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NEGLIGENCE — AUTOMOBILES — ILLEGAL PARKING — DOES NEGLIGENCE OF SECOND ACTOR RELIEVE ORIGINAL TORT-FEASOR OF LIABILITY?— Plaintiff brings action for personal injuries sustained when the car of defendant *P*, negligently driven, struck the rear of the car of defendant *R*, which was parked on the highway in violation of the Pennsylvania Vehicle Code. The lower court gave verdict and judgment for plaintiff against both defendants. Defendant *R* appeals. *Held*, reversed, and judgment entered for defendant *R*. In order for defendant *R* to be liable it must appear that his illegal parking was a concurrent cause of the accident; and in cases which involve illegally parked vehicles the Pennsylvania courts have adopted the following rule as the test of proximate cause:

> "... Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties." [1]

The evidence in this case indicates that the defendant *P* was sufficiently aware of the danger created by defendant *R's* illegal parking to have avoided the accident by the exercise of due care. *Venorick v. Revetta*, (Pa. Super. Ct. 1943), 33 A. (2d) 655.

A majority of the courts hold a defendant liable for the direct consequences of his negligence, regardless of foreseeability. For the indirect results of his negligent conduct he will be held only if the consequences or the intervening

[1] Kline v. Moyer, 325 Pa. 357 at 364, 191 A. 43 (1937).

force were foreseeable to an ordinary man. This, as Prosser says,[2] is a rule based on policy and practicality rather than upon logic. The basis for it is the practical reason that liability for negligence must stop somewhere. The courts have adopted this rule in seeking a middle ground between absolute liability and elimination of all responsibility for indirect consequences of defendant's negligence. Section 447 of the *Restatement of Torts* suggests that the first negligent actor might not reasonably be expected to foresee an act of negligence committed by a third party after he has acquired knowledge of the danger created by the first tort-feasor. By applying this view, the instant case may still be reconciled with the doctrine of liability for indirect results of one's negligence if they are forseeable consequences or if the subsequent intervening factor is forseeable in that it may be deemed not foreseeable that defendant *P* would fail to exercise due care after becoming aware of the dangerous condition created by defendant *R*. Except upon this basis, however, the Pennsylvania court is at least in partial conflict with the almost universal rule set forth in the *Restatement of Torts*.[3] It seems to have adopted a modification of the last human wrong-doer rule [4] in the principal case and the cases upon which this case is based.[5] It does not say that in all instances the intervening negligence of an independent actor insulates the negligence of the first tort-feasor and breaks the causal chain, but seeks to draw still another distinction than either the last human wrong-doer

[2] PROSSER, TORTS, Hornbook series, 341 (1941).

[3] TORTS RESTATEMENT, § 447 (1934). Negligence of Intervening Acts.

"The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act . . ."

[4] Attributed to Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (1806) and advocated by Wharton.

[5] Kline v. Moyer, 325 Pa. 357, 191 A. 43 (1937); Schwartz v. Jaffe, 324 Pa. 324, 188 A. 295 (1936); Hoffman v. City of McKeesport, 303 Pa. 548, 154 A. 925 (1931); Stone v. Philadelphia, 302 Pa. 340, 153 A. 550 (1931).

In tracing back the decisions upon which Venorick v. Revetta is based, through Kline v. Moyer to Stone v. Philadelphia, the first in this line of reasoning, the latter decision purports to be based upon Thubron v. Dravo Contracting Co., 238 Pa. 443, 86 A. 292 (1913) and upon WHARTON, LAW OF NEGLIGENCE (1878). In the Thubron case, defendant failed to erect barrier and plaintiff's runaway horse went over the embankment. The court held defendant not liable but seemed to base its decision on the foreseeability test, rather than on the last human wrong-doer rule. Schaeffer v. Jackson Twp., 150 Pa. 145 at 149, 24 A. 629 (1892), which the court cites in the Thubron case, says, "It is a general rule . . . that a man is responsible for such consequences of his fault as are natural and probable, and might therefore be seen by ordinary forecast."

These early decisions seem to adopt the foreseeability test of liability although the court is not always definite in stating the bases. It is difficult to see then where the court derived its doctrine except from the last human wrong-doer theory in Wharton. Wharton illustrates it thus: "I am negligent . . . Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence . . ." WHARTON, LAW OF NEGLIGENCE, § 135, p. 110 (1878).

or the foreseeability tests of causation in law. The criterion is apparently whether the second negligent actor saw the danger created by the first tort-feasor in time to have avoided the accident by the exercise of due care.[6] If so, his negligence insulates that of the first party, even though a jury might have found that the intervening factor and the resulting injury to the plaintiff were foreseeable. If not, then as suggested in *Stone v. Philadelphia*, "there might arise a different legal liability situation." [7] Arbitrary as it may be from the standpoint of logic, the foreseeability test would seem to have more to recommend it than the Pennsylvania doctrine of causation adopted in the instant case. Defendant is here released from liability even though the very thing occurred which the legislature must have contemplated might happen, and sought to guard against when it enacted the statute making it unlawful to park on the highway. The defendant should not be relieved from liability when the very risk which he has in part created and to which he has subjected the plaintiff comes to pass. The courts of other states do not seem to consider the kind of negligence involved, and indeed to do so seems to be splitting hairs. Why should it make any difference in defendant's liability for creating a condition of potential danger whether the second actor's negligence is conscious or unconscious, if it is a negligence that should have been foreseeable to defendant when he created the condition? [8] As a result of this unfortunate doctrine, two lines of cases have developed in Pennsylvania, very similar on their facts, but almost directly contradictory in their decisions. An almost parallel line of Pennsylvania cases has followed the foreseeability theory of liability for indirect results of negligence.[9] The court in the instant case ignores these decisions.[10] However, a tendency to abandon its last human

[6] In Kline v. Moyer, 325 Pa. 357, 191 A. 43 (1937), defendant Albert's truck broke down and he left it standing with all four wheels on the concrete while he went for aid. The truck was unguarded and insufficiently lighted. The court cites numerous cases in which recovery was allowed against the first tort-feasor when a second person's negligence was the immediate cause of the injury to the plaintiff, but contends at p. 363 that "in all of them the operator of the moving car through negligence . . . failed to see the standing truck and consequently was unable to avert the accident; whereas in the *Stone* case, the *Hoffman* case and the *Schwartz* case, the accident was due to a negligent failure of the driver to see the obstruction before being committed to a situation which made the accident inevitable, but was caused by an independent act of negligence . . . *after* he had become aware of the presence of the defect in the highway."

[7] Stone v. City of Philadelphia, 302 Pa. 340, 153 A. 550 (1931).

[8] Lane v. Atlantic Works, 111 Mass. 136 at 141 (1872), where the court said,

"It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against."

[9] In a comprehensive article in 86 UNIV. PA. L. REV. 121 (1937) "Culpable Intervention as a Superseding Cause," Laurence Eldredge discusses the self-contradicting stand of the Pennsylvania courts as to the liability of the first tort-feasor for damage which results from a combination of his negligence with the subsequent independent negligence of a third person.

[10] In Burrell Township v. Uncapher, 117 Pa. 353 at 363, 11 A. 619 (1887), where a frightened horse went over an embankment which defendant township should have protected with a railing, the court held the township liable saying, "Their duty is

wrong-doer rule is evidenced in the distinction formulated in *Kline v. Moyer* and applied in the instant case. The criterion adopted seems a rather arbitrary one; a compromise doctrine formulated by a court which is trying to reconcile two inherently contradictory theories.[11]

irrespective of the duty of others, and for its breach they are responsible whether others are responsible for another violated duty or not." In Trusty et ux. v. Patterson et al., 299 Pa. 469, 149 A. 717 (1930) where defendant was negligent in renting an automobile with defective brakes and driver also knew of the condition of the brakes, *P* was injured because of the defective brakes. *Held*, *P* could recover from defendant who rented the car to the driver.

In Koelsch et al. v. Philadelphia Co., 152 Pa. 355 at 364, 25 A. 717 (1893), defendant was negligent in construction of a gas main, plaintiff's servant lit a match and an explosion occurred. "The concurrence of the presence of the gas and the lighting of the match, the negligence of the defendant with that of Walters, was necessary to and did cause the explosion. In such cases the injured party has his redress against either of the wrong-doers, or both, at his election."

[11] The hope expressed by Mr. Eldredge on p. 133 of his article cited note 9, supra, that the Pennsylvania court would accept the criterion of the American Law Institute TORTS RESTATEMENT (1934) appears not yet to have been realized, with the decision in the instant case following religiously the doctrine of Kline v. Moyer, 325 Pa. 357, 191 A. 43 (1937). Illogical as the distinction may be, it is, as Mr. Eldredge intimates, a step in the right direction and a departure in some degree from Stone v. Philadelphia 302 Pa. 340, 153 A. 550 (1931), and the last human wrong-doer rule.