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Torts–Intervening Cause–Liability of Original Tortfeasor for Subsequent Damages to Property by a Repairman

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CASE COMMENTS

that the nature and extent of the risk are fully appreciated; and second, that it is voluntarily incurred. It was formerly confined by many courts to cases where a contractual relation existed. That limitation is generally no longer regarded.”

Thus, assumption of risk consists of a mental state of willingness and knowledge, whereas contributory negligence is a matter of conduct. Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943); Peoples Drug Stores v. Windham, 178 Md. 172, 12 A.2d 532 (1940).

Assumption of risk can arise out of contract by express agreement or may be implied from the action and conduct of the parties. As there was no contractual relation in the principal case, then if the defense existed it arose by implication. Professor Prosser states that assumption of risk whether it be express or implied means: “By entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it and to agree that he will look out for himself and relieve the defendant of responsibility.” Prosser, Torts § 55 (2d ed. 1955).

It would seem, therefore, that this statement would be qualified to the extent that if the defendant is guilty of gross negligence, the plaintiff will not be held to have assumed the risk since gross negligence, in the ordinary case, is seldom anticipated, and it is clear that unless it definitely appears from the plaintiff’s words and conduct that he does consent to relieve the defendant of his obligation to act toward the plaintiff as a reasonable man he will not be held to have assumed the risk. Ridgeway v. Yenny, 228 Ind. 16, 57 N.E.2d 581 (1944). Thus, since D’s negligence in the principal case may be said to have approached gross negligence, then it may be said P did not assume the risk.

While the court reached a just verdict, the distinction between D’s two principal defenses could have been more clearly indicated.

G. H. A.

TORTS—INTERVENING CAUSE—LIABILITY OF ORIGINAL TORTFEASOR FOR SUBSEQUENT DAMAGES TO PROPERTY BY A REPAIRMAN.—D chartered a barge from P, a barge owner. During the period of the charter the barge was damaged through the negligence of D in navigating through ice floes encountered during a journey. P and D agreed that the barge should be delivered to a drydock where it was to be repaired. Five days after redelivery, while the barge was being placed in drydock, cakes of ice became lodged, through
the negligence of a third party, the drydock company, between the scow bottom and the drydock. As a result, when the barge was brought out of the water, ice penetrated the scow's bottom causing additional damage. P brought an action against D for all the damage to the barge. The District Court denied recovery against D for the additional bottom and side damage. Held, that D was not liable for the additional damages sustained by the barge during the drydocking for repair, after the termination of the charter upon redelivery, since such damage was not proximately caused by the prior conceded negligence of the characters but rather by the intervening negligence of the third party. Exner Sand & Gravel Corp. v. Petterson Lighterage & Towing Corp., 258 F.2d 1 (2d Cir. 1958).

Of all the problems dealing with causation in negligence cases, the problem of intervening cause has perhaps presented the most perplexing problem. A tortfeasor is liable only for the damage or injury proximately caused by his negligent act. Cleary Bros. v. Port Reading R.R., 29 F.2d 495 (2d Cir. 1928). Where the negligent act of a third party intervenes between the act of the original tortfeasor and the damage to the person or property of the plaintiff the original wrongdoer will only be relieved of liability if such intervening cause could not reasonably have been foreseen; or as otherwise stated, if the intervention was one which was not the normal incident of the risk created. Prosser, Torts § 49 (2d ed. 1955); Cleary Bros. v. Port Reading R.R., supra. In the instant case, the court in applying the tests of legal causation to the facts, held that there was no such causal relationship between D's negligence and the damage which occurred when the barge was being repaired at the drydock which would fasten legal liability on D. In so holding the court rejected P's contention which was based on the proposition that a defendant who has wrongfully caused personal injuries is liable for any aggravation thereof, immediately caused, negligently or otherwise, by a physician in the treatment of injuries. Lane v. Southern R.R., 193 N.C. 287, 134 S.E. 855 (1926); Thompson v. Fox, 326 Pa. 209, 192 Atl. 107 (1937). The court makes a distinction between those situations where personal injuries necessitating treatment by a doctor were caused by a defendant, and the situation involving repairs to property. The basis for distinguishing cases involving intervening negligence of a third party resulting in personal injury and those resulting in property damage is that the risk of aggravated personal injury is inherent in the
services of a physician and it is readily foreseeable that such services will be forthcoming when persons are injured; however, when property has been damaged, the risk of "human fallibility" is not normally recognized as inherent in the services of a repairman. Pound, *Causation*, 67 Yale L.J. 1, 13 (1957).

The majority of the court relies on the decision in Cleary Bros. *v.* Port Reading R.R., *supra*, for the proposition that "ordinarily the first wrongdoer is not held responsible for damages which result both from his own negligence and that of a subsequently intervening third party, unless the latter's negligence was such as the first wrongdoer might reasonably have expected to occur."

In the *Lane* case, *supra*, the court applied the general rule that the wrongdoer is liable for any injury which is the natural and probable consequence of his misconduct, and permitted damages upon the principle that when an intervening act is made necessary by the act of the wrongdoer, he is liable for additional damages resulting therefrom, upon the theory that such damages are the natural and probable consequences of his act.

West Virginia, in *Washington v. Baltimore & O. R.R.*, 17 W. Va. 190 (1880), has recognized that in cases where the causal connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible third party, there is no right of action against the original wrongdoer. On the other hand, in those cases where a person has been injured by the negligence of another and the injuries are subsequently aggravated by the negligent or improper treatment of a physician, the original wrongdoer who caused the injury is liable for the resulting damage. In such case the negligence of the wrongdoer in causing the original injury is regarded as the proximate cause of all the resulting damage. *Makarenko v. Scott*, 132 W. Va. 430, 55 S.E.2d 88 (1949).

In the instant case, the dissenting opinion takes the view that the risk of subsequent damage by treatment or repair is as inherent in the situation involving property damaged by an original wrongdoer as in those cases involving personal injuries. The rationale of the decisions which have held the original negligent tortfeasor liable for injuries by treatment has been set forth in the *Makarenko* case, *supra*, wherein the view was advanced that the improper medical treatment is a result which should reasonably have been anticipated by the wrongdoer. The wrongdoer is presumed to know that medical treatment is necessary to the recovery of an injured person and
is chargeable for the hazards of such services. The aggravation caused by the unskillful treatment of a doctor would not have occurred if there had been no original injury and the aggravation is regarded as the proximate result which naturally flows from the original injury.

It is possible that the instant case may be cited as affirming a limitation on the liability of the original tortfeasor for the subsequent repair of property. The problem of causation is one of ascertaining the ambit of the risk created by the defendant. Pound, *Causation*, 67 *Yale* L.J. 1, 18 (1957). In the *Cleary* case, supra, the court recognized that it is the probability of the occurrence of the intervention of another conscious agent which is material. It is submitted that the test of liability should be foreseeability of the intervention and not whether it involves personal injury or property damage.

A. G. H.

ABSTRACTS OF RECENT CASES

**Conflict of Laws—Full Faith and Credit—Judgment of a Sister State.**—Ds, West Virginia residents, in purchasing a house trailer, had given P, a Pennsylvania corporation, a promissory note authorizing a confession of judgment in the event of a default of payment. When Ds became delinquent in an installment, P's agent requested that Ds sign a release on the trailer, and he orally promised that such release would end the transaction between the parties. After obtaining the signatures, P brought an action in Pennsylvania on the note, and obtained a judgment against Ds pursuant to the provisions of the note. P then instituted an action in debt on the judgment in West Virginia. Upon the court's refusal to give the judgment full faith and credit under U.S. Const. art. 1, § 4, because the judgment had been obtained through fraud, P appealed. Held, that a judgment in a court of record of a sister state will not be given full faith and credit where it is shown that the judgment was procured through fraud. *Consumer Credit Co. v. Bowers*, 104 S.E.2d 869 (W. Va. 1958).

The full faith and credit clause does not preclude a court from impeaching the validity of the judgment of a sister state. *Crover v. Baker Sewing Machine Co.*, 137 U.S. 287 (1897); *Bonnet-Brown Sales Service v. Utt*, 323 Mo. 589, 19 S.W.2d 888 (1929).