



Volume 65 | Issue 1

Article 17

December 1962

Torts--A New Test for Proximate Cause?

Robert William Burk Jr.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Torts Commons](#)

Recommended Citation

Robert W. Burk Jr., *Torts--A New Test for Proximate Cause?*, 65 W. Va. L. Rev. (1962).

Available at: <https://researchrepository.wvu.edu/wvlr/vol65/iss1/17>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

S.E.2d 113 (1953). The complaint, however, referred to the party as a union. Rule 4 (d) (9) of the West Virginia Rules of Civil Procedure does provide how process shall be issued against unincorporated associations, but should not be read to alter substantive law. LUGAR & SILVERSTEIN, WEST VIRGINIA RULES 48 (1960).

Perhaps the best summation of what became the majority view was by Judge Wright in a Louisiana district court opinion. "Even if this court read the weathervane as indicating a judicial overruling of the Norris-LaGuardia Act in these situations and thought that solution desirable, it could not presume to ignore the plain mandate of applicable statutes in order to achieve a result in accord with its private views of what the law ought to be." *Baltimore Contractor's Inc. v. Carpenters' Dist. Council*, 188 F. Supp. 382 (E.D. La. 1960). Thus, it seems the only avenue of corrective process is Congress.

James Kilgore Edmundson, Jr.

Torts—A New Test for Proximate Cause?

P, while pushing a stalled automobile, was injured when struck by a passing automobile owned and driven by *D*. In an action for damages brought against only one of the joint tort-feasors, the trial judge instructed the jury that if the conduct on the part of *D* "contributed proximately" to *P*'s injuries, they might find in favor of *P* against *D*, unless the jury further believed that *P*, at the time of the accident was not using due care in his own behalf. The jury returned a verdict for *P*. *Held*, affirmed. Although the use of "contributed proximately" in an instruction standing alone may have been somewhat misleading, the verdict of the jury will not be disturbed on its account where the objection was removed by the giving of other instructions consistent with the law. *Metro v. Smith*, 124 S.E.2d 460 (W. Va. 1962).

For the plaintiff to recover in an action for personal injuries, there must be some reasonable connection between the defendant's negligence and the injury sustained. This has been dealt with almost universally by the use of the term "proximate cause". However, at this point the universality ends. The doctrine of proximate cause has developed a chameleon-like quality as a result of which courts have in case after case attempted to clarify its meaning. To illustrate the confusion and uncertainty of the application of this doctrine of proximate cause, the courts have used the "but for" rule, the "nearest

cause" test, the "cause and condition" test, the "natural and probable consequence" test, and the "substantial factor" test. PROSSER, TORTS § 44 (2d ed. 1955).

This difficulty of clarification is enhanced where the injury or damage is caused by concurrent negligence of two or more persons. Generally the test in such a situation is whether the negligence of the defendant contributed or concurred with that negligence of another or others to directly cause the injury. *Parkinson v. California Co.*, 255 F.2d 265 (10th Cir. 1958); *Alexander v. Philadelphia Ceiling & Stevedoring Co.*, 99 F. Supp. 178 (E.D. Pa. 1951). Plaintiff must, of course, prove that the defendant was responsible for one of the concurring causes, but the defendant cannot base his defense on grounds that the injury would not have resulted from his negligence alone. However, he may escape liability by showing the negligence of another of the joint tort-feasors to be the sole proximate cause. *Atlantic Coast Line R.R. v. Freeman*, 193 F.2d 217 (5th Cir. 1952); *Houser v. Kurn*, 100 F.2d 488 (10th Cir. 1938). In such cases of concurrent negligence, each of the joint tortfeasors is jointly and severally liable for the whole injury, unless the particular jurisdiction allows the apportionment of damages based on the degree of negligence. *Siebrand v. Gosnell*, 234 F.2d 81 (9th Cir. 1956); *Hower v. Roberts*, 153 F.2d 726 (8th Cir. 1946).

In litigation where the act or omission is on the part of a single individual, the West Virginia court favors the "foreseeable, natural, and probable consequence" test. *Miller v. Bolyard*, 142 W. Va. 580, 97 S.E.2d 58 (1957). In other words, before the plaintiff may recover, he must prove that some injury was foreseeable from the defendant's negligence and the injury that occurred was the reasonable and probable consequence of that negligence.

On the other hand, when the action moves from the single negligent actor to the plural, these narrow guide lines have been found too restrictive. At least up until the principal case, West Virginia appears to have followed the general rule that where the negligent acts of two or more persons continue unbroken to the injury, directly and immediately contributing to that injury, they constitute the sole proximate cause. *Roush v. Johnson*, 139 W. Va. 607, 80 S.E.2d 857 (1954). Furthermore, where negligent acts of two or more have concurred and combined to produce this so called "proximate cause" of the injury, each may be jointly and severally liable and it is immaterial which of the two was guilty of the greater negligence. *Reilley v. Byard*, 119 S.E.2d 650 (W. Va. 1961).

In this manner the court has broadened the guide lines used for determining liability of the single individual, until a joint tort-feasor may be liable for his negligence even though the injury might have occurred without his negligence or even though it alone might not have caused the injury. Under the former alternative, the test seems to be limited to whether or not the negligence of the defendant concurred and contributed with the negligence of another or others in causing the injury or damage to the plaintiff or his property. Nor does this liability seem to be changed by the fact that the plaintiff proceeds against only one of the joint tort feasors. As West Virginia has not adopted the apportionment of damages concept, each defendant may be jointly and severally liable for the whole damage or injury. *Reilley v. Byard, supra.*

While the principal case appears to be the first in which the West Virginia court has placed its stamp of approval on the use of the term "contributed proximately" as a means to aid the jury in making their determination, the court has in several previous cases used similar terms. *Divita v. Atlantic Trucking Co.*, 129 W. Va. 267, 40 S.E.2d 324 (1946); *Johnson v. Majestic Steam Laundry*, 114 W. Va. 352, 171 S.E. 902 (1933).

In *Divita v. Atlantic Trucking Co.*, *supra*, the court stated that, "if it appears that plaintiff was guilty of acts of negligence which 'proximately contributed' to the damage complained of, plaintiff is barred from recovery." The court here is speaking of contributory negligence, but it went on to say that the term "proximately contributed" had the same import as proximate cause. In another action for personal injury, the trial judge instructed the jury that they must find for the plaintiff if the negligence of the defendant contributed to the accident, unless they further believed that the defendant did not keep his automobile as far as reasonably possible to the right of the road. The court, on appeal, ruled that if the word "defendant", in that portion of the instruction which was intended to negative contributory negligence and which read "unless they further believed that the defendant did not keep his automobile as far as reasonably possible to the right of the road", had been replaced by "plaintiff", the instruction would have been corrected. Or in other words, absent contributory negligence, the plaintiff could be allowed a verdict against the defendant where the defendant's negligence contributed to the accident. *Johnson v. Majestic Steam Laundry, supra.*

The dissent in the principal case criticized the majority decision

on two major grounds. First, the action was brought against only one of the joint tort-feasors. There being only one defendant, the dissent felt it was necessary for the plaintiff to prove that the defendant's negligence was the sole proximate cause, pointing out that, in all previous cases of concurrent negligence, the action has been against several defendants. In other words, the doctrine of concurrent negligence is not applicable to situations where there is only one defendant. If this be the case, liability of joint tort-feasors should be stated as joint or singular rather than joint and several. When two or more persons are guilty of negligence, and the negligence of each concurs and proximately causes or contributed to the injury of another, it is a case of concurrent negligence. *Ransom v. Otey*, 144 W. Va. 810, 111 S.E.2d 25 (1959). At this point there are joint tort-feasors, each of which is jointly and severally liable. *Reilley v. Byard*, *supra*. Because the plaintiff selects only one, it does not seem logical nor equitable that he must accept a greater burden of proof than if he had joined all the joint tort-feasors. Certainly the same defenses may be asserted by the defendant and the same proof should be required of the plaintiff.

Secondly, the dissent placed great emphasis on the use of "contributed proximately" as being totally inadequate and prejudicially erroneous to sufficiently describe the necessary connection between the defendant's act and the injury sustained by the plaintiff. It was argued that "contributed proximately" was not the same as "proximate cause" and since "proximate cause" was nowhere mentioned in the instruction, it was reversible error. As pointed out in the foregoing discussion, confusion and hesitancy surround any attempt to define proximate cause or lay down strict requisites to determine liability. From the number of tests that have evolved, it is easy to see how differences of opinion may arise and how opinions may change. Unfortunately, tort actions are not susceptible to hard and fast rules. General guide lines and the innate sense of justice on the part of the jury must be relied on. The West Virginia court has attempted to establish some guide posts which are adaptable to the infinite variations of tort actions. It does not appear that they have strayed far afield from these guide lines nor, for that matter, enlarged them by allowing the instruction in the principal case. In the past the terms of 'proximately contributed', "contributed to the accident", and "immediately contributed" have been used. The words "contributed proximately" can hardly be considered any more confusing to the layman.

Whether we call it "proximate cause", "contributed proximately", or "substantial factor", it becomes largely a battle of words. What is needed is a separation between the issue of cause and the multitude of other issues. 60 YALE L.J. 761 (1951). This might not alter a single verdict, but it could not help but lighten the burden now placed upon the jury to apply the law which is rightly the duty of the court. Whatever the answer, if there is one, at least for the present it does not appear that the West Virginia court has made any drastic alteration in their definition of proximate cause.

Robert William Burk, Jr.

**Conflict of Laws—Full Faith and Credit—Lack of
Jurisdiction vs. Mistake of Law**

P was granted an absolute divorce in the State of Florida. The decree included a provision that in the event *H*, *P*'s former husband, should predecease *P*, the monthly alimony would become a charge upon his estate during her lifetime. *H* died while a resident of West Virginia. *P* brings this action against the heirs and administrator of *H* for the alimony unpaid since his death. The trial court ruled that the Florida court was without jurisdiction to award alimony against *H* which would be valid and enforceable against his estate after his death, and therefore, such judgment was not entitled to full faith and credit in the courts of this state. *Held*, affirmed. A court in this state may inquire into the proper jurisdiction of the court of another state. The lack of proper jurisdiction in the court of another state will render the judgment or decree of such state void and incapable of enforcement in a court of this state. Such void judgment is a nullity and may be attacked directly or collaterally in any court where that judgment is sought to be enforced. *Aldrich v. Aldrich*, 127 S.E.2d 385 (W. Va. 1962).

The principal case revolves on the question of whether the Florida court actually had jurisdiction to grant the decree in question, whether they may have exceeded their jurisdiction, or whether theirs was a mistake of law in exercising proper jurisdiction. If the error was merely a mistake of law, the issues are *res judicata* and the full faith and credit clause would apply. If the error is lack of jurisdiction or the exceeding of jurisdiction in granting the decree in question, the decree may be collaterally attacked as a void decree. The difference is often quite difficult to perceive. In fact, the difference between the concept of jurisdiction alone is often confused with the improper or erroneous exercise of jurisdiction by a court.