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Torts -- Negligence -- Intervening Criminal Act

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are no longer needed. He may release himself, as has been noted, by
giving sufficient notice to the patient to secure the services of another, or by turning the case over to another physician, provided of course, he exercises due care in selecting such substitute.

As a generalization, then, it seems that the prevailing view, with which North Carolina is apparently in accord, is that a physician or surgeon can relieve himself of liability for the negligent acts and omissions of a substitute physician or surgeon, provided: (1) he is under no contract which would create greater liability than that which rises out of the mere physician and patient relationship, (2) due care is exercised in selecting such substitute, (3) by the relations actually existing among the parties under their agreements or acts, agency between the physicians in fact did not exist.

HUGH P. FORTESCUE, JR.

Torts—Negligence—Intervening Criminal Act

When the deceased entered the defendant's store, the defendant's fourteen-year-old son pulled a pistol from under the counter and pointed it at the deceased. Though requested to put it away, he discharged it, inflicting a fatal wound.

A suit was instituted for the wrongful death against both the defendant and his son. The plaintiff alleged that the defendant, who knew that his son had brandished the pistol at other customers, was negligent in leaving the pistol where his son could obtain possession of the dangerous instrumentality. It was further alleged that the son maliciously shot the deceased and also that the son's act was negligent. The Georgia court held that the demurrer as to the defendant should have been sustained since the son's intervening act was criminal and superseded the defendant's negligence. As to the son, the court said a cause of action, in negligence, had been stated.

The statement of the general rule applicable to such cases, that a subsequent, independent and unforeseeable criminal or negligent act supersedes the original party's negligence and renders that party not liable, is followed by the Georgia court. Whether stated in terms of liability or non-liability for intervening acts, the problem of these cases is not the statement of the rule but rather the application of the rule to the facts of a particular case.

The case did not reach a jury, and the holding of the Georgia court is partially explainable under peculiar local rules of pleading. When a petition is attacked by demurrer in that state, the facts alleged are taken

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29 See note 2 supra.
30 See note 3 supra.
as true; however, unlike the general rule, the petition is construed most strongly against the pleader. Following these rules, the court interpreted the petition as alleging that the son's act was malicious and intentional which would subject the son to criminal prosecution for murder or manslaughter. Furthermore, Georgia is one of the states which consistently hold intervening criminal acts unforeseeable, unless the original party had definite knowledge that the intervening party was of a vicious disposition. The holding in the case under consideration is not inconsistent with previous decisions of the Georgia courts.

On the facts it seems that the plaintiff should recover; however, the petition omitted material allegations, e.g., that the deceased was a business invitee to whom the defendant owed a duty to provide a reasonably safe place in which to shop.

In an Oregon case, the proprietor of a restaurant was held liable, on grounds of negligence, when a guest was assaulted by another guest who was known by the proprietor to create trouble. It was so held even though the intervening act was criminal and the intervening party had not previously committed a similar crime. Consequently, it seems

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4 Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694, 697 (1950). "We think the plaintiff's allegation that the defendants... knew that W. C. Skelton, Jr., had pointed the pistol at other customers... was not sufficient to show notice on their parts that W. C. Skelton, Jr., would commit the criminal offense of murder or manslaughter."
5 Andrews & Co. v. Kinsel, 114 Ga. 300, 40 S. E. 300 (1901) (repairman negligently left side of building in such condition that thieves entered and stole plaintiff's goods; held, not liable, the subsequent intervening criminal act being unforeseeable); Henderson v. Dade Coal Co., 100 Ga. 568, 28 S. E. 251 (1897) (defendant, in charge of a convict under a convict lease system, was held not liable when the felon escaped and raped plaintiff; the court holding the criminal act unforeseeable even though the prisoner was known to be of "violent passions, prone to desire for sexual intercourse"); Pinell v. Yellow Cab Co., 77 Ga. App. 73, 47 S. E. 2d 774 (1948) (defendant's servant negligently picked up drunk passenger after plaintiff had hired the taxicab; the second passenger shot the first; held, plaintiff could not recover since the subsequent criminal act was unforeseeable); Hulsey v. Hightower, 44 Ga. App. 455, 161 S. E. 694 (1931) (defendant gave his son a knife with which he intentionally inflicted a serious wound upon plaintiff; held, defendant could not foresee that his son, who was known to have a reckless and negligent disposition, would commit the crime of attempted murder).
6 Henderson v. Molting First Mortgage Corp., 184 Ga. 724, 193 S. E. 347 (1937) (defendant's servant, an apartment house janitor, maliciously shot plaintiff, held, there could be no recovery on respondent superior, but there was a cause of action for defendant's negligence in retaining a servant known to be of a vicious character).
7 Fanelty v. Rogers Jewelers, 230 N. C. 694, 55 S. E. 2d 493 (1949); Ross v. Sterling Drug Store, 225 N. C. 226, 34 S. E. 2d 64 (1945) (plaintiff injured due to a defective "door check" which applied force to close the front door of defendant's store; held, judgment for plaintiff reversed because of instructions which could be interpreted to mean a storekeeper has absolute liability for injuries sustained by business invitees). See Note 18 N. C. L. Rev. 163 (1939) for a discussion of the positive duty owed a business invitee.
9 While the assaulting guest had attempted to hit others, it was not shown that he had done so.
the defendant in the principal case might have been held liable on the
time that he had failed to provide a safe shopping place for the de-
dceased, a business invitee. The previous pointing of the pistol and
the probability of a continuation of this practice, as long as the pistol
was lying around, had rendered the place unsafe.

There was no allegation as to who was in charge of the store when
the injury was inflicted. If the defendant was present, support is lent
to the argument that he failed to use reasonable care in providing a
safe shopping place for the deceased since there is nothing to show
that he attempted to prevent the discharge of the pistol. If the defendant
was not present, it is possible that the son was in charge of the store.
This raises the question of defendant's liability based on respondeat
superior. In fact, the court itself raised this question, but held the
allegations insufficient to show an agency.\(^{10}\)

It has been suggested that the proprietor of a store be held abso-
lutely liable for intentional torts committed by their servants.\(^{11}\) This,
however, has not been done except in cases involving common carriers\(^{12}\)
and public service corporations.\(^{13}\) Nevertheless, a proprietor will be
held liable if he does not use reasonable care in the selection and reten-
tion of servants and refrain from putting the customer in a position
where it is likely that a tort will occur.\(^{14}\) The latter statement seems
particularly applicable to the principal case if an agency could be
established.

Not only did the plaintiff omit material allegations in his petition,
but the allegations are inconsistent. The plaintiff alleged that the son's
act was both malicious\(^{15}\) and negligent.\(^{16}\) As pointed out above, the
court construing the petition against the petitioner held the son's act
criminal and this in the face of the court's subsequent conclusion that
a cause of action in negligence was stated against the son.

In a jurisdiction which construes pleadings most strongly in favor
of the pleader, the decision would probably have been contra, since the
allegations are capable of the construction that the defendant was negli-

\(^{10}\) Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694, 697 (1950). "Nor
do we think the mere allegation 'that said store was owned and operated by
the defendants named herein,' was sufficient to show that the son was acting as
servant or agent of the parents and within the scope of their employment."

\(^{11}\) See Robinson v. Sears, Roebuck & Co., 216 N. C. 322, 324, 4 S. E. 2d 889,
890 (1939) (dissenting opinion).


\(^{13}\) Munick v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921).

\(^{14}\) See Note 18 N. C. L. Rev. 163, 166.

\(^{15}\) In the second allegation, the plaintiff alleged, "that this suit is brought for
the malicious homicide of petitioners' mother, and wife. . . ." Skelton v. Gamb-

\(^{16}\) Plaintiff in his eighteenth allegation alleged, "That the defendant W. C.
Skelton, Jr., was negligent in the following. . . ." Skelton v. Gambrell, 80 Ga.
App. 880, 57 S. E. 2d 694, 695 (1950).
gent in failing to foresee the intervening negligence of the son, who had previously pointed the pistol at people in the store. 17

North Carolina follows the general rule that an intervening and foreseeable negligent act will not insulate the original party's negligence. 18 There are very few cases in this state dealing with intervening criminal acts 19 and in only one case was defendant held liable. 20

In cases of intervening negligence of third parties, there are North Carolina cases which make a distinction between the active and the passive negligence of the defendant. Where the negligence of the intervening third party is active at the time of the accident and the defendant's negligence is passive, defendant has been relieved from liability. 21

In the principal case, defendant's negligence might be regarded as passive, unless it can be argued that there was a continuing duty to protect the business invitee. Justice Seawell's opinion to the effect that storekeepers should be responsible to customers for all acts of their employees, criminal as well as negligent, is not applicable to the Georgia case under discussion because there was no allegation that the son was an employee or agent.

It is doubtful whether the Georgia court would deny the general proposition that if the intervening act and resultant injury could reasonably have been foreseen by the defendant, he remains liable. The problem is one of the extent or scope of protection which the law affords in these cases of intervening criminal or negligent acts. If the proprietor of a store creates or maintains a risk of danger to his customers, it would not be unreasonable to hold him responsible for the intervening

17 Sullivan v. Creed, [1904] 2 K. B. 317 (defendant left gun inside hedge where minor son found it and negligently shot the plaintiff).
18 Rulane Gas Co. v. Montgomery Ward & Co., 231 N. C. 270, 56 S. E. 2d 689 (1949); Henderson v. Powell, 221 N. C. 239, 19 S. E. 2d 876 (1942); Horton v. Td. Co., 141 N. C. 455, 463, 54 S. E. 299, 302 (1906). "... the test ... is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."
19 Ward v. Southern Railway Co., 206 N. C. 530, 174 S. E. 443 (1934) (plaintiff was killed when struck by a piece of coal thrown from defendant's car; held, assuming defendant was negligent in allowing thieves to be on the train, nevertheless, the plaintiff cannot recover since the intervening criminal act was unforeseeable); Chancey v. Norfolk & Western Ry., 174 N. C. 351, 93 S. E. 834 (1917) (plaintiff, who was robbed due to defendant's negligence in not properly lighting its cars, was denied recovery since the intervening criminal act was unforeseeable).
20 Britton v. Atlanta & Charlotte Air-Line Ry., 88 N. C. 536 (1883) (defendant held liable when his servant failed to protect plaintiff, a Negro, from an assault by other passengers known to the servant to be reckless and dissatisfied with plaintiff's presence).
21 Montgomery v. Blades, 222 N. C. 463, 23 S. E. 2d 844 (1943), reaffirmed in Montgomery v. Hovan, 223 N. C. 331, 25 S. E. 2d 567 (1943) (plaintiff injured when driver of car in which she was riding negligently ran into a pillow constructed in the street by defendants; held, defendants' negligence was static while the driver's negligence was active but for which the injury would not have occurred, therefore, defendant not liable); Haney v. Town of Lincolnton, 207 N. C. 282, 176 S. E. 573 (1934); see Note 13 N. C. L. Rev. 245 (1935).
act which might be foreseen as likely to happen as a result of that risk. It has never been a requirement that the exact nature of the intervening act be foreseeable.

PAUL K. PLUNKETT.

Torts—Liability of Parent for Willful Injury to Child

By the overwhelming weight of authority in this country an unemancipated minor may not bring an action for personal tort against his parent. The Supreme Court of Oregon has recently engrafted an exception on this general rule, holding that an unemancipated minor may maintain an action against his parent for a willful or malicious tort.

In the Oregon case, a father, intoxicated and accompanied by his brother and son as passengers, drove his pickup truck at high speed at night over a mountainous highway. An accident ensued which resulted in the death of all the occupants of the truck. The court held that the father's estate could be sued for the wrongful death of the unemancipated minor, the majority regarding the case as one presenting "willful misconduct" for which the father should be held liable to his son.

With this decision another inroad has been made into the general rule disallowing tort actions between unemancipated minors and their parents. The action has been allowed heretofore in the case of a minor but emancipated child; where the child was of legal age but continued to live at home with his parents; where the suit was brought by or against one in loco parentis; and in negligence cases where the defendant is protected by liability insurance. An unemancipated minor has

1 Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 644 (1903); see Note, 71 A. L. R. 1071 (1931). "Proprietary torts" between parent and minor in matters affecting property and contract seem always to have been freely recognized. Lamb v. Lamb, 146 N. Y. 317, 41 N. E. 26 (1895); Myers v. Myers, 47 W. Va. 487, 35 S. E. 868 (1900); PROSSER, HANDBOOK OF THE LAW OF TORTS 905 (1941).


4 Ledgerwood v. Ledgerwood, 141 Cal. App. 538, 300 Pac. 144 (1931); Farrar v. Farrar, 41 Ga. App. 120, 152 S. E. 278 (1930); Ponder v. Ponder, 157 So. 627 (La. App. 1934); Weyan v. Weyan, 165 Miss. 259, 139 So. 608 (1932); Taylor v. Taylor, 232 S. W. 2d 382 (Mo. 1950).
