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Negligence–Proximate Cause–Foreseeability of Specific Injury

J. S. T.
West Virginia University College of Law

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proved inadequate the city decided to issue electric revenue anticipation bonds to complete the project and to refund 80% of the general obligation warrants. The court held that since the refunding was to be made solely from the revenue of the electric system, issuance of such bonds would not violate the debt provision of the constitution. *Fuller v. City of Cullman*, 248 Ala. 236, 27 So. 2d 203 (1946).

In the principal case the court was not confronted with a situation demanding great extension of the language of the constitutional debt provisions. The money advanced was expended for purposes properly considered a part of the cost of construction. *W. Va. Code* c. 16, art. 13, § 8 (Michie 1955). The contingencies upon which repayment was dependent occurred. No obligation to pay other than from the bond proceeds was placed on the city. In light of these facts, it seems evident that the court was justified and correct in its decision.

J. C. W., Jr.

**Negligence—Proximate Cause—Foreseeability of Specific Injury.—**P, a twelve year old boy, was riding in a truck owned and driven by his father. As D's truck, coming in the opposite direction, met and came abreast of the truck in which P was riding, a large stone lodged between the left rear dual wheels of D's truck was hurled through the right windshield of the truck in which P was riding, injuring P. Judgment for P; D appealed. *Held*, reversing lower court, that such injury could not be reasonably foreseen and, negligence was not established which was the proximate cause of the injury. *Miller v. Bolyard*, 97 S.E.2d 58 (W. Va. 1957).

No factual precedent was available to the court in deciding this case. No case in any jurisdiction has previously been reported involving a rock definitely lodged in the dual wheels of a truck. In a closely related case, a plaintiff was hit by a stone allegedly lodged between the wheels of defendant's truck. But the plaintiff could not definitely identify the truck and it was not proved whether the stone was wedged between the dual wheels. The court ruled out negligence and decided the case on the ground of the inapplicability of absolute liability. *Randall v. Shelton*, 293 S.W.2d 559 (Ky. 1956). Other cases have involved rocks, gravel, slag, bricks, boards, and other objects lying on the road which have been run over and thrown by vehicle wheels, but liability and negligence have usually been determined on the basis of the speed of the...
vehicle and the driver's knowledge of the presence of such objects on the road. For a discussion and collection of such cases, see Annot., 115 A.L.R. 1948 (1938) and 1 Negl. & Comp. Cas. Ann. 3d 85 (1953).

The case confirms the oft stated rule that proximate cause is a requisite for actionable negligence. That such a rule is a fixture in West Virginia is indicated by the large number of recent cases cited by the court in the principal case.

Whether any negligence actually existed in the present case is a matter of conjecture. The fact is emphasized that negligence did not exist which was the proximate cause of the injury. This suggests the possibility that negligence did exist which was not the proximate cause of the injury.

It is stated that the defendant was not negligent unless operation of the truck with the stone wedged in the dual wheels constituted negligence. This statement is then negated by evidence that an injury to persons or property on or near the highway could not be reasonably foreseen in the manner in which the truck was operated even if the driver knew the rock was between the wheels.

"Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen. Upon this all are agreed, whether they regard foreseeability as relevant only to the duty issue, or to questions of proximate cause as well." 2 HARPER AND JAMES, TORTS § 20.5 (1956). (Emphasis added.) This seemingly well-settled rule has thus far been given only token recognition by the West Virginia court, although discussions of foreseeability have been frequent and numerous. The prime requisite of foreseeability in this case hinges on the foreseeability of the ordinary, prudent man. However, does the ordinary, prudent man need to see the exact consequences of his act? In McClary v. Knight, 73 W. Va. 385, 393, 80 S.E. 866, 869 (1913), although not expressly mentioning foreseeability, the court quotes with approval from Davis v. Lumber Co., 164 Ind. 413, 73 N.E. 899 (1905): "It is not necessary that the defendant should have anticipated the exact injury . . . . It is sufficient if by ordinary care he should have known that some injury might happen from such negligence." Whether neglected or forgotten, the rule thus stated has not since been expressly used. The implied rejection by omission of this rule in recent foreseeability cases in this state places West Virginia in a seemingly singular minority. For application in
other jurisdictions, see, e.g., Virginian Ry. v. Viars, 193 F.2d 547 (4th Cir. 1952); Scott v. Simms, 188 Va. 808, 51 S.E.2d 250 (1949); and Frazier v. Cities Service Oil Co., 159 Kan. 655, 157 P.2d 822 (1945). It is submitted that an application of the rule in the principal case, if negligence actually existed, could have reversed its outcome. It seems feasible that the driver of a truck who knows of the presence of a rock between the dual wheels could reasonably foresee an injury of some kind if the rock is thrown. Through use of the majority rule, the fact that the injury occurred in an unusual manner or to an unexpected victim would not absolve the defendant of his negligence.

A modernization or restatement of the rule of foreseeability and a definite showing of the presence or absence of negligence would aid in an interpretation of the principal case.

J. S. T.

**NEGLIGENCE—RES IPSA LOQUITUR—POSSIBLE RELAXATION OF THE REQUIREMENT OF EXCLUSIVE CONTROL IN BOTTLED-BEVERAGE CASES.—**

D, a bottling company, made delivery of six cases of coca-cola to P’s employer, X company. Two of these cases were placed in a hallway next to a soft-drink vending machine; the other four were locked in a closet until needed. Y, another employee of X company, was in charge of stocking the vending machine. P got a bottle from the machine; immediately uncapped it and drank therefrom. Relying on *res ipsa loquitur*, she brought an action for personal injuries sustained from glass particles allegedly contained in the bottled beverage. *Held*, “...[U]nder the rule of res ipsa loquitur, it is reversible error to instruct the jury to the effect that they should find for the plaintiff unless they believe that the defendant has overcome by competent evidence, the inference of negligence.” *Rutherford v. Huntington Coca-Cola Bottling Co.*, 97 S.E.2d 803 (W. Va. 1957).

Our court is here considering the extent of a procedural advantage that a showing of *res ipsa loquitur* will confer upon a plaintiff. The various jurisdictions are by no means unanimous upon this point. See Prosser, Torts § 43 (2d ed. 1955); 20 Minn. L. Rev. 241 (1936). A very few have held that such a showing shifts to the defendant the burden of proof. *Coca Cola Bottling Co. v. Mat-tice*, 219 Ark. 428, 243 S.W.2d 15 (1951); *Jones v. Shell Petroleum Corp.*, 185 La. 1067, 171 So. 447 (1936). A somewhat larger group