Buffalo Law Review

Volume 5 | Number 2 Article 74

1-1-1956

Torts—Foreseeability of Injury

Arnold Liberman

Foreseeability of Injury

A convict on a prison farm working under minimal restraint escaped due to the negligence of the guards, and perfected his escape by forcing decedent through threats and duress to drive and transport him, which caused decedent to suffer a fatal brain hemmorhage.

Decedent's representative sued the State for conscious pain and suffering and wrongful death. The Court ruled unamimously against recovery,[40] on the rationale of lack of foreseeability and no duty owing to decedent.

Tort liability is occasioned when the actor negligently causes an unreasonable risk to a class of persons to whom he owes a duty of care.[41] The act charged to be negligent must be the proximate cause of the injury, and reasonably foreseeable.[42] The Court in the instant case asserted that the negligence of the State, qua jailor, was not the proximate cause of the death of decedent, since the risk was not reasonably foreseeable which defined the duty "to be obeyed";[43] i.e., a more rigorous vigil over the inmates. In support of this contention the Court distinguished between *restraint* and *punishment,* stating that punishment is the function of our penal institutions rather than the insulation of the prisoner from society. On the strength of this dichotomy, the Court concluded that the State owed no duty to decedent. The learned Court concedes that the State does incur liability when it breaches its duty of restraint as to the mentally ill, since injury as a result of an escape is patently foreseeable.[44] Secondly, the Court justifies its refusal to grant recovery on the theory of the *Mitchell* doctrine,[45] which requires a physical impact as an essential requisite to recovery for negligently caused fright, an element which was seemingly lacking here.

The decision in the instant case can perhaps best be justified on the ground that there is a reluctance to sanction claims against the State;[46] in addition, the Court apparently is not prepared to discard the impact doctrine,[47] although it has

40. 308 N. Y. 548, 127 N. E. 2d 545 (1955).
41. PROSSER, TORTS 165 (2d ed. 1955).
42. *Paine v. City of New York,* 277 N. Y. 393, 14 N. E. 2d 449 (1938); *Shaw v. Irving Trust Co.,* 249 App. Div. 659, 291 N. Y. Supp. 571, *aff'd,* 274 N. Y. 632, 10 N. E. 2d 586 (1937).
43. *Palsgraf v. Long Island R. R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928).
44. *Scolavino v. State,* 297 N. Y. 460, 74 N. E. 2d 174 (1947); *Weihs v. State,* 267 App. Div. 233, 45 N. Y. S. 2d 542 (3rd Dep't 1943); *Jones v. State,* 267 App. DIV. 254, 45 N. Y. S. 2d 404 (3rd Dep't 1943).
45. *Mitchell v. Rochester Railway Co.,* 151 N. Y. 107, 45 N. E. 354 (1896).
46. 28 ST. JOHN'S L. REV. 312.
47. 4 BUFFALO L. REV. 366.

been greatly limited by exceptions[48] and has been the subject of adverse criticism by the great majority of text writers.[49] On these bases the Court confined its reasoning primarily to the consideration of the foreseeability test.

Proximate cause and foreseeability are not rigid mechanical rules; therefore, their application must be dependent upon the particular facts of each case.[50] It would seem foreseeable that a convict, even a trusty, in an effort to escape without means of rapid transportation to facilitate his flight, would force a passing motorist to transport him. An equally probable result under these circumstances would be that the escaping prisoner would use force, threats and duress to effect his purposes, as in the instant case. And it seems highly reasonable that injury to a passer-by would in some manner be effected.

Prima Facie Tort

In an action to recover damages for the malicious refusal of defendant union to allow its members to work for plaintiffs on the same terms on which they worked for other employers, the Court held,[51] the union's "interference" with plaintiff's business was not based solely on malicious motives, and so was justifiable concerted activity.

The jury in the first instance had found that the defendant's activity *was* solely malicious; the Appellate Division reversed, holding that the defendant had the absolute right to refuse to allow members to work for the plaintiffs "for any reason or for no reason at all";[52] a concurring opinion stated that malice was a relevant factor, but that in this case the evidence was insufficient to establish that defendant's activity was prompted *solely* by malice. The Court of Appeals affirmed the Appellate Division for essentially the same reasons as those in the Appellate Division concurring opinion.

Unions are exempt from the anti-trust laws and may engage in concerted activity against employers if their activities are directed toward a legal labor objective.[53] In this case, the defendant union apparently tried to harrass the plaintiff corporation because its controlling stockholder (also a plaintiff) had at

48. *Comstock v. Wilson*, 257 N. Y. 231, 177 N. E. 431 (1931); *Cohn v. Ansonia Realty Co.*, 162 App Div. 791, 148 N. Y. Supp. 39 (1st Dep't 1914); *Klumbach v. Silver Mount Cemetery Ass'n.*, 242 App. Div. 843, 275 N. Y. Supp. 180 (2d Dep't 1934).

49. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260.

50. *Wheeler v. Horton*, 92 App. Div. 368, 86 N. Y. Supp. 1095 (1st Dep't 1904).

51. *Reinforce, Inc. v. Birney*, 308 N. Y. 164, 124 N. E. 2d 104 (1954).

52. 282 App. Div. 736, 737, 122 N. Y. S. 2d 369 (2d Dep't 1953).

53. *Nat'l Protective Ass'n. v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Opera on Tour v. Weber*, 285 N. Y. 348, 34 N. E. 2d 349 (1941); N. Y. GENERAL BUSINESS LAW §340(3).