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Torts—Foreseeable Consequences

Irwin N. Davis

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was denied recovery not only because he failed to prove the identity of the person involved, but also because of the lack of proof that care by the defendant hospital was disregarded in the selection of whoever was the administering nurse.²²

Judge Froessel, dissenting, argued that even though a hospital's failure to carefully select a duly qualified (i. e. registered) nurse may be the only basis of liability in the usual case, a different situation arises when other than duly qualified personnel are selected to perform a medical act. The mere fact that a person is an undergraduate nurse is insufficient to presume her competence.²³ Therefore, the dissent felt that the defendant should have the burden of justifying the selection of a student nurse when harm results.

The dissent in the instant case recognizes that changes in economic and social conditions may have invalidated the original policy considerations behind the immunities doctrine.

Foreseeable Consequences

Plaintiff, in *Owen v. Rochester-Penfield Bus Co.*,²⁴ suffered a severe case of frostbite while a passenger on defendant's bus. During the course of the trip, the driver stopped the vehicle and left the door open for about fifteen minutes. Since no one could get frozen feet when the temperature is above 32 degrees, it must have been below freezing on the bus. Plaintiff, unknown to the driver, had a heart condition which rendered her more susceptible to frostbite than the average person in normal health.

The Appellate Division dismissed the complaint on the grounds that plaintiff's injuries did not come within the realm of reasonable foreseeability.²⁵ The Court of Appeals, however, determined that a jury could find that the defendant had failed to furnish reasonable heat to plaintiff and that as a result thereof, she suffered frostbite.²⁶ Judicial notice was taken of the then effective Public Service Commission rule adopted pursuant to

22. "The plaintiff does not advance his case materially by fastening upon the defendant a duty of diligent selection. The burden is still his to prove that the duty was disregarded." *Hamburger v. Cornell University*, *supra* note 17 at 339, 148 N. E. at 542.

23. See *Howe v. Medical Art Center Hospital*, 261 App. Div. 1088, 26 N. Y. S. 2d 957 (2d Dep't 1941), *aff'd* 287 N. Y. 698, 39 N. E. 2d 303 (1942).

24. 304 N. Y. 457, 108 N. E. 2d 606 (1952).

25. *Owen v. Rochester-Penfield Bus Co.*, 278 App. Div. 5, 103 N. Y. S. 2d 137 (3d Dep't 1951).

26. The trial judge charged—"The test here is whether or not this bus company failed to furnish reasonable heat to the plaintiff." Since no exceptions were made to this charge, it became the law of the case, *Imbrey v. Prudential Insurance Co.*, 286 N. Y. 434, 440, 36 N. E. 2d 651, 654 (1941), and plaintiff was not deemed an abnormal person.

subdivision 14 of § 61 Public Service Law "23 Heating: Each omnibus shall be heated when reasonably required for the comfort and safety of passengers." Furthermore, the court stated that it is common knowledge that many people suffer from low blood pressure and poor circulation.

Negligence has been defined as "any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for the protection of others against an unreasonable risk of harm."²⁷ The standard of conduct which an actor is held to is that which an ordinary prudent person would use under the circumstances i. e. reasonable care.²⁸ As a general proposition, an actor's liability for negligence is based upon the foreseeability of any harm resulting from the careless conduct.²⁹

Once the negligent conduct of the defendant is established, it is well settled that an injured person can recover for all the harm actually suffered.³⁰ Thus a defendant is liable for the consequences of a negligent act, even if those consequences are more severe or aggravated by a delicate condition of health.³¹

While the court merely applied general rules of negligence in reaching the above result, the rationale behind the decision is not very clear. Perhaps the court is arguing that since plaintiff was considered a normal person, defendant's conduct was negligent because it created an unreasonable risk to such an average person.³² Inasmuch as it is "common knowledge" that many people have poor circulation, the rationale may be that the frequency of the occurrence of the abnormality is high enough to impose a duty of care in regard to it.

Vicarious Tort Liability

The true basis of vicarious liability, where one person is held liable for the acts of another, is said to be one of policy.³³ A deliberate allocation of a risk is involved when the losses caused by a servant are placed upon the master, because he is better able to bear them and to distribute the costs.³⁴

27. RESTATEMENT, TORTS § 282.

28. See Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 88 (1942).

29. *Poplar v. Bourjois Inc.*, 298 N. Y. 62, 67, 80 N. E. 2d 334, 336 (1948).

30. *Poplar v. Bourjois Inc.*, *supra* note 29; See 1 COOLEY, TORTS 140-141 (4th Ed. 1932).

31. *McCahill v. New York Transportation Co.*, 201 N. Y. 221, 94 N. E. 616 (1911); *Tice v. Munn*, 94 N. Y. 621 (1883); See PROSSER, TORTS 344.

32. See note 26 *supra*.

33. PROSSER, TORTS § 62.

34. Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 106 (1916); Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584, 720 (1929).