Verdictive Foresight

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# Introduction

Last week, I foresaw a risk [R] that this session might go badly—11,000 words in the paper and only 15-20 minutes to ‘read’ them. If I actually foresaw R, it follows that R is foresee*able*.

I might plough on and come to grief. Having *foreseen* R, I would be *reckless* rather than *negligent*. Were I to tell him about that next week, my colleague Mike might say, ‘No-one can read that sort of paper in such a short session’.

* That would be his ‘verdict’. It would reveal none of his reasons for making it. Like Nero’s thumb, in their pure form verdicts do not invoke, imply or allude to reasons
* His verdict is ambivalent. It might mean: ‘it is physically impossible…’; ‘don’t beat yourself up….’; ‘you ought to have taken more care…’.
* Context and status matter. If Mike were my manager, his words might be a reprimand and/or an instruction not to do such a stupid thing again.

‘Thus if you are a judge and say “I hold that...” then to say you hold is to hold; [but] with less official persons it is not so clearly so: it may be merely descriptive of a state of mind.’
(JL Austin, How to Do Things with Words (1975, 2nd edn: Cambridge MS, Harvard University Press) 88)

# Analytical tools

Verdictives and JL Austin’s ‘illocutionary force’

‘To say “The cat is on the mat” is very different from saying “I apologize”…
…‘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.’ (HTDTWW 146)

‘A verdict is essentially giving a finding as to something—fact, or value—which is for different reasons hard to be certain about.’ (HTDWW 151)

‘The total speech act in the total speech situation is the only actual phenomenon which, in the last resort, we are engaged in elucidating.’ (HTDTWW 148)

‘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.’
(Paul Ricoeur, ‘Creativity in Language’ (1973) 17(2) Philosophy Today, 97-111, 101)

‘‘[T]he sentence as a whole is the bearer of meaning…[which] should be called the intended rather than the signified of the sentence.’ (ibid. 99)

* Is ‘I call that negligent’: explanatory; condemnatory; or an attribution of responsibility?
* Is ‘The Ford Fiesta is the one to have’; a conclusion made having read a comparative car test report; or is it a commitment to purchase? Without more, can we tell whether the conclusion favoured fuel economy, drivability, purchase price, reliability, aesthetics, etc.?
* Is ‘I shall be there’ a prediction, a threat or a promise?
* ‘I expect my children to behave.’ What does ‘expect’ mean in this sentence and/or its context?
Think: regular/regulation; normal/normative.

***Ex ante* and *ex post***

Because they address particular disputes, judicial verdicts are predominantly *ex post facto*. Exceptions include injunctions, curfews etc. But even these look back in order to predict the future R. Of course, the like cases rule means that judges’ reasoning might, like Parliament’s, be future-oriented. Distinguish: ‘D must pay C’ from ‘the rule is (or from here on will be) that manufacturers must take reasonable care of ultimate consumers’.

Judicial verdicts can ‘make it so’ that D is responsible in law only because judges have the exercisable power to do so. We too can ‘make some things so’: (e.g.) by signing a contract or permitting a dentist to remove our troublesome tooth.

# Factive-attributive ambiguity

The *factive* (world-to-word) ‘What *was*/*is*/*will be* the case?’ plays the *attributive* (word-to-world) ‘What *ought to have been*/*be* the case?’ Applied to foreseeability, we have to distinguish:
 (i) factive foresight; (ii) factive foreseeability; (iii) attributive foreseeability.

The words alone will not distinguish (iii) from (ii) or, sometimes, (i). We need to consider their illocutionary force in order to discern (or construct for ourselves) their speaker’s (or writer’s) meaning. The factive-attributive distinction affects the appropriate tests of validity and, hence, the kinds of contributory reasons.

*Factive foresight verdicts* and *factive foreseeability verdicts* attempt to describe what was/is the case—albeit with the subjectivity of the describer. The validity test is empirical truth/falsehood.

*Attributive foreseeability*[[1]](#footnote-1) *verdicts* ‘*make it so*’ that D is blamed or held responsible. They *do* (or *perform*) the blaming and the holding responsible. They are congenially, but misleadingly, expressed as ‘R was reasonably foreseeable’. It makes no sense to test for truth or falsehood. The validity of the attributive is determined by normative evaluation. By contrast, ‘D ought (reasonably) to have foreseen’ is clear to the alert reader.

## Factive foreseeability as a necessary but insufficient condition of responsibility or liability

No-one will claim that D acted intentionally, recklessly or negligently in respect of R when R was utterly unknown *ex ante*. The *factive foreseeability filter* will keep such cases from court.

But where C can show that a few people (not including D) have fore*seen* R, C will argue that R is (factively) foresee*able*. D will counter (attributively) that too few had foreseen R for it to be reasonable: to ‘expect her to foresee R’ ; or, more straightforwardly, to ‘hold her responsible for R’. By contrast:

* those who commit intentional torts are strictly liable for unforeseeable consequences; and
* strict liability claims can therefore survive despite factive unforeseeability. Nevertheless, selecting the *causa causans* from amongst the almost infinite number of *causae sine qua non* entails subjective judgement.

# Links to Folk Morality and Rule of Law predictability

* Kahneman’s Systems 1(thinking fast) and 2 (thinking slow), for citizens
* Frederick Schauer’s ‘presumptive formalism’, for the legal system
* Free will and blame
* Outcome and hindsight bias
* Accounts for foreseeability’s ubiquity.

# Problems

* Negligence is based on D’s *unreasonable* *omissions* to foresee R, not on (active) factive fore*sight*, which would signal intention or recklessness, or even on the factive foresee*ability* of R. Negligence is not ‘a state of mind’ in the way that intention and recklessness are, but is only ‘a state of mind’ 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 to the R that materialised, but *did not*.[[2]](#footnote-2)
* Attributive ‘foreseeability’ is mostly (ex/implicitly) linked with ‘reasonableness’. Which word does the work?
* Does ‘foreseeability’ have any function beyond making a rhetorical connection with folk morality?
* Does foreseeability obscure judicial reasoning? Does it confuse students? Or judges?

# The Algorithmic Model—only a model

I take just one example*—proximity*. In the negligence tort—modelled algorithmically: Q1 factive foreseeability filter; Q2 attributive foreseeability; Q3 proximity; Q4 ‘fair, just and reasonable’; Q5 public policy; Q6 remoteness—*foreseeability verdicts and proximity verdicts share*:

* Functioning *ex post*
* Circularity/tautology
* Factive-attributive ambivalence and open-texture
* Risk, relationality[[3]](#footnote-3) and cause

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*.[[4]](#footnote-4) Think ‘proximate cause’ (and, of course, remoteness of damage).

Lord Oliver’s wise words in *Alcock* v *Chief Constable of South Yorkshire* [1992] AC 310, 411 about *proximity* can be applied equally to *attributive foreseeability*.

‘The answer has…to be found in the existence of a combination of circumstances from which the necessary degree of "proximity" [or of “attributive foreseeability”] between the plaintiff and the defendant can be deduced. And, in the end, it has to be accepted that the concept of "proximity" [or of “attributive foreseeability”] 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.’

* Why then have two concepts doing the same work? And using the same contributory reasons?

Case Studies (There are four in the paper but I will deal only with two here)

## Page v Smith [1996] AC 155

‘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.’

Lord Lloyd uses the inappropriate language of *factive foresight*. D had simply failed to give way when turning out of a side road. Yet D was held liable, even though he had not actually foreseen any harm to C.

Later, in changing the law for those actually involved in accidents (so-called ‘primary victims’), Lord Lloyd used the language of *factive foreseeability*—attributive foreseeability would have been more appropriate.

‘[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.’ (Emphases and bracketed interpolations added.)

But the clue to his illocutionary meaning is, I suggest, his use of the word ‘*reasonably*’. That word signals that he spoke *attributively*, as a judge of *standards* (rather than of *fact*). Indeed, it does *all* the normative work.

## The Wagon Mound litigation

Fire damage was unforeseeable and irrecoverable in the first case, but foreseeable and recoverable in the second. In *WM1*, the trial judge, Kinsella J, made what Viscount Simonds later described [1961] AC 688 as ‘the all-important finding’. It seems two-pronged—factive and attributive.

‘The raison d'être of furnace oil is… 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.’

In WM2FI [1963] 1 Lloyd’s Reports 402, Walsh J, (i) undertook ‘some scrutiny of the test of foreseeability, in order to determine how it should be applied to the circumstances of the case’; and (ii) heard and assessed the evidence of people in the same technical business as D. (The evidence in *WM2* was different to that in *WM1* because in the risk of contributory negligence present in *WM1* was absent in *WM2*). He held that,

‘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’

These words conflate two of his verdicts. Verdict (A) is factive and verdict (B) is attributive:

(A) some might have foreseen the risk (so it is *factively* foreseeable);

(B) but the *reasonable* ship’s engineer (a *judicial construct*) would have discounted the risk as too improbable.

On its face, verdict (B) reads as if a finding of fact, a matter for the judge who heard the witnesses and not appealable unless patently perverse. But one needs to read the sentence in context to determine its attributive illocutionary force. And elsewhere, Walsh J spoke of the room for diversity of view and of the ship’s officers’ ‘assumed…mental processes’ in considering whether the fire risk was low enough to disregard. That language is more obviously attributive. On appeal [1967] 1 AC 617, the Privy Council thought verdict (B) was reversible, and reversed it (despite the clash with WM1). Lord Reid said that verdict (B) 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.’[[5]](#footnote-5)

# Conclusions

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 vicarious *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.

In many cases, the decision whether to attribute responsibility to D, is a verdict of *reasonableness*—Abraham calls it ‘unbounded norm creation’[[6]](#footnote-6)—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? What kinds of evidence or argument make for its validity?

Consider verdicts on: proximity; involved in the accident; intention (whether in crime, contract, tort, trusts, tax,[[7]](#footnote-7) etc.); recklessness; habitability; an ‘adventure in the nature of trade’;[[8]](#footnote-8) and many, many more.

1. I use the term ‘attributive to mean ‘attributive of blame or moral or legal responsibility’. One can also ‘attribute’ the status of fact but that is captured here by the slightly arcane term ‘factive’. [↑](#footnote-ref-1)
2. Fiery 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.’ [↑](#footnote-ref-2)
3. See John Oberdiek, ‘Structure and Justification in Contractualist Tort Theory’ in John Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford: OUP, 2015) 103-121 and Michael Moore, ‘Four friendly critics: a response’, (2012) 18 *Legal Theory* 491-542. [↑](#footnote-ref-3)
4. See Stephen Perry, ‘Torts, Rights and Risks’, in Oberdiek (ed.) note 3, 39-34, especially 40-44. [↑](#footnote-ref-4)
5. *WM2PC* 641. However, in 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-5)
6. Note Kenneth Abraham, ‘The Trouble with Negligence’, (2001) 54 *Vanderbilt Law Review* 1187, 1191. [↑](#footnote-ref-6)
7. *HMRC Commissioners* v *Pendragon plc* [2015] UKSC 37: intention to avoid tax rendered a scheme an ‘abuse of law’. One must foresee to intend. [↑](#footnote-ref-7)
8. In *Edwards v Bairstow* [1956] AC 14, 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-8)