

TORTS

“The American Recipe”

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NO DUTY BEYOND FAULT

Justice Cardozo Held in Palsgraf v. Long Island RR (NY 1928): “ 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 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.’ ”

Because Mrs. Palsgraf was not a foreseeable victim of the railroad’s apparent negligent handling of the package, Cardozo determined that the jury verdict had to be reversed.

"DUTY" OR "PROXIMATE CAUSE"?

HOW TO LIMIT LIABILITY

1. DUTY TO PL? – NECESSARY RELATIONSHIP BETWEEN PL & D
2. STANDARD OF CARE – REQUISITE LEVEL OF CONDUCT
3. BREACH OF DUTY – FAILURE TO MEET STANDARD
4. CAUSE IN FACT – BREACH OF DUTY RELATES TO INJURY
5. PROXIMATE CAUSE – POLICY RE EXTENT OF LIABILITY
6. INJURY – REQUISITE HARM

ANDREWS' DISSENT IN PALSGRAF

Rejected Cardozo's view that a duty is owed only to foreseeable victims. He contended that where the "act itself is wrongful . . . it is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there – a wrong to the public at large."

Duty, according to Andrews, did not serve as a limit on liability. He recognized the need for some restriction beyond cause in fact, however, he viewed proximate cause as the element that serves as the ultimate brake on the scope of liability.

CARDOZO'S HOLDING IS MAJORITY RULE IN U.S.

Both "Duty" and "Proximate Cause" Serve to Limit Liability in All Negligence Cases

"Duty" is Question of Law to Be Determined by Judge

"Proximate Cause" is Question of Fact to be Determined by Jury

DEVELOPING EUROPEAN APPROACH

European Group on Tort Law (1992)
20 Notable Scholars (e.g., Lubos Tichy')
Drafting "Principles of European Tort Law" (PETL)
Resumed Work in 2009

Similar to U.S. Restatement of Torts

Not Law

Common Framework for Further Harmonized European Law

PETL SCOPE OF LIABILITY

“Where an Activity is a Cause . . . , Whether and to What Extent Damage May Be Attributed to a Person Depends on Factors Such As:

- a) Foreseeability of the Damage to a Reasonable Person, Taking Into Account in Particular the Closeness in Time or Space Between the Damaging Activity and Its Consequence
- b) The Nature and Value of the Protected Interest
- c) The Basis of Liability
- d) The Extent of the Ordinary Risks of Life
- e) The Protective Purpose of the Rule Violated

LIMITED DUTIES OF LAND OCCUPIERS

DEPENDENT ON STATUS OF ENTRANTS:

TRESPASSER – One Who Enters or Remains on the Property in the Possession of Another Without the Express or Implied Consent of the Land Occupier

LICENSEE – One Who Enters the Land With the Express or Implied Consent of the Land Occupier

INVITEE –

BUSINESS – One Who is Invited on the Land for the Potential Financial Benefit of the Land Occupier

PUBLIC – One Who is Invited on the Land as a Member of the Public at Large

DUTIES OWED ENTRANTS

TRESPASSERS – Refrain From Willfully Harming

FREQUENT OR KNOWN TRESPASSERS – Duty to Warn of Known Hidden Artificial Serious Dangers

CHILDREN TRESPASSERS - Liable for Artificial Condition if:

- a) Possessor Knows Children Trespass Near Condition
- b) Possessor Knows Condition Creates Serious Risk of Harm
- c) Children Do Not Appreciate Danger Due to Age
- d) $B < P \times L$
- e) Possessor Fails to Exercise Reasonable Care

DUTIES OWED ENTRANTS (Cont'd)

LICENSEES – Duty to Warn of Known Hidden Artificial & Natural Dangers

INVITEES – Full Duty of Due Care That May, Depending on Circumstances, Include Affirmative Steps to Discover Dangers and Either Warn or Remedy.

MINORITY RULE – Abandoned Status Rules in Favor of Reasonable Person Under the Same or Similar Circumstances.

LIMITED DUTY BASED ON KIND OF HARM

- 1) EMOTIONAL DISTRESS
- 2) WRONGFUL DEATH & SURVIVAL
- 3) WRONGFUL CONCEPTION, BIRTH & LIFE
- 4) PURE ECONOMIC LOSS

LIMITED DUTY BASED ON KIND OF HARM (Cont'd)

EMOTIONAL DISTRESS

PARASITIC TO PHYSICAL HARM

PARASITIC TO PHYSICAL CONTACT

ZONE OF DANGER + PHYSICAL MANIFESTATIONS

BYSTANDER – LIMITED TO ZONE OF DANGER

MINORITY

Near Accident

Sees Accident

Close Family Member

LIMITED DUTY BASED ON KIND OF HARM (Cont'd)

WRONGFUL DEATH – AVAILABLE TO CLOSE FAMILY MEMBERS
AND/OR THOSE FINANCIALLY DEPENDENT ON DECEASED

DAMAGES – MOSTLY PECUNIARY LOSS, i.e., SUMS PLs WOULD
HAVE RECEIVED FROM DECEASED

SURVIVAL ACTION – CONTINUATION OF VICTIM'S CAUSE OF ACTION
BROUGHT BY ADMINISTRATOR OF ESTATE FOR BENEFIT OF ESTATE

D's ACTION DOESN 'T NEED TO BE CAUSE OF DEATH

DAMAGES SAME AS DECEASED WOULD HAVE OBTAINED
Except Some Courts Bar Emotional Distress as Windfall

LIMITED DUTY BASED ON KIND OF HARM (Cont'd)

WRONGFUL CONCEPTION – PARENTS' ACTION FOR
HEALTHY UNWANTED CHILD

WRONGFUL BIRTH – PARENTS' ACTION FOR WANTED
CHILD WHO WAS NOT KNOWN TO BE UNHEALTHY

WRONGFUL LIFE – CHILD'S ACTION FOR NEGLIGENLY
CAUSED BIRTH

CAUSE IN FACT

MORE PROBABLY THAN NOT, THE D'S CONDUCT WAS A "BUT FOR" CAUSE OF PL'S INJURY

EUROPE (PETL) – AN ACTIVITY OR CONDUCT IS A CAUSE OF THE VICTIM'S DAMAGE IF, IN THE ABSENCE OF THE ACTIVITY, THE DAMAGE WOULD NOT HAVE OCCURRED.

D'S CONDUCT NEED NOT BE THE SOLE CAUSE.

ADDITIONAL TEST – "SUBSTANTIAL FACTOR"

UNIQUE SITUATIONS:

SUMMERS v. TICE (CA 1948)

SINDELL v. ABBOTT LABS (CA 1980)