It will be interesting to see if a duty of care in negligence is owed by barristers to litigants. Solicitors also might find themselves challenged by disappointed "beneficiaries" under a will, but whether such persons can bring themselves within the language of the formulations used by their Lordships remains to be seen.

Whatever the categories of persons who are shown to owe a duty of care, the problem becomes more and more complex the further apart or less proximate the two parties are. Consider the position posed by Denning, L.J. in *Candler* v. *Crane, Christmas & Co.* of a marine hydrographer whose negligence in preparing a chart leads to the loss of a ship.[52] The shipping company's loss is financial but flows from damage to its property and assuming the damage not to be too remote then it would have been recoverable under the old law. But what of the insurance company which pays out for the loss? It now seems to have an action against the hydrographer even though the payment was the result of the risk insured against. So, of course, the hydrographer must either disclaim liability when preparing the chart, an action which would discourage business, or take out a substantial insurance policy himself. The result seems to be more business for insurance companies.

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A RECONCILIATION PROBLEM IN REMOTENESS

HUGHES v. *LORD ADVOCATE*[1] and *DOUGHTY* v. *TURNER MANUFACTURING CO. LTD.*[2]

I *The Background*

The Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd.*[3] laid down that foreseeability is the test for determining the issue of remoteness of damage when it arises in an action for negligence: ". . . it is the foresight of the reasonable man which alone can determine responsibility."[4] It was stressed in the judgment of their lordships that the questions of duty, breach and damage must be dealt with in relation to each head of damage claimed separately: To hold one "liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just".[5] The question of liability for some other damage is, therefore, irrelevant.

The Board did not, however, suggest that the exact consequences which occurred had to be shown to be foreseeable, since they recognized that no one "can be assumed to know all the processes of nature".[6] Nor did the case itself determine exactly how much of what occurs the law requires to be

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E. T. Sweeting & Son Ltd. (1963) 1 W.L.R. 665. A builder is liable for his negligence to a person who comes to live in the house after it is built—provided he is not a spec. builder. There is a duty on a man who is less in a position to do harm because he is likely to be under independent supervision but no duty on the spec. builder who is under no supervision at all because the latter completes and sells the house.

The anomalous position of the spec. builder flows from the existing authority of *Bottomley* v. *Bannister* (1932) 1 K.B. 458 and *Otto* v. *Bolton & Norris, supra,* as well as the House of Lords decision in *Cavalier* v. *Pope* (1906) A.C. 428.

[52] *Op. cit.* n. 3 at 183.

[1] (1963) A.C. 837.

[2] (1964) 1 All E.R. 98.

[3] (1961) A.C. 389.

[4] At 424.

[5] At 425.

[6] At 426.

foreseeable before liability ensues. It was said, indeed, that a man will be liable for damage "if he foresaw or could reasonably foresee the intervening events which led to its being done".[7] Again it was said that the damage must be "of such a kind"[8] as the reasonable man should have foreseen. The possibilities as to the proper manner of stating the rule which are left open by the Privy Council are numerous. Conceding that there is no need to show that the actual injury is foreseeable, one might still be required to show that injury or damage similar to, or of the kind of, that actually suffered was foreseeable; or that the actual events following upon the defendant's act and leading to the injury were foreseeable; or that events of a kind similar to these were foreseeable. Again, the rule might be that some combination of these things would have to be proved by the plaintiff. It will be observed that the possible requirements we have mentioned fall into two groups, one of which is pointed to by each of the last two passages in the Privy Council judgment we have quoted. In the first group the emphasis is placed on the character of the consequences to the person injured themselves while in the second the emphasis is rather on the manner of occurrence of the injury. For the sake of brevity, while recognizing the looseness of the terms, we shall hereafter refer to this distinction as the distinction between the injury and the accident.

II *Hughes* v. *Lord Advocate: The Facts*

The authority of the *Overseas Tankship Case* was accepted by the House of Lords in *Hughes* v. *Lord Advocate*. A manhole in an Edinburgh street was opened under statutory powers for the purpose of maintaining underground telephone equipment. It was covered with a tent and, in the evening, left by the workmen unguarded but surrounded by warning paraffin lamps. Soon afterwards the pursuer-appellant, an eight year old boy, and a companion approached the shelter and entered it, taking with them a length of rope, a lantern and a ladder which the workmen had left nearby. After they had explored the manhole, the lantern they had taken with them came to be knocked or dropped into it and a violent explosion took place. The appellant either fell into the manhole as a result of losing his balance or was thrown into it by the force of the explosion. In any case as a result of the explosion, the effect of which upon him was magnified in the confined space of the manhole, he suffered severe injuries. The accepted explanation of the explosion was that when the lamp fell into the manhole and was broken, paraffin escaped and enough was vaporised to create an explosive mixture which was detonated by the naked light of the lamp.

In these circumstances an action in negligence was brought against the Lord Advocate as representing the Postmaster-General, the breach of duty alleged being the leaving the shelter and manhole unattended and insufficiently guarded. The respondent averred that the appellant was a trespasser and, therefore, there was no duty to take reasonable care for his safety. Alternatively it was denied that the chain of events leading up to the accident was such as ought to have been foreseen. The Lord Ordinary held that the appellant did not have a sufficient interest in the road to raise the defence that the plaintiff was a trespasser, but that the accident was not such as ought reasonably to have been foreseen by the Post Office employees. This was affirmed on appeal by the First Division of the Court of Session, and from this decision in turn the present appeal arose.

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[7] At 426.
[8] At 426.

III *Hughes* v. *Lord Advocate: The Argument and Judgments*

Counsel for the appellant argued that the accident was of a type that could be foreseen, being within the risk created. There was a foreseeable risk of injury by the lamp, a known source of danger. Counsel for the respondent accepted the holding below on trespass and did not press the question of contributory negligence. While agreeing that minor burning might have been foreseen, he contended that a thirty-foot flame resulting from an explosion was different in kind from any consequence which might have been foreseen as flowing from a small naked flame. In sum, it was common ground that some injury by burning could have been foreseen, but an explosion could not. Nevertheless, in the outcome the House of Lords found for the plaintiff.

Lord Guest took the view that the paraffin lamp, shelter tent and manhole were all allurements to the inquisitive child and that together they rendered the situation one of potential danger. Thus there was a duty of care. In considering the question of remoteness he said: ". . . it is unnecessary that the precise details leading up to the accident should have been reasonably foreseeable: it is sufficient if the accident which occurred is of a type which should have been foreseeable."[9] The explosion he regarded as "a non-essential element in the dangerous situation created by the allurement".[10] In his view: "The test might better be put thus: Was the igniting of paraffin outside the lamp by the flame a foreseeable consequence of the breach of duty?"[11] "An explosion is only one way in which burning can be caused."[12] He regarded burning and explosion as the same kind of accident which could arise from the dangerous situation.

Lord Pearce[13] agreed. His formulation of the remoteness rule was:

> When an accident is of a different type and kind from anything that a defender could have foreseen he is not liable for it (see the *Wagon Mound*). But to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable.[14]

Quoting Denning, L.J., as he then was, in *Roe* v. *Minister of Health*[15] he stated that the result was "within the risk created by the negligence".[16] There was only "an unexpected manifestation of the apprehended physical dangers".[17]

On the same issue of remoteness Lord Reid said that the fact that damage is greater than foreseeable is no defence unless "the damage can be regarded as differing in kind from what was foreseeable".[18] Here he considered that the damage "did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature".[19] But Lord Reid considered that a distinct requirement was that it should be shown "that the defender's fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way".[20] Lord Reid disagreed, on one interpretation of it, with a passage in the judgment of Lord Thankerton in *Glasgow Corporation* v. *Muir*.[21] Lord Thankerton appeared to say that the appellants would not be made liable for damage which happened in a way not reasonably to be anticipated.[22] Lord Reid, on the other hand, denied that "the mere fact

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[9] (1963) A.C. 855.
[10] At 856.
[11] At 856.
[12] At 856.
[13] At 857.
[14] At 857.
[15] (1954) 2 Q.B. 66 at 85.
[16] (1963) A.C. at 858.
[17] At 858.
[18] At 845.
[19] At 845.
[20] At 845.
[21] (1943) A.C. 448.
[22] At 456.

that the way in which the accident happened could not be anticipated is enough to exclude liability although there was a breach of duty and that breach of duty in fact caused damage of a kind that could have been anticipated".[23] For Lord Reid, Lord Thankerton's statement could only be defended if it meant that the accident must be caused by the defender's fault and not by the intrusion of a new and unexpected factor.

Lord Jenkins asked himself the question "whether the occurrence of an explosion such as did in fact take place in the manhole was a happening which could reasonably have been foreseen".[24] Thinking the distinction between burning and explosion too fine to warrant acceptance, he rejected the view expressed by Lord Sorn, typical of the view in the court below, that "the explosion was a thing that differed in kind from the kind of thing which could be said to have been reasonably foreseeable".[25] Lord Morris of Borth-y-Gest supported his brethren on the vital issue by saying that the defenders were not absolved from liability because they did not envisage the precise concatenation of circumstances which led up to the accident, since they were bound to safeguard the pursuer against the type or kind of occurrence which in fact happened.[26]

IV *Hughes* v. *Lord Advocate*: *Its Contribution to the Rules of Remoteness*

A main theme reiterated throughout the judgments is that the harm—or the accident—must be of a kind or type that is reasonably foreseeable. There is unanimity on this requirement and it follows what was said in the *Overseas Tankship Case*. But the case did not, any more than its predecessor, attempt to settle the question whether there are categories of harm, or accident, laid down by law for the purpose of interpreting the rule. That there are such categories might have been suggested by the statement in the *Overseas Tankship Case* that:

> "There can be no doubt since *Bourhill* v. *Young* that the test of *liability for shock* is foreseeability of *injury by shock*." Their Lordships substitute the word "fire" for "shock" and endorse this statement of the law.[27]

In *Hughes* v. *Lord Advocate*, however, their Lordships were content to say that explosion was within the kind of harm that could be foreseen in the case before them. They do not appear to say that explosion and fire are always the same kind of harm for legal purposes. It is submitted that any such course would be unwise and that the question whether the accident is within the risk should remain a question of fact in each case without the aid of categorizing rules. In *Hughes* v. *Lord Advocate* the risk arose out of a complex set of facts which lent special colour to the risk itself. It should not therefore follow that the U.S. Circuit Court of Appeals in *Republic of France* v. *U.S.*[28] was wrong in holding that explosion damage was unforeseeable, although fire damage was foreseeable. In that case ammonium nitrate fertilizer exploded in a fire which occurred while a ship was being loaded in Texas. The formulation which the High Court made of the problem for itself in *Chapman* v. *Hearse*[29] would, it is submitted, support the present view. It was there regarded as sufficient "to ask whether a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow a collision between two vehicles on a dark wet night upon a busy highway".[30] It can be seen that there is no effort here to put the accident which occurred in any specific category and the question is

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[23] (1963) A.C. at 846.
[24] At 848.
[25] (1961) S.C. 310 at 333.
[26] (1963) A.C. 837 at 853.
[27] (1961) A.C. 389 at 426.
[28] (1961) 291 F. 2d 395 (5th Cir.).
[29] (1961) 106 C.L.R. 112.
[30] At 120.

made throughout the formulation one for the particular circumstances.

A further question which *Hughes* v. *Lord Advocate* raises but does not solve is the relationship of questions of remoteness of damage to questions of causation in the analysis of the tort of negligence. It will be observed from the account of the judgments above that while most of the law lords regarded the vital issue as remoteness of damage, Lord Reid treated the issue, on one acceptable basis of argument at any rate, as causation. While in the instant case the same result was reached, and perhaps would always be reached if "a new and unexpected factor"[31] means "an unforeseeable factor which renders the accident a different kind of accident", it is submitted that this mode of argument is unsatisfactory in its tendency to duplicate unnecessarily the questions asked in the analysis of the tort of negligence and is contrary to the strictures of the Privy Council in the *Overseas Tankship Case* on attempts to solve what can satisfactorily be handled as part of the problem of remoteness by complicating the legal notions of causation.

V *Doughty* v. *Turner Manufacturing Co. Ltd.*: *The Facts*

Hughes v. *Lord Advocate* was considered by the Court of Appeal in *Doughty* v. *Turner Manufacturing Co. Ltd.*[32] The plaintiff workman was injured at the factory where he worked when another workman inadvertently knocked a loose compound asbestos cement cover, causing it to fall four to six inches into a cauldron of very hot molten liquid. The extreme heat caused a chemical change in the asbestos cement, creating or releasing water, which turned to steam, which one or two minutes later caused an eruption of molten liquid from the cauldron. The plaintiff was injured by some of the liquid. Until the accident had been investigated no one knew or suspected that heat would cause this chemical reaction, but (as the trial judge found) the plaintiff's employers should have realised that the fall of the cover into the liquid might cause a dangerous splash. The plaintiff, however, was not injured by any splash, and at the time when he was injured any danger from splashing had ceased. The trial judge held for the defendants and the plaintiff appealed to the Court of Appeal, which dismissed the appeal.

VI *Doughty* v. *Turner Manufacturing Co. Ltd.*: *The Judgments*

Lord Pearce took his stand upon the judgment of Lord Reid in *Hughes* v. *Lord Advocate*. In *Hughes* v. *Lord Advocate* there was a known source of danger, the lamp, and no intrusion of a new and unexpected factor, in Lord Reid's view. But here, Lord Pearce making the same analysis, found that the source of danger, "the potential eruptive qualities of the covers when immersed in great heat were not suspected and they were not a known source of danger".[33] It was said to be apparent that splashes were in a different category from the accident that occurred, and so were not a variant of the foreseeable. Again quoting Lord Reid, Lord Pearce said that the cause of the accident was the intrusion of a new and unexpected factor. The case was therefore distinguishable from *Hughes* v. *Lord Advocate*.

Harman, L.J., after retailing the argument that a splash causing burns was foreseeable and that the explosion causing burns was really only a magnified splash which also caused burns, rejected it and came to the conclusion that the damage was of an entirely different kind from the foreseeable splash.[34] He added: "This (referring to the eruption) had nothing to do with the agitation caused by dropping the board into the cyanide."[35]

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[31] (1963) A.C. 837 at 845.
[32] (1964) 1 All E.R. 98.
[33] At 101.
[34] At 102.
[35] At 102.

By contrast to the rest of the court, Diplock, L.J. based his judgment on the absence of any breach of duty. In the court below it had been suggested that since it was known that some substances would cause an explosion on immersion, there was an absolute duty to ensure that no such substance was used. Diplock, L.J. rejected this view of the law. His Lordship then pointed out that the defendant's only duty was in relation to the risk of foreseeable harm, namely to use reasonable care to avoid knocking the cover into the liquid or allowing it to slip in such a way as to cause a splash which would injure the plaintiff. "Failure to avoid knocking it into the liquid . . . was of itself no breach of duty to the plaintiff."[36] Even if there was a splash it caused no injury.[37]

VII *Doughty* v. *Turner Manufacturing Co. Ltd.*: *The Analysis of the Tort of Negligence*

The relationship to one another of the judgments in this case calls attention to the fact that even if the new approach to the problem of remoteness in the *Overseas Tankship Case* made the law on this particular topic more intelligible and easier to apply, it did little to settle the appropriate mode of analysis for the tort of negligence as a whole, and the prominence given to the question of causation by Lord Reid has done nothing to assist matters in this regard. In the present case both Lord Pearce and Harman, L.J., appear to have assumed that there was a breach of duty in failing to guard against splashing, but Diplock, L.J. found that there was no breach of duty. The breach of duty apparently assumed to have taken place by Lord Pearce and Harman, L.J. was a failure to take care to guard against splashing and it certainly would seem that this assumption was unjustified having regard to the fact that the cover was dropped only a few inches. If each of the elements in the tort of negligence duty, breach, and damage are examined in their conventional order it would, therefore, appear that Diplock, L.J.'s analysis was the strictly correct one. Moreover, on Diplock, L.J.'s analysis, the case of *Hughes* v. *Lord Advocate* and the case presently under discussion are readily reconcilable. It is submitted, indeed, that this will come to be regarded as the true distinction between the two cases, namely, that in *Hughes* v. *Lord Advocate* there was a breach of duty in relation to a risk within the contemplation of the reasonable man and within which the actual damage fell, whereas in *Doughty* v. *Turner Manufacturing Co. Ltd.* there was no failure to guard against the only risk which was within the contemplation of a reasonable man—the splashing.

On the same kind of analysis, however, no objection could be made to the procedure of Lord Pearce and Harman, L.J., if we understand it as being the adoption of an invitation by counsel to assume a breach of duty in relation to the possibility of a splash caused by the impact and discuss the question of liability on the basis of the damage issues, involving the distinguishability or otherwise of *Hughes* v. *Lord Advocate* in these respects. By holding this case distinguishable they decided that even if there was a breach of duty the independently existing requirement of damage was not proved by the plaintiff.

Putting it, however, from the viewpoint of a different possible means of analysis of the tort of negligence, they decided there was no *relevant* breach of duty. This latter way of putting it would be justified if we took the rule about breach of duty to be that the breach must be proved in relation to a risk of damage of the same kind as that which actually occurs. This is

[36] At 104. [37] At 104.

certainly now the rule about liability for the tort of negligence and it is a matter of convenience whether we say that where the damage is not of this kind there may be a breach but no liability, or whether we prefer to say that the defendant has not committed the relevant breach. But it seems that in the present case there was a difference in the factual assumptions on which Diplock, L.J. and the other judges proceeded, and not a mere difference in mode of analysis.

VIII *Doughty* v. *Turner Manufacturing Co. Ltd.*: *Its Contribution to the Rules of Remoteness*

Lord Pearce and Harman, L.J., by treating the issue of damage as the central one in the case, at least demonstrated that it is not merely the kind of *injury*, which could certainly have been regarded as of the foreseeable kind in the present case, but the kind of *accident* which must be foreseeable in order to involve the defendant in liability. It is still, unfortunately, uncertain whether we regard the requirement that the kind of intervening circumstances should be foreseeable as part of the causation of damage issue or as part of the remoteness issue, the reliance by Lord Pearce on Lord Reid having continued the suggestion that it is part of the causation issue. It appears, in any case, that Lord Pearce insisted on proof that the kind of intervening events were foreseeable for one reason or another, and Harman, L.J. seems to agree with this, though his language is less clear.

Considered as a case concerned with the damage element in negligence, the distinction between this case and *Hughes* v. *Lord Advocate* is much less clear than Diplock, L.J. was able to make it. For all the argumentation of Lord Pearce and Diplock, L.J., it is submitted that there was no indisputably correct theoretical answer on this basis to the argument of plaintiff's counsel. But the result in any case confirms the earlier submission that questions of the "kind of accident" are questions of fact not to be determined on the basis of broad categories laid down by law.

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THE DUTY OF CARE OWED BY AN OCCUPIER TO A TRESPASSER

COMMISSIONER FOR RAILWAYS v. *QUINLAN*[1]

On 5th January, 1956 Q was injured when a truck which he was driving collided with a steam train operated by the Commissioner for Railways at a private level crossing, guarded by unlocked gates, which gave access to a farm upon one side and to a public highway upon the other. In the weeks immediately prior to the accident, the crossing had been used by vehicles in connection with building operations carried on by the Housing Commission of New South Wales on the farm side of the line, although the Commissioner for Railways had no actual or imputed knowledge of the use of the crossing in connection with these or any other operations. In 1955 the Housing Commission had sought permission to use the crossing and this had been refused.

Evidence adduced at the hearing disclosed that the gates had been open at the time of the accident, that Q had halted at the gates and had neither

[1] (1965) 38 A.L.J.R. 10.