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NEGLIGENCE-FORESEEABILITY AS A LIMITATION ON LIABILITY

Frank Bowen Jr.
University of Michigan Law School

NEGLIGENCE—FORESEEABILITY AS A LIMITATION ON LIABILITY—Plaintiff's truck broke down on the road. Another truck driver, attempting to pass plaintiff's truck, became mired beside it, and the two trucks blocked the road. While plaintiff lay under his truck attempting repairs, a bulldozer operated by the defendant approached the two trucks from the rear. The driver of the second truck signaled the defendant to push his, the mired truck, but the defendant, mistaking the signal, pushed plaintiff's truck, causing it to run over plaintiff's legs. The defendant had not seen the plaintiff beneath the truck. The issue of defendant's negligence was submitted to the jury, and verdict was for the plaintiff. On appeal, *held*, affirmed. The issue of the defendant's negligence was properly for the jury. *McDonald v. Ferrebee*, 366 Pa. 543, 79 A. (2d) 232 (1951).

The problem of the unforeseeable plaintiff arises when the defendant's conduct involves foreseeable risk to one party and results in injury to a plaintiff to whom risk would not have been foreseen by a reasonable man.[1] In these cases, two views exist as to the manner in which foreseeability will affect the defendant's liability.[2] The Pennsylvania view holds that the defendant's negligent act is the "proximate cause" of only the foreseeable consequences of such act.[3] On the other hand, the New York view holds that there is no "duty" toward a plaintiff unless injury to that plaintiff could have been foreseen.[4] Since "foreseeability" is a common limitation to defendant's liability, it would seem that under either view the results ought to be the same.[5] It is submitted, however, that the pro-

[1] Goodhart, "The Unforeseeable Consequences of a Negligent Act," 39 YALE L.J. 449 (1930); PROSSER, TORTS 182 (1941); 38 AM. JUR., Negligence §58 (1941).

[2] Liability for a negligent act may be limited by other methods, not considered here, which do not involve foreseeability. PROSSER, TORTS 316 et seq. (1941).

[3] Wood v. Pennsylvania R. Co., 177 Pa. 306, 35 A. 699 (1896); Mellon v. Lehigh Valley R.R., 282 Pa. 39, 127 A. 444 (1925). Of course, when a "duty" is accurately defined, as in landlord-tenant relations, the absence of such duty will limit liability. Harris v. Lewistown Trust Co., 326 Pa. 145 at 152, 191 A. 34 (1937).

[4] Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

[5] "I suspect, for instance, that what I have called the Cardozo and Pennsylvania views are really the same view except that the former emphasizes those factors in a case which might indicate that the result of defendant's negligence was probable or foreseeable, whereas the latter ignores those clues and looks only at the damage in light of normal expectancies." Gregory, "Proximate Cause in Negligence—A Retreat from 'Rationalization,'" 6 UNIV. CHI. L. REV. 45 at 53 (1938). But it has been said that ". . . nearly all legal theory in negligence cases is designed to serve the ends of allocating the power of judgment respectively to judge and jury." Green, "The Palsgraf Case," 30 COL. L. REV. 789 at 798 (1930). In accord with the latter writer, it is believed that any distinction must be found in the difference of allocation of function.

cedural difference in determining "duty" as a question of law for the judge,[6] and "proximate cause" as a question of fact for the jury[7] may affect the substantive limits of liability. Considering the principal case as a problem of "duty," foreseeable risk to the property interest represented by the plaintiff's truck would seem clear, but the "duty" of using due care to avoid personal injury would depend upon the foreseeable risk of personal harm to the plaintiff.[8] This limitation, though criticized as being a refinement too subtle for practical application,[9] is theoretically sound,[10] and has gained recognition in the *Restatement of Torts*[11] and in a few decided cases.[12] As a question of law under the "duty" concept, the diverse legal interests of person and property could be considered directly and explicitly by the appellate court. On the other hand, when the question of foreseeability takes the form of "proximate cause," as it did in the principal case, and the jury determines it, review by the appellate court is indirect by the unwieldy device of evaluating jury instructions.[13] Thus, in the principal case, the question of whether the defendant should have foreseen the presence of the plaintiff beneath the truck, having been decided by the jury, is not discussed. A court using the "duty" concept, however, could find from the facts given that foreseeable risk to the plaintiff's truck did not necessarily include foreseeable risk to the plaintiff personally. The difference in method does not, of course, necessarily predicate a different result,[14] but it is submitted that determination by the judge, rather than by the jury, of whether a particular injury is foreseeable has the practical effect of more accurately defining the limits of liability in that the particular legal interests involved are explicitly examined as a question of law.[15]

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[6] Palsgraf v. Long Island R.R. Co., supra note 4; Green, "The Duty Problem in Negligence Cases," 28 COL. L. REV. 1014 at 1022 (1928); but see O'Neill v. City of Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930), holding that where varying inferences of the risk creating the duty are possible the question is for the jury.

[7] Helmick v. Township of South Union, 323 Pa. 433, 185 A. 609 (1936); PROSSER, TORTS 282 (1941).

[8] "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e.g., one of bodily security." Palsgraf v. Long Island R.R. Co., supra note 4.

[9] Goodhart, "The Unforeseeable Consequences of a Negligent Act," 39 YALE L.J. 449 at 467 (1930).

[10] Tilley, "The English Rule as to Liability of Unintended Consequences," 33 MICH. L. REV. 829 at 847 (1935).

[11] 2 TORTS RESTATEMENT §281 (1934).

[12] Texas & Pacific R. Co. v. Bigham, 90 Tex. 223, 38 S.W. 162 (1896); Excelsior Insurance Co. of N.Y. v. State, 296 N.Y. 40, 69 N.E. (2d) 553 (1946).

[13] Principal case at 234: "Defendants took only a general exception . . . to the error which they now allege. Under these facts they cannot now be heard to complain."

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

[15] In a particular case, there may be no distinction, if, because of undisputed facts, the question of "proximate cause" is taken from the jury. West Mahonoy Township v. Watson, 116 Pa. 344, 9 A. 430 (1887).