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TORTS—NEGLIGENCE—NO LIABILITY TO PARENT FOR PHYSICAL INJURIES INDUCED BY FEAR FOR CHILD'S SAFETY

While standing on the sidewalk across the street from their house, plaintiff's two small children were killed by an auto driven by defendant which, traveling at a high rate of speed, jumped the curb and struck them down. Plaintiff witnessed the occurrence from her front porch and ran to them. In her action to recover damages for physical injuries resulting from nervous shock, the trial court sustained defendant's demurrer without leave to amend. On appeal, held: affirmed. Since plaintiff had not been imperilled, defendant had not breached any duty owed to her, and therefore, as to plaintiff, was not negligent.¹

The principal case is squarely in line with both the fact situation and the holding of the leading American case in point, *Waube v. Warrington*,² and is consistent with the trend of analogous American decisions.³ The basic problem in cases of this type is ascertaining the scope of liability. The American attitude

1. *Resavage v. Davies*, 86 A.2d 879 (Md. 1952).

2. 216 Wis. 603, 258 N.W. 497 (1935). The following elements of plaintiff's position have been considered important in cases of this type, and were present in both the principal case and the *Waube* case:

- (a) Defendant's actions were negligent, as distinguished from intentional.
- (b) Plaintiff suffered no impact whatsoever.
- (c) Plaintiff was not in any imminent peril or personal danger.
- (d) Plaintiff was within sight of the accident (whether plaintiff actually saw the occurrence, or could have seen it if she had looked, or would have seen it if she had not fainted, has been controlling in some cases).
- (e) Plaintiff was not a user of the highway where the accident occurred but was situated on its contiguous premises.
- (f) Fear which induced plaintiff's injury was not for self, but for another.
- (g) Injured person was a close relative of plaintiff.
- (h) There was serious injury inflicted upon the victim.
- (i) Plaintiff suffered obvious physical injuries as a direct result of the nervous shock and fear.

3. For example, see the following cases: *Cincinnati & St. Louis Ry. v. Stewart*, 24 Ind. App. 374, 56 N.E. 917 (1900); *Sanderson v. Northern P. Ry.*, 88 Minn. 162, 92 N.W. 542 (1902); *Buchanan v. Stout*, 123 App. Div. 648, 108 N.Y. Supp. 38 (2d Dep't 1908); *Blessington v. Autry*, 105 N.Y.S.2d 953 (Sup. Ct. 1951); *Nuckles v. Tennessee Electric & Power Co.*, 155 Tenn. 611, 299 S.W. 775 (1927); *Carey v. Pure Distributing Corp.*, 133 Tex. 31, 124 S.W.2d 847 (1939); *Taylor v. Spokane, Pacific & Southern Ry.*, 72 Wash. 378, 130 Pac. 506 (1913); see *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 209, 77 Pac. 209, 211 (1904). *But cf.* *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927 (1912); *Cohn v. Ansonia Realty Co.*, 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914).

Generally, see Note, 18 A.L.R.2d 220 (1951) and PROSSER, TORTS 210 (1941).

on this subject is clearly illustrated in the distinction which the Maryland Supreme Court drew between the principal case and an earlier Maryland decision, *Bowman v. Williams*.⁴ In the *Bowman* case, plaintiff, while inside his home, saw defendant's truck crash into the basement wall of his house right below where he was standing. He knew that his children were then playing in the basement. Plaintiff was allowed to recover for fright, shock, and resultant physical injuries. The court reasoned that defendant had breached a duty owed to plaintiff, that there was no reason to separate plaintiff's fear for himself and a fear for his children when they both arose from the same series of events, and that the plaintiff could recover whether his fright was for the safety of his children or of both himself and the children. The principal case was distinguished from the *Bowman* case on the ground that in the latter there was in fact imminent danger of direct physical injury that confronted the plaintiff, the very reason upon which liability was denied in the former decision.⁵

In contrast to the American decisions, the English courts have been more liberal in allowing recovery when similar fact situations have been presented. In the leading English case of *Hambrook v. Stokes Bros.*,⁶ plaintiff's deceased wife saw defendant's truck careen around a corner of a narrow street in which she knew her children to be walking. The trial court instructed the jury that, if they found that the shock and death of the mother arose from a reasonable fear of immediate injury to herself, defendant was liable, but that if they found that the mother's fear was for the safety of her children, then defendant was not liable. On appeal it was held that if the mother suffered shock from what she realized through her own unaided senses, as distinguished from what she was told by a bystander, then defendant

4. 164 Md. 397, 165 Atl. 182 (1933). The court reached this decision primarily on the basis of the English decisions discussed herein. *Accord*: *Frazee v. Western Dairy Products*, 182 Wash. 578, 47 P.2d 1037 (1935).

5. Actually the distinction is not so easy to draw. The duty and breach thereof was much clearer in the *Bowman* case, plaintiff having been the owner of the house. In the court's opinion plaintiff in the *Bowman* case was in danger, but it may be questioned if he was in fact in danger. This presents an interesting question upon which no direct comment has been found: suppose that the plaintiff actually thinks he was in peril, when in fact he was not? The *Bowman* case seems to suggest the answer that the fear of the plaintiff should be a reasonable one.

6. [1925] 1 K.B. 141 (1924).

was liable,⁷ even though the shock was brought about by fear for the safety of her children, and not by fear for her own safety.⁸ There was a dictum⁹ to the effect that plaintiff could have recovered even if she had been an unrelated bystander who feared for the person injured. That statement was later applied and extended in *Owens v. Liverpool Corp.*¹⁰ There the court held that the fear need not be for another human being and that thus the mourners in a funeral procession (whose relationship to the deceased varied from mother to a husband of a cousin) could recover for fright and shock caused when, due to defendant's negligence, the casket was overturned. In the most recent English decision, however, the scope of liability has been limited to the extent that a plaintiff who only heard the crash in which defendant was killed, who admitted that she entertained no fear of personal injury, who was outside of the zone of peril, and who was unrelated to the deceased, was not permitted to recover.¹¹

In the rationales of these cases, the courts have used such words as duty, proximate cause, foreseeability, remoteness, reasonable risk of harm. One typical argument is phrased thus: In order for the defendant to be negligent as to the plaintiff, the defendant must have breached a duty owing to the plaintiff, and

7. It was not clear from the facts of the case whether the injury to plaintiff's wife was brought about solely by what she realized through her own unaided senses, in which case there would have been recovery under the rationale set forth above, or whether it was caused by what she learned by oral communication from bystanders, in which case there would not have been recovery under that rationale. The case was sent back for a new trial to resolve that factual issue but was apparently settled out of court.

8. The development of the English law up to the *Hambrook* decision may be traced through the following cases: Victorian Railways Commissioners v. Coultas, 13 A.C. 222 (P.C. 1888). (Recovery was not allowed where there had been no physical impact upon plaintiff's person and where the physical injuries resulted solely from nervous shock caused by fear of being run down by defendant's train.); *Smith v. Johnson & Co.* (1897) (unreported but cited in *Wilkinson v. Downtown*, [1897] 2 Q.B. 57, 61.) (Recovery was not permitted for physical injuries resulting from shock upon witnessing the negligent killing by defendant of a stranger, plaintiff not having been in the zone of peril.); *Dulieu v. White & Sons* [1901] 2 K.B. 669. (Recovery was allowed for injury induced by shock when defendant negligently drove a wagon into plaintiff's house, the plaintiff having been in the zone of peril. Kennedy, J., said: "The shock . . . must be a shock which arises from a reasonable fear of immediate personal injury to oneself." *Id.* at 675.). The preceding statement of Kennedy, J., was disapproved of in the *Hambrook* decision. *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141, 150, 157 (1924). See also 2 *CAMB. L.J.* 247 (1925).

9. *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 151, 157 (1924).

10. [1939] 1 K.B. 394 (1938).

11. *Hay or Bourhill v. Young*, [1942] 2 All E.R. 396.

the scope of that duty is limited to what the defendant reasonably could have foreseen.¹² Another familiar line of reasoning is couched in terms of proximate cause: The defendant's act or omission is the proximate cause of the injury which the plaintiff suffered if the plaintiff (or the harm to the plaintiff) was reasonably foreseeable.¹³ The ostensible decision then in many of these cases is as to whether the plaintiff (or the harm to him) was reasonably foreseeable, and on that issue the English courts have extended liability further than the American courts.

The problem inherent in these rationales is the difficulty in setting up standards¹⁴ by which foreseeability can be determined.¹⁵ The outstanding feature of both the *Waube* decision and the principal case is that the courts in both instances threw aside such traditional verbiage and frankly stated what perhaps was the real reason behind all the other decisions in this area of tort law.¹⁶ They here found no duty, not because of any lack of the

12. For example, see the case of *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), where Cardozo, J., analyzed the problem of the unforeseeable plaintiff in terms of the relative duty concept, and cast aside the arguments and distinctions which had developed around proximate cause. This approach is precisely illustrated in the principal case, *Resavage v. Davies*, 86 A.2d 879 (1952): "We think the fundamental consideration is the extent of the duty owed. . . ." *Id.* at 881. The same approach was taken in *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935): "The problem must be approached at the outset from the viewpoint of the duty of defendant and the right of plaintiff, and not from the viewpoint of proximate cause." *Id.* at 605, 258 N.W. at 497.

13. For example, see *Cohn v. Ansonia Realty Co.*, 162 App. Div. 791, 792, 148 N.Y. Supp. 39, 40 (1st Dep't 1914); *Carey v. Pure Distributing Corp.*, 133 Tex. 31, 35, 124 S.W.2d 847, 849 (1939).

14. For example, the court in the principal case was faced with the problem of setting up a standard: ". . . We see no logical reason for holding that liability does not extend to bystanders or persons less closely related than child or spouse, but may extend to a child or spouse. . . ." *Resavage v. Davies*, 86 A.2d 879, 883 (Md. 1952).

15. No problem is solved by substituting a similar word such as remoteness for foreseeability, as some of the English cases have done. *Hay or Bourhill v. Young*, [1942] 2 All E.R. 396; *Smith v. Johnson & Co.* (1897) (unreported but cited in *Wilkinson v. Downtown*, [1897] 2 Q.B. 57, 61).

16. *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935):
 . . . The answer to this question [of liability] cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended. . . . [If liability is imposed, it] would put an unreasonable burden on users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point.
Id. at 613, 258 N.W. at 501.

element of foreseeability, but because they simply could not, as a matter of justice and fairness to all the parties involved, extend liability to include such a situation. It is a policy decision, and the court so states. Such an analysis is commendable and far more to be desired than decisions which cover up the real reasons behind the result with terms the ultimate definition of which depends upon those undisclosed policy factors.¹⁷

**TORTS—RIGHT OF PRIVACY—NO RIGHT OF RECOVERY FOR
PUBLICATION CONCERNING DECEASED RELATIVES**

Defendant newspaper published a report of the death of Ben Milner in an automobile accident, describing the accident, and mentioning the fact that he was one of a group of men who had been indicted for theft. The deceased's widow, son and parents instituted an action, claiming that the report violated their right of privacy. Defendant moved for a summary judgment in the

The principal case, *Resavage v. Davies*, 86 A.2d 879 (Md. 1952), is to the same effect:

. . . If such a rule [of liability] were adopted it would involve a tremendous extension of liability to the world at large, not justified by the best considered authorities.

Id. at 883.

The English courts show both sides of the argument. In *Dulieu v. White & Sons*, [1901] 2 K.B. 669, Kennedy, J., stated:

. . . I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claims.

Id. at 681. In *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (1924), Atkin, L.J., said:

. . . It may be that to negative Kennedy J.'s restriction [*i.e.*, the statement in the *Dulieu* case that the plaintiff must have suffered apprehension for herself, not for another, in order to recover for resultant physical injuries] is to increase possible actions. I think this may be exaggerated.

Id. at 158. In his dissent in the same case, Sargant, L. J., argued:

. . . [I]t would be a considerable and unwarranted extension of the duty of owners of vehicles towards others in or near the highway, if it were held to include an obligation not to do anything to render them liable to harm through nervous shock caused by the sight or apprehension of damage to third person.

. . . And the extent of this extra liability is necessarily both wide and indefinite. . . .

Id. at 163.

17. See RESTATEMENT, TORTS §§ 312, comment *e*, 313, *caveat* (1934). It is interesting to note that the RESTATEMENT has refused to take a stand on the question whether or not the scope of liability as drawn in the American cases, or in the English cases, is correct.