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Torts - Negligence - Causation - Foreseeability

J. Stephen Kreglow

TORTS — NEGLIGENCE — CAUSATION — FORESEEABILITY — The Supreme Court of Pennsylvania has held that harm resulting from the raising of a snow swirl by a bus passing at high speed is not the product of a foreseeable risk or hazard which could render this conduct negligent.

Metts v. Griglak, 438 Pa. 392, 264 A.2d 684 (1970).

Joseph H. Metts was a passenger in a Perry Bus Lines coach which was following several car lengths behind an automobile driven by Mrs. Helen R. Harshman. Both vehicles were traveling at approximately 30 to 35 miles per hour in the far right hand lane of a four lane divided highway which was slippery and covered with ice and snow. They were passed by a Greyhound bus traveling in the immediate left hand lane at approximately 60 miles per hour, 10 miles per hour over the posted speed limit. In passing the two vehicles, the Greyhound bus splashed slush and raised a cloud of snow which obscured the vision of the other drivers. Although unable to see, the Perry bus driver continued without reducing his speed. When his vision of the road cleared he observed the Harshman automobile skidding but was unable to avoid colliding with it. Neither vehicle was utilizing chains, nor was the Perry bus driver using the sander with which his bus was equipped. At the time of the accident, the Greyhound bus was out of sight.

Plaintiff filed a personal injury suit against the Perry Bus Lines, its driver and Mrs. Harshman for injuries resulting from the rear end collision. Mrs. Harshman filed a third party complaint joining Greyhound and averring that the collision was the direct result of their bus. The jury returned a verdict in favor of plaintiff and against all the defendants including Greyhound; subsequently the court granting Greyhound's motion for a judgment n.o.v. This decision was affirmed by the Supreme Court of Pennsylvania.[1]

Speaking for the majority, Justice Pomeroy[2] ruled:

> . . . that if Greyhound was negligent, its negligence lay only in exceeding the speed limit. The harm suffered by Metts, however, was not the result of a risk the foreseeability of which rendered Greyhound's excessive speed negligent. Rather that harm was attributable to Greyhound's nonnegligent raising of a snow swirl and the subsequent and unforeseeable negligence of Perry and Mrs. Harshman.[3]

1. Metts v. Griglak, 438 Pa. 392, 264 A.2d 684 (1970).
2. Chief Justice Bell concurred in the result. Justice Roberts filed a dissenting opinion.
3. Metts v. Griglak, 438 Pa. 392, 398-99, 264 A.2d 684, 688 (1970).

On appeal the decisive issue was whether the injury to Metts resulted from a risk or hazard, the foreseeability of which could render the conduct of the Greyhound bus negligent. In resolving this issue the court relied on *Brusis v. Henkels*, 376 Pa. 226, 102 A.2d 146 (1954) and *Dahlstrom v. Shrum*, 368 Pa. 423, 84 A.2d 289 (1951)[4] for the proposition that only those risks or hazards which are foreseeable could render Greyhound negligent.[5] Assuming Greyhound owed some duty to exercise reasonable care to fellow travelers, the court proceeded to fragment the risks of driving under these circumstances and found that, although other reasonably foreseeable risks might easily be imagined,[6] the risk of an accident resulting from a snow swirl was not among them.[7] Even assuming negligence on the part of Greyhound, the intervening negligence of the Perry bus driver was sufficiently extraordinary as to be a risk unforseeable to Greyhound.[8]

In conclusion, the court agreed with the lower court's finding that snow swirls, caused by passing motorists, are a normal risk of driving and are practically speaking unavoidable. To support this argument the court analogized this situation to the dangers created by the headlights of an oncoming car. In addition, the court stated that no case had been found to support the theory of Mrs. Harshman.

In his dissenting opinion, Mr. Justice Roberts, set forth the following arguments: 1) though the majority found no case to support the theory of the third party complaint, no case had been cited holding

4. The importance of this case in defining the role of foreseeability in determining negligence, and the Pennsylvania Supreme Court's adoption of Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, (1928) is set forth in an article by Eldredge, *"The Role of Foreseeable Consequences in Negligence Law"*, 23 PA. B. ASS'N Q. 158 (1951-52).

5. It should be noted that the problem in both the cited cases was that of the unforeseeable plaintiff. The issue in the latter as stated by the court: "Was plaintiff within that group of people to whom a reasonable man could foresee an injury under these circumstances?" Dahlstrom v. Shrum, 368 Pa. 426, 84 A.2d 289, 291 (1951).

6. The court here cites the RESTATEMENT (SECOND) OF TORTS § 281, comment *e* (1965). "Thus the duty to exercise reasonable care in driving an automobile down the highway is established for the protection of the persons or property of others against all of the unreasonable possibilities of harm which may be expected to result from collisions with other vehicles, or with pedestrians, or from the driver's own automobile leaving the highway, or from narrowly averted collisions or other accidents. When harm of a kind normally to be expected as a consequence of the negligent driving results from the realization of any one of these hazards, it is within the scope of the defendant's duty of protection."

7. "But in the case at hand, we cannot say that a collision occurring when the Greyhound bus was over one-half mile from the scene, and alleged to have resulted from the creation of a snow swirl (or the throwing of slush) was a harm within the risk foreseeably created by Greyhound's operation of its bus at an excessive speed." Metts v. Griglak, 438 Pa. 392, 397, 264 A.2d 684, 687 (1970).

8. The court cites the RESTATEMENT (SECOND) OF TORTS § 447 (1965) to support this conclusion.

there was no liability in this situation;[9] 2) it was a jury question as to whether Greyhound's conduct was negligent and the risk foreseeable; 3) finding Greyhound was out of sight when the accident occurred was irrelevant; and, 4) it is clearly foreseeable under these circumstances that passing motorists will obscure the vision of others.

The court's approach to the problem of the scope of liability, through the concept of foreseeability of the risk, can not be faulted for lack of authority.[10] However, it is necessary to be aware of what is taking place by the utilization of this approach. Although it is sometimes accomplished under the concept of proximate cause, Pennsylvania, in using the doctrine of foreseeable consequences, has placed a great deal of the scope of liability problem under the question of duty.[11] The specific mode of analysis used in Metts was risk fragmentation, which looks to and analyzes harm in terms of specific risks, the foreseeability of which renders conduct negligent.[12] Its utilization stems from the adoption by Pennsylvania of Justice Cardoza's rational in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), and the position taken by the Restatement of Torts.[13]

The problem with the utilization of a risk fragmentation approach is the limitation it places on the consideration of what in some cases may be the very difficult question of how far negligence goes before we cut off liability.[14] If one looks only at the risk of one specific type

9. As stated by Chief Justice Stern in Hudson, Admrx. v. Grace, 348 Pa. 175, 176-77, 34 A.2d 498, 499-500 (1943):

> While no case is reported in Pennsylvania with the same factual situation as that which gave rise to the present litigation, there is not involved here the application of any new doctrine in the law of negligence. Human life is so complex that the circumstances attending the happening of different accidents are correspondingly varied, but the principle of liability is simple and constant, being based on the proposition that one who, by sub-standard conduct, causes injury to another is legally responsible therefore if the harmful consequences of such conduct could reasonably have been foreseen.

10. Dahlstrom v. Shrum, 368 Pa. 423, 84 A.2d 289 (1951); Brusis v. Henkels, 376 Pa. 226, 102 A.2d 146 (1954).

11. "Whether there is to be such an obligation is a matter of policy; of the end to be accomplished; and when we say that the defendant is or is not under a 'duty' to protect the plaintiff against such consequences, 'duty' is only a word, and no more with which we state our conclusion." W. PROSSER, TORTS § 49, at 287 (3d ed. 1964).

12. "Sometime the foreseeability limitation is stated in a form which on its face, would seem to narrow the scope of liability. It is said that the defendant's responsibility must be limited to harm which results from the particular risk or hazard which he has created." W. PROSSER, TORTS § 50, at 292 (3d ed. 1964).

13. ". . . . the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty . . . The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Palsgraf v. Long Island R. Co., 248 N.Y. 339, 343-44, 162 N.E. 99, 100 (1928). See Eldredge, *"The Role of Foreseeable Consequences in Negligence Law"*, 23 PA. B. ASS'N Q. 158 (1951-52).

14. "If the defendant could not reasonably forsee any injury as the result of his act,

of accident, and asks is this one of the things that I have to worry about, further discussion of other relevant factors in determining the scope of liability may be precluded. By fragmenting the risk, one is asking in isolation whether a duty is owed as to the risk of a specific type of occurrence and the answer, if an unusual factual situation is present or a novel approach to recovery is raised (as in *Metts*), should in all such cases be in the negative. This answer follows since the determination of negligence is a process of gauging probabilities and not mere possibilities.[15] This is clearly the result by a close inspection of the elements normally used to determine unreasonable conduct, *i.e.*, probability of harm, severity of harm and the burden of precaution.[16] If we fragment the risk, the probability factor goes down and we are left with conduct, as in *Metts*, which cannot be termed negligent when considered in the total balance.

Thus, it would appear fragmentation of the risk may ask the wrong question at the wrong time in the negligence formula. *Metts* illustrates this point in the difficult cause in fact question it presents, *i.e.*, whether Greyhound's speeding contributed in the creation of the snow swirl to the plaintiff's injury. This question, as well as the issue of intervening negligence, does not have to be resolved since the court has determined at the outset an absence of unreasonable conduct on the part of Greyhound towards the plaintiff.[17]

If one of the effects of risk fragmentation is to preclude the discussion of such issues as I have mentioned above, it is submitted that the court must be doing more than is evident from a strict application

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or if his conduct was reasonable in the light of what he could anticipate, there is no negligence, and no liability. But what if he does unreasonably fail to guard against harm which he should foresee, and consequences which he could in no way have anticipated in fact follow?" W. PROSSER, TORTS § 50, at 288 (3d ed. 1964).

15. "In the ordinary conduct of the affairs of life, there is no duty on anyone to anticipate and provide against the remotely possible. . . ." White v. Roydhouse, 211 Pa. 13, 17, 60 A. 316, 317 (1905). "Want of ordinary care consists in failure to anticipate what is reasonably probable—not what is remotely possible." Camp v. Allegheny County, 263 Pa. 276, 282, 106 A. 314, 316 (1919), "Liability for negligence depends on antecedent probability, not the mere possibility of harmful results therefrom." Venzel v. Valley Camp Coal Co., 304 Pa. 583, 590, 156 A. 240, 242 (1931).

16. "Foreseeability of consequences, or, as it is sometimes called, the risk of harm, is only one of the factors which are important in determining negligence. Into the scale with it there must also be thrown the gravity of the harm if it is to occur, and against both must be balanced the utility of the challenged conduct." W. PROSSER, TORTS § 50, at 306 (3d ed. 1964).

17. The court does take note of the cause in fact issue in a footnote on page 398 of the opinion in considering the lower court's findings that snow swirls are an unavoidable hazard of driving. The issue of intervening negligence was dealt with based on the assumption that Greyhound was negligent, but the finding of extraordinary negligence breaking the causation chain does not disturb the court's initial finding of no unreasonable conduct by Greyhound.

of this approach. In anlyzing a negligence problem in this manner, and dismissing the case at this point, the court must have, or should have, considered numerous additional factors which are relevant to the determination of the scope of liability, particularly when the theory of recovery could open new doors to litigation. Among these additional factors are allocation of risk, economic burden, other factually or theortically analogous precedent, common sense and justice.[18] Though the end result may very well be the same, it is still a considered evaluation and therefore does not fit neatly into the mould of risk fragmentation or the analysis of foreseeability as such.

Thus, it is submitted the court is deciding the potential liability problem almost entirely on the foreseeability issue and using risk fragmentation to justify the result. The court's consideration of other questions raised by the case does not diminish the impact of the determination of this issue, *i.e.*, accidents resulting from the raising of snow swirls by passing automobiles are not the result of foreseeable risks, and hence there is no potential avenue of recovery available to one thereby affected.[19] This approach has placed the court in a straight jacket at a point in the negligence formula, and in an area of potential liability, which should remain flexible. Public opinion being a variable in regards to what constitutes a normal highway hazard, the holding of *Metts* may very well prove to be a burden if a stronger factual pattern were presented.

The difficulty of a risk fragmentation approach can be seen through an application of its reasoning to the facts in *Thorton v. Weaber*, 380 Pa. 590, 112 A.2d 344 (1955). In this case a negligently driven truck in which three boys were riding skidded off the highway, struck a utility pole carrying high tension wires and overturned. The wires fell on a cable fence electrifying it. Sparks rising from the truck and the feeling of slight shocks, warned the boys electricity had been released. Fearing the wires may have electrified the fence, two of the boys in going for help, decided not to return to the highway directly above them but proceeded to a point 150 feet away

18. This appears to be what the court has done in the latter part of the opinion when it compares snow swirls to lights of an oncoming automobile in assessing normal highway hazards.

19. The determination of the intervening negligence issue, having been dealt with on the assumption that Greyhound was negligent, must be regarded as dicta or an alternative basis for the resolution of this particular case, and presumably, if none had been present, the question of Greyhound's conduct would not be changed.

where in attempting to go through the fence they were immediately electrocuted. It was held that the negligent operation of the truck was the legal cause of the passengers' death by electrocution. The defendant raised the issue of foreseeability,[20] but Justice Musmanno, speaking for the court, dismissed the argument finding foreseeability was consistent with the fact that "[a]nyone who creates a mortal hazard must anticipate that the innocent person caught within the orbit of danger will endeavor to save his life."[21] This he supported by the proposition that only the general character of injuries must be forseeable.[22]

Applying a risk fragmentation analysis, the initial question to be asked would be whether the electrocution resulted from a risk or hazard the foreseeability of which rendered the driver's conduct negligent. If the injury had resulted from the overturning of the truck there would be no problem, nor would there be a serious problem if the plaintiffs, while dazed, had simply crossed the fence at the point of the accident, although the foreseeability of this is less. Here they knew the wire had charged the fence and had gone 150 feet up the roadway before attempting to cross. By fragmenting the risks involved in poor driving and looking only to this particular hazard, the answer must be it is unforeseeable because it is a mere possibility, not something one would have to worry about. The result of this analysis would be that, although the driver's conduct may have been unreasonable for numerous other reasons, it cannot be negligent as regards the electrocution. The court having found this hazard to be foreseeable, it is submitted accidents arising from the creation of snow swirls must also be within the realm of foreseeability.

The approach of a general class of harms enabled the *Thorton* court to satisfy the foreseeability requirement and proceed to the difficult question of intervening cause. However, by using a risk fragmentation analysis, potential liability would be foreclosed at the initial stage and the question of intervening cause unnecessary to be resolved.[23]

20. Defendant relied on Jacobs v. Philadelphia, 333 Pa. 584, 5 A.2d 176 (1939) for the proposition that conduct creating an unreasonable risk of harm is not negligent if not anticipated to create any harm to the plaintiff.

21. Thornton v. Weaber, 380 Pa. 590, 594-95, 112 A.2d 344, 347 (1955).

22. The court cites Smith, *"Legal Cause in Actions of Tort"*, 25 HARV. L. REV. 103, 238 (1911-12): "What must be foreseen, in order to establish negligence is 'harm in the abstract, not harm in the concrete.' The defendant need not foresee 'that an injury should occur.' He need only forsee that some injury of a like general character is not unlikely to result from failure to use care."

23. A similar result is found in *Metts* where the issue of intervening cause is superfluous after the initial finding of no unreasonable conduct on the part of Greyhound.

Therefore, it is submitted the two approaches cannot be deemed consistent unless the risk fragmentation analysis is in part a guise for the determining of scope of liability problems on more than a simple application of its elements. The court may utilize a *Thorton* approach or simply affirm a jury determination on a strong factual pattern in a case involving "unforseeable consequences". However, this serves as a bypass to the sometimes difficult question of where do we cut off negligence. A considered evaluation of numerous factors, including those mentioned above, applied through a general class of harms, would increase judicial integrity and certainty when facing this type of problem. The alternative of risk fragmentation leaves us simply with the statement that this hazard is unforeseeable.

The use of risk fragmentation is consistent with Pennsylvania's approach to this type of problem, but if the court utilizes it to foreclose liability simply on the basis of foreseeability, then it must be presumed that any accident resulting from highly unusual circumstances presents a very difficult problem to the plaintiff. If correctly applied the process will result in a finding of no liability in the majority of such cases. Therefore, the rational in *Metts* must be understood for exactly what it is—a seemingly innocent process whereby potential liability may be effectively foreclosed at a very early stage in the negligence formula. It also provides a vehicle, or a guise, for resolving the difficult scope of liability problem on less than the full consideration of factors necessary, and at a minimum, may block the resolution of other issues which might more rationally dispose of the case.

J. Stephen Kreglow

CONSTITUTIONAL LAW—VOID FOR VAGUENESS—POLITICAL DEMONSTRATION—In reversing a conviction based on the desecration of an American flag, the Supreme Court of Pennsylvania has held the term "political demonstration" be given a broad interpretation.

Commonwealth v. Haugh, 439 Pa. 212, 266 A.2d 657 (1970).

Appellant-defendant Haugh was convicted in the Philadelphia Common Pleas Criminal Court of violating the Pennsylvania flag desecration statute which makes it a misdemeanor to publicly desecrate or