

162 N.E. 99  
248 N.Y. 339  
**PALSGRAF**

**v.**

**LONG ISLAND R. CO.**

\* Reargument denied 164 N. E. 564.

Court of Appeals of New York.

May 29, 1928.

CARDOZO, C. J.

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

(1-3) The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." Pollock, *Torts* (11th Ed.) p. 455; *Martin v. Herzog*, 228 N. Y. 164, 170, 126 N. E. 814. Cf. *Salmond, Torts* (6th Ed.) p. 24. "Negligence is the absence of care, according to the circumstances." *Willes, J., in Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679, 688; 1 *Beven, Negligence* (4th Ed.) 7; *Paul v. Consol. Fireworks Co.*, 212 N. Y. 117, 105 N. E. 795; *Adams v. Bullock*, 227 N. Y. 208, 211, 125 N. E. 93; *Parrott v. Wells-Fargo Co.*, 15 Wall. (U. S.) 524, 21 L. Ed. 206. The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor. *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. "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." *McSherry, C. J., in West Virginia Central & P. R. Co. v. State*, 96 Md. 652, 666, 54 A. 669, 671 (61 L. R. A. 574). Cf. *Norfolk & W. Ry. Co. v. Wood*, 99 Va. 156, 158, 159, 37 S. E. 846; *Hughes v. Boston R. R. Co.*, 71 N. H. 279, 284, 51 A. 1070, 93 Am. St. Rep. 518; *U. S. Express Co. v. Everest*, 72 Kan. 517; 1 *Emry v. Roanoke Navigation & Water Power Co.*, 111 N. C. 94, 95, 16 S. E. 18, 17 L. R. A. 699; *Vaughan v. Transit Development Co.*, 222 N. Y. 79, 118 N. E. 219; *Losee v. Clute*, 51 N. Y. 494; *Di Caprio v. New York Cent. R. Co.*, 231 N. Y. 94, 131 N. E. 746, 16 A. L. R. 940; 1 *Shearman & Redifield on Negligence*, section 8, and cases cited; *Cooley on Torts* (3d Ed.) p. 1411; *Jaggard on Torts*, vol. 2, p. 826; *Wharton, Negligence*, section 24; *Bohlen, Studies in the Law of Torts*, p. 601. "The ideas of negligence and duty are strictly correlative." *Bowen, L. J., in Thomas v. Quartermaine*, 18 Q. B. D. 685, 694. The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

183 P. 817.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been invaded, are not even ests said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. The gain is one of emphasis, for a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself; i. e., a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. *Seavey*, *Negligence, Subjective or Objective*, 41 H. L. Rv. 6; *Boronkay v. Robinson & Carpenter*, 247 N. Y. 365, 160 N. E. 400. This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." *Munsey v. Webb*, 231 U. S. 150, 156, 34 S. Ct. 44, 45 (58 L. Ed. 162); *Condran v. Park & Tilford*, 213 N. Y. 341, 345, 107 N. E. 565; *Robert v. United States Shipping Board Emergency Fleet Corp.*, 240 N. Y. 474, 477, 148 N. E. 650. Some acts, such as shooting are so imminently dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even to-day, and much oftener in earlier stages of the law, one acts sometimes at one's peril. *Jeremiah Smith*, *Tort and Absolute Liability*, 30 H. L. Rv. 328; *Street*, *Foundations of Legal Liability*, vol. 1, pp. 77, 78. Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure in injury to B. *Talmage v. Smith*, 101 Mich. 370, 374, 59 N. W. 656, 45 Am. St. Rep. 414. These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. *Parrot v. Wells-Fargo Co. (The Nitro-Glycerine Case)* 15 Wall. 524, 21 L. Ed. 206. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the

most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

(4) Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. Confirmation of this view will be found in the history and development of the action on the case. Negligence as a basis of civil liability was unknown to mediaeval law. 8 Holdsworth, *History of English Law*, p. 449; Street, *Foundations of Legal Liability*, vol. 1, pp. 189, 190. For damage to the person, the sole remedy was trespass, and trespass did not lie in the absence of aggression, and that direct and personal. Holdsworth, *op. cit.* p. 453; Street, *op. cit.* vol. 3, pp. 258, 260, vol. 1, pp. 71, 74. Liability for other damage, as where a servant without orders from the master does or omits something to the damage of another, is a plant of later growth. Holdsworth, *op. cit.* 450, 457; Wigmore, *Responsibility for Tortious Acts*, vol. 3, *Essays in Anglo-American Legal History*, 520, 523, 526, 533. When it emerged out of the legal soil, it was thought of as a variant of trespass, an offshoot of the parent stock. This appears in the form of action, which was known as trespass on the case. Holdsworth, *op. cit.* p. 449; cf. *Scott v. Shepard*, 2 Wm. Black. 892; Green, *Rationale of Proximate Cause*, p. 19. The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. Holland, *Jurisprudence* (12th Ed.) p. 328. He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N. Y. 47, 54, 120 N. E. 86, 13 A. L. R. 875; *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Smith v. London & S. W. R. Co.*, (1870-1871) L. R. 6 C. P. 14; 1 Beven, *Negligence*, 106; Street, *op. cit.* vol. 1, p. 90; Green, *Rationale of Proximate Cause*, pp. 88, 118; cf. *Matter of Polemis*, L. R. 1921, 3 K. B. 560; 44 *Law Quarterly Review*, 142. There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e. g., one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

Judgment reversed, etc.