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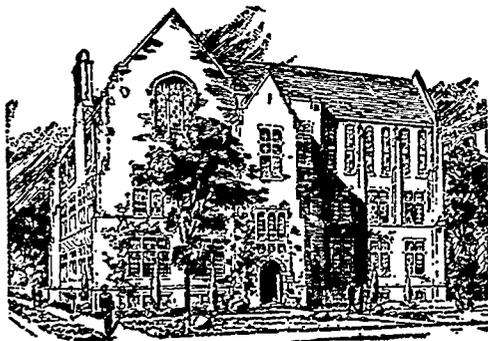
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## DUTY AND FORESEEABILITY FACTORS IN FRIGHT CASES

REYNOLDS C. SEITZ

**W**HAT liability will be imposed by the next decision in a fright case? The law in this field of torts is constantly developing, and it is difficult to answer the question. Those who wish to limit recovery place their reliance upon a strict or narrow interpretation of the duty and foreseeability rules. They seem to feel sure that their attitude will inevitably lead a court to restrict recovery in emotional disturbance cases. Actually in such an outlook the probability is that logic will force many courts to extend the rule.

Let us assume that a court has for the first time met with a case in which a defendant is claimed to have unintentionally<sup>1</sup> directed an act of negligence toward one person and by so doing has caused another and different person to suffer from fright, shock, and emotional disturbances which are so pronounced as to bring about physical conse-

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<sup>1</sup>It is recognized that the problem illustrated by such cases as *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931), and *La Salle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934), where the emotional disturbance was intentionally caused is different from the problem suggested by this article.

quences. Or, to put the matter in concrete form, the factual situation of the famous English case, *Hambrook v. Stokes Bros.*<sup>2</sup>

An act of negligence was directed toward a child. Because the mother, who witnessed the predicament of the child, feared for its safety, she became emotionally disturbed. As she was pregnant at that time, the shock caused her to have a hemorrhage. She partially recovered, but later suffered a relapse and underwent an operation which resulted in the removal of a dead foetus. The mother died within a few days. Suit was brought for the wrongful death of the mother.<sup>3</sup>

The purpose of assuming that such a case has never before been decided is to escape from the many artificial principles that have guided the courts in handing down decisions in fright cases. It seems, if it were not for the existence of some of the so-called sacred principles, we could view what is at best a most difficult problem with a little clearer vision. No apology is needed for disregarding some of the existing maxims in the type of case set forth. The courts throughout the years have been busy paring away at the groundwork of dogma which is supposed to underlie the philosophy in shock cases. Since Lord Wensleydale's famous dictum in *Lynch v. Knight*<sup>4</sup> to the effect that "mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone," and the resultant outcome of that theory which took form in the generalization that there can be no recovery for physical injuries produced through fright,<sup>5</sup> the courts have progressed far<sup>6</sup> in getting away from the restricting influences of stereotyped legal phrases. They have advanced through allowing recovery when they found "initial impact," no matter how slight,<sup>7</sup> up to the majority opinion of today which allows recovery for physical injuries produced through fright, even in the absence of impact, when the negligent act is directed toward the person injured.<sup>8</sup> This majority expression is the modern maxim which will

<sup>2</sup> *Hambrook v. Stokes Bros.* (1925) 1 K.B. 141. For a review of the cases dealing with the problem, see notes (1935) 2 U. OF CHI. L. REV. 654 (1935) 19 MINN. L. REV. 906.

<sup>3</sup> The court allowed recovery.

<sup>4</sup> 9 H.L. Cas. (1861).

<sup>5</sup> *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354, 34 L.R.A. 781 (1896); *Millër v. Baltimore & Ohio R. R.*, 78 Ohio St. 309, 85 N.E. 499 (1938).

<sup>6</sup> No attempt is made in this article to trace the ramifications, variety of holdings, and complete development of the doctrine in emotional disturbance cases. The author could not possibly improve upon the wealth of high grade literature already existing on the topic. Perhaps the most complete and clear discussion is Green's *Fright Cases*, (1933) 27 ILL. L. REV. 761.

<sup>7</sup> *Homans v. Boston Elevated R. R.*, 180 Mass. 456, 62 N.E. 737 (1902); *Porter v. Delaware L. & W. R. R.*, 73 N.J.L. 405, 63 Atl. 860 (1906).

<sup>8</sup> *Purcell v. St. Paul R. R.*, 48 Minn. 134, 50 N.W. 1034, 16 L.R.A. 203 (1892); *Yoakum v. Kroger* (Texas Civ. App. 1894) 27 S.W. 953; *Hanford v. Omaha & C. B. St. Ry.*, 113 Neb. 423, 203 N.W. 643 (1925); (1925) 73 U. OF PA. L. REV. 285, n. 26.

be dropped out of our discussion.<sup>9</sup> Dean Green truly states that it is dangerous to continue to lay down generalizations when they are allowed to parade under the sacrosanct banner of principles.<sup>10</sup> Since much judicial heed has been given to the axioms mentioned simply because it was felt that such formulas had to exist in order to raise a bulwark against the danger of pretense and fraud in shock cases, and today much legal literature<sup>11</sup> condemns denying justice solely because of the fear of the possibility of fraud, another reason exists to clear the atmosphere of artificiality.

Looking at the problem for the first time, one is confronted with a proximate or legal cause situation. The reader should, of course, not get the idea from the preceding paragraphs that our courts at the present time would not recognize in the suggested factual set-up a proximate cause case. It is true that in deciding almost all emotional disturbance cases, the courts spend most of their time discussing theories of legal causation. Lurking, however, in at least the inner consciousness of most courts is the awareness of the principle pointed out. It is apparent that reasoning is done within the boundaries of the too highly respected pronouncement that "there can be recovery for physical injuries produced through fright even in the absence of impact *only when* the negligent act is directed *toward* the person injured." If the situation falls outside the statement, the courts, with only a few exceptions<sup>12</sup> have refused to allow recovery. There have been, of course, quite a few cases in which the courts have allowed a mother to recover for injuries produced by fright when her child was in danger. *Spearman v. McCrary*<sup>13</sup> and *Alabama Fuel Co. v. Baladom*<sup>14</sup> furnish examples. It was apparent from the evidence in those cases that the mother suffered from shock because of concern for her child. The court, however, thinking of the maxim which required that the force be directed toward the person injured professed to see that the same force which put the child in danger could also be said to be directed toward the person of the plaintiff and thereby allowed recovery while staying inside the rule. In other words, the court, to a great extent acting in the face of the

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<sup>9</sup> My only concern is dropping out of the discussion the last phrase, namely, "When the negligent act is directed toward the person injured."

<sup>10</sup> Green, *Fright Cases* (1933) 27 ILL. L. REV. 761.

<sup>11</sup> Goodrich, *Emotional Disturbance as Legal Cause* (1922) 20 MICH. L. REV. 497; RESTATEMENT, TORTS (Tent. Draft No. 8, 1932) § 311. Gulf C. & S. F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900), in which the court points out that fear of fraud should disappear under actual practice.

<sup>12</sup> Gulf Ry. v. Coopwood (Texas Civ. App. 1906) 96 S.W. 102; Cohn v. Ansonia Realty Co., 162 App. Div. 794, 148 N.Y. Supp. 41 (1914); Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937); affirmed in (Neb. 1938) 280 N.W. 890.

<sup>13</sup> 4 Ala. App. 473, 58 So. 927 (1912).

<sup>14</sup> 15 Ala. App. 316, 73 So. 205 (1916).

testimony, decided the mother suffered from fright because of her own proximity to danger. When, however, the courts cannot find such convenient grounds so that a case can be said to fall within the limits of the familiar axiom, it is easy for them to manipulate the rules of legal causation so as to insure a decision which will come within the prescribed boundary—a boundary based upon a generalization repeated almost parrot-like by court after court.

And now, although the path has been devious, the problem will be analyzed. Suppose that a court is looking at the problem as if it were entirely new and different. The first matter which would suggest itself to a court is the problem of duty. In other words, did the defendant owe a duty to the third party (the mother) or only a duty to the person (the child) toward whom the negligent act was directed? Cardozo's famous decision in the case of *Palsgraf v. Long Island R. Co.*<sup>35</sup> would come to mind. His famous words, "What the plaintiff must show is a wrong to herself" would be recalled. If the word "herself" is interpreted literally and narrowly, the court would deny recovery. It is submitted, however, that Cardozo did not mean to have the word defined narrowly.<sup>36</sup> Under the facts of the *Palsgraf* case, there was no need for Cardozo to be more explicit. The act of shoving a package out of another person's arm could not possibly have been a wrong to the "herself" who was the plaintiff hit on the head by the falling scales. It seems that if Cardozo had met the factual situation herein advanced, he would have taken more time to indicate that the term "herself" was not to be used in a narrow sense. Would it have been illogical for him to have gone on and have said that a wrong to the "herself" who was plaintiff could have been the fact that she witnessed a dangerous negligent act being directed at her dearly loved child? Are we not stretching the point when we attempt to read into Cardozo's rule the fact that the wrong has to be directed at the person of the plaintiff?<sup>37</sup>

In substantiation of this theory it is pointed out that Cardozo said that if the defendant's servants had known of the explosives in the package, then their conduct with reference to it would have related their negligence to all people within the area of the foreseeable explosion, including the plaintiff. Now therefore, in the assumed case, cannot the defendant be said to know that a serious negligent act directed toward a child will upset its mother—cannot the defendant be presumed to know that such an act will be a wrong to the mother?

<sup>35</sup> 248 N. Y. 339, 162 N.E. 99 (1928).

<sup>36</sup> Green, *Duty Problem in Negligence Cases* (1929) 29 COL. L. REV. 283 where the author points out "that words do not have to be canonized. Rights and duties, wrongs and faults must surrender their sanctity; scientific government is opposed."

<sup>37</sup> Cowan, *The Riddle of the Palsgraf Case* (1938) 23 MINN. L. REV. 46.

For the purpose of clarity it is submitted that the view just stated is not the view of Justice Andrews in his dissenting opinion in the Palsgraf case. He thought that the case was properly submitted to the jury since there was negligence toward someone which in fact contributed to the harm. But in order to find a duty the initial negligence must be directed toward a "someone" or a "something" in whom or in which the plaintiff has much more than a casual interest. Only then can the plaintiff show a wrong to herself. In other words, in applying Andrew's theory there is negligence in knocking a package out of a man's arm, but it is difficult to see that the plaintiff who was hurt in the case had any interest whatever in the matter.<sup>18</sup>

Definite reactions to the Palsgraf case have just been stated. It is not the purpose of this article to quarrel with the judgment of any court that wants to adopt as its policy the narrow aspect of the duty pronouncement. Objection is made solely to the interpretation of Cardozo's decision as authority for a limited concept of the duty rule.<sup>19</sup> It seems, however, that many courts which profess to follow this limited concept are not certain of their ground. How else can we justify a court allowing a case which could be decided entirely on the basis of duty getting into the hands of the jury on the question of the foreseeability of the proximate cause element in the case?

A duty can be found when confronted with the circumstances supposed in this article on the ground given by Dean Green<sup>20</sup> in his statement that "what is more remarkable, we can never say that a particular defendant owes a particular plaintiff any specific duty, save in the rarest of cases, *prior* to the time the conduct to be passed upon has transpired, and is presented in an actual case in court." Adopt this view and look back after a mother has suffered injuries from shock because her child was put in peril and it may not be difficult to find a duty owed the mother.

Assuming, for the purpose of continuing with the argument that it would not be unreasonable to agree with the broader view of the Palsgraf case, a duty may be found toward the mother—to refrain from shocking her by directing a negligent act toward her child. One

<sup>18</sup> On the subject of the distinction between the Cardozo view, the English view, and the Andrews view, see Gregory, *Proximate Cause in Negligence—A Retreat from Rationalization* (1938) 6 U. of CHI. L. REV. 36. Professor Gregory professes to see a concurrence between the English view as expressed in the Hambrook case, *supra*, note 2, and *In re Polemis* (1921) 3 K.B. 560 and the Andrews' view as set forth in the Palsgraf case, *supra* note 15. Gregory's view seems to be erroneous. It seems that the English view and the Cardozo view are in accord and that Andrews' view is something different. Gregory himself in the same article admits that his analysis may not be right and that the suggested view may be the correct one.

<sup>19</sup> Many courts have made the Palsgraf case the leading depository of the so-called narrow rule as regards duty.

<sup>20</sup> Green, *The Duty Problem in Negligence Cases* (1928) 28 COL. L. REV. 1025.

is then face to face with the foreseeability theory in proximate cause cases. In working out this theory, it is certain that the defendant would be able to foresee that a negligent act directed toward the child might cause injuries to the child. But, can he foresee that his act will shock and as a result injure the pregnant mother who is not herself in physical danger? If the defendant cannot foresee the injury to the mother, then he should not be liable.

It is the common opinion among authorities that in proximate cause situations almost any decision can be justified on the grounds of foreseeability.<sup>21</sup> This is true because the courts do not always logically apply the foreseeability test in proximate cause cases. Too often, courts fail to see that there is a great difference between the foreseeability rule in its application when used for determining if some initial conduct was negligent, and when used to determine if a final result in a chain flows naturally and probably from a previous happening. In the first instance, it seems that it is perfectly correct for a court to look forward and ask itself if the prudent man could have foreseen the initial negligent result. For example, under the assumed facts, the court should look forward and ask if a reasonable man could have foreseen that a harmful force (a carelessly rolling truck) directed at a child would injure the child. When the court determined that the result was foreseeable, it would correctly have found a first act of negligence. But, once it determined that first result, if it is going to be logical and minimize the possibility of conflicting decisions it is to be desired that the court stop looking forward in order to find a cause relationship.<sup>22</sup> The test to be applied after the court has found the first negligent result is given us by the Restatement of Torts.<sup>23</sup> After the event, the court should look back from the final harm to the actor's negligent conduct and ask itself if it appears highly extraordinary that the conduct should have brought about the end result. That this is the only honest approach to the problem is forcibly pointed out by the authors of the Restatement.<sup>24</sup> In extending the forward-looking test to cover the range of proximate cause situations, nothing more is done than to endow the reasonable man with a super-eye capable of piercing a very clouded future. It is simply too far fetched to say that a prudent man could

<sup>21</sup> *Supra*, notes 10, 12. RESTATEMENT, TORTS (1932) § 433, comment *b*. And for an excellent illustration of how a court can confuse both the duty and the foreseeability issue, see *Huset v. Case Threshing Machine Co.*, 120 Fed. 865 (C.C.A. 8th, 1903). Compare this with *McPherson v. Buick Co.*, 217 N.Y. 382, 110 N.E. 1050 (1916), which by the clarity of its reasoning effectively points out the fallacies apparent in the *Huset* decision.

<sup>22</sup> As a typical example of the type of decision possible under the forward looking foreseeability rule in proximate cause cases, see *Hoag v. Lake Shore R. R.*, 85 Pa. 293 (1877) and *Wood v. Pennsylvania R. R.*, 177 Pa. 306, 35 Atl. 699 (1896).

<sup>23</sup> Torts (1932) § 433, comment *b*.

<sup>24</sup> *Ibid.*

foresee the result in many and many a proximate cause case. And yet, the actor is responsible for the outcome. His act is the substantial cause of what happened. Furthermore, he was, after all, the only person who had an opportunity to prevent the harm. But, the defendant's conduct as the substantial cause can be seen only when one looks back upon the events.

Although the phraseology of the Restatement rule has given us the clearest expression of the technique to be followed, the thought is not new. The Wisconsin Supreme court in *Bell Lumber Co. v. Bayfield Transfer Ry Co.*<sup>25</sup> was honest about the inappropriateness of the forward-looking foreseeability test in determining proximate causation. The court remarks that "strictly speaking, the element of anticipation characterizes negligence rather than causation." The English doctrine<sup>26</sup> and those American cases which follow the English view<sup>27</sup> seem to be in line with the view of the Restatement.

It is now necessary to show the relationship between the duty rule, as it has been explained, and the foreseeability rule. Since the broad interpretation of Cardozo's rule has been followed it is apparent that the backward view idea of the Restatement would not be discussed unless an initial duty were found. Under the set of facts supposed in this article, no difficulty is to be found in holding a defendant liable.

In order to explore the problem a little further, a very recent Nebraska<sup>28</sup> case will be alluded to, which is popularly known as the "Poison Bran" case. There a defendant is negligent because he sells to a dairyman a sack of bran which has been poisoned. When the bran is fed to the cattle in the dairy, the entire herd is wiped out. When the authorities come to carry away the animals, the owner collapses. Medical experts testify that shock served to decompensate his heart. He is never a well man again, and about nine months later dies of heart failure. The widow is allowed to recover for his wrongful death. The dissent in the case could see no duty owed the plaintiff. Major reliance is placed upon what has been referred to as a narrow interpretation of the *Palsgraf* case.

As indicated such an explanation of the *Palsgraf* case seems erroneous. In the Nebraska case one can see that the dairyman would be vitally interested in his business. If a negligent act completely destroys the business, one could see Cardozo finding that a harm was done the plaintiff. Thus, as a duty is found, one is justified in looking at the proximate cause angle. In looking forward one finds the initial negli-

<sup>25</sup> 169 Wis. 357, 172 N.W. 955 (1919).

<sup>26</sup> *Supra*, note 18.

<sup>27</sup> BOHLEN, CASES ON TORTS (3d ed. 1930) 305, n. 19.

<sup>28</sup> *Supra*, note 12.

gence. The negligence is toward the cattle, which constitute the support of the plaintiff's business. Then applying the Restatement's provision for looking backward, there is little difficulty in saying the result—the death of the farmer from heart failure—was not highly extraordinary.

It should not be overlooked that in the word "extraordinary" a safeguard is provided. If one or two cows had died, the death of the owner would have been extraordinary. It is not so when death results from shock after a realization that an entire business has been destroyed. Especially is that true when one remembers that it must be taken into account that a substantial minority of men have emotional make-ups, which would place them below the standard of the average man.<sup>29</sup> Since such is the rule, the result would be extraordinary only if the defendant could prove that the plaintiff's intestate had sensibilities which would place him even below the substantial minority above mentioned.<sup>30</sup> That would obviously be impossible under the facts in the Nebraska case.

It may well be that in emotional disturbance cases the law should restrict liability to the instance where a negligent act is directed toward the person of the plaintiff. However, in practice that theory is based either upon an abstract principle which has been modified again and again by the courts, or upon a duty concept supposed to come out of the *Palsgraf* case—a concept which is not supported by the particular facts in that case.

How far will the theories herein set forth extend liability? Will it be practically unlimited? It has already been pointed out that the word "extraordinary" in the Restatement phraseology will give great protection. There will still exist the added protection that a jury can refuse to believe testimony. The good judgment<sup>31</sup> of the court will of necessity play a large part in keeping liability within bounds.

No fault could be found with any jurisdiction which in its good judgment decided to cut off liability brought about by fright at any definite point. Perhaps it could be cut off when the harm is directed at something other than the person of the plaintiff, perhaps it should be extended to cover fear of a mother for the safety of her child whom she sees is in the path of negligent danger, but not to cover fear for the safety of property. It will serve no purpose to go on and multiply examples. The main purpose of this article is to indicate that the line

<sup>29</sup> RESTATEMENT, TORTS (1932) § 312, comment *c*.

<sup>30</sup> *Ibid.*

<sup>31</sup> Green, *Fright Cases* (1933) 27 ILL. L. REV. 761, Gregory, *Proximate Cause in Negligence—A Retreat from Rationalization* (1938) 6 U. OF CHI. L. REV. 36; and RESTATEMENT, TORTS (1932) § 433, comment *f* all agree that in the type of case discussed it will be necessary to depend upon the good judgment of the court.

should not be drawn on the question of causation on the authority of the *Palsgraf* case or the forward-looking foreseeability test. If the line is drawn on that basis, when one begins to analyze, one is forced to find fault with a jurisdiction which would not allow recovery in a situation such as the Nebraska Poison Bran case. On the other hand, a court might say frankly that in its opinion a line must be drawn in emotional disturbance cases. Perhaps the line could be drawn on the mere grounds of expediency. Expediency is certainly not new in tort law.<sup>32</sup> Holdings on such a ground would be no more conflicting than present American decisions,<sup>33</sup> and they would at least not be open to the charge that they were based upon false premises.

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<sup>32</sup> See the very frank case of *Ryan v. New York Central R. R.*, 35 N.Y. 210, 91 Am. Dec. 49 (1866).

<sup>33</sup> *Hallen, Damages for Physical Injuries Resulting from Fright or Shock* (1933) 19 VA. L. REV. 271.