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Torts: The theory of "Subsequent Negligence"

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ing to contain the plaintiff's name as producer as required by contracts with the exhibitors who brought such advertising material from the defendant, an injunction was granted on the theory that the manufacturing and distributing of the inferior material for the purpose of being used in a manner which violated exhibitors' contracts was a direct inducement of breach. *Paramount Pictures* v. *Leader Press,* 106 F. (2d) 229 (C.C.A. 1939).

One question raised in the principle case of *Wilkinson* v. *Powe, supra,* is not answered satisfactorily by the court, nor does there seem to be any decision directly in point. In that case the plaintiff actually breached the contract, yet was allowed to recover against defendant for inducing the farmers to breach their contracts with the plaintiff. In all other cases cited, as in *Knickerbocker Ice Co.* v. *Gardiner Dairy Co.,* 107 Md. 556, 69 Atl. 405 (1908) cited in the principal case as having almost analogous facts, the actual breach was not by the party bringing the action. The language of *Aalfo Co., Inc.* v. *Kinney, supra,* might be extended to fit the situation, where the court says that the act of third persons in maliciously and without legal justification preventing performance of a contract by a party who was willing to perform would make such third persons liable in damages to either contracting party that suffers injury as the direct result of such act. In *Wilkinson* v. *Powe* the plaintiff suffered injury as the direct result of the defendant's act in being forced to breach his contract with the farmers.

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Torts—The Theory of "Subsequent Negligence."—Plaintiff, while crossing a street at an intersection which was regulated by traffic lights, was struck by the left fender of defendant's auto. The street runs east and west and plaintiff was crossing from north to south on the east side of the intersection. Plaintiff used the crosswalk and looked at the traffic lights before crossing. The light was in plaintiff's favor so plaintiff started to cross. Plaintiff proceeded across the street without any further observation of traffic or traffic lights. While plaintiff was crossing, the traffic light changed. When in about the center of the street, defendant's auto, coming from the west, struck plaintiff. The lower court instructed the jury that if the light changed while plaintiff was crossing the street, she continued to have right to pass to the other side of the street before defendant could start his car in such a way and to such an extent as to collide with her. The jury returned a verdict for plaintiff and judgment was rendered accordingly.

On appeal, *held,* judgment reversed, the trial court's instructions being erroneous in that they suspended the duty of plaintiff to use reasonable care after starting across street. Plaintiff, in an attempt to have judgment affirmed, argued that defendant was guilty of subsequent negligence. In refuting plaintiff's attempt to apply the doctrine of subsequent negligence, the Michign Supreme Court spoke as follows: "To apply the theory of subsequent negligence, the plaintiff's negligence must have come to rest and defendant must have discovered such negligence in time and with the ability to avoid the accident and have failed to do so." *Sloan* v. *Ambrose,* 1 N.W. (2d) 505 (Mich. 1942).

The theory of subsequent negligence provides for recovery on the part of the plaintiff, if, after placing himself in a position of peril, the plaintiff's negligence comes to rest and the defendant discovers such negligence in time and with ability to avoid injury to plaintiff and fails to do so.

Subsequent negligence of the defendant obviously becomes pertinent only when there is causal negligence of the plaintiff involved in the action. *Wells* v. *Oliver,* 283 Mich. 168, 277 N.W. 872 (1938); *Gallagher* v. *Walter,* 299 Mich. 69, 299 N.W. 811 (1941).

All jurisdictions applying the doctrine agree that the plaintiff's negligence must come to rest before defendant's negligence operates to cause injury to the plaintiff. For example, in *Butler* v. *Rockland, T. & C. Ry.,* 99 Me. 149, 58 Atl. 775 (1904), which is strikingly similar to the principal case, plaintiff was driving a covered delivery wagon, the cover extending so far forward that plaintiff couldn't see out at right angles without leaning forward. One of defendant's street cars was approaching as plaintiff came out of a yard with his wagon. Plaintiff neither saw nor heard any cars, bell or gong. The street car struck the wagon and plaintiff was injured. Plaintiff could have seen the car coming if he had taken the trouble to look. The court held that the negligence of the brakeman in failing to stop street car was not subsequent but contemporaneous with negligence of plaintiff. To the same effect are *Birmingham Ry., Light & Power Co.* v. *Aetna Accident & Life Ins. Co.,* 184 Ala. 601, 64 So. 44 (1913); *Routt* v. *Berridge,* 294 Mich. 666, 293 N.W. 900 (1940); *Heffelfinger* v. *Lane,* 239 Ala. 659, 196 So. 720 (1940).

The authorities differ on the question whether the defendant must have actual knowledge of the peril to the plaintiff or whether something less is sufficient to hold the defendant liable. The Michigan rule says that in a case where defendant, who knows or ought to know by exercise of ordinary care of the precedent negligence of plaintiff, by his subsequent negligence does plaintiff an injury, this amounts to "gross" negligence of defendant which will excuse contributory negligence of plaintiff. *Gibbard* v. *Cursan,* 196 N.W. 398 (Mich. 1923). On the other hand, in the case of *Srogi* v. *New York Central R. Co.,* 286 N.Y.S. 215, 247 App. Div. 95 (1936), the court stated: "It is important to note that, as applied in this jurisdiction, this doctrine (subsequent negligence) is predicated upon the knowledge of the peril being brought home as an actual fact to the person charged with the subsequent negligence. It is not sufficient to prove that the defendant ought to have discovered the deceased's perilous situation by the exercise of ordinary care. It is what the defendant did or failed to do after acquiring knowledge of the peril that constitutes the breach of duty." *Young* v. *Woodward Iron Co.,* 216 Ala. 330, 113 So. 223 (1927) is in accord with the latter view.

There is a distinction made in considering the nature of a defendant's negligence. In *Gibbard* v. *Cursan,* supra, plaintiff's intestate walking north on right side of highway a foot from edge of pavement was struck by a truck going north; the truck gave no warning till it was almost upon her. Deceased then became excited and ran in front of truck. The court held that the subsequent negligence of defendant would be considered gross negligence to enable the plaintiff to recover. But in the case of *Southern Ry. Co.* v. *Diffley,* 228 Ala. 490, 153 So. 746 (1934) where engineer had warning of deceased's perilous position and could have stopped the train in time, the court distinguished between subsequent negligence which is inadvertent failure to use all means at hand known to skillful engineers, in their proper order and effectiveness, to avert injury, and wantonness which is failure to use such means in their proper order and effectiveness accompanied by a conscious knowledge of consequences and reckless disregard thereof. Whether a real difference exists among different jurisdictions in this respect cannot be determined, however, until it is determined whether the jurisdictions involved have the same concept of what constitutes "gross" negli-

gence. The looseness with which the term is used is illustrated by *Gibbard* v. *Cursan,* supra, where the court said: "Such gross negligence is also sometimes called discovered negligence, subsequent negligence, wanton or willful or reckless negligence, discovered peril, last clear chance doctrine, and the humanitarian rule."

Subsequent negligence does not differ fundamentally from the last clear chance doctrine. For example, in an Alabama case where deceased was induced by defendant's agents to cross tracks while cars of a freight train were being coupled, it was held that the negligence in consequence of which deceased was subsequent to that of deceased, and therefore there was no opportunity to avoid negligence of defendant while defendant did have opportunity to avoid injuring deceased after his negligence, which may have been induced by defendant. The court held that this evidence made a clear case for the application of the doctrine of subsequent negligence or last clear chance. *Stanford* v. *St. Louis & S. F. R. Co.,* 163 Ala. 210, 50 So. 110 (1909). In *Srogi* v. *New York Cent.,* supra, the court said that last clear chance or the doctrine of subsequent negligence permits recovery by plaintiff who, by his own lack of care, may have placed himself or his property in a position of danger, provided there is proof of knowledge of plaintiff's peril by defendant in time to avoid injury complained of and a failure by defendant to use reasonable means to avert consequence of plaintiff's own negligence. There is one point on which subsequent negligence differs from last clear chance, namely, that the plaintiff's negligence must come to rest. Last clear chance is not emphatic on this point. In the case of *Iverson* v. *Knorr,* 298 N.W. 28 (S.D. 1941) where plaintiff in making a left turn into a filling station, angled across highway to driveway 100 feet ahead and was struck by defendant approaching on highway, the court held that the doctrine of last chance applies where negligence of defendant with actual knowledge of the situation in circumstances imposing upon him duty to realize the danger in time to avert the accident stands over against the continuing negligence of injured person without actual knowledge of the situation; but not where plaintiff's negligence with knowledge of situation and danger stands over against defendant's negligence also with such knowledge.

Wisconsin does not adhere to the doctrine of last clear chance or subsequent negligence. The case illustrating this point is *Switzer* v. *Detroit Investment Co.,* 188 Wis. 330, 206 N.W. 407 (1925). In this case the plaintiff negligently stepped into an elevator shaft; the operator in the car heard plaintiff's screams but descended anyway. The court held that plaintiff was barred from recovering because of contributory negligence on his part even though defendant was found negligent. The court specifically stated that for any change in such public policy resort should be had to legislative action. Today the absence of such doctrines in Wisconsin is immaterial in view of the comparative negligence law, sec. 331.045, Wis. Stat. (1941).

To understand the reason for the doctrine of subsequent negligence in Michigan it is necessary to consider the problem that faces the courts of that state. Michigan has no comparative negligence statute, so under the doctrine of contributory negligence plaintiff is barred from recovering if his negligence contributes to the cause of his injury. The courts realize that this situation often works injustice, so they seize upon the theory of subsequent negligence to balance the scales. On the other hand, the doctrine does not help a plaintiff where under accepted standards of justice he should not recover. For example, in *Richter* v. *Harper,* 95 Mich. 221, 54 N.W. 768 (1893) the court held that plaintiff could not recover damages when his museum was destroyed by a fire which

defendant negligently had set and which smouldered for two days before breaking forth, because plaintiff knew of the fire and his negligence in not doing something about it caused the destruction. It was held that contributory negligence of plaintiff doesn't prevent recovery in a case where defendant who knows or ought by exercise of the most ordinary care, to have known of precedent negligence of plaintiff, by his subsequent negligence does plaintiff an injury. The doctrine does not permit recovery *notwithstanding* plaintiff's contributory negligence, but it recognizes that such discovered negligence of plaintiff, or his negligence which should have been discovered, is not in a legal sense, a contributing cause to his injury.

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