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The Many Faces of Foreseeability

Benjamin C. Zipursky

JUDGE BOUDREAU: The third issue for discussion is the role of foreseeability in the duty and proximate cause analysis. Our first speaker is Professor Benjamin Zipursky of Fordham University School of Law.

PROFESSOR BENJAMIN ZIPURSKY: Thank you. I should begin by saying that my comments on foreseeability are intended to fit into a larger view of negligence law of the preferred structure for the Restatement (Third): General Principles.[1] This view has been developed in conjunction with my collaborator, Professor Goldberg.

Foreseeability is undoubtedly a muddle in the law of negligence. Restatement Reporters, like doctrinal scholars more generally, are charged with the task of cleaning up conceptual messes. There are at least three general strategies for cleaning up a mess. This applies to all messes, not just conceptual messes. First, if I find a big mess in my office I could look at the huge overwhelming mess and just decide that the only thing to do is throw everything out. Second, I could take a "one box" strategy: find a nice big box and throw it all in there. Or I could take the approach of putting everything back in its place.

Conceptually, I think we could talk about a trashing strategy: it just has to be eliminated. We heard some of that in the last couple of days. The second approach that might be taken is the "one clear concept" strategy. What we need to do here is find one version of the idea that makes sense and then link everything we find in the law to it if we can, and if we cannot, throw it out. A final approach is what I might call an approach of "ordered complexity," where we say, "You know what we need to do here is recognize that this area is complex." There are a lot of different ideas here, and every time we can find a version of the concept that makes sense and has a place, we should put it back in its place. If there are problems that come up we haven't seen before, we should try to find the best place for them." What I want to suggest is that a strategy of "ordered complexity" is appropriate in the Restatement, and that we should try to do it with foreseeability.

It seems to me that Professor Gary Schwartz has taken the "one clear concept" approach to foreseeability, and the "one clear concept" he has in mind is in connection with the Hand Standard. The term "foreseeable" appears in Section 4 as a modifier in the phrase "foreseeable likelihood of risk," and is thereby being subsumed into the Hand Formula.[2] The core of negligence is unreasonable risk, and one

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of the three primary factors in determining the unreasonableness of the risk is the degree of risk, which is analyzed as the foreseeable likelihood of it. *Foreseeability* is not the core of this primary factor as Schwartz has presented it, *likelihood* is. Moreover, likelihood is not the only factor that is qualified by "foreseeability." So is the severity of the loss.

Note that the Restatement treatment is at least unconventional and out of tune with doctrine. The phrases "foreseeable likelihood" and "foreseeable severity" are not typically found in the cases. "Foreseeable" normally modifies the injury in question, not the degree of likelihood or severity of it. Now whether this is a problem or simply an uninteresting variation is a question I leave for another time. I will point out that it is a variation whose explanation lies in Professor Schwartz's aim to assimilate breach into unreasonable risk, unreasonable risk into primary factors, and primary factors into the Hand Formula. I have elsewhere expressed my doubts about reducing breach to the Hand Formula. Here I merely point to the evident theory: lading the Restatement's description of a requirement as basic as foreseeability.

Now let us turn to duty. A great deal of twentieth century negligence law asserts that foreseeability is vitally important in the analysis of duty. What does the Restatement (Third) have to say about this? Very little. Duty is somewhat awkward, for it is really "no duty" decisions that are important in the tentative drafts. In some of these decisions, the court is making its own judgment that there is no breach instead of letting the jury make it. In others, whether there could be a breach is not the question, the question is whether there are institutional reasons for declining to impose liability even where there is unreasonable risk, according to the Tentative Draft. "No duty" covers both of these categories, but note that, as in the case of breach, the Restatement account of foreseeability does not capture the prominence or significance of the term "foreseeability" in duty doctrine, nor does it promise to elucidate difficult decisions about the allocation of the foreseeability question to judge or jury. And its explanation appears to be an extension of what was suggested above: just as foreseeability is collapsed into the Hand Formula analysis of breach, so duty appears to be folded into the breach element itself in some sense, and foreseeability's role in duty, if any, depends on its role in breach.

The doctrine of foreseeability in duty, breach, and proximate cause is complex, rich, and in need of a correspondingly nuance restatement, not a collapsing into one simple idea. Let us start briefly with breach. The risk that a reasonable person is under, the common law obligated to take precautions against, are not all conceivable or possible risks, but only ones that a reasonable, prudent person under all of the circumstances could anticipate or foresee.

By contrast, consider the law of foreseeability in duty. The duty element requires courts to decide whether a certain class of persons is obligated to be vigilant of a certain category of injuries to another class of persons. A classic example is the *Tarasoff* case.[3] Does a therapist have a duty to protect potential victims of her patients? A decision on the duty element for plaintiff is an announcement that therapists shall guard against this sort of injury to identifiable victims. How does foreseeability enter into this? According

to the court in that case, a critical question was how capable therapists are of predicting, essentially of forecasting or foreseeing, the violent conduct of their patients. It was only because the California Supreme Court thought that therapists were relatively well situated and well equipped to foresee such conduct that they concluded that there was a duty to use reasonable care to ascertain and to warn identifiable potential victims. Foreseeability within the duty question goes to whether possible victims are sufficiently foreseeable as a class that they should be on the therapists' radar screen, so to speak, as among those for whom reasonable precautions must be taken. The breach question assumes that they should and asks whether this particular victim, under the circumstances, was sufficiently foreseeable that a person with potential victims on his radar screen would have warned her. Because it is a threshold question about who was to take reasonable care toward whom for what sorts of injury, duty is a question for courts, not juries.

Foreseeability enters proximate cause analysis in two different ways corresponding to two different roles of proximate cause itself. Proximate cause is necessary both to *complete* the tort of negligence and to *constrain* it; both to establish that there is liability and to determine whether appropriate constraints on the scope of liability would permit certain damages. In certain cases, a breach of the due care is not enough even when it actually causes the injury, you need the right connection. Therefore, the risk must be one that the defendant was negligent to have risked, and it follows that it must be foreseeable.

There is a different role in proximate cause, a constraint role. The idea of foreseeability is that notwithstanding the "eggshell skull rule" and a variety of other doctrinal devices that stretch consequential damages, courts often cut off liability for damages that are deemed unforeseeable. This idea of foreseeability has little to do with the levels of care used or risk properly guarded against. And indeed it is often deployed outside of negligence law as well as within it. It is, rather, a way of flushing out the idea that some damages are so improbable and freakish that it would be inappropriate to deem the tortfeasor responsible for them.

To conclude, foreseeability does not play a single role within negligence law, but a complex variety of connected roles. If we wish a restatement to restate, to clarify, and to guide, we must, in Holmes' words, "get the dragon out of his cave on to the plain and in the daylight,"[4] rather than shrink the peephole through which we view the dragon.

Notes

1. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Tentative Draft No. 1, 1999).
2. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1997).
3. *See* Tarasoff v. Regents of University of California, 551 P.2d 334, (Cal. 1976).
4. Oliver Wendall Holmes, Jr., *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997).