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# Proximate Cause - Last Clear Chance - Admiralty: Foreseeability Requirement and the Freak Accident

Minn. L. Rev. Editorial Board

# Case Comments

## Proximate Cause—Last Clear Chance—Admiralty: Foreseeability Requirement and the "Freak Accident"

The lake vessel Shiras, owned by Kinsman Transit Company and containing a cargo of grain owned by Continental Grain Company, was moored at Continental's dock on the Buffalo River. The swift current forced an accumulation of ice against the ship, causing some of its mooring lines to part. A defective "deadman" owned by Continental to which a mooring cable had been attached pulled out, then the remaining lines parted. None of the Shiras' anchors had been put out and after the ship broke loose, the shipkeeper was unable to lower them. Careening downriver, the Shiras struck the Tewksbury, which also broke loose from its moorings and both vessels drifted downstream. Some distance further, the City of Buffalo maintained a drawbridge. Two timely calls were made to the proper authorities but the bridge was not raised.[1] The ensuing collision, which destroyed the bridge and arrested the vessels in the wreckage, dammed the river and flooded considerable property.

In an admiralty proceeding to adjudicate the liability of the parties among themselves and to others suffering property damage, the lower court found Kinsman, Continental, and the city all at fault.[2] Kinsman and Continental were held equally liable for

1. In its original opinion, the court of appeals concluded that one bridge operator had left work early enroute to a tavern while the second operator left home late and had not yet arrived. Therefore there was no chance to raise the bridge after the peril was known. *In re* Kinsman Transit Co., 33 U.S.L. WEEK 2225 (2d Cir. Sept. 29, 1964). In denying Continental's petition for rehearing, the opinion was modified to show that an operator had just arrived when the second call was received. However, the court still felt that this "may have been" a situation where there was no possibility to avoid the injury because of some prior negligence. Petition of Kinsman Transit Co., 338 F.2d 708, 720 (2d Cir. 1964).

2. Kinsman was found negligent because its shipkeeper did not prepare to drop the anchor despite the ship's hazardous position, the swift current and the ice conditions. *Id.* at 712, 714. Continental's fault was based partly on the defective "deadman" and partly on the inadequate mooring of the Shiras performed by both it and Kinsman. *Id.* at 714. The city's failure to raise the bridge amounted to actionable fault under a regulation of the Corps of Engineers, Department of the Army, as authorized by Congress, 28 Stat. 362 (1894), as amended, 33 U.S.C. § 499 (1958), which required that the bridge "shall be opened promptly on signal for the passage of any vessel at all times during the day or night . . . ." 33 C.F.R. § 203.707(e) (1962).

damages sustained by the Tewksbury;[3] the city, Kinsman, and Continental were held equally liable for damages suffered by the flood victims; and, on the basis of the last clear chance doctrine, the city was held solely liable for damages to Kinsman and Continental and unable to recover from them for the damage to the bridge.[4] On appeal, the Second Circuit *held* the last clear chance doctrine inapplicable and permitted division of damages resulting from injury to the property of the three tortfeasors, but affirmed the liability of all three parties for flood damage, *holding* that a duty of care was owed to all whose property was injured and that the unforeseeability of the manner and extent of the harm did not bar recovery where the damages were of the sort expectable and were caused by the very elements requiring the exercise of greater care than was displayed. *Petition of Kinsman Transit Co.*, 338 F.2d 708 (1964), *cert. denied*, 33 U.S.L. WEEK 3304 (U.S. March 16, 1965).

The court rejected the last clear chance contention of Kinsman and Continental, noting that since the city left the bridge unattended, it could not have avoided the injury.[5] The last clear chance doctrine is generally held inapplicable if the defendant's prior negligence in fact deprives him of the last chance to avoid the accident.[6] As to third parties injured by the flooding, the court specifically based its refusal to apply the last clear chance rule on the accepted principle that the original wrongdoer is

3. The Tewksbury's shipkeeper had left to spend the evening watching television with his girl friend and no one was therefore present to put out the anchor when the threatening river condition demanded it. However, exoneration of the Tewksbury and its owner was affirmed by the court of appeals on the basis that the shipkeeper's presence could not have prevented the disaster. 338 F.2d at 716.

4. Kinsman's total liability was limited to the value of the Shiras and her freight then pending, pursuant to the Limitations of Liability Act § 3, 9 Stat. 635 (1851), as amended, 46 U.S.C. § 183 (1958), which allows this limitation if the damages are incurred without the privity or knowledge of the owner.

5. See note 1 *supra*.

6. See, *e.g.*, Illinois Cent. R.R. v. Nelson, 173 Fed. 915 (8th Cir. 1909); Johnson v. Director General, 81 N.H. 289, 125 Atl. 147 (1924); Anderson v. Bingham & Garfield Ry., 117 Utah 197, 214 P.2d 607 (1950). A significant decision to the contrary is British Columbia Elec. Ry. v. Loach [1916] 1 A.C. 719 (P.C. 1915) (B.C.). See also Little Rock Traction & Elec. Co. v. Morrison, 69 Ark. 289, 62 S.W. 1045 (1901). This area is treated in 2 HARPER & JAMES, TORTS § 22.13 (1956) [hereinafter cited as HARPER & JAMES]; PROSSER, TORTS § 65, at 442–43 (3d ed. 1964) [hereinafter cited as PROSSER]; Bohlen, *Contributory Negligence—"Last Clear Chance,"* 66 U. PA. L. REV. 73 (1917); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1241 (1940).

liable for damages suffered by innocent third parties even though another party subsequently neglects to take precautions which could have prevented the injury.[7] More significant, however, is the court's recognition that the last clear chance doctrine must be used selectively in admiralty cases. The justification for the doctrine in ordinary negligence cases is that it overcomes the unjust result of denying recovery to a slightly negligent plaintiff otherwise barred by his contributory negligence, if the defendant had the last chance to avoid the injury.[8] In admiralty, contributory negligence is not an absolute defense;[9] the loss in cases of mutually caused collisions is divided equally between two negligent parties.[10] However, if a 50/50 division of damages does not approximate the true fault of each party or if the equal division rule is not applicable, inequitable results may follow[11] and application of the last clear chance doctrine may de desirable. The instant court's unwillingness to employ the last clear chance rule and thereby burden the city with the whole responsibility must indicate that in its judgment an equal division of the damages

7. See HARPER & JAMES § 20.5, at 1146 & n.42; HART & HONORE, CAUSATION IN THE LAW 143, 250 (1959); RESTATEMENT, TORTS § 452 (1934); MacIntyre, *supra* note 6, at 1234–35.

8. HARPER & JAMES § 22.14, at 1260–63; PROSSER § 66, at 443–44. Where contributory negligence is not an absolute defense and where it is possible to apportion damages on the basis of fault, the last clear chance doctrine is no longer necessary, since plaintiff's recovery will only be defeated to the extent of his negligence. See MacIntyre, *supra* note 6, at 1236, 1251–52. However, in some jurisdictions where apportionment statutes have been enacted, the last clear chance doctrine has been retained by the courts. See PROSSER § 66, at 449; MacIntyre, *Last Clear Chance After Thirty Years Under the Apportionment Statutes*, 33 CAN. B. REV. 257 (1955).

9. The Max Morris, 137 U.S. 1 (1890).

10. GILMORE & BLACK, ADMIRALTY 402, 404 (1957). However, in cases where one vessel is relatively innocent, and the other is grossly negligent, the lesser fault may be excused by the major and minor fault rule, *id.* at 402–03, unless the minor fault involves a violation of statute. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873). On the basis of the availability of these rules, it has been suggested that there is no need for the last clear chance doctrine in admiralty. Mollison, *Last Clear-Chance Doctrine in Admiralty*, 31 INS. COUNSEL J. 261 (1964).

11. It would seem that completely fair results would follow only where the contributing fault of each party is equal or where the negligence of one is so slight as to justify a 100% recovery by application of the major and minor fault rule. All these rules, therefore, appear to be but a crude attempt to award damages fairly. Much better results could be achieved by apportioning the damages on the basis of fault as suggested by the Brussels Collision Liability Convention of 1910, followed by most maritime nations today. GILMORE & BLACK, *op. cit. supra* note 10, at 439.

better reflected the relative faults of the parties contributing to the disaster.

The incredible sequence of events required the court to define and limit the extent of defendants' liability. The various tests for determining the scope of liability for negligent acts having extraordinary consequences usually depend on the "foreseeability" of some factor of the occurrence.[12] This is the natural result of a system of law which developed around the concept of fault[13] and which exalts the underlying deterrence value of tort liability[14]—for no one can guard against something that he cannot foresee. The scope of liability may be limited because either the plaintiff or the resultant damages were unforeseeable. Justice Cardozo's opinion in the *Palsgraf*[15] case suggests that before the plaintiff can recover, the defendant must have breached a duty of care owed to the plaintiff and this duty only extends to those persons to whom injury was foreseeable. Most of the difficult cases, however, have lent themselves to an analysis of the foreseeability of the resultant damages as a liability limitation. The broadest approach has been to find liability for all direct injuries, whether foreseeable or not, if they resulted from defendant's negligence.[16] The trend, however,

12. "[N]o other consideration so affects our feeling that it is or is not just to hold him for the result as its foreseeability . . . ." Edgerton, *Legal Cause*, 72 U. PA. L. REV. 343, 352 (1924); see KEETON, LEGAL CAUSE IN THE LAW OF TORTS 41 (1963); Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189, 194 (1952).

13. See KEETON, *op. cit. supra* note 12, at 20; Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law*, 52 CALIF. L. REV. 459, 498 (1964); Dias, *Remoteness of Liability and Legal Policy*, 1962 CAMB. L. J. 178, 191–92.

14. Fleming, *The Passing of Polemis*, 39 CAN. B. REV. 489, 502–04 (1961).

15. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), 59 A.L.R. 1253. For discussion of the case see, *e.g.*, Cowan, *The Riddle of the Palsgraf Case*, 23 MINN. L. REV. 46 (1938); Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L. J. 449 (1930); Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189 (1952); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 52 HARV. L. REV. 372, 48 YALE L. J. 390 (1939).

Justice Cardozo's analysis was accepted in admiralty in Sinram v. Pennsylvania R.R., 61 F.2d 767, 770 (2d Cir. 1932).

16. The leading case applying this approach is *In re* Polemis & Furness Withy & Co., [1921] 3 K.B. 560 (C.A.), in which one of defendant's workmen dropped a plank into a ship's hold, a spark was struck igniting vapors and the ensuing fire destroyed the ship. The arbitrators found that this specific result was not foreseeable, but the defendant was held liable on the ground that the damages were a direct result of the negligence. Under this analysis

has been to limit or deny liability if the type of damage occurring is unforeseeable.[17] Where the type of injury is foreseeable, foreseeability of the manner in which the harm occurred has not been required.[18] Similarly, the unforeseeable magnitude of the harm actually occurring will not excuse the defendant, provided it is of the kind expectable.[19] In sum, the negligent actor is liable for all damages which fall within the risk created by his conduct.[20]

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foreseeability is only relevant to determine whether the defendant was negligent. This origin of this approach is generally credited to Smith v. London & So. W. Ry., (1870) L.R. 6 C.P. 14. A few American jurisdictions have adopted this reasoning, notably Minnesota. Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961); Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 69 N.W. 640 (1896); see Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 196–98 (1950).

17. See Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co. (The Wagon Mound), [1961] A.C. 388 (P.C.) (N.S.W.). Furnace oil was carelessly spilled on the water as the Wagon Mound was being refuelled. It eventually reached plaintiff's wharf. Experts later testified, that no fire hazard was created in view of the oil's high flash point. However, two days later molten metal from welding operations on the dock fell on some rags which, acting as a wick, ignited the floating oil and severely damaged the wharf and vessel moored alongside. While some damage, such as fouling the wharf, was foreseeable, recovery was denied since ignition of the oil and damage by fire were not foreseeable.

In the United States the leading case applying foreseeability of damages is Milwaukee & St. P. Ry. v. Kellogg, 94 U.S. 469 (1876). Although frequently modified and flatly rejected in Minnesota, see authorities cited note 16 *supra*, most American jurisdictions rely on foreseeability of damages to some extent. See MORRIS, TORTS 171 (1953); PROSSER § 50, at 290.

18. It was originally feared that the *Wagon Mound* decision, *supra* note 17, might be interpreted as requiring foreseeability of the manner in which the injury occured. See Dias, *supra* note 13, at 181; Fleming, *supra* note 14, at 522–23; Note, 22 FACULTY OF L. REV. 119, 120 (1964). This notion was subsequently dispelled. In Hughes v. Lord Advocate, [1963] A.C. 837 (Scot.), post office employees had left an open manhole, covered only by a shelter tent surrounded by paraffin lamps, to enjoy a tea break. While the workers were gone, the eight year-old plaintiff started to explore the shelter. He used a lamp to enter the manhole causing the accumulated vapors to explode and severely burn him. Even though the manner in which the injury happened was unforeseeable, the claim was allowed since the injury was of the kind foreseeable by the defendant. This position is generally accepted by American courts. See PROSSER § 50, at 307 and cases cited n.97.

19. See, *e.g.*, McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911) (plaintiff struck by taxicab died of delirium tremens precipitated thereby); Koehler v. Waukesha Milk Co., 190 Wis. 52, 208 N.W. 901 (1926) (trivial scratch led to blood poisoning and death); 2 HARPER & JAMES § 20.5, at 1139–41; PROSSER § 50, at 300–01; Flemming, *supra* note 14, at 525–27.

20. See, *e.g.*, KEETON, *op. cit. supra* note 12.

Dealing first with the *Palsgraf* standard of foreseeability of plaintiffs, the instant court found that all persons injured by the flooding belonged to the class to whom a duty of care was owed.[21] From the city's viewpoint it was foreseeable that failure to raise the bridge, thereby causing a collision with two large ships in a narrow, ice-ridden river, could result in a partial damming which would flood property upstream from the bridge.[22] As to Kinsman the threat of harm to persons and property downstream from an insecurely moored vessel was clear, and under the existing conditions it was foreseeable that the runaway vessel would catch along the shore, swing around, block the ice flow, and create a dam in the narrow channel.[23] Although the court found that flooding was unforeseeable from Continental's viewpoint — since it could not foresee a loose vessel during the icy river conditions which contributed to the eventual flood damage — the wharfinger nevertheless owed a duty to property owners downstream, since it was foreseeable that the moored vessel might break loose because of the inadequate deadman and damage property on or near the river.[24]

Even though the instant court applied the *Palsgraf* test, it apparently entertained serious doubts about its usefulness.[25] Had there been more difficulty in bringing the claimants within the scope of the duty, the court might have been unwilling to follow this analysis — and justifiably so. If nonriparian property or any property upstream from the dock had been damaged, these "plaintiffs" would have been "unforeseeable" as to Continental and hence unable to recover from it.[26] Such a difference in result seems arbitrary and suggests that the standard of duty to foreseeable plaintiffs may be an inadequate and cumbersome

21. 338 F.2d at 721–22.

22. *Ibid.* The dissent found it highly unforeseeable that a bridge could ever become a dam. *Id.* at 727.

23. *Id.* at 723. The Court pointed out that between the dock and the bridge the width of the river channel does not exceed 250 feet, while the Shiras was 425 feet long. *Id.* at 722, 723.

24. *Id.* at 723.

25.

> Since all the claimants here met the Palsgraf requirement . . . we are not obligated to reconsider whether that case furnishes as useful a standard for determining the boundaries of liability in admiralty for negligent conduct as was thought . . . when Palsgraf was still in its infancy.

*Id.* at 722. See also *id.* at 725 where the court approvingly cites Justice Andrews' dissenting opinion in *Palsgraf*.

26. *Cf. id.* at 722 n.6.

tool to define the extent of liability in negligence cases. The class of persons to whom harm is foreseeable often depends upon the type of damage foreseeable. If the two questions are different, it is because the *Palsgraf* test may incorporate a spatial limitation on liability — a limitation often difficult to justify.

In examining the foreseeability of flood damage, the court found that from the city's and Kinsman's viewpoint, the actual consequences were foreseeable. Even though flooding was found unforeseeable as to Continental, the court nevertheless held it liable.[27] Two interpretations of this holding are possible. The court may have eliminated foreseeability of flood damage as a requirement for liability and simply applied a direct causation test[28]— flooding was a direct result of Continental's negligence, therefore it is liable. Alternatively, to harmonize this decision with those using foreseeability of result to limit the scope of liability, the court may have regarded flooding as the manner in which the injury occurred rather than as a type of injury. The court's statement that so long as the injury is of the "general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability,"[29] supports the latter interpretation. To read the case in this way, however, strains the distinction between the manner in which injury occurs and the type of injury to the breaking point. If flooding is not characterized as a "type of damage," it is difficult to see how the relevant expectable type of damage could be anything less broad than property damage. Once this point is reached there is no apparent reason to distinguish between property damage and personal injury — it is only necessary that some type of damage be foreseeable.[30] This is no different than making defendant liable for all damage resulting from his negligence.

A significant aspect of the instant decision is that the court recognized the limitations of any definite tests. The court suggested dealing with each case individually and considering such policy factors as insurance or other loss-sharing methods.[31] The result approaches the position of Judge Andrews' dissent in *Palsgraf* — in the last analysis the scope of liability question is

27. *Id.* at 723–24.
28. See note 19 *supra.*
29. 338 F.2d at 726.
30. Fleming, *supra* note 14, at 521–22.
31. 338 F.2d at 725–26.

simply one of expediency and of fairness.[32]

This broad approach, which permits open consideration of policy factors, is perhaps the most desirable way to deal with scope of liability questions — especially in "freak accident" cases. Facts and backgrounds vary so much that a definitive test cannot apply fairly to all situations. Further, the concept of foreseeability, although once having a preferred position in a system based primarily on fault, is not the only determining factor today. Although accident prevention and compensation are still the two primary functions of tort law; the emphasis upon the latter has increased in recent years.[33] Liability beyond fault can be no more offensive than letting an innocent plaintiff suffer the total loss. Increasing consideration is given to the shifting of loss from the plaintiff to a defendant who can pass it on as a small fraction of the cost of doing business or where this loss distribution is likely to be performed by insurance.[34] Although unable to divorce itself completely from the fault concept and desiring to retain a degree of certainty in tort law, the present court's express willingness to let the question of the extent of liability be determined in large measure by underlying policy considerations rather than doctrinaire tests is in tune with the modern concept of the law.

32. *Id.* at 725, citing Palsgraf v. Long Island R.R., 248 N.Y. 339, 354–55, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting).

33. See Cowan, *supra* note 15, at 66; Fleming, *supra* note 14, at 502, 506.

34. See *id.* at 506; Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 30 (1953).