Notre Dame Law Review

Volume 12 | Issue 2 Article 6

1-1-1937

Recent Decisions

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does not involve a consideration of the principles of contracts at all."[23] The term quasi contract or contract implied in law denotes the source of obligation. "It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."[24]

One source on which quasi contracts arise is upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another.[25] This doctrine gives the most numerous illustrations of the scope of quasi contract, and it always involves not the question of the defendant's intention, but what in equity and good conscience the defendant ought to do. Quasi contractual obligations are based upon equitable considerations, but are enforced by legal remedies because their origin was in the courts of law. Invoking the doctrines of equity and abandoning the rules of implied contracts was the real reason for allowing the surgeons to recover in the *Agnew* case.

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RECENT DECISIONS

NEGLIGENCE—NATURAL AND PROBABLE CONSEQUENCES—CONSEQUENCES THAT SHOULD HAVE BEEN FORESEEN.—In *Pure Distributing Corporation v. Carey*, 97 S. W. (2d) 768 (1936), decided in the Texas Court of Civil Appeals, one H. S. Johnson was employed by the Pure Distributing Corporation, and, while driving a company truck along a gravel road, at a fast rate of speed, one of the cans of distillate, which made up the load, fell to the ground. The can exploded, causing the lid to fly some twenty or thirty feet through the air, and struck one Walter Carey who was lying on a cot, close to his trailer house, thereby causing a severe wound in his head. Carey was invisible from the road because of bushes which screened his presence. Carey's wife, inside of the trailer, heard the commotion and saw something fly through the air. She concluded an attack was being made upon her husband, because of his outcry, and she jumped up from bed to secure a pistol and stumbled to the door where she saw blood flowing from her husband's head. As a result, she suffered a miscarriage. Walter Carey brought his suit against the corporation to recover the sum of $11,000 for injuries sustained by himself and wife. The jury in the trial case, upon the admission of the truck driver that he knew of defective fasteners which held the side of the truck, found that such negligence was the proximate cause of the injuries to both Carey and his wife, and awarded $1,500 to Carey and $2,000 to his wife. The Corporation then appealed to the Court of Civil Appeals, which reversed the lower court on

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23 KEENER, QUASI CONTRACTS (1893) 4.

24 *Op. cit. supra* note 22, p. 5; MAINE, ANCIENT LAW (3d Am. ed.) 332 ("It has been usual with English critics to identify the quasi contract with implied contracts; but this is an error, for implied contracts are true contracts, which quasi contracts are not. . . .").

25 Ames, *The History of Assumpsit*, 2 HARV. L. REV. 64.

the grounds that Johnson, the truck driver, could not reasonably anticipate, in the ordinary course of human experience, that such consequences would result from his negligence, and further that there was no legal or moral obligation to guard against that which could not be foreseen. The court further held that the evidence failed to support the jury's finding that the truck driver's negligence was the proximate cause. The judgment was accordingly reversed.

On motion for rehearing, which was denied, Justice Bobbit filed a dissenting opinion wherein he maintained that the Careys should have been successful. His opinion is based on the additional facts that the road on which the truck was moving at the time of the accident was a well-traveled one to a resort, and that Johnson knew or should have known that there were travelers camped in the locality where the Careys were located that night. It is further set forth that since the defendant Johnson also knew of the defective, "dangerous" condition of the truck, as it was being operated, he might reasonably have foreseen some injury to the persons along the road as a result of a falling oil can and explosion, especially since it contained a highly volatile substance. Justice Bobbit maintains that the rule of foreseeability, which the majority of the court applied, is not the true rule in Texas; that the specific consequences need not be foreseeable to impose liability on the negligent defendant if a general injury to persons similarly located might reasonably be expected by him; also, that the injuries sustained were the direct, natural and probable result of defendant's confessed negligence and reckless conduct; that the causal connection between the negligent act which caused the can to fall and explode, and the injuries sustained by the Careys, was completely within an unbroken chain of events arising as the direct and natural result of such act of negligence; therefore, because the defendant *knew* the truck to be too dangerously defective to be driven along a highway where people might be, and that other people were or had the right to be camped along the roadside, and that if, as had happened before, the defective fastener might come loose causing a can to fall from the truck, it would in some manner inflict serious injuries to such people along the road, *then* the actual injuries sustained were foreseeable within the meaning of the Texas rule, and defendant's negligence would and should be held to be the proximate cause of the accident; finally, that under any view the question of forseeability and proximate cause is one of fact for a jury, and that the Court of Appeals should not have disturbed the jury's finding in the lower court.

There are two general rules in regard to the existence of negligence, and both are expressed in *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928). The majority opinion therein, speaking through Chief Justice Cardozo, points out that "The risk reasonably to be perceived defines the duty to be obeyed, and risk imparts relation; it is a risk to another or others within the range of apprehension." And further, " 'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.' " It appears, therefore, that the majority opinion handled the case as concerning the question of whether defendant owed a duty to the specific plaintiff, and whether such duty comprehended a risk of the kind involved, as applied to the case in point. The problem would be whether the defendant in his position and with the knowledge he had of the defective fasteners on the sides of the truck, and also coupled with the knowledge that people often camped in the area wherein defendant was encamped for the night, created such a duty toward such persons from him as to render him liable for the injuries which resulted from his negligent act. Justice Andrews, in the minority opinion, assumed that there was such a duty owing and disregarded the same, basing his reasoning

more on the theory that proximate cause was the important question, and where there was a causal connection between the negligent act and the resulting injury, liability should ensue.

In short, the two theories laid down were: That if the hazard was not apparent to the eye of ordinary vigilance, it was not reasonably foreseeable and there should be no liability; and That where there is a negligent act which might result in injury, and the resulting injury is the direct and natural result of the act, there is a causal connection and the act must be regarded as the proximate cause of the injury. See Green, *The Palsgraf Case,* 30 COL. L. REV. 789, 791.

The difference between the two views may be summed up in another manner also, as expressed by Arthur L. Goodhart. He summarizes the differences as follows: "According to the former [Cordozo, C. J.] negligence is a relation between particular individuals. It is not a wrong to third persons, and therefore they cannot recover even though they may have been injured by the act. According to the latter [Andrews, J.], negligence is not only a wrong to the particular individual foreseeably endangered by the act, but also, to anyone who may be injured by it." Goodhart, *The Forseeable Consequences of a Negligent Act,* 39 YALE L. J. 449, 452.

It would appear, then, that the Texas Court of Civil Appeals also came to disagreement concerning these views. The majority opinion evidently relied on the fact that not only was the injury unforeseeable but it was also in no sense foreseeable in regard to any particular person or persons. Whereas Justice Bobbitt takes the view that Andrews, J., did in the *Palsgraf* case, namely, that there was no necessity that a duty be owed to anyone in particular as long as some class of persons, or someone, might be injured as a result of driving this "dangerous" and defective vehicle. He believes, as did Andrews, J., that the particular injury need not be foreseeable, as long as there was causation or causal connection between the negligent act and the resulting injury, and there might reasonably have been foreseen some injury resulting or probably resulting.

In attempting to discern the Texas rule in regard to causation, and also foreseeability of injuries from negligent acts, the courts seem to have based their decisions chiefly upon the individual factual situations surrounding each case. However, as may be seen from the following cases, the general Texas doctrine on these problems seems to be that the negligent act must be the proximate cause of the resulting injury, and that some possible or probable injury must have been foreseeable before recovery will be allowed. "The proximate cause of an event is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which the event would not have occurred." *El Paso & S. W. Ry. Co. v. Smith,* 108 S. W. 988, 992 (Tex. Civ. App. 1908). See, also, *Kirby Lumber Co. v. Cunningham,* 154 S. W. 288, 293, 294 (Tex. Civ. App. 1913).

However, these cases as well as many others expressly and implicity indicate that the *particular* or *specific* injury resulting need *not* be foreseeable. *Citizens' Ry. Co. v. Farley,* 136 S. W. 94 (Tex. Civ. App. 1911); *Wiley v. Atchison, T. & S. F. Ry. Co.,* 103 Tex. 336, 127 S. W. 166 (Tex. Civ. App. 1910). Furthermore, if an act or omission is one which by ordinary care should have been anticipated as likely to result in injury to others, as natural and probable consequence, the actor is liable for injury proximately resulting therefrom, although he did not foresee that which did happen. *Houston, E. & W. T. Ry. Co. v. McHale,* 47 Tex. Civ. App. 360, 105 S. W. 1149, 1151 (1907); *Missouri, K. & T. Ry. Co. of Texas v. Morgan,* 49 Tex. Civ. App. 212, 108 S. W. 724, 725, 726 (1908). Again in 1912 it was expressly stated in *Gulf, C. & S. F. Ry. Co. v. Smith,* 148 S. W. 820, 822 (Tex. Civ. App. 1912), that "The proximate and natural consequences of an act

of negligence are always deemed foreseen, though the precise injury may not have been anticipated." It may be gathered, then, that although Texas requires that the negligent act must be the proximate cause of the injury and connected by an unbroken chain of events, yet the actor need not foresee the particular or specific injury resulting.

It seems rather clear, then, from these decisions, that Walter Carey could recover. In regard to his wife, however, the case is somewhat different. Not only was the injury to her more remote, but also, the court seems to have completely ignored the question of "recovery for fright." The time of miscarriage is not mentioned in the report of the case, so the proximity of the same to the other events in the case remains unknown. However, in the case of *St. Louis, Southwestern Ry. Co. of Texas v. Murdock,* 54 Tex. Civ. App. 249 116 S. W. 139 (1909), it was held that where a physical injury results from fright or mental shock caused by negligence, though there be no actual rupture or change in the substance of any organ or part of the body, a recovery may be had if the negligent act was the proximate cause of the injury. Therefore, it would seem that once the injury of the woman was attributed to the negligent act of the defendant, as the proximate cause, she too would and should recover.

At first blush, it would appear that to allow recovery would be stretching the doctrine of causation to an extremely remote degree. But upon close analysis of the complete facts of the case, combined with the general Texas authority available, the reasonableness of the minority opinion becomes more apparent.

To advocate the doctrine of liability on the negligent actor for all results which flow in an unbroken chain, without intervention, would open the door to unreasonable and unjust litigation. There must be some limit, therefore, to the remoteness of the injury complained of to the negligent act. This the law has provided for under the doctrine of public policy. Public policy would not, in my opinion, interfere with recovery in the principal case.

In the light of the cases mentioned herein, as well as the arguments so ably presented by Justice Bobbitt, it seems that the only logical and just view was expressed in the minority opinion. Was there not an injury resulting from a negligent act of the defendant? And would justice not be brushed aside in a denial of compensation for the injuries sustained by these plaintiffs as a direct result of such negligent act? That the defendant could foresee some possible injury cannot be denied, and certainly no great hardship is forced upon him to recompense those who were actually injured by his negligence. The great weight of authority in Texas, which has always been liberal, seems to affirm this right of recovery and to be properly expressed in the dissenting opinion of the principal case. It not only brings forth the law on the point, but also the justice of allowing recovery for the injury done. When these two—justice and the law—are combined, the natural result must be the proper result.

Guy H. McMichael, Jr.

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—EVIDENCE AS TO PURCHASE IN GOOD FAITH—WEIGHT AND SUFFICIENCY.—A recent New York case, *Hood v. Webster,* 271 N. Y. 57, 2 N. E. (2d) 43 (1936), presents a question not altogether without difficulty, and in respect to which the authorities are not wholly in agreement. The grantee of a deed which had been held in escrow, and was not recorded, brought an action to annul a subsequent deed to the defendants. The subsequent

deed expressed the grantees' payment of "One dollar and other good and valuable consideration," and was duly recorded. Under the defense of purchase in good faith and for value, the court was called upon to decide who had the burden of maintaining the affirmative of the issue, and, in a primary sense, the burden of proof. Section 291 of the Real Property Law of New York (CONSOL. LAWS, c. 50) provides that every conveyance of real property not recorded "is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." *Held,* that the defendants were bound to make out by a fair preponderance of the evidence the affirmative assertion of their status as purchasers in good faith and for a valuable consideration, and that they had failed to discharge that burden; also, that the recital in the subsequent deed, which expressed the grantee's payment of "One dollar and other good and valuable consideration," was insufficient to constitute them purchasers for a valuable consideration. The majority opinion did say, however, that the party claiming under an unrecorded conveyance was required to prove that the subsequent purchaser of record took with notice, when substantial value had been paid for the subsequent conveyance. That fact is more than evidence of consideration. It is further the basis for the auxilliary inference that there was, also, good faith in the transaction. For the same reason, the burden of proof in the primary sense is upon the holder of an unrecorded conveyance when a subsequent deed first recorded acknowledges receipt by the grantor of a consideration sufficient to satisfy the statute. *Wood v. Chapin,* 13 N. Y. 509 (1855); *Page v. Waring,* 76 N. Y. 463 (1879); *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.,* 82 N. Y. 476 (1880). Crane, C. J., dissented, contending that the burden of proof should rest on the person who asserts the invalidity of the subsequent deed. It is conceded that the holder of a prior unrecorded deed has the burden of proving lack of good faith in the holder of a subsequent deed. The burden is upon him to prove notice or such circumstances as would give notice to a reasonable man. *Brown v. Volkening,* 64 N. Y. 76 (1877); *Constant v. University of Rochester,* 133 N. Y. 640 (1892). This rule is only complicated by shifting the burden of proof when it comes to valuable consideration, and we should not impair the force and efficacy of the recording statutes upon which it has become a habit and custom to rely in the transfer of real property.

The Supreme Court of Michigan, in the case of *Shotwell v. Harrison,* 22 Mich. 410 (1871), considered this question and drew a distinction between the burden of proof as to notice of the prior unrecorded deed, and the burden of proof as to showing affirmatively the payment of a valuable consideration. The court held that the burden of proof is upon him who claims by virtue of priority of record to show affirmatively the payment of a valuable consideration, but that the burden is upon him claiming under a deed of prior date but of subsequent record to show that such purchaser under the deed having priority of record had notice of the prior unrecorded deed. This ruling is founded upon the notion that the payment of the purchase price being peculiarly within the knowledge of the grantee under the deed having priority of record, the law would not impose the burden of proving the negative fact upon the opposite party. This Michigan case contains a strong dissent by Campbell, C. J., to the effect that there is no ground for any such distinction, and that the burden rests upon the party claiming under the unrecorded deed. The Supreme Court of Wisconsin concurred with the dissenting opinion of Chief Justice Campbell in the case of *Hoyle v. Jones,* 31 Wis. 389 (1872). The court refused to recognize any distinction between the burden of proof as to bona fides and valuable consideration, and held that the burden of proving both should rest on the grantee under the unrecorded deed. The