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Torts -- Causal Relationship

James G. Billings

Torts—Causal Relationship

The existence of a causal relationship between defendant's act or omission and plaintiff's injury is an essential element in any negligence action.[1] In *Maharias v. Weathers Brothers Moving & Storage Company*[2] defendant used a room in his warehouse for refinishing furniture and had allowed rags soaked with inflammable liquid to accumulate in a corner. A fire started and spread to plaintiff's adjoining building. Expert testimony showed that the fire could have started by spontaneous combustion, but that it was possible that it had started from any one of a number of sources. The court affirmed a non-suit for insufficient evidence of the causal relationship. There were three distinct possibilities. The fire could have started (1) in the rags and from spontaneous combustion, (2) in the rags but from an outside source, or (3) at another place within the room and without fault on the part of the defendant. If defendant's liability was to hinge on whether the fire actually started in the rags, then perhaps the court was justified in refusing to allow the case to go to the jury since there was no way to determine exactly where the fire started. However, even if this be the case, it seems strongly arguable that the very fact that defendant allowed a condition to exist which created a risk of fire should, in itself, go far toward establishing the chain of causation. But why should the point at which the fire started be determinative? In a California case,[3] the defendant had stored large quantities of paint

[1] The traditional test which courts have applied to determine whether the causal relationship exists is the familiar "but for" rule—but for the negligence the injury would not have occurred. Although this rule has not gone without criticism, *see, e.g.*, Green, *The Causal Relationship Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962), it has been used effectively in the great majority of the cases. However, in a limited number of cases involving multiple causation the rule has proven inadequate, and courts have formulated the "substantial factor" test—was defendant's negligence a "substantial factor" in contributing to the plaintiff's injury? *See* Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 146 Minn. 430, 179 N.W. 45 (1920), where the fire set by defendant merged with a second fire from another source. Either one, acting alone, would have produced the same result. Obviously the "but for" rule would not impose liability, but the defendant's negligence was a "substantial factor" in contributing to the loss. *See* RESTATEMENT (SECOND) OF TORTS § 432 (1965).

[2] 257 N.C. 767, 127 S.E.2d 548 (1962).

[3] Reid & Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal. App. 2d 60, 285 P.2d 364 (1955).

thinner on the premises. Even though he was not responsible for the starting of the fire, the court held that the evidence was ample to warrant the conclusion that the inflammable material contributed substantially to the spread of the fire and increased the difficulty of fighting it. It has been suggested that a similar approach could have been taken in *Maharias*.[4]

In the recent case of *Phelps v. Winston-Salem*[5] the city's agent was the manager of a large building in which stalls were rented to local produce dealers. One of the tenants had built a shed in which he "cured" tomatoes. The roof of the shed was cluttered with crates, paper, and other debris. The exhaust pipe from an oil heater protruded through the roof and on a previous occasion had started a small fire. The manager had never reported this incident, nor had he taken steps to see that the combustibles were removed. There was also evidence of several "pot-bellied" stoves being in the building, and one tenant had been allowed to store cylinders of ethylene gas. A nightwatchman first saw the fire "about two feet over the top of the Blalock shed."[6] It was small, "something like two feet high."[7] He barely had time to alert the other tenants before there was an explosion which spread the fire.[8] Firemen arrived and seemed to have the situation under control when a second explosion put the entire building in flames.[9] In affirming a non-suit the court said that the jury should not be allowed to "speculate" on the origin of the fire.[10] The eyewitness testimony of the nightwatchman, together with other evidence, was more than adequate to

[4] *See* Note, *Spreading Fires, Tenth Annual Survey of North Carolina Case Law*, 41 N.C.L. REV. 521 (1963).

[5] 272 N.C. 24, 157 S.E.2d 719 (1967). Plaintiff also alleged that defendant was negligent in failing to provide firefighting equipment. The court held that lack of such equipment was not a causal factor because there was nothing to show that the nightwatchman would have had time to use it. *Accord*, Wainwright v. Jackson, 291 Mass. 100, 195 N.E. 896 (1935).

[6] 272 N.C. 24, 27, 157 S.E.2d 719, 721 (1967).

[7] Record at 82: "the fire was very small. . . .," record at 89.

[8] Record at 83, 86.

[9] Record at 41.

[10] The court cited Maguire v. Seaboard Airline Ry., 154 N.C. 384, 70 S.E. 737 (1911), for the proposition that the plaintiff must prove the origin of the fire. However, in *Maguire* the only evidence was that defendant's train passed by two hours before the fire was discovered on plaintiff's adjoining land. Contrary to a statement in *Phelps*, there was insufficient evidence of a foul right-of-way. Other railroad cases where there *was* evidence of a foul right-of-way held that defendant was liable when sparks from the engine ignited combustibles on the right of way, and circumstantial evidence was sufficient to prove this. See cases cited note 14 *infra*.

sustain the inference that the fire actually started in the combustibles on the roof of the shed.[11] However, the opinion of the court is unclear as to whether it accepts this explanation, or whether it is concerned with the possibility that the fires started elsewhere and somehow spread to the top of the shed. As previously pointed out, the point at which the fire started should make no difference.[12] If it did start in the combustibles, then it is a reasonable assumption that they were ignited by the heater flue as on the previous occasion.[13] In refusing to submit this possibility to the jury, the court has taken a very restrictive view of the probative value of circumstantial evidence. In *McRainey v. Virginia & Carolina Southern Railway*,[14] the evidence was also purely circumstantial. Defendant-railroad allowed its right-of-way to become cluttered with combustible material. The fire was discovered more than three hours after the train had passed. No one saw the engine emitting sparks and there was no evidence of burned cinders on the right-of-way. The jury was allowed to infer that the spark which ignited the material had come from defendant's engine. If the *Phelps* fire started at another location and was communicated to the roof of the shed, the combustibles were still a substantial factor in contributing to its spread.[15] Admittedly this might not be the proper analysis had the fire been a conflagration by the time it reached the shed, but evidence clearly shows that the fire was very small when first seen.

In concerning itself with the origin of the fire, the court in *Phelps* overlooks the possibility that the ethylene gas cylinders could have caused one or both of the explosions. Although the fire chief stated that the cause of the explosions was unknown,[16] there was

[11] Record at 40, 82, 86, 89.

[12] *See* note 3 *supra* and accompanying text.

[13] There was some question as to whether the oil heater had been lighted on the day of the fire; *see* Brief for Appellee at 6, and Brief for Appellant at 28. However, the evidence taken in the light most favorable to the plaintiff would seem to support the inference that the heater flue could have been hot.

[14] 168 N.C. 570, 84 S.E. 851 (1915). *See also* Gainey v. Rockingham R.R., 235 N.C. 114, 68 S.E.2d 780 (1951); Betts v. Southern Ry., 230 N.C. 609, 55 S.E.2d 76 (1949); Simmons v. John L. Roper Lumber Co., 174 N.C. 220, 93 S.E. 736 (1917). For two recent fire cases which give an indication of the quantum of evidence that will be sufficient to avoid a non-suit, see Drum v. Baisner, 252 N.C. 305, 113 S.E.2d 560 (1960) and Patton v. Dail, 252 N.C. 425, 114 S.E.2d 87 (1960).

[15] RESTATEMENT (SECOND) OF TORTS § 431 (1965).

[16] Record at 48, 50.

testimony which negated several other possible explanations,[17] and further testimony indicated that at least one exploded cylinder had been found.[18]

Another fire case which deals with the cause issue is *Broughton v. Standard Oil Company of New Jersey.*[19] The prior lessee of the filling station testified that he noticed the odor of gasoline while digging near a large underground storage tank. His records indicated that the tank was losing ten gallons per day. The tank was buried so that it was on a level with the basement of the station, and the ground sloped in that direction. A few months after decedent's employer took over the station a heavy rain caused the basement to flood. A three-fourths-inch coating of gas was found on the top of the water. The basement was drained and cleaned, but three days later the fumes were again noticeable. When the manager struck a match to assist a customer in looking for his keys, a bluish flame appeared along the floor. The customer and manager escaped but decedent was killed in the ensuing explosion. The court held that there was insufficient evidence of negligence, but also stated that the evidence of causal relationship was inadequate, alluding to the possibility that gas could have gotten into the basement due to improper use of the pumping equipment by the filling station attendants. However, in *Masten v. Texas Company*[20] the court held that there was sufficient evidence to be submitted to the jury. Plaintiff's well had contained pure water prior to the installation of defendant's gas pumps. There was a strata of rock which ran from the pumps to the well, and the slope of the ground was in the same direction. Plaintiff recovered for contamination of his well.

Two "harmful substance" cases take a very harsh approach, and illustrate how one unjust decision may lead to another. The cases are particularly significant because they deal with the evidentiary requirements unclouded by any subsidiary elements of multiple causation or intervening cause. In the first case, *Wall v. Trogdon,*[21] the plaintiff and two witnesses testified that they saw defendant's cropdusting plane emit spray as it circled near the fish pond, that they noticed an oily substance on the surface of the water, and that

[17] Record at 43, 56.
[18] Record at 57, 61.
[19] 201 N.C. 282, 159 S.E. 321 (1931).
[20] 194 N.C. 540, 140 S.E. 89 (1927).
[21] 249 N.C. 747, 107 S.E.2d 757 (1959).

immediately thereafter the fish began to die. An expert fish biologist testified that several other possible causes had been ruled out and that poisoning was the "only possible cause of death"[22] which he could discover. In affirming a non-suit the court discounted the expert opinion as "purely speculative and founded on possibilities,"[23] and indicated that the plaintiff should have offered evidence of the constituent elements of the spray, that the oily substance on the water was the spray, that it was poisonous to fish, and that it did in fact kill plaintiff's fish.

Other jurisdictions do not seem to impose such harsh requirements. In *S.A. Gerrard Company v. Fricker*[24] the defendant contended that the burden was on the plaintiff to show that the substance which allegedly killed his bees was in fact poisonous to them. The court held that the mere fact that the substance come into contact with the bees and that they died was sufficient. And in *Pitchfork Land and Cattle Company v. King*[25] the plaintiff brought an action for damages allegedly caused by defendant's negligence in allowing herbicide chemicals to drift into the plaintiff's crops. Defendant, contending that there was no causal relationship, offered expert testimony that the effects of such a chemical would appear not more than ten days after application and that the damage to plaintiff's crops did not appear until fifteen days after the crop spraying. Evidence also showed that the damage was confined to a narrow strip rather than a wide area as would be expected if the spray had been dispersed by the wind. An expert testified that he had seen such a confined damage pattern before and that the more probable explanation was that an airplane which was leaking spray had flown over the plaintiff's land. The damaged crops were located from seven and one-half to fifteen miles from the point at which the cropdusting

[22] *Id.* at 751, 107 S.E.2d at 760.

[23] *Id.* at 754, 107 S.E.2d at 762.

[24] 4 Ariz. 503, 27 P.2d 678 (1933); *see* Lundberg v. Bolon, 67 Ariz. 259, 194 P.2d 454 (1948); Hammond Ranch Corp. v. Dodson, 199 Ark. 846, 136 S.W.2d 484 (1940). *See generally* Annot., 12 A.L.R.2d 436 (1950).

[25] 162 Tex. 331, 346 S.W.2d 598 (1961). *See* Casey v. Phillips Pipeline Co., 431 P.2d 518 (Kan. 1967) (Evidence which showed that there had been a rupture of a high pressure gasoline line, that it was in close proximity to plaintiff's lake, that a "mist" was seen hanging over the lake, that the lake water was used to water plaintiff's grass crop, and that soon thereafter the grass died, was held sufficient to establish the causal relationship). *See also* Ebers v. General Chemical Co., 310 Mich. 261, 17 N.W.2d 176 (1945) (Evidence held sufficient even though etymologist testified that they did not know what killed plaintiff's trees).

had been conducted. The court held that there was sufficient evidence on the issue of cause to be submitted to the jury. In a North Carolina case, *Nance v. Merchant's Fertilizer & Phosphate Company*,[26] evidence tended to show that the defendant emptied waste into a stream. Heavy rains caused the stream to overflow into plaintiff's pasture. Soon afterwards his hogs began to die. Examination of the hogs' entrails showed that they were perforated and traces of acid were found in samples of mud from the pasture. The court held that even though the evidence was circumstantial, "the probative force was for them [the jury]—not us."[27]

In the second "harmful substance" case, *Reason v. Singer Sewing Machine Company*,[28] the court relied heavily on *Wall*. Plaintiff was sprayed in the face with oil from defendant's defective sewing machine and two hours later her eyes began to burn and water. A doctor who examined her the next day testified that the second degree burns on her eyelids could have been caused by "either hot oil . . . or warm oil so spraying, depending on the chemical composition."[29] The court said that the plaintiff had not shown the chemical composition of the oil or that it was hot. The case never reached the jury. Admittedly questions of physical injury may reach a point where difficult problems of medical causation are involved.[30] But where the relationship between act and injury is of such a nature that the layman can readily comprehend cause and effect, there seems to be no justification for such an approach. Indeed, the court has held on previous occasions where the question of causation appeared to be much more obscure that the issue was for the jury. For example, in *Metz v. City of Asheville*[31] the court allowed the jury to find that pollution of the stream which ran near decedent's house could have caused his death from typhoid, even

[26] 200 N.C. 702, 158 S.E. 486 (1931).
[27] *Id.* at 706, 158 S.E. at 488.
[28] 259 N.C. 264, 130 S.E.2d 397 (1963).
[29] *Id.* at 266, 130 S.E.2d 398.
[30] The question of medical causation is clearly beyond the scope of this note. However, for some case law in this area, Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1964) (proof insufficient to establish causal relationship between blow to plaintiff's back and ruptured disc); Lee v. Stephens, 251 N.C. 429, 111 S.E.2d 623 (1959) (proof insufficient to establish causal relationship between head injury and cerebral hemorrhage); Byrd v. Express Co., 139 N.C. 273, 51 S.E. 851 (1905) (proof insufficient to establish causal relationship between failure to deliver medicine on time and death of a patient). *See generally* Annot., 2 A.L.R.3d 487 (1965).
[31] 150 N.C. 748, 64 S.E. 881 (1909).

though neither his wife nor his child caught the disease. And in *Cook v. Town of Mebane*[32] testimony indicated that there never had been pools of stagnant water or mosquitoes prior to defendant's polluting the stream with sewage. The court held that the question of whether the pollution caused plaintiff's mill workers to get malaria was for the jury. In *Harper v. Bullock*[33] the jury was allowed to find the causal relationship where decedent died after eating weiners which contained decomposed meat, although another who had eaten them did not die, and although decedent's doctor testified that she had been suffering from nephritis and did not die from the effects of the meat.

There may be many factors contributing to the approach which the court has taken in these cases, and an attempt to enumerate them would be impractical. The most obvious factor is simply a failure to give the proper probative value to circumstantial evidence. Of course the burden of proof on the issue of causation, like other elements of the negligence case, is normally on the plaintiff.[34] He must show by the greater weight of the evidence,[35] be it direct or circumstantial, that defendant's negligence was a substantial factor in contributing to the injury. But he need not negate entirely the possibility of other "causes" for which the defendant is not responsible.[36] Since the issue is essentially a factual determination, it should normally be one for the jury, and it has been stated that *courts should seldom rule on it as a matter of law.*[37]

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[32] 191 N.C. 1, 131 S.E. 407 (1926).

[33] 198 N.C. 448, 152 S.E. 405 (1941).

[34] There are rare decisions which shift the burden of proof to the defendant. *See, e.g.,* Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). *See also* W. PROSSER, TORTS 247 (3d ed. 1964) [hereinafter cited as PROSSER].

[35] There are, however, a limited number of cases in which much less than a preponderance of the evidence is required to establish the causal link. *See* Malone, *Ruminations on Cause-In-Fact,* 9 STAN. L. REV. 60 (1956). For a rather liberal decision in the area of medical malpractice see Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), noted in 45 N.C.L. REV. 799 (1967). In Bear v. Harris, 118 N.C. 476, 24 S.E. 364 (1896), defendant moved plaintiff's boat without permission and it was damaged by a storm. The court held that it was no defense to show that the damage might have been the same or greater had the boat been at its original mooring. Where the tort is intentional it is clear that courts will impose liability for a greater range of consequences. Are cases such as *Bear* an indication that courts will also be more lenient in establishing causation when the tort is intentional? *See e.g.,* Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940) (trespasser accused of causing fire).

[36] *See* PROSSER 246. *See also* RESTATEMENT (SECOND) OF TORTS § 433B, comment b at 443 (1965).

[37] Kearns v. Railroad, 139 N.C. 470, 476, 52 S.E. 131, 134 (1905) (dis-

In speaking of circumstantial evidence, the court in *Phelps* stated:

> [I]n criminal cases it [circumstantial evidence] must point unerringly to the guilt of the defendant, and in effect, must show not only that the defendant is guilty but that upon no reasonable interpretation of the evidence could he be innocent. And also, that if the evidence is consistent with a finding of either guilt or innocence, that the innocent interpretation must be adopted.
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> *The law in civil cases is so similar that little difference can be found.* The innocent interpretation is applicable when we recall that the defendant, in such cases is not required to prove his lack of responsibility, but the plaintiff must affirmatively fix it by the greater weight of the evidence. And it is not sufficient to show that the circumstantial evidence introduced *could* have produced the result—it must show that it *did.*[38]

Although this statement is somewhat clarified by the "greater weight of the evidence" language near the end, it still seems totally unnecessary to analogize guilt in a criminal case to proof of cause in a civil case. And to state that circumstantial evidence must show, not that it *could* have produced the result, but that it *did,* is clearly erroneous. The *Phelps* court also cites *American Jurisprudence,* and states that

> [P]roof of the burning alone is not sufficient to establish *liability,* for if nothing more appears, the presumption is that the fire was the result of accident or some providential cause.[39]

However, the cited section of *American Jurisprudence* deals with the law of arson, and reads as follows:

> [P]roof of the burning alone is not sufficient to establish the *corpus delicti,* for if nothing more appears the presumption is . . . that the fire was the result of accident or some providential cause rather than of *criminal design.*[40]

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senting opinion): "[I]t is also the better doctrine that where the negligent act has been established or admitted, it is only in *clear and exceptional instances* that the question of proximate cause should be withdrawn from the jury and determined by the judge." (Emphasis added). *See* PROSSER 246; RESTATEMENT (SECOND) OF TORTS § 433B comment b at 443 (1965). It has also been suggested that, as a practical matter, once it is shown that the harm suffered by the plaintiff is clearly within the ambit of risk created by the defendant, courts are often willing to allow the issue of cause to get to the jury on the "slightest factual plausibility;" *see* Malone, *Ruminations on Cause-In-Fact,* 9 STAN. L. REV. 60 (1956).

[38] 272 N.C. 24, 28, 157 S.E.2d 719, 722 (1967) (Emphasis added).

[39] *Id.* at 31, 157 S.E.2d at 724 (Emphasis added).

[40] 5 AM. JUR. 2d *Arson and Related Offenses* § 46 at 836 (1962) (Emphasis added).

How can the crime of arson, where the question is whether a criminal agency started the fire, be analogous to a civil case where the issue is whether an accumulation of combustible materials was the "cause" of the fire?

Another factor may be faulty conceptualization and analysis. For example, in *Phelps* the court was obviously concerned with the possibility that an outside source ignited the combustibles as evidenced by statement that the origin of the fire could have been a discarded cigarette or match. In making this a point of emphasis the court indicates that it was thinking in terms of an intervening cause which would insulate defendant from liability.[41] While the doctrine of intervening cause is quite different from cause-in-fact, it is significant to note that *Phelps* is in conflict with the rule which is well-established in other jurisdictions.[42] In the case where defendant had stored paint thinner the fire did not originate from any act or omission on his part.[43] His liability was for creating a dangerous condition which was conducive to the starting or spread of a fire. And in *B.W. King Incorporated v. Town of West New York*[44] the defendant-municipality allowed wood, lumps of coal, coal dust and other debris to accumulate on an unused pier. The fire was started by a trespasser who flipped a lighted cigarette onto the pier. The court held that since the defendant had kept the premises in an unsafe condition, it was liable even though the fire was started by the act of a third party. Such an act was reasonably foreseeable as the natural and probable consequences of the negligence. In this respect, *Phelps* also seems to be in conflict with clear North Carolina precedent. In *Lawrence v. Yadkin River Power Company*[45] lightning struck defendant's power line and blew out an insulator. Molten parts of the insulator fell into dry brush which had accumulated on

[41] On the doctrine of intervening cause see PROSSER 309.

[42] The great majority of jurisdictions impose liability where defendant has permitted his property to exist in such an unsafe condition that a fire may easily be started, regardless of the origin of the fire. *See* Annot., 18 A.L.R.2d 1081 (1951).

[43] Reid & Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal. App. 2d 60, 285 P.2d 364 (1955).

[44] 49 N.J. 318, 230 A.2d 133 (1967); *accord,* Menth v. Breeze Corp., 4 N.J. 428, 73 A.2d 183 (1950).

[45] 190 N.C. 664, 130 S.E. 735 (1925). *See* Harton v. Telephone Co., 141 N.C. 455, 54 S.E. 299 (1906), where the court said "the test is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably forseen and expected." *Id.* at 464, 54 S.E. at 302.

the right-of-way and started the fire. The court held that defendant was negligent in maintaining his property in such condition and that the intervening cause did not absolve him from liability. In *Newton v. Texas Company*[46] defendant maintained a distributing plant where he stored large quantities of gasoline. Gas leaked from the warehouse and into the street. In imposing liability for the ensuing explosion, the court said that a reasonable inference could be drawn that the spark came from a passing train, from carelessly discarded matches, cigarettes, or otherwise. Thus *Phelps* cannot be correctly explained on the grounds of an intervening cause which may have ignited the combustibles.

These cases indicate that the court has taken a very restrictive approach to the issue of causal relationship. While all the reasons may not be apparent, the implications are quite clear—trial practitioners who find themselves confronted with the issue of cause had best proceed with utmost care.

JAMES G. BILLINGS

Torts—Products Liability—Is Privity Dead?

The movement to abolish the privity requirement in "warranty" actions has in the past decade played an increasingly successful role in the American judicial theater.[1] The crusade has not left the North Carolina Supreme Court unaffected, and a recent decision by that court may prove to be the signal for privity's final exit from the legal stage in North Carolina.

In *Corprew v. Geigy Chemical Company*[2] the North Carolina Supreme Court sustained a complaint based on warranty and

[46] 180 N.C. 561, 105 S.E. 433 (1920). The court said:

> [I]f the defendant, by its negligence, produced a situation or condition of danger by allowing gasoline to escape . . . where it would probably come into contact with fire, sparks . . . or live ashes from a lighted cigar or cigarette . . . we do not see why this would not be negligence . . . . [I]f the negligence of the defendant combined with the act of some other person . . . the defendant would be liable, though he had no connection with the conduct of the third party and had no control over him.

Id. at 563-64, 105 S.E. at 434.

[1] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[2] 271 N.C. 485, 157 S.E.2d 98 (1967).