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Torts--Negligence--Causation (Cornbrooks v. Terminal Barber Shops, Inc., 282 N.Y. 217 (1940))

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treat the tax obligation as attaching to the income itself in her hands.[11]

The problem may be clarified by the following formula derived from the decisions: firstly, if the obligation to support is a continuing one imposed by the laws of a particular jurisdiction, income from a trust is taxable to the grantor;[12] secondly, if the obligation is contractual and it is personally assumed by the grantor when the trust is created, income from that trust is taxable to the grantor;[13] lastly, if the obligation to support is discharged *pro tanto* by virtue of local law, and there is no contractual liability, income from the trust is *not* taxable to the grantor.[14] None of these decisions, however, imply that Congress lacks the authority to design a different statutory scheme applying uniform standards for the taxation of income from the so-called "Alimony Trusts". If this is desired, recourse must be had to appropriate legislation to attain that end.

F. D. M.

TORTS—NEGLIGENCE—CAUSATION.—On January 9, 1934, defendant's employee, a barber, applied an electric vibrator to plaintiff's scalp, bringing it down over his left eye to his neck. The plaintiff felt merely a jarring sensation and no pain. Later in the day the vision in his left eye began to be impaired. The medical testimony was that the retina had been torn or detached, a condition in the manifestation of which there may be some delay. Plaintiff consulted an ophthalmologist on January 15 who found that the vision of the left eye was reduced to ten per cent of normal. The plaintiff now seeks to recover damages for his injury which, he alleges, was the result of the negligent operation of the electric vibrator by the barber in defendant's employ. Experts called by the plaintiff testified that in their opinion the use of the vibrator upon the plaintiff's eye was a competent producing cause of the harm he sustained. Defendant contends that the injury might have been caused by a jar or jolt received by a ride upon such conveyances as a subway train, a taxicab and a bus, upon which plaintiff had ridden, and that plaintiff had failed to prove a cause of action against it because the chain of causation between the act of the barber and the damage to the eye was not shown to be unbroken. The Appellate Division reversed a judgment in favor of plaintiff and directed that the complaint be dismissed. *Held,* the judgment at Trial Term affirmed. The Court of Appeals found sufficient evidence to present two questions of fact upon which it was necessary for the jury to pass: whether the defendant's employee was negligent in his application of the electric vibrator and, if so, whether his negligence

[11] Note (1934) 48 HARV. L. REV. 815.
[12] Douglas v. Willcuts, 296 U. S. 1, 56 Sup. Ct. 59 (1935).
[13] Helvering v. Leonard, 310 U. S. 180, 60 Sup. Ct. 780 (1940).
[14] Helvering v. Fuller, 310 U. S. 69, 60 Sup. Ct. 784 (1940).

was the "proximate cause" (that is, a substantial factor) in bringing about the injury to the plaintiff's eye. *Cornbrooks* v. *Terminal Barber Shops, Inc.*, 282 N. Y. 217, 26 N. E. (2d) 25 (1940).

The defendant's contention that the chain of causation was not sufficiently shown to be unbroken fails in the light of the absence from the record of evidence that the plaintiff experienced a shock or jar while in a conveyance or elsewhere, except while in the defendant's chair. "The existence of remote possibilities that factors other than the negligence of the defendant may have caused the accident, does not require a holding that plaintiff failed to make out a *prima facie* case. It is enough that he shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." [1] The two questions which the court found to exist for the jury constitute the basis of negligence actions.[2] The testimony of the experts that the passing of a vibrator over an eye is a competent producing cause of plaintiff's injuries and the absence of any evidence of the intervention of any other cause are clearly sufficient to raise a question for the jury as to whether the defendant's act was a substantial factor in bringing about the plaintiff's harm. Even when the record of evidence adduced by a plaintiff shows the existence of two or more possible causes, for only one of which the defendant is responsible, the plaintiff has met his burden if one of the reasonable inferences from all of the facts is that the cause set in motion by the defendant was a substantial factor in producing the injury.[3] The facts in the instant case are still more favorable to the plaintiff. Not only was there no evidence of anything other than the defendant's act to constitute a complicating causative factor, but, in addition, the only testimony in the record upon the question of causa-

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

[2] Laidlaw v. Sage, 158 N. Y. 73, 89, 52 N. E. 679, 684 (1899); Karr v. Inecto, Inc., 247 N. Y. 360, 363, 160 N. E. 398, 399 (1928); Von Wangenheim v. N. Y. Stockyards Co., 153 N. Y. Supp. 696 (1915), *aff'd*, 171 App. Div. 897, 155 N. Y. Supp. 405 (1st Dept. 1915); RESTATEMENT, TORTS (1934) §§ 430, 431(a) and 432(1); Smith, *Legal Cause in Actions of Tort* (1911) 25 HARV. L. REV. 103; see also Palsgraf v. L. I. R. R., 248 N. Y. 339, 351, 162 N. E. 99, 103 (1928) (dissenting opinion of Mr. Justice Andrews).

[3] In Stubbs v. City of Rochester, 226 N. Y. 516, 526, 124 N. E. 137, 140 (1919), the plaintiff sought to recover damages sustained by reason of typhoid fever suffered through drinking contaminated water negligently supplied by the defendant, the court said: "He (the defendant) submits that it was essential for plaintiff to eliminate all other of the seven causes from which the disease might have been contracted. If the argument should prevail and the rule of law stated is not subject to any limitation the present case illustrates the impossibility of a recovery in any case based upon like facts. * * * I do not believe the rule stated to be as inflexible as claimed for. If two or more possible causes exist, for only one of which a defendant may be liable, and a party injured establishes facts from which it can be said with reasonable certainty that the cause of the injury was the one for which the defendant was liable the party has complied with the spirit of the rule." Even more clearly can he be seen to have done so when his testimony has actually disproved the possibility of the intervention of all the other known causes and stands uncontradicted.

tion points to the defendant's act as the cause, and nothing by way of evidence offered in rebuttal or otherwise detracts from the testimony of the medical experts, so that it stands uncontradicted on the record.

The question of negligence remains. There was testimony by barbers called as experts (including the defendant's own witnesses) that it was not the practice to bring electric vibrators within the vicinity of customers' eyes. Negligence may be an act "which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another." [4] It was surely at least a question for the jury whether or not the existence of the risk should have been recognized. It has been suggested that the test for negligence in many situations is whether the ordinary man, correlating reasonable intelligence, judgment and perception of the circumstances, would have perceived the risk, and the superior knowledge of the actor also enters in as a criterion.[5] The general rule is that one, who represents himself as possessing a certain knowledge and skill and invites confidence in that relation, undertakes that he will bring them to bear in the discharge of his duties.[6] In keeping with this obligation, defendant's employee was bound to exercise that skill and ability which barbers in his vicinity customarily use,[7] and he should have

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[4] Palsgraf v. L. I. R. R., 248 N. Y. 339, 162 N. E. 99 (1928); RESTATEMENT, TORTS (1934) § 284(a).

[5] Barnett v. Roberts, 243 Mass. 233, 137 N. E. 353 (1922); Hun v. Cary, 82 N. Y. 65, 74, 59 How. Pr. 439, 445 (1880); Palsgraf v. L. I. R. R., 248 N. Y. 339, 162 N. E. 99 (1928); Greene v. Sibley, Lindsay & Curr Co., 257 N. Y. 190, 177 N. E. 416 (1931); Ehret v. Village of Scarsdale, *et al.*, 269 N. Y. 198, 207, 199 N. E. 56, 59 (1935); Haverstick v. Hansen & Sons, Inc., 277 N. Y. 158, 13 N. E. (2d) 753 (1938); Payne v. City of New York, 277 N. Y. 393, 14 N. E. (2d) 449 (1938); Blyth v. Birmingham Waterworks Co., 11 Ex. 781, 156 Eng. Rep. 1047 (1856); Hales v. Kerr, 2 K. B. 601 (1908); HARPER, LAW OF TORTS (1933) §§ 69, 72; RESTATEMENT, TORTS (1934) § 289, (a), (b), (c) and comment *n*. See also § 290, comment *e*, § 299 and comments *a*, *b*, *d* and *f* thereunder.

[6] Hun v. Cary, 82 N. Y. 65, 74, 59 How. Pr. 439, 445 (1880) ("One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatory, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. * * * Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; * * *").

[7] Barnett v. Roberts, 243 Mass. 233, 137 N. E. 353 (1922); Hales v. Kerr, 2 K. B. 601 (1908). In the *Barnett* case, the plaintiff was damaged by the defendant hair-dresser's use upon his scalp of a dangerous and harmful substance. The defendant did not know either the character or the composition of the substance so used, or that it was harmful. The court held that the defendant was negligent and liable to the plaintiff, by reason of the fact that she ought to have known that the use of the substance was likely to result in harm. The court said: "The defendant was bound to exercise the ordinary *skill and ability of persons engaged in her business practicing in Boston.*" (Italics ours.) In the *Hales* case, the plaintiff suffered an infection because of the defendant barber's failure to sterilize his razor. In holding the defendant liable, the court said: "It is clearly evidence of negligence in a barber to use appliances of this kind, which have already been in use on other persons, without taking means to

foreseen the effect of his failure to keep the vibrator away from the plaintiff's eye.

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insure that they are thoroughly cleansed. So in the case of a razor. It is evidence of negligence in a barber not to keep his razors clean." In this case the English court admitted the testimony of previous infections at the hands of the same defendant as evidence that such conduct as the failure to sterilize the razor has been a source of danger on other occasions, not to prove that the defendant, having committed a similar offense on a former occasion, is likely to have committed it upon the plaintiff, but to show that the happening "is not a mere accident or a mere isolated event," but, inferentially, is the foreseeable effect of failure to keep the razor clean. The editor of *Annotated Cases,* writing of the *Hales* case, in a note following the report of the case (15 Ann. Cas. 448, 450) says of it: "The rule to be deduced from the reported case, that a barber who infects his patron with disease by failing to keep his instruments clean is guilty of negligence, is but a particular application of the general rule that a man is required to exercise an ordinary degree of skill and care in the course of the employment he undertakes to practice. *Per* Lord Ellenborough in *Seare* v. *Prentice,* 8 East 348. Beven, in his work on Negligence, p. 1156, expresses the rule as follows: 'The principle of most extensive scope, prevailing through all classes of skilled labor, and not confined to medical practitioners, is that he who undertakes the public practice of any profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character.'"