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Criminal Law - Causation - Tort Concept of Proximate Cause Is Inapplicable in Criminal Prosecution

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CRIMINAL LAW—CAUSATION—TORT CONCEPT OF PROXIMATE CAUSE IS INPPLICABLE IN CRIMINAL PROSECUTION.

Commonwealth v. Root (Pa. 1961).

The defendant was convicted at trial of involuntary manslaughter. On the night of the fatality the deceased had challenged defendant to a race in their respective automobiles. The automobiles were being operated at between seventy and ninety miles per hour on a rural three-lane highway when the deceased crossed the highway dividing line in an attempt to pass defendant. As a result, deceased's automobile crashed into a truck coming from the other direction and he was fatally injured.[1] The Pennsylvania Supreme Court, with one justice dissenting, reversed, *holding* that the defendant's conduct was not the proximate cause of the decedent's death; and moreover, that the tort concept of proximate cause is inapplicable in prosecutions for criminal homicide, a more direct causal connection being required. *Commonwealth v. Root,* 170 A.2d 310 (Pa. 1961).

Substantial authorities assert that the proximate cause test to determine responsibility for a particular consequence should be used not only in tort cases but in criminal prosecutions as well.[2] There is another view, however, which asserts that, although courts have said that they were employing the same proximate cause test in both fields, they have in fact adjusted the rule to take into consideration the difference between a criminal wrongdoer and an accidental wrongdoer.[3] These jurisdictions speak of using "common sense" along with causation.[4] The bulk of the criminal courts still apply, or speak of applying, a proximate cause test. They maintain that the test is whether or not the criminal act is the proximate cause of the result.[5] Until recently,[6] the Pennsylvania courts have followed the proximate cause doctrine in criminal prosecutions[7] and have done so since the middle of the nineteenth century.[8] Quite clearly,

1. The trial court was affirmed by the Pennsylvania Superior Court. Commonwealth v. Root, 191 Pa. Super. 238, 156 A.2d 895 (1959).

2. Taylor v. State, 193 Ark. 691, 101 S.W.2d 956 (1937); State v. Campbell, 83 Conn. 671, 74 Atl. 927 (1940); State v. DesChamps, 126 S.C. 416, 120 S.E. 491 (1923); State v. Osmus, 74 Wyo. 183, 276 P.2d 469 (1954); Beale, *The Proximate Consequences of An Act,* 33 HARV. L. REV. 633 (1920).

3. State v. Benton, 38 Del. 1, 187 Atl. 609 (1936); Fine v. State, 193 Tenn. 422, 246 S.W.2d 70 (1952). See generally PERKINS, CRIMINAL LAW 601-17 (1957).

4. State v. Benton, 38 Del. 1, 187 Atl. 609 (1936).

5. People v. Clark, 106 Cal. App. 2d 271, 235 P.2d 56 (1951); People v. Rodriquez, 8 Cal. Rptr. 863 (Cal. App. 2d 1960); Nelson v. State, 58 Ga. App. 243, 198 S.E. 305 (1938); Tucker v. Commonwealth, 303 Ky. 864, 199 S.W.2d 631 (1947); State v. Schuab, 231 Minn. 512, 44 N.W.2d 61 (1950). See, PERKINS, note 3, *supra.*

6. See, Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). This case is claimed by the majority in the instant case to have rejected the use of the proximate cause test as set forth in the cases cited in note 7, *infra.*

7. Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947); Commonwealth v. Kostan, 349 Pa. 560, 37 A.2d 606 (1944).

8. Commonwealth v. Hare, 2 Clark 467 (Pa. 1844).

however, the tort concept of proximate cause is widening and is not the same test which was applied even as short as fifty years ago.[9]

Other jurisdictions dealing with deaths resulting from automobile racing have upheld decisions of involuntary manslaughter[10] and voluntary manslaughter[11] where a third person has been killed, although the defendant's car at no time came in contact with the deceased. What can be gathered from these cases is that proximate cause is being used in at least some jurisdictions in deciding criminal prosecutions despite its broadening scope.

When the majority in the instant case held that defendant's conduct was not the proximate cause of decedent's death it was necessary to confront a conflicting 1957 Superior Court case, *Commonwealth v. Levin*.[12] There the defendant was racing another in an automobile and swerved in front of the second car forcing it out of control; the second car hit a tree killing an occupant. The defendant was convicted of involuntary manslaughter. The majority in the instant case sought to distinguish *Levin* on the grounds that there was a sufficient causal connection there because the defendant forced the other car from the road. Doubtless, the majority would agree that in both the *Levin* case and the instant case, both participants acquiesed in the unlawful racing. Further, it necessarily must have been contemplated that all types of hazardous chances and attempts might be tried in the course of their venture. In both cases, an act of willful, wanton and reckless conduct was present. The Act of racing *led* to, or *resulted* in, a fatality in both cases. Yet, only one of these drivers received criminal punishment for his act. While the causal connection in *Levin* may have been more direct, under all the known tests it was hardly less proximate.

But even if proximate cause were present in the instant case, the basic thrust of the decision must still be faced. Pennsylvania criminal courts can no longer employ the test of proximate cause in prosecutions for criminal homicide, rather, they must convict only where there is a "more direct causal connection." By this decision, the trial courts are compelled to abandon much which until now has been relied upon to test criminal causation. At the same time, they have been given little indication as to what will be acceptable in future decisions. Apparently it is now for

9. Prosser, *The Proximate Cause in California*, 38 CALIF. L. REV. 369 (1950). The typical advance can be seen in cases involving mental suffering. Before the nineteen twenties courts asserted that damages of mental suffering standing alone were "too remote and not proximate enough." See PROSSER, TORTS 176-182 (1955). Mitchell v. Rochester R., 151 N.Y. 107, 45 N.E. 354 (1897); Chittick v. Phila. Rapid Transit Co., 224 Pa. 13, 73 Atl. 4 (1909). But today, more courts are finding that a negligent act can be the proximate cause of mental suffering. Strazza v. McKettrick, 146 Conn. 714, 156 A.2d 149 (1954); Chuichiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Houston Electric Co. v. Dorsett, 145 Tex. 95, 194 S.W.2d 546 (1946). See, Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1962).

10. Jones v. Commonwealth, 247 S.W.2d 517 (Ky. 1952).

11. State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1946).

12. 184 Pa. Super. 436, 136 A.2d 764 (1957).

the trial courts, by trial and error, to develop the law in this area. Further, it must be noted that the causal relationship must be of this greater degree even where, as here, the conduct involved can be considered wanton, willful and reckless.

There is always the possibility that the court has been inclined to absolve the defendant because the deceased was a willing and equally foolish participant in the race which led to his death. Whether such a consideration was pondered by the court cannot be answered, but it is certain that if it was weighed, it has no bearing upon the problem of causation. If the court would have come to a different result had the truck driver been killed, then the reasoning of the instant case is defective. Certainly, other jurisdictions which have convicted drivers in a racing fatality of this sort have found sufficient causation.[13] The court here may have felt itself to be dealing with the same problems encountered in the Pennsylvania felony murder cases.[14] Although the instant majority opinion asserts that the proximate cause test was rejected in the leading felony-murder case *Commonwealth v. Redline,*[15] the *Redline* opinion does not so specifically state. A possible explanation of these cases is that the result hinged not upon subtle questions of causation but upon the more general ground that the deceased had freely participated in the known dangerous act which led to his death. While such a result may or may not be termed *just,* to arrive at such a conclusion under the terminology of *causation* is not wholly consistent.

It is true that proximate cause has never been defined in a manner definite or concrete, but it was at least a workable concept upon which a court might base a decision or instruct a jury. The factors used in determining proximate cause such as "foreseeability",[16] "substantial factor",[17] and "natural and probable consequence",[18] all were of at least some help. Each Pennsylvania trial court is left now with the problem of working out a test of causation in cases of homicide until one is better defined by the Pennsylvania Supreme Court. While this may not in itself be an evil result, it is at least a conflict with other jurisdictions which allow proximate cause to be employed in criminal prosecutions. This case perhaps stands as an omen of the court's philosophy that the all encompassing tort concept of proximate cause is seemingly too punishing for criminal courts in which a life might hang in the balance.

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13. See notes 10 and 11, *supra.*
14. See Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). This case held that the perpetration of a felony was not legally accountable for the death of his co-felon who was killed by the justifiable homicide of a policeman. See also Commonwealth v. Almeida and Commonwealth v. Moyer, note 7, *supra.*
15. *Ibid.*
16. Guinan v. Famous Players Lasky Corporation, 267 Mass. 501, 167 N.E. 235 (1929).
17. Mahoney v. Beatman, 110 Conn. 184, 147 Atl. 762 (1929).
18. Stone v. Boston, 176 Mass. 536, 51 N.E. 1 (1898).