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The Test of Reasonable Foreseeability: As Applied to Intervening Negligence Rather Then the Particular Act Constituting the Negligence

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THE TEST OF REASONABLE FORESEEABILITY: As Applied to Intervening Negligence Rather Than the Particular Act Constituting the Negligence

The district court of appeal in *Arthur v. Santa Monica Dairy Co.*[1] has departed from earlier California decisions which have applied the test of reasonable foreseeability. Affirming the decision of the trial court which denied recovery to the plaintiff for injuries from a rear end collision, the upper court reached this result through a clearly erroneous application of the test of reasonable foreseeability.

The accident occurred after the defendant had double parked his milk truck in the right hand lane of a four lane highway next to a line of parked cars. Such double parking, in violation of section 586 of the Vehicle Code[2] has been held to constitute negligence;[3] and such negligence on the part of the defendant was conceded by this court. While negligently double parked the truck was struck from behind by the car in which the plaintiff was riding as a passenger. Evidence showed that the driver of the car had been looking on the floor of the car for a lighted cigarette ten seconds before the collision and at no time had seen the parked truck in front of him. Thus, there was no doubt but that this driver was also negligent.

The court held that the intervening negligence of the driver of the colliding car relieved the defendant from liability on the basis that the act of the driver, that of taking his eyes from the road ahead and looking for a cigarette, was not such an act as could have been reasonably foreseen by the defendant. The court cited as controlling, *McMillan v. Thompson,*[4] a decision which has itself been criticized[5] because it fails to recognize that the risk of a rear end collision is part of the foreseeable risk created by the defendant's negligent double parking.

The basic unsoundness of the *Arthur* decision lies in the clearly erroneous application of the foreseeability test. Admitting that the defendant could not have foreseen the particular act of looking for a lighted cigarette, it does not follow that the act of negligent driving was not foreseeable. The court should not have looked to the particular act causing the negligent driving but to the negligent driving itself; for to look only to the act which gives rise to the negligence and not to the negligence itself is to discard negligence as a reasonably foreseeable happening. Countless different acts, such as watching the scenery, adjusting the radio, ad infinitum might lead to negligent driving and if the test of reasonable foreseeability were applied to one of these particular acts, then it is easy to say, as the court did in *Arthur,* that such acts are not reasonably foreseen. Properly applied, the test should be limited to whether or not the act of negligent driving itself could have been reasonably foreseen, and not how this driving came about as was done by the court in *Arthur.* Thus if the court in *Arthur* had recognized this distinction and limited the test to the proper act, it likely would have found

[1] 183 Cal. App. 2d 483, 6 Cal. Rptr. 808 (1960).

[2] Now CAL. VEH. CODE 1959, § 22500(h).

[3] Thompson v. Bayless, 24 Cal. 2d 543, 150 P.2d 413 (1944).

[4] 140 Cal. App. 437, 35 P.2d 419 (1935).

[5] Prosser, *Proximate Cause in California,* 38 CALIF. L. REV. 369, 407 & n.182 (1950).

that negligent driving was among the hazards reasonably foreseen and within the risk created by the negligent double parking of the defendant.

While few California decisions have found it necessary to point out this distinction, the district court of appeals in *Bilyeu v. Standard Freight Lines*[6] stated, "It is not the particular act which caused the plaintiff's injury that is the subject of the foreseeability test to determine the existence of the duty to exercise care, but the activity of which that act may be a part."[7] In *Ferroggiario v. Bowline*,[8] essentially the same thought was expressed by the court which said, "But, if the original actor's conduct is a substantial factor in bringing about harm to another, the fact that he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."[9]

This position is strengthened by the fact that many, if not most, of the cases which have considered the test of reasonable foreseeability and its bearing upon relieving the defendant from liability for the risk created by him, have not even mentioned the act which constituted intervening negligence, but only whether or not the intervening negligence itself was foreseeable.

Aside from the *McMillan* case, which as noted earlier has been appropriately criticized as incorrect, there are no other California decisions lending support to the position taken by the court in *Arthur*. On the other hand, there is considerable California authority to support the plaintiff's argument that a person leaving an obstruction on the highway must answer for his negligence to those injured as a result thereof, notwithstanding the intervening negligence of another.

For instance, in *Mason v. Crawford*,[10] the defendant, while double parked, was struck from the rear by the car in which the plaintiff was a passenger. The court, in holding that the plaintiff was among those to be protected from the foreseeable risk which existed as part of the original risk created by the defendant, did not inquire into the cause of the negligence of the driver of the colliding car. Further illustrating this point is *Keiper v. Pacific Gas & Electric Co.*,[11] in which the defendant negligently parked his auto on a streetcar track. The streetcar operator failed to see the defendant's car (although it was daytime and the visibility was good), and upon colliding therewith shoved the car forward, injuring the plaintiff who had been working in the street in front of the parked car. The defendant was held liable for his negligence, notwithstanding the negligence of the streetcar operator, since it was reasonably foreseeable that the plaintiff might suffer injury as a result of the risk created by the defendant. Again only the foreseeability of the streetcar operator's negligence, and not the specific act constituting it, was considered. In fact, the opinion does not even reveal what had caused the streetcar operator to so act.

Upon considering *Mason, Keiper* and other similar decisions, as well as the inherent weaknesses of the court's relying on a case so doubtful as

[6] 182 Cal. App. 2d 536, 6 Cal. Rptr. 65 (1960).

[7] *Id.* at 542, 6 Cal. Rptr. at 68.

[8] 153 Cal. App. 2d 759, 315 P.2d 446 (1957), 64 A.L.R.2d 1355 (1960).

[9] *Id.* at 763, 315 P.2d at 448, 64 A.L.R.2d at 1361.

[10] 17 Cal. App. 2d 529, 62 P.2d 420 (1936).

[11] 36 Cal. App. 362, 172 Pac. 180 (1918).

McMillan, it would seem that the *Arthur* decision is unsound; and being predicated upon a misapplication of the test of reasonable foreseeability, very unlikely to set a precedent for any future decisions.

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