Saint Louis University Law Journal

Volume 45
Number 3 *Teaching Torts (Summer 2001)*

Article 15

5-1-2001

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Recommended Citation

Patricia K. Fitzsimmons & Bridget G. Hoy, *Visualizing Foreseeability*, 45 St. Louis U. L.J. (2001).
Available at: https://scholarship.law.slu.edu/lj/vol45/iss3/15

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VISUALIZING FORESEEABILITY

PATRICIA K. FITZSIMMONS* AND BRIDGET GENTEMAN HOY**

We ought not to have been surprised that our torts class differed from the average first-year law school course; our professor began the first class by reading a Ralph Nader interview. He caught our attention and from that day forward taught the law of torts in a decidedly unconventional manner.

Throughout the semester, our instructor presented the field of tort law as a series of doctrines existing on a continuum,[1] stretching from intentional torts with discrete elements (including a mental state that must be proven before imposing liability) at one end, to absolute liability at the other end. We learned that judges decide where on the continuum to place a certain disfavored or prohibited act by "collapsing" tort doctrine, emphasizing or de-emphasizing elements of the doctrine to suit their needs.[2] We considered whether decision-makers act as "gatekeepers" by denying application of tort liability to whole classes of acts or "tweakers" who make adjustments along the continuum on a case-by-case basis. And we learned that foreseeability is best described as "strawberry shortcake."

The day this revelation was made began like any other. Our professor was pacing around the auditorium-style classroom, climbing up and down the steps on either side as we discussed the relevance of foreseeability in determining whether a defendant's act was the cause of a plaintiff's injury. Should all foreseeable results be attributed to an act? What about results that were caused directly by the defendant's actions, but were not reasonably foreseeable at the time of the act? In the midst of this discussion, a student asked for an

* J.D. Candidate, Saint Louis University School of Law. I am grateful for this unique opportunity to contribute to the "Teaching Torts" special issue. Thanks are due to my family for their encouragement during my law school career, and to my co-author for her friendship and support.

** J.D. Candidate, Saint Louis University School of Law. It is a special treat to participate in the *Law Journal*'s "Teaching" series, initiated with "Teaching Contracts" in Volume 44. *See Teaching Contracts*, 44 ST. LOUIS U. L.J. 1193 (2000). The opportunity has allowed me to reflect on the challenges and successes of my three years at the Saint Louis University School of Law, and in doing so, I am reminded that my success would have been greatly hindered if not for the patience of family and friends.

1. *See, e.g.*, JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 163-97 (2d ed. 1997) (containing sections titled *Categorization of Socially Desirable Activities* and *Doctrinal Subcategories and Characterization*).

2. *See* Nicolas P. Terry, *Collapsing Torts*, 25 CONN. L. REV. 717 (1993).

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explanation of how fact-finders determine whether a certain result was foreseeable. Our instructor responded by proclaiming: "What is foreseeability? Foreseeability is strawberry shortcake!" Needless to say, this declaration took us all by surprise.

Like many legal terms, foreseeability is hard to define clearly.[3] The word "foreseeable" has unique legal meaning; unfortunately, it also has a common meaning and that, ultimately, is what confuses things. Foreseeability is an attempt to predict at what point the "causal relationship between [one person's] conduct and [another person's] injury is too attenuated, remote, or freakish to justify imposing liability."[4] This prediction must be called something, and borrowing "foreseeable" from the common lexicon undoubtedly seems a logical choice. However, *any* term could have been chosen because "foreseeable" in a legal context means much more than what the average first-year law student may expect. In other words, a foreseeable act may just as well be called "strawberry shortcake."[5]

As in any torts class, we studied foreseeability in the contexts of duty, breach and causation. Under each discrete element of negligence, foreseeability played a role. In the duty analysis, the concept of foreseeability arose at least twice: Justice Bird's foreseeability test found in *Bigbee v. Pacific Telephone & Telegraph Co.*[6] and the *Rowland/Weirum* factors enumerated in *Rowland v. Christian*[7] and *Weirum v. RKO General, Inc*.[8] In *Bigbee*, California Supreme Court Justice Rose Bird "collapsed" duty into the breach and causation analyses, allowing the jury to determine whether a duty existed based on the foreseeability of the result.[9] Her approach embraced hindsight and an application of the law on a fact-sensitive, case-by-case basis.[10] On the other hand, the earlier California Supreme Court cases of *Rowland v. Christian* and *Weirum v. RKO General, Inc.* advocated the use of foreseeability as one factor among many used in a cost/benefit analysis of risk allocation.[11] The

3. For a discussion of "famous court decisions and numerous scholarly articles" which have attempted to define at what point an act is or is not foreseeable, see JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 203-04 (1996).

4. *Id.*

5. This, of course, is our interpretation. Our Torts professor may very well have had other intentions. Any misunderstanding is admittedly due to our own shortcomings as newcomers to the field of torts.

6. 665 P.2d 947 (Cal. 1983).

7. 443 P.2d 561 (Cal. 1968).

8. 539 P.2d 36 (Cal. 1975).

9. *Bigbee*, 665 P.2d at 952-53.

10. "[F]oreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct." *Id.* at 952.

11. *See* McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 195 (Cal. Ct. App. 1988), *reprinted in* PHILLIPS ET AL., *supra* note 1, at 693-99 (listing factors to be considered).

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Rowland/Weirum approach serves a gatekeeping function in that a judge's determination of whether or not a duty exists can keep an entire class of actions from falling under the aegis of tort liability.[12]

Under the breach analysis, we learned that foreseeability was the focal point of risk contextualization. The risk created by an act determines whether performing the act was unreasonable—hence, a determination of the foreseeability of the risk must be made by a court before deciding to impose tort liability for the performance. For example, in *Hill v. Yaskin*,[13] the New Jersey Supreme Court stated:

> In order to ascertain the existence *vel non* of a duty owed by either defendant in the circumstances before us, it is necessary to determine whether or not probable harm to one in the position of this injured plaintiff . . . should reasonably have been anticipated from defendant's conduct. The issue of foreseeability in this sense must be distinguished from the issue of foreseeability as that concept may be said to relate to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff was a reasonably foreseeable result so as to constitute a proximate cause of the injury. Simply put, *the distinction is between foreseeability as it affects the duty determination and foreseeability as it is sometimes applied to proximate cause, a critical distinction too often (because too easily) overlooked*.[14]

Finally, foreseeability made a mess of what naïve first-years would simply call "causation." We saw that different courts applied various levels of foreseeability when determining if an injury was proximately caused by a defendant's conduct.[15] In *The Wagon Mound I*,[16] the court used a straight foreseeability test, holding the defendant liable only for those injuries that were foreseeable at the time the act occurred. We learned that this was actually a duty issue, collapsing the elements of negligence. The court expanded this concept of foreseeability in *The Wagon Mound II*,[17] holding that so long as the

12. The *Rowland/Weirum* "factors have been used frequently by California judges confronted with challenging duty questions. Other jurisdictions have borrowed these factors or use similar ones." DIAMOND ET AL., *supra* note 3, at 112 n.3.

13. 380 A.2d 1107 (N.J. 1977), *reprinted in* PHILLIPS ET AL., *supra* note 1, at 240-45.

14. *Hill*, 380 A.2d at 1109 (emphasis added).

15. *See* DIAMOND ET AL., *supra* note 3, at 203-17.

16. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound I), [1961] A.C. 388, *reprinted in* PHILLIPS ET AL., *supra* note 1, at 901-05 (holding the defendant not liable for injuries after spilled oil was ignited on water because the consequence was not reasonably foreseeable).

17. Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. Pty. (The Wagon Mound II), [1967] A.C. 617, *reprinted in part in* PHILLIPS ET AL., *supra* note 1, at 905-06 (finding the defendant liable for damage resulting from the same fire as in *The Wagon Mound I* because although the risk of fire was low, the potential harm was great, and a "reasonable man would have realized or foreseen or prevented the risk").

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same general type of risk was foreseeable at the time the act occurred, proximate cause existed. Finally, *In re Polemis*[18] taught that direct cause was the only appropriate standard, ignoring foreseeability considerations altogether (and collapsing proximate cause into but-for cause).

Soon, we realized that what we understood foreseeability to mean in a non-legal sense was far too simplistic when applied to legal questions. As amateurs at the law, we, like other first years, wanted to place fact patterns in neat legal categories. The confusion surrounding the legal definition of "foreseeability" ultimately illustrated that legal concepts are not composed of orderly compartments, but rather are interwoven, abstract and loose.[19]

Much to a first-year law student's dismay, this interweaving of the law is celebrated. The law is not well served by narrowly defining every legal term as a first-year student may expect. Rather, it allows one concept, like foreseeability, to apply to vastly different fact patterns. The infinite scenarios encountered by attorneys and judges demand an open-ended approach to solving legal problems, and therefore demand the avoidance of restrictive legal terms. This idea, of course, is not novel and is certainly not specific to foreseeability. The need for flexibility in the law has been recognized from the beginnings of our legal system. In *McCulloch v. Maryland*, for instance, Justice Marshall declared that the Constitution could not explicitly spell out the powers granted by it, or else it "would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."[20] Rather, "its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[21]

To the readers of this essay, and to anyone who has met the challenge of being a "One L"[22] with even the slightest success, the proposition that the law must be flexible is far from earth-shattering.[23] Nevertheless, to a first-year law student who is trying to keep her head above water, this fundamental notion is easily lost in the reading, outlining and memorizing shuffle. For many, recognizing the subtle ideas underlying the more manageable legal doctrines

18. 3 K.B. 560 (1921), *reprinted in* PHILLIPS ET AL., *supra* note 1, at 898-900 (finding defendants liable under a direct causation theory where a dropped plank created a spark, igniting petrol fumes and destroying a ship).

19. In his contribution to this "Teaching" issue Professor Jerry Phillips notes this confusion, asking why in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), Cardozo "confuse[s] generations of law students by talking about duty instead of foreseeability." *See* Jerry J. Phillips, *Law School Teaching*, 45 ST. LOUIS U. L.J. 727 (2001).

20. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819).

21. *Id.*

22. *See* SCOTT TUROW, ONE L (1977).

23. Readers of Professor Phillips's essay will note he prefers to "work with elasticizing judicial concepts" and therefore will be unsurprised by our thesis. *See* Phillips, *supra* note 19, at 726.

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takes several semesters[24] and requires an opportunity to reflect on the concepts which were initially too foreign to fully comprehend.[25]

Perhaps our professors give us more credit than we deserve and imagine that we see the big picture with more clarity than is possible so early in our legal endeavors. A professor approaching a first-year course such as Torts should not be afraid to spell out fundamental notions of the law—such as the need for flexibility in defining legal concepts—throughout the semester rather than waiting and hoping that students will be able to turn the light on to the broad picture themselves. This is not to say that first-year students need to be spoon-fed, for the intellectual challenge of "learning the law"[26] is not only welcomed, it is a necessity for one who aspires to solve legal problems and "think like a lawyer." That being said, reinforcing legal subtleties can only aid in opening the eyes of wary first-year students who are likely bogged down in the search for tidy definitions that can be memorized and indiscriminately applied.

The sometimes tedious process of visualizing the broader legal picture is, to be sure, an integral component of the law school experience. In upper-division courses, many professors take advantage of the lessons to which first-year students were introduced but were unable to fully appreciate at the time.[27] Each time a professor brings a second- or third-year student back to the first-year courses by analogy or reference, the student benefits by gaining a glimpse of the legal web. In the end, it is, of course, the student who must make the effort to look at legal concepts with a grand view, but each opportunity a professor can provide helps students take a step in the right direction.

Regarding foreseeability, Torts introduced us to the concept and attempted to show us its flexibility. "Strawberry shortcake" helped us look past the narrow definition we were inclined to apply and see foreseeability as a malleable standard used by judges in their roles as gatekeepers and tweakers. We presume many students finish their first year of law school without coming to this realization. Maybe no real harm is done, but we recommend professors seize every opportunity to help students see the law in a new light.

24. Foreseeability appears in any number of upper-division courses, including Jurisprudence, Admiralty and Criminal Law (currently offered as an upper-division course at our school). By the time students enroll in these courses, they are expected to have an easier time working with the conceptual quality of the law, spend less time trying to define everything and more time actually learning how to understand and apply the law.

25. Few students are given such an opportunity as contributing to a "Teaching" symposium and therefore have little occasion to reflect on what they take away from a class other than the substantive law taught.

26. This may more appropriately be described as "learning to understand the law," as other articles in the special issue on "Teaching Torts" point out.

27. Thankfully, a number of professors at the Saint Louis University School of Law make generous efforts to reinforce what we learned as first-year students.