CSU
College of Law Library

Cleveland State Law Review

Volume 14
Issue 3 *Medicolegal Symposium*

Article

1965

Foreseeability in American and English Law

Harry G. Fuerst

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

 Part of the Legal History Commons, and the Torts Commons

How does access to this work benefit you? Let us know!

Recommended Citation

Harry G. Fuerst, Foreseeability in American and English Law, 14 Clev.-Marshall L. Rev. 552 (1965)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Foreseeability in American and English Law

*Harry G. Fuerst**

MANY OF THE INEQUITIES of the common law have been remedied in recent years. The workmen's compensation acts have eliminated contributory negligence, assumption of risk and fellow servant rule as employers' defenses. Congress has enacted laws to modify the common law for employees engaged in interstate commerce: the Federal Employers' Liability Act,[1] the Federal Safety Appliance Acts,[2] the Federal Boiler Inspection Acts,[3] the Jones Act,[4] and so forth.

The adoption of the comparative negligence doctrine, for example, in Wisconsin, the compulsory submission of the question of contributory negligence to a jury in the State of New Jersey, and the widespread liberalization of the rules of common law pleading have introduced flexibility into our present-day adjudication of causes. But the problem of foreseeability is not yet settled in our law.

The common law, despite its pitfalls with regard to sound democratic principles in jurisprudence, is better than most other systems: *Idem est, fortior et potentior est dispositio legis quam hominis*—The disposition of the law is of greater force and effect than that of man.[5]

Foreseeability is "the ability to see or know in advance, hence, the reasonable anticipation that harm or injury is the likely result of acts or omissions." [6]

In order to determine culpable negligence and establish the right to recover for a wrong, there must be a sequence of events like concatenation, or a series of united events like the links of a chain, called *proximate cause*. The definition of proximate cause is, "that cause which in natural and continuous sequence, un-

---

* Of Miami Beach, Florida; member of the Bar of Illinois and Ohio.

1 45 U.S.C. Secs. 51-60 (1958).

2 *Ibid.* Secs. 1-16 (1958).

3 *Id.* Secs. 22-34 (1958).

4 *Id.* Sec. 688 (1958).

5 37 C.J.S. 131, n. 70.

6 Black, Law Dictionary, 777 (4th Ed. 1951).

broken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." [7]

English Cases on Foreseeability

In 1961 the Privy Council of England passed on a cause known as *The Wagon Mound*[8] and reversed the judgment of the Supreme Court of New South Wales, Australia, thereby devising a new formula in the never ending analysis of what constitutes tort liability. *The Wagon Mound* destroyed a rule of law of long standing, on foreseeability, decided and set forth in the *Polemis* case.[9]

In *Polemis* the defendant chartered a boat which belonged to the plaintiffs. When the boat arrived at port it became necessary to shift a part of the petrol cargo, due to some leakage caused by rough water. The defendant hired employees to change the position of the petrol. The defendant's employees in charge of this work placed certain pieces of lumber in position to facilitate the lifting of the cases of petrol with a winch. The defendant's employees also controlled the operation of the winch. Due to the negligence of these employees a piece of lumber became dislodged and fell into the hold with such force as to cause a spark which ignited the petrol vapor. Fire immediately broke out in the hold, totally destroying the ship.

The defendant contended that because of the nature and character of the work in which their employees were engaged, they could not be held liable, on the ground of foreseeability. This was denied by the court and judgment was rendered in favor of Polemis.

On appeal to the House of Lords, it was found that the defendant charterer was liable because *some* damage to the ship might reasonably have been anticipated from the negligence of its employees. From this finding they held that the defendant was responsible *for all consequences of its negligent act,* saying:

> In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce

---

[7] Pope v. Pinkerton-Hays Lumber Co., 120 So. 2d 227, 229 (Fla. 1960).

[8] Overseas Tankship (U.K.) Ltd. v. Morts Dock and Eng'r. Co. (1961) A.C. 388 (P.C.) (Austl.).

[9] In re Polemis and Furness Withy & Co. (1921) 3 K.B. 560 (C.A.).

> an unexpected result, a spark in an atmosphere of petrol vapor which caused a fire, does not relieve the person who was negligent from the damage which his negligent act *directly* caused.[10]

The word italicized is denounced in *The Wagon Mound* decision hereinafter discussed.

The facts in *The Wagon Mound* disclose that fuel oil was being taken aboard a ship named The Wagon Mound. Through negligence, a lot of oil was spilled into the bay. Because of the tide and wind the oil was carried toward respondent's dock and under the dock and ways, surrounding their property. Respondent or plaintiff was in the ship repair and marine engineering business, and at the time they were repairing and outfitting a ship and had valuable supplies, machinery and tools on their dock property.

Neither litigant feared that the oil spilled in the bay could cause a conflagration. The condition remained *in status quo* for two and a half days. Then it appeared, according to testimony, that a piece of waste was ignited and dropped into the water (by whom no one knows) which caused the oil to catch on fire and resulted in a total loss of plaintiff's dock, ship, machinery and tools. The Supreme Court of New South Wales, Australia, affirmed the judgment in favor of the plaintiff, relying on the law and precedent of the *Polemis* case that the defendants were responsible for *all* consequences of their act, however grave, holding that the fire was the direct result of the negligent act whether *reasonably* foreseeable or not.

It therefore becomes necessary to examine the decision in the *Wagon Mound* case with reference to the *Polemis* case. Here *Polemis* says that the defendant was responsible for *all the consequences of his negligent act* and therefore held them in that case to have been the direct result of the act whether reasonably foreseeable or not.

Wagon Mound held:

> The essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. Liability does not depend solely on the damage being the "direct" or "natural" consequence of the precedent act; but if a man should not be held liable for damage un-

[10] *Ibid.*

> predictable by a reasonable man because it was "direct" or "natural," equally he should not escape liability however "indirect" the damage, if he foresaw or could reasonably have foreseen the intervening events which led to its being done. Foreseeability is thus the effective test—the "direct" consequence test leads to nowhere but the never-ending and insoluble problems of causation.
>
> There is not one criterion for determining culpability (or liability) and another for determining compensation; unforeseeability of damage is relevant to liability or compensation—there can be no liability until the damage has been done; it is not the act but the consequences on which tortious liability is founded.[11]

The court determined that a man must be held responsible only for the foreseeable probable consequences of his act. To demand more of him would be unwarranted, to demand less would ignore the necessity for a minimum standard of behavior.

The reason given for the reversal of the law pronounced in the *Polemis* case was that the court was in error when it said that the defendant was responsible for *all* consequences of its negligent act; that the court erred when it said that defendant was liable for any and all damage which its negligent act directly caused, instead of using the words "proximately caused."

It is not understood why the court in its decision was so technical because the context in the opinion by the House of Lords in the *Polemis* case clearly indicated their intention in the use of the word "direct" was in truth and in fact to be fully construed as the proximate cause.

Yet, the facts in the *Polemis* case clearly establish the culpability of the defendant when considered under the doctrine known to both American and British jurisprudence as *res ipsa loquitur*. In *Polemis* the ship and its employees were under the exclusive control of the defendant and the negligent handling of the plank was done by the defendant's employees. The spark created by negligence caused the fire and the resultant burning of the ship which clearly established the right of recovery under the doctrine of *res ipsa loquitur*.

But *Polemis* did not employ the *res ipsa loquitur* doctrine. Furthermore, in *Wagon Mound* there is an intervening cause directly responsible for the fire: The actions of an unknown person who provided and dropped the burning waste. *Wagon Mound*

---

[11] *Supra* n. 8 at 397.

is pregnant with contributory negligence and possibly with sole negligence of another as to the cause of the fire. In our judgment the Privy Council reversed a non-liability case to revoke a good pronouncement of law theretofore established in the *Polemis* case.

The United States Supreme Court, in *San Juan Light & Transit Co. v. Requena*[12] defines *res ipsa loquitur,* and says:

> Where a thing which causes injury, without fault of the injured person is shown to be under the exclusive control of the defendant, and the injury is such, as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.

The proved fact of electric shock, found in the above case, is peculiarly analogous to the facts of *Polemis.* Similar applications arise in railroad cases with unexplained derailments and many other types of accidents.[13]

According to the British decision announced in *Scott v. London & St. Katherine Docks Co.,*[14] the same doctrine of *res ipsa loquitur* is approved and in full force and effect in the British Commonwealth:

> There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care.

By the application of the *res ipsa loquitur* doctrine, the plaintiff in the *Polemis* case was entitled to full recovery whether the case had been tried under British or American jurisprudence.

American Cases on Foreseeability

It was of great interest to the American Bar when *Wagon Mound* was reversed and the decisional law of the *Polemis* case

---

[12] 224 U.S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680 (1911).

[13] Jesionowski v. Boston & M. R.R., 329 U.S. 452, 67 Sup. Ct. 401, 91 L. Ed. 416 (1947); Central Ry. of N.J. v. Peluso, 286 F. 661 (CCA2 1923); Minneapolis & St. Louis Ry. v. Gotschall, 244 U.S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995 (1916), and Cochran v. Railway, 31 F. 2d 769 (N.D. Ohio 1923).

[14] (1865) 3 H. & C. 596.

was denounced and referred to as bad law by their lordships in the Privy Council. It was pointed out to their lordships, referring to the *Smith* case[15] (the authority upon which the *Polemis* case was decided), that *"Smith's* case does not correspond with the position in the law of the United States of America as held and enunciated in *Palsgraf v. Long Island Railway Co."* [16]

In effect, it was felt that the New York Court of Appeals, through Cardozo, J., used the same philosophy to eliminate the *Polemis* pronouncement of law in the *Palsgraf* case, also known as the firecracker case. In *Palsgraf* plaintiff, while in defendant's station, was struck by weighing scales dislodged by the explosion of a package of firecrackers dropped by a passenger being assisted onto a moving train by defendant's negligent guard. Said the court:

> The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. 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. "Proof of negligence in the air, so to speak, will not do." * * * "Negligence is the absence of care, according to the circumstances." * * * [17]

The overruling of *Polemis* by the House of Lords in *Wagon Mound* has left as an enigma, that which was formerly regarded in the British Commonwealth as settled law.

Professor Leon Green, in an article,[18] makes this observation:

> A reading of *The Wagon Mound* decision, however, seems to indicate that the Privy Council had much more in mind than either correcting the error of the courts below or eliminating the doctrinal structure of *Polemis*. The foreseeability formula of *The Wagon Mound* is much more comprehensive than any heretofore suggested. It rolls into a single formula much that is relevant to the issues of duty, negligence, and damages. This is undoubtedly a strong temptation when a

---

[15] Smith v. London & South Western Ry. Co. (1870) L.R. 6 C.P. 14.

[16] 248 N.Y. 339, 225 N.Y. Supp. 412, 162 N.E. 99 (1928).

[17] *Ibid.*

[18] Green, Foreseeability in Negligence Law, 61 Columbia L. Rev. 1401, 1415 (1961).

> judge exercises the functions ordinarily allocated to a jury, but it is dangerous to yield to the temptation. The seeming simplicity of the "all purpose" formula could prove a snare resulting in great injustice and endless confusion in cases to come.

The Florida Supreme Court followed the reasoning of the *Palsgraf* case on the foreseeability doctrine in affirming the decision in *Pope v. Pinkerton-Hays Lumber Co.*[19] In this case a telephone cable had been cut by defendant's construction crew, thereby disconnecting plaintiff's telephone service. A fire occurred on plaintiff's premises, resulting in substantial destruction because it was impossible to summon the aid of the fire department by telephone.

The court, in ruling on these facts, using the doctrine of foreseeability and granting that the defendant was negligent, held that there can be no recovery for an injury that was not a reasonable and foreseeable consequence of his negligent conduct, thereby denying liability.

It is worthy of note that the Florida court applied the foreseeability test to the independent intervening cause and concluded that in some cases the intervening cause does not break the causal connection if the intervention of such force is of itself probable or foreseeable. This is the distinction that the Florida Supreme Court made in reversing in part the previous decision of the appellate court. The holding here is comparable and can be likened to the underlying philosophy announced in the *Palsgraf* case by Cardozo.

Similarly, in *Ohio Jurisprudence* it is stated:

> The act of a third person, which intervenes and contributes a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen.[20]

Regarding the right to determine all questions arising under the common law and the jurisdiction towards determining such rights, the Supreme Court of the United States, in *Erie R. R. v. Tompkins,*[21] by reversing the old *Tyson*[22] case finally settled

---

[19] 127 So. 2d 441 (Fla. 1961).

[20] 39 Ohio Jur. 2d, Negligence, 545.

[21] 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).

[22] Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

that every state in the Union is vested with the power to determine the common law and that federal courts do not have any such common law powers. Every individual state has the *exclusive* right to determine its common law rights, including rules of permissible evidence thereunder. All federal courts, including the United States Supreme Court, must follow the law as interpreted and pronounced by the highest tribunal of the state where the cause was initiated and tried.[23]

The progress of the American courts in negligence, proximate cause, and foreseeability has come about because we have fifty state supreme courts and thousands of intermediary courts. By contrast, jury cases in the British Commonwealth are a rarity. The English judges are also the judges of the facts.

The issue of causal relation between defendant's conduct and the plaintiff's injury is not primarily determined by foreseeability. It can only be determined after the event and, while usually not difficult, in some cases may be so very difficult as to require expert opinions from physicians, attorneys, engineers, industrial and special types of technicians and certain craftsmen. Quoting from *The Wagon Mound:*

> After the event even a fool is wise. But it is not the hindsight of a fool, it is the foresight of the reasonable man which alone can determine responsibility.[24]

If there is any evidence raising the issue of foreseeability, its determination and finding is for the jury in the United States. An example is the case of *Gedeon v. East Ohio Gas Co.*[25] where plaintiff, driver of a truck, was struck by an oncoming car swerving to avoid defendant pedestrian, employee of the gas company, who carelessly stepped into traffic.

The court stated:

> * * * it is, in our opinion, impossible to say as a matter of law, that Tesnow (defendant pedestrian) was free from negligence. Common experience attests the danger of stepping from the left side of a parked car directly into a heavily

---

[23] See 28 U.S.C.A. 725, "In federal courts, except in matters governed by Federal Constitution or by acts of Congress, law to be applied in any case is law of state * * * HELD to include not only state statutory law, but also state decisions on questions of general law * * *."

[24] *Supra* n. 8 at 424.

[25] 128 Ohio St. 335, 190 N.E. 924 (1934).

> traveled street. Common experience likewise gives daily warning of the danger of crossing such a street in traffic without looking for the approach of vehicles. It is for the jury to say whether any reasonably careful and prudent person might be expected to know that his sudden and unexpected appearance in such a street in front of an oncoming car would probably cause its driver to take emergency action to avoid striking him, emergency action which might consist in swerving into another lane of traffic with a subsequent collision.[26]

Foreseeability contemplates a legal duty, but there is no fixed standard of conduct in law. Custom and usage are no defense for unreasonable and dangerous conduct, nor for carelessness.

One of the most important decisions on foreseeability applied and rendered by the Ohio Supreme Court is the case of *LoSchiavo v. Northern Ohio Traction & Light Co.*[27] This was a case where a street car collided with a truck. The plaintiff claimed damages for the loss of his business due to his injuries, resulting from the collision.

The court held that the plaintiff should not be permitted to recover for the loss of his business. The plaintiff could, however, testify as to the value of the service that he, himself, rendered to the business and the amount the plaintiff would have to pay another to take his place in the operation of the business. Marshall, C.J. stated that an inquiry into the realm of profits of a business opens a wide field for speculation and fraudulent practices, and in any well-contested controversy justice could only be arrived at by a thorough inquiry into the business and accounting. Not only are such facts peculiarly within the knowledge of the injured party but it would be possible for him to make a false showing which would be beyond contradiction by the evidence available to the defense. Therefore,

> In such action it is proper to admit evidence of a party's business, its character, its extent, the part transacted by him and the compensation paid to persons doing such business for another, but it is error to admit evidence of net profits of such business.[28]

---

[26] *Id.* at 926.

[27] 106 Ohio St. 61, 138 N.E. 372 (1922).

[28] *Ibid.*

Another very important case involving business profits is *Bishop v. East Ohio Gas Co.*[29] In this case the plaintiff chemist kept certain glass flasks containing cultures of great value to him for the preparation of a marketable product known as "Almalac," an intestinal drug, in his laboratory. The defendant through its agent, a meter reader, forced in the door near which these flasks were kept, breaking the flasks and destroying the cultures.

The underlying reasoning of law concerning the rights of recovery against a person who commits the trespass of breaking and entering a home or place of business is found under the established law of *Schell v. Dubois,*[30] wherein the syllabus recites that a violation of state law or municipal ordinance passed for the protection or safety of the public is negligence per se.

The trespasser under the common law takes the property as he finds it and must repay in full for all damage incurred by his unlawful conduct. Therefore, when the cause of *Bishop v. East Ohio Gas Co.*[31] was decided, although it was contended by the defendant that it was not liable (on the grounds of no foreseeability) for the loss of cultures and tubes caused by the forcible entry of its agent into the plaintiff's property, the lower courts held that the defendant was liable. The only question raised in the Supreme Court of Ohio was the question of the value and whether the plaintiff himself was qualified to testify as an expert on the value of his cultures. The Supreme Court of Ohio affirmed the judgment of the lower court, thereby certifying not only as to the evidence of the value by the plaintiff but that he was entitled to full damages for his loss.

In a recent Supreme Court case, *Gallick v. Baltimore & O. R.R.*[32] the doctrine of foreseeability was invoked in connection with both the protection afforded under the Federal Employers' Liability Act[33] and recovery under the negligence per se rule. This action was initiated in the Court of Common Pleas of Ohio, for an insect bite which resulted in a triple amputation of the limbs of the plaintiff.

---

[29] 143 Ohio St. 541, 56 N.E. 2d 164 (1944).

[30] 94 Ohio St. 93, 113 N.E. 664 (1916).

[31] *Supra* n. 29.

[32] 372 U.S. 108, 83 Sup. Ct. 659, 9 L. Ed. 618 (1963).

[33] *Supra* n. 1.

The appellate court in Ohio reversed the judgment and entered a judgment *non obstante veredicto*. The Supreme Court of Ohio refused the motion to certify and dismissed the appeal. The Supreme Court of the United States granted a writ of certiorari. The Court found sufficient evidence for the cause to be submitted to a jury. On the question whether the insect bite had caused the injury, the insect having emanated from a stagnant pool on railroad property adjacent to its track, the conclusion of the United States Supreme Court says:

> * * * Reasonable foreseeability is an essential ingredient of Federal Employers' Liability Act negligence, * * * but this requirement has been satisfied in the present case by the jury's findings * * * of negligence in maintaining the filthy pool of water.[34]

It was on the question of foreseeability that the Ohio appellate court reversed the verdict for the plaintiff. Uniformly, the courts have denied the defense of the doctrine of foreseeability where a defendant is guilty of negligence per se. The Supreme Court of the United States disposed of the contention of the Ohio court with the following language:

> * * * We have no doubt that under a statute where the tortfeasor is liable for death or injuries caused even "in slightest part" * * * by his negligence, such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act.[35]

Conclusion

If the House of Lords in the *Polemis* case had applied the doctrine of *res ipsa loquitur* in its decision, the *Polemis* case would have remained the law on foreseeability of the British Commonwealth.

The House of Lords in the *Wagon Mound* case forty years later would never have disturbed the profoundness of the *Polemis* decision.

---

[34] *Supra* n. 32.
[35] *Ibid.*