Michigan Law Review

Volume 49 | Issue 2

1950

NEGLIGENCE-PROXIMATE CAUSE-FORESEEABILITY OF NEGLIGENT INTERVENING ACT

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NEGLIGENCE—PROXIMATE CAUSE—FORESEEABILITY OF NEGLIGENT INTERVENING ACT—Plaintiff's intestate purchased from Montgomery Ward & Company a gas water heater which had been manufactured by a third party. The heater was installed by defendant Rulane Gas Company. It worked satisfactorily for fourteen months until the flame went out due to unknown causes. Deceased notified the defendant, and sixteen hours later it sent a repairman to investigate the trouble. He descended to the basement with deceased and struck a match in disregard of a warning not to do so. An explosion followed in which both deceased and the repairman were killed. Investigation showed that the "automatic cut-off" valve was defective, allowing gas to flood the basement after the flame had gone out. After the commencement of this suit by plaintiff, defendant filed a cross-complaint against Montgomery Ward & Company, alleging negligence in failing to inspect the heater and thus failing to determine that it had a defective cut-off valve. The jury returned a verdict against defendant for $25,000 and against the cross-defendant for $12,500. *Held,* judgment reversed as against cross-defendant Montgomery Ward & Company on the ground that the intervening negligence of the defendant was not foreseeable and made cross-defendant's negligence the remote and not the proximate cause of the injury. *Rulane Gas Co. v. Montgomery Ward & Co.,* (N.C. 1949) 56 S.E. (2d) 689.[1]

The question of what will constitute "insulating" negligence so as to cut off liability for an actor's negligent conduct appears to be one of the most elusive concepts in the law of torts. The rules are easily stated, but great difficulty arises in their application to the sets of facts before the courts. If the negligence of two or more persons concurs in contributing to an accident, the injured person may hold them jointly and severally liable.[2] The requirement of "concurring"

[1] A serious question arises as to whether Montgomery Ward & Company was actually under a duty to inspect the sealed automatic cut-off valve. The TORTS RESTATEMENT §402 (1948 Supp.) reversed its previous stand and now takes the position that the vendor of chattels of this nature manufactured by third parties is not under a duty to inspect. An illustration very similar to the facts of the instant case is set forth therein at p. 717: "A, a wholesale distributor, sells to B, a retail vendor, who in turn, sells to C, a defective gas heater, obtained from a reputable manufacturer and which A and B believe to be in perfect condition although they have not inspected it. The heater when used emits poisonous fumes, harming C. Neither A nor B is liable to C." It was held in O'Rourke v. Day and Night Water Heater Co., Ltd., (Cal. App. 1939) 88 P. (2d) 191 that a manufacturer was under no duty to inspect the sealed apparatus of the safety valve manufactured by another company.

[2] Buda v. Foley, 302 Mass. 411, 19 N.E. (2d) 537 (1939); Oviatt, Admr., v. Garretson, 205 Ark. 792, 171 S.W. (2d) 287 (1943); Buckeye Irrigation Co. v. Askren, 45 Ariz. 566, 46 P. (2d) 1068 (1935); Northern Texas Utilities Co. v. Floyd, (Tex. Civ. App. 1929) 21 S.W. (2d) 6; 1 SHEARMAN & REDFIELD, NEGLIGENCE, rev. ed., §39 (1941); TORTS RESTATEMENT §439 (1934).

negligence would seem to be met without difficulty here. By the nature of the defect, it became manifest only when the flame went out, and as a natural consequence, gas continued to flow and flood the basement up to the time of the explosion. But the rule is qualified by the requirement that the intervening negligent act must have been "reasonably foreseeable."[3] It is this point which appears to have given the courts the greatest difficulty. Even though it is often said that proximate cause is usually a question for the jury,[4] the appellate courts have frequently deemed it advisable to determine themselves whether a specific intervening act of negligence was foreseeable. The decision in the principal case that the negligent act of the repairman was not foreseeable finds some support in several analogous cases,[5] but due to the circumstances of this case the wisdom of the decision is open to question. If an automatic cut-off valve is defective, it is certainly foreseeable that an explosion of some sort might occur. The *Restatement of Torts* takes the position that an intervening negligent act does not break the causal chain where a reasonable man, knowing the situation existing when the act of the third person was done, would not regard it as highly extraordinary that the third person had so acted.[6] Can it be said that a negligent act of this type is *highly* extraordinary in view of the nature of the defect? The trial court instructed the jury as to foreseeability in terms which seem to be even more favorable to cross-defendant than the position taken by the *Restatement*: " . . . the liability . . . will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not."[7] Having found that the intervening negligent act was foreseeable under the trial court's instruction, it would seem that, a fortiori, the jury would find foreseeability under the *Restatement* test. Under the instruction, the jury could have found the act unforeseeable if they considered it extraordinary, while the *Restatement* test would have required them to find that the act was highly extraordinary. The court put much stress on the fact that fourteen months had elapsed between the time of the sale and the explosion. Again, due to the nature of the defect, time should have no bearing on the foreseeability, for the defect became manifest and dangerous only when the flame ceased to burn. The negligence of the cross-de-

[3] Salt River Valley Water Users' Assn. v. Cornum, 49 Ariz. 1, 63 P. (2d) 639 (1937); Rankin v. S. S. Kresge Co., (D.C. W.Va. 1945) 59 F. Supp. 613; Ayers v. Atlantic Greyhound Corp., 208 S.C. 267, 37 S.E. (2d) 737 (1946); 1 SHEARMAN & REDFIELD, NEGLIGENCE, rev. ed., §38 (1941).

[4] Ashby v. Philadelphia Electric Co., 328 Pa. 474, 195 A. 887 (1938); Conowingo Power Co. v. State of Maryland, (4th Cir. 1941) 120 F. (2d) 870; 1 SHEARMAN & REDFIELD, NEGLIGENCE, rev. ed., §43 (1941).

[5] Seith v. Commonwealth Electric Co., 241 Ill. 252, 89 N.E. 425 (1909); Hubbard v. Murray, Adm., 173 Va. 448, 3 S.E. (2d) 397 (1939); Stultz v. Benson Lumber Co., 6 Cal. (2d) 688, 59 P. (2d) 100 (1936). Reaching the result that the intervening negligent force is foreseeable: The W. D. Anderson, (D.C. Pa. 1937) 17 F. Supp. 754, affirmed, (3d Cir. 1937) 94 F. (2d) 377; Rankin v. S. S. Kresge Co., supra note 3; Brewer v. Town of Lucedale, 189 Miss. 374, 198 S. 42 (1940).

[6] TORTS RESTATEMENT §447(c) (1934).

[7] Record of principal case on appeal, p. 208.

fendant would seem to meet the "concurrently operating" test, and in view of the nature of the defect, it is submitted that the action by the court in ruling as a matter of law that the intervening negligence was not foreseeable was an unwarranted invasion of the province of the jury.

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