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Torts—Negligence—Causation

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The court leaned toward the modern tendency to abolish rules of special relationship and instead to apply the general rules of negligence.

Causation

An essential element of an actionable tort is causation in fact; it must appear that the defendant's acts were the actual cause of the harm in question.[33] The historical test for causation has been the "but for" or *sine qua non* rule. By this test consequences are in fact caused by defendant's conduct if they would not have happened *but for* such conduct.[34] The "but for" test works affirmatively to establish cause in fact, but not always does it disestablish the causal relation. The rule fails where two causes could have brought about the event, each without the other. In such a case, some different rule must be used: The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.[35] This is a question of fact, and one on which any layman is quite as competent to sit in judgment as the most experienced court. If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from responsibility merely because other causes contributed to the result.[36] If, as a matter of ordinary experience, a particular act or omission might be expected under the circumstances to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the casual relation exists. It is enough that the plaintiff introduces evidence from which reasonable men may conclude that it is more probable than not that the event was caused by the defendant.

The Court of Appeals in *Dunham v. Village of Canisteo*[37] used the "substantial factor" analysis in finding that it was a question for the jury "whether or not defendant's negligence was a competent producing cause of . . . the death . . ."[38]

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33. Causation in fact, or cause and effect, is not to be confused with proximate or legal cause, which is the limitation courts have been compelled to place, as practical necessity, upon the actor's responsibility for the consequences of his act. *Comstock v. Wilson*, 257 N. Y. 231, 177 N. E. 431 (1931). Before any question of proximate or legal cause may arise, there must be cause and effect.

34. See Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106, 109 (1911).

35. RESTATEMENT, TORTS § 431.

36. This is not what *might* have caused the plaintiff's harm, but what did in *fact* cause it. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 638 (1920).

37. 303 N. Y. 498, 104 N. E. 2d 872 (1952), *rev'g* 278 App. Div. 743, 103 N. Y. S. 2d 519 (4th Dep't 1951).

38. 303 N. Y. 498, 506, 104 N. E. 2d 872, 877 (1952).

Plaintiff's intestate was found by village officials on the floor of the village firehouse, apparently incoherent and suffering from the cold. They placed him in the jail, where he did not receive medical attention for eighteen hours. He died of pneumonia several days later, with a broken arm and hip given as the direct cause. Plaintiff brought a death action.[39]

It is a well settled principle in New York that where there are several causes contributing to injury, the injury may be attributed to any or all of those causes.[40] The question is whether or not the defendant's acts or omissions *substantially* contributed to the injury.[41] This effectively disposes of the argument that because the broken arm and hip could have caused the death, the defendant is absolved from liability. The mere fact that the death *might* have resulted from another cause is insufficient.[42] In short, plaintiff is not required to eliminate by his proof all other possible causes. The question of what constitutes a substantial factor is here a jury question.

It becomes clear that this case merely fits the facts to the existing rules, neither adding to nor substracting from them.

Indemnity

There is no indemnity[43] between joint tortfeasors as a general rule.[44]. *In pari delicto potior est conditio possidentis.* This rule is not without exceptions. Among the many are: (1) The rule does not apply and there may be recovery where one party was only technically or constructively at fault and the negligent act of the party from whom indemnity is sought was the primary cause of the injury.[45] (2) The rule does not apply where both parties were at fault, but not in the same fault toward the person injured and the fault of the party against whom indemnity is claimed was the primary and efficient cause of the injury.[46]

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39. DECEDENT ESTATE LAW §130.

40. *Foley v. State of New York*, 294 N. Y. 275, 280, 62 N. E. 2d 69, 71 (1945); see also, RESTATEMENT, TORTS § 879.

41. *Cornbrooks v. Terminal Barber Shops*, 282 N. Y. 217, 223, 26 N. E. 2d 25, 27 (1940).

42. *Ingersoll v. Liberty Bank of Buffalo*, 278 N. Y. 1, 7, 14 N. E. 2d 828, 830 (1938).

43. There is an important distinction between indemnity, which shifts the entire loss, and contribution, which distributes the loss *among* the tortfeasors. PROSSER, TORTS 1117 (1941). For contribution among joint tortfeasors in New York see C. P. A. § 211-a.

44. *Wineck v. Yanoff*, 265 App. Div. 835, 37 N. Y. S. 2d 563 (1942).

45. *Commercial Casualty Ins. Co. v. Capital City Surety Co.*, 244 App. Div. 500, 231 N. Y. Supp. 169 (1928).

46. *Colonial Motor Coach Corp. v. New York Cent. R.*, 131 Misc. 891, 228 N. Y. Supp. 508 (Sup. Ct. 1928); *General Accident, Fire & Life Assur. Corp. v. Goodyear Tire & Rubber Co.*, 132 F. 2d 122 (2d Cir. 1942).