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### The Foreseeability Factor in the Law of Torts

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# THE FORESEEABILITY FACTOR IN THE LAW OF TORTS

## I.

### *Elasticity of Application*

Probably the most powerful and most uniform social policy crystallized in the various rules and doctrines of tort law is to be found in the concept of foreseeability or expectability of certain harms from certain types of conduct. The whole idea of *risk* or *threat* is comprehended in the notion of foresight—foresight in the sense of the probability of harm resulting from conduct. Experience suggests the danger incident to certain activity. Not particular experience of particular individuals, but general experience—experience that often defies analysis—the multitude of factors, knowledge, hunches, instincts or what they may be called, the common sense that makes social intercourse possible, all operate to prompt the “ordinary reasonable man” that harms are “probable” or “natural” as normal results of certain situations and certain conduct. Where harm is to be anticipated, the problem of legal responsibility is raised.

Anticipation of harm, of course, is by no means the only factor involved. Other aspects of social policy find crystallization in other doctrinal developments. Even where the actor has created *risks*, that is, has conducted himself in such a way as to probably injure others, legal liability may be wanting. Perhaps the injured party participated in the creation of the risk.<sup>1</sup> Perhaps he assented, either to the creation of the risk or to the actual injury.<sup>2</sup> Perhaps the

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<sup>1</sup> See Bohlen, *Contributory Negligence*, STUDIES IN THE LAW OF TORTS (1926) 500.

<sup>2</sup> If the plaintiff consented to the actual injury, he is, of course, barred from a recovery, as a matter of policy, on the general theory that he cannot be heard to complain. There is no *invasion* of his interest, if he consented thereto. If he consented, not to the actual invasion of his interests, but to the conduct of the

creation of the risk by the actor, although threatening foreseeable harm, was made under circumstances which, for reasons of social policy, the law regards as privileged. Perhaps the actual harm was privileged.<sup>3</sup> Or perhaps the risk created, although threatening foreseeable harm, was not, on the whole, unreasonable.<sup>4</sup> Each of these policies outlined finds its counterpart in a series of complicated rules of law, the effect of which may be to insulate the actor from liability for the creation of a situation which contains potentiality of probable harm to others.

But the foreseeability factor is essential to liability. Somewhere in the sequence of happenings, a defendant has acted in a manner that *threatened* others, or there will be no liability. In other words, while one may not be held legally responsible merely because the harm caused was to be anticipated, he is never held liable unless it was, in some sense, foreseeable. Hence, it appears that it may be stated as a major principle of the law of torts that there is no liability unless the harm produced was, in some measure, to be anticipated.

The application of the test of foreseeability, however, requires a rather nice analysis. Harm may be foreseeable

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defendant which created the risk, he may be barred on the theory that he voluntarily assumed the risk. See Bohlen, *op. cit. supra* note 1, at p. 524.

<sup>3</sup> The same distinction exists between the privilege for the actual invasion of interest and the privilege to indulge in the conduct which creates a risk, that exists between consent and voluntary assumption of risk. The former type of privilege exists in such cases as self defense, arrest under warrant, seizure of goods under process, etc. The latter type exists when certain types of conduct, ordinarily the basis of liability, are legalized by statute or customary law, e. g., legal authority to engage in conduct which, but for the statute would be the basis for the rule of *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1886); *Madras R. Co. v. Semindar of Carvatenagarum*, L. R. 1 Indian App. Cases 364 (1874); or statutory authority to engage in conduct which, but for the statute, would be a nuisance. *Pittsburgh, etc. R. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73 (1879). The point to be made here is that both types of consent, as well as both variations of privilege are grounded on the same idea of social policy.

<sup>4</sup> See the treatment of the negligence problem by the AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW OF TORTS, TENTATIVE DRAFT No. 4*, §§ 172 to 175. And see Terry, *Negligence*, 29 HARV. L. REV. 40, *SELECTED ESSAYS ON THE LAW OF TORTS*, 261.

in several senses and much confusion is to be found in the cases from a sloppy use of the idea. In the first place, the particular injury or damage may be foreseeable in the sense that, not only the exact person injured was foreseen to have been exposed to the risk, but the precise manner in which the injury happened was to be reasonably apprehended. Again, while the exact way in which the injury occurred may not be foreseeable, the general type of injury may be reasonably foreseeable, as well as the general class of persons threatened. Although it is by no means necessary that the precise sequence of events be the subject of reasonable foresight, it is necessary that the general sort of interest invaded and the general class of persons injured be foreseeable before there can be legal liability. The former question is a problem of legal causation, and the foreseeability of the precise train of happenings is not always essential to liability. But the latter two questions go to distinctly different problems, namely, the character of the conduct upon which legal liability shall be predicated, and it is submitted that liability is never predicated upon conduct which did not threaten the *general type* of injury complained of to the *general class* of persons injured, in the sense that some such injury to some such persons could be foreseen as probable.

Such an analysis, to be sure, cannot be made to operate automatically or mechanically. It cannot serve as a substitute for the exercise of the judgment forming faculties. The concept is an elastic one. It may, to use Justice Cardozo's phrase, "expand or shrink." The "general type of harm" and the "general class of persons" threatened, quite obviously must include or exclude many situations today which were outside or within their purview yesterday. Experience and particular aspects of social life will determine the scope and range of such concepts and circumstances will always affect their applicability. There is, however,

value to be derived from such analysis. It reveals a great and uniform principle of policy—the policy to confine legal liability in tort to situations in which a man's conduct created some foreseeable danger to a foreseeable part of society. Unless his conduct can be characterized in such a way, it is never a basis of legal responsibility.

## II.

### *Foreseeability of the Harm Threatened*

Neither in the case of intended invasions nor of negligent invasions of another's interests, nor yet when the invasion is the result of extra-hazardous conduct, is the actor liable unless his conduct created a general type of foreseeable danger. Nor is he liable for any injury not within the general class of harm threatened. In other words, there can never be a recovery in tort for an injury which was not of the general class of harms, the foreseeable danger of which made the actor's conduct the basis of liability.

In the case of intended invasions, the operation of this policy is somewhat obscured by its very obviousness, quite as the principles of legal causation are obscured by their obvious application. Even in the case of intended wrongs, a defendant is liable only for harms legally caused, but one of the first rules of legal causation is that intended consequences are always regarded as proximate<sup>5</sup> and the reasons of policy for such rule are so patent that they need no discussion. Similarly, the limitation that only harms which come within the general class of injuries that made the conduct dangerous can be the subject of recovery, is consistent with the rule of liability for intended wrongs, for it is the threat of "intended wrongs" that makes the actor's conduct tortious. The application of both general limitations of liability is thus comparatively simple in the case

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<sup>5</sup> RESTATEMENT OF THE LAW OF TORTS, TENTATIVE DRAFT, No. 1, § 6, Comment.

of intended wrongs, for the reason that intended invasions of one's interests are both "legal consequences" and the "general class of harms," the apprehension of which makes the conduct unreasonably dangerous. When a man engages in conduct intended to inflict injury upon another, it is to be anticipated that certain harms will result therefrom, and his liability therefore is no exception to the policy that there is no liability in tort for injuries that are not, in a general way, expectable.

In the case of negligent conduct, the same policy is to be found running through the law. There is no liability for "negligence in the air."<sup>6</sup> A defendant must be negligent with respect to the general type of harm of which the plaintiff complains or there can be no liability. Thus, if the defendant has created an unreasonable risk toward the plaintiff's property interests, such conduct is not negligent toward the plaintiff's interest in his personal safety<sup>7</sup> and there can be no recovery therefore because such a harm was not the sort of hazard, the anticipation of which made defendant's conduct the basis of liability. Thus where a defendant was charged with negligence in failing to keep a cattle pen properly locked and the cattle, frightened by a passing train, stampeded and crashed through a gate injuring the plaintiff and damaging his property, the court held the defendant liable for the plaintiff's property damage, as the likelihood of such a harm made the defendant's conduct unreasonable. There was, however, no liability for the plaintiff's personal injuries because such a harm was not of the general class of hazards which made defendant's conduct the basis of liability.<sup>8</sup> Such a thing was not reasonably foreseeable. And, in another case, where plaintiff sought to recover damages for the diminution of the value of his house by reason of

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<sup>6</sup> See Cardozo, C. J., in *Palsgraph v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928).

<sup>7</sup> See RESTATEMENT, § 165.

<sup>8</sup> *Texas & P. R. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162 (1896).

a murder committed therein by defendant by reason of which the plaintiff's family refused to live therein, there was no liability. This sort of damage was entirely outside the general type of harm which made defendant's conduct unlawful.<sup>9</sup>

The clearest working of this policy, of course, is to be ascertained from cases in which liability is based upon defendant's breach of statutory duty. If the general class of harms which the statute sought to protect against does not include the harm of which plaintiff complains, there can be no recovery.<sup>10</sup> Where, for example, a statute forbade a railroad company from blocking a public crossing and the plaintiff by reason of such blocking was prevented from seeing a switch engine which struck and injured him, there could be no recovery against the railroad merely because of the violation of the statute. The general sort of risk to be anticipated from such conduct and the one sought to be avoided by the statute was the delay and inconvenience to traffic,—not obstruction of view. Since injuries of the type resulting from the latter effect were not reasonably to be anticipated and not the sort of thing which made defendant's conduct unlawful, there could be no recovery.<sup>11</sup>

Herein lies the explanation for much of the confusion in the development of the principles of legal causation. The courts have for centuries persisted in stating and purporting to apply the "natural and probable consequences" formula to determine whether consequences were proximate to conduct. Many still insist that there can be no recovery if the injuries complained of were not reasonably foreseeable. It would be most astonishing that such a formula should persist for so long if there were no validity whatever to it.

<sup>9</sup> Clark v. Gay, 112 Ga. 777, 38 S. E. 81 (1901).

<sup>10</sup> See Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, SELECTED ESSAYS IN THE LAW OF TORTS, 276.

<sup>11</sup> Denton v. Missouri, K. & T. R. Co., 90 Kan. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 820 (1913).

The secret is revealed by the frequent qualification of the rule that the exact manner in which the injuries occurred need not be foreseeable. The explanation is that the courts are perfectly accurate in declaring that there can be no liability where the injuries were unforeseeable, if "foreseeability" refers to the general type of harm sustained. It is perfectly true that there is no liability for injuries or damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor, at the time of his conduct. And yet, if the general result suffered falls within the danger area, there may be liability, providing other requisites of legal causation are present.

It should be observed that while non-liability for harms completely outside the general threat is a correct statement of the result, to couch the rule in terms of legal causation is not a desirable analysis of the problem. It is rather a lack of analysis. Legal causation is better confined solely to the problem presented by the sequence of events leading up to the injury. Where the actor's liability is predicated upon his negligent conduct, the question of whether the harm sustained falls within or outside the general class of harms which made the conduct negligent may be treated more conveniently as an aspect of the negligence problem, and it has been so treated by the American Law Institute in its Restatement of Negligence.<sup>12</sup>

Where the actor's conduct is of the third type upon which tort liability is predicated, conduct which is extra-hazardous although neither intended to invade the interests of others nor negligent with respect to such interests, it is significant

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<sup>12</sup> See RESTATEMENT, § 165.

that the same principle of liability is observed by the common law. Only those harms which come within the general "extra" hazards threatened may be the subject of recovery. The coordinating policies of the law are particularly striking in this area. The actor is held liable here not upon the obvious moral ground that one who intentionally invades the interests of another should be required to compensate the injured person; nor yet upon the social ground that when one has acted unreasonably with respect to others, he should make good the loss occasioned thereby. Liability "without fault," as it were, is imposed upon grounds that are purely socio-economic, upon the theory that one who so conducts himself as to create certain unusual risks toward others, for his own advantage, should do so at his peril as the price of his social privilege of carrying on the dangerous activity. The activity is not, of itself, negligence, for, although it involves foreseeable risks to others, still such threats are not unreasonable by virtue of the social utility and community benefits of the enterprise. Nevertheless, such social benefits and individual privileges may not be created at the risk of the unfortunate individuals who happen, sometimes by accident, to be within the danger zone. Those most benefited must therefore carry such risks. This means, the actor, immediately and society indirectly, must make good the loss, and such extra hazardous conduct is a common basis for tort liability.

Now, once such risk has actually materialized into harm, the injured person may recover providing, of course, all other requisites of legal liability are present. But what here concerns us is the policy that restricts recovery to those harms of the general class which made the conduct of the actor the basis of liability. The harm must come within the general risk area the anticipation of which prompted the rule of extra-hazardous liability, for only in this way could the original policy of the law be observed and made effective.

Thus the keeping of animals known to be vicious, whether because of their wild nature or whether due to the particular characteristics of the particular beast, is conduct which falls within the common law rule of liability for extra-hazardous conduct. But such conduct is dangerous only because of a certain general type of hazard, and no other harm resulting from such conduct will support a recovery.<sup>13</sup> The same rule applies to harm caused by domestic animals. The common law rule predicated liability upon the keeping of cattle because of a definite and rather narrow type of risk, *viz.*, the escape and consequent trespasses of such animals by reason of their wandering propensities.<sup>14</sup> But the owner of such cattle was not responsible for harms outside this general class of risk which constituted the hazard anticipated.<sup>15</sup> Similar results are to be found in other phases of strict liability, such as nuisance<sup>16</sup> and liability for blasting.<sup>17</sup>

The foreseeability of harm is, it seems, a factor of vital importance in all phases of tort liability. If the harm complained of was unexpected in the sense that it is entirely outside the general sort of risk which made the actor's conduct the basis of liability, and was, therefore, not harm of a sort, the anticipation of which gave rise to the rule or principle of law invoked, there is no social policy to be

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<sup>13</sup> *Osborne v. Chocqueel* [1896] L. R. 2 Q. B. 109; *Scribner v. Kelly*, 38 Barb. 14 (1862).

<sup>14</sup> See POLLOCK, *THE LAW OF TORTS*, 13th ed., 514.

<sup>15</sup> See COOLEY ON TORTS, 403; *Hadwell v. Righten* [1907] 2 K. B. 345; *Cox v. Burbage*, 13 C. B. N. S. 430 (1863).

<sup>16</sup> *Robinson v. Kilvert* [1889] L. R. 41 Ch. Div. 88.

<sup>17</sup> Where liability was denied, especially by the older cases, for damage due to concussions of the atmosphere alone. See *Booth v. Rome, etc.*, R. Co., 140 N. Y. 267, 35 N. E. 592 (1893). Blasting was not regarded as extra-hazardous because of the danger of this sort of thing, but solely because of the hazard to person or property from tangible substances. The more modern rule seems to proceed from the view that damage to adjoining property resulting from concussions of the atmosphere ought to be as much within the general threat from blasting as damage from actual invasions of physical substances. See *Johnson, J.*, in *Hicky v. McCabe*, 30 R. I. 346, 75 Atl. 404 (1910). Thus the foreseeability of harm was expanded to enlarge the general type of risk which made the blaster's conduct the basis of liability.

advanced by holding the actor liable.<sup>18</sup> So far as the law is concerned, the harm was caused entirely by accident of a kind that there is no point in putting the loss elsewhere than upon the person upon whom it unfortunately falls.

### III.

#### *Foreseeability of the Person Threatened*

Tort law, like all other legal phenomena, is entirely social in the sense that the actor is liable only when his conduct has resulted in harm to others. If there are no injurious consequences, in the legal sense, his conduct entails no liability. On the other hand, there is never liability in tort for harms caused unless the actor had voluntarily engaged in a course of conduct which is made the basis of legal liability.<sup>19</sup> Both "tortious" conduct<sup>20</sup> and harm legally resulting therefrom must concur before there is liability.

But it is to be noticed that certain types of conduct are made the basis of liability because of the probability of certain injurious consequences to certain persons. Risk or danger implies an object as well as a subject, and a risk is created only when there is a threat of harm to somebody. And so the social policy that bases liability upon certain types of conduct, does so both because a general class of harm is created and because the harm threatens a general

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<sup>18</sup> The harm may be "actual" or "constructive," but it must always be "legal damage." Some harms are not the subject of compensation because the interest actually invaded is not, for practical reasons, accorded legal protection. See *Lynch v. Knight*, 9 H. L. C. 577 (1861). Here there is actual harm, but no "legal damage." Again an interest may be protected, also for practical reasons, to the extent of allowing recovery for "legal damage" although there is, in fact, no actual harm, as in the case of "nominal" damages for "technical" trespass.

<sup>19</sup> See the development of the policy that tort liability is only imposed as a price of voluntary activity or relations voluntarily assumed, by Professor Bohlen in *STUDIES IN THE LAW OF TORTS*, 33, 67, 109.

<sup>20</sup> Not necessarily *wrongful* conduct. By "tortious" conduct is merely meant conduct which, if harm is legally caused, and other requisites of legal liability are present, will support a civil action for damages. In the case of extra-hazardous activity, the conduct is "tortious" in this sense, although not prohibited by law and not morally nor socially reprehensible.

class of persons. This policy is carried out completely by confining recovery to injured persons of this general class imperiled, and no one else, as to whom there was no foreseeable danger, can recover.

Again, the applicability of this policy to the type of injuries characterized as intended invasions of one's interests, is somewhat obscured. Upon analysis, however, it appears that such species of conduct is unsocial because of the danger to certain classes of persons and only such persons may recover. For the most part, the general class of persons threatened by the kind of conduct which in these cases is the basis of liability, is the person or persons whom the actor intends to injure. But it is to be remembered that "intended" has here a somewhat weighted meaning. It is unaffected by the motive of the actor or by a mistake on his part as to either the identity of the person whom he intended to harm or the existence of circumstances which, had they in fact existed, would have privileged the actor to invade the other's interests.

Such persons, however, are not the only ones imperiled by conduct "intended" to injure, for when a person engages in such activity, it is not improbable that others may also be threatened. Accordingly, anyone within the danger zone thus created may recover. If A shoots at B, intending to injure him, but the ball strikes C, it is clear that A is liable criminally to the state for the assault and battery upon C and civilly to C for the harm inflicted.<sup>21</sup> Various theories and fictions are sometimes advanced to rationalize the result as an "intended" invasion of C's interests, but it is clear that the hazards involved in the actor's attempt to intentionally injure one person are so great toward others in the zone of danger that the policy of the law requires that the actor make good the harm thus caused. The more

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<sup>21</sup> *Anderson v. Arnold*, 79 Ky. 370 (1881); *Bannister v. Mitchell*, 127 Va. 578, 104 S. E. 800 (1920).

rational ground of tort liability in such cases would seem to be the negligence of the actor toward persons other than the one against whom the assault was directed. Thus where a defendant threw a stone at one boy and struck another close by, he was liable to the person actually injured, for the intended assault upon the one person constituted a risk of harm that was foreseeable and unreasonable toward the plaintiff.<sup>22</sup> Frequently it is said that such a result to the person injured was the "natural and probable" consequence of the conduct intended to injure a third person,<sup>23</sup> which is to say that it is foreseeable that third persons within the area of danger may be injured by an intended attack upon another, and such conduct is, therefore, negligence toward the former. It is submitted that there is no civil liability to one who, at the time the actor attempts an intended invasion of a third person's interests, was not within the zone of apprehended peril.

Other situations in which liability is predicated on the defendant's negligence illustrate the principle further. To support a recovery, it must appear that the actor's conduct created an unreasonable risk toward the plaintiff or persons in his position.<sup>24</sup> In other words, the plaintiff must show that the actor's conduct was such as to create a foreseeable hazard toward a general class of persons of which the plaintiff is one. Again, the operation of the principle is most clearly observed in cases involving a breach of statutory duty. The statute creates certain duties toward certain persons for their protection against anticipated harms. Not only must the harm actually sustained be such as was of the general class which the statute was designed to protect

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<sup>22</sup> Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81 (1877).

<sup>23</sup> See Bannister v. Mitchell, *op. cit. supra* note 21.

<sup>24</sup> Palsgraph v. Long Island R. Co., *op. cit. supra* note 6, per Cardozo, C. J.; Hoag v. Lake Shore & M. S. R. Co., 85 Pa. 293, 27 Am. Rep. 653 (1817); Wood v. Pennsylvania R. Co., 177 Pa. 306, 35 Atl. 699 (1896). And see GREEN, RATIONALE OF PROXIMATE CAUSE, 85ff.

against, but the plaintiff must show that the actor's breach of the statute was a wrong toward *him*. "A violation of a statutory duty," observed Judge Mitchell in a Minnesota case,<sup>25</sup> "can be made the foundation of an action only by the person belonging to the class intended to be protected by such regulation and . . . such statutes were never intended to abrogate the ordinary rules that to recover, the neglected duty must have been due to the party injured." The failure to comply with the statute is a breach of duty only toward such persons as to whom the legislature anticipated harm and accordingly sought to protect.

And finally, it appears that in situations in which the defendant's liability for harm caused is predicated upon his extra-hazardous activity, the principle that only persons who, in the general sense, were foreseeably exposed to the extra hazards can recover. It is hardly to be supposed that had the plaintiff, in *Rylands v. Fletcher*,<sup>26</sup> owned land so far from the location of the defendant's reservoir that no one could foresee danger to his interests even if the reservoir should burst, there could have been a recovery against the defendant. The "absolute duty," as Lord Blackburn described the defendant's relation to the plaintiff, was owing the plaintiff as an *adjoining landowner*, and he would be required to bring himself within this general class of persons, in order to invoke liability for a breach of such "absolute" duty. Only such persons were exposed to the extra hazards which were the basis of the defendant's liability and only such persons could recover for damage sustained.

Again, workmen's compensation liability is imposed by reason of the foreseeable injuries to workmen caused by "accident arising out of and in the course of" their employment. To invoke such statutory strict liability, not only must the plaintiff show that the injury complained of was

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<sup>25</sup> *Akers v. Chicago, etc., R. Co.*, 58 Minn. 540, 60 N. W. 669 (1894).

<sup>26</sup> *Op. cit. supra* note 3.

of the general class of harms the anticipation of which made the employer's activity the basis of liability,<sup>27</sup> but he must show that he is a member of the general class of persons as to whom the threatened peril was the subject of legislative concern. First of all, of course, he must show that he was an employee, for the danger to employees was the foreseeable harm subject to compensation. An independent contractor, for example, cannot recover,<sup>28</sup> nor employees of independent contractors.<sup>29</sup> Again, the statutes usually eliminate certain kinds of employees from the benefits of the act, so that if the plaintiff was a mere "casual" worker, he cannot recover compensation.<sup>30</sup>

The same limitation of liability is found in the cases wherein the actor's conduct consisted in the harboring of dangerous animals. Such conduct is made the basis of liability because of anticipated harm toward a certain class of persons, to which a felonious trespasser, for example, does not belong. Anticipation of harm toward such a person is in no sense a reason for imposing strict liability upon the keeper of vicious animals and there can be, accordingly, no recovery by such a person.<sup>31</sup>

Once again, it appears that the foreseeability standard is of the greatest significance in determining the limitation

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<sup>27</sup> That is, he must show that his injury was of the general class, described as an "accident" received "in the course of the employment." The statutory provision that the "accident" must "arise out of the employment" refers, not to the general type of injury sustained, but to the causal relation between the employer's conduct (the operation of the industrial plant) and the injury. See *In Re McNicols*, 215 Mass. 497, 102 N. E. 697 (1913), and *Brown, Arising out of and in the course of the Employment in Workmen's Compensation Acts*, 7 Wis. L. Rev. (1931) 14.

<sup>28</sup> *Vamplew v. Parkgate Iron & Steel Co.* [1903] L. R. 1 K. B. 851, 72 L. J. K. B. N. S. 575; *In re Pheinwald*, 168 App. Div. 425, 153 N. Y. S. 598 (1915).

<sup>29</sup> *Kennedy v. David Kauffman & Sons Co.*, 91 Atl. 99 (N. J. 1914), and see cases collected in L. R. A. 1918 F, 206 and Ann. Cas. 1918 B, 709. *Contra*, under the Massachusetts Statute, *Sundine's Case*, 218 Mass. 1, 105 N. E. 433 (1914).

<sup>30</sup> *Baer's Express & S. Co. v. Industrial Bd.*, 282 Ill. 44, 118 N. E. 412 (1917); *Cheever's Case*, 219 Mass. 244, 106 N. E. 861 (1914); *Bridger v. Lincoln Feed & Fuel Co.*, 105 Neb. 222, 179 N. W. 1020 (1920).

<sup>31</sup> See *Wolf v. Chalker*, 31 Conn. 121 (1862).

and scope of the various rules of tort liability. Throughout the entire ambit of tort law, the anticipation of harm of a *general sort* to persons of a *general class*, is a determinative factor. Here, it seems, is a principle of policy that is so deeply imbedded in the law that it may fairly be said to be a "fundamental" principle—not fundamental in a dogmatic or doctrinal sense, but fundamental in the sense that it represents an approximately universal sense of fairness and social justice, deep rooted in human thinking.

May it not be that whereas the long sought "system" of tort law, not discovered in the artificialities of procedure and forms of action, nor yet in the logical organization of doctrinal generalizations, may yet be found in a few comparatively simple formulations of social policy which seem consciously and unconsciously, to have pushed the judges in the right direction for these many centuries. If such a formulation of somewhat general notions of social policy can be made, it seems pretty clear that the general concept of the foreseeability of harm, the idea of a general threat to a general class of persons, will occupy a conspicuous place in the rational organization of tort law.

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