**Verdictive Foreseeability**

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# Abstract

*Verdicts state conclusions rather than reasons. Official verdicts can ‘make something so’. In holding individuals responsible, foreseeability verdicts reflect folk morality. In factive mode they can be true or false. In attributive mode they are normative. Many other legal concepts exhibit similar ambivalence. Status, context and Austinian illocutionary force are needed to distinguish these modes. Verdicts could appear at each stage of algorithmic reasoning but reasons contributing to one verdict should not reappear at a later stage. But neither folk morality nor legal reasoning are algorithmic.*

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# Foreseeability’s Pervasiveness

Lord Bingham held that ‘legal rights and liabilities ‘should ordinarily be resolved by application of law and not the exercise of discretion’ and that ‘law must be accessible and so far as possible intelligible, clear and predictable’.[[1]](#footnote-1) However, the enforcement system would be overwhelmed were law not, to a significant extent, self-applying—which is possible only when a considerable proportion of legal norms are perceived to go with the grain of popular expectations or folk morality. In Alexander Pope’s words,

‘Men must be taught as if you taught them not, and things unknown proposed as things forgot.’[[2]](#footnote-2)

Where legal norms and popular expectations diverge too much and too often, systemic legitimacy is imperilled and, because the system comes to rely too heavily on coercive force, human dignity is compromised.[[3]](#footnote-3) To the extent that law conforms to 'expectations', the burden of ensuring sufficient predictability is lightened. These expectations are not always coherent[[4]](#footnote-4) but there are common or dominant threads manifested in our ‘common’ law. As Lon Fuller put it,

‘Over much of its history the common law has been largely engaged in working out the implications of conceptions that were generally held in the society of the time. This large measure of coincidence reduced greatly the force of the objection that the rules of the common law were, in contrast with those of a code, difficult to access’.[[5]](#footnote-5)

Whatever the challenges from modern neuroscience, assumptions about free will, choice, self-control and responsibility for our conduct pervade our moral and legal cultures.[[6]](#footnote-6) Although we might want to blame our satnavs for making us late, we do not blame a stone for tripping us up or a jelly fish for stinging. We might blame a dog for biting but we like to regard the free will of mature humans as unique amongst living things.[[7]](#footnote-7)

Bertram Malle and colleagues and Fiery Cushman, suggest that blaming follows a path.

‘[B]lame reads like a detective novel. We begin with a body on the ground, the first question we ask is “Whodunnit?” and as soon as we’ve answered that question, we want to know why they did it...[T]his stands in contrast to other categories of moral judgment, such as judgments of “wrongness.” The object of a wrongness judgment is the action that a person performs, not their relation to an event. Wrongness judgments begin with that action and then proceed to consider the mental states that gave rise to that action. Consider people who string a wire across the sidewalk in order to trip old ladies. The *action* they perform is *wrong*, but they will be blamed for the *outcome*.’[[8]](#footnote-8)

Like blame, foresight and foreseeability focus on outcomes or consequences rather than on deontic notions of acts wrongful in themselves.[[9]](#footnote-9) As Viscount Simonds said in *Wagon Mound No 1* (hereinafter ‘*WM1*’),

‘It is not the act but the consequences on which tortious liability is founded.’[[10]](#footnote-10)

Deeply embedded in folk morality,[[11]](#footnote-11) foresight and foreseeability provide the language in which we rationalise our outcome-biased and hindsight-biased blaming intuitions and accommodate the arbitrary unfairness of moral luck—‘liability grossly in excess of the only moral shortcoming that is thought to be its predicate’.[[12]](#footnote-12) In e*x post* judgements of behaviour, the worse the known outcome the greater the blame and the higher the standards of care we set—and *say* we ‘expect’.[[13]](#footnote-13)

‘[O]utcomes are viewed as more predictable in retrospect (“a reasonable person should have expected that”), which leads to greater condemnation when the outcome is bad.’[[14]](#footnote-14)

When a risk [R] results in harm, we ask ‘*did* A foresee R?’ and ‘*could* A have foreseen R’. Intuitively, we might say ‘A *should have* foreseen R’. More reflectively, we might ask ‘*ought* A to *have* foreseen R?’ By imposing, after judicial reflection, foreseeability rather than causation as the test of remoteness, the Privy Council in *WM1*[[15]](#footnote-15)was able to temper the outcome and hindsight biases. By way of justification, Viscount Simonds invoked Lord Atkin’s reference in *Donoghue* v *Stevenson* to ‘a general public sentiment of moral wrongdoing for which the offender must pay’[[16]](#footnote-16)—itself an appeal to folk morality. Suspicious of causal concepts, Viscount Simonds added,

‘It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural" consequence of the precedent act. Who knows or can be assumed to know all the processes of nature?’[[17]](#footnote-17)

System 1 *ex post* blaming for bad outcomes can be rationalised by the System 2 consequentialist notion that fault might deter. But, by contrast with the folksiness of fault, business morality holds responsible those best placed to manage and/or insure risks—a System 1 consequentialism that is culturally-acquired and can rationalised with System 2 reflections on the inevitability of accidents and the marginality of deterrent effects.

# Foreseeability’s Ambivalence

## Factive Foresight

We cannot expect, predict or plan without foreseeing some object. A cannot intend to kill X, contract with Y or settle money on Z without foreseeing some particular consequences. Neither can A be reckless about a consequence without foreseeing it as a risk and pressing on regardless. But this is ‘foresight talk’ not ‘foreseeability talk’. Unless A confesses to having foreseen R, the foresight problem is not conceptual but evidential—how to discover what A actually foresaw, thus confronting factual *inference* and its limits.[[18]](#footnote-18) Thus, ‘A foresaw R’ and ‘R was foreseen by A’ are statements that are, in principle, either true or false. Call this ‘*factive foresight*’.[[19]](#footnote-19) The ‘direction of fit’ of factive propositions is from world-to-word.[[20]](#footnote-20)

To ‘prove’ factive foresight, two approaches are possible: scientific method, testing falsifiable propositions; and reliance on personal or vicarious general experience, whilst wondering whether D’s position might differ in any material respect. The former approach is unusual. It might involve psychiatric experiments or social surveys. The latter, though more common and less cumbersome, is less valid. Absent D’s confession, judges have only the available evidence and their own experiences from which to construct their verdicts. Some subjectivity is inevitable. Causal *inference*—as distinct from *imputation*—provides the theoretical limit but, if a judge thinks that she would herself have foreseen R, she will be inclined to hold that D must have foreseen R. However, note the ambiguity of ‘must’. ‘It *must* have been the case’ shades into ‘D *should* have’—the factive and causally explanatory shade into what is called, in this paper, ‘attributive’.

## Factive Foreseeability

The direction of fit of ‘all human beings *can foresee* R’ and ‘some human beings *can* foresee R’ is also world-to-word. Whilst those propositions can be similarly true or false, they are propositions not of *foresight* but of *foreseeability*—that some indeterminate number of persons[[21]](#footnote-21) has the ability to foresee R. Call this ‘*factive foreseeability*’.

## Attributional Foreseeability

‘A *should have foreseen* R’ has the opposite direction of fit—from word-to-world. It is attributive, not factive. *Ex post* it is used to *attribute* or *impute* responsibility for outcomes*.*[[22]](#footnote-22) The adjective does more work than the noun but, in deference to the ubiquity of the term ‘foreseeability’, call this ‘*attributive foreseeability*’.

## Factive-Attributive Ambivalence

Whilst the very idea of a norm is rooted in practices and regularities that give rise to *expectations*, expectations can be *predictive* (world-to-word) or *normative* (word-to-world). Consider, ‘I expect my children to behave’. The bare words of such utterances do not tell us whether the speaker means to *predict* or to *regulate*. A parent might seek to raise the children’s *regular* standard of behaviour. ‘I expect you to stay seated quietly at the table until everyone has finished eating (word-to-world) and not to rush off as soon as you’ve finished as you usually do (world-to-word)’.

An *ex post* judgement that ‘A should have foreseen R’ (attributing responsibility for R to A) might be grounded in *normal* or *regular* practice. Most people will look before crossing the road and will think that they *ought* to do so. But the speaker might think first of attributing responsibility and express that attribution by saying ‘A *should have* foreseen R’. Crossing roads whilst distractively engaged with a smartphone is commonplace but a speaker wants to attribute responsibility for it. The speaker is concerned not to reflect but to criticise or improve current behaviour. Because *ought* implies *can*, a speaker will probably not use foreseeability language to attribute responsibility for risks that no-one could have foreseen. Instead, strict liability language might be used.[[23]](#footnote-23)

This factive-attributive ambivalence: allows attributive foreseeability to draw rhetorical power from the hard ‘propositional attraction’ of factive foreseeability and foresight; and masks the way in which attributive foreseeability’s open-texture can—at the price of reduced predictability—increase law’s flexibility.[[24]](#footnote-24)

# Verdictiveness and Illocutionary Force

Verdicts can be: knee-jerk reactions to a tragedy; an unreasoned gesture of Nero’s thumb; a view of the most probable scientific explanation; or the conclusion of a reasoning process. Whilst verdicts—cause, foreseeability, proximity, reasonableness, intention, negligence—are ubiquitous in law, the concept of a *verdict* is largely uncontested. Nevertheless, *verdictiveness*[[25]](#footnote-25) is a provocative concept. When engaged, it challenges us to look beneath a verdict’s rhetorical surface at its evidential and rational provenance and at its functions.

Our main problem is to distinguish in legal judgements the *factive* world-to-word from the *attributive* word-to-world. J.L. Austin’s work—and some of the developments from it—suggests a way forward. Austinian *verdictives* are speech acts or other communications that articulate conclusions.[[26]](#footnote-26)

‘A verdict is essentially giving a finding as to something—fact, or value—which is for different reasons hard to be certain about.’[[27]](#footnote-27)

In their purest form, such verdicts as ‘liable’, ‘guilty’ and ‘not out’ do not articulate lines of reasoning but, when spoken by an appropriate authority, they ‘make it so’[[28]](#footnote-28) that D is liable, guilty or not out. A verdict is logically distinct from the act of speaking it[[29]](#footnote-29) and from any reasons or supporting evidence that might be given in explanation or justification of it. The latter distinction is readily apparent when, after reviewing numerous car magazines, your verdict is, ‘The Ford Fiesta is the one.’ By contrast, when you hear evidence from C, D and Wn and conclude that ‘D is responsible for C’s injuries’, factive and attributive verdicts and reasoning are involved, albeit implicitly. But the verdict *simpliciter* obscures rather than elucidates the factors considered and the methods used in: finding facts, considering reasons; and deciding what verdict to issue.

There are issues of *context* and *status* here—‘what we have to study is *not* the sentence but the issuing of an utterance in a speech situation.’[[30]](#footnote-30) Your choice of automobile has validity for you and, perhaps, for those who respect your judgement,[[31]](#footnote-31) but, unless you are a judge or a jury member, your verdict that D is responsible for C’s injuries has no more legal effect than my announcement that I have re-named Tony Blair, ‘Tony Liar’. By contrast, the Queen can *name* a ship or grant a Royal Charter to a livery company.[[32]](#footnote-32)

Given their nature, it makes no sense to challenge a verdict’s *accuracy qua* verdict. But the *sincerity* of J’s verdict can sensibly be challenged. J might have been more concerned to compensate C than to treat D fairly. Furthermore, J’s implied factive verdict—that D caused C’s injuries—*can* be challenged on accuracy grounds. D might claim that he was under general anaesthetic prison at the material time, but J’s verdict is still J’s verdict.[[33]](#footnote-33) Errors, if there be any, will lie in the evidential and evaluative processes (including the approach to determining cause-in-fact) that underlie, and might be obscured by, the verdict.

Austin explains that more than grammatical, syntactical and lexical competence is sometimes needed to identify the various kinds of speaker meaning, such as: verdicts; exercises of powers, promises[[34]](#footnote-34) or other commitments; behaviours like apologising; or words of exposition.[[35]](#footnote-35) Whether ‘The Ford Fiesta is the one’ is a *verdict on suitability* or a *commitment to purchase* depends on what Austin calls ‘illocutionary force’.[[36]](#footnote-36) To adapt one of Austin’s examples, you might hear me say, ‘You can’t do that’. I might be: talking to myself; asserting the task’s impossibility; assessing your competence; trying to dissuade you from doing it; or prohibiting you from doing it. These distinctions are not matters of truth or falsehood but of ‘illocutionary force’.[[37]](#footnote-37) We *do* more than describe something in the world when we promise, find liable, criticise, etc.

Nevertheless, Austin recognises that his various categorisations of illocutions cannot be rigid. A single utterance—D must return C’s car—might well be any or all of: a verdict (a conclusory finding that ‘the car is Cs’); an exercise of judicial power (‘C shall have it’);[[38]](#footnote-38) blaming D; and holding D responsible. If the full force of the utterance in its context is to be appreciated, we must be alert for each of these discrete speaker meanings. In Lecture XII, Austin talks of ‘general *families* of related and overlapping speech acts’ and of ‘very general classes’.[[39]](#footnote-39) Most importantly for our purposes, he frequently recognises that illocutionary forces and findings of fact can be combined in one utterance. ‘That bull is going to charge’ is both a *warning* and a true or false *prediction* of bullish behaviour.[[40]](#footnote-40)

# Tackling Foreseeability’s Ambivalence

The concepts of illocutionary force and speaker meaning[[41]](#footnote-41) can assist in distinguishing factive and attributive foreseeability. Unless D concedes that R was foreseeable (or that R was foreseen) foreseeability, whether factive or attributive, must be determined by some sort of judge, who will look in vain for a litmus test. Austin wondered, ‘Can we be sure that stating truly is a different *class* of assessment from arguing soundly, advising well, judging fairly, and blaming justifiably?’[[42]](#footnote-42) However, I suggest that—in principle if not always in practice—factive and attributive foreseeability are distinguishable by reference to the kind of evidence and arguments appropriate to their instantiation. As discussed above, factive foreseeability, like *factive* foresight, raises *empirical* questions, whereas *attributive foreseeability* is a matter of selecting and applying *norms*.

Because the lawyer’s interest lies in understanding what judges do when they decide cases, judges’ words and decisions in the context of each case are the principal object of study. As Austin puts it,

‘The total speech act in the total speech situation is the only actual phenomenon which, in the last resort, we are engaged in elucidating.’[[43]](#footnote-43)

What then might we look for (but not necessarily ‘expect’ in any normative sense) when we examine cases?

## A Differentiation between foresight, and foreseeability

This is largely a matter of linguistic discipline. We shall see: some sentence constructions that, without error or ambiguity, use ‘foresight’ when discussing ‘foreseeability’; and some judicial reluctance to be constrained by the formality of a quasi-scientific linguistic register or anything approaching formal logic.[[44]](#footnote-44)

## *B Differentiation between factive and attributive foreseeability*.

We want to distinguish:

1. the factive foreseeability filter that protects D from blame for failure to foresee the wholly unforeseeable; from
2. the attribution of responsibility that is based on *fault*.[[45]](#footnote-45)

We must ask, in discerning speaker meaning, what the judge was ‘overtly’ or ‘avowedly’[[46]](#footnote-46) *doing* in uttering[[47]](#footnote-47) not just one word but whole sentences, whole paragraphs, whole judgements in the context of the issues at stake for the parties in the case. We are looking for indications of speaker meaning or illocutionary force in the functional context of the judgement. Sometimes one word or one sentence itself will be sufficiently clear. Sometimes we must rely on the context. Sometimes we will be left in doubt.

Nevertheless, the distinction between factive and attributive judicial verdicts has significant practical consequences. Factive verdicts are matters for juries or judges of fact, whereas attributive verdicts are normative and, as such, matters of law for judge rather than jury—and thus appealable.[[48]](#footnote-48) As *Donoghue* v *Stevenson*[[49]](#footnote-49)famously illustrates, they can result from strikeout applications made on assumed facts. The response to a judicial foreseeability verdict must distinguish the factive from the attributive by reference to the illocutionary force with which—it appears to the person responding—that verdict was issued. In that interpretive exercise, reasonable Supreme Court Justices might disagree with reasonable Court of Appeal members.

## C The factive foreseeability filter

No-one will claim that D acted intentionally, recklessly or negligently when R was utterly unknown *ex ante*. The factive foreseeability filter will keep such cases from court. But where a few (not including D) can be shown to have foreseen R, C will argue that R is *factively* foreseeable. D will counter *attributively* that too few had foreseen R for it to be *reasonable* to hold her responsible.[[50]](#footnote-50) By contrast, those who commit intentional torts are strictly liable for unforeseeable consequences[[51]](#footnote-51) and strict liability claims can survive despite factive unforeseeability. If Parliament has made D strictly liable,[[52]](#footnote-52) C has only to establish factual cause—although even that entails subjective judgement in selecting the *causa causans* from amongst the almost infinite number of *causae sine qua non*.

By ‘R was not foreseeable by D’ the speaker might mean something more complex, such as the following:

1. Someone other than D *has foreseen* R (factive),
2. but R’s probability and severity of harm *were not so great* (factive but, because subjective, inevitably attributive)
3. that someone in D’s position *ought to have foreseen* it (attributive).

Thus in *Roe* v *Minister of Health*,[[53]](#footnote-53) D’s anaesthetist, was aware of a contamination risk and therefore checked each ampoule of anaesthetic visually for cracks. But he was unaware of the identified but little known risk of invisible hairline cracking through which the anaesthetic became contaminated and caused the claimants’ paralysis. Having been foreseen by some experts, the hairline risk was factively foreseeable but it was only with the later UK publication of Macintosh’s *Lumbar Puncture and Spinal Anaesthesia* that it became widely known amongst UK-based anaesthetists.[[54]](#footnote-54) Factive foreseeability embraced far more than the court was prepared to accept as the anaesthetist’s *fault*. Folk morality does not hold D responsible just because foresight of the risk that materialised was within the range of human imagination. We sense that the factive foreseeability filter is too coarse.

## D Algorithmic discipline

Imagine legal reasoning that is conceptually sequenced[[55]](#footnote-55)—as in an algorithm. The verdict at Q1 determines whether Q2 or the end of the claim is next—and so on stage by stage. The factors—evidential and evaluative, not randomly selected but prescribed by the question—considered in resolving Q1 contribute to, but do not appear on the face of, the Q1 verdict, which has a binary yes/no quality. Verdicts are conclusions and not in themselves reasons.

In the negligence tort, Q1 might be the factive foreseeability filter and Q2 might address attributive foreseeability. A positive Q2 foreseeability verdict would conditionally determine the outcome in C’s favour. In this algorithmic mode, a verdict at Q3 (or Q4, etc.) might favour D but only for reasons unconsidered in Q1 and Q2. Thus, if Q3 is proximity, the factors considered at Q3 should not have been expended in reaching the Q1 or Q2 verdicts. Similarly if: Q4 is the *Caparo* trio—‘what is fair, just and reasonable?’;[[56]](#footnote-56) Q5 is ‘public policy’; [[57]](#footnote-57) and Q6 is remoteness.

The algorithmic rule against double counting imposes uncongenial discipline[[58]](#footnote-58) of a kind that was rejected when *Anns* v *Merton* was overruled.[[59]](#footnote-59) Whilst judges value the covert flexibility of their freedom to fudge, the fundamental problem with *Anns* was that it burdened D with the case-by-case task of holding the floodgates closed rather than giving C the task of pushing them ajar.

## E Overlapping Concepts

In the negligence model just postulated—factive foreseeability is Q1, attributive foreseeability Q2, proximity Q3, etc.—algorithmic discipline requires a clear differentiation between foreseeability and proximity. However, in practice, proximity and foreseeability are such close relatives that they might even be twins.

Linguistically and in ordinary descriptive discourse they are not synonymous. ‘A is close to B’ does not entail that ‘A foresees B’—and *vice versa*. But, as *verdicts* issued in the practical context of legal judgements, they can have the same *illocutionary* force.[[60]](#footnote-60) Consider: ‘R to persons in C’s position is foreseeable by persons in D’s position’. Because foreseeability is *transitive* (it must have some object) and because one can only be proximate *in relation to something*, foreseeability and proximity are intertwined. Indeed, when used in legal verdicts, they share several key features.

### *Functioning ex post*

We explore this more fully below. It suffices here to note that in the great majority of cases judges are looking back at past events to determine what was the case or ought to have been the case—‘A was close to B’; ‘the reasonable person in A’s position would have foreseen R’. Proximity can be ‘found’, or not, in exactly the same way as, when judges think it *reasonable* to do so, attributive foreseeability is constructed *ex post*.

### *Circularity*

Proximity verdicts might seem vulnerable to this criticism. In *Michael*, Lord Toulson [133] criticised Lord Kerr’s dissenting view—that proximity could be established by: (i) closeness of association between D and C; (ii) an apparent R to C; and (iii) D’s ability to avert R; (iv) without taking excessive personal risk[[61]](#footnote-61)—as circular or tautological (i.e. there is proximity *iff* there is proximity).[[62]](#footnote-62) Lord Kerr responded,

Proximity may in many cases add little to the concept of foreseeability but at root it reflects what Richardson J described in *South Pacific Manufacturing Co Ltd* v *New Zealand Security Consultants & Investigation Ltd* [1992] 2 NZLR 282 at 306, as 'a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility' which is exactly what has been the aim of the test for liability which I have proposed. For all, therefore, that the test of proximity may be described as circular, it still has a useful role to play. It is clear, for instance, that it was not present in the *Hill* case.[[63]](#footnote-63) There was, obviously, no proximity between the police and a member of the public killed by a criminal whose whereabouts were unknown and who, apparently, randomly picked out his victim from the female population.[[64]](#footnote-64)

But that so-called circularity is inherently characteristic of verdicts. ‘P is the winner’ is a verdict that ‘makes it so’ that P is the winner—according to the unspoken background rules of racing. Imagine rules that award the prize to the person who takes longest.

### Factive-attributive ambivalence and open-texture

Space-time proximity is an analogue of the factive foreseeability filter. If A is spatially and/or temporally too far away from B, System 1 folk morality will not deem them proximate. Being the other side of the world a hundred years ago is not factively proximate. But, just as with foreseeability, subjective judgement is required—and that allows in the attributive. The front row of the lecture theatre is proximate to the lectern, but what of the back row when the lecturer sneezes violently and spreads Severe Acute Respiratory Syndrome?

### Risk, Relationality and Cause

‘R = probability X severity.’ Both foreseeability and proximity can be invoked when considering the probability element of risk allocation. For D to be held responsible, R to persons in C’s position must be deemed sufficiently probable to be *foreseeable* by persons in D’s position. That *entails* that the relationship between C and D be, in some sense, sufficiently *close*.[[65]](#footnote-65) Furthermore, to determine whether R is of some class of harm being *caused* to C or to a class to which C belonged, we often use the interpretive expression *proximate* *cause*.

In summary, Lord Oliver’s words about proximity can be applied to attributive foreseeability.

‘[I]t has to be accepted that the concept of "proximity" is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.’[[66]](#footnote-66)

Proximity will be invoked when factive foreseeability is undeniable, making proximity the more appropriate rhetorical tag for a policy-driven, floodgates-locking, limit on the liability of persons in the position of D to persons in the position of C.[[67]](#footnote-67) Folk morality does not readily appreciate that attributive foreseeability is but window-dressing for an *ex post* judicial verdict that it is *(un)reasonable* to hold D responsible.

# Case Studies

## Rhodes v OPO

In *Rhodes*, a claim under the *Wilkinson* v *Downton*[[68]](#footnote-68) principle, Lady Hale and Lord Toulson noted,

‘a critical difference, not always recognised in the authorities, between *imputing* the existence of an intention as a matter of *law* and *inferring* the existence of an intention as a matter of *fact*. Imputation of an intention by operation of a rule of law is a vestige of a previous age and has no proper role in the modern law of tort. It is unsound in principle.’[[69]](#footnote-69)

The context of this declaration of the legitimacy of *factive* *inference* and the illegitimacy of *attributive imputation* was a judicial determination to protect D’s freedom to publish his autobiography despite the actually foreseen risk to the well-being of C, D’s vulnerable and estranged young son. The Supreme Court held that D was free to publish. That D was publishing to a general readership, rather than to C specifically, apparently meant that D lacked any ‘targeted intent’ to cause C distress.[[70]](#footnote-70) Furthermore, great weight was attributed to freedom of expression. The abolition of imputed intent suggests factivity but both the heavy weighting of freedom of expression and the refusal to recognise that D could have two targets are clearly attributive.

Although, in *Wilkinson* itself, Wright J explicitly relied on imputation,[[71]](#footnote-71) *Wilkinson* was not overruled. Lord Neuberger explained that it can be based straightforwardly on (factive) inference.

‘How…could Mr Downton not have intended to cause the apparently happily married Mrs Wilkinson significant distress by falsely telling her that her husband had been very seriously injured? That was the very purpose of the so-called joke. There are statements (and indeed actions) whose consequences or potential consequences are *so obvious that the perpetrator cannot realistically say that those consequences were unintended*.’[[72]](#footnote-72)

But if imputed intention is forbidden, why is negligence imputed when D has not adverted at all to R?

## Page v Smith

Some of the judicial language in *Page* suggests that, in a negligence claim, C must prove D’s factive *foresight*. Lord Lloyd said,

‘Before a defendant can be held liable for psychiatric injury suffered by a primary victim, he *must at least have foreseen* the risk of physical injury.’[[73]](#footnote-73)

Read literally and in isolation, this amounts to an insistence that D must be proved *reckless* (deliberate disregard of an *actually foreseen* R) with regard to a *physical* *damage* R (that did not materialise) before liability for the *psychiatric damage* R (which had materialised) can be considered. However, we can see from the whole tenor of his judgement that Lord Lloyd thought he was engaged in a *law-changing* and thus *attributive* exercise. The intended change can be better expressed as uniting, for primary victims, the categories of physical and psychiatric harm. But here, rather than *attributive foreseeability,* he somewhat confusingly chose the *language* of *factive foreseeability*:

‘[T]he approach in all cases should be the same, namely, whether the [actual] defendant [not some judicial construct] *can* *reasonably foresee* that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric.’ [[74]](#footnote-74)

The clue to his *illocutionary meaning* is, I suggest, his use of the word ‘reasonably’. That signals that he spoke *attributively*, as a judge of standards (rather than of fact). On that view, his underlying meaning is that, on the balance of interests, it is *reasonable* that D should be held responsible for the psychiatric harm to C who, although not physically injured, was actually involved[[75]](#footnote-75) in the accident. D had not actually adverted to either R. D could, and in Lord Lloyd’s view *should*, have taken more care.[[76]](#footnote-76) That formulation is attributively adequate without invoking foreseeability. Lord Keith was similarly confusing when using the word ‘proof’, which fits comfortably only with the judge-of-fact role.[[77]](#footnote-77) It is sensible to talk of proving or disproving facts but norms are matters for formulation, (dis)approval and (dis)application.

### Ex post ‘foreseeability’

Foreseeability can be *ex ante* or *ex post*. ‘I think I will buy a Fiesta’ states that I do *now* foresee a future action. But we are concerned here with *judicial* foreseeability verdicts, which—except where C wants an injunction or specific performance or the judge is considering imposing a curfew, etc.[[78]](#footnote-78)—are necessarily *ex post*, whether they are verdicts of factive foresight, factive foreseeability or attributive foreseeability.

An *ex post* verdict that D intended to shoot C entails that shooting C was factively foreseeable and was in the past foreseen by D. Similarly, a verdict that D shot C recklessly entails that D, in the past, actually adverted to R. But attributive foreseeability verdicts declare the results of considerations of the reasonableness of responsibility attributions. It is no accident that in negligence cases—in which, *ex hypothesi,* Deitherseriously underestimated or did not advert to the specific R that materialised—‘foreseeability’ is usually explicitly or implicitly coupled with ‘reasonableness’. The word ‘foreseeability’ is not needed in deciding—by means of *ex post* balancing of the interests of C, D and the wider public—the *reasonableness* of an attribution of responsibility to D or C. It functions—along with the judicial *construction* of hypothetical *reasonable* foreseers—only as rhetorical dignification that has the potential to confuse.

Negligence is not ‘a state of mind’ in the way that intention and recklessness are, but only in the way that your mind is presently blank about the number of worms that live under your lawn. In negligence, responsibility is *attributed* because D *should* have adverted, but *did not*. Despite folk morality and judicial reluctance to hold D liable for omissions, negligence is always based on D’s omission to take care.[[79]](#footnote-79) More straightforwardly, in strict liability attributions, no foreseeability-language is needed. Attribution there is a matter of policy-informed interest-balancing, together with the establishment of a sufficient causal connection between D’s act or omission and the materialised R.

In *Page*, Lords Keith and Lloyd argued that, where C is not involved in the physical accident but is a secondary victim of psychiatric harm, ‘the circumstances of the accident or event must be viewed *ex post facto*.’[[80]](#footnote-80) They reasoned that,

‘if you do not know the outcome of the accident or event, it is impossible to say whether the defendant should have foreseen injury by shock. It is necessary to take account of what happened in order to apply the test of reasonable foreseeability at all.’

This might amount to a proper recognition that judicial attributive foreseeability verdicts are normally *ex post*. However, Lord Lloyd said that to look back,

‘makes no sense in the case of a primary victim. Liability for physical injury depends on what was reasonably foreseeable by the defendant before the event…To introduce hindsight into the trial of an ordinary running-down action would do the law no service.’

Consider this first in terms of factive foreseeability. If physical and psychiatric harms indeed comprise one category for those who are involved in (rather than spectators of) the accident, *psychiatric harm* to *primary* victims must be factively foreseeable ‘before the event’. But *psychiatric* harm to a *secondary* victim also survives the factive foreseeability filter. We do not have to wait and see what happens to reach that factive verdict. It is even factively foreseeable that someone with an egg-shell personality might see or hear a road accident and suffer psychiatric harm that a ‘person of normal fortitude or "ordinary phlegm"’[[81]](#footnote-81) would not suffer. However, factive foreseeability is no more than a filter.

In attributive terms, Lord Lloyd was saying that *any* physical harm to persons involved is *always* recoverable, whereas psychiatric harm to *secondary* victims is only recoverable when the circumstances have been weighed. However, that is not a matter of *foreseeability* at all. As Lord Oliver said,

‘[T]here is, on the face of it, no readily discernible logical reason why he who carelessly inflicts an injury upon another should not be held responsible for its inevitable consequences not only to him who may conveniently be termed "the primary victim" but to others who suffer as a result. It cannot, I think, be accounted for by saying that such consequences cannot reasonably be foreseen.’[[82]](#footnote-82)

Rather, physical harm is such a commonplace result of road accidents that the *necessarily ex post attribution* of responsibility is taken for granted. In Kenneth Abraham’s terminology, such situations are normatively ‘bounded’. There are ‘pre-existing, concrete norm[s] that exist…independently of the finder of fact’s individual sense of the situation’.[[83]](#footnote-83) To quibble whether a particular injury is recoverable would fly in the face of folk morality.[[84]](#footnote-84)

But psychiatric harm is less frequent. Its causal pedigree is more difficult to establish[[85]](#footnote-85) and there is significant popular scepticism. In ‘unbounded’ situations, verdict-givers use their ‘own general normative sense of the situation, informed by individual experience and by the evidence submitted by the parties.’[[86]](#footnote-86) However, judges also fear: giving the appearance of palm tree justice; and a flood of claims from those who factively foreseeably suffer psychiatric harm when witnessing tragic accidents. Hence judges sometimes choose to draw their arbitrary attributive ‘lines in the sand’ well above high watermark.

## Yapp v Foreign and Commonwealth Office

The so-called foreseeability of psychiatric harm was also the issue in *Yapp*. The factual context was rather different from road accidents, but by no means unusual. C claimed that his employer’s behaviour towards him had caused him psychiatric harm. Underhill LJ first addressed the matter factively,

I start from the position that it will in my view be exceptional that an apparently robust employee, with no history of any psychiatric ill-health, will develop a depressive illness as a result even of a very serious setback at work. That is, inevitably, based to some extent on my own assessment of human nature…

However—sliding from factive foreseeability towards a rebuttable attributive presumption imposed by law—he continued

…‘but it also reflects the message of *Croft* [that] it is not usually foreseeable that even disciplinary action which is quite seriously unfair will lead the employee to develop a psychiatric illness unless there are signs of pre-existing vulnerability.’[[87]](#footnote-87)

The court’s concern was that, ‘foreseeability’ should yield the same result whether the claim was based on negligence or on breach of the implied contractual term of mutual trust and confidence. That concern can only arise because attributive foreseeability is not a litmus test but a way of dignifying a verdict that, in *Yapp* and similar cases, employers’ freedoms are to be protected lest there be a flood of claims. The decision’s effect is to make C’s pre-existing vulnerability a necessary condition of liability and to spare courts the trouble of evaluating the varied facts and interests.[[88]](#footnote-88) That’s not foreseeability but policy. Although the verdict ‘R is (attributively) foreseeable’ is *ostensibly* a reason for responsibility, it is both reason-dependant and reason-concealing.

Notably, the deeming of a category of harm—by a category of defendant, to a category of claimant—presumptively ‘unforeseeable’ is not a *rule of thumb* for determining matters of fact but an *attributive rule* of ‘irrecoverability’. The arbitrariness in *Rhodes*, *Page* and *Yapp* exemplifies the *presumptive formalism* that, Frederick Schauer argues, justifies System 1 fast thinking by citizens and judges alike. Schauer rightly holds that decision-makers must often ‘defer [to clear but arbitrary rules] even when they are convinced that their own judgment is best’.[[89]](#footnote-89) Neither judges nor citizens have the time and energy to treat every case *de novo* by system 2 slow thinking. Furthermore, arbitrariness does serve the cause of predictability and often accords with folk morality.

But the problem—largely for the appeal courts—is to determine when arbitrariness’s consequent injustices warrant switching to System 2 slow thinking. In the *Wagon Mound* litigation, we will see: some judicious System 2 review and re-shaping of the remoteness rules to favour attributive foreseeability; but only minimal consideration of the very nature of foreseeability verdicts as they might compare with causation or proximity verdicts.

## The Wagon Mound litigation

The spillage of furnace oil from a tanker, the *Wagon Mound*, in Sydney Harbour Bay, is more remote from popular experience than everyday road accidents and employment disputes are. The courts’ decisions in both *Wagon Mound* cases[[90]](#footnote-90) determined whether D’s liability insurer or C’s fire insurer must pay for the fire damage suffered by C. Nevertheless, the discourse of the dispute was about foreseeability—and we can all foresee that oil spillages might do more than pollute. There were two claims, brought in separate cases. In *WM1*,C1 was a wharfinger whose property had suffered fire damage caused by the ignition of the spilled oil. Because the technically experienced C1 had, by resuming welding operations, probably caused ignition and contributory negligence was at the time a complete defence in New South Wales, C1 had to argue that the fire damage was unforeseeable but recoverable—either in public nuisance or in negligence under the *Polemis* doctrine.[[91]](#footnote-91) In W*M2*, C2 was the owner of the ship that was being welded. Having no contributory negligence flank to guard, C2 could argue that fire damage was foreseeable. Fire damage was unforeseeable and irrecoverable in the first case, but foreseeable and recoverable in the second. This extraordinary feature suggests that the two cases merit careful examination.

In *WM1*, the trial judge, Kinsella J, made what Viscount Simonds later described as ‘the all-important finding’. It seems two-pronged—factive and attributive.

‘The raison d'être of furnace oil is, of course, that it shall burn, but I find [factively] the defendant did not know and [attributively] could not reasonably be expected to have known that it was capable of being set afire when spread on water.’[[92]](#footnote-92)

In dismissing C1’s appeal to the Privy Council, Lord Simonds commented that

‘[t]his finding was reached after a wealth of evidence, which included that of a distinguished scientist, Professor Hunter.’[[93]](#footnote-93)

The Privy Council clearly regarded foreseeability as a more manageable tool than causation, which they thought was beset with ‘never-ending and insoluble problems’ of a ‘logical and metaphysical’ nature. By contrast, ‘reasonable foreseeability…corresponds with the common conscience of mankind’[[94]](#footnote-94)—the kind of approach that, for Heidi Hurd, exemplifies ‘decades of verbiage devoted to superficial moralizing about the superiority of a fault-based standard to a standard of strict liability’.[[95]](#footnote-95) But causation and foreseeability share a similar factive-attributive ambivalence. Cause-in-fact, although seemingly factive, involves the subjective selection of operative causes from the *nexus* of composed of factors that survive the ‘but for’ test. Intuitively, we prioritise a human agency that in a force-dynamic[[96]](#footnote-96) way produces the adverse, and hence blameworthy, outcomes. We look also for sufficient causal closeness[[97]](#footnote-97) and yet do not know how long a ‘reasonable’ length of string might be.

In *WM2FI*, Walsh J made some undoubtedly factual findings—the presence of oil in the water around C2’s ships was a cause of C2’s loss and the oil’s ignition was by means of the floating waste.[[98]](#footnote-98) These propositions are subject to true/false testing. But, having *inferred* from one witness’s evidence that D had been ‘careless’[[99]](#footnote-99) in spilling the oil and undertaken ‘some scrutiny of the test of foreseeability, in order to determine how it should be applied to the circumstances of the case’,[[100]](#footnote-100) Walsh J, went on to hold that:

‘(1) Reasonable people in the position of the officers of the Wagon Mound would regard the furnace oil as very difficult to ignite upon water.[[101]](#footnote-101)

(2) Their personal experience would probably have been that this had very rarely happened.

(3) If they had given attention to the risk of fire from the spillage, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances.

(4) They would have considered the chances of the required exceptional circumstances happening whilst the oil remained spread on the harbour waters as being remote.

(5)…the occurrence of damage to the plaintiff's property as a result of the spillage was not reasonably foreseeable by those for whose acts the defendant would be responsible.’[[102]](#footnote-102)

The crucial verdict is finding (5), to which verdicts (1)-(4) clearly contributed. But is the verdict—‘not reasonably foreseeable’—materially attributive and thus of a kind that an appeal court can legitimately overturn?[[103]](#footnote-103)

Walsh J reached verdicts (1)-(5) by assessing the factual evidence (different to that in *WM1*)[[104]](#footnote-104) of people in the same technical business as D. Thus informed, he *constructed* a view of whether reasonable people in D’s position (technically savvy rather than scientists[[105]](#footnote-105)):

(a) would have foreseen a fire risk; and

(b) would have thought the risk sufficiently likely to require action to stop the welding operations, which apparently ignited the floating waste material that burned hot enough to reach the oil’s flashpoint.

(a) is akin to our factive foreseeability filter. There was some evidence that ‘ordinary men’ might find the fire risk unforeseeable, but Walsh J concentrated on ‘what *would* have been foreseen by men of that class [ship’s officers]’.[[106]](#footnote-106) The word ‘would’ is factive-attributive ambivalent. A factive interpretation—that persons in the same class as D will actually foresee—is plausible. Nevertheless, Walsh J had *constructed* the *reasonable* ship’s officer, albeit from the evidence of actual members of that class. That suggests *attributivity*.[[107]](#footnote-107)

Walsh J’s verdict on (b) was the subject of the appeal to the Privy Council and seems more strongly attributive. His approach to it was informed by a review of some leading cases that focus on degrees of likelihood.[[108]](#footnote-108) He cited Lord Dunedin’s patently attributive comment that,

‘It is still left to the judge to decide what, in the circumstances of the particular case, the *reasonable man* *would* have had in contemplation, and what, accordingly, the party sought to be made liable *ought* to have foreseen. Here there is room for *diversity of view*…’[[109]](#footnote-109)

That diversity of view is not about truth or falsehood but normative—it’s about standard-setting. Walsh J also spoke of the ship’s officers’ ‘assumed…mental processes’ in considering whether the fire risk was low enough to disregard.[[110]](#footnote-110) But there is some ambivalence. He cited Herron CJ’s view in *Pusell* v *Grabham*[[111]](#footnote-111) that foreseeability is a matter of ‘fact and degree’ that should be left to the jury.[[112]](#footnote-112) That might suggest factivity.

In *WM1* the Privy Council had accepted Kinsella J’s verdict that the fire risk was not foreseeable. Walsh J’s verdicts in *WM2* were: that the fire risk was factively foreseeable (directly contradicting Kinsella J’s verdict); but that the likelihood of fire was so low that responsibility should not be attributed when it materialised. The latter verdict’s reversal on appeal entailed deeming fire damage that was unforeseeable in *WM1* foreseeable in *WM2*. That there were different witnesses and that the later claimants were not at risk of being held contributorily negligent[[113]](#footnote-113) was thought sufficient explanation and justification. But, significantly, the brute facts about cause-in-fact do not vary. The crucial difference between the two cases is not *factive* but *attributive*.

In *WM2PC* the concept of *misdirection* provided the warrant for the Privy Council to override Walsh J’s verdict that low likelihood excused D.[[114]](#footnote-114) Directions are essentially statements of the relevant *law* that must be applied to the facts and, given the predominantly attributive approach that Walsh J had adopted to evaluating what he heard from a great cloud of witnesses, the override is legitimate. It would be otherwise if the Privy Council had reversed Walsh J’s factive verdict that the fire stared through the ignition of waste material. Lord Reid said that finding (5) was

‘not a primary finding of fact but an inference from the other findings, and it is clear from the learned judge's judgment that in drawing this inference he was to a large extent influenced by his view of the law.’[[115]](#footnote-115)…‘but [their Lordships] think that [Walsh J] may have misdirected himself in saying "there does seem to be a real practical difficulty, assuming that some risk of fire damage was foreseeable, but not a high one, in making a *factual judgment* as to whether this risk was sufficient to attract liability if damage should occur."’[[116]](#footnote-116)

‘If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.’[[117]](#footnote-117)

# Conclusions

Although this paper was not intended as a pedagogic tool, it was borne of current experience of teaching tort law to first year undergraduates, many of whom seem too ready to accept foreseeability as the touchstone of liability in negligence. Believing that unexamined law is not worth learning and that one remembers most easily what one understands best, I have sought some pedagogic gain.

Foreseeability, so much part of folk morality, has a seductive quality. Its associations with notions of free will, choice and blame and with true/false factive propositions that ‘A did foresee B’ and that ‘A is able to foresee R’ go some way to explain its attractive force, which sometimes operates to obscure its attributive meaning. That *propositional attractiveness* readily combines with legitimate rule of law concerns and with the utility of System 1 presumptive formalism. But, without analytical care, it encourages naïve legalism—the ability to ‘think about a thing, inextricably attached to something else, without thinking of the thing it is attached to’[[118]](#footnote-118)—and inhibits purposeful inquiry into law’s dynamic function. It is, in attributive mode, legitimatory rhetoric that can conceal both good reasons and mere manipulations. Indeed, in many cases, the decision whether to attribute responsibility to D, is a verdict of *reasonableness*—Abraham calls it ‘unbounded norm creation’[[119]](#footnote-119)—illustrated rather than determined by *ex post* speculation about the hypothetical musings of various constructed chimeras.

Law feeds off verdicts, so we should pay attention to verdictiveness. It is illuminating to spot the verdict and then ask: what is its illocutionary force?; how was that verdict determined?; how does it function?; factively or attributionally? Hopefully this article does a little to reduce ‘the confusion of thought’ that Holmes saw in ‘mixed questions of law and fact’[[120]](#footnote-120)—one can discern the constituents of a fruit salad more easily than of a smoothie. And foreseeability is by no means alone in exhibiting factive-attributive ambivalence. Consider: proximity; involved in the accident; intention (whether in crime, contract, tort, trusts, tax,[[121]](#footnote-121) etc.); recklessness; habitability; an ‘adventure in the nature of trade’;[[122]](#footnote-122) and many more.[[123]](#footnote-123)

1. Tom Bingham, *The Rule of Law* (London: Penguin, 2011) 48 and 37. [↑](#footnote-ref-1)
2. Alexander Pope, *An Essay on Criticism* (1711) Part 3. [↑](#footnote-ref-2)
3. Jeremy Waldron, ‘How Law protects Dignity’ (2012) 71(1) *Cambridge Law Journal* 200-222, 205-208. [↑](#footnote-ref-3)
4. Max Weaver, ‘Herbert, Hercules and the Plural Society, A “Knot” in the Social Bond’ (1978) 41 *Modern Law Review* 660. [↑](#footnote-ref-4)
5. Lon Fuller, *The Morality of Law* (London: Yale University Press, 1964) 50.Cf Scott Shapiro, *Legality* (London: Belknap, 2011) who, at 396, suggests that Fuller neglected the ‘cognitive energy saved by not having to think about the best way to regulate our lives and to convince others about the rectitude of our judgements.’ [↑](#footnote-ref-5)
6. For threatening evidence of determinism, see (e.g.) Chun Siong Soon, *et al*, Predicting free choices for abstract intentions (2013) 110(15) *Proc. Nat. Ac. Sciences USA*, 6217–6222, 6220 and Benjamin Libet, *et al*, ‘Time of conscious intention to act in relation to onset of cerebral activity (readiness-potential)—the unconscious initiation of a freely voluntary act’ (1983) 106(3) *Brain* 623–642. For a ‘hard determinist’ view that purports to save free will on consequentialist grounds, see Joshua Greene & Jonathan Cohen, ‘For the law, neuroscience changes nothing and everything’ (2004) *Phil.* *Trans. R. Soc. B 359* 1775–1785, 1775. [↑](#footnote-ref-6)
7. But see (e.g.) Felix Warneken & Alexandra Rosati, ‘Cognitive capacities for cooking in chimpanzees’ 3 June 2015, *Proc. R. Soc. B*. DOI: 10.1098/rspb.2015.0229. [↑](#footnote-ref-7)
8. Fiery Cushman, ‘The Scope of Blame’ (2014) *Psychological Inquiry* 201-205, 201, emphases added, commenting on Bertram Malle, Steve Guglielmo & Andrew Monroe, ‘A Theory of Blame’ (2014) *Psychological Inquiry* 147-186. [↑](#footnote-ref-8)
9. Cf Heidi Hurd, ‘Finding No Fault with Negligence’ in John Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford: OUP, 2015) 387-405, 392-394, listing problems with ‘equating negligence with the violation of deontological mini-maxims’. Also, at 392, ‘objective fault without a morsel of subjective fault is no fault at all.’ Liability in cases like *Nettleship* v *Weston* [1971] 2 QB 691 (learner driver held to the standard of qualified driver) is notably strict but, as appears below, Hurd’s argument is more radical. [↑](#footnote-ref-9)
10. [1961] AC 388, 425. Even where a claim is for a tort actionable *per se*, some adverse consequence—often an interference with autonomy—to C is required for standing. Similarly, Convention claims can normally be brought only by persons suffering ‘significant disadvantage’: see my ‘Beyond Compensation’ (currently under review). [↑](#footnote-ref-10)
11. Arguably some moral norms are innate. Others might be culturally acquired and ingrained. Such norms are entrenched in our System 1 ‘fast thinking’ and the effortful reflection of System 2 ‘slow thinking’ struggles to overcome them: see: Daniel Kahneman, *Thinking, fast and slow* (London: Penguin. 2012). In addition to outcome and hindsight biases, see also: familial preference; loss aversion (*ibid* 283-286, 308-309); and the tendency to excuse omissions more readily than actions (see: Jonathan Bennett, *Morality and Consequences* (1981), in Sterling M. McMurrin (ed.), The Tanner Lectures on Human Values, Volume II,45-116; and *Michael* v. *Chief Constable of South Wales Police* [2015] UKSC 2 [44]-[94] *per* Lord Toulson, but cf Lord Kerr [174]-[181]). [↑](#footnote-ref-11)
12. Hurd, note 9, 394. [↑](#footnote-ref-12)
13. Martin & Cushman, ‘The adaptive logic of moral luck’ (2015) (forthcoming in *The Blackwell Companion to Experimental Philosophy*) *ibid* cite: Jonathan Baron & John Hershey, ‘Outcome bias in decision evaluation’(1988) 54(4) *Journal of Personality and Social Psychology* 569–579; and Manuel Tostain & Joëlle Lebreuilly, ‘Rational model and justification model in “outcome bias.”’ (2008) 38(2) *European Journal of Social Psychology* 272-279. [↑](#footnote-ref-13)
14. Justin Martin & Fiery Cushman, note 13, citing Elaine Walster, ‘Assignment of responsibility for an accident’ (1966) 3(1) *Journal of Personality and Social Psychology* 73–79. [↑](#footnote-ref-14)
15. Note 10. [↑](#footnote-ref-15)
16. [1932] AC 562, 580. [↑](#footnote-ref-16)
17. *WM1* 426. On the background to, and wisdom of, *WM1*, see Martin Davies, ‘The Road from Morocco’ (1982) 45 *Modern Law Review* 534-555, especially 552-553 and note 9. [↑](#footnote-ref-17)
18. See: text at notes 69 to 72; and Max Weaver, ‘Redress and Distress: a note on *Rhodes* and *Gulati*’ (2015) under review. [↑](#footnote-ref-18)
19. A ‘factive’ verb assigns (or attributes) the status of established fact to its object: see oxforddictionaries.com. [↑](#footnote-ref-19)
20. See Mitchell Green, ‘Speech Acts’, *Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), http://plato.stanford.edu/archives/sum2015/entries/speech-acts/ at §3.1 [↑](#footnote-ref-20)
21. Lord Macmillan said in *Bourhill* v *Young* [1943] A.C. 92, 104, ‘There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree.’ [↑](#footnote-ref-21)
22. Roughly: description is world-to-word; prescription is word-to-world; attribution is retrospective prescription. The simplistic temptation to see foresight as prospective and attributive foreseeability as retrospective should be resisted. Responsibilities can be allocated in advance—‘take care of my child’. [↑](#footnote-ref-22)
23. See Hurd, note 9, for an argument that—because it is not based on actual foresight, which would signal recklessness of intention—negligence is a strict liability tort. [↑](#footnote-ref-23)
24. Other terms, such as proximity and ‘fair, just and reasonable’ are similarly open-textured and subjective. [↑](#footnote-ref-24)
25. For the more-or-less synonymous term ‘conclusory’ (rather than the more decisive ‘conclusive’) see Guido Calabresi , ‘Concerning Cause and the Law of Torts’ (1975) 43 U. Chi. L. Rev. 69, 72. Faculty Scholarship Series, paper 2001, http://digitalcommons.law.yale.edu/fss\_papers/2001 (1975-1976). ‘Conclusory’ does not fit well with knee-jerk verdicts. [↑](#footnote-ref-25)
26. J.L. Austin (eds. JO Urmson & Marina Sbisà), *How to do Things with Words* ~~(~~1975, 2nd edn: Cambridge MS, Harvard University Press) hereinafter ‘*HTDTWW*’. At 163, Austin summarises several other *performative* functions: ‘To sum up, we may say that the verdictive is an exercise of judgment, the exercitive is an assertion of influence or exercising of power, the commissive is an assuming of an obligation or declaring of an intention, the behabitive is the adopting of an attitude, and the expositive is the clarifying of reasons, arguments, and communications.’ [↑](#footnote-ref-26)
27. *HTDWW* 151. At 161, Austin gives ‘analyse’, ‘class’ and ‘interpret’ as verbs capable of verdictive use. But ‘holding’ and ‘interpreting’ ‘may, if official, be exercitive acts [exercises of official power]...Furthermore, “I award” and “I absolve” are exercitives, which will be based on verdicts’ (*HTDWW* 156). ‘Also, by an interpretation of the facts we may commit ourselves to a certain verdict or estimate’ (*HTDWW* 154). [↑](#footnote-ref-27)
28. *HTDWW* 7. [↑](#footnote-ref-28)
29. ‘He took only ten seconds to give his verdict’ relates to the act of giving it (perhaps, ‘verdicting’). But ‘His verdict was correct in law’ refers to the verdict itself. Cf John Searle, ‘Austin on Locutionary and Illocutionary Acts’ (1968) 77(4) *Philosophical Review* 405-424,422. [↑](#footnote-ref-29)
30. *HTDTWW* 139. Cf Paul Ricoeur, ‘Creativity in Language’, (1973) 17(2) *Philosophy Today*, 97-111, 99, ‘[T]he sentence as a whole is the bearer of meaning…[which] should be called the intended rather than the signified of the sentence’. [↑](#footnote-ref-30)
31. Cf. *Chaudhry* v *Prabhakar* [1988] 3 All ER 718, [1989] 1 WLR 29. [↑](#footnote-ref-31)
32. *HTDTWW* 117. [↑](#footnote-ref-32)
33. Even when you have such status, your verdicts might misfire for breach of procedural rules or other infelicities. ‘Thus if you are a judge and say “I hold that….” then *to say you hold is to hold*; with less official persons it is not so clearly so: it may be merely descriptive of a state of mind.’ (*HTDTWW* 88, emphasis added). [↑](#footnote-ref-33)
34. Is ‘I shall be there’ a prediction, threat or a promise? See *HTDTWW* 33. [↑](#footnote-ref-34)
35. For a full list see *HTDTWW* 148-164. [↑](#footnote-ref-35)
36. *HTDTWW* 146, ‘With the performative utterance, we attend as much as possible to the illocutionary force of the utterance, and abstract from the dimension of correspondence with facts.’ To say ‘The cat is on the mat’ is very different from saying ‘I apologize’. [↑](#footnote-ref-36)
37. *HTDTWW* 1, 5-6, 12. At 151, Austin refers to the ‘true/false fetish’ and to the ‘value/fact fetish’. I fear that in emphasising the distinction between foresight and attributive foreseeability I might be guilty of the latter. See also, 149 (D) and, at 140, ‘Performatives are, of course, incidentally saying something as well as doing something, but we may feel that they are not essentially true or false as statements are.’ [↑](#footnote-ref-37)
38. *HTDTWW* 154. [↑](#footnote-ref-38)
39. *HTDTWW* 150 and 151. [↑](#footnote-ref-39)
40. *HTDTWW* 135-136.Austin adds that true/false ‘comes in in appraising the warning just as much as, though not quite in the same way as, in appraising the statement.’ At 141, he says, ‘there is an obvious slide towards truth or falsity in the case of (e.g.) verdictives, such as estimating, finding, and pronouncing.’ [↑](#footnote-ref-40)
41. See Green, note 20, §3 and §5. [↑](#footnote-ref-41)
42. *HTDTWW* 142. [↑](#footnote-ref-42)
43. *HTDTWW* 148. See also 146-147. Ricoeur, note 30, 101, says, ‘By context we mean not only the linguistic environment of the actual words, but the speaker’s and the hearer’s behaviour, the situation common to both, and…the horizon of reality surrounding the speech situation.’ [↑](#footnote-ref-43)
44. A quasi-scientific language—as in legal judgements—is usually more disciplined in its use of terms than ordinary discourse is. Ricoeur, note 28, 103-105 likens scientific language to formal logic and mathematical language. [↑](#footnote-ref-44)
45. ‘Fault’ is used here to include intentional, reckless and negligent conduct. The ‘fault’ might lie in D’s conduct or in its consequences. [↑](#footnote-ref-45)
46. P.F. Strawson, ‘Intention and Convention in Speech Acts’ (1964) 73(4) *Philosophical Review*, 439-460, 454 and, at 459-460, ‘[T]he illocutionary force of an utterance is essentially something that is intended to be understood…[T]he types of audience-directed intention involved may be very various and…different types may be exemplified by one and the same utterance.’ See also Green, n 20, §5.3. [↑](#footnote-ref-46)
47. In this context, we can probably disregard Austin’s concern, *HTDTWW* 104-107, that a speaker might, for example, be joking, insinuating, swearing to relieve feelings, speaking under duress or showing off (*HTDTWW* 122), which matters he wanted to exclude from illocutionary forces. [↑](#footnote-ref-47)
48. See later discussion of *Rhodes* v *OPO* [2015] UKSC 32 and *Yapp* v *Foreign & Commonwealth Office* [2014] EWCA Civ 1512. [↑](#footnote-ref-48)
49. See note 16. [↑](#footnote-ref-49)
50. At first instance in *Wagon Mound No 2*, [1963] 1 Lloyd’s Reports 402, 412, Walsh J cited Dixon CJ’s remark in *Chapman* v *Hearse* (1961) CLR 112, 115, that ‘foreseeability does not include any idea of likelihood at all. I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence.’ [↑](#footnote-ref-50)
51. In *Quinn* v *Leatham* [1901] AC 495 at 537, Lord Lindley said, ‘The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage.’ [↑](#footnote-ref-51)
52. Civil Aviation Act 1982, §76(2). [↑](#footnote-ref-52)
53. [1954] 2 Q.B. 66, 77. [↑](#footnote-ref-53)
54. Had the anaesthetist actually foreseen the hairline risk and nevertheless proceeded, he would have been reckless rather than merely negligent. [↑](#footnote-ref-54)
55. Bruce Chapman, *‘*Law, Incommensurability, and Conceptually Sequenced Argument’ (1998) 146 *University of Pennsylvania Law Review* 1487-1528. [↑](#footnote-ref-55)
56. *Caparo Industries plc* v *Dickman* [1990] 2 AC 605. [↑](#footnote-ref-56)
57. *Michael v Chief Constable of South Wales Police and another* [2015] UKSC 2is not really about omissions but about a public policy of leaving decisions about the disposition of police resources to the police. [↑](#footnote-ref-57)
58. Cf note 44. [↑](#footnote-ref-58)
59. *Anns* v *Merton LBC* [1978] AC 728, overruled by *Murphy* v *Brentwood DC* [1991] AC 398*.* Harm-within-the-risk thinking reduces the number of stages and threatens algorithmic discipline less than does the conventional cause-duty-breach-remoteness approach to the negligence tort. In *Wagon Mound No 2* [1963] 1 Lloyd’s Reports 402, 406, 408, Walsh J, at first instance, made no division between duty, standard and remoteness. [↑](#footnote-ref-59)
60. Cf Goff LJ in *Leigh & Sillavan Ltd* v *Aliakmon Shipping Co Ltd* [1985] 2 All ER 44, 74, ‘Once proximity is no longer treated as expressing a relationship founded simply on foreseeability of damage, it ceases to have an ascertainable meaning, and it cannot therefore provide a criterion for liability.’ [↑](#footnote-ref-60)
61. *Michael*, note 57, [144]. [↑](#footnote-ref-61)
62. *ibid* [133]. [↑](#footnote-ref-62)
63. *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53, the ‘Yorkshire Ripper’ case. [↑](#footnote-ref-63)
64. *Michael,* note 61, [147] [↑](#footnote-ref-64)
65. See Stephen Perry, ‘Torts, Rights and Risks’ in Oberdiek ed, note 9, 39-34, especially 40-44. [↑](#footnote-ref-65)
66. *Alcock* v *Chief Constable of South Yorkshire* [1992] AC 310, 411. [↑](#footnote-ref-66)
67. Examples include: *Hill*, note 63; *Alcock* note 66; *McLoughlin* v *O’Brian* [1983] 1 AC 410; *Spartan Steel and Alloys Ltd* v *Martin & Co* [1973] QB 27. [↑](#footnote-ref-67)
68. [1897] 2 QB 57. [↑](#footnote-ref-68)
69. *Rhodes* v *OPO* [2015] UKSC 32 [81] emphases added. [↑](#footnote-ref-69)
70. Shades here of collateral damage and the slippery doctrine of double effect. See Philippa Foot, ‘The Problem of Abortion and the Doctrine of the Double Effect’ (1967) Oxford Review, No. 5, <http://philpapers.org/rec/FOOTPO-2> (visited 11 August 2015).But Stephen Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (London: Penguin Books, 2008), 218, distinguishes helping, hindering, allowing and preventing as modes of causation. Arguably Rhodes allowed harm to his son and, having adverted to R, can be said to have intended. [↑](#footnote-ref-70)
71. Note 68, 59. [↑](#footnote-ref-71)
72. *Rhodes,* note 69, [112] emphases added. [↑](#footnote-ref-72)
73. [1996] AC 155, 189. [↑](#footnote-ref-73)
74. *ibid* 197, emphases and bracketed interpolations added. Furthermore his language purports to focus on the particular defendant. The Supreme Court of New South Wales recently adopted the same approach in *Casey* v *Pel-Air Aviation Pty Ltd* [2015] NSWSC 566. [↑](#footnote-ref-74)
75. Another interpretive term that exhibits factive-attributive ambivalence. [↑](#footnote-ref-75)
76. Hurd, note 9, 405, argues that, when D consciously choose (e.g.) not to have an eye test and D’s poor eyesight causes a crash that injures C, D is D morally *reckless* although the common law persists in calling D ‘negligent’. [↑](#footnote-ref-76)
77. ‘Liability for negligence depends upon *proof* both *that it was reasonably foreseeable* that injury *would* result from the act or omission called in question…*’*. When taken literally, this does no more than invoke the factive foreseeability filter. But he added, attributively, ‘…*and that a relationship of proximity* existed between plaintiff and defendant’. (*Page*, note73, 167, emphases added). [↑](#footnote-ref-77)
78. Here present probability judgements about D’s future conduct are extrapolations from past behaviours. [↑](#footnote-ref-78)
79. Cushman, ‘Deconstructing intent to reconstruct morality’, (2015) 6 *Current Opinion in Psychology* 97-103, 100, argues that, in negligence, the ‘moral failing consists in planning that is insufficient or misdirected: an inattention to the likely consequences of their action.’ The ‘path model’ of blame (Malle *et al*, note 8) posits that we ask whether [D] had both the ‘obligation’ and ‘capacity’ to have prevented their harmful conduct.’ Cushman comments that ‘capacity…specifies *counterfactual* possibility—a person could have prevented their harmful conduct, even though they did not.’ See also: Hurd, note 9: and Larry Alexander & Kimberley Ferzan, ‘Confused Culpability, Contrived Causation and the Collapse of Tort Theory’ in Oberdiek (ed) n 15, 406-425. [↑](#footnote-ref-79)
80. *Per* Lord Lloyd, note 73, 188-189, citing Lord Wright in *Bourhill* v *Young* [1943] AC 92, 110 and Lord Bridge in *McLoughlin*, note 67, 420 and 432. [↑](#footnote-ref-80)
81. *Page,* note 73*,* 189. [↑](#footnote-ref-81)
82. *Alcock*, note 67, 410. See also *Liverpool Women's Hospital NHS Foundation Trust* v *Ronayne* [2015] EWCA Civ 588 (there must be a ‘sudden shocking event’ [10], ‘'horrifying' [to] a person of ordinary susceptibility’ [14]). ‘Sudden’ ‘shocking’ and ‘horrifying’ are each interpretive concepts that exhibit factive-attributive ambivalence. [↑](#footnote-ref-82)
83. Kenneth Abraham, ‘The Trouble with Negligence’, (2001) 54 *Vanderbilt Law Review* 1187-1223, 1190, 1199–1202. [↑](#footnote-ref-83)
84. As reflected in *Hughes* v *Lord Advocate* [1963] AC 837. But cf the *Wagon Mound* litigation, discussed below*.* See also note 76. [↑](#footnote-ref-84)
85. But neuroscience is beginning to measure its effects. See (e.g.): Sara Reardon, ‘Neuroscience in court: The painful truth’, *Nature* 518, 474–476 (26 February 2015) doi:10.1038/518474a; and Frank Pasquale ‘Of Algorithms, Algometry, and Others: Pain Measurement & the Quantification of Distrust’, http://clbb.mgh.harvard.edu/of-algorithms-algometry-and-others-pain-measurement-the-quantification-of-distrust/ (accessed 18 August 2015). [↑](#footnote-ref-85)
86. Abraham, note 83, 1190. [↑](#footnote-ref-86)
87. [2014] EWCA Civ 1512 [125] and [104]. For *Croft* v *Broadstairs & St Peter's Town Council*, see [2003] EWCA Civ 676. Douglas Brodie, ‘Risk Allocation and Psychiatric Harm’ (2015) 44(2) *Industrial Law Journal* 270-280, 273-274, comments, ‘The difficulty…lies in the application’. [↑](#footnote-ref-87)
88. These unforeseeability rules are, in Joseph Raz’s terminology, ‘exclusionary reasons’: see his *Practical Reason and Norms* (London: Hutchinson. 1975) 40-48. [↑](#footnote-ref-88)
89. Frederick Schauer, ‘Formalism’, (1988) 97 *Yale Law Journal* 509-548, 546. [↑](#footnote-ref-89)
90. *Wagon Mound No 1* [1961] AC 688 (hereinafter ‘*WM1*’); *Wagon Mound No 2* at first instance [1963] 1 Lloyd’s Reports 402 (hereinafter ‘*WM2FI*’); and before the Privy Council [1967] 1 AC 617 (hereinafter ‘*WM2PC*’). [↑](#footnote-ref-90)
91. *Viz.* that once D is deemed negligent all damage caused in fact is recoverable: [1921] 3 KB 560. [↑](#footnote-ref-91)
92. [1959] 2 Lloyd’s Reports 697, bracketed interpolations added. [↑](#footnote-ref-92)
93. *WM1* 413. [↑](#footnote-ref-93)
94. *WM1* 423. [↑](#footnote-ref-94)
95. *WM1* 423. Hurd, note 9, 405. [↑](#footnote-ref-95)
96. See Pinker, note 70, 223-227. [↑](#footnote-ref-96)
97. See Michael Moore, ‘Four friendly critics: a response’, (2012) 18 *Legal Theory* 491-542. [↑](#footnote-ref-97)
98. *WM2FI* 408. [↑](#footnote-ref-98)
99. He explicitly avoided the term ‘negligence’, which, he thought, would have signalled a liability verdict, *WM2FI* 408. [↑](#footnote-ref-99)
100. *WM2FI* 406. Cf Abraham, note 83, 1190-1191. [↑](#footnote-ref-100)
101. But Kinsella J found, on different evidence, that D did not know and could not reasonably be expected to have known of the fire risk. See *WM2FI* 426. [↑](#footnote-ref-101)
102. *WM2FI* 426. [↑](#footnote-ref-102)
103. See *Edwards* v *Bairstow* [1956] AC 14. [↑](#footnote-ref-103)
104. *WM2FI* 405. At 406, he describes his approach to ‘the issues of fact’. [↑](#footnote-ref-104)
105. *WM2FI* 409. At 414, he constructed ‘a thoughtful man’. See also ‘a properly qualified and alert chief engineer’, WM2PC 643; and ‘a vigilant ship's engineer’, WM2PC 644. [↑](#footnote-ref-105)
106. *WM2FI* 409 emphasis added. [↑](#footnote-ref-106)
107. See *WM2FI,* 409, ‘The inquiry…is not necessarily to be limited to the knowledge and experience the officers of the *Wagon Mound* themselves actually had’. [↑](#footnote-ref-107)
108. Including: *Glasgow Corporation* v *Muir* [1943] AC 448, 457; *Bourhill* v *Young* {1943] AC 92, 110; *Bolton* v *Stone* [1951] AC 850, 858, 861 and 865; and Lord Atkin’s reference in *Donoghue* v *Stevenson* [1932] AC 562, 580 to ‘acts and omissions…likely to injure’: *WM2FI* 410-411. Cf Dixon CJ, cited in note 50. [↑](#footnote-ref-108)
109. In *Muir* note 108, emphases added. [↑](#footnote-ref-109)
110. *WM2FI* note 58, 413. At 414 he talks of *attributing* knowledge, whereas at 413 he uses the *factive* term *inference*. [↑](#footnote-ref-110)
111. (1963) NSWR 172. [↑](#footnote-ref-111)
112. *WM2FI* 410. [↑](#footnote-ref-112)
113. *WM2PC* 640-641. [↑](#footnote-ref-113)
114. By contrast, in *WM1* the findings of fact (foreseeable pollution, unforeseeable fire damage) were not challenged by the Privy Council, which simply relished the opportunity to find *Polemis* not good law and to exculpate D for the fire damage, at least in negligence. Nevertheless, the *WM1* verdict of total unforeseeability looks odd after *WM2PC*. [↑](#footnote-ref-114)
115. *WM2PC* 641. Discussing *Sharp* v *Powell* (1872) LR 7 CP 253, at *WM2PC* 637, he described a patently attributive foreseeability verdict as a ‘finding of fact’. [↑](#footnote-ref-115)
116. *WM2PC* 643 emphasis added. [↑](#footnote-ref-116)
117. *WM2PC* 643-644. For a level of risk that can be brushed aside, see *Bolton v Stone* [1951] AC 850 and for a standard-raising duty to inform patients about low probability risks, see *Montgomery* v *Lanarkshire Health Board* [2015] UKSC 11 [112]. At [75] Lords Kerr and Reed said that ‘patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession. They are also widely treated as consumers exercising choices’. [↑](#footnote-ref-117)
118. Thomas Reed Powell, cited in Thurman Arnold, *The Symbols of Government* (New Haven, CT: Yale University Press, 1935) 101. [↑](#footnote-ref-118)
119. Note 83, 1191. [↑](#footnote-ref-119)
120. Oliver Wendell Holmes, *The Common Law’* (London: Macmillan, 1968, original 1881) 97. [↑](#footnote-ref-120)
121. *HMRC Commissioners* v *Pendragon plc* [2015] UKSC 37: intention to avoid tax rendered a scheme an ‘abuse of law’. [↑](#footnote-ref-121)
122. In *Edwards*, note 103, 31, Viscount Simonds said, whether a transaction is ‘an adventure in the nature of trade’ depends on ‘the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics’. [↑](#footnote-ref-122)
123. Cf my discussion of the principle/policy distinction in ‘Is a General Theory of Adjudication Possible?’ (1985) 48 *Modern Law Review* 613-643. [↑](#footnote-ref-123)