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TORTS - PROXIMATE CAUSE -REMOTENESS OF DAMAGE

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TORTS — PROXIMATE CAUSE —REMOTENESS OF DAMAGE — The plaintiff brought an action for damages to his realty, alleging that the murder of his sister-in-law, on his property, by the defendant's decedent, induced numerous curiosity seekers to trespass on his land to view the scene of the crime. *Held*, the defendant's demurrer was sustained, for the damages were too remote. *Koontz v. Keller*, 52 Ohio App. 265, 3 N. E. (2d) 694 (1936).

This particular factual situation immediately suggests the case of *Guille v. Swan*,[1] which is perhaps the leading case in the field of liability for third party trespassers, wherein the plaintiff brought an action of trespass against a balloonist whose descent on plaintiff's land while in a perilous position induced a crowd of spectators to burst in on plaintiff's land; the court found the defendant liable for the total damage, holding he should have foreseen that his descent in this manner would draw a crowd. In order to render an intentional wrongdoer liable for damages, as for an intended wrong, the harm suffered must belong to the class of consequences the risk of which made his conduct culpable,[2] and the party injured must be one of the persons intended

[1] 19 Johns. (N. Y.) 381 (1822).

[2] HARPER, TORTS, § 64 (1933); 1 TORTS RESTATEMENT, §§ 279, 280 (1934); Vandenburgh v. Truax, 4 Denio (N. Y.) 464, 47 Am. Dec. 268 (1847). GREEN, RATIONALE OF PROXIMATE CAUSE 30 (1927), states, in criticizing the decision of

to be harmed,[3] before we may even consider the element of causation. If the injured party cannot satisfy these qualifications, he can recover only on the theory of negligence,[4] i.e., the defendant should have apprehended some unreasonable risk of harm to this plaintiff,[5] and the harm sustained must be of the general class of harms which were foreseeable.[6] However, many courts approach this problem of defining the limits of tort liability from the standpoint of causation entirely,[7] stating that a wrongdoer is liable for all the consequences of his act which fall within the rules of legal causation. We often find the statement that an intentional wrongdoer is liable for all the consequences, however

Isham v. Dow's Estate, 70 Vt. 588, 41 A. 585 (1898): "The rule of law invoked that a person shall not commit a trespass upon the property of another is not designed to protect against personal injuries. . . ."

[3] HARPER, TORTS, § 64 (1933); Renner v. Canfield, 36 Minn. 90 (1886) (note the theory of the trial court); Talmadge v. Smith, 101 Mich. 370, 59 N. W. 656 (1894); Edgin v. Talley, 169 Ark. 662, 276 S. W. 591 (1925) (where a police officer fired at *A's* car without justification, and plaintiff, a passenger, was injured by falling glass—plaintiff does not recover as for consequences of an intended wrong).

[4] In Renner v. Canfield, 36 Minn. 90 at 92 (1886), where the defendant wilfully shot a dog near plaintiff's residence and plaintiff suffered injuries through fear, the court stated: "If the acts of the defendant amounted to any tort which, in any possible view of the case, could be held to be the proximate cause of the injuries complained of, the *gist* of it must be negligence in shooting in such proximity to a human residence. . . ." In Edgin v. Talley, 169 Ark. 662, 276 S. W. 591 (1925), the court found that the act of the officer, though an assault as to *A*, was tortious to the plaintiff as a negligent act. HARPER, TORTS, § 64 (1933): "If, however, the actor assaults *A* and actually harms *B*, he would, in most cases, be liable to *B* on the grounds of negligence." See GREEN, RATIONALE OF PROXIMATE CAUSE 30 (1927) in re his criticism of the court's approach in Isham v. Dow's Estate, 70 Vt. 588, 41 A. 585 (1898).

[5] Judge Cardozo, in Palsgraf v. Long Island Ry., 248 N. Y. 339 at 342, 162 N. E. 99, 59 A. L. R. 1253 (1928), stated: "If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless . . . with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to some one else." See cases in note 3, supra.

[6] 2 TORTS RESTATEMENT, § 281, p. 737, comment (g) (1934): "Conduct may be negligent because it involves an unreasonable risk of invading one of a particular species of interests, such as an interest of personality, but may involve no realizable risk of invading an interest of another species, such as an interest in land or chattels. If so . . . he is not liable for any harm done to land or chattels." HARPER, TORTS, § 73 (1933); Waube v. Warrington, 216 Wis. 603, 258 N. W. 497 (1935).

[7] Judge Andrews, in Palsgraf v. Long Island Ry., 248 N. Y. 339 at 350, 162 N. E. 99 (1928), stated: "Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain."

In Clark v. Gay, 112 Ga. 777, 38 S. E. 81 (1901), defendant murdered a servant of plaintiff in the latter's house and plaintiff sought damages for the decreased value of the house; the court found for defendant on the basis of causation, but HARPER, TORTS, § 73 (1933), states the approach should have been that of reasonable risk of harm. Hoag v. Lake Shore & Mich. So. Ry., 85 Pa. St. 293 (1877); Wood v. Pennsylvania Ry., 177 Pa. 306, 35 A. 699 (1896).

remote,[8] but on examination we find that the rules of legal causation are substantially the same whether the tortious act be wilful or merely negligent; viz., all intended consequences are proximate; [9] the consequences must be direct and immediate; [10] intervening factors will render the causation too remote unless such factors were foreseeable.[11] The court in *Koontz v. Keller*, by sustaining the demurrer, holds that the damages are too remote to constitute a cause of action. Remoteness of damages suggests causation, so it may be that the court, relying on the causation approach, found the intervening factors so unforeseeable as to enable it to rule, as a matter of law, that the defendant's wrongful act was merely the remote cause of the injury.[12] In that event the case of *Guille v. Swan* is easily distinguishable for there the court held the intervening factors to be so foreseeable as to warrant a directed verdict for the plaintiff.[13] It is more probable that the Ohio court approached the problem as one of negligence, and hence that the term, remoteness of damages, may infer that the court found this particular class of harm so unforeseeable that

[8] 22 R. C. L. 123 (1918); Isham v. Dow's Estate, 70 Vt. 588, 41 A. 585 (1898).

[9] SALMOND, TORTS, 7th ed., 157 (1928); 1 TORTS RESTATEMENT, § 6 (1934); McLaughlin, "Proximate Cause," 39 HARV. L. REV. 148 (1925).

[10] 36 Am. St. Rep. 807 at 819 (1894); Borworth v. Brand, 1 Dana (31 Ky.) 377 (1833); May v. Western Union Tel. Co., 157 N. C. 416, 72 S. E. 1059 (1911); 8 AM. & ENG. ENCYC. LAW 598 (1898); Philpot v. Taylor, 75 Ill. 309 (1874) (consequences of an intentional act must be direct and immediate). The cases of In re Polemis, [1921] 3 K. B. 560; Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 69 N. W. 640 (1896); Smith v. London & South Western Ry., 6 C. P. 14 (1870), all hold a negligent tortfeasor is liable for all direct and immediate consequences. However, the cases of Milwaukee & St. Paul Ry. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256 (1876); Hamilton v. Southern Ry., 200 N. C. 543, 158 S. E. 75 (1931); Alabama Power Co. v. Bass, 218 Ala. 586, 119 So. 625, 63 A. L. R. 1 (1929); Hoag v. Lake Shore & Mich. So. Ry., 85 Pa. St. 293 (1877), hold that the negligent tortfeasor is liable only for those consequences which were foreseeable.

[11] The cases of Godbey v. Grinnell Elec. & Heating Co., 190 Iowa 1068, 181 N. W. 498 (1921), and Clark v. E. I. Du Pont de Nemours Powder Co., 94 Kan. 268, 146 P. 320 (1915), hold intervening factors must be foreseen to be proximate when the defendant's act is negligent. The cases of Strong v. Granite Furn. Co., 77 Utah 292, 294 P. 303 (1930), and Ricker v. Freeman, 50 N. H. 420 (1870), and SALMOND, TORTS, 7th ed., 164 (1928), state that intervening factors must be foreseeable when the defendant's wrongful act is intentional. Lane v. Atlantic Works, 111 Mass. 136 (1872) (an intervening trespass is foreseeable); Steenboch v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117 (1923) (an intervening negligent act is not foreseeable).

[12] Scholes v. North London Ry., 21 L. T. N. S. 835 (1870) (intervening trespasses of third persons, induced by curiosity, are not foreseeable); Chicago, B. & Q. R. R. v. Gelvin, (C. C. A. 8th, 1917) 238 F. 14, L. R. A. 1917C 983; Hoag v. Lake Shore & Mich. So. Ry., 85 Pa. St. 293 (1877); Beetz v. City of Brooklyn, 10 App. Div. 382, 41 N. Y. S. 1009 (1896).

[13] "Now, if his descent . . . would, ordinarily and naturally draw a crowd . . . either from curiosity, or for the purpose of rescuing him . . . all this he ought to have foreseen, and must be responsible for." Guille v. Swan, 19 Johns. (N. Y.) 381 at 382-383 (1822).

the defendant owed no duty to this plaintiff with respect to the interest invaded. The language of the Ohio court, suggesting contributory negligence,[14] would indicate that the court treated the issue as one of negligence, for contributory negligence is no defense to an intentional wrongdoer.[15] The case of *Guille v. Swan* presents no such refined problems for there we find an act, wrongful to the plaintiff, with respect to the interest actually invaded, with a clear line of causation. It is submitted that the decision of the Ohio court is to be approved, although it is suggested that the preferable approach is to limit the defendant's liability to the avoidance of broad classes of risks which were reasonably foreseeable.

[14] "Moreover . . . it was within the province and power of Koontz to exclude from his property these curiosity seekers. . . . he had the right and power to prevent this intrusion." Koontz v. Keller, 52 Ohio App. 265 at 271-272, 3 N. E. (2d) 694 (1936).

[15] HARPER, TORTS, § 150 (1933): "The doctrine of contributory negligence as a defense has no application to harms intentionally inflicted by the defendant." Steinmetz v. Kelly, 72 Ind. 442 (1880).

HARPER, TORTS, § 132 (1933): "The general rule is . . . that contributory negligence on the part of the plaintiff is a bar to a recovery based upon defendant's negligence."