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NEGLIGENCE - PROXIMATE CAUSE - INTERVENING ACT - MERE CONDITION OR PASSIVE CAUSE

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NEGLIGENCE — PROXIMATE CAUSE — INTERVENING ACT — MERE CONDITION OR PASSIVE CAUSE — Defendant, driving an automobile at night on a new highway in process of construction, turned therefrom on to the old road with which he was familiar, at such a speed and angle that his headlights did not immediately reveal the condition thereof; the car struck a lantern-marked depression in the road, caused by the excavation by the defendant construction company for a culvert, whereupon the defendant driver lost control, overturning the car, with resultant serious injuries to the plaintiff passenger. From a directed verdict for the defendant construction company, a refusal of the defendant driver's motion for judgment *non obstante veredicto* and from an order for new trial for the plaintiff on the ground of inadequacy of the verdict, defendant driver appealed. *Held*, that the intervening negligent conduct of the driver, rather than the negligent creation of a dangerous condition, was the proximate cause of the injury. Appeal dismissed and order for new trial for plaintiff as to damages affirmed. *Schwartz v. Jaffe*, 324 Pa. 324, 188 A. 295 (1936).

A state trooper, who had received a message to cancel an order to arrest occupants of an automobile, bearing a certain license number, as suspects in an armed payroll robbery, the criminals having been arrested, failed to transmit same by teletype or telephone to all local authorities to whom had been sent the original notice of the crime. Later, the occupants of the aforesaid automobile were accosted by armed plainclothesmen who did not identify themselves, and who had no knowledge of the cancellation. Not knowing this was an attempted arrest, the plaintiff's intestate sought to escape but was shot, death resulting from the wound. From a judgment awarding damages, both parties appealed. *Held*, that the failure of the state officer to relay the cancellation message was not merely a passive condition but the proximate cause of the attempted arrest and death, for the intervening acts of third parties were dependent and foreseeable. *Slavin v. State*, 291 N. Y. S. (App. Div.) 721 (1936).

A person who has negligently created a dangerous but passive condition is not liable for the injury caused in fact by the intervening negligent conduct

of a third party, if the latter is the proximate cause.[1] But where there is created a dangerous situation and the intervening acts of third parties are foreseeable, reasonably expected, or result from a natural stimulus, the former is no longer merely a passive condition but rather the proximate cause of the injury.[2] The principal cases exemplify the two possibilities of the effect of an intervening act or omission of a third party upon proximate cause.[3] In one, the intervening negligent act of the third party was held to be the legal cause of the injury, while in the other, the original negligence creating a condition that was expected to be acted upon was held to be the proximate cause because such acts were foreseeable,[4] though not the exact manner thereof.[5] Both decisions, being socially advantageous, readily meet the familiar "justly attachable cause" test,[6] though the legal writers have long been in controversy as to the feasibility of definite rules of proximate cause.[7] The doctrine that an

[1] HARPER, LAW OF TORTS 263 (1933); Munsen v. Illinois Northern Utilities Co., 258 Ill. App. 438 (1930); Illinois Central R. R. v. Oswald, 338 Ill. 270, 170 N. E. 247 (1930); Stone v. Philadelphia, 302 Pa. 340, 153 A. 550 (1931); Thubron v. Dravo Contracting Co., 238 Pa. 443, 86 A. 292 (1913); Bruggeman v. City of York, 259 Pa. 94, 102 A. 415 (1917); Hoffman v. McKeesport, 303 Pa. 548, 154 A. 925 (1931); see also 45 C. J. 929-932, notes 35, 55 and 56 (1928), for cases there cited, upholding the rule even where the injury could not have taken place but for such condition.

Proximate cause has been defined as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." 22 R. C. L. 110 (1918).

[2] 2 TORTS RESTATEMENT, § 447 (1934); but there may be a duty to act when the prior conduct is found to have created an unreasonable risk. Ibid., § 321; 45 C. J. 932 (1928) and cases there cited; Darrah v. Wilkinsburg Hotel Co., 318 Pa. 511, 178 A. 669 (1935); the leading case establishing this doctrine is Scott v. Shepherd, 2 Wm. Black. 892, 96 Eng. Rep. 525 (1772).

[3] See Gardner, "Theories of Proximate Causation," 4 UNIV. CIN. L. REV. 118 (1930); Green, "Mahoney v. Beatman: A Study in Proximate Cause," 39 YALE L. J. 532 (1930).

[4] Thus the mere fact that one actor has done no more than to create a condition which involves no unreasonable risk of harm without the intervention of a third party does not absolve the first actor of liability. Where the created condition is of such a nature that a third party is expected to act thereon, there then will be a duty to control the conduct of such third person. See 2 TORTS RESTATEMENT, §§ 303, 315 (1934). Cf. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633 (1920).

[5] Munsey v. Webb, 231 U. S. 150 at 156, 34 S. Ct. 44 (1913); Hoover v. Southern Bell Tel. Co., 50 Ga. App. 680, 179 S. E. 216 (1935); 2 TORTS RESTATEMENT, § 435 (1934).

[6] Edgerton, "Legal Cause," 72 UNIV. PA. L. REV. 211 (1924), upholding such a doctrine, suggests that foreseeability should be a test of justice.

[7] Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 223, 303 (1911-1912); Edgerton, "Legal Cause," 72 UNIV. PA. L. REV. 211 (1924). Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633 (1920). The respective views of these writers and others are thoroughly discussed and criticized in Carpenter, "Workable Rules for Determining Proximate Cause," 20 CAL. L. REV. 229, 396, 471 (1932).

intervening and superseding negligence may be the legal cause, rather than the original negligence of another, is also evidenced in the recent case of *Stultz v. Benson Lumber Co.*, concerning the supplier of defective chattels.[8] Where there is such an intervening act or omission of a third party, it would seem that the test should basically be one of foreseeability, if the negligence of the actor has been a substantial factor.[9] Likewise, the test of control is helpful. [10] If one induces another to act and can control his conduct, the act of the latter cannot be held to be such an efficient intervening cause that would absolve the former from liability.[11] Since all cases involving causation depend for their decision upon the particular facts, there is only one unvarying rule that may be applied, that is, one of common sense and public policy.[12]

[8] 6 Cal. (2d) 688, 59 P. (2d) 100 (1936). It was there held that the negligence of the buyer—in using a plank for scaffolding supplied by the defendant with knowledge of the defective condition—was the proximate cause of the injury of a workman. A later decision, Waterman v. Liederman, (Cal. App. 1936), 60 P. (2d) 881, reasserts the doctrine in dictum that the unreasonable use of a chattel may be the proximate cause of the injury.

[9] 2 TORTS RESTATEMENT, § 435 (1934); HARPER, LAW OF TORTS 258 (1933); Washington & Georgetown R. R. v. Hickey, 166 U. S. 521, 17 S. Ct. 661 (1897); Szymanska v. Equitable Life Ins. Co., (Del. Super. 1936) 183 A. 309; Shayne v. Coliseum Bldg. Corp., 270 Ill. App. 547 (1933); cf. Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).

[10] 2 TORTS RESTATEMENT, § 315 (1934); Wichita Valley R. R. v. Minor, (Tex. Civ. App. 1936) 100 S. W. (2d) 1071.

[11] McLaughlin, "Proximate Cause," 39 HARV. L. REV. 149 at 159 (1925); Garis v. Eberling, 18 Tenn. App. 1, 71 S. W. (2d) 215 (1934); Hogan v. Comac Sales, 245 App. Div. 216, 281 N. Y. S. 207 (1935), affd. 271 N. Y. 562, 2 N. E. (2d) 695 (1936); McWhorter v. Dahl Chevrolet Co., 229 Mo. App. 1090, 88 S. W. (2d) 240 (1935).

[12] Milks v. McIver, 264 N. Y. 267 at 269, 190 N. E. 487 (1934).