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THE DOCTRINE OF INTERVENING CAUSE IN THE LAW OF NEGLIGENCE.

VICTOR I. MINAHAN, OF THE GREEN BAY BAR

The determination of whether certain facts present a “cause” or merely a “condition” in the train of causation which has resulted in an injury, determines very often to whom will go the judgment. The term “cause” has been used so much as a football on the field of negligence that misunderstandings have arisen as to the precise meaning of legal rules for the government of a certain class of cases.

I would present herein situations and decisions which appeal to me as interesting and instructive and in which the determination of the successful party is based upon a conclusion that the particular act under discussion was either a “cause” of the damage or a “condition” present at the time of the injury. With respect to some of these decisions, it may safely be said that there is no appreciable diversity of opinion among the courts of the United States in announcing rules of law nor in their application; that, in fact, there could hardly be more harmonious holdings; and yet, withal, there is a constant, persistent and never-ending presentation of arguments, quite shoddy and shopworn, by the defendants in those cases, which makes it a not inadvisable thing for the practitioner to be certain of his footing.

I. The simpler class of these cases, those most often recurring and by that token most often presented to the appellate courts, arises where negligence on the part of a defendant is clearly established, but there is present in the story of the injury something done by or happening to the injured person that may be apprehended as likely to occur and yet as not usually happening. This includes unmanageable action of horses in backing into a defective condition of highway (Olson vs. Chippewa Falls, 71 Wis. 558); fright of horses at an approaching train (Michaels vs. Co., 146 Wis. 466); the breaking of a bit in an attempt to lead horses by an obstruction (Cairncross vs. Pewaukee, 86 Wis. 181); defective axle in separator breaking in a defect in the highway (Dreher vs. Fitchburg, 22 Wis. 675); oil on floor causing a slip onto unguarded machinery (Yess vs. Co., 124 Wis. 406); slipping or stumbling of the injured person from any non-negligent cause and thus being precipitated into immediate touch with the defend-
In all of the foregoing cases, as a prerequisite, of course, to recovery, the injured person had established a lack of ordinary care upon the part of the defendant, and the defendant had then, in seeking to escape liability, put forth the claim that the unmanageable action of the horses, or the fright of the horses, or the breaking of a bit in a harness, or the defective axle, or the slip or stumbling of the injured person, had been, in fact, the cause of the injury. The argument was advanced that without the occurrence of any one of these things in the cases mentioned, no injury would have resulted. That was the truth. Liability upon the part of the defendant, however, was upheld because in each instance the unusual thing which occurred and gave the negligence of the defendant opportunity to become effective could not reasonably be ascribed to any fault upon the part of the injured person; neither was it a thing so outside the range of human probability as not reasonably to be apprehended as likely to occur at any time, and yet no injury would ever have resulted without the negligence of the defendant. In the early decisions of our own court, as well as elsewhere, and particularly in many standard text-books, the accident, such as the slipping, stumbling, etc., which has entered and become a part of the train of events resulting in the injury, has been loosely denominated as a cause of the injury, sometimes as an intervening cause. This is not accurate. It is no more a cause of the injury, in a legal sense, than the presence of the injured person at the place of accident. In the clear language of Mr. Justice Dodge:

"While the plaintiff states that, but for the slipperiness, he and his companion could probably have held the car, notwithstanding the conduct of the foreman, yet that it was the sudden pressure against him resulting from such conduct which caused him to slip. There could hardly be a plainer case of an existing condition in face of which acts of carelessness were likely to be injurious, so that those acts should be held to be the legal cause, rather than the slippery condition of the ground, which constituted merely one of the surrounding circumstances and conditions."

_Hardt vs. Ry. Co., 130 Wis. 512, 520._
INTERVENING CAUSE IN NEGLIGENCE

So a little later, in the equally clear language of the present Chief Justice:

"The accidental and non-negligent slip or fall resulting from the edging coming along the live rollers crosswise and hitting the plaintiff's foot, is not properly an element in the causation. It is simply a condition or circumstance to be expected in the natural order of things as liable to occur at any time."

Koutsky vs. Lbr. Co., 146 Wis. 425, 432.

It is plain, therefore, that where an injury is the result of negligence upon the part of the defendant, but would not have been brought about were it not for some accident for which neither party is responsible, the occurrence of such accident does not relieve the defendant from liability, for the very good reason that the accident itself is not a cause of the injury, nor is it in any sense an intervening cause, but is merely a circumstance attending the injury, and, like any other circumstance in attendance at the time, properly denominated a "condition."

I have not written the foregoing as a mere play upon the words "cause" and "condition," but because, in a legal sense, it cannot be accurately said that any one or more of the various events which bring a person to his injury is a cause of that injury, unless the event was a negligent one; and, unless the act or event is clothed in negligence, it remains merely an act, an event, a condition or circumstance, as you please, and therefore without effect upon liability. When negligence of a defendant is clearly established, the solution of the question of liability, to quote Mr. Justice Siebecker, "depends upon whether, under the circumstances, the injuries would have resulted except for defendant's negligence. If it is shown that the resultant injuries would not have occurred had the defendant's negligence not been involved in the accident, then we are logically led to the conclusion that the negligence was the real producing cause of the injurious consequences. Under such circumstances, the fact that other conditions and events, not the result of plaintiff's fault, were involved does not relieve the negligent defendant from responsibility."

Winchel vs. Goodyear, 126 Wis. 271, 276.

2. There is another class of cases in the domain of negligence, of less frequent occurrence than those just discussed, but
embodying the action of the same principles of law. I refer to
the cases where the negligence of the defendant is established as
a proximate cause of the injury, but where there is likewise in
the case some act of Nature of such infrequent occurrence as to
be designated extraordinary, or an act of God. This includes that
class of cases involving lightning, floods and windstorms of un-
precedented velocity. There have been in common use loose ex-
pressions to the effect that an act of God involved in an injury
is such an intervening cause, when once established, as to relieve
a negligent defendant of liability. That is wholly inaccurate.
The same rule of law applies as was applied in the cases men-
tioned in the first paragraph herein; that is to say, when it clearly
appears that a defendant has been guilty of negligence and a
plaintiff free from negligence, the defendant must respond in
damages, even though an act of God was one of the train of events
leading up to the injury, so long as it can be satisfactorily said
that, without the negligence of the defendant no injury would
have occurred. In common parlance, this means that a defendant
cannot exculpate himself from liability by the claim that the in-
jury is an act of God, so long as the injury would not have oc-
curred without the negligence of the defendant. Just so long as
the defendant’s negligence is a proximate cause of the injury, it
cannot be truly nor accurately said that an act of God is a cause
or the cause of the injury; but, in a legal sense, the act of God
must be treated as a condition present at the time of injury and
of no other or different consequence than had it been absent.
The student of this subject will find interesting reading in the
following cases: Jackson vs. Wisconsin Telephone Co., 88 Wis.
243; Brown vs. Coal Co., (Iowa) 120 N. W. 732; Clark vs. Public
82 S. E. 502; Bogart vs. Ry. Co., (N. Y.) 40 N. E. 17; Ulrick
vs. Dakota Co., (S. D.) 51 N. W. 1023; Booker vs. Ry. Co.,
(Mo.) 128 S. W. 1012; Goddard vs. Ry. Co., 143 Wis. 169;
O’Connor vs. Ry. Co., 163 Wis. 653.
The reasons underlying all of the decisions in the foregoing
cases, as announced by the courts deciding them, are not always
the same. They range from the conclusion that a defendant must,
under some circumstances, anticipate even a so-called act of God,
such as lightning (Jackson vs. Wis. Telephone Co., supra), to the
conclusion, which I think should underly all these decisions, that
“if defendant had done that which reasonable care and foresight

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dictated it should do, plaintiffs would not have been injured, even though the rain was so extraordinary that the sending of it must be considered as an act of God." (Atkinson vs. Ry. Co., supra.) A close analysis of the facts of these cases, and of other cases as well, will disclose the studied purpose upon the part of the courts not to be misled by the easy attempt of defendants to shoulder responsibility upon God or Nature or accident, but to hold that a liability exists when it is clear that it was human intervention, and not the intervention of the Almighty, that primarily caused the injury; or, in other words, that a liability devolving upon a person for a failure to use reasonable human foresight, pains and care which has resulted in injury to another cannot be evaded because some unusual act of Nature was in the train of causation.

Not infrequently it will be claimed that the doctrine of Cook vs. Ry. Co., 98 Wis. 624, is at variance with what has been said heretofore. The rather cumbrous language of that opinion does not aid in determining what was there decided, but a close study of the case will satisfactorily demonstrate that the principles there adopted by the Supreme Court of Wisconsin are in full accord with what has been decided in the other cases cited. The defendant in that case had negligently set a fire upon its right of way and negligently allowed the same to spread therefrom. Another fire was burning in the vicinity, of unknown origin. A sudden change of wind brought the fire of unknown origin towards the property of the plaintiff, and, joining with the fire negligently set by the defendant, destroyed the property of the plaintiff. The plaintiff's property was, therefore, destroyed by a fire which was the union of the fire negligently set by the defendant and a fire of no responsible origin. It was clearly established in the case that the fire of unknown origin, operating entirely and absolutely independently of the defendant's negligence and regardless of the defendant's negligence, would have destroyed the property of the plaintiff. In other words, it appeared that the fire of unknown origin would, beyond doubt, without relation to defendant's negligence and entirely without regard to it, have destroyed the plaintiff's property. It was an overwhelming agency that was coming upon the plaintiff's property and was bound to destroy the same, whether the defendant was negligent or not. The property of the plaintiff lay in its path and was doomed. Any act of the defendant was powerless to thwart it, and whether or not it aided
it infinitesimally was held to be of no consequence, since the injury was bound to happen anyway. In other words, independently of the defendant entirely, in spite of all the defendant might do to prevent it, and regardless of anything the defendant might do to hasten it or aid it, the plaintiff's injury was a certainty. It was bound to happen. This differentiates the Cook case from the other cases herein, although it affects not the principles set forth.

3. The question presented in all these cases is: Would the injury have happened were the defendant guilty of no negligence? Liability was predicated in all of the cases cited, except the Cook case, because that question was necessarily answered in the negative; and because that question brought forth an affirmative answer in the Cook case, it required, of course, a judgment of non-liability. The Cook case does not decide that an act of God or some overwhelming catastrophe of unknown origin relieves a negligent defendant, but does decide that in that particular case the defendant was not guilty of any negligence which became a proximate cause of the injury to the plaintiff, because an overpowering disaster, sufficient and certain to cause the injury without any negligence of the defendant, preceded or accompanied the defendant's negligence, and therefore that, even had the defendant been not negligent, the same injury would have resulted.