Torts--Negligence--Substantial Factor Test

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While it is the right of the press . . . to freely criticize and comment upon the official action and conduct of a public officer, false and defamatory words . . . are not privileged on the ground that they related to a matter of public interest, and were spoken or published in good faith.17

Since Sullivan, of course, this is no longer either the majority or Ohio position.

After the Sullivan case, good faith is a defense to a libel action and malice cannot be inferred from the falsity of the statement — it must be proved by the plaintiff to have actually existed in the mind of the critic at the time the statement was printed.

What effect this decision will have upon the attitude of the country's newspapermen remains to be seen. Nevertheless, Sullivan should provide sufficient safeguards to enable an even wider and more open presentation of events and issues by responsible reporters and columnists. The beneficiaries of this decision are the American public.

Hence, the Sullivan case has, in effect, imposed upon all American jurisdictions, via the first amendment, the view formerly espoused by only eight states. As to these states, New York Times Co. v. Sullivan18 has had little or no effect. Also, it no longer matters whether a distinction is drawn between fair comment and qualified privilege. Justice Holmes' distinction has been laid to rest in a graveyard of brilliance.19

ANDREW M. FISHMAN

TORTS — NEGLIGENCE — SUBSTANTIAL FACTOR TEST


The plaintiff, an employee of a subcontractor hired to dig a trench on defendant’s premises, alleged severe personal injuries while assisting in the operation of a trench-digging machine. In lifting the boom of the machine to unload the bucket, the operator contacted overhead electric wires, exerting upward force on the connecting steel posts. After engaging the wires ten to fifteen times, one of the posts broke off, striking the plaintiff.

17. Ibid. (Emphasis added.) The earliest Ohio case on the subject is Seely v. Blair, Wright 358 (Ohio 1833), wherein the defendant stated publicly that plaintiff, a candidate for county sheriff, was a liar and had perjured himself. The accusations were false and plaintiff recovered a judgment. The case is cited for the proposition that the right of free comment with reference to public officials does not extend to misstatements of fact. In this case, however, defendant was malicious and so the proposition loses much of its force with respect to the changes that Sullivan will bring.


The plaintiff alleged that the defendant landowner had been negligent in failing to properly maintain the post in that it had been weakened by rust and corrosion. Defendant, Jones & Laughlin Steel Corporation, claimed that the acts of the subcontractor's machine operator constituted intervening negligence. Further, the defendant alleged that the subcontractor had been warned against touching any wires on the premises. The issue at trial was: whether defendant's failure to properly maintain the post and the negligent action of the machine operator were concurring causes of the plaintiff's injuries; or, on the other hand, whether the negligent action of the machine operator was a superseding cause. This issue was in turn resolved into the pivotal question of whether the negligence of the defendant in failing to maintain the post in a safe condition was a substantial factor in the injury to the plaintiff.

At trial, the jury returned a verdict against the defendant landowner, Jones & Laughlin Steel Corporation, in the sum of $135,000. On review, the court of appeals reversed the judgment of the lower court for failure to give instructions on third party negligence. However, the court went on to hold that

if the original negligence continues to the time of injury and contributes substantially thereto in conjunction with the intervening act, each [negligent act] may be the proximate concurring cause for which full liability may be imposed.5

The instant case resolves three interrelated points of law: (1) judicial recognition of the doctrine of substantial factor, (2) resolution of the foreseeability requirement in relation to the doctrine of substantial factor, and (3) assignment of the decision-making power on the issue of substantiality to the jury.

With respect to the first point, the Springsteel case is unique in that

* Motion to certify overruled, 37 OHIO BAR 534 (Ohio Sup. Ct. 1964).

1. "An intervening cause is one which comes into active operation in producing the result after the negligence of the defendant. 'Intervening' is used in a time sense; it refers to later events." PROSSER, TORTS § 49, at 266 (2d ed. 1955). (Emphasis added.)

2. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." RESTATEMENT, TORTS § 440 (1934).

3. All definitions of causation suffer difficulties in clear and simple expression. The Wisconsin Supreme Court has defined substantial factor by relating it to proximate cause as follows: "An instruction on proximate cause would be proper which informs the jury that by proximate cause, legal cause, or cause . . . is meant such efficient cause of the accident as to lead the jurors, as reasonable men and women, to conclude that the negligence of [defendant] was a substantial factor in causing the injury." Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 236-37, 55 N.W.2d 29, 33 (1952).


5. Id. at 86. However, judgment for plaintiff was reversed, and the case was remanded for a new trial on the ground that the trial court refused to give a requested instruction to the jury on third party negligence.
it recognizes the doctrine of substantial factor\(^6\) within the framework of legal causation wherein the second actor's part is an independent\(^7\) intervening force. Prior to the instant case, the principle of substantial factor was recognized, for the most part, only where the second actor's part was a dependent\(^8\) intervening force.\(^9\) Moreover, causation in Ohio negligence law was traditionally tested in terms of whether the plaintiff's injuries were the natural and probable consequence of the defendant's negligence.\(^10\)

The substantial factor test, however, supplants the natural and probable consequences test. Now, where the injury is the result of concurrent causation, full liability may be imposed on the defendant if his conduct was a substantial factor in bringing about plaintiff's injury.\(^11\)

The second point discussed in the instant case involves the issue of foreseeability. The question was whether the landowner should have anticipated the negligent act of the machine operator. Traditionally, the test for deciding whether an intervening act absolves the original tort-

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For an especially tragic fact situation exemplifying concurrent tortfeasors held jointly liable based on the substantial factor test, see Levin v. Trans World Airlines, Inc., 201 F. Supp. 791 (W.D. Pa. 1962). See also 2 HARPER & JAMES, TORTS § 20.6, at 1159-60 n.45 (1956), for a criticism of the doctrine of substantial factor as a legal versus factual test for legal cause. The substantial factor doctrine has also been criticized as not providing an adequate safeguard for imposing liability. See 2 HARPER & JAMES, op. cit. supra at 1158-61; MORRIS, TORTS 163, 187-88 (1955).

7. It is important to note the distinction between an "independent intervening cause" and a "dependent intervening cause." An "independent intervening cause" is one which operates without respect to defendant's cause; a "dependent intervening cause" is one which is caused by the tortfeasor's original act. Werkman v. Howard Zink Corp., 97 Cal. App. 2d 418, 425, 218 P.2d 43, 48 (1950).

8. See note 7 supra.


11. In GREEN, JUDGE & JURY 230 (1930), the author explains the principle of substantial factor as follows: "In the absence of wrongful conduct on the plaintiff's part, the inquiry as to causes should end as soon as it appears that the defendant's conduct was a substantial factor." GREEN, op. cit. supra at 230. (Emphasis added.) See also Prosser, The Minnesota Court on Proximate Cause, 21 MINN. L. REV. 19 (1936).
feasor of liability is whether the consequences ought to have been foreseen under the circumstances. However, in the instant case, the court, relying on the *Restatement of Torts*, stated:

> [T]he law does not inevitably require that in order to prevent an intervening act from being a superseding cause which will relieve defendant of responsibility for its negligence, that the precise act be foreseeable.

Clearly, this holding liberalizes the test of foreseeability with respect to concurrent third party negligence. Therefore, greater vigilance will now be required of landowners to correct latent defects on their premises.

The third point in the *Springsteel* case involves the question of separation of functions between judge and jury. The question was whether the judge or the jury ought to decide whether the third party’s intervening act was a concurrent cause of the injury, and if so whether such an act constituted a superseding cause. In *Springsteel*, the court concludes that

whether an intervening act is a concurrent cause or a superseding cause of injury presents a question of fact for the triers of fact, the jury.

This position finds support in the *Restatement of Torts* which grants the jury the power of deciding issues where reasonable judicial minds could differ as to a defendant’s liability. On the other hand, the dissenting opinion in *Springsteel* would have allowed the trial court to grant a directed verdict for the defendant by what is essentially a “but for” test. These two positions exemplify a controversial area in the law of torts—the division of decisional powers between the judge and the jury. The instant case resolves this question in favor of the jury.

In summarizing these three principles in their application to the instant case, it can be concluded: (1) that the latent defect in the post was a sub-

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12. See 39 Ohio Jur. 2d Negligence § 30 (1959). *But see 2 Harper & James, op. cit. supra note 6, at 1159, wherein the author states: "... [A]s we have seen, foreseeability has no place at all in solving the cause-in-fact problem. Rather, it represents a limitation which would relieve a defendant, for reasons of policy, from liability for harm which he in fact caused."


15. *Id.* at 87.


17. 192 N.E.2d 81, 91 (Ohio Ct. App. 1963), (dissenting opinion).

18. The "but for" test may be stated as follows: the tortfeasor’s "conduct is not a cause of the event if the event would have occurred without it." *Prosser, Torts § 44, at 220* (2d ed. 1955). In *Springsteel*, the dissenting opinion stated: "It is crystal clear from all circumstances in this case that had the pole not been subjected ... to this whipping action, the accident would not have taken place ...." 192 N.E.2d 81, 92 (Ohio Ct. App. 1963). In other words, the dissenting opinion would have held for the defendant on the theory that "but for" the conduct of the machine operator, the plaintiff would not have been injured. It is important to note, however, that the "but for" test is not universally valid as an exclusionary rule. 2 Harper & James, op. cit. supra note 6, at 1110.

stantial factor in causing plaintiff's injury; (2) that the defendant cannot prevail under the substantial factor test by asserting that the event was unforeseeable, notwithstanding the fact that in prior Ohio cases involving concurrent negligence, a showing of lack of foreseeability under the circumstances might have been sufficient to relieve the defendant of liability; and (3) that the question of whether the negligent acts of the subcontractor's operator, or the latent defect in the post was a substantial factor in causing plaintiff's injuries is a question for the jury as opposed to one to be determined by the judge.

In concluding, it is clear that the effect of this decision is to enlarge a plaintiffs' remedies under Ohio negligence law. Asking a jury to decide whether a defendant's negligence is a substantial factor in a plaintiff's injury is a direct proposition. It must thus be concluded that *Springsteel v. Jones & Laughlin Steel Corp.* is an important milestone in the growth of Ohio tort law.

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