

# Foreseeability and Recovery in Tort

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## Recommended Citation

Edgar, David S. Jr. (1934) "Foreseeability and Recovery in Tort," *St. John's Law Review*: Vol. 9 : No. 1 , Article 5.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol9/iss1/5>

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# FORESEEABILITY AND RECOVERY IN TORT

## THE PROBLEM

**E**VEN well-informed first-year law students know that there is still a conflict between two points of view upon the question of whether damages for breaches of legal duty which are not intentional must be "proximate" or foreseeable in order that they may be redressed with money.

They also know that the newer theory is that the test of "foreseeability" usually ought not to be applied, but rather that the author of a cause, which is a breach of legal duty, should be held responsible for all actual results whether foreseeable or not, even when the breach of legal duty is mere negligence.

Such is the influence of a Bohlen.<sup>1</sup> And in New York there is special reason for interest in the newer view—for was not Mr. Justice Cardozo one of Bohlen's collaborators in the Restatement of the Law of Torts wherein all this gains at least persuasive authority?<sup>2</sup>

The "newer" view, however, is still novel enough so that, even today, it is still a minority view in this, at least: That there are yet more decisions holding for a necessity that damages be foreseeable or proximate, in negligence law, at least, in order that they be compensable, than cases repudiating the necessity of foreseeability and granting recoveries when damages not foreseeable actually flowed from unintentional breaches of legal duty as consequential results.<sup>3</sup>

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<sup>1</sup> Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, *ESSAYS IN THE LAW OF TORTS* 1, 40 *Am. L. Reg. (N. S.)* 79, 148 (Feb.-Mar., 1901). Also Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, *ESSAYS IN THE LAW OF TORTS* 252, 41 *Am. L. Reg. (N. S.)* 141 (Mar., 1902).

<sup>2</sup> *RESTATEMENT, TORTS* (1934) §§231-328, 430-453. Therein the test of an *injuria* is clearly made to be the existence of a risk. *Nota bene* §§435, 436.

<sup>3</sup> Bohlen says in "The Probable or the Natural Consequence," *supra* note 1, in his second paragraph, quoting from *Hoag v. R. R.*, 85 Pa. 293, 298 (1877): "The usual [*italics mine*] test of a negligent wrongdoer's liability for the results of his wrong in these cases [*i. e.*, negligence cases] is that announced by Paxson, J., in *Hoag v. R. R.*: 'The injury must be the natural consequence of the negligence—such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to follow from the act.'

So cases like *Mitchell v. Rochester Railway Company*,<sup>4</sup> criticized so frequently even in the jurisdiction responsible for it,<sup>5</sup> still cause trouble for school men and students alike. Unquestionably many of the former are unable to escape the notion that its presence in New York's corpus juris enmeshes us in the web of uncertainty, if, indeed, it does not for the time being make it altogether unwise to teach the newer view as the accepted one. And this in spite of the Restatement,<sup>6</sup> of course!

We compromise by saying, "Unquestionably it will be limited in its application to cases involving precisely its own facts," and point to *Comstock v. Wilson*<sup>7</sup> and *Carroll v. New York Pie Baking Company*.<sup>8</sup> We even say, "Where the Court of Appeals has not spoken the Restatement will no doubt be followed; but if New York has an entrenched rule, the Restatement will not be enough to make the Court of Appeals reverse it. Deprecation with a view to legislative aid will probably be the extent of the Restatement's influence here."

How, then, account for *Parnell v. Holland Furnace Company*,<sup>9</sup> wherein New York, the chief antagonist of the "attractive nuisance" rule<sup>10</sup> when accepted by the majority of states, seems, when the adherents of the doctrine were on the way toward becoming a mere minority,<sup>11</sup> to have adopted it? Was this not a result of the Restatement's influence?<sup>12</sup>

No matter what is the outcome of the uncertainty about the *Mitchell* case, it seems incontrovertible to the writer that the "newer view" referred to above should be taught as a

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"This of itself would indicate that in such cases *the wrongdoer's responsibility for the consequences of his act was to be restricted to his reasonable anticipations.*" (Italics mine.) His article continues to disprove the validity of the thesis quoted.

<sup>4</sup> 151 N. Y. 107, 45 N. E. 354 (1896).

<sup>5</sup> *Comstock v. Wilson*, 257 N. Y. 231, 234, *et seq.*, 177 N. E. 431 (1931).

<sup>6</sup> RESTATEMENT, TORTS (1934) §436 (2).

<sup>7</sup> *Supra* note 5.

<sup>8</sup> 215 App. Div. 240, 213 N. Y. Supp. 553 (2d Dept. 1926).

<sup>9</sup> 260 N. Y. 604, 184 N. E. 112 (1932).

<sup>10</sup> *Walsh v. Fitchburg Railway*, 145 N. Y. 301, 39 N. E. 1068 (1895); *Flaherty v. Metro Stations*, 202 App. Div. 583, 196 N. Y. Supp. 2 (4th Dept. 1922), *aff'd*, 253 N. Y. 605, 139 N. E. 753 (1930); *Joffy v. N. Y. C. & H. R. R. Co.*, 118 Misc. 147, 192 N. Y. Supp. 852 (1922).

<sup>11</sup> BURDICK, LAW OF TORTS (4th ed. 1926) §§488, 489.

<sup>12</sup> RESTATEMENT, TORTS (1934) §339.

more nearly valid theory than the time-worn attitude exemplified in the *Mitchell* case.

In classroom and conversation it becomes necessary, for the clarification of the minds of one's auditors, to paraphrase the statements of Bohlen and the abstractions of the Restatement. Each teacher has pet formulae. The writer has found it serviceable to interpret the modern attitude, involving, as it does in its beginnings, the first fundamental of the theory of legal liability, in a rather simple way.

The first proposition may be stated as follows: *Given an act or an omission from which it can be reasonably foreseen that harm will be a probable consequence, we have been given a breach of legal duty.*

The reader must bear in mind, of course, that the writer most certainly is not claiming originality for this thesis or any of the others touched upon in this short essay; rather he is describing a formula, found by trial to be serviceable, for interpreting the words and thoughts of the masters, written for other scholars, in a manner which will give to the first-year law student an understanding of the problem of foreseeability, and how the moderns deal with it and what the prospect is.

This first proposition is, as stated, fundamental. Disciples of the new and adherents of the old alike can agree, for the most part, upon it as the basis of liability in tort—for negligence at least.

It is not infallible as a test, for economic considerations sometimes justify a departure from it.<sup>13</sup> So do other matters of public necessity, as, for instance, those which have given rise to the judicial and legislative privileges, the police power and the like.

All tort cases, unless they be among the exceptions stated or others similar to them, exemplify this first proposition of ours if they are well-reasoned by an understanding court.

Particularly excellent as recent illustrations are *Kalinowski v. Truck Equipment Company*<sup>14</sup> (as compared with

<sup>13</sup> *Guest v. Reynolds*, 68 Ill. 478 (1873); *Booth v. Rome, etc., Co.*, 140 N. Y. 267, 35 N. E. 592 (1893).

<sup>14</sup> 237 App. Div. 472, 261 N. Y. Supp. 657 (4th Dept. 1933).

*Palsgraf v. Long Island Railroad*<sup>15</sup>), and *Glanzer v. Shepard*<sup>16</sup> (as compared with *Ultramares Corporation v. Touche*<sup>17</sup>); *Smith v. Peerless Glass Company*,<sup>18</sup> *Burrows v. Livingston-Niagara Power Company*,<sup>19</sup> *DeHaen v. Rockwood Sprinkler Company*<sup>20</sup> and the *Parnell* case itself.

The development of the proposition (with respect to the significance of foreseeability upon it) is perfected by comparisons of these cases with each other. In collaboration with another analyst of trends, the writer has previously commented similarly.<sup>21</sup>

The sum total of such comparisons results in a revision of our first proposition so that it now reads: *Given an act or omission from which it can be reasonably foreseen that harm will be a probable consequence to a certain person, we have been given a breach of legal duty to that person, but not to anyone else to whom harm could not have been reasonably foreseen as a probable consequence.*

The plaintiff in the *Palsgraf* case was denied a recovery because, from the act of the guard in pushing another passenger into a train, no harm to the plaintiff, some distance away, could reasonably have been foreseen as a probable consequence. Therefore, what the guard did to the passenger, whether or not a breach of legal duty to him, was not a breach of legal duty to the plaintiff.

She did *not* lose because a breach of legal duty to her resulted in damages not foreseeable. She lost because there was no probability of harm to her and therefore the occurrence was not a breach of legal duty *to her* at all.

We come to the next proposition, which may be stated as follows: *Given a breach of legal duty, the defendant is liable for all the actual consequences thereof and not only for the foreseeable consequences.*

No better example of the validity of this view can be found than in subdivision (2) of Section 436 of the Restate-

<sup>15</sup> 248 N. Y. 339, 162 N. E. 99 (1928).

<sup>16</sup> 233 N. Y. 236, 135 N. E. 275 (1922).

<sup>17</sup> 255 N. Y. 170, 174 N. E. 441 (1931).

<sup>18</sup> 259 N. Y. 292, 182 N. E. 225 (1932).

<sup>19</sup> 244 N. Y. 548, 155 N. E. 892 (1926).

<sup>20</sup> 258 N. Y. 350, 179 N. E. 764 (1932).

<sup>21</sup> EDGAR AND EDGAR, LAW OF TORTS (2d ed. 1933) §151.

ment: "If the actor's conduct is negligent as creating an unreasonable risk of *causing bodily harm to another otherwise than by subjecting him to fright, shock or other similar and immediate emotional disturbance*, the fact that such harm *results solely from the internal operation of fright or emotional disturbance does not protect the actor from liability.*" (Italics mine.)

If the *Mitchell* case is still law in New York, however, this illustration does not greatly help us. It is necessary, therefore, to seek for other applications of the test.

Section 435 of the Restatement is as follows: "If the actor's conduct is a substantial factor in bringing about harm to another, *the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.*" (Italics mine.)

In the explanatory notes upon this section, three cases<sup>22</sup> are cited as the sources of the illustrations of the application of the section. These three cases will repay comparative and critical reading. A fourth case<sup>23</sup> is mentioned in the notes but is not used in the illustrations. In this case "the fall of a heavy plank into the hold of a vessel was held to be the sole cause of its destruction by fire although the arbitrators were left in doubt" as to how fumes from the gas line in the ship's hold were ignited by the fall of the plank. Not cause and effect but *post hoc ergo propter hoc*, perhaps, brought about the factual determination that the fall of the plank was the producing cause of it all. However, it is respectable English authority and serves our present purpose well, for surely few will argue that where no flame is involved the starting of a fire is reasonably to be foreseen from the falling of a plank into the hold of a ship, even though there is a gas line below. Yet everyone must admit that carelessness in handling a plank so that it drops is a breach of legal duty because the probability of harm to persons about (as the

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<sup>22</sup> *Hill v. Winson*, 118 Mass. 251 (1875); *Twin City Gas Co. v. Smith*, 83 N. H. 439, 144 Atl. 783 (1929); *Bunting v. Hogsett*, 139 Pa. St. 363, 21 Atl. 31 (1891). The explanatory notes are to be found in Tentative Draft No. 8 of the Restatement at 102, under old §310.

<sup>23</sup> *Polemis v. Furness Withy & Co., Ltd.* [C. A. 1921] 2 K. B. 560.

plaintiff was) is reasonably to be foreseen as a result, though the harms foreseeable are utterly different from those which did actually result. Nor is this in conflict with the *Palsgraf* case, for there is surely greater risk to all nearby when a heavy plank is carelessly handled, than is involved, as far as standers-by are concerned, in exerting pressure upon a person to aid him into a train.

For strong evidence of the substantial validity in New York of this second proposition of ours, we have only to look at that line of New York cases wherein the defendant's negligence creates apparent danger in which the plaintiff himself acts to his own harm and the defendant is held liable,<sup>24</sup> and to the rule, established in New York by *Ehrgott v. Mayor*,<sup>25</sup> under which the city of New York was held responsible for illnesses resulting from exposure to the elements consequential upon an accident caused by the failure of the city to keep one of its streets free from dangers to travel. The condition of disrepair was a nuisance, no doubt, and the failure to make it safe, negligence—in any event there was a breach of legal duty because the situation was foreseeably and probably productive of accidents. But that, as a result of such an accident, there would be spinal disease from incidental exposure of a traveler involved was certainly not foreseeable or probable, yet the traveler properly succeeded in his action.

On the other hand, New York has not only the rule of the *Mitchell* case but also an arbitrary rule limiting liability for spreading fire as illustrative remnants of the "older theory."<sup>26</sup> However, here, as with the *Mitchell* case rule, we have an anachronism which is being not extended but closely restricted in its application.<sup>27</sup>

The very fact that the outworn *Mitchell* case and *Hoffman* case rules are being limited is further evidence of the

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<sup>24</sup> *Twomley v. Railroad*, 69 N. Y. 158 (1877); *Poulson v. Nassau Elect.*, 18 App. Div. 221, 45 N. Y. Supp. 941 (2d Dept. 1897); *Poulsen v. Nassau Elect.*, 30 App. Div. 246, 51 N. Y. Supp. 933 (2d Dept. 1898); *Kreuzen v. 42nd, etc. R. Co.*, 38 Sup. Ct. 461, 13 N. Y. Supp. 588 (1891).

<sup>25</sup> 96 N. Y. 264 (1884).

<sup>26</sup> *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 401 (1899); *Bird v. St. Paul, etc., Ins. Co.*, 224 N. Y. 47, 120 N. E. 86 (1918).

<sup>27</sup> *Homac Corp. v. Sun Oil Co.*, 258 N. Y. 462, 180 N. E. 172 (1932).

ground gained and held, even in New York, by this second proposition of ours, exemplifying what I have called the "newer theory."

In passing, to forestall the hasty, it should here be pointed out that only in the broad sense are we as yet discussing "proximate cause." In the true and technical sense these observations have so far had little or nothing to do with problems of proximate and remote causes, for these require the involvement of two or more culpable agencies under control of at least two non-identical persons. What we are discussing ought rather be called the "proximateness of damages." And we have concluded that there is little necessity for the existence of any metaphysical "proximateness" of damages suffered as the actual consequences of a conceded breach of legal duty, when the breach of duty is negligence, at least.

Thus we come to our third proposition, which *does* deal with proximate and remote causation: *Given two breaches of legal duty entering into the causation of harm, under circumstances which do not constitute the actor's "concurrent tort feasons" but wherein the act or omission of the later actor was instigated or induced by the act or omission of the earlier, the earlier actor will not be held free from liability, in spite of the culpability of the later actor, if the earlier could reasonably have foreseen that the later actor might be induced by the earlier cause to act as he did.*<sup>28</sup>

Many New York cases illustrate this as a well-founded (if not quite thoroughly understood) principle.<sup>29</sup> The reader must not be led astray by judicial attempts to justify the conduct of the later actor.<sup>30</sup> Clearly in such cases the culpability of the later actor's conduct was and is unimportant, because it was, whether culpable or not, a foreseeable intervention rather than causatively a superseding influence.

<sup>28</sup> RESTATEMENT, TORTS (1934) §447 (c).

<sup>29</sup> *Guille v. Swan*, 19 Johns. 381 (N. Y. 1822); *Vandenberg v. Truax*, 4 Denio 464 (N. Y. 1847); *Lowery v. Man. R. Co.*, 99 N. Y. 158, 1 N. E. 608 (1885); *Williams v. Couler*, 41 App. Div. 426, 58 N. Y. Supp. 863 (2d Dept. 1899).

For cases out of New York see *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403 (Eng. 1773); RESTATEMENT, TORTS (Tent. Draft. No. 8) old §322 (c) at 108.

<sup>30</sup> *Lowery v. Man. R. Co.*, *Vandenberg v. Truax*, both *supra* note 29.

Equally clear is the fact that these attempts to decide that the conduct of the later actor was not culpable arose out of the failure of the judicial mind completely to grasp the philosophy of this proposition.

In cases involving an "inducing cause," the author of that cause is held liable if he ought to have realized (*i. e.*, if the average person would have been aware) that the intervening conduct, culpable or not, of the later actor might have been induced by the earlier cause. If the conduct of the second person is not foreseeable, it is a "superseding cause." An example of such superseding cause as discharges the earlier actor is frequently to be found when the contribution of the later actor is that almost never-to-be-foreseen occurrence—a crime.<sup>31</sup>

Lastly, foreseeability as the important test in cases involving our third and last proposition relating to inducing and induced causes is not eliminated or even devaluated by such cases as *Stone v. Boston R. Co.*,<sup>32</sup> for in that case there was no question of inducement. Rightly or wrongly decided—and the writers of the Restatement quite evidently disagree with it because of the foreseeability of the teamster's conduct<sup>33</sup>—the *Stone* case evidences a view that though the groundwork for harm be prepared by the earlier actor's wrongful conduct, there is no liability on his part if the later and intervening actor, through independently culpable conduct, merely builds on the foundation erected by the earlier. The *Stone* case does not enter into our discussion, however, for, no matter how readily foreseeable was the conduct of the teamster with his match, that conduct was not induced by the oil-soaked platform.<sup>34</sup>

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<sup>31</sup> *Benenson v. Nat. Sur. Co.*, 260 N. Y. 299, 183 N. E. 505 (1932); RESTATEMENT, TORTS (1934) §448.

<sup>32</sup> 171 Mass. 536, 51 N. E. 1 (1898).

<sup>33</sup> RESTATEMENT, TORTS (Tent. Draft. No. 8) old §322 (a), (b) at 108. See also RESTATEMENT, TORTS (1934) §447 (a), (b).

<sup>34</sup> There is ground for criticism of this case in the light of the tendency toward a strict view of the responsibility of the earlier actor. The Restatement expresses it (*supra* note 33). Certainly the conduct of the teamster was not independently a competent and producing cause, though it was independently culpable. Not the match of the teamster alone, but also the presence of the oil-soaked platform of the defendant railroad, brought about the harm to the plaintiff. Under these circumstances the writer inclines toward the view that the actors are concurrently liable, since the causative contribution of each was a substantial factor in producing the harm.

## THE PROSPECT.

In the writer's experience, the above approach and development eliminate most of the student's bugaboos concerning the much misunderstood "doctrine of foreseeability," as he calls it.

With substantial and workable, though not universal and absolute, accuracy—and whatever may be true of some of the fields of the law, there is not to be discovered anything absolute in the one we have been tilling—he thus concludes:

Foreseeability is important in determining whether conduct is tortious, but not in testing damages in the effort to discover whether they are compensable *ex delicto*.

*Hadley v. Baxendale*,<sup>35</sup> making foreseeability, in effect, the test for compensability of damages *ex contractu*, establishes the only possible rule for a branch of the law whose purpose is to effectuate the express and implied terms of agreements between persons; for who can reasonably say that any contracting party contemplates liability for damages the likelihood of which is not known and is not brought home to him? But this rule has no place in the law of torts whose purpose has to do with the creation of philosophic standards of conduct based on probable results, and to administer justice upon the fact of illegal conduct so as to compensate for the actual results of that conduct. Harm which *has* flowed from wrongdoing need not be probable; happening has made it certain. Nothing in the theory of tort liability justly limits responsibility to intended consequences or even to apparently intended consequences. Such restriction inheres only in liability for breaches of contract, wherein alone apparent intention is the beginning and the end of the law and the prophets.

As new situations arise in our law requiring a choice between the application of the "older theory" and the application of the "newer," they are certain to be dealt with according to the modern view that foreseeability is not a test for compensability when harm has followed consequen-

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<sup>35</sup> 9 Exch. 341 (Eng. 1854).

tially upon a wrong. Moreover, there will be relief against the errors which are still with us. The rules of mistaken decisions are being and will continue to be limited. A complete cure will probably depend upon legislative aid, almost certainly as far as the *Hoffman* case<sup>36</sup> is concerned, for the *Bird* case,<sup>37</sup> deploring but following it, is still recent. Perhaps the remedy for the evils of the *Mitchell*<sup>38</sup> decision will come about naturally through evolution of the case law; but probably here, too, it will remain for the legislature to remove the vestigial traces, for *stare decisis* will still be *stare decisis* more often than not in cases exactly on all fours with definite precedents until many agitators have come and gone. However, there is always a chance, of course, that the Court of Appeals will itself accomplish the change, without legislative aid, as it did in deciding the *Parnell* case.<sup>39</sup>

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November 7, 1934.

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<sup>36</sup> *Supra* note 26.

<sup>37</sup> *Supra* note 26.

<sup>38</sup> *Supra* note 4.

<sup>39</sup> *Supra* note 9.