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Article 6

Negligence: Foreseeability

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for pecuniary loss ($15,000) is increased $1500 on account of each child in excess of two, but not exceeding a total increase of $7500.[36] It has been said that such pecuniary loss may include counsel and advice, in addition to support and such contributions as may have been made to the child had the parent lived.[37] It should be noted, however, that the Wisconsin statute limits recovery for loss of the society and companionship of the deceased to his spouse or parents.[38]

The tendency of modern law, as reflected in the alienation of affections decisions discussed above,[39] seems to be away from recognizing judicially any new rights in children;[40] but the vigorous minority in those cases, characterized by *Daily v. Parker*,[41] and the recognition in some jurisdictions of the right of the wife to sue for loss of the consortium of her husband,[42] are factors difficult to evaluate. In Wisconsin, in view of the stand taken by the court, against extending to the child the right to sue for alienation of affections, and especially the stand on judicial lawmaking,[43] it seems safe to say that an action like the one in the principal case would receive similar treatment.

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Negligence—Foreseeability—Plaintiff was injured when her husband lost control of a truck, in which they were riding, due to severe corrugations in the floor covering of a bridge maintained by the defendant. The uneven corrugated surface was caused when a gravel mixture, which the defendant's employees had used to cover the bridge flooring, sifted between cracks of the flooring. Defendant maintained that the development of the dangerous condition was unforeseeable. *HELD*: The defense that one is not liable for unforeseeable consequences of an act is inapplicable to relieve the actor who negligently sets into motion a chain of circumstances leading to the final resultant injury. *Pruett v. State through Department of Highways et al., 62 So. 2d 686 (La. 1953).*

The court in the prinicipal case has placed itself with the majority of courts regarding the effect of the foreseeability test[1] upon the causation issue. This position is: the duty of care owed a plaintiff is determined with reference to the reasonably anticipated or foreseen injury to that plaintiff. Once the defendant's breach of duty is estab-

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[36] WIS. STATS. (1951), §331.04(4).
[37] Green, *Relational Interests*, 29 ILL. L. REV. 460, 484-485(1934).
[38] WIS. STATS. (1951), §331.04(4).
[39] *See supra*, note 27.
[40] *See supra*, note 26.
[41] *See supra*, note 24.
[42] *See supra*, note 7.
[43] Scholberg v. Itnyre, *supra*, note 27.
[1] 38 *Am. Jur. Negligence*, §58.

lished, no reference is made, in holding him responsible for the injurious consequences of his act or omission, to the foreseeablity of the actual result.[2]

The alternative minority position is: the proximate-causal relation of negligent act or omission and subsequent injury to another does not exist except where the injurious consequences were foreseen or reasonably foreseeable.[3]

Frequently a jurisdiction has brought itself to the majority position from a confused state of the law rather than to a newer position from a previously well-established minority doctrine. Such has been the development in Wisconsin.[4] Many of the older cases adhered to a variously worded principle. The substance of it was that a breach of duty is proximately causal of an injury (*i.e.* renders one liable) only in the instances where the injury was a "natural and probable" consequence of the negligence, and ought reasonably to have been anticipated or foreseen to be such in the perspective of the situation then existing.[5]

With the *Osborne* case, Rosenberry, C. J., placed Wisconsin with the group that adapted themselves to Cardozo's analysis in the *Palsgraf* case, drawing the distinction between the operation of foreseeability to establish negligence, and to limit its legal consequences to the actor.[6] Following the distinction it is made clear that assuming negligence resulting in damage, the actor is entirely liable for all naturally consequent damages, whether reasonably anticipated or foreseen or not. This principle is confirmed as the law in Wisconsin in the recent *Pfeifer* case:

> ". . . foreseeability under our law as it now stands applies only to the question of negligence or the failure to exercise ordinary care, and not to limit the liability for the consequences of the wrongful act, . . ."[7]

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[2] Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); Gibson v. Delaware & H. Canal Co., 65 VT. 213, 26 A. 70 (1892).

[3] Palsgraf v. Long Island R.R. Co., *ibid.*, (Dissenting opinion); Wood v. Pennyslvania R. Co., 177 Pa. 306, 35 A. 699 (1896); Mellon et al. v. Lehigh Valley R. Co., 282 Pa. 39, 127 A. 444 (1925); Brush Electric Light & Power Co. v. Lefevre et ux., 93 Tex. 604, 57 S.W. 640; Palermo v. Orleans Ice Mfg. Co., 130 La. 833, 58 So. 589; Huber v. The La Crosse City R. Co., 92 Wis. 636, 66 N.W. 708 (1896). Louisiana and Wisconsin have since varied their positions.

[4] Koehler v. Waukesha Milk Co., 190 Wis. 52, 208 N.W. 901 (1926); Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931); Pfeifer et al v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W. 2d 29 (1952); *See Note,* 155 A.L.R. 157 (1945).

[5] Atkinson v. The Goodrich Transportation Co., 60 Wis. 141, 18 N.W. 764 (1884); Deisenreiter v. The Kraus-Merkel Malting Co., 97 Wis. 279, 72 N.W. 735 (1887); Morey v. Lake Superior T. & T. Co., 125 Wis. 148, 103 N.W. 271 (1905); Bell Lumber Co. v. Bayfield Transfer Ry. Co., 169 Wis. 357, 172 N.W. 955 (1919); Smith v. Taylor-Button Co., 179 Wis. 232, 190 N.W. 999 (1923).

[6] Osborne v. Montgomery, *supra,* note 4, 203 Wis. at 234.

[7] Pfeifer v. Standard Gateway Theater, Inc., *supra,* note 4, 262 Wis. at 235.

The position that the problem is a question of an interpersonal duty of care could conceivably give into the court's hands more extensive control of the case than does the minority theory.[8] Not only does the primary question of duty rest with the court, but the court further reserves to itself the power in other than "mine run" negligence cases,

> ". . . to decide as a matter of law whether or not considerations of public policy require that there be no liability."[9]

The Wisconsin case of *Lindgren v. LaCrosse County* offers facts virtually parallel with those in the principal case.[10] Chuck holes in a road, recently filled by a governmental unit, were washed out by rains, which were expected to fall, as was the gravel mixture in the principal case expected to sift between the bridge flooring. The court found that there was no breach of an interpersonal duty in the absence of actual or constructive notice to the governmental unit that the road had fallen into disrepair.

The trend to the majority rule creates unexpected novelties, and replaces the older observation that a difference in method of approach does not necessarily require a different result,[11] with the proposition that a similar method of approach does not necessarily require a similar result.[12] The majority view represents a developing judicial self-confidence in the ability of the court to exercise discretion in determining proper conduct among the complexities of human affairs. The early cases invariably preferred the flexibility of the law to reside in a kind of "formula elasticity," which relieved the court of any personal responsibility for, or authority over, the judgment. The current law permits legal flexibility to reside in a kind of "administrative elasticity" which causes the court to assume the personal responsibility for a circumspect judgment.

It remains to determine whether the frequent past use of the "natural and probable" phrase, together with the "foreseeability" requirement, will permit an identification of "natural and probable" consequences of a breach of duty with "foreseeable" consequences of the same.[13] It had been speculated that the conjunctive use of the phrases

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[8] Warren A. Seavey, *Mr. Justice Cordozo and the Law of Torts*, 52 HARV. LAW REV. 372, 383.

[9] Pfeifer v. Standard Gateway Theater, Inc., *supra*, note 4.

[10] Lindgren v. LaCrosse County, 231 Wis. 347, 285 N.W. 772 (1934).

[11] Mosely v. Arden Farms Co., 26 Cal. 2d 213, 157 P. 2d 372 (1945).

[12] It is proposed that the Lindgren case is already an application of the maxim. In that case the considerations upon which judicial discretion refused a judgment for plaintiff were: the plaintiff's contributory negligence (even despite a comparative negligence statute), the relative "nuisance" character of the plaintiff's injury, and the infeasibility of a more substantial highway repair. None of these elements was present in the principal case.

[13] Atkinson v. The Goodrich Transportation Co., *supra*, note 5; Andrews v. C.M. & St. Paul R. Co., 96 Wis. 348, 71 N.W. 372 (1897); Maitland v. The

was redundant in testing the actionability of negligence.[14] The court seems to have confirmed that speculation, first by establishing that foreseeability cannot limit liability for the consequences of the negligence,[15] and then by declaring that the law in Wisconsin is not restricted to holding actors liable only for natural and probable consequences, but can impose liability for natural consequences that were probable or not.[16] The effect of this is to establish that probability of a natural consequence was always foreseeability, though separately expressed in conjunction with it for emphasis. The confusion is now laid to rest:

> "We have used the 'natural and probable' phrase from time to time when it was not of particular moment . . ."[17]

Unfortunately, disposing of half of a conjunctive usage as a redundancy does not halve the problem. The law is left with a single, clearly-expressed test of liability for consequences of negligence. The test is isolated, but what will satisfy it? What is a "natural consequence?"

Definitions are to be had which include the questioned word in them and are, for that reason, unsatisfactory.[18] The sum of the definitions leads to the following conclusion: the test in Wisconsin of natural consequence is the *sine qua non* ("but for") proof of the series of events.[19] That proof is sufficiently restricted to render it practically useful by limiting the meaning of "substantial factor" (that without the contribution of which the injury would not have occurred) to those of the real, philosophic causes as are popularly and reasonably regarded to impute responsibility.[20]

The Wisconsin law presently touching the issue lends itself to a systematic formulation:

> 1. The question of foreseeability is applied only to the issue of an interpersonal duty, not to proximate cause.
>
> 2. Breach of duty is the proximate cause of naturally consequent injuries.

Gilbert Paper Co., 97 Wis. 476, 72 N.W. 1124 (1897); Stefanowski v. Chain Belt Co., 129 Wis. 484, 109 N.W. 532 (1906); Schabow v. Wisconsin T., L., H. & P. Co., 162 Wis. 175, 155 N.W. 951 (1916).

[14] 5 WIS. L. REV. 142 (1928).

[15] Pfeifer v. Standard Gateway Theater, Inc., *supra,* note 4.

[16] Osborne v. Montgomery, *supra,* note 4; Bengston v. Estes, 260 Wis. 595, 51 N.W. 2d 539 (1951); Pfeifer v. Standard Gateway Theater, Inc., *supra,* note 4.

[17] Bengston v. Estes, *ibid.,* 260 Wis. at 600.

[18] [Negligence] is the natural cause when either it acts directly in producing the injury, or sets in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury; thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor the direct cause of the event. Meyer v. Milwaukee Elect. Ry. & Light Co., 116 Wis. 336, 93 N.W. 6 (1903); Winchel v. Goodyear, 126 Wis. 271, 105 N.W. 824 (1905).

[19] Bell L. Co. v. Bayfield T. R. Co., 169 Wis. 357, 172 N.W. 955 (1919).

[20] Schultz v. Brogan, 251 Wis. 390, 29 N.W. 2d 719 (1947); Walton v. Blauert, 256 Wis. 125, 40 N.W. 2d 545 (1949); Siblik v. Motor Transport Co., 262 Wis. 242, 55 N.W. 2d 8 (1952).

3. A natural consequence is the effect of a *sine qua non* ("but for") cause, tempered by popular reason and judicial discretion.

Whether the court will elect to restrict itself by even this most liberal, organized whole requires a decision embracing it.

HOWARD EQUITZ

Divorce—The Effect of a Prior Divorce Judgment on a Subsequent Action for Alimony and Support—In 1946 plaintiff wife procured a valid absolute divorce in Connecticut, which was her domicile at the time, against her non-resident spouse upon constructive service. Subsequently, she brought an action in California to obtain alimony and support, at which time, she conceded that the *"in personam"* provisions of the Connecticut decree were invalid because of lack of jurisdiction over her spouse. The former husband made a general appearance in the California action, and appealed from the judgement in favor of the plaintiff. *Held*: Reversed. The application for alimony is a collateral proceeding or episode within the action for divorce, authorized for a particular purpose, but dependent for its maintenance upon the existence of the action. After the judgment granting the divorce the plaintiff was no longer the wife of the defendant, and he no longer owed her any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment. *Dimon v. Dimon, 254 P.2d 528 (Cal.1953).*

The courts are divided on the question as to whether a wife's suit for alimony, subsequent to a valid foreign divorce decree, may be maintained. Local rules on that question depend, in the first instance, upon whether such a divorce is thought to be divisible or indivisible in regard to its effect upon the marital status of either spouse on the one hand, and upon the wife's right to alimony on the other.[1]

There is a line of cases which support the view that a wife may obtain alimony from her former husband, notwithstanding a valid existing *ex parte* divorce decree in a jurisdiction in which the husband did not appear or reside.[2] These decisions point out that it was impossible for the wife to recover an allowance for support at the time of the divorce decree because the court lacked personal jurisdiction over the husband. If the question of support could not be litigated

[1] See Note, 28 A.L.R. 2d 1378.

[2] Stephanson v. Stephanson, 54 Ohio App. 239, 6 N.E. 1005 (1936); Darnell v. Darnell, 212 Ill. App. 601 (1918); Miller v. Miller, 186 Okla. 566, 99 P. 2d 515 (1940); Nelson v. Nelson, 71 S.D. 342, 24 N.W. 2d 327 (1946); Pawley v. Pawley, Fla. 46 So. 2d 464 (1950); Searles v. Searles, 140 Minn. 385, 168 N.W. 133 (1918).