Kentucky Law Journal

Volume 43 | Issue 2 Article 8

1954

Torts--Intervening Negligent and Intentional Acts as Relieving a Negligent Actor From Liability

Thomas A. Mitchell
University of Kentucky

independent contractors would be the use of a statutory definition of "principal contractor" that would include such owners, but this would broaden the actual meaning of the term "contractor." A provision which might be wise and beneficial would subject an employer to liability for compensation to employees of any of his contractors in any case where the employer furnishes labor and/or machinery to a contractor on the basis of a presumption that, under such circumstances, the employer of the contractor is contracting for work that he would ordinarily do himself.

The Kentucky and Tennessee statutes as presently worded do not contain language broad enough to cover such situations, and the meaning of the term "principal contractor" should not be expanded in order to place liability on those who are not contractors by profession. Such expansion should come, if at all, through legislative action.

P. JOAN SKAGGS

TORTS—INTERVENING NEGLIGENT AND INTENTIONAL ACTS AS RELIEVING A NEGLIGENT ACTOR FROM LIABILITY

Liability of a negligent actor for injury to another's person or property may present a difficult question where an intervening independent negligent or intentionally tortious act of some third person is the direct or immediate cause of the injury. The problem is not one which can be disposed of wholly in terms either of proximate cause or of duty to the injured party. The purpose of this note is to examine the Kentucky decisions and attempt to reconcile them by using the tests applied by the Kentucky Court of Appeals, and also to present some other factors which are of prime importance in determining the basis of liability in these cases. No attempt will be made to go outside the Kentucky cases except to point out certain fundamental principles which bear on the subject, and to compare the rule in Kentucky with the general rule in other states. For purposes of clarity and emphasis the subject will be covered in the following order:

1) The ordinary case where an intentionally tortious or criminal act of a third person intervenes.

2) The ordinary case where a negligent act of a third person intervenes.

3) Certain cases where, because of some social relationships recognized by law, the defendant has an affirmative duty to control the acts of the intenvening third party.

American courts have recognized the doctrine that the earlier of two wrongdoers, even though his wrong has only created a force or the condition on which an intervening wrongdoer acts to the plaintiff's injury, is not necessarily relieved from liability merely because the subsequent act of the intervening wrongdoer has been a means by which his own misconduct was made harmful.[1] In the ordinary case the test has come to be whether the subsequent act was "foreseeable" by the first negligent actor—or stated more completely, whether in view of the surrounding circumstances and the conditions which the defendant's conduct may be expected to create, the third party's subsequent action was normal, and so, expectable.[2] In applying this test, much depends upon the character of the intervening act in determining whether or not it should have been anticipated.[3] The general rule throughout the United States as pertains to intervening willful or criminal acts is that the causal chain between the negligence and the accident is broken only where such act could not have been foreseen by the negligent actor.[4]

While most of the courts in this country have recognized that intentionally tortious and criminal acts are sometimes foreseeable under the particular circumstances, this general rule has not been followed

---

[1] 50 HARV. L. REV. 1225, 1229 (1936-37). See also RESTATEMENT, TORTS Sec. 439 (1938).

[2] RESTATEMENT, TORTS sec. 447 (1938): "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or (c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent." (Note that this section applies only to intervening negligent acts. It is suggested that it may be applied also in cases of intervening intentional and criminal acts).

[3] 38 AM. JUR. 727 (1941). Also see PROSSER, TORTS 248 (1941): "There is usually much less reason to anticipate acts which are malicious or criminal than those which are merely negligent. . . . But there are situations which would be recognized by any reasonable man as affording an especial temptation and opportunity for criminal misconduct, and demanding precautions against it."

[4] *Id.* at 728. Also see RESTATEMENT, TORTS sec. 448. "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct should have realized the likelihood that such a situation might be created thereby and that a third person might avail himself of the opportunity to commit such a tort or crime." (Note that this test seems to be mere surplusage. It is suggested that with respect to intentional and criminal intervention, the same rule can be applied as that expressed in RESTATEMENT, TORTS sec. 447, which pertains to negligent intervening acts.) Also see PROSSER, TORTS 367 (1941). (In dealing with intentional and criminal intervening acts, note that Prosser says it is more a "problem of duty to protect the plaintiff against such an intervening cause").

in Kentucky. An exhaustive search into the Kentucky decisions has failed to reveal a single case (in the absence of certain social relationships) where a plaintiff has recovered for injuries to his person or property by the defendant where an intentionally tortious or criminal act intervened which was directly responsible for the injury. While most courts profess to limit the original wrongdoer's responsibility to cases where such intervention was expectable or foreseeable, the Kentucky Court of Appeals has taken the position that such acts are never expectable. *Watson* v. *Kentucky and Indiana Bridge Co.*,[5] which was cited with approval in a recent Kentucky case,[6] is illustrative of the general attitude of the Kentucky courts toward intervening criminal acts. In this case the plaintiff was seriously injured as a result of an explosion following the derailment of a railroad tank car containing gasoline. The explosion occurred when a bystander threw a lighted match onto the street which ignited the combustible gas arising from the gasoline flowing in the street. The negligence charged was the failure of the defendant to maintain in a safe condition the roadbed and track at the point of derailment. The trial court peremptorily instructed the jury in favor of the defendant. Although this decision was reversed on appeal because of a conflict in testimony, the Court of Appeals made clear its standing on intervening criminal acts. It said that if the act of this bystander was malicious and willful then it was one which the defendant could not have anticipated. This conclusion is reached from the court's language when it stated:

> . . . if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted. . . .[7]

It should be kept in mind in reading these cases that even though the court may speak in terms of expectable and extraordinary acts, the feeling seems to be that intentional and criminal acts are never foreseeable. Is there any need to speak of unexpected or extraordinary acts in the face of a state policy which prohibits liability in every case of willful intervention? At any rate, regardless of the theory used to exonerate the defendant from liability, the controlling question in

---

[5] 137 Ky. 619, 126 S.W. 146 (1910).

[6] Miles v. Southeastern Motor Truck Lines, 295 Ky. 156, 173 S.W. 2d 993 (1943) (Note that here there was not substantial evidence tending to show that the unknown person who threw the match did so willfully or maliciously). See also Noonan v. Sheridan, 230 Ky. 162, 18 S.W. 2d 976 (1929) (There was no evidence that the roll of linoleum would have toppled over on plaintiff except for the willful act of some boys pushing it over).

Note that the Watson case pertained only to intervening criminal acts, but it is believed that the same rule is followed in cases of mere willful intervention.

[7] *Supra* note 5, at 634, 126 S.W. at 151.

such cases, and the one which will help the reader best to visualize the problem, is how far is society willing to go in requiring the negligent defendant to pay for damages which his conduct has been a substantial factor in producing? It can be said with assurance that Kentucky's policy, unlike that of most states, forbids the courts to carry the responsibility of a negligent actor to cases where an intentional or criminal act intervenes.

This strict line which has been drawn with respect to intervening willful acts seems to be the only absolute limitation on the defendant's liability as far as foreseeability is concerned. Certainly it can be said that Kentucky has followed the general rule with respect to intervening negligent acts, by extending the responsibility of the original wrongdoer in such cases.[8] In order to excuse the defendant in cases where another negligent act intervenes, such act must amount to a superseding cause.[9]

It has been suggested that if the intervening negligence so entirely supersedes the operation of the defendant's negligence that it alone can be said to have caused the injury, without the defendant's negligence contributing thereto, then it operates as a superseding cause[10] relieving the defendant from liability. It is submitted that this test is more confusing than helpful, and that in cases of intervening negligent as well as intentional acts, the same rule can be applied which is that expressed in the Restatement of Torts.[11] Under this rule one must decide only whether the act of the intervening negligent actor was so abnormal or extraordinary that the defendant should not or could not have foreseen it. After the negligence of both parties has been established, it is much easier for one to understand what a

[8] Dixon v. Kentucky Utilities Co. 295 Ky. 32, 174 S.W. 2d 19 (1943) (negligent driver of vehicle struck defendants electric pole carrying sagging wire, causing it to come in contact with barbed wire fence); United States Natural Gas Co. v. Hicks, 134 Ky. 12, 119 S.W. 166 (1909) (Young child threw a match into box covering defendants' defective gate valve); Louisville Home Telephone Co. v. Gasper, 123 Ky. 128, 93 S.W. 1057 (1906) (negligent driver of vehicle ran upon a guy wire negligently anchored by defendant telephone co. and caromed into a pedestrian); Whitman McNamara Tobacco Co. v. Wurm, 23 Ky. L. Rep. 2120, 66 S.W. 609 (1902) (plaintiff was carelessly bumped into scalding hot water negligently discharged into gutter by defendant).

[9] RESTATEMENT, TORTS sec. 440 (1938): "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Also see RESTATEMENT, TORTS sec. 442 (Considerations important in determining whether an intervening force is a superseding cause of harm to another).

[10] Eldredge, *Culpable Intervention as Superseding Cause,* 86 U. of PA. L. REV. 121 (1937-38).

[11] *Supra* note 2, Clause (b): . . . "a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted. . . ." Also see MORRIS, TORTS 191 (1953).

"highly extraordinary act" is than to try to visualize the complexities of other superseding cause tests.

There is a third class of cases where certain relationships exist between the negligent actor and the intervening wrongdoer or the injured party. In such cases the law imposes an affirmative duty upon one person to attempt to control another's conduct to avoid an unreasonable risk to a third person. It is well settled in the law today that there is ordinarily no general duty to act for the protection of others.[12] There are, however, certain social relationships which constitute a basis for this legal duty.[13] *University of Louisville* v. *Hammock*[14] is an unusual case which is illustrative of this duty to control the conduct of others. The plaintiff, a patient at the defendant's infirmary, was injured when she was attacked by another patient who was afflicted with delirium tremens. The latter had been left in charge of a single nurse who was utterly powerless to restrain him. He broke away from her, and upon entering the plaintiff's room, seized her and dragged her from her bed. In the opinion of the court no mention was made of an intervening act on the part of the assailant which might relieve the infirmary from liability. Indeed, the negligence of the defendant was in failing to confine such a dangerous person. The rule of this case is supported by abundant authority, especially in the realm of common carriers.[15]

It is suggested that these duty to control cases are not real intervening cause cases in the true sense and liability is more a question of scope of responsibility than of foreseeability, and the fixing of duty is more clearly a question of policy than it is in the ordinary case.[16] In the ordinary case the intervening act is done independently of the negligent act of the defendant; his act merely creates a condition on which the wrongful intervenor acts. In the special relationship cases, there is an affirmative duty on the part of the defendant to control the conduct of the intervening actor. The negligence charged will be the failure to control the very act which might operate to relieve the defendant in the true intervention case.

In conclusion, the writer suggests that in attempting to analyze cases where an intervening act occurs, it should first be decided

---

[12] PROSSER, TORTS 357 (1941).

[13] *Id.* at 249.

[14] 127 Ky. 564, 106 S.W. 219 (1907).

[15] See Cashen v. Riney, 239 Ky. 779, 40 S.W. 2d 339 (1931) ("A person standing temporarily in loco parentis may not shut his eyes to obvious danger threatening the moral or physical well-being of the child committed to his custody. . . ."). Of the many common carrier cases, the following will suffice: Miller v. Mills, 257 S.W. 2d 520 (Ky. 1953); Louisville and Nashville R.R. Co. v. McEwan, 21 Ky. L. Rep. 487, 51 S.W. 619 (1899).

[16] MORRIS, TORTS 185-187 (1953).

whether it falls within the last mentioned class of social relationships. If not, then the character of the act should be given some consideration. It may be that the policy of the state is against binding anyone to anticipate certain kinds of acts. Thirdly, it is submitted that even though the court may speak in terms of an independent superseding cause, the case will be better understood if one applies the test of "extraordinary or abnormal acts" as a criteria of foreseeability in cases of intentional intervention, as well as negligent intervention.

THOMAS A. MITCHELL

EVIDENCE–PRIOR CONVICTION–IMPEACHMENT AND REHABILITATION

The early common law rule that one who had been convicted of an infamous crime was deemed incompetent to testify in a court of law has been generally modified or abrogated by statutes. Nevertheless, these statutes, usually by express terms, subject witnesses, whether the action be civil or criminal, to impeachment by proving a previous conviction of some crime.[1] This previous conviction will generally be brought out as bearing on the credibility of the witness, and there is great disagreement as to the types and degree of crime which may be used for this purpose. There appear to be three general classes. The majority of jurisdictions takes the view that the crime must be a felony before it can be used for impeachment purposes; a growing minority of the jurisdictions which have statutes permitting prior conviction of crime to be shown has construed the word crime as including both felonies and misdemeanors; in Texas and a few other jurisdictions evidence as to previous conviction of crime for the purpose of effecting a witness's credibility must relate to offenses involving moral turpitude.[2]

In general these rules are applied without making any distinction as to whether the case is civil or criminal,[3] and whether the accused or a third party testifies.[4] At least one jurisdiction differentiates between the criminal defendant and the third party witness by holding that the latter may be cross-examined to establish his conviction while the former is free from the risks of such cross-examination.[5] In nearly

[1] 58 AM. JUR. 397 (1948).
[2] See 2 WIGMORE, EVIDENCE sec. 987 (1940), as to the statutes of the various jurisdictions.
[3] See *supra* note 1.
[4] Kimbrough v. State, 66 Okla. Crim. Rep. 66, 89 P. 2d 982 (1939).
[5] People v. Halkens, 386 Ill. 167, 53 N.E. 2d 923 (1944).