Winneke C.J. and Gowans J. appear to indicate there is no middle ground between actions covered by the exemption clause and action (such as conversion by the defendants themselves as distinct from their servants) which would be a breach sufficiently fundamental to repudiate the contract.

Lush J., however, does suggest an implied limitation.

> It would, however, be proper in the light of the authorities cited to read down the clause so that it applies only so long as the carrier is maintaining the objective of moving the goods to Melbourne, even though he may have departed from the contract in point of method, route, time or otherwise. Thus if the carrier has stolen, destroyed, or given away the goods the clause will cease to apply.[29]

This is still a very wide interpretation of clause 5 and appears to be, in one respect, in complete contradiction of the High Court's decision in *T.N.T. (Melb.) Pty Ltd v. May & Baker (Aust.) Pty Ltd.*[30] In that case, the court held that any deviation in route, unauthorized by the consignor, was a breach of contract, thus making all clauses, including exemption clauses, inoperative. Yet Lush J. specifically states that deviation will be covered so long as the general 'objective of moving the goods to Melbourne' is maintained.

It would thus appear that the cases decided prior to the *Suisse Atlantique Case*[31] have by no means been rendered useless. The distinction between authorized and unauthorized conversion of goods by servants of the carrier, suggested in the *Sze Hai Tong Bank case*[32] clearly still survives. The justice of this distinction would seem to be very questionable. One would have thought that conversion of goods by the carrier's servants, whether authorized by the carrier or not, would have been so utterly alien to the basic obligations of the carrier under the contract as to bring the 'four corners' rule into operation and amount to a fundamental breach of the contract—but the Full Court held this was not the case.

The extraordinary result is thus obtained that where (as in *T.N.T. (Melb.) Pty Ltd v. May & Baker (Aust.) Pty Ltd*)[33] no negligence is proved against either the carrier or his servants but the carrier deviated from his normal route, the carrier is liable for any loss that would not have occurred if there had been no deviation, but where a servant actually converts the goods to his own use without the knowledge of the carrier, the carrier is not liable.

This position indicates that the High Court might at some future date reconsider some of the very artificial distinctions that currently operate in this branch of the law.

IAN RENARD

ANDREWS v. WILLIAMS[1]

Damage—Remoteness—Nervous shock caused by mother's death in motor accident—Reasonable foreseeability of damage

A car driven by an employee of the appellant, Williams, collided with a car driven by the respondent, Andrews. The respondent's mother was also travelling in the same car. The respondent suffered physical injuries in the collision.

[29] *Ibid.* 18.
[30] (1966) 115 C.L.R. 353; [1967] A.L.R. 3.
[31] [1967] A.C. 361; [1966] 2 All E.R. 61.
[32] [1959] A.C. 576; [1959] 3 All E.R. 182.
[33] (1966) 115 C.L.R. 353; [1967] A.L.R. 3.
[1] [1967] V.R. 831. Full Court of the Supreme Court of Victoria; Winneke C.J., Little and Lush JJ. The judgment was read by Winneke C.J.

Her mother was killed. Due to the fact that she was rendered unconscious by the accident, the respondent was unaware of the death of her mother until several days later, when she was apprised of the fact while she was recovering in hospital. There was evidence that the news of her mother's death contributed to causing a reaction of nervous anxiety and depression. The jury found that the appellant had been negligent and negated the performance of any contributory negligence by Andrews. The trial judge[2] directed the jury that they could take into account the respondent's reaction of nervousness and depression when they assessed the amount of damages. The jury subsequently decided in favour of the respondent and awarded her $24,657 and $343 interest. The appellant then appealed to the Full Court of the Supreme Court of Victoria, which affirmed the decision of the Supreme Court in favour of the respondent.

The significance of this case arises from the appellant's contention that the damage which the respondent suffered as a result of being informed of her mother's death was too remote in law for the appellant to be held liable. This contention was based upon the apparent change in the law which had been carried out by the Privy Council in *The Wagon Mound No. 1.*[3] But before further analysis is made of *Andrews v. Williams,* it is necessary to consider in general terms the law relating to the remoteness of damage and the place of the now famous *Wagon Mound No. 1.*[4]

The practicalities of life and affairs demand that the law defines a boundary beyond which damages are not legally recoverable.[5] The attempts to fix the location of this crucial boundary have given rise to two contrasting, conflicting doctrines. One doctrine, usually associated with *Re Polemis,*[6] but founded on authority dating from 1870,[7] is that the defendant, once a duty of care and a breach of that duty have been established, is liable for all damage which is 'the direct consequence of the act'.[8] The other doctrine holds that although a duty of care and a breach of that duty have been established, the defendant is only liable for the damage which was reasonably foreseeable at the time of the accident. Although based upon 19th century authority[9] this doctrine has its most well-known expression in the recent case of *The Wagon Mound No. 1.*[10] From 1921 the former 'direct consequences' or *Re Polemis*[11] rule was in ascendancy. This situation lasted until 1961[12] when the Privy Council rehabilitated the doctrine of limiting liability for damages to the area within the bourne of reasonable foresight. This change in the law raises the question of how different in practice the reasonable foresight method of delimiting damages is from the 'direct consequences' test.

In fact, the difference in practical effect between the two doctrines seems to be small. The courts perceived the danger of the 'direct consequences' test becoming an open ended device and took the view that 'in the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on

[2] Gowans J.
[3] *Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co. Ltd* [1961] A.C. 388; [1961] 1 All E.R. 404.
[4] *Ibid.*
[5] For a full discussion of issues involved in the question of the remoteness of damage, see Fleming, *The Law of Torts* (3rd ed. 1965) 176 ff.
[6] *Re Polemis and Anor and Furness Withy and Co. Ltd* [1921] 3 K.B. 560; 126 L.T. 154.
[7] *Smith v. London and South Western Railway Co.* (1870) L.R.6C.P.14; 23 LT 678.
[8] *Re Polemis* [1921] 3 K.B. 560, 574 *per* Warrington L.J.
[9] *Greenland v. Chaplin* (1850) 5 Ex. 243, 248. See also Fleming, *op. cit.*
[10] [1961] A.C. 388.
[11] [1921] 3 K.B. 560.
[12] *The Wagon Mound No. 1* [1961] A.C. 388; [1961] 1 All E.R. 404.

grounds of pure logic but simply for practical reasons'.[13] While the 'direct consequences' method was thus limited, the 'reasonable foresight' method of *The Wagon Mound* has been liberalized, by extending the kind of damage which actually had to be foreseen,[14] and by considering the magnitude of the risk when deciding what a reasonable person would foresee.[15]

Andrews v. Williams was decided after *The Wagon Mound No. 1*[16] and it gives an indication of how the courts implement the 'reasonable foresight' rule. Counsel for the appellant argued that the nervous shock which the respondent suffered on being told of her mother's death was, *inter alia*, not reasonably foreseeable and therefore beyond the scope of the appellant's liability. If this was so then the trial judge had misdirected the jury with regard to this aspect of the respondent's injuries. To this argument was added the contention that as the respondent was informed of her mother's death by a third party the shock was not due to any negligence of the appellant.

In dealing with these arguments the court distinguished between the question of causation and the issue of the extent of liability for damage, Winneke C.J., speaking for the court, cited a High Court *dictum*[17] that 'the term "reasonable foreseeability" is not, in itself, a test of causation; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act'.[18] The court then decided that there was evidence upon which the jury could reasonably conclude that the appellant had caused the respondent's nervous shock. Turning its attention to the matter of reasonable foreseeability, the Full Court held that the nervous shock was foreseeable, even though knowledge of her mother's death was communicated to her by a third person. This conclusion was based upon reasoning used by the trial judge, that it was certainly reasonably foreseeable that if the respondent perceived her mother's death at the time of the accident she might have suffered injury by nervous shock, and that it was also reasonably foreseeable that knowledge of her mother's death might be delayed by her unconsciousness and only conveyed to the respondent after some time. Since the nervous shock was held to be reasonably foreseeable, the appellant's contention failed.

The significance of this decision is not in any rules or principles of law which it has established but merely in indicating the way in which the courts are going to apply *The Wagon Mound* rule. Basically, *Andrews v. Williams* augurs well for the courts adopting a liberal interpretation of *The Wagon Mound No. 1*.[19] The Full Court regarded the actions of a third person as reasonably foreseeable in this case. The liberality displayed by the court is further emphasized by the fact that the injury which they regarded as foreseeable was nervous shock, a type of injury which the courts have traditionally treated with reserve.[20] The desirability of a liberal approach to a principle which could be construed narrowly seems obvious in modern technological society, which is capable of producing highly complicated accident situations. Although a defendant should not be penalized to a limitless extent beyond his degree of fault, it is better that the trend leans in this direction than that inno-

[13] *Liesbosch v. Edison* [1933] A.C. 449, 460 *per* Lord Wright.

[14] *Hughes v. The Lord Advocate* [1963] A.C. 837; [1963] 1 All E.R. 705. It is worth noting that the Full Court made no direct reference to the distinctions *Hughes v. Lord Advocate* raised regarding the degree of specificity required in foreseeing the kind of injury which occurred.

[15] *Overseas Tankship (U.K.) Ltd v. The Miller Steamship Co. Pty Ltd and Anor* [1967] 1 A.C. 617; (1966) A.L.J.R. 165 (*The Wagon Mound No. 2*).

[16] [1961] A.C. 388.

[17] *Chapman v. Hearse* (1961) 106 C.L.R. 112, 122; [1962] A.L.R. 379, 383.

[18] *Andrews v. Williams* [1906] V.R. 831, 833.

[19] [1961] A.C. 388.

[20] Fleming, *op cit.* 154.

cent victims suffer both their injuries and the financial expenses of their injuries.

The main criticism of this liberal approach to *The Wagon Mound No. 1*[21] is that it has a potential tendency to stretch the concept of foreseeability to a stage where the prevision of a minor prophet is required on behalf of the defendant. This creates a discord between legal formula and judicial practice which is undesirable from a stand-point of jurisprudential theory, but which is perhaps to be expected in coping with the problem of defining the location of such a will-of-the-wisp as the point beyond which a defendant should not be held liable for the consequences of his wrongful acts.

R. T. UREN

THE QUEEN v. DISTRICT COURT OF THE NORTHERN DISTRICT OF QUEENSLAND AND OTHERS; *Ex parte* THOMPSON[1]

National Service—Exemption on basis of conscientious belief—whether certiorari *lies to quash order of District Court.*

Bruce Thomas Thompson was called to render military service to the Commonwealth Military Forces under the National Service Act 1951-65 (Cth). He applied to the Magistrate's Court—the court of summary jurisdiction prescribed by s.29B of the Act—to be exempted from military service on the grounds that he was a person falling within the ambit of s.29A(1) of the Act which provides that:

> A person whose conscientious beliefs do not allow him to engage in any form of naval, military or air force service is, so long as he holds those beliefs, exempt from liability to render service under the act.

The application was dismissed by the Stipendiary Magistrate.

Thompson then had recourse to s.29B and appealed to the District Court sitting as a court of review. The District Court Judge found that:

(a) Thompson sincerely believed that the involvement of Australian troops in the Vietnam war was morally wrong.
(b) Thompson's beliefs precluded him from serving in the military forces in either a combatant or non-combatant capacity.
(c) Thompson was not however a complete pacifist. He was prepared to bear arms in circumstances where this was necessary for self-defence. He did not consider Vietnam such a case.[2]

Notwithstanding, the District Court judge found that Thompson's situation was not covered by s.29A. This section in his opinion applied only to 'a person whose conscientious beliefs do not allow him to engage in any form of military service *in any circumstances*'.[3]

These findings by the judge, on which he based his decision, were transcribed in full, but not incorporated into the court's order. This merely stated that Thompson had appealed against the Stipendiary Magistrate's decision, and '[I]t is this day adjudged that the appeal shall be dismissed and that there shall be no order as to costs'.[4]

Appeals to higher courts for a full review of the District Court's decision were prevented by s.29C of the Act which declared that the decision of this Court was to be 'final and conclusive'. Thus Thompson had to resort to an application to the High Court for a writ of *certiorari*, alleging an error of law by the District Court judge apparent on the face of the Court's record. This

[21] [1961] A.C. 388.

[1] (1968) 42 A.L.J.R. 173. High Court of Australia; Barwick C.J., McTiernan, Kitto, Taylor and Menzies JJ.

[2] *Ibid.* 173. [3] *Ibid.* [4] *Ibid.* 176.