Michigan Law Review

Volume 35 | Issue 7

1937

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Michigan Law Review

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Recommended Citation
Michigan Law Review, *DAMAGES - PERSONAL INJURY - NEGLIGENT AGGRAVATION BY INJURED PERSON*, 35 MICH. L. REV. 1176 (1937).
Available at: https://repository.law.umich.edu/mlr/vol35/iss7/16

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DAMAGES — PERSONAL INJURY — NEGLIGENT AGGRAVATION BY INJURED PERSON — As a direct result of the defendant's negligence, plaintiff fell and sustained injuries including a fracture of the pubic bone. Ten months later, knowing that she could not walk unassisted because the bone had not knit, plaintiff attempted to do so, fell and refractured the bone. *Held*, that plaintiff's negligence, found as a matter of law, was an "efficient intervening cause" [1] making the defendant's negligence remote as to the aggravation of the injury. *S. S. Kresge Co. v. Kenney*, (App. D. C. 1936) 86 F. (2d) 651.

There is a clearly prevailing line of authority that aggravation of a personal injury by the victim's non-negligent act is not of necessity an efficient intervening cause isolating the negligent act which caused the injury.[2] Neither this

[1] The terminology of "efficient intervening cause" as used in this case is herein adopted as synonymous with "isolating" or "superseding" cause. The latter is defined in 2 TORTS RESTATEMENT, § 440 (1934). "Intervening" is distinguished from "existing" and "direct" causes in McLaughlin, "Proximate Cause," 39 HARV. L. REV. 149 at 159 and 167-168 (1925).

[2] Hartnett v. Tripp, 231 Mass. 382, 121 N. E. 17 (1918), and other cases collected in 9 A. L. R. 248 at 255 (1920) and 20 A. L. R. 520 at 524 (1922). This may be on the theory that non-negligent use of an injured member, like an involuntary act, is not an intervening cause at all. See Carpenter, "Workable Rules for Determining Proximate Cause," 20 CAL. L. REV. 229, 396, 471 at 483 (1932). The cases in the main merely rebut an earlier assertion that any voluntary act by the plaintiff would be an efficient intervening cause. See Raymond v. City of Haverhill, 168 Mass. 382, 47 N. E. 101 (1897), and annotation in 18 L. R. A. (N. S.) 640 at 641.

doctrine nor the reliance of the principal case upon it seems to offer any affirmative reason for setting up the converse rule of causation: that a negligent act of the victim is an efficient intervening factor. A bald statement of the decision seems superficially to rely on the arbitrary theory,[3] now generally exploded,[4] that any negligent intervention changing the effect of the original negligence will be efficient. The modern rule is that an intervening cause can generally be efficient only if it is unforeseeable.[5] Carrying the actor's liability as far as the results were or should have been anticipated at the time of the act has the obvious justice of more nearly relating liability to fault.[6] When a new force intervenes between a completed tort and consequential injuries, it is tested for foreseeability as of the time of the completed tort.[7] The question in this case then becomes merely whether the aggravation of the injury occurred through the happening of a normal convalescent risk.[8] The case is directly analogous to those in which insanity induced by the injury,[9] negligent care by physicians [10] or other third persons,[11] or some other convalescent risk [12] results in new injuries. No logical distinction can be made to show why voluntary acts by the victim should be tested by any different standards from those convalescent risks above

[3] Set out in Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (1806), discussed in BOHLEN, STUDIES IN THE LAW OF TORTS 500-511 (1926), reprinting "Contributory Negligence," 21 HARV. L. REV. 233-242 (1908).

[4] Criticized by Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103 at 119, 303 at 324-325 (1911-1912); and McLaughlin, "Proximate Cause," 39 HARV. L. REV. 149 at 175-176 (1925). See 2 TORTS RESTATEMENT, § 447 (1934).

[5] See Lane v. Atlantic Works, 111 Mass. 136 at 141 (1872). Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633 at 652 (1920). McLaughlin, "Proximate Cause," 39 HARV. L. REV. 149 at 181 (1925); paraphrased by Professor Beale in the article cited, 33 HARV. L. REV. at 651, "where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer." For comment on a similar case, see Carpenter, "Workable Rules for Determining Proximate Cause," 20 CAL. L. REV. 229, 396, 471 at 485 (1932).

[6] See McLaughlin, "Proximate Cause," 39 HARV. L. REV. 149 at 175-176 (1925).

[7] Not at the time of the defendant's negligence as is the usual case. Discussed by McLaughlin, "Proximate Cause," 39 HARV. L. REV. 149 at 171-172 (1925).

[8] Test suggested in 45 HARV. L. REV. 412 at 418 (1931). In 2 TORTS RESTATEMENT, § 457, comment (b) (1934), it is said: "If the actor knows that his negligence may result in harm sufficiently severe to require such [medical] services, he should also recognize this as a risk involved in the other's forced submission to such services and, having put the other in a position to require them, the actor is responsible for any additional injury resulting from the other's exposure to this risk."

[9] See 2 TORTS RESTATEMENT, § 455 (1934).

[10] See 2 TORTS RESTATEMENT, § 457 (1934), and cases collected in 8 A. L. R. 503 at 506 (1920) and 39 A. L. R. 1263 at 1268 (1925).

[11] See cases collected in 82 A. L. R. 486 at 491 (1933) and 101 A. L. R. 554 at 559 (1936).

[12] 2 TORTS RESTATEMENT, § 457, comment (c) (1934): "He [the actor] is therefore as fully responsible for the negligent manner in which the nurses or clerical staff perform their part as he is for the negligent manner in which a physician or surgeon treats his case. . . ."

mentioned. Insanity or negligence by professional attendants is certainly a less normal occurrence than negligence of the victim himself. There should be no difficulty in finding the original negligence to be the legal cause of the aggravated injuries, despite the plaintiff's intervening negligence.[13] In practice, however, this result is never discussed in this line of cases because, through slight changes in pleading and procedure, an impregnable defence may be raised on the basis of contributory negligence. Because of that broad principle, a plaintiff will be barred from increased damages by any failure to perform his plain duty of due care for mitigation and recovery.[14] Separation of the consequential injuries caused by contributory negligence offers no great difficulty.[15] Thus a simple solution is offered for the common type of case,[16] avoiding the more complicated theories of causation.[17] A clearer separation of the two questions, eliminating the consideration of negligence as such from the causation field, seems to be the trend of the modern theory.[18]

[13] 2 TORTS RESTATEMENT, § 443 (1934): "An intervening act of a human being or animal which is a normal response to the stimulus of a situation caused by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about."

Ibid., comment (a): "It is not necessary that an act which is done by the person harmed or by a third person should be 'reasonable'. . . . It is enough that the act is a normal response to the stimulus of the situation created by the actor's negligence. If it be done by the person who is harmed and is unreasonable . . . it may amount to contributory negligence which as such prevents him from recovering, but the actor's negligent conduct is none the less the legal cause of the harm."

[14] This basic duty is discussed in 18 L. R. A. (N. S.) 640 (1909) and 48 L. R. A. (N. S.) 93 at 106 (1914).

[15] See Mahoney v. Beatman, 110 Conn. 184, 147 A. 762 (1929), and the excellent comment by Dean Green in 39 YALE L. J. 532 (1930), reprinted in JUDGE AND JURY 226 (1930).

[16] In criminal cases the suggested elimination is of course impossible. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 657 (1920). See also Edgerton, "Legal Cause," 72 UNIV. PA. L. REV. 211 at 227 (1924).

[17] The cases listed by Carpenter, "Workable Rules for Determining Proximate Cause," 20 CAL. L. REV. 229, 396, 471 at 526-539 (1932), of intervening causes dependent on the actor's negligence contain many voluntary acts done by the victim to avoid harm. Those in which the act was negligent might possibly be disposed of on this theory. The broadness of the contributory negligence principle arbitrarily dismisses consideration of comparative negligence and such questions of deep significance as "Has the actor done enough that he should bear this loss?" 20 CAL. L. REV. 229 at 233 (1932). See the fundamental discussions in Bohlen, "Contributory Negligence," 21 HARV. L. REV. 233 at 255-256 (1908), as to apportioning liability in cases of successive negligence.

[18] See Bohlen, "Contributory Negligence," 21 HARV. L. REV. 233 at 259 (1908), discussing contributory negligence as a survival in a special case of the rule of Vicars v. Wilcocks, discussed at note 3, supra.