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# Torts--Liability in Kentucky for Personal Injury to an Unforeseen Plaintiff Resulting From a Negligent Injury to Property of Another

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## TORTS—LIABILITY IN KENTUCKY FOR PERSONAL INJURY TO AN UNFORESEEN PLAINTIFF RESULTING FROM A NEGLIGENT INJURY TO PROPERTY OF ANOTHER

It is fundamental that there are at least three elements essential to establish actionable negligence, (1) the existence of a duty owed by the defendant; (2) violation of that duty by the defendant; and (3) damage resulting from violation of that duty[1] It is also fundamental that the absence of any one of these three elements renders the petition bad, or the evidence insufficient. There is, however, much confusion in determining liability when the situation involves a plaintiff who is not readily apparent. Under such circumstances the reasoning of the courts has, in the main, developed along two lines:

(1) Some employ the language of "proximate cause" with limitation of liability being determined by the confusion of ordinary and natural course of events, remoteness in time and space, efficient intervening cause, foreseeability of intervening cause, etc.[3]

(2) The second view is that the act must violate a duty owing to the plaintiff, as an individual or member of a class, and holds that there is no liability for negligence unless there is in the particular case a legal duty owed to the plaintiff or to the class.

The latter position was ably expounded by Justice Cardozo in the leading case of *Palsgraf* v. *Long Island R. Co.*[4] In that case the servant of the defendant railroad, in assisting a passenger to board a moving train, knocked a package from the passenger's hands which package, unknown to the servant, contained fireworks. The fireworks exploded and the concussion dislodged a scale which fell upon and injured the plaintiff, who was standing on the railroad platform some distance away The court, in denying recovery held that the plaintiff could not recover as the vicarious beneficiary of a breach of duty to another. Under this view there is a fairly definite boundary, capable of application, to the liability of the defendant, in that there must be an act foreseeably dangerous to an interest of the plaintiff. There is an interesting suggestion in the Palsgraf case[5] that

[1] Warfield Natural Gas Co. v Allen, 248 Ky 646, 59 S.W 2d 534 (1933) Horse Creek Mining Co. v Frazeir's Adm'x., 224 Ky. 211, 5 S.W 2d 1064 (1928) Illinois Central R. R. Co. v. Cash's Adm'x., 221 Ky 655, 299 S.W 590 (1927) Gosney v. Louisville & Nashville Ry. Co., 169 Ky 323, 183 S.W 538 (1916).

[2] Gosney v. Louisville & Nashville Ry. Co., 169 Ky. 323, 183 S.W 538 (1916).

[3] Miller v Gooding Highway Distr. 55 Idaho 258, 41 P 2d 625 (1935) Gordon v Bedard, 265 Mass. 408, 164 N.E. 374 (1929)

[4] 248 N.Y. 339, 162 N.E. 99 (1928).

[5] *Id.* at 346-347, 162 N.E. at 101.

if the defendant could have foreseen injury only to the package he might not be liable for any injury to the person.

It is the purpose of this note to consider the attitude of the Kentucky courts toward these two theories, as related to negligence toward a plaintiff not readily apparent, and especially in the situation where injury to property might be foreseen, but not the resulting injury to a person.

The Court of Appeals of Kentucky has never expressly adopted or rejected the rule of the *Palsgraf* case. It has, in fact, been referred to only once by the court, which quoted a portion not containing the decision of the case.[6] A study of the Kentucky cases indicates, however, that the "duty" approach has only occasionally been used; usually the court talks in terms of "proximate cause" though this term is sometimes used interchangeably with "foreseeability"

Where the injury is the direct result of immediate negligence to a known or readily foreseeable plaintiff, there is liability for the injury regardless of whether the particular consequences were foreseeable. Here the type or extent of the injury and the manner of occurrence have no relation to foreseeability, which is not at issue. The familiar situation illustrating this is the ordinary automobile collision where, if the defendant was negligent at all, he will be held to have foreseen, necessarily, the injury to the occupants of the other automobile, resulting directly from the collision. The defendant's act is the "proximate" cause of any injuries, foreseeable or not.

Where, however, the injury is remote in point of time or space, or where there is an intervening cause which more directly produces the injury, the courts again require that the injury be the "proximate" result of the defendant's negligence. But here the determination of whether or not the act of the defendant was the "proximate" cause of the injury to the plaintiff depends on the foreseeability of the result.

A recent case, for example, stated that "proximate cause is otherwise defined to be 'that cause which naturally leads to, and which might have been expected to have produced, the result.' "[7] A more satisfactory statement is given in *Dixon* v. *Ky. Utilities Co.* where, quoting from an earlier case, the court said:

> "Some courts deny that the injury in order to be the proximate result of the negligence 'ought to have been foreseen in the light of the attending circumstances' but most of the courts, including our own, incorporate that element in the definition. The confusion seems to have grown out of the failure to distinguish between an injury directly produced by the negligence complained of and one which is indirectly or re-

[6] Louisville & N. R. R. v. Vaughn, 292 Ky 120, 126, 166 S.W 2d 43, 47 (1942).

[7] Hooks v. Cornett Lewis Coal Co., 260 Ky 778, 785, 86 S.W 2d 697, 700 (1935).

> motely produced. If the injury is the direct result of the alleged negligence, the latter may be said in all cases to be the proximate cause of the injury, although it may not have been foreseen in the light of the attending circumstances. If, however, the injury is only the indirect or remote result of the alleged negligence, then it must have been foreseen or anticipated in the light of the circumstances." [8]

The rule applied in Kentucky, then, at least in most situations, may be stated thus:

1. If the injury is the "direct" result of defendant's negligence, he is liable therefor, though the injury which actually occurred might not have been foreseen.[9] This would seem the true situation in which to speak of "proximate cause."

2. If the injury is the "indirect" result of defendant's negligence, as where another act occurs between the negligence of defendant and the actual injury, liability will depend on "foreseeability" [10]

Neither of these rules takes into account the situation involving the unforeseeable plaintiff, which was the problem before the New York Court in the *Palsgraf* case. What does the Kentucky court mean by "negligence"—negligence in the air, which Cardozo says "will not do," or negligence as breach of duty to a particular plaintiff? The defendant engages in conduct which is socially undesirable, because it involves an unreasonable risk of harm to A. If injury to A is a direct result, defendant is liable for all the consequences, whether he could foresee them or not, and "duty" may be readily assumed. If injury to A results indirectly, defendant's liability depends on the foreseeability of intervening forces which brought about the injury But suppose injury to B is the direct result and defendant could not foresee the possibility of harm to B. Shall we apply the "direct result" rule and hold defendant liable to B, or shall we relieve defendant of liability for the direct consequences of his undesirable conduct by asking whether he could foresee harm to B, i.e., whether he had a duty to B. It would seem simpler and less confusing to deal with this type of problem in terms of duty. Consideration of causation obscures the issue, which is whether the defendant is under a legal obligation to protect B's interest.

A further complication arises if a distinction is made between the interest in freedom from bodily harm and the interest in property. If the defendant's conduct negligently threatens a property

[8] 295 Ky 32, 37, 174 S.W 2d 19, 22 (1943).

[9] Louisville & N. R. Co. v. Wright, 183 Ky 634, 210 S.W 184 (1919) Louisville & N. R. Co. v Daugherty, 108 S.W 336 (Ky 1908).

[10] Dixon v Ky Utilities Co., 295 Ky 32, 174 S.W 2d 19 (1943) Nelson Creek Coal Co. v Bransford, 189 Ky 741, 225 S.W 1070 (1920) (reversed on other grounds)

interest of A, Cardozo suggests he might not be liable for injury to the person of A. This distinction is adopted in the RESTATEMENT OF TORTS,[11] but has been the subject of criticism.[12] Suppose defendant's conduct threatens harm to a property interest of A, but personal injury to B is the direct result.

Some such problem was lurking in the background of a case recently before the Kentucky Court of Appeals. In *Meeks Motor Freight, Inc.* v. *Hams Adm'r*[13] the defendant's truck was making a delivery to a wholesale dry goods warehouse and, in order to reach the warehouse, used a driveway which sloped sharply downward. As the truck was driven into the driveway the driver and his helper both noticed a paper box in the roadway ahead of them. The right front wheel of the truck ran over the box and in doing so fatally injured one of two small children who were inside. There was a dispute in the testimony as to whether the box was moving at the time, the driver testifying that it was not, while his helper testified that he " saw the end of it just waving just a little bit."[14] Several children, one of them a bystander and another (a six year old unsworn witness) an occupant of the box, testified that the box was moving when struck which, if true, might be explained by the steepness of the grade, described as "just a drop off."

The court, in reversing a judgment for the plaintiff, held that an instruction on the ordinary law of the road was insufficient. But the instruction given for use on a second trial, while apparently designed to leave to the jury the question as to whether, having seen the box, the driver discovered or ought to have discovered that there was some motion of the box as would place upon him the duty to investigate and he failed to do so, actually is so worded as to indicate that, having seen the box *or* having discovered or if he should have discovered motion, he had the duty to investigate.[15] It is inter-

[11] Sec. 281, Comment g.

[12] "If the courts once adopt such a distinction, then we are faced with the terrifying prospect of a whole new series of cases in which it will be necessary to consider whether or not a person has the same interest in his foot and his eye, in his two adjoining houses, in his ship and the cargo which it carries. Obviously a single distinction between bodily security on the one hand and property security on the other, would be too broad." Goodhard, *The Unforeseeable Consequences of a Negligent Act* (1930) 39 YALE L.J. 449, 467.

[13] 302 Ky. 71, 193 S.W 2d 745 (1945)

[14] *Transcript,* page 124.

[15] The instructions " should have stated that the defendant, after having discovered the box in the driveway or by the exercise of ordinary care and maintenance of a reasonable lookout, should have discovered the box; and further, after having seen the box, or by the exercise of ordinary care in maintaining a reasonable lookout, did discover, or ought to have discovered that there was some motion of the box as would place upon him the duty to investigate and inspect in order that its dangers may fully appear, and fails to exercise

esting to note that, while defendant obtained the requested reversal, the case was never re-tried since, on the basis of the instruction given by the court, the verdict would almost certainly have been for the plaintiff, it being admitted that the box itself was seen.

One month later another case involving children playing in a cardboard box was before the court. In *Gray* v. *Golden*[16] the defendant, in moving her car from her driveway saw a large cardboard box in the driveway, and stopped and removed it, together with some pots and pans which had been left there by children playing in the driveway. When she returned a short time later she saw the box in the driveway again and ran over it, severely injuring a child who was playing inside the box. The testimony of the defendant indicated that she knew the children had been playing with the box in the driveway, an element which was not present in the *Meeks* case, yet the court, in affirming a judgment for the plaintiff, said, "While this case is not free from doubt and is rather a difficult one the judgment is correct." Based upon the fact that the defendant knew that children had been playing in the box a short time before, the court held that she should have anticipated that they had replaced the box in the driveway and was therefore under a duty to investigate.

These two cases, considered together, would seem to indicate that the attitude of the court at present is that a driver of an automobile who sees any object large enough to contain a human being in front of his vehicle on a driveway or semi-public road, should foresee that it might contain a human being and he is under a consequent duty to investigate before proceeding. If the instruction given by the court in the *Meeks* case be taken literally such is undoubtedly the case for, strictly construed, it requires one who sees a box or sees motion of the box, to investigate.

Without this literal interpretation, and adopting the meaning apparently intended by the court, liability is determined by duty, and duty imposed by the foreseeability of harm to the *particular plaintiff*. There is always some risk of harm in running over a large box, the contents of which are unknown. If injury to merchandise in the box, to another occupant of the vehicle, or to the vehicle itself resulted, liability might well be imposed on the driver. With such considerations the court is not concerned in these cases. Liability of the driver for injury to a child concealed in a box does not depend on whether the driver could foresee some harm, somehow, to someone, but on whether he could foresee injury to the child, i.e. did the circumstances charge him with knowledge (or duty to acquire

ordinary care therein, and such failure, if any, was the proximate cause of the death of John Ham, Jr., the law is for the plaintiff." Meeks Motor Freight, Inc. v Ham's Adm'r., 302 Ky. 71, 78, 193 S.W 2d 745, 748 (1945)

[16] 301 Ky 477, 192 S.W 2d 371 (1945)

knowledge) of the presence of a child in the box. It is not sufficient to show that the defendant was guilty of "negligence in the air" and that injury directly resulted; negligence consisting of the breach of a duty to the particular person injured must be shown.

On several previous occasions the court has indicated that, in a proper fact situation, it will make the same requirement of "duty to the particular plaintiff" that is required by the *Palsgraf* case.[17] The most direct statement is contained in *West Kentucky Coal Co.* v. *Smithers*[18] where the court says:

> " it is not sufficient to show that there was a violation of a duty owing to another person or class of persons, which, had it been performed, would have prevented the injury complained of. It must further appear that there was a violation of a duty owing to the plaintiff personally, or to a class to which he bore the necessary relation to make the duty applicable to him Facts which create a relation and therefore a duty as to one, do not establish the same obligation to all mankind "

The reasoning of the court in the *Meeks* case (and in the *Gray* case as well) seems to indicate that the court has adopted the rule of the *Palsgraf* case, consciously or unconsciously. That there must be a duty to the particular plaintiff is assumed by the court; its only concern is whether such a duty arose in the circumstances of the case. It concludes that a jury might find in each case that the defendant's conduct involved an unreasonable risk of harm to the plaintiff's interest in personal security. It seems probable that the court may now be considering negligence as the relation between particular individuals; that it is not a wrong to third persons, and therefore they cannot recover even though they may have been injured by the act, unless they can establish the existence of a duty owed to them by the wrongdoer.

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[17] *See* Brauner v. Leutz, 293 Ky 406, 169 S.W 2d 4 (1943) (where the court held that, assuming defendant was negligent, there still was no cause of action in favor of the plaintiff unless there was a duty on the part of the negligent one toward the injured one, since "actionable negligence is based upon the violation of duty owed to the injured person by the negligent one.")

In Komonyi, Adm'x. v Consolidation Coal Co., 182 Ky 683, 684, 206 S.W 883, 884 (1918) the court stated, "It is not sufficient . . to show a mere general breach of duty, but it must appear that there was a breach of duty owing to the employee who was killed."

[18] 184 Ky. 211, 211 S.W 580 (1919) (But the court cites as authority Garland v. Boston & M. R. R., 76 N.H. 556, 86 Atl. 141, which involved the question of duty to a trespasser, an exceptional class of case antedating the Palsgraf case and followed by courts which would reject the more generalized rule of the Palsgraf case.)