Crim.A. 47/56

DAVID MALKA

v.

THE ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal
[October 24, 1956]
Before Silberg J., Goitein J., and Berinson J.

Criminal Law - Criminal Code Ordinance, 1936, s. 218 - *Causing death unintentionally - Negligence - Measure of liability - Civil liability - Civil Wrongs Ordinance,* 1944, s. 60(a) - *Application of rule in Hadley v. Baxendale - No liability for consequences of unusual series of events.*

On September 1, 1953, the appellant, who was driving a truck, knocked down a child of two years of age, Shimon Manan, causing a fracture of the arm. The child was taken to hospital where the doctors examined the arm, discovered the fracture, but also found that the fracture was a closed one so that the child's blood had not come in contact with the road. The doctors considered that there was, for this reason, no need to give the child an antitetanus injection, and that in fact it "might have been dangerous to do so. The child remained under treatment in hospital, but a few days later the wound opened. The child was given antibiotics but no injection against tetanus. On September 9 the child died.

The appellant was charged under s. 218 of the Criminal Code Ordinance [1)] in the District Court of Haifa with having unintentionally caused the death of manan. The court held that the appellant had been

[1)] Criminal Code Ordinance, 1936, S. 218.

Causing death by want of precaution or by carelessness

218. Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence, unintentionally causes the death of another person, is guilty by carelessness of a misdemeanour and is liable to imprisonment for two years or to a fine of one hundred pounds

negligent in driving the truck when he knocked down Manan and that there was a causal connection between the accident and the death and accordingly found the appellant guilty of causing the death within the meaning of the section. The appellant was fined I.L. 75.-.

Held : allowing the appeal, that although the appellant was negligent when he knocked down the child, his negligence was not the cause of the death of the child since it was not possible for the appellant to foresee what the doctors had failed to foresee.

Held further, that the measure of liability for the purposes of s. 218 of the Criminal Code Ordinance, 1936, is the same as the measure of civil liability in the law of torts, and that s. 60(a) of the Civil Wrongs Ordinance, 1944, which deals with the measure of liability in tort for the consequences of an act, determines that measure according to the rule in Hadley v. Baxendale, (1854), 156 E.R. 145, and not that in re Polemis [1921] 3 K.B. 560.

Israel cases referred to :

(l) *Cr. A.* 35/52 - *Shalom Rotenstreich* v. *Attorney-General ;* (1953), 7 *P.D.* 58.

(2) *C.A.* 224/51 - *Noah Pritzker and Others* v *Moshe* Fridman;(1953), 7 P.D. 674.

(3) *C.A.* 22/49 - *Zecharia Levi v. Abba Leon Mousaf;* (1950), 4 P.D. 558.

English cases referred to:

(4) *In re Polemis and Another and Furness, Withy and Co., Ltd.,* [1921] 3 *K.B.* 560.

(5) *Roe v. Minister of Health and Another; Wooley v. Same,* [1954] 2 Q.B. 66.

(6) *Minister of Pensions v. Chennel,* [1947] *K.B.* 250.

(7) Smith v. *The London and South Western Railway Co.,* (1870) *L.R. 6 C.P.* 14.

(8) *Greenland v. Chaplin,* (1850), 5 *Ex.* 243: 19 *L.J. (Ex.)* 293.

(9) *Aldham v. United Dairies (London) Ltd.,* [1940] 1 K.B. 507.

(10) Thorogood v. Van den Berghs and Jurens, Ltd., [1951] 1 *All E.R.* 682.

(11) *Hambrook v. Stokes Brothers,* [1925] 1 *K.B.* 141.

(12) *Lilley v. Doubleday,* (1881), 7 *Q.B.D.* 510.

(13) *Sharp v. Powell,* (1872), *L.R. 7 C.P.* 253.

(14) *The Arpad,* (1935), 152 L.T. 521.

(15) O*wners of Dredger Liesbosh v. Owners of Steampship Edison,* [1933] *A.C.* 449.

(16) *Haddley and Another v. Baxendale and Others,* (1854)156 *E.R.* 145.
(17) *Weld-Blundell v. Stephens,* [1920] *A.C.* 956.
(18) *Scott v. Shepherd,* (1773) 96 *E.R.* 525.
(19) *The Argentino,* (1889) 59 L.T. 914,

Hayoun for the appellant.
Eltis, Deputy State Attorney, for the respondent.

SILBERG J.: This is an appeal, by leave, against a judgment of the Haifa District Court, in which the appellant was convicted of an offence under section 218 of the Criminal Code Ordinance, 1936 (unintentionally causing death), and fined I.L. 75.-.

2. Chance has played a large part in the facts of this case. Though the beginning was something small - a slight injury which was not in itself dangerous and was expected to heal, and which had resulted from the appellant's negligence (as was found by the court) - the end was fatal, after a series of further occurrences, not due to negligence, caused partly by the hand of man, and partly by Providence. These caused the death of the victim, a child of tender years, through an unusual coincidence. The legal question - in fact, the only question - confronting us is, to what extent the "final act" can be related to the "original negligence" of the appellant. This question falls in part within the category of the complex of problems which arose in the well-known "Polemis Controversy" (4), but in part also can be distinguished from it, because of the criminal character of the case, as will be explained later.

3. The facts briefly are these: -

(a) On September l, 1953, at 9.30 in the morning, the appellant drove a tender laden with watermelons through the streets of Haifa, and while turning from Stanton Street into the Omar-el-Khateeb Street, at a point about ten meters from the cross-roads, his vehicle collided with a two-year-old child (Shimon Manan), who was knocked down or fell to the ground, and this caused a fracture in his arm above the elbow. The appellant's arguments - that he drove very slowly, that he did not and could not have seen the injured child because of a cartload of prickly pears which obstructed his view, and other similar excuses - did not

avail him; the learned judge did not believe what he said and she, relying on proper and sufficient evidence, held, as a finding of fact, which we see no ground for disagreeing with or departing from, that that injury was definitely caused by the appellant's negligent driving.

(b) On the same day, shortly after the accident occurred, the child was taken to the Rothschild Hospital. An X-ray was taken, the fracture in his arm was found and it was put in plaster. He did not receive an anti-tetanus injection, for the doctors were of the opinion that this was not necessary, as the place of the injury was a closed fracture, and the child's blood had not come into contact with the ground. According to the doctors who testified: -

> "If there is no open wound, anti-tetanus injections are never given... This anti-tetanus is not a remedy entirely without danger, and it is not just given anyhow - only in cases where it is clear to us that there is an open wound... In this case, the wound was not open, and there was no reason for giving an anti-tetanus injection" (Dr.Kliffer, pp. 2, 3 of the record).

> "In this case, there was no reason for giving the child an anti-tetanus injection, because the skin on the body was closed" (Dr. Peyser, ibid., p. 14).

> "In this case, that of Shimon Manan, there was no justification for giving an anti-tetanus injection..." (Dr.Galli, ibid., p. 21).

One witness disposes of the matter by saying: -

> "When there is no wound (he is obviously referring here to the case when there is no *open* wound) and a person falls to the ground, the chances of his getting tetanus are almost nil." (ibid. p. 22)

> "In eight years that I have been working in the Rothschild Hospital in the surgical ward, that was the first case of a patient getting tetanus after a closed fracture" (Dr. Kliffer, ibid., p. 3).

(c) After a few days had passed, a necrosis developed in the child's skin in the region of the fracture. The cellular tissue in the same spot died, the skin blackened and contracted, and, as a result, the wound opened and was no longer "closed". To avoid infection and sepsis, the child's doctors began to use anti-biotics, penicillin and streptomycin, but nevertheless did not give him an anti-tetanus injection.

> "The fact that a necrosis had taken place did not render it necessary to give an anti-tetanus injection" (Dr. Peyser, ibid., p. 13).

> "Infection (he is referring to the infection of the pus excretion of the necrosis) is something secondary, that appeared after a few days, and in such a case it is not usual to give an anti-tetanus injection" (Dr. Kliffer, ibid., p. 3).

If I apprehend this medical expert's opinion correctly, what he intended to say is this: that as at that moment, several days had passed since the day that the body had come into contact with the ground. and during all of those days the wound had been closed, there was no room then for fearing that the tetanus germs would penetrate the opening that had been formed with the coming of the necrosis.

(d) This was the opinion of the experienced doctors, but the facts, to their surprise, proved them wrong. On September 9, 1953, early in the morning, eight full days after the accident had occurred, there suddenly appeared in the injured child's body symptoms of trismus and ophisthotonus, that is to say, convulsion of the mouth and twisting of the spinal cord - characteristic signs of tetanus. The doctors' efforts to save him were of no avail, and at 11 o'clock at night, the child died as a result of the above-mentioned illness. The cause of the illness was, according to the evidence of the doctors and the court's finding, the penetration of tetanus germs at the time when (or after) the said necrosis took place.

(e) Thereafter the appellant was charged with unintentionally causing death, an offence under section 218 of the Criminal Code Ordinance, and was brought to trial before the Haifa District Court. The learned judge held that, notwithstanding the unexpected turn of

events, there was a direct causal connection between the negligent act of the appellant and the death of the child, and convicted him of the offence under the section. The learned judge drew an analogy between the present case and the *Polemis* case (4), and concluded therefrom that the foreseeability of the concrete result is not a prior condition to convicting a person according to section 218. The learned judge saw the distinction between the civil action for tort in the *Polemis case* (4), and the criminal prosecution in the present case, but thought that it did not affect the matter because in the judgment of this court in *Rotenstreich v. Attorney-General* (1), the court had likened the degree of criminal liability under s. 218 to the degree of civil liability in actions in tort. It is against that judgment of the Haifa District Court that this appeal is brought.

4. It is well known that the bare causal connection between the act and the result does not alone suffice to impose legal liability upon the doer of the act. I wish to state that the test of the *causa sine qua non* is not the sole test for determining legal responsibility. One will not find an act or event which is not preceded by a long series, in fact an infinite series, of necessary causes, and although from the scientific or philosophical point of view, as John Stuart Mill has taught us, there is no ground whatsoever for discriminating between them, they cannot all be regarded as of equal weight as regards legal liability, civil or criminal. By holding otherwise, one must eventually arrive at the first man as the prime cause for all of the sins of mankind. Therefore Anglo-Saxon jurists on both sides of the Atlantic have been long wrestling with the problems of the limitation of the causes which preceded a given act, of how to define them and how to make of them an unvarying instrument for the purpose of practical use in court. Much ink has been spilt over this knotty problem, and the coins that have been minted to explain it have long been chipped or lost their lustre: expressions like "proximate cause", "remote cause", "direct cause", "material", "substantial", "effective", "causa causans", and the like - all these being tests suggested by judges and writers as additional tests, second in order but equal in degree, to the primary test of the "necessary cause" (James and Perry, Legal Cause, 60 Yale Law Journal, 1951, pp. 761-811; Hart and Honore, Causation in the Law, 72 Law Quarterly Review, 1956, pp. 58-90, 260-281, 398-417).

From amongst all those obscure tests and distinctions, one test, much more certain and clear, raises its head, and that is the test of "foreseeability", that is, the possibility of

foreseeing the outcome of an act; though even this test has been fenced around to prevent it being the subject of criticism. It is a firm rule in the law of torts that, if the defendant, as a reasonable man, did not anticipate and could not have anticipated, that his act (or his omission) would bring in its wake any injurious consequence whatsoever to someone to whom he owes a duty of care, then he is not liable to pay for the damage that has been caused, notwithstanding that his act (from the physical point of view) constituted a necessary cause, or causa sine qua non, of the injurious consequences. In other words, the reasonable foreseeability of the very fact of damage occurring is a necessary and prior condition of legal liability. For "there is no negligence unless there was a corresponding duty of care" *(Pritsker v. Fridmnan* (2), at p. 682), and "the test of duty depends, without doubt, on what you should foresee" (Denning L.J. in *Roe v. Minister of Health* (5), at p. 84; cf. Denning J., in *Minister of Pensions v. Chennel* (6), at p. 253).

On the other hand, it is clear and beyond dispute, that the absence of foreseeability as regards the extent and dimensions of the damage does not serve to prevent the imposing of liability, and even the unforeseen part of the damage will be charged to the person who negligently causes the damage: -

> "If the negligence were once established, it would be no answer that it did much more damage than was expected..." *(Smith v. London and South Western Railway Co.* (7), at p. 22).

But the problem once more arises in the intermediate case, where the foreseeability is lacking, not in relation to the fact of the damage occuring nor in relation to its extent, but "in relation to the kind of damage", or to put it more accurately, in relation to the remarkable way in which, in this specific case, the injurious process worked. It should be added that there is no relationship between the two ways, the actual and the potential; for example, instead of the expected theft, there comes a flood! This group of cases parallels, in fact, what the Sages of the Talmud describe in a remarkably apposite definition:"The beginning was with negligence, though the end was through an accident", with the additional attribute that both of them are to be found within one "causal chain", that is to say, were it not for the negligence, the accident would not have happened. Take, for example, the well-known case of the "cot of bulrushes", which is the Talmudic

"counterpart" to the English *Polemis* case (4), except that it preceded it by 1600 years. It is worthwhile examining that case, for it contains, in a concise passage, all the elements of the concept: -

> "A certain man deposited money with his neighbour, who placed it in a cot of bulrushes. Then it was stolen. Said R. Yosef: Though it was proper care in respect to thieves, yet it was negligence in respect to fire: hence the beginning (of the trusteeship) was with negligence though its end was through an accident, (and therefore) he is liable." (Babylonian Talmud, Baba Metsiah, 42a).

> "It once happened that a man deposited money with another who put it in a fence made of reeds. The money lay well hidden in a pocket within the fence, when it was stolen." The Sages said, "Although this is a proper safeguard against thieves it is not a proper safeguard against fire... and whenever a bailee is negligent at the beginning, though in the end its loss occurs through force (or accident) he is liable" (Maimonides, Chapter 4 of Milchot She'elah Pikadon, Halacha 6).

Here there was a causal connection between the negligence and the accident, and the accident "comes because of the negligence", as the commentators say, for had he not left the money there, it would not have been stolen, for the thieves, apparently, did not look in other places. On the other hand, the law is different in the following case: -

> "If he (the bailee) was negligent - (sc. the negligence of the bailee to whose care the animal was entrusted, placing it in a stable improperly closed (Rashi, ibid.)) - and it went out into a meadow (sc. to graze), and died naturally .. .Raba in Rabbah's name ruled that he is not liable... not only is he not liable on the principle that, if the beginning is through negligence, and the end through an accident, one is not liable, but even on the view that he might otherwise be liable, in this case he is not. Why? Because we say what difference is there to the Angel of Death where one places the animal" (Baba Metsiah, 36b).

Here there is no causal connection between the negligence and the accident, for the Angel of Death does not distinguish between "here" and "there", and would have taken his toll in the cowshed, too; so the keeper is not liable, even though he was negligent in keeping the cow in an unenclosed shed.

This, in a nutshell, presents us with both sides of the Polemis principle, as will be explained later on, but with one important difference which should be emphasized right at the very outset: the Polemis rule concerned the duty derived from the law of torts; the rule of the "cot of bulrushes" concerned the duty in contract, a special contractual duty derived from the law of bailment. I shall consider this distinction at a later stage in the judgment.

5. To turn now to the Polemis case itself. What happened there was this:

In February, 1917, the charterers hired the Greek vessel "Thrasyvoulos" from its owners, Polemis and Co., for the duration of the war, and transported cargo in it to North Africa. Clause 5 of the charterparty provided that at the end of the period of the charter, the charterers were to return the ship in the same condition as they received it from the owners, subject to ordinary wear.

On July 17, 1917, the ship reached Casablanca with a varied cargo containing cases of benzine and petrol. Unloading by Arab workers and winchmen, taken on from the shore on behalf of the ship's charterers, began immediately, and preceded without a hitch for four days. On the fourth day, the 21st of the month, when the workers unloading the ship were about to bring up a number of cases from the hold on to the deck by means of a bridge of planks which had been set up by them for that purpose, a heavy board fell into the hold below, struck something, and, as a result of the blow, a spark ignited the petrol vapour escaping from inside the tins, there was a burst of flame, and the ship was destroyed by fire.

Polemis and Co. demanded payment of the cost of the ship from the charterers, the charterers denied liability, and the matter came before arbitrators who were requested to give their judgment in the form of a case stated. In their statement of claim, the plaintiffs accused the defendants of negligence causing the loss of the ship, but as an alternative

ground, they relied on the duty of returning the ship which the defendants had taken upon themselves, as stated in clause 5 of the aforementioned charterparty. Paragraph 5 of the statement of claim, as quoted by McNair in his article, "This Polemis Business", published in the Cambridge Law Journal, Vol, 4, pp. 125-145, is as follows: -

> "5. The Charterers are not relieved of liability for the negligence of the agents and/or servants or employees under the said charterparty and the Owners' claim for loss and damage occasioned to them by reason of the negligence aforesaid. Alternatively the Claimants say that the Charterers are liable in damages under Clause 5 of the said charterparty." *(Loc cit.,* p. 127.)

This means that Polemis was riding two horses at one and the same time - both on the law of torts and on the law of contract; and this should not be overlooked when coming to examine and criticize the Polemis decision.

The arbitrators gave their judgment in the form of a case stated, and made the following principal findings of fact: -

> "(a) That the ship was lost by fire.
>
> (b) That the fire arose from a spark igniting petrol vapour in the hold.
>
> (c) That the spark was caused by the falling board coming into contact with some substance in the hold.
>
> (d) That the fall of the board was caused by the negligence of the Arabs (other than the winchmen) engaged in the task of discharging.
>
> (e) That the said Arabs were employed by the Charterers or their Agent the Cie. Transatlantique.

(f) That the causing of the spark could not reasonably have been anticipated from the falling of the board though some damage to the ship might reasonably have been anticipated." (Ibid., p. 134.)

The legal conclusion to be drawn from all those facts was left to the decision of the court; Sankey J. in the court of first instance, and the Court of Appeal, upheld the owner's claim, and held the "Thrasyvoulos" charterers liable to pay the cost of the ship. I do not know what the legal argument before Sankey J. was, but the arguments submitted to the Court of Appeal by counsel for the parties are known, and of these I shall note one: that which turned, in a somewhat curious manner, on the alternative versions and different texts that were discovered of Pollock C.B.'s dictum in the case of *Greenland v. Chaplin* (8). The charterers' counsel, Mr. Wright and Mr. Porter (who were later to become so famous as Law Lords), quoted the version appearing in the Exchequer Reports, according to which the judge had said: -

"I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." (at p. 248)

On the other hand, Polemis' counsel produced the Law Journal Reports, in which Pollock C.B.'s words were quoted thus : -

"I entertain considerable doubt whether a man is responsible for all the possible consequences that may, under any circumstances, arise in respect of mischief which by no possibility could he have foreseen, and which no reasonable person under any circumstances could be called upon to have anticipated." (19 L.J. (Ex.) 295.)

Here, in the latter passage, there are missing the words, "who is guilty of negligence", meaning that, if his very conduct was negligent by dint of any foreseeable damage whatsoever, which could have resulted from it, he is liable for all actual damage which came

about as a consequence of his conduct, even if he could not (at the time of the act) have seen "that which was to come about".

Indeed, that was the rule which was accepted by the judges of the Court of Appeal, and on account of which they held the charterers liable to pay to Polemis the cost of that ship. Three Judgments were given by the three Lords Justices, and they all had the same purpose, though they did not express it in the same way: -

> "In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellants' junior counsel (the reference is to Mr. Porter) sought to draw a distinction between the anticipation of the *extent* of the damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act... I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipation of the person whose negligent act had produced the damage appears to me to be irrelevant" (Bankes L.J. in *Re Polemis* (4), at pp. 571-572.)

> "The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act." (Warrington L.J., ibid.,at p. 574.)

> "To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it (the act) in

> fact 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, and not due to the operation of independant causes having no connection with the negligent act, except that they could not avoid its results." (Scrutton L.J., ibid., p. 577; cf. *Aldham v. United Dairies (London)* Ltd. (9), per du Parcq L.J.,at p. 513.)

It is stated here, "the fact that the damage it in fact causes is not the exact kind of damage etc". Does that exclude the case where the actual damage differs considerably from the expected damage? In my opinion, it does not. It seems to me that the expression, "is not exactly", is not in itself quite accurate, and the Polemis case itself demonstrates that. For it is impossible to say that the conflagration of the petrol vapour as a consequence of the falling of the plank is only not exactly the same damage that is usually expected whenever a heavy block of wood rolls over and falls from the deck to the ship's hold.

That, therefore, was the Polemis rule, which was propounded 35 years ago in England by the Court of Appeal. Attempts have been made to express it concisely, and one of the coins that the learned have minted from that rule is the well-known dictum of the great American judge. Holmes: -

> "The tort once established, the tortfeasor takes the risk of consequences." (Oliver Wendell Holmes, Holmes-Pollock Letters, Vol. 2, p. 88, quoted by Lord Wright in "Re Polemis", (1957), 14 Modern Law Review 393.)

But if I am not mistaken, the correctness of that dictum has been attacked by one of the authors; with the very greatest respect, it contains something of a circulus vitiosus, for so long as you have not determined the liability for the consequences, you have not yet identified the tortfeasors. It appears to me that, if we really must search for and find a concise formula as a device against forgetfulness, then the most pungent one will be the Talmudic formula: -

> "The beginning was with negligence though its end was through an accident, and therefore he is liable – so long as the accident occurs because of negligence."

Except that, as a consequence of transferring the word "negligence" from the law of bailment to the law of torts, a slight change will take place in its meaning, and instead of "a breach of the duty of guarding", will come "a breach of the duty of care." Subject to the differences flowing from that change, the Polemis rule will be identical with the rule of the "cot of bulrushes", with the addition of the rounding-off notion which was expressed in the picturesque saying: "What difference does one place or another make to the Angel of Death".

6. Now, having reached this point, let us see how that rule can be applied to the case under appeal. But before we do that, let us retrace our steps for a brief moment, and take one more look at the details of the case. There is no doubt that from the point of view of the remarkable course in which the events followed one upon the other, an accident of the kind with which we are faced is infinitely more rare, less expected, than that which happened to the Greek ship in the Polemis case. The arbitrators found that the firing of the spark by the falling of the board was something that could not have been foreseen, but we do not know, for example, what they would have said about the reasonable foreseeability of the onlooker, had the persons engaged in the matter been, not simple porters from Casablanca, but an expert group of chemists and physicists who know what the natural reaction of petrol vapour is, and what the temperature created by the falling and colliding of that solid body is likely to be. In the present case, we are freed entirely from the necessity of going into such questions and conjectures; here, indeed, they were not only laymen, but also experts, professional men - by which I mean the senior doctors who treated the deceased child - and it did not occur to them, nor did they imagine, that the contact with the ground at the place where there was the closed wound, would result several days later in the penetration of tetanus germs into the child's body. Conclusive proof thereof may be found in the fact that during the whole of those eight days, even after the necrosis occurred, they refrained - with their eyes wide open they refrained - from giving him an anti-tetanus injection; and if expert doctors thought on these lines, surely no more can be expected of an ordinary man in the street, such as the appellant Malka!

In trying, therefore, to bring the actual facts of this case within the rules of the Polemis case as defined by us above, it is necessary to find, and we do find, that all the conditions of the rule are fulfilled:

(a) the beginning was with negligence - namely, the appellant's negligent driving which was calculated, on any reasonable view, to run down and kill the child;
(b) its end was through an accident - namely, the child's death from tetanus, something which even the expert doctors could not foresee; and
(c) the accident came because of the negligence - for but for the injury to the arm, there would have been no necrosis and no penetration of the tetanus germs, and the child would not have died.

The present case, therfore, fulfils with considerable accuracy all the conditions of the Polemis rule, and if we answer all three questions in the affirmative and reach the conclusions -

(a) that the Polemis rule is the rule applicable in England;
(b) that the decision also binds the courts in Israel;
(c) that this rule, *mutatis mutandis,* also applies to the offence under section 218,

we shall have no alternative but to confirm the appellant's conviction. Let us therefore, examine these three questions one by one.

7. Questions (a) and (b) arose in this court, from one point of view and to a certain degree, in *Levi v. Mousaf* (3), but in the end no decision was given on them as they called for further consideration and as was stated by Agranat J. at p. 570, there was no need to decide them in that appeal. As for the first question, Agranat J. states - and with respect, I agree with him - that : -

"The rule laid down in the Polemis case has not been entirely crystallized in England . . . . . and has not yet had its final confirmation in the House of Lords" (p. 569).

However, in the meantime (after judgment was given in the said case of Levi), the English Court of Appeal had the opportunity of dealing with this question once again, and it openly, and expressly, followed the decision laid down in the Polemis case while noting it as one which had not been shaken till this day. I refer to the judgment given in 1951 by the Court of Appeal in the case of *Thorogood v. Van den Berghs and Jurgens, Ltd.* (10), at pp. 690, 692, and if, indeed, a final ruling is not always established on the basis of two judgments, the accepted view is that for the time being, and for as long as the House of Lords does not intervene in the matter, the Polemis rule is to be regarded as the current rule on this subject in English law; and even its distinguished and strongest critic, Professor Goodhart in his brilliant article, "The Imaginary Necktie and Re Polemis", who wrote at the beginning of the article that: -

> "It may not be out of place to put forward… the view that Re Polemis is of doubtful ancestry and that its sterility during recent years has been of benefit to the law",

writes in another place that : -

> "Only in the House of Lords could the criticisms that had been advanced against the rule be taken into consideration, and its validity be open to question. *Thorogood's* case (10), is therefore conclusive on the point that Re Polemis is still alive, but there is nothing in Asquith L.J.'s judgment which can be regarded as an argument in favour of its continued existence" ((1952) 68 Law Quarterly Review 514, at p. 517).

To sum up, if indeed the question what is the current rule on this subject in the courts of England, is of relevance for us, then the question has been answered - the Polemis rule !

8. I said. "If indeed the question is of relevance, etc.", and with that we reach the second question mentioned above, namely, whether or not the Polemis decision also binds the courts in Israel. The cautiousness of approach necessitated here is founded on the meaning to be attached to the provisions of section 60(a) of the Civil Wrongs Ordinance, and the

question is whether the section should not be regarded as a clear and express departure by the Palestinian legislator from the ruling prevailing in English law.

In form, this question resembles the question that arose (but was not settled) in *Levi* v. *Mousaf* (3). In substance it differs from it entirely. I will not attempt here to draw positive conclusions from the expressions to be found in the said section; I am aware of the considerable significance attaching to those expressions, having regard to the presence of both scientific exactitude and legal realism. I shall content myself here with a negative argument, and will endeavour to show that in that same section 60(a), the legislator did not intend, and could not have intended, to adopt the standard laid down in the Polemis decision.

9. I will explain my meaning. The great argument carried on between the judges and the authors over the confines of the Polemic rule is well-known; it is a "frontier dispute" which has never been settled to this day. One view, propounded apparently by some authorities, though very much in the minority, is that the Polemis rule refers only to breaches of contract. That is the opinion of Sargant L.J. in the case of *Hambrook v. Stokes* (11), which concerned a widower's action for the payment of damages for the death of his wife, caused as the result of the negligent act of the defendant: -

> " …And In re Polemis and Furness, Withy & Co., dealt with a case in which there was a duty by contract between the plaintiff and the defendant, while here we have to determine, in the absence of contract, what is the extent of the duty of the defendant, and whether the plaintiff's wife fell within the area of the duty..." (at p. 164).

That view is not entirely to be dismissed. Admittedly, no one can dispute the fact that in the Polemis case there were proper and well-ordered contractual relations between the owners of the ship and its charterers and, as we have seen above, the plaintiffs in that case even relied in their statement of claim on the duty of restoring the subject-matter of the charterparty as laid down in clause 5 of the agreement. Yet there was extra-contractual negligence on the part of the charterers, which was equally capable of rendering them liable to pay for the owners' damage. In the *Hambrook* case (11), on the other hand, the

negligence was non-contractual, "pure and simple", as we have already seen. Sargant L.J.'s distinction, therefore, is not, with respect, entirely without foundation; and as for the correctness of its legal content, the scales of logic are decidedly balanced here, and it is possible to an equal extent to argue one way or the other: that the material is contractual rather than tortious, or that the material is tortious rather than contractual. A fair example of this equilibrium may be found in Lord Porter's article on "The Measure of Damages in Contract and Tort", in which these words of the American scholar, Sedgwick, are quoted:-

> "A just rule therefore would put upon a person who commits a tort the risk of all proximate consequences of his wrong, but upon him who breaks a contract such risk as he could have foreseen when he undertook the duty and this appears to be the conclusion of the law." (Sedgwick on Damages, 9th Ed., p. 261, quoted in Lord Porter's article, The Measure of Damages in Contract and Tort, 5 Cam. L.J. 176, at pp. 185-186).

And Lord Porter himself replies in these words: -

> "But is the rule necessarily just? One might, I should have thought, as readily transpose the wording of the statement and say one who commits a tort has the obligation to be careful imposed upon him by the general law, and therefore should be subject only to liability for damage which he can foresee as likely to follow from his negligence, whereas he who breaks a contract voluntarily exposes himself to a risk he need not have undertaken and therefore should incur all the proximate consequences of his voluntary act" (ibid. p. 186).

It is obvious that common sense cannot decide the matter here, and that Sargant L.J.'s opinion, too, has logic on its side. It should not be forgotten that the Polemis case concerns property placed in the hands of the defendant, and that is also a ground for making the rule stricter, for the liability here is for an event, anticipated or unanticipated, which prevents any possibility of the owners getting their property back. Perhaps it would be proper to make use here, *mutatis mutandis,* of the judgment that was delivered by an English judge as early

as 1881 - a judgment applying, as it were, the Polemis rule which was yet to be born, to the special duty of the bailee towards the owner. That case concerned goods which the bailee (or depositee) had transferred to another place of safekeeping, where they were burned without any fault on his part; the judge said: -

> "I think the plaintiff is entitled to judgment.... The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other." (Grove J., in *Lilley v. Doubledcry* (12); vide Georke T. Washington, Damages in Contract at Common Law, 48 L.Q.R. 90, at p. 105, note 83; cf. judgment of Grove J. in *Sharp v. Powell* (13), at pp. 259-260).

A rule was laid down here strikingly resembling the above-mentioned Talmudic ruling. Before us is a rule of bailment, in the spirit of the principle of the "cot of bulrushes", juxtaposed with the "exception" of "what difference does one place or another make to the Angel of Death" (on the assumption that the actual transferring from place to place is "negligence"). And as we saw earlier, that indeed is the Talmudic rule which is the counterpart to the Polemis rule. Here is the link and the bridge between the two cases.

To be quite accurate, in order to avoid any misunderstanding as regards that comparison, I wish to say further that, if indeed the rule, "the beginning was with negligence though its end was through an accident, and therefore he is liable", applies principally to matters of bailment (cf. Babylonian Talmud, Baba Metsiah, 36^b, 42^a, 93^b; Maimonides, Chapter 4 of Hilchot She'ela ve-Pikadon, Halacha 6 ; Chapter 3 of Hilchot Schirut, Halachot Schirut, Halachot 9, 10 : Shulhan Aruh Choshen Mishpat, Art. 291, 9), nevertheless, in its periphery, it has penetrated somewhat into the field of torts, torts of property, that is, property that causes damage (Babylonian Talmud, Baba Kama, 21^b, 56^a ; Maimonides, Chapter 2 of Hilchot Nizkei Mamon, Halacha 15; Shulhan Aruh, Hoshen Mishpat, Art. 390, 12; Art. 396, 1). The reason is that here too is something analogous to the "law of bailment", for, according to the sources of Hebrew law, liability for the torts of

property which cause damage arises from the fact that "its safekeeping is your responsibility" (Baba Kama, 9[b]).

It is possible, therefore, to place the rule on a single notional basis, and say: "The Talmudic Polemis rule, namely, the rule that the beginning was with negligence though its end was through an accident, and therefore he is liable, is confined neither to contracts nor to torts; it has become linked to matters pertaining to the duty to safeguard property, whether it is someone else's property and the duty is to safeguard it against damage, or whether it is one's own property and the duty is to keep it from causing damage."

Noting that in the concrete instance of Polemis, also, there was a duty to safeguard property, it would be desirable to try and regard the Polemis rule from this aspect also. That would raise the number of possible interpretations of the Polemis rule to four.

10. To return to the interpretation given by Sargant L.J., I shall conclude by noting the fact that that interpretation has not found any response among lawyers, and that they have passed it over without any discussion worthy of the name. Two schools of thought remain: one holding the view that the Polemis rule is limited to cases of tort only, and the other holding that it applies both to tort and to contract. We shall see later that in order to decide the specific question with which we are engaged, we do not need to adopt either position in that dispute, but will draw out. conclusions for the most part from the arguments themselves that have been put forward for and against in that debate.

Let us see how those views were expressed and what were the reasons upon which they were based. Scrutton L.J.'s view (which assumes special significance from the fact that he was, as will be recalled, one of the judges who sat in the Polemis case) was that the application of the Polemis rule is limited to actions in tort only. These are his words:

> "The real distinction is, I think, between a tort, thedamages for which do not require notice to the wrongdoer of their probability, and contract, where *Hadley v. Baxendale* requires the consequence to be in the contemplation of the parties" *(The Arpad* (14), at p. 526; cf. *Liesbosch v. Edison* (15), at p. 461).

Whatever the precise meaning of the terms "probability", "notice of their probability" and "contemplation" may be, one thing is clear, namely, that in the opinion of Scrutton L.J., the application of the Polemis rule, to which he was very obviously referring in the first half of the passage, is limited to cases of tort alone.

And we learn one thing more, the great importance of which will later become apparent, and that is that the measure of liability imposed according to the Polemis rule is not identical with the measure of liability that was imposed, a hundred years ago, in *Hadley v. Baxendale* (16). It follows that whoever defines the measure of liability of a tortfeasor in terms that were used in *Hadey v. Baxendale,* testifies to the fact that he himself does not believe in the Polemis doctrine and that he wishes to have nothing to do with the stricter measure of liability laid down in that decision.

The judgment in the case of *Hadley v. Baxendale* was delivered in 1854 by Alderson B, and to this day the judge and his judgment are referred to with the greatest respect; the decision is regarded as a classic ruling, sound and wellfounded, which is beyond appeal and beyond question. For the sake of accuracy, I shall quote it here exactly as it was written in the original:

> "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it" (at p. 151).

It is stated here: "either - or", but it is clear that to the extent that I have spoken in this judgment of applying the principle in *Hadley v. Baxendaie* to torts, the intention was, of course, to the first alternative, namely, to the limiting of the tortfeasor's liability to such

damage as may fairly and reasonably be considered as damage, "arising naturally, i.e., according to the usual course of things", from the tortious act itself.

The question of the relationship between the Hadley rule and the Polemis rule has played and still plays an important part in the great debate taking place over the Polemis rule's "area of jurisdiction": whether it is limited to tort cases, or whether it also covers cases of breach of contract. Professor McNair, for instance, in his article, "This Polemis Business", referred to earlier, expresses the opinion that the Polemis rule is limited to cases of tort, saying: -

> "In short, I submit that, in the light of the foregoing documents, the Polemis decision is not an authority upon the measure of damages for breach of contract and must be confined in its effects to the law of tort; the shipowner's claim was pleaded alternatively in contract and in tort, but they obtained judgment in tort. In support of this submission I beg to make the following comments upon the case: -
>
> .....
>
> "10. The judgments of the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) are familiar to all readers, and it is unnecessary to make more than two comments. (i) Throughout they treat the action as a claim for damages for negligence, that being the cause of action upon which Sankey J. gave the judgment appealed from.(ii) Nowhere do they refer to Hadley v. Baxendale, which it would have been impossible to ignore if they had been laying down a principle governing the measure of damages in tort and in breach of contract alike, and which, decided in the Court of Exchequer, has since been recognised by the Court of Appeal and is so well established that even the House of Lords would hesitate to disturb it."

In his footsteps another author, in a very profound article dealing with the question of damages in contract at common law, states: -

> "Hadley v. Baxendale was at once recognised as the leading authority in this branch of the law, and it still maintains its position. That position as Dr. McNair has mustered persuasive evidence to show, will doubtless remain unaffected by the decision of the Court of Appeal in the Polemis case... Whatever the validity of Re Polemis as a case in tort, it cannot affect the authority of Hadley v. Baxendale, in the field of contract" (George T. Washington, op. cit., at p. 105).

Professor Goodhart, too, in the aforementioned article, shows that the view prevailing among those learned in the law of contract is that the Hadley rule and not the Polemis rule holds sway in the field of damages in contract. Although Professor Goodhart himself shares the opinion that the judges in the Polemis case intended to spread the net of that decision over both cases of tort and contract, he uses that approach itself to attack the very rule in Polemis, and thus proves how very wrong the judges in the Polemis case were in ignoring the classic ruling laid down in *Hadley v. Baxendale, or* treating it as of no effect. For the consistent idea passing like a silken thread through his brilliant article is that Polemis and *Hadley v. Baxendale* cannot live under one roof. Thus, he states:

> "It is difficult, therefore, to see how the rule in Polemis can be reconciled with that in Hadley v. Baxendale, however much we may strain the language used in the latter judgment" (loc. cit., p. 521).

> "...there are only two possible solutions to the problem we are considering: either Polemis and Hadley v. Baxendale must be heard to mean the same thing, which will require a feat of the greatest mental ingenuity by the re-interpretation of Hadley v. Baxendale, or Polemis must be held to have been incorrectly decided, as I believe it was" (ibid., p. 522).

The upshot of all that - and that is the first link in the chain of legal conclusions necessary for deciding this appeal - is that the Polemis test and the Hadley test are not the

same thing, and that there is a difference both in degree and in kind between the two said measures of liability.

12. I said earlier, in paragraph 6 of this judgment, that if we make use of the Polemis rule as the correct standard by which to determine the criminal liability of the appellant under section 218, we must uphold his conviction for that offence. Now, let us put to ourselves the question, which may perhaps seem at this moment to be purely academic, and that is, what would have been the present appellant's fate if it had been provided somewhere in the statute or case law that in fact liability under section 218 is to be examined in the light of the test of *Hadley v. Baxendale?* (I am referring, of course, to the fact alternative in it).

It seems to me that the question has but one answer, and that is that the appellant in this case would be found not guilty. I am at one with those who think that, in the final analysis, and after peeling off all the layers that have encrusted it, the test of the Hadley rule is a test of "foreseeability" (see Goodhart, loc. cit., p. 511; and examine closely the words of Cheshire and Fifoot, Law of Contract, 3rd edition, p. 493). The latter part of the rule confirms the earlier part, for there is no real difference between foreseeability and contemplation, so far as the actual principle of the need to foresee is concerned.

Now, since the foreseeability as regards the very fact of damage occurring is, as we have seen earlier, a prior, necessary condition for the operation of the Polemis rule as well, the corollary that divided the two rules can only be this: that according to the Hadley rule, the foreseeability must embrace not only the very fact of damage occurring, but also the "kind" of damage, as distinct from its "degree", as I explained in paragraph 4 of this judgment.

It follows that if mutatis mutandis we are to examine the liability of an offender under section 118 according to the civil test of *Hadley v. Baxendale,* we should have to acquit the appellant. For when that rule is applied to the present case, the "foreseeability as regards the character of the fatal result" becomes a requisite for conviction here, and in the present case there is not a shadow of doubt that the character of the actual result, namely, the child's death from tetanus as a consequence of the penetration of germs into the body three full days after its contact with the ground, was so remarkable and rare, so unusual and

abnormal, that no reasonable man could have anticipated it - as the evidence of the doctors proves - and here there was certainly no adequate or sufficient link between the actual and potential result of the accident.

13. So we reach the decisive question: what is the standard by which to measure the liability of a person accused of an offence under section 218 of the Criminal Code Ordinance? That question divides itself into two:

(a) How is that measure of liability related to the measure of liability employed in the law of torts - does it differ from it, or is it the same?

(b) If it is said that it is the same, then what are the principles prevailing in the law of torts in Israel law as regards the problem before us?

The second question, as I have already implied, turns on the interpretation to be given to the provision in section 60(a) of the Civil Wrongs Ordinance, and briefly put, the question is whether that provision contains within it the Polemis test, or not.

14. As far as the first question is concerned, the answer is that it is the same. No one will be found guilty of an offence under section 218, unless he has failed to fulfil his duty of care towards the victim, to the extent to which such failure would have obliged him to pay damages if a civil action in tort had been brought against him for the very same act of negligence. This conclusion clearly follows from the rule laid down by the majority of the judges of this court in the appeal of *Rotenstreich* (1), above mentioned. It makes no difference whatsoever whether the matter under consideration is (as it was in the case of *Rotenstreich)* the question of the offender's liability towards a trespasser, or whether it is (as in this appeal) the question of the measure of liability for the results flowing from his act of negligence; for both of them shelter beneath the shade of one central idea. The learned judge was fundamentally right, therefore, when she sought the solution to the problem among the sources of the civil law concerning the law of torts.

15. Turning now to the second question, which concerns the proper meaning of section 60(a), I have reached the conclusion that the provision in that section expresses, not the

Polemis principle, but rather the "opposing" principle, that is, the one laid down in *Hadley v. Baxendale.* It is very easy to demonstrate this: we have only to carry out a sort of "comparison of handwriting", that is to say, a comparison of the text of section 60(a) with the text of the Hadley rule, in order to recognise that simple and obvious conclusion.

The text of the Hadley rule, namely, the first part which can be transferred, *mutatis mutandis,* to the law of torts, is :-

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or..."

Whilst the language of section 60(a) of the Civil Wrongs Ordinance is: -

> "(a) where the plaintiff has suffered damage compensation shall only be awarded in respect of such damage as would naturally arise in the usual course of things and which directly arose from the defendant's civil wrong."

We see that section 60(a) follows word for word the test laid down, as regards foreseeability, in *Hadley v. Baxendale.* Moreover, it seems that the additional condition also (as regards the causal connection) stated in the first part, namely, "and which directly arose from the civil wrong", is none other than the adequate "counterpart" to the corresponding first part of the Hadley rule - damage "arising... from such breach of contract itself". All that the interpreters of the term "directly" have up to now succeeded in their wisdom in suggesting as its meaning is, that there has been no *novus actus interveniens* between the cause and the effect, and it seems to me that that is the purport of the words, "damage arising from such breach of contract itself" (Chitty on Contracts, 21st edition, p. 411; Goodhart, op. cit., p. 530; James-Perry, op. cit., pp. 804-805; 62 Corpus Juris 1115; Clerk and Lindsell on Torts, 9th edition, pp. 135-143 ; cf. Lord Sumner in *Weld-Blundell v. Stephens* (17), at pp. 983-984 ; De Grey C.J., in *Scott v. Shepherd* (18), at pp. 528-529).

Identity of text and definition is at all times and in all places a sure sign of identity of content, and the conclusion to be drawn is that the Palestinian legislator adopted not the Polemis rule, but its "opposite", in section 60(a).

This is not to be wondered at, and no tears need be shed over it. The Polems principle is full of difficulty and stumbling-blocks, and has never enjoyed the loud plaudits of writers in the law. Only the force of precedent and "the power of the spoken word" have managed to continue its unwanted existence in England, and thus it will remain until expressly overruled by the House of Lords. The Palestinian legislator was free from those shackless, and so substituted for the Polemis rule the more reasonable rule in *Hadley v. Baxendale.* And it may be truly said that there is nothing novel in that, that it is not the first time it has happened, and that a great English judge once said that *Hadley* v. *Baxendale* is a rule covering both cases in contract and cases in tort (Lord Esher M.R., in *The Argentino* (19), at p. 916).

16. To sum up: earlier in this judgment we put forward these three basic conclusions : -

(a) that the measure of liability according to section 218 is the same as the measure of civil liability applicable in the law of torts ;

(b) that section 60(a), which deals with the measure of liability in tort for the consequences of an act determines that measure according to the test *of Hadley v. Baxendale;*

(c) that in the light of the *Hadley v. Baxendale* test, the present appellant is not liable for the fatal consequence that flowed, in the course of an unusual series of events, from his act of negligence.

And the final conclusion to be drawn therefrom is that the appellant has not committed the offence set out in section 218 of the Criminal Code Ordinance.

Accordingly, I think that the appeal should be allowed and that the conviction and sentence should be quashed.

GOITEIN J., I agree.

BERINSON J., I agree.

Appeal allowed. Conviction and sentence set aside.
Judgment given on October 24, 1956.