Indiana Law Journal

Volume 6 | Issue 2 Article 10

11-1930

Tort-Concurrent Negligence--Knowledge of Party Charged--Proximate Cause

TORT — CONCURRENT NEGLIGENCE — KNOWLEDGE OF PARTY CHARGED — PROXIMATE CAUSE—Appellee, a child of five years, was sent by X to appellant's filling station to purchase a quart of gasoline, and was given a glass jar of quart capacity in which to procure same. Employee of appellant filled said jar with gasoline, delivered it into custody of the child, and cautioned her to carry it in an upright position. While returning to the home of X, appellee fell, broke the jar, and cut her hand and wrist on the broken glass. Complaint alleged that the gasoline burned and cauterized the wounds, and that appellant was negligent in delivering a caustic, dangerous substance into the custody of a child, knowing it to be such. *Held,* Judgment on verdict for plaintiff reversed. *Indian Refining Co. v. Summerland,* Appellate Court of Indiana, July 2, 1930, 172 N. E. 129.

Appellant contended that the complaint on its face showed that the proximate cause of the injury was the negligence of X in sending appellee on said errand with the jar in question. But one negligent person cannot escape liability for his negligence because negligence of another concurred in producing the injury. *Louisville, New Albany and Chicago Railway Co. v. Lucas,* 119 Ind. 583. If the defendant's negligence concurs with that of another, or with an act of God, and becomes a part of the direct and proximate cause of the injury, although not the sole cause, the defendant is liable. This doctrine is well established. *Watts v. Evansville, Mt. Carmel & Northern Railway,* 191 Ind. 27. Thus the appellant cannot escape liabil-

ity on this ground. Appellee could have recovered from either X or the appellant, assuming that concurrent negligence had existed. But was the appellant guilty of any negligence, of any breach of duty of the person injured with respect to this particular risk? The whole question of proximate cause is irrelevant until negligence is found, and should have received little or no consideration by the court. Before there can be liability in this type of case there must be (1) a breach of duty owed by the defendant to the particular plaintiff (2) which proximately causes (3) damage to the said plaintiff. If any one of these three elements is lacking, there is no liability. Green, *Rationale of Proximate Cause*, pp. 1-5. Clearly if there is no breach of duty, there is no need to discuss proximate cause. The breach of duty alleged by the appellee was the delivery of the gasoline to the child, appellant knowing that it would have a caustic effect on human flesh. It is the essence of such action that the party charged should have knowledge that the act complained of was such as might within the domain of probability cause the alleged injury. *Liggett and Meyers Tobacco Co. v. Cannon*, 132 Tenn. 419; L. R. A.—1916A-940. Thus unless it is proved that appellant knew of the caustic nature of gasoline, or unless it was proved that such was a matter of common knowledge from which it could be inferred that as a reasonable man the appellant should have known the same, there is no breach of duty.

The evidence did not support the allegation. As against one expert testifying that gasoline was caustic in character, five testified that it was *not* caustic, but was even used as an antiseptic at times. It was entirely within the sphere of the jury to decide on the weight of this conflicting evidence. *Calcutt v. T. H. Gerig*, 271 Fed. 220. It may have rightly believed the one as against the others, but this testimony of one expert should not stand as evidence that the appellant *knew* that gasoline would have the effect charged in the complaint. The principal case, thus being correctly reversed, merely holds that it is not a matter of common knowledge that gasoline is caustic, and that the appellant's act was not proved to constitute negligence.

P. J. D.