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The Nature of Actionable Negligence

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THE NATURE OF ACTIONABLE NEGLIGENCE.—"The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[1] This sentence from the prevailing opinion in a case recently decided by the New York Court of Appeals contains the gist of that decision. Involving, as is does, the basis of the theory as to the nature of negligence, it presents an excellent starting point for a discussion of that question.

The facts involved in the case were not disputed. Plaintiff was standing on a platform of defendant's railroad intending to take passage on a train. While she waited, a train bound for some other point arrived at the station. After the signal for the train to proceed had been given two men ran forward to catch it. One of them reached the platform of the car without mishap; but as the second of the two men, who was carrying a package wrapped in newspaper jumped upon the train, the defendant's trainman and platform man took hold of him to help him on. As they did so, the package he was carrying was dislodged, and fell, becoming wedged between the train and the station platform. After the train moved a few feet the package exploded and the concussion broke some scales standing a considerable distance away. The scales fell, striking the plaintiff and causing the injuries for which she sued.

The jury found a verdict in favor of the plaintiff which was affirmed by the Appellate Division by a divided court.[2] The Court of Appeals reversed the judgment below, Judge Andrews writing a dissenting opinion, in which Crane and O'Brien, *JJ.*, concurred.

The plaintiff's argument was directed to the question of proximate cause, and, stated briefly, was that the defendant set in motion a series of events which almost instantly and without the intervention of the act of any other person injured the plaintiff.[3]

The defendant's contention was that being ignorant of the contents of the package defendant's employees were not negligent in assisting the man as they did, nor was their action, if negligent, the proximate cause of the explosion.[4]

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

[2] 222 App. Div. 166, 225 N. Y. S. 412 (2nd Dept. 1927).

[3] Scott v. Shepard, 2 Wm. Black, 892; Vandenburg v. Truax, 4 Denio 464 (1847); Guille v. Swan, 19 John (N. Y.) 381 (1822); Milwaukee Railway Co. v. Kellogg, 94 U. S. 469 (Cir. Ct., Dist. of Iowa 1876); Lowery v. W. U. Tel. Co., 60 N. Y. 198 (1875); Lowery v. Railway Co., 99 N. Y. 158, 1 N. E. 608 (1885).

[4] Paul v. Consol. Fireworks Co., 212 N. Y. 117, 105 N. E. 795 (1914); Hall v. N. Y. Tel. Co., 214 N. Y. 49, 108 N. E. 182 (1915); Perry v. Rochester Lime Co., 219 N. Y. 60, 113 N. E. 529 (1916); Pyne v. Cazenozia Canning Co., 220 N. Y. 126, 115 N. E. 438 (1917); Adams v. Bullock, 227 N. Y. 208, 125 N. E. 93 (1919); McKinney v. N. Y. Cons. R. R. Co., 230 N. Y. 194, 129 N. E. 652 (1920); Palsey v. Waldorf-Astoria, Inc. & ano., 220 App. Div. 613, 222 N. Y. S. 273 (1st Dept. 1927); Parrott v. Wells-Fargo & Co., 15 Wall. (U. S.) 524 (1872); A. T. & S. Fe Ry. Co. v. Calhoun, 213 U. S. 1, 53 L. Ed. 671, 29 Sup. Ct. 321 (1908).

Since the Court confined itself to the theory as to the nature of negligence, *i. e.*, the question of whether or not there was a tort to be redressed, and found that there was not, it had no occasion to consider the law of causation.

The prevailing opinion written by Judge Cardozo states that the conduct of the defendant's guard, if a wrong in relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away; that relatively to her it was not negligence at all. It points out that nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right." [5] The Court cites Salmond, Torts (6th Ed.), at page 24, where the author says:

> "There is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others."

The two views on the question of the nature of negligence diverge from this statement. Judge Andrews, in his dissenting opinion, thought it too narrow a conception and that where there is an act which unreasonably threatens the safety of others, the doer is liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger.[6] Judge Cardozo, however, writing for the majority, held in substance that negligence is a relative concept—the breach of some duty owing to a particular person or to particular persons.

An individual has a right to be protected against invasion of his bodily security by acts which would in the thought of reasonable men create the possibility of the occurrence of such an invasion.[7] But if no risk is to be reasonably anticipated, an act will not assume the quality of a tort as to one individual because it happens to be a tort as to someone else. This seems to be the rule in most jurisdictions.[8]

It has been said that one who drives down a crowded thoroughfare at a reckless rate of speed is negligent whether or not he strikes an individual.[9] But, while we must agree with Judge Andrews that

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[5] *Supra,* note 1 at 341.

[6] *Ibid.,* 347.

[7] Paul v. Consol. Fireworks Co., Adams v. Bullock, Parrott v. Wells-Fargo Co., *supra,* note 4.

[8] West Va. C. & P. R. Co. v. State, 96 Md. 652, 666, 54 A. 669, 671, 61 L. R. A. 574 (1903); Norfolk & W. Ry. Co. v. Wood, 99 Va. 156, 158, 159, 37 S. E. 846 (1901); Hughes v. Boston R. R. Co., 71 N. H. 279, 284, 51 A. 1070, 93 Am. St. Rep. 518 (1902); U. S. Express Co. v. Everest, 72 Kan. 517, 83 P. 817 (1906); Emry v. Roanoke Navigation & Water Power Co., 111 N. C. 94, 95, 16 S. E. 18, 17 L. R. A. 669 (1892); Vaughan v. Transit Development Co., 222 N. Y. 79, 118 N. E. 219 (1917); Losee v. Clute, 51 N. Y. 494 (1873); De Caprio v. N. Y. C. R. R. Co., 231 N. Y. 94, 131 N. E. 746, 16 A. L. R. 940 (1921).

[9] *Supra,* note 1 at 349.

the act is one of negligence, it is negligence only because the consequent possibility of damage is within the thought of reasonable men. Even where a statutory direction is disregarded there is no violation of the rights of those who do not come within the zone of apprehended danger.[10] This, however, does not mean that an individual must have anticipated the manner in which the accident would occur, if the possibility of an accident was within the apprehension of reasonably prudent men.[11]

The facts in the case of Parrott v. Wells-Fargo & Co.,[12] were quite similar to those in the *Palsgraf* case. The plaintiff in that action sought damages for injury to his property caused by the explosion of a package which was in defendant's possession as a common carrier, and which unknown to the defendant contained nitro-glycerine. Field, *J.*, writing for the court, which affirmed a judgment for defendant, said at page 536:

> "It not, then, being his duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicions as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged as a matter of law with notice of the properties and character of the packages thus received. * * * The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. Negligence has been defined to be 'The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' It must be determined in all cases by reference to the situation and knowledge of the parties and all the attending circumstances."

In the *Palsgraf* case the consequences complained of could not reasonably have been anticipated from the alleged wrongful act, but were only made possible by the fact that the passenger was carrying a package of explosives, of which fact defendant was ignorant.

That the plaintiff sues in an action for defendant's negligence, for breach of a duty owing to him individually is borne out by the historical development of the subject. The central idea of the

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[10] Boronkay v. Robinson & Carpenter, 247 N. Y. 365, 160 N. E. 400 (1927).

[11] Munsey v. Webb, 231 U. S. 150, 156, 34 S. Ct. 44, 45, 58 L. Ed. 162 (1913); Condran v. Park & Tilford, 213 N. Y. 341, 345, 107 N. E. 565 (1915); Robert v. U. S. S. Emergency Fleet Corp., 240 N. Y. 474, 477, 148 N. E. 650 (1925).

[12] *Supra*, note 4.

mediæval common law was that civil liability was based upon an act causing damage, if that act fell within one of the causes of action provided for by the law, and this idea excluded any direct reference to negligence as a cause of liability.[13] Damage to the person was remedied by trespass, which would only lie in the presence of a direct act of violence to the individual harmed. But, since damage may result to the person through the doing of an act lawful in itself, but because of surrounding circumstances an act of violence to the injured party, it was necessary to develop a new form of action, which was known as trespass on the case.[14] Thus it may be seen that the plaintiff in the early conception of negligence did not sue to recover for the doing of a "wrong" as such, but rather that his right to bring an action was the culmination of the development of the idea that he had been personally wronged, although not by an act directed against him personally, and so should be afforded a remedy.

The opinion of the Court of Appeals indicates that negligence will not be considered as a tort unless it results in the commission of a wrong, which in turn imports the violation of a right owing to the individual seeking redress.

J. W. B.

CONTRACTS—MUTUALITY OF OBLIGATION.—It is ancient learning that mutual promises give rise to a contract. So long and well settled is this proposition that the thought rarely arises to-day that such was not always the law.[1] However, from that doctrine, there has devolved the rule finding expression in the statement that there must be mutuality of obligation to render a contract binding on the parties thereto. Williston, in criticism thereof, says that "this form of statement is likely to cause confusion, and however limited, is at best an unnecessary way of stating that there must be a valid consideration."[2] The criticism of the learned author is merited.

Primarily, where contract liability is sought to be imposed, the quest is directed to ascertaining whether there is a valid consideration supporting the obligation intended to be enforced. The rule embodied in the statement that there must be mutuality, as though that were a requisite in the formation of contracts, is ofttimes an insecure guidepost confounding the seeker. For mutuality of obligation is never found in unilateral contracts; and the equitable as distinguished from the legal tenet tends towards greater confusion, for lack of

[13] 8 Holdsworth, History of English Law, p. 449.
[14] *Ibid.*

[1] The Growth of the Law, Honorable Benjamin N. Cardozo (p. 39).
[2] Williston on Contracts, Vol. 1, Sec. 140.