be foreseeable, then, not only do *Palsgraf* and *Bourhill* appear to directly contradict *Re Polemis*, which had explicitly stated that the exact 'kind' of damage was *not* required to be foreseeable for that damage to be recoverable, but we are now very close to saying the remoteness of the damage is relevant to the wrong after all, thereby contradicting the first premise and so establishing that factual duty is unnecessary.

[116] Fleming describes such a result as 'capricious': JG Fleming, 'The Passing of Polemis' (1961) 39 Can Bar Rev 489, 497. The same 'capriciousness' can be illustrated by imagining that the cargo on the steamship Thrasyvoulos had belonged to a third party. As the defendant's carelessness only created a foreseeable risk of harm to the *ship*, and not the *cargo*, the defendant would therefore only be liable to the owner of the ship; that is, the 'wrong' was to the owner of the ship, not to the owner of the cargo. Now imagine that both the ship *and* the cargo belonged to the same party. Here, the defendant would be liable for the damage to the ship *and* the cargo; the 'wrong' was to the owner of the ship and so the defendant was liable for *all* direct consequences of that wrong. The defendant's liability for the cargo therefore seems to depend on who happens to own it. Goodhart (Goodhart (n 80) 466) and Dias (Dias, 'The Breach Problem and the Duty of Care' (n 27) 386) both argue that such an explanation is unsatisfactory, whilst Prosser describes it as 'utter nonsense' (Prosser (n 72) 23).

Although Cardozo,[117] Lord Wright[118] and others[119] recognised the difficulties involved with isolating foresight of harm to the plaintiff from foresight of the kind of harm suffered, the first person to tackle them in detail was E Anthony Machin. Machin accepted that factual duty required more than foresight of *any* injury to the particular plaintiff; however, it was not foresight of the 'kind' of injury that was also required, but foresight of injury to the particular plaintiff's affected 'interest',[120] such as plaintiff's 'interest' in freedom from physical bodily injury, 'interest' in freedom from injury to chattels, 'interest' in freedom from injury to land, and 'interest' in freedom from nervous shock.[121] As Machin explains:

> [I]t is difficult to accept that reasonable foresight of injury to the one interest should be sufficient to ground an action in respect of actual injury to the other, any injury to which being *ex hypothesi* unforeseeable … [I]f I know that little Tommy's mother is watching him from a second-floor window as he plays in the street, and I nevertheless drive my motor-car at a reckless speed towards him and thereby kill him under her eyes, and she suffers shock, I am surely liable to her in respect of it because shock is foreseeable. Now suppose that little Tommy, unknown to me, has a stick of dynamite in his pocket which explodes and physically injures his mother. I can foresee no physical injury to the mother whatsoever. Upon what principle should I pay for such physical injury, when all I could reasonably foresee was injury to a different interest of hers? A person standing in the street a quarter of a mile away who was hit by a fragment thrown out by the explosion would clearly have no cause of action of any kind against me. Why should the mother be placed in any better position, so far as recovery for unforeseeable physical injury is concerned, because she already has a right to recover in respect of shock?[122]

Machin's 'interest theory' certainly addressed the difficulties highlighted above. Distinguishing 'kind of harm' from 'interests', reconciled the seeming conflict between *Palsgraf* / *Bourhill* and *Re Polemis* and explained the seeming overlap between the roles of factual duty and remoteness; factual duty required foresight of injury to the particular plaintiff's affected 'interest', and once that duty had been breached, remoteness permitted recovery for all directly caused 'kinds' of harm whether they were foreseeable or not. The reason, then, that Mrs Palsgraf could not have recovered for her personal injury even if she had owned the package of

[117] *Palsgraf* 347: 'There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, eg, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now.'

[118] *Bourhill* 108 ('Her interest, which was in her own bodily security, was of a different order from the interest of the owner of the car'); ibid 110 ('[*Re Polemis*] must be understood to be limited … to "direct" consequences to the *particular interest of the plaintiff* which is affected.').

[119] See, eg: J Smith, 'Legal Cause in Actions of Tort' in Harvard Law Review Association (ed), *Selected Essays on the Law of Torts* (Harvard Law Review Association, 1924) 649; Leon Green, 'The Palsgraf Case' (1930) 30 Colum L Rev 789, 790; F James, 'Scope of Duty in Negligence Cases' (1952) 47 NwULRev 778, 783.

[120] EA Machin, 'Negligence and Interest' (1954) 17 MLR 405, 410.

[121] ibid 418.

[122] ibid 410.

fireworks is because there would have only been foresight of injury to her 'chattel-interest', and not her 'body-interest'. For the same reason Mrs Bourhill could not have recovered for her personal injuries even if she had owned the car.[123]

The interest theory, however, is not unproblematic. First, it created even *more* arbitrary distinctions, now that the affected 'interest' was required to be foreseeable, whilst the 'kind' of harm, extent of harm, etc, inexplicably, were not.[124] Secondly, Machin's justification for requiring that damage to the affected *interest* be foreseeable, equally justified requiring that the *kind* of damage suffered be foreseeable, the exact proposition he was trying to disprove. In particular, how is the argument that 'it is difficult to accept that reasonable foresight of injury to the one interest should be sufficient to ground an action in respect of actual injury to the other, any injury to which being *ex hypothesi* unforeseeable',[125] any different to 'it is difficult to accept that reasonable foresight of one *kind of harm* should be sufficient to ground an action in respect of actual injury to another *kind of harm*, that was *ex hypothesi* unforeseeable'?[126] It is, therefore, perhaps unsurprising that the stated aim of Machin's 'interest theory' was nothing more than 'a means to an end',[127] and motivated more by pragmatism than logic; that is, Machin was *not* attempting to justify the necessity of factual duty requirement, but was merely attempting to provide an interpretation of *Palsgraf* and *Bourhill* that was reconcilable with *Re Polemis*: 'a compromise between the theory which requires foreseeability as a criterion both of duty and remoteness, and the theory which regards all direct damage as actionable provided some damage was foreseeable'.[128] Whilst Machin may, indeed, have achieved this, he only did so by making the duty enquiry even more confusing than it was in the first place.

There was, however, a rationale for the interest theory that had not been advanced by Machin, a rationale that was, arguably, more convincing than any of his explanations: that the interest theory eschewed any reliance on the problematic concept of 'kind' of damage. After all, what was a 'kind' of damage? Was, for example, damage to an eye the same 'kind' of damage as damage to a foot?[129]

[123] Similarly, in the *Re Polemis* example above, *neither* party could recover for the damage to the cargo, as different chattels involve different interests, so the interest in the cargo would have been different to the interest in the ship.

[124] AL Goodhart, 'The Imaginary Necktie and the Rule in *Re Polemis*' (1952) 68 LQR 514, 515 (fn 7).

[125] Machin (n 120) 412.

[126] Similarly, Machin's 'little Tommy' example, quoted above, could equally be used to justify foresight of the same 'kind' of harm: 'Upon what principle should I pay for such physical injury [or damage of one 'kind'], when all I could reasonably foresee was injury to a different interest [or of a different kind] of hers.'

[127] Machin (n 120) 418.

[128] ibid 419. That this was the only way to reconcile the cases, was often put forward as a reason in favour of such an interpretation: See, eg, Wilson and Slade (n 90) 468; RWM Dias, 'Trouble on Oiled Waters: Problems of *The Wagon Mound (No 2)*' (1967) 25 CLJ 62 (n 23) 179. Of course, the fact that two cases *can* be interpreted consistently, says nothing about whether the cases were correctly decided in the first place.

[129] Williams (n 63) 181; Prosser (n 72) 23; Goodhart, 'The Unforeseeable Consequences of a Negligent Act' (n 80) 467.

Similarly, how broad or narrow was a 'kind' of damage meant to be? On the one hand, if the level of abstraction is set low enough, then almost no kind of damage will be foreseeable (that is, the more specific the risk the less likely it will be foreseeable), whilst, on the other hand, vague generalisations of 'kinds' of harm will cover almost anything, and so every 'kind' of harm will be foreseeable.[130] Depending on the level of abstraction, both everything and nothing is foreseeable. Stevens sums up the problem as follows: 'there is no necessarily right answer to the question of what counts as the same [kind][131] of damage, and no criterion by which it can be determined. The [kind] is wholly dependent on the level of generality with which the damage is described …'[132]

In contrast to the comparatively fixed idea of 'interests,' the 'kind' of harm concept seemed wildly imprecise and problematic. Requiring foreseeability of harm to the plaintiff's particular 'interest' therefore seemed a preferable and more stable option to foreseeability of the exact 'kind' of harm. But was this actually so? Consider, for example, *Smith.* The defendant train company had allowed dried grass cuttings to pile up close to its railway lines which were set alight by sparks from a passing locomotive. Wind carried the fire across an adjoining stubble field to the plaintiff's cottage over 200m away. The plaintiff's cottage was destroyed by the fire. Physical damage to the land adjoining the railway track was no doubt foreseeable, and so, according to the interest theory, the defendant was negligent vis-à-vis the owner of the stubble field's property interest in the stubble field. Damage to the plaintiff's cottage, however, being so far away, was not a foreseeable consequence of the defendant's actions, meaning that, per the interest theory, the defendant had not been negligent vis-à-vis the plaintiff's property interest in his cottage. So far, so good. The difficulty, however, comes when we hypothesise that the scrub field had belonged to the plaintiff.[133] Under the interest theory, this modification to the facts would mean that damage to the property interest of the plaintiff *would* have been foreseeable and so the plaintiff would have recovered for the damage to his cottage. The plaintiff's case, therefore, depended on who owned the adjoining scrub field. Such a capricious result, however, is clearly unsatisfactory. Whilst one might reply that the scrub field was on a separate title to the house, and so the subject of a separate property interest, this would imply that liability ought to depend on the nature of the property title, an equally capricious result.

One solution might be to define interests more narrowly, such that the interest in the scrub field is different to the interest in the house. But how narrow do we go?

[130] G Fridman and J Williams, 'The Atomic Theory of Negligence' (1971) 45 ALJ 117, 122. See also Fleming, 'The Passing of Polemis' (n 116) 520; Goodhart, 'The Imaginary Necktie and the Rule in *Re Polemis*' (n 124) 534.

[131] Stevens uses the word 'type', but this can be used interchangeably with 'kind'.

[132] Stevens (n 91) 155. See also ibid 156: 'Distinctions of this kind, based on an unstable concept, with no demonstrably correct result one way or the other, do no credit to our law.'

[133] The example is further discussed in: Williams (n 63) 185–86; and Fleming, 'The Passing of Polemis' (n 116) 525–27.

Is the interest in a house, for example, the same as the interest in an adjacent garage, and would it matter whether they were adjoined or detached? Would the interest in a house extend to the chattels inside the house, such as a painting, or even outside the house, such as a car in the driveway? And would the interest in a painting extend to the interest in the frame, or the paint on the canvas?[134] Clearly, a line needs to be drawn somewhere. On the one hand, 'interests' cannot be defined too broadly (adjoining land involves the same interest), or we will be left with capricious results, and a hopelessly undemanding test for foreseeably endangering an 'interest.' On the other hand, 'interests' cannot be defined too narrowly (the interest in a painting's canvas is separate to the interest in the paint on the canvas), or it will become extremely difficult to show that harm to a particular interest was ever foreseeable. Where, exactly, to draw the line clearly cannot be 'supported by any obviously rational principle',[135] and so will necessarily involve some degree of flexibility. Of course, the moment we start relying on discretion and flexibility to distinguish between different interests, we are back to where we started, and any meaningful distinction between 'kinds' of harm and 'interests' ceases to exist. The interest theory is therefore subject to the same problems it was trying to overcome. Indeed, even Machin conceded that when interests start being treated flexibly, and subdivided further, it would 'lead ultimately to a requirement of foreseeability of the very kind of damage which in fact occurred [and] [t]his would be incompatible with *Re Polemis*'.[136] Requiring foreseeability of damage to a particular 'interest' of the plaintiff is therefore just as problematic as requiring foreseeability of the same 'kind' of damage, and so does not provide a convincing way for distinguishing between foreseeability of harm to the plaintiff and foreseeability of the kind of harm suffered, nor can it provide a way for *Palsgraf* and *Bourhill* to be read consistently with *Re Polemis.*

If foreseeability of harm to the plaintiff and foreseeability of the kind of harm suffered cannot be distinguished, then the existence of a factual duty must, in fact, require foreseeability of the particular kind of harm suffered by the particular plaintiff. Of course, if the *kind* of harm suffered by the particular plaintiff needs to be foreseeable, then the first premise, that causing harm to an unforeseeable plaintiff does not constitute a wrong, is, in fact: 'causing *an unforeseeable kind of* harm to a particular plaintiff is not a wrong', or, in other words, causing harm that is too remote is not a wrong. Remoteness, then, *is* relevant to the wrong, and so the second premise contradicts the first premise. Factual duty is therefore not needed after all.

[134] The same difficulties arise in cases of the interest in bodily safety. Negligently exposing someone to spinning fan blades would surely give rise to liability for foreseeable physical maiming, but what if the plaintiff instead unforeseeably caught a chill. And would it matter if the chill was viral or bacterial? See Goodhart, 'The Imaginary Necktie and the Rule in *Re Polemis*' (n 124) 516.

[135] ALG (n 114) 177.

[136] Machin (n 120) 418.

iii. We Must Simultaneously Accept Contradictory Rationales

The third difficulty with treating foreseeability of harm to the plaintiff as relevant to the wrong, and the rest of the consequences as relevant to the remedy only, is that it relies on a rationale that contradicts the rationale underlying the second premise. In particular, the claim that foreseeability of harm to the claimant is relevant to the wrong rather than the remedy is based principally on an objection to the idea that negligence is an abstract enquiry, and that liability for carelessness can be determined without regard to the foreseeability of its consequences. The rationale underlying the second premise, however, being that the wrong in the law of negligence is the breach of a duty of care *only*, is based on the idea that the consequences of the defendant's carelessness are *completely irrelevant to* the wrong. Indeed, according to the second premise, the breach of the real 'duty' occurs at the moment of the carelessness, regardless of the consequences that follow: negligence in the air therefore *is* enough. Accordingly, if we accept the first premise we must reject the second premise, and if we accept the second premise, we must reject the first premise. The claim that the wrong in negligence is the breach of the duty of care only, *and* that foreseeability of harm to the plaintiff is relevant to the wrong whilst the rest of the consequences of the carelessness are relevant to the remedy only, is therefore inherently contradictory. Again, the claim that factual duty is necessary, can therefore not be justified.

V. Why Factual Duty Entered the Duty Enquiry and Why it Remains

Factual duty would therefore seem to be both theoretically and practically unnecessary; not only can the exact same outcome be achieved via the fault and remoteness enquiries, but the idea that it is nevertheless necessary to ensure that causing harm to an unforeseeable plaintiff did not amount to a 'wrong' is unconvincing. Given these problems, one may therefore ask, why the courts in *Palsgraf* and *Bourhill* introduced the problematic factual duty concept at all, when, as we have seen, the same result could have been achieved, and the above-mentioned difficulties avoided, if *Re Polemis* had simply been overruled and the problem of the unforeseeable plaintiff dealt with as a matter for remoteness? Whilst *Palsgraf* can conceivably be explained on the basis that the court did not want to leave the issue of the unforeseeable plaintiff to the jury (given the question of duty was one for the court whilst the issue of remoteness was for the jury), it does not explain the result of *Bourhill* given that, in the UK, juries were no longer being used in civil trials.[137] The answer, then, at least in the UK, must surely be that the reliance on

[137] See (n 25).

factual duty was nothing more than an artifice for the purpose of circumventing the well-established rule in *Re Polemis*. What other explanation can there be? Why create so many analytical difficulties in such an important cause of action when they could have all been avoided by overruling a single case? A reluctance to overrule *Re Polemis* is surely the answer.

Even if, however, this explains the results of *Bourhill* and (possibly) *Palsgraf*, it does not explain why factual duty has endured. Indeed, after the Privy Council handed down the judgment in *The Wagon Mound (No 1)*, there was no longer any good reason for factual duty to remain; not only was it no longer necessary to ensure that *Re Polemis* remained good law, but, as we have seen, the foreseeability-based test of remoteness rendered the factual duty enquiry functionally superfluous.[138] Additionally, the reasoning relied on in *Palsgraf* and *Bourhill*, that justified the existence of the factual duty in the first place, was expressly disapproved. In particular, as to the claim that the breach of the duty of care was the 'wrong', whilst remoteness merely went to the measure of consequences that go with the 'wrong', the court said:

> [In relation to the proposition] 'This, however, goes to culpability not to compensation'. It is with the greatest respect to that very learned judge and to those who have echoed his words, that their Lordships find themselves bound to state their view that this proposition is fundamentally false.
>
> It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) 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 its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other.[139]

Remoteness, in other words, was *not* foreign to the 'wrong', and so there was no reason for the unforeseeable plaintiff to be dealt with as a matter of duty rather than a matter for remoteness to avoid negligence becoming an abstract enquiry. The court also disapproved of any meaningful distinction between foreseeability of harm to the plaintiff and foreseeability of the kind of harm suffered:

> [I]f it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B

[138] Although *The Wagon Mound (No 1)*, a Privy Council decision, did not technically overrule *Re Polemis*, it was soon expressly approved by English courts: *Smith v Leech Brain & Co* [1962] 2 QB 405 (QB); *Hughes v Lord Advocate* [1963] AC 837 (HL). Though note (n 143).

[139] ibid 425. For a more recent statement of this position, see Lord Hoffmann in *Kuwait Airways Corp v Iraq Airways Co* (No 6) [2002] 2 AC 883 (HL), 1106: 'One cannot separate questions of liability from questions of causation. They are inseparably connected. One is never simply liable; one is always liable for something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability.'

> liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary … It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacre.[140]

In other words, remoteness was a question of the foreseeability of the *risk*,[141] requiring that both harm to the plaintiff *and* the kind of harm suffered by the plaintiff be foreseeable. There was, therefore, little point asking the same question at the duty stage.

Following *The Wagon Mound (No 1)*, it was abundantly clear that there was no longer any good reason for factual duty to remain a part of the duty enquiry. Notwithstanding this, however, more than 50 years later, factual duty remains alive and well, an orthodox part of the duty enquiry that is relied on in higher courts regularly,[142] despite the remoteness enquiry remaining largely the same.[143] What, however, explains this? If factual duty is so clearly superfluous, why has it not been consigned to the annals of legal history? It seems there are two reasons. First is the persistent belief that if we are to avoid imposing a 'duty' to take care to avoid causing unforeseeable harm, the duty *of care* stage must have a foreseeability requirement. Indeed, as we saw in chapter three, the belief that a defendant cannot be expected to exercise reasonable care towards the world at large, but only to those he can reasonably foresee could be affected by his actions, is the principal modern justification for retaining the foreseeability requirement.[144] Though, as we have also seen, such a justification is based on the mistaken belief that a 'duty' of care is a *real* duty rather than a mere label for an element of the negligence enquiry. The confusion has led Nolan to state that the 'duty' label is nothing more than a 'confusing and inappropriate … misnomer.'[145] Secondly, is the reluctance among courts to discard well-established authority. In particular, much like the judges in

[140] ibid 425–26.

[141] JC Smith, 'The Mystery of Duty' in L Klar (ed), *Studies in Canadian Tort Law* (Butterworths, 1977) 33.

[142] See (n 50).

[143] There have been, however, a number of changes to the remoteness enquiry, which arguably undo the effect of *The Wagon Mound (No 1)*. In particular, the eggshell-skull rule (that the defendant is responsible for the full extent of a plaintiff's injury, even though it was unforeseeable due to some unusual sensitivity of the plaintiff) and unusual value rule (that a defendant is responsible for negligently caused damage, even where its degree is unforeseeably high, such as dropping a Ming vase that appeared to be a fake, or running over a millionaire in the belief they were a vagrant) potentially make a defendant liable for damages beyond those that were reasonably foreseeable. For criticism of the rules, see: Stevens (n 91) 155–58; A Beever, *Rediscovering the Law of Negligence* (Hart, 2007) 162–66. For defences of the rules, see: Williams (n 63) 193–98. Stauch (n 63) 207–214. See also the discussions in RWM Dias, 'Remoteness of Liability and Legal Policy' (1962) 20 CLJ 178, 186; Smith, 'Clarification of Duty—Remoteness Probems through a New Physiology of Negligence: Economic Loss, a Test Case' (n 53) 240, 243; Smith, 'The Mystery of Duty' (n 141) 33-34; Gibson (n 24) 208–209; Wilson and Slade (n 90) 469.

[144] See Section V(A).

[145] Nolan, 'Deconstructing the Duty of Care' (n 43) 563. See also Gibson (n 24) 191; Fleming and Morison (n 101) 70–71.

Palsgraf and *Bourhill* were reluctant to overrule the well-established *Re Polemis*, and so brought factual duty into existence in the first place, modern judges seem similarly reluctant to discard the now well-established enquiry. Although such reluctance could be justified on the grounds that 'it would also be foolish and mischievous [to discard such a well-established rule], because [to do so] would inflict much too great a shock on ingrained habits of legal thought',[146] as Gibson notes, 'fallacious or superfluous concepts must not be preserved in the law simply because they provide members of the legal profession with mementoes of their youth'.[147] It seems, then, that this is just another one of those times, in the long history of the common law, where the rationale for a case has been decisively rejected, yet the rule it created has survived.

VI. Why Does it Matter?

Even if the preceding argument is accepted in its entirety, one might still wonder, 'does it *really* matter'? Just because the same conclusion can be reached via two different paths does not mean that one of the paths is necessarily 'superfluous' and should be removed.[148] According to Lord Steyn in *Rees v Darlington Memorial Hospital NHS Trust*,[149] for example, provided that the same result is achieved, the 'the difference in method is not of great importance.'[150] One may even go so far as to argue that the 'right' result is more likely to be reached when two paths lead there rather than just the one. Whilst this might be an attractive argument, there are nevertheless a number of benefits to removing factual duty from the negligence enquiry and confining the duty stage to notional duty questions only. First, it would prevent the unhelpful confusion between notional and factual issues.[151] This would promote greater transparency in judicial reasoning, as decisions based on notional considerations would need to expressly articulate why those notional considerations were relevant and warranted a particular conclusion, rather than, as is often believed to be the case,[152] being disguised as factual issues. Secondly,

[146] Winfield (n 3) 58.

[147] Gibson (n 24) 215.

[148] See, eg, James (n 119) 784–85. Though, compare the position in the United States, where the allocation of an issue to duty or remoteness will determine whether it is an issue for the judge or an issue for the jury: Cardi, 'Purging Foreseeability' (n 53) 794–804.

[149] [2004] 1 AC 309 (HL) [30].

[150] ibid [30]. Lord Steyn was, in fact, talking about the distinction between duty of care and actionable damage, but the point remains. See also the comments of Sir Murray Stuart-Smith in *Vellino v CC of Greater Manchester* [2002] 1 WLR 218 (CA) [62].

[151] See also the discussion in Nolan, 'Deconstructing the Duty of Care' (n 43) 579–81.

[152] It has been suggested that *Bourhill*, for example, was a notional decision disguised as a factual decision: '[the] finding that the claimant was unforeseeable masked [notional] concerns which militated against imposing a duty of care. Was the decision that Mrs Bourhill was owed no duty of care really attributable to the fact that she was not a reasonably foreseeable victim of John Young's negligent

determining when a duty of care does or does not exist would be greatly simplified, as there would no longer be a need to formulate tests that accommodate both factual and notional considerations.[153] Thirdly, the negligence enquiry would be more coherent, as each stage of the enquiry would deal with a discrete issue: duty would deal with whether the situation ought to be subject to the laws of negligence, the fault stage would deal with the quality of the defendant's behaviour, causation would deal with whether the harm was attributable, as a matter of fact, to the defendant's conduct, and remoteness would deal with whether the defendant had been careless in relation to the risk that materialised. Until the duty stage is confined to notional questions only, the law will continue to be indecisive, inconsistent, and unpredictable.[154]

VII. Conclusion

As well as encouraging courts to think about duty in terms of general principles, Lord Atkin's neighbour principle also encouraged academics to think about what the duty enquiry was really doing. Although early commentary dismissed the duty concept as little more than a 'fifth wheel on the coach', closer analysis of the concept itself, rather than just Lord Atkin's foreseeability-based formula, soon revealed that it in fact performed a dual function, involving both factual and notional elements. The focus of the factual duty enquiry is, like Lord Atkin's neighbour dictum, on whether harm to the claimant was a foreseeable consequence of the defendant's carelessness, whilst the focus of the notional enquiry is on whether the law of negligence ought to apply to the broad situation to which the particular facts belong. Whilst the notional aspect of the duty enquiry is 'invaluable', the factual aspect would appear to be entirely unnecessary, or, as Buckland would say, a 'fifth wheel on the coach'. In particular, it will necessarily be present where the other elements of the negligence enquiry have been satisfied, and will only ever be absent where either the fault or remoteness elements are absent also. *Palsgraf* and *Bourhill*, however, argued that, even if the same result could be achieved at the remoteness stage, factual duty is nevertheless required, as harming an unforeseeable plaintiff does not constitute a 'wrong', and the wrong in the law of negligence

driving? There seems little doubt that the reason consideration which motivated the House of Lords was the fact that the damage suffered by the claimant was shock-induced' (Lunney and Oliphant (n 43) 134). See also: Richard Kidner, 'Resiling From the Anns Principle: The Variable Nature of Proximity in Negligence' (1987) 7 LS 319, 325; Jenny Steele, 'Scepticism and the Law of Negligence' (1993) 52 CLJ 437, 453; RFV Heuston, 'Donoghue v Stevenson in Retrospect' (1957) 20 MLR 1, 17; Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (n 86) 491–93; Beever, *Rediscovering the Law of Negligence* (n 143) 408.

[153] See also: Nolan, 'Deconstructing the Duty of Care' (n 43) 582–85.

[154] Comments to this effect are also made in Smith, 'Clarification of Duty—Remoteness Probems through a New Physiology of Negligence: Economic Loss, a Test Case' (n 53) 231.

is the breach of a duty of care, not the breach of a duty of care causing damage that is not too remote. However, this argument both relied on a problematic understanding of the meaning of 'wrong', as well as required arbitrary and problematic distinctions between the various consequences of the defendant's careless behaviour to be drawn. Despite these problems, factual duty remains an orthodox part of the duty enquiry, most likely for the same reason it entered the law in the first place; a reluctance to overrule existing authority. Whilst such reluctance might be understandable prior to the Practice Statement of 1966, the presence of factual duty today is actively harmful, and should be removed from the negligence enquiry. The duty enquiry, then, is best understood as a purely notional question, which will now be further examined in chapters five and six.