Perspective: Foreseeability in the Tests for Duty and Proximate Cause

In his dissent in *Palsgraf,* Justice Andrews promoted a rule that "every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." An Australian law professor, Jane Stapleton, observed that jurisdictions following this expansive duty rule came under pressure from lawyers arguing that there should be liability for a wide array of types of acts and omissions other than those in which the carelessness of the defendant directly resulted in physical injury to the plaintiff. See Jane Stapleton, *Legal Cause: Cause-in-Fact and Scope of Liability for Consequences,* 54 Vand. L. Rev. 941, 946-947 (2001):

> Under the pressure of such non-traditional claims, the views have crystallized in foreign common law jurisdictions that the negligence principle is one that requires tight and effective doctrinal control, and that society simply cannot and should not require the tort system to provide monetary compensation for every harm resulting from carelessness, not even every physical harm. Priorities must be chosen, and boundaries for the obligation of care must be drawn. . . . The earlier emotional allure of a general duty . . . has withered away in these jurisdictions. While these foreign courts continue to accept that a duty is owed in the traditional case of the running down of an absolute stranger, in all other contexts they insist on being positively persuaded that the law should recognize a particularized or "relational" duty between the parties.

Adopting a proximate cause rule requiring that the type of harm the plaintiff suffered be reasonably foreseeable is an attempt to limit liability in nontraditional cases. Adopting a duty rule requiring that the type of plaintiff and type of harm be reasonably foreseeable is another way to accomplish this result. Because the existence of a duty is generally a question of law for the judge to decide and the issue of proximate cause is a question of fact for the factfinder to decide, the choice of whether to put the foreseeability question in the duty or proximate cause analysis depends in part on whether one prefers to have liability limited by judges or juries.

McCAIN v. FLORIDA POWER CORPORATION

593 So. 2d 500 (Fla. 1992)

KOGAN, J.

. . . Thomas McCain was injured when the blade of a mechanical trencher he was operating struck an underground Florida Power Corporation electrical cable. An employee of Florida Power had come out earlier and marked those areas where it would be safe to use the trencher. Although the evidence at trial was conflicting, there was some evidence indicating that McCain was in an area marked "safe" when he struck the cable. Later, a jury awarded McCain a verdict of $175,000, including a thirty-percent reduction for McCain's own comparative negligence.

On appeal, the Second District reversed and remanded for entry of a directed verdict for Florida Power, concluding that the injury was not foreseeable. . . .

Then, the district court acknowledged the seemingly contradictory holding of some Florida courts "that the question of foreseeability is for the trier of *fact*." Without expressly disagreeing with this precedent, the district court went on to suggest that no duty existed in the present case as a matter of law because the specific injury suffered by McCain was not foreseeable. . . .

On the merits, we find that the district court erred in ordering a directed verdict. In the present case, Florida Power clearly was under a duty to take reasonable actions to prevent the general type of injury that occurred here. Moreover, there is sufficient evidence in the record to justify a reasonable person in believing that Florida Power breached this duty and that the breach proximately (i.e., foreseeably and substantially) contributed to the specific injury McCain suffered. Thus, the question of negligence could not be removed from the jury.

The . . . question of foreseeability can be relevant both to the element of duty (the existence of which is a question of law) and the element of proximate causation (the existence of which is a question of fact). The temptation therefore is to merge the two elements into a single hybrid "foreseeability" analysis, or to otherwise blur the distinctions between them. A review of both precedent and public policy convinces us that such blurring would be incorrect, even though it often will yield the correct result. The present cause happens to be one of a minority of cases in which an imprecise foreseeability analysis would lead to the wrong result.

Contrary to the tacit assumption made by the district court, foreseeability relates to duty and proximate causation in different ways and to different ends. The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold *legal* requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

It might seem theoretically more appealing to confine all questions of foreseeability within either the element of duty or the element of proximate causation. However, precedent, public policy, and common sense dictate that this is not possible. Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. . . .

The statute books and case law . . . are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.

On the question of proximate causation, the legal concept of foreseeability also is crucial, but in a different way. In this context, foreseeability is concerned with the specific, narrow factual details of the case, not with the broader zone of risk the defendant created.

In the past, we have said that harm is "proximate" in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question. In other words, human experience teaches that the same harm can be expected to recur if the same act or omission is repeated in a similar context. However, as the *Restatement (Second) of Torts* has noted, it is immaterial that the defendant could not foresee the *precise* manner in which the injury occurred or its *exact* extent. *Restatement (Second) of Torts* §435 (1965). In such instances, the true extent of the liability would remain questions for the jury to decide.

On the other hand, an injury caused by a freakish and improbable chain of events would not be "proximate" precisely because it is unquestionably unforeseeable, even where the injury may have arisen from a zone of risk. The law does not impose liability for freak injuries that were utterly unpredictable in light of common human experience. Thus, as the *Restatement (Second) of Torts* has noted, a trial court has discretion to remove the issue from the jury if, "after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that [the conduct] should have brought about the harm." *Restatement (Second) of Torts* §435(2) (1965).

Unlike in the "duty" context, the question of foreseeability as it relates to proximate causation generally must be left to the fact-finder to resolve. Thus, where reasonable persons could differ as to whether the facts establish proximate causation — i.e., whether the *specific* injury was genuinely foreseeable or merely an improbable freak — then the resolution of the issue must be left to the fact-finder. The judge is free to take this matter from the fact-finder only where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference.

. . . *As to duty,* the proper inquiry for the reviewing appellate court is whether the defendant's conduct created a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred.

Here, there can be no question but that Florida Power had the ability to foresee a zone of risk. By its very nature, power-generating equipment creates a zone of risk that encompasses all persons who foreseeably may come in contact with that equipment. The extensive precautionary measures taken by Florida Power show that it understood or should have understood the extent of the risk involved. The very fact that Florida Power marked the property for McCain itself recognizes that McCain would be within a zone of risk while operating the trencher. . . .

Certainly, the power company is entitled to give the fact-finder all available evidence about intervening causes, precautions taken against the risk, the fact that no similar injury has occurred in the past, and the comparative negligence of the plaintiff, among other matters. These questions clearly are relevant to the fact-based elements of breach or proximate causation. But the mere fact that such evidence exists — even if it ultimately may persuade the fact-finder — does not relieve the power company of its duty. Here, the zone of risk was foreseeable, giving rise to a coextensive duty of care as a matter of law. A reasonable jury then could have

concluded as a matter of fact that McCain's injury fell within this zone of risk and that Florida Power breached the duty it owed to McCain.

We also believe the jury was justified in concluding that the injury was proximately caused by Florida Power's breach. . . .

In this instance, the power company's agent marked those areas where McCain could safely dig. There is sufficient evidence in this record to justify a reasonable person in concluding that this marking was done negligently, causing McCain to operate the trencher in an area where an energized cable lay buried. A foreseeable consequence of this sequence of events is that electricity might escape from a severed cable and injure McCain, notwithstanding the existence of safety equipment to prevent this result and notwithstanding the fact that no similar accident has occurred in the past on cables equipped with such safety equipment. Human experience teaches that safety equipment can fail and that the severing of *any* energized cable is a dangerous event likely to lead to an electrical shock, even if safety equipment fails for only a split second. Indeed, if a jury believed the available evidence that McCain suffered a shock, it reasonably could have inferred that the safety equipment had failed.

There thus is sufficient evidence in this record that would justify a reasonable juror in concluding that McCain's injury was proximately caused by a breach of a duty imposed by law. The factual issues were for the jury, not the court, because reasonable persons may differ in resolving them. Accordingly, the district court erred in remanding for entry of a directed verdict. The opinion under review is quashed and the jury's verdict is reinstated.

NOTES TO McCAIN v. FLORIDA POWER COMPANY

1. *Duty and Proximate Cause.* Palsgraf v. Long Island Railway Co. illustrates the foreseeability test for duty while Tieder v. Little shows the foreseeability test for proximate cause. *McCain* compares the two tests, describing how the tests may differ and who applies each of them. For duty, the court focuses on "whether the defendant's conduct created a foreseeable zone of risk, not whether the defendant could foresee the specific injury that actually occurred." For proximate cause, the *McCain* court shifted its focus from whether the defendant's conduct foreseeably created some general type of risk to whether the specific type of injury to the plaintiff was foreseeable. The general risk involved injuries from transmission of electricity, while the specific circumstances of the plaintiff's injury involved the type of power cable involved and the safety devices in place designed to prevent injury where McCain was digging.

2. *Foreseeability in the Restatement (Third) of Torts (Proposed Final Draft No. 1 April 6, 2005).* Tort law traditionally uses the concepts of duty and proximate cause to limit liability. The proposed Restatement (Third) takes a different approach. Rather than deal with the bifurcated foreseeability analysis illustrated by the opinion in *McCain*, Restatement (Third) §26 simply recognizes a limit on liability independent of either the duty or the cause element:

> §29. Limitations on Liability for Tortious Conduct
>
> An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.

The risks consist of physical harms occurring with some probability. The Restatement (Third) approach reflects an approach that is familiar after the study of what it means to breach a duty in a negligence claim: "The magnitude of the risk is the foreseeable severity of the harm discounted by the foreseeable probability that it will occur." §29 cmt. d. So, to determine the foreseeability of the risk, the fact-finder would go back to the breach question and determine whether the harms risked by the tortious conduct were of the same general sort as those suffered by the plaintiff. If an electric company improperly marked zones as safe for digging, the general risk would be electrocution. If a flood somehow resulted, that harm might be unforeseeable because it is not the possibility of flooding that makes improper marking negligent. The drafters of the Restatement (Third) have only considered physical harms and have not yet adopted rules applicable to other harms such as purely emotional or economic harms.

3. ***Problem: Foreseeability of Harm.*** Restatement (Third) §29 Illustration 3 offers the following hypothetical. Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard. Richard hands his loaded shotgun to Kim as he enters the house. Kims drops the shotgun, which lands on her toe, breaking it. Assuming that Richard was negligent in giving Kim his shotgun, is Kim's broken toe outside the scope of Richard's liability using the approach in Restatement (Third) §29?

2. Relating the "Eggshell Plaintiff" Rule to a Foreseeability Analysis

Sometimes conduct that would ordinarily be negligent because it creates a certain risk turns out to create unforeseeably large damages because the victim has an unusual weakness. In these situations, tort law must decide whether the unpredictable extent of the injury represents a cost that the defendant should bear, even though it is difficult to call that loss foreseeable. Schafer v. Hoffman applies the colorfully named "eggshell" or "thin skull" plaintiff rule in the context of the foreseeability approach to proximate cause. The eggshell plaintiff rule applies to the *extent* of harm, while the foreseeability rule in the proximate cause context applies to the *type* of harm.

SCHAFER v. HOFFMAN

831 P.2d 897 (Colo. 1992)

VOLLACK, J.

Petitioner, Larry Schafer (Schafer), petitions from a court of appeals decision. . . . The court of appeals affirmed the judgment entered on a jury verdict in favor of Shirley Hoffman (Hoffman) in the amount of $715,000. We affirm.

On January 15, 1988, Schafer struck Hoffman, a pedestrian, with his vehicle. Schafer was under the influence of alcohol and drugs at the time of the collision. As a result of the collision, Hoffman sustained numerous injuries, including a compression fracture in a spinal vertebra, a concussion with intracranial bleeding, a fractured femur in her left leg, and torn cartilage in her left knee. Hoffman also sustained other injuries to her left leg, left hand, and right elbow.

Hoffman filed an action against Schafer which proceeded to trial on January 3, 1989. Schafer admitted negligence in the operation of his vehicle but denied that his

conduct was willful and wanton, and disputed the nature and extent of Hoffman's injuries. Schafer contended that Hoffman had pre-existing injuries for which he was not liable because they were not caused by his conduct.

Hoffman produced numerous witnesses at trial, including Dr. Rupp, her orthopedic surgeon. Dr. Rupp testified that he treated Hoffman shortly after the January 15, 1988, accident. Dr. Rupp was aware that Hoffman had developed thrombophlebitis (blood clots) in her left leg, around her knee, as a result of the accident. Hoffman took anticoagulant drugs in order to reduce clotting. As a result, Dr. Rupp could not perform surgery on Hoffman's knee until the clotting had sufficiently dissipated. Dr. Rupp referred Hoffman to a physical therapist, but determined early in the fall of 1988 that surgery was necessary based on the lack of improvement in her condition through the course of her therapy. . . .

On cross-examination, Schafer elicited testimony that Dr. Rupp had treated Hoffman two months prior to the accident, in November 1987, for pain in her right knee. She could not fully extend her knee at that time and was taking Motrin (a drug designed to decrease swelling of arthritic joints) on an as-needed basis. Dr. Rupp prescribed Darvocet, a mild pain killer, and Chlorinol, an anti-inflammatory drug, during November 1987. . . .

In summary, the jury heard evidence introduced by Schafer that Hoffman had complained of knee pain and lower back problems prior to the accident, and that the vertebra fracture might have occurred prior to the January 15, 1988, accident. The jury also was aware that Hoffman's knee had some degeneration as a result of the normal aging process, that Hoffman might be predisposed to causalgia, and that Hoffman's knee surgery was delayed longer than the average person's because of her blood clotting condition.

At the close of trial, Hoffman submitted a "thin skull" instruction which read as follows:

> In determining the amount(s) of plaintiff's actual damages in each of the various categories set forth in Instruction No. 16, you may not refuse to award nor reduce the amount of any such damages because of any physical frailties of the plaintiff that may have made her more susceptible to injury, disability or impairment.

Schafer objected to the giving of this instruction on the grounds that the instruction told the jury that they may not refuse or reduce the amount of damages because of Hoffman's pre-existing physical ailments. Schafer contended that there was no evidence of aggravation of Hoffman's condition and thus Schafer could not be held liable for her pre-existing conditions. The district court, however, gave the challenged instruction to the jury.

The jury found for Hoffman, and Schafer appealed. The court of appeals concluded that the instruction was a proper statement of the law and that it was supported by the evidence in this case. Schafer petitions this court for a determination that the thin skull instruction is not a correct statement of law and that the court of appeals erred in holding that Hoffman was entitled to the instruction as her theory of the case. We disagree.

The term "thin skull," or "eggshell skull," is derived from illustrations appearing in English cases wherein a plaintiff with an "eggshell skull" suffers death as a result of a defendant's negligence where a normal person would only suffer a bump on the head. Dulieu v. White & Sons, 2 K.B. 669, 679 (1901); W. Page Keeton et al., Prosser and

Keaton on the Law of Torts §43, at 292 (5th ed. 1984) [hereinafter "Prosser"] (citing Glanville Williams, *The Risk Principle,* 77 L.Q. Rev. 179, 193-97 (1961)). The negligent defendant is liable for the resulting harm even though the harm is increased by the particular plaintiff's condition at the time of the negligent conduct. Prosser §43, at 291; see also Restatement (Second) of Torts §461 cmt. a (1965) ("A negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other toward whom his act is negligent.").

As Prosser notes, there is almost universal agreement on this rule. Prosser §43, at 291 ("There is almost universal agreement upon liability beyond the risk, for quite unforeseeable consequences, when they follow an impact upon the person of the plaintiff."). Liability "beyond the risk," however, is not solely premised on the existence of ascertainable pre-existing physical conditions:

> The defendant is held liable when the defendant's negligence operates upon a concealed physical condition, such as pregnancy, or latent disease, or *susceptibility* to disease, to produce consequences which the defendant could not reasonably anticipate. The defendant is held liable for unusual results of personal injuries which are regarded as unforeseeable, such as tuberculosis, paralysis, pneumonia, heart or kidney disease, blood poisoning, cancer, or the loss of hair from fright.

Prosser §43, at 291-92 (emphasis added). Some scholars have interpreted the thin skull doctrine to encompass the plaintiff's physical, mental, or financial condition. 4 Fowler Harper et al., The Law of Torts §20.3 (2d ed. 1986). "And these preexisting conditions may have the greatest bearing on the extent of the injury actually suffered by any particular plaintiff in a given case. Thus the same slight blow in the abdomen might cause only fleeting discomfort to a man but a miscarriage to a pregnant woman." Id.

Under Colorado law, it is fundamental that a tortfeasor must accept his or her victim as the victim is found. Stephens and Kraftco Corp. v. Koch, 192 Colo. 531, 533, 561 P.2d 333, 334 (1977) ("As this court has made clear, a defendant must take his 'victim' as he finds him."); Fischer v. Moore, 183 Colo. 392, 394, 517 P.2d 458, 459 (1973) ("Under the common-law principles of tort law, it is axiomatic that the tortfeasor must accept the plaintiff as he finds him. . . .").

Accordingly, under the thin skull doctrine, a tortfeasor "may not seek to reduce the amount of damages [owed to the victim] by spotlighting the physical frailties of the injured party at the time the tortious force was applied to him." Id. A thin skull instruction is appropriately given when the defendant seeks to avoid liability by asserting that the victim's injuries would have been less severe had the victim been an average person. See Priel v. R.E.D., Inc., 392 N.W.2d 65, 69 (N.D. 1986) (citing *Dulieu,* 2 K.B. at 679) (holding that the defendant could not escape liability where plaintiff had a prior fragile condition making her more susceptible to certain injuries than the average person).[2] . . .

The thin skull doctrine has not been limited to pre-existing bodily conditions. See Prosser §43, at 291-92 and discussion supra. The doctrine appropriately applies where

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[2] In Dulieu v. White & Sons, 2 K.B. 669, 679 (1901), the court stated:

> If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

a plaintiff may be predisposed or more susceptible to ill effects than a normal person. See City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 495 P.2d 1327, 1335 (1972) (plaintiff had no pre-existing injury but rather an anatomically different spine); Walton v. William Wolf Baking Co., 406 So. 2d 168, 175 (La. 1981) (holding that tortfeasor was required to take plaintiff as found, with predisposition to neurosis); Reck v. Stevens, 373 So. 2d 498, 502 (La. 1979) (plaintiff had an underlying emotional instability); Freyermuth v. Lutfy, 376 Mass. 612, 382 N.E.2d 1059, 1064 n.5 (1978) ("The established rule is that where the result of an accident is to activate a dormant or incipient disease, or one to which the person is predisposed, the negligence which caused the accident is the proximate cause of the disability.").

The challenged instruction encapsulates the fundamental thin skull doctrine. A party "is entitled to an instruction embodying his theory of the case, if there is evidence in the record to support it." Newbury v. Vogel, 151 Colo. 520, 524, 379 P.2d 811, 813 (1963).

During trial, Schafer . . . . attempted to establish that Hoffman had longstanding complaints with regard to her knees. Schafer sought to prove that Hoffman's recovery process was longer than the average person's because arthroscopic surgery expedites recovery but was delayed in Hoffman's case as a result of her blood clotting condition.

Schafer also attempted to establish . . . that chondromalacia can develop over the course of the normal aging process. Schafer elicited, through cross-examination of Hoffman's physical therapist, that Hoffman had some degeneration in her knee as a result of her age.

The testimony elicited by Schafer in this case could lead the jury to believe that Hoffman suffered frailties or was more susceptible to certain medical infirmities than the average person. The challenged instruction merely informed the jury that Schafer could not escape liability because of Hoffman's condition at the time of the accident. The trial court did not err by giving the thin skull instruction in this case.

Schafer contends that the court of appeals erred in holding that Hoffman was entitled to a thin skull instruction as her theory of the case. Schafer specifically argues that the court of appeals determination was based on Ms. Woodward's testimony, and that her testimony supported analysis of "true value" issues and not the thin skull instruction. We disagree.

The true value or "shabby millionaire" rule complements the thin skull doctrine. Gary Bahr & Bruce Graham, *The Thin Skull Plaintiff Concept: Evasive or Persuasive?*, 15 Loy. L.A. L. Rev. 409, 410 (1982). The thin skull doctrine declares that foreseeability of plaintiff's injuries is not an issue in determining *the extent of injury* suffered, while the true value or shabby millionaire rule declares that foreseeability is not an issue in determining *the extent of damages* that the injuries cause.[9] Id. (citing Rowe, *The Demise of the Thin Skull Rule,* 40 Mod. L. Rev. 377 (1977)).

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[9] The shabby millionaire rule is illustrated as follows:

> If a person fires across a road when it is dangerous to do so and kills a man who is in receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer.

Gary Bahr & William Graham, *The Thin Skull Plaintiff Concept: Evasive or Persuasive?*, 15 Loy. L.A. L. Rev. 409, 410-11 (1982) (citing Smith v. London & S.W. Ry., L.R. 6 C.P. 14, 22-23 (1870)); Glanville Williams, *The Risk Principle,* 77 L.Q. Rev. 179 (1961).

The court of appeals discussed the testimony of the orthopedic surgeons regarding Hoffman's particular condition at the time of the accident. In the context of this discussion, the court of appeals noted that Ms. Woodward, a vocational rehabilitation counselor, testified that Hoffman would be disadvantaged in the job market. The record amply supports the court of appeals determination that the thin skull instruction was proper in this case. We thus find Schafer's contention to be without merit, and affirm the judgment of the court of appeals.

NOTES TO SCHAFER v. HOFMAN

1. *Take the Plaintiff as You Find Him or Her.* The eggshell plaintiff principle is sometimes expressed as a statement to defendants: "You must take the plaintiff as you find him or her." If a plaintiff happens to have an unusual weakness, the eggshell plaintiff rule requires the defendant to pay damages for an injury that could not have been foreseen. How does that fit with the foreseeability approach to proximate causation?

2. *Who Should Bear the Risk of Unusual Susceptibility?* In a case where a defendant does something that could harm a typical person but happens to do it to a person with an unusual weakness, the consequences of the defendant's act will likely be more severe than the defendant could have anticipated. Compare the fairness of the eggshell plaintiff rule and an alternative approach (rejected by typical tort law) that would make the plaintiff bear the unusual costs related to the plaintiff's unusual condition. Should it affect your analysis if negligent defendants sometimes injure people who are abnormally robust and healthy and therefore defendants will be liable for unusually small damages? On average, would the damages paid even out and be equal to the expected amount of damages that typical people would suffer from the negligent conduct?

3. *Unusual Weakness and Damages.* Even though a defendant may be liable for more severe harm than would have been suffered by a normally healthy person, the calculation of damages can mitigate the severity of the eggshell plaintiff rule. Consider how the rule would apply in a case where the plaintiff died even though a typical person would have suffered a lesser injury. If the decedent's life expectancy was already shortened by his or her preexisting condition, the jury would take that into account. The jury would be required to place a dollar amount on the loss of living for the number of years projected for that abnormally short life expectancy. Contrast this approach to a typical case in which the life expectancy the jury uses is a typical or average one.

3. Difficulty in Applying Foreseeability Analysis

To proponents of foreseeability analysis, the directness test seems primitive because it imposes virtually unlimited liability on some defendants. The foreseeability approach, on the other hand, tailors liability to the risks a defendant should have comprehended. This limitation may direct tort law's deterrent power properly. The fear of tort liability for foreseeable harms can cause an actor to avoid conduct that could cause those foreseeable harms. In contrast, an actor who fears tort liability that might be unlimited cannot make any change in behavior other than a general decrease in his or her level of activity.

The theoretical appeal of the foreseeability approach is tempered by difficulty in applying it. In Petition of Kinsman Transit Co., that complication is confronted. The opinion also describes the continuing vitality of the directness test in some circumstances.

PETITION OF KINSMAN TRANSIT CO.

338 F.2d 708 (2d Cir. 1964)

[Jams of ice were floating downstream in the Buffalo River. The crew of Kinsman's barge, Shiras, acted negligently, and the barge was torn from its moorings at a dock operated by Continental. Continental employees were also negligent in handling the barge. It floated downstream and crashed into a moored ship, the Tewksbury. Both vessels moved toward a bridge. Due to negligence on the part of city employees, the bridge was not raised in time to let the vessels and ice pass under it, and the bridge was destroyed. The wreckage dammed up the river, and property damage was sustained as far upstream as the Continental dock. Claims were made for property damage. An admiralty decree adjudicated liability, and several parties appealed.]

FRIENDLY, J.

. . . We see little similarity between the *Palsgraf* case and the situation before us. The point of *Palsgraf* was that the appearance of the newspaper-wrapped package gave no notice that its dislodgement could do any harm save to itself and those nearby, and this by impact, perhaps with consequent breakage, and not by explosion. In contrast, a ship insecurely moored in a fast flowing river is a known danger not only to herself but to the owners of all other ships and structures down-river, and to persons upon them. No one would dream of saying that a shipowner who "knowingly and wilfully" failed to secure his ship at a pier on such a river "would not have threatened" persons and owners of property downstream in some manner.[6] The shipowner and the wharfinger in this case having thus owed a duty of care to all within the reach of the ship's known destructive power, the impossibility of advance identification of the particular person who would be hurt is without legal consequence. . . . Similarly the foreseeable consequences of the City's failure to raise the bridge were not limited to the Shiras and the Tewksbury. Collision plainly created a danger that the bridge towers might fall onto adjoining property, and the crash of two uncontrolled lake vessels, one 425 feet and the other 525 feet long, into a bridge over a swift ice-ridden stream, with a channel only 177 feet wide, could well result in a partial damming that would flood property upstream. As to the City also, it is useful to consider, by way of contrast, Chief Judge Cardozo's statement that the Long Island would not have been liable to Mrs. Palsgraf had the guard wilfully thrown the package down. If the City had deliberately kept the bridge closed in the face of the onrushing vessels, taking the risk that they might not come so far, no one would give house-room to a claim that it "owed no duty" to those who later suffered from the flooding. Unlike Mrs. Palsgraf, they were within the area of hazard. . . .

[6] The facts here do not oblige us to decide whether the Shiras and Continental could successfully invoke *Palsgraf* against claims of owners of shore-side property upstream from the Concrete Elevator or of non-riparian property other than the real and personal property which was sufficiently close to the bridge to have been damaged by the fall of the towers.

Since all the claimants here met the *Palsgraf* requirement of being persons to whom the actors owed a "duty of care," we are not obliged to reconsider whether that case furnishes as useful a standard for determining the boundaries of liability in admiralty for negligent conduct as was thought in Sinram [v. Pennsylvania R. Co., 61 F.2d 767 (2d Cir. 1932)], when *Palsgraf* was still in its infancy. But this does not dispose of the alternative argument that the manner in which several of the claimants were harmed, particularly by flood damage, was unforeseeable and that recovery for this may not be had — whether the argument is put in the forthright form that unforeseeable damages are not recoverable or is concealed under a formula of lack of "proximate cause."[8]

So far as concerns the City, the argument lacks factual support. Although the obvious risks from not raising the bridge were damage to itself and to the vessels, the danger of a fall of the bridge and of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought. And the same can be said as to the failure of Kinsman's shipkeeper to ready the anchors after the danger had become apparent. The exhibits indicate that the width of the channel between the Concrete Elevator and the bridge is at most points less than two hundred fifty feet. If the Shiras caught up on a dock or vessel moored along the shore, the current might well swing her bow across the channel so as to block the ice floes, as indeed could easily have occurred at the Standard Elevator dock where the stern of the Shiras struck the Tewksbury's bow. At this point the channel scarcely exceeds two hundred feet, and this was further narrowed by the presence of the Druckenmiller moored on the opposite bank. Had the Tewksbury's mooring held, it is thus by no means unlikely that these three ships would have dammed the river. Nor was it unforeseeable that the drawbridge would not be raised since, apart from any other reason, there was no assurance of timely warning. What may have been less foreseeable was that the Shiras would get that far down the twisting river, but this is somewhat negated both by the known speed of the current when freshets developed and by the evidence that, on learning of the Shiras' departure, Continental's employees and those they informed foresaw precisely that.

Continental's position on the facts is stronger. It was indeed foreseeable that the improper construction and lack of inspection of the "deadman" might cause a ship to break loose and damage persons and property on or near the river — that was what made Continental's conduct negligent. With the aid of hindsight one can also say that a prudent man, carefully pondering the problem, would have realized that the danger of this would be greatest under such water conditions as developed during the night of January 21, 1959, and that if a vessel should break loose under those circumstances, events might transpire as they did. But such post hoc step by step analysis would render "foreseeable" almost anything that has in fact occurred; if the argument relied upon has legal validity, it ought not be circumvented by characterizing as foreseeable what almost no one would in fact have foreseen at the time.

The effect of unforeseeability of damage upon liability for negligence has recently been considered by the Judicial Committee of the Privy Council, Overseas Tankship

[8] It is worth underscoring that the *ratio decidendi* in *Palsgraf* was that the Long Island was not required to use *any* care with respect to the package vis-a-vis Mrs. Palsgraf; Chief Judge Cardozo did not reach the issue of "proximate cause" for which the case is often cited. 248 N.Y. at 346-347, 162 N.E. 99.

(U.K.) Ltd. v. Morts Dock & Engineering Co. (*The Wagon Mound*), (1961) 1 All E.R. 404. The Committee there disapproved the proposition, thought to be supported by Re Polemis and Furness, Withy & Co. Ltd. (1921) 3 K.B. 560 (C.A.), "that unforeseeability is irrelevant if damage is 'direct.'" We have no difficulty with the result of *The Wagon Mound*, in view of the finding, 1 All E.R. at 407, that the appellant had no reason to believe that the floating furnace oil would burn. . . . On that view the decision simply applies the principle which excludes liability where the injury sprang from a hazard different from that which was improperly risked. . . . Although some language in the judgment goes beyond this, we would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded. Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken—the current, the ice, and the physical mass of the Shiras, the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation.[9] . . . The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated. . . .

The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked. . . . Other American courts, purporting to apply a test of foreseeability to damages, extend that concept to such unforeseen lengths as to raise

[9] The contrasting situation is illustrated by the familiar instances of the running down of a pedestrian by a safely driven but carelessly loaded car, or of the explosion of unlabeled rat poison, inflammable but not known to be, placed near a coffee burner. Larrimore v. American Nat. Ins. Co., 184 Okla. 614, 89 P.2d 340 (1939). Exoneration of the defendant in such cases rests on the basis that a negligent actor is responsible only for harm the risk of which was increased by the negligent aspect of his conduct. See Keeton, Legal Cause in the Law of Torts, 1-10 (1963); Hart & Honore, Causation in the Law, 157-58 (1959). Compare Berry v. Borough of Sugar Notch, 191 Pa. 345, 43 A. 240 (1899). This principle supports the judgment for the defendant in the recent case of Doughty v. Turner Mfg. Co., (1964) 2 W.L.R. 240 (C.A.). The company maintained a bath of molten cyanide protected by an asbestos cover, reasonably believed to be incapable of causing an explosion if immersed. An employee inadvertently knocked the cover into the bath, but there was no damage from splashing. A minute or two later an explosion occurred as a result of chemical changes in the cover and the plaintiff, who was standing near the bath, was injured by the molten drops. The risk against which defendant was required to use care—splashing of the molten liquid from dropping the supposedly explosion proof cover—did not materialize, and the defendant was found not to have lacked proper care against the risk that did. As said by Lord Justice Diplock, (1964) 2 W.L.R. at 247, "The former risk was well known (that was foreseeable) at the time of the accident; but it did not happen. It was the second risk which happened and caused the plaintiff damage by burning." Moreover, if, as indicated in Lord Pearce's judgment, (1964) 2 W.L.R. at 244, the plaintiff was not within the area of potential splashing, the case parallels *Palsgraf;* Lord Justice Diplock's statement, (1964) 2 W.L.R. at 248, that defendants "would have been under no liability to the plaintiff if they had intentionally immersed the cover in the liquid" is reminiscent of Chief Judge Cardozo's quoted above.

serious doubt whether the concept is meaningful;[10] indeed, we wonder whether the British courts are not finding it necessary to limit the language of *The Wagon Mound* as we have indicated.

We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculpate him further rather than limit his liability. This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous — that what is claimed to be consequence is only fortuity. Thus, if the destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient's life, few judges would impose liability on any of the parties here, although the agreement in result might not be paralleled by similar unanimity in reasoning; perhaps in the long run one returns to Judge Andrews' statement in *Palsgraf* . . . "It is all a question of expediency, . . . of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." It would be pleasant if greater certainty were possible . . . but the many efforts that have been made at defining the locus of the "uncertain and wavering line," 248 N.Y. at 354, 162 N.E. 99, are not very promising; what courts do in such cases makes better sense than what they, or others, say. Where the line will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago. Here it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding; yet the mind is also repelled by a solution that would impose liability solely on the City and exonerate the persons whose negligent acts of commission and omission were the precipitating force of the collision with the bridge and its sequelae. We go only so far as to hold that where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the

[10] An instance is In re Guardian Casualty Co., 253 App. Div. 360, 2 N.Y.S.2d 232 (1st Dept.), *aff'd*, 278 N.Y. 674, 16 N.E.2d 397 (1938), where the majority gravely asserted that a foreseeable consequence of driving a taxicab too fast was that a collision with another car would project the cab against a building with such force as to cause a portion of the building to collapse twenty minutes later, when the cab was being removed, and injure a spectator twenty feet away. Surely this is "straining the idea of foreseeability past the breaking point," Bohlen, *Book Review*, 47 Harv. L. Rev. 556, 557 (1934), at least if the matter be viewed as of the time of the negligent act, as the supposedly symmetrical test of *The Wagon Mound* demands, (1961) 1 All Eng. R. at 415. On the other hand, if the issue of foreseeability is viewed as of the moment of impact, see Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 Harv. L. Rev. 372, 385 (1939), the test loses functional significance since at that time the defendant is no longer able to amend his conduct so as to avert the consequences.

extent of the loss will not limit liability. Other fact situations can be dealt with when they arise. . . .

NOTES TO PETITION OF KINSMAN TRANSIT CO.

1. ***The Wagon Mound.*** *The Wagon Mound* case discussed in *Kinsman Transit* involved the destruction of a dock by fire. The defendant spilled a large quantity of oil into a harbor. That oil floated on the surface of the water, and a third party's employees allowed sparks to come into contact with it. The oil ignited and caused the fire that harmed the plaintiff's dock. The plaintiff and defendant agreed that no one could foresee that the floating oil could be ignited by the conduct of the workers. Liability was rejected on the theory that the defendant's conduct was negligent only because of the risk that its oil could smudge or otherwise foul equipment at the plaintiff's dock and that liability for unforeseeable risks should not be imposed.

2. ***General Type of Damage.*** Judge Friendly wrote that:

> We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care.

What degree of foreseeability is required by this formulation? How does it relate to the "thin skull" rule?

D. Substantial Factor Test

The *substantial factor test* for proximate cause generally ignores foreseeability. It considers whether the contribution of a party's act was relatively important compared with other but-for causes in producing the harm suffered by the plaintiff. The opinion in American Truck Leasing, Inc. v. Thorne Equipment Company relies on the considerations identified in the Restatement (Second) of Torts §431 to analyze whether the defendant's act was a substantial factor. Just as "direct" and "foreseeable" are subject to interpretation, the Restatement factors are similarly malleable. Chelcher v. Spider Staging Corp. focuses on how the number of factors contributing to a plaintiff's harm affects the substantial factor analysis. Taylor v. Jackson considers the relevance of the lapse of time between a defendant's conduct and a plaintiff's harm.

AMERICAN TRUCK LEASING, INC. v. THORNE EQUIPMENT COMPANY

583 A.2d 1242 (Pa. Super. Ct. 1991)

WIELAND, J.

. . . Dorothy Gross was the owner of a vacant building at Nos. 1758-1762 North Front Street, Philadelphia. On June 27, 1988, between 1:30 and 2:30 a.m., a fire started in combustible trash and debris which had been allowed to accumulate on the premises. The fire spread across a narrow street and damaged premises at Nos. 105-109 West Palmer Street, which premises were owned by Joseph A. Tartaglia and occupied

for business purposes by JATCO, Inc. The fire burned for more than eight hours before being extinguished. Pursuant to a determination made by the City of Philadelphia, Thorne Equipment was engaged thereafter to demolish a six story elevator shaft on Tartaglia's land. This elevator shaft, although still standing, had been damaged by the fire. Thorne Equipment began its demolition work on June 28, 1988, but during the course thereof a portion of the elevator shaft fell upon and damaged buildings and vehicles owned by the plaintiffs, American Truck Lines, Inc. and American Truck Leasing, Inc. (American). American thereafter filed a civil action against Thorne Equipment, the City of Philadelphia, Tartaglia, JATCO, Inc. and Dorothy Gross. All claims remain undetermined in the trial court except the claim against Dorothy Gross, which has been summarily dismissed.

American alleged in its complaint that Gross had been negligent by allowing combustible trash and debris to accumulate on her property and in otherwise failing to exercise care to prevent the occurrence of a fire. That negligence, if it existed, would be a legal cause of American's harm only if it could be shown to be a substantial factor in bringing about such harm. Restatement (Second) of Torts §431. Factors to be considered in determining whether an act is a substantial factor in bringing about harm to another are enumerated in Restatement (Second) of Torts §433 as follows:

> The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:
>
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
>
> (c) lapse of time.

When these considerations are applied to the facts of the instant case, they demonstrate that even if Dorothy Gross had been negligent in allowing combustible trash to accumulate on her property, such accumulation was too far removed factually and chronologically from American's harm to be a legal cause thereof. Gross's negligence was passive and harmless until acted upon by an independent force. Moreover, the fire which erupted on her property was extinguished before any harm had occurred to American. The negligence for which she was responsible, if any, was not in active operation at the time when damages were caused to American's property. Those damages were caused on the day following the fire because of the manner in which the fire weakened elevator shaft was demolished by Thorne Equipment. Because the negligent accumulation of combustible trash was too far removed from the damages to American's property and because those damages were caused by the intervening act of the demolition contractor, it cannot be said legally or factually that the alleged negligence of Dorothy Gross was a substantial factor in causing harm to American.

In Ford v. Jeffries, 474 Pa. 588, 379 A.2d 111 (1977), the Supreme Court held that it was for the jury to determine whether a property owner's negligence in maintaining his property in a state of disrepair was a substantial factor in causing the harm to a neighbor's property damaged by fire originating on the original owner's property. In the instant case, however, American's property damage was not caused by a

spreading fire. It was caused, rather, by the demolition of a fire damaged grain elevator after the fire had been extinguished. This demolition constituted an independent agency. We conclude, therefore, that the trial court correctly determined that Dorothy Gross, as a matter of law, was not legally responsible for appellant's harm.

Affirmed.

NOTES TO AMERICAN TRUCK LEASING, INC. v. THORNE EQUIPMENT COMPANY

1. ***Substantial Factor Test.*** The court describes its earlier decision in Ford v. Jeffries, where a defendant who had maintained property in disrepair was liable, when a fire started on the defendant's property, for fire damage to a neighbor's property. Why was a finding of liability proper there but rejected as a matter of law in *American Truck Leasing?* How would the court have decided *American Truck Leasing* if the elevator shaft had collapsed onto the plaintiff's property while the fire was still burning?

2. ***Problem: "Continuous" Forces.*** How should a court apply the Restatement's "continuous" forces factor to the following facts? A manufacturer failed to warn about the dangers associated with its pipeline valve. A distributor of the valve supplied a bracket that was unsafe to hold the valve. Workers, who were injured while trying to repair the valve, neglected to check diagrams that would have enabled them to repair the valve safely and failed to wear safety equipment. Could the Restatement provision justify treating the failure to warn as a substantial factor in the worker's injuries? See Torres v. Xomox Corporation, 49 Cal. App. 4th 1, 18 (1996).

3. ***Foreseeability and the Restatement's Substantial Factor Test.*** The Restatement (Second) of Torts §435(1) states that the foreseeability of the harm or the manner in which it occurred to someone in the defendant's position is irrelevant to the determination of whether the defendant's act is a substantial factor. Section 435(2) qualifies this rule by saying that "if, looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm," the actor's conduct should not be considered a legal cause.

CHELCHER v. SPIDER STAGING CORP.

892 F. Supp. 710 (D.V.I. 1995)

MOORE, District Judge.

This matter is before the Court on the plaintiffs' motion for partial summary judgment, filed June 5, 1995, and the defendant's motion for summary judgment, filed May 19, 1995. Having carefully reviewed the parties' submissions, the Court will deny plaintiffs' motion and grant the defendant's motion for the following reasons.

On May 17, 1989, plaintiff Lennox Chelcher worked at sandblasting the top hemisphere of a spherical propane tank belonging to Hess Oil Virgin Islands ("HOVIC") while employed by Industrial Maintenance Corporation ("IMC"). Working from [a] movable, cage-like scaffold or "spider" allegedly manufactured by defendant Spider Staging Corporation ("Spider"), plaintiff Lennox Chelcher ("Chelcher") allegedly sustained permanently disabling damage to his lower back from approximately five hours

of sandblasting in an uncomfortable position. The spider scaffold had been mis-rigged on the day in question by HOVIC and/or Chelcher's employer, IMC, such that it did not hang plumb from its suspension wires, but rather dragged along the side of the spherical tank. This mis-rigging caused the floor-platform of the spider to tilt increasingly away from the horizontal as it progressed up the side of the tank. Having become fully aware of this situation, Chelcher nonetheless boarded the spider cage and sandblasted from its increasingly tilted platform for about five hours. . . . The instant summary judgment motion[] concern[s] causes of action against Spider in the nature of . . . negligent failure to warn. . . .

The first prong of causation plaintiffs must prove is whether the alleged product defect, a [negligent] failure to affix an instruction manual to the scaffold, was a cause-in-fact of Chelcher's injuries. . . .

Chelcher had worked on similar, if not identical scaffolds, for approximately three years before he proceeded to sandblast the tank from the spider on the morning May 17, 1989. In these circumstances, the Court can find no credible evidence that Spider's alleged failure to warn could have caused Chelcher's injury. First, plaintiffs' claim that a pictogram depicting a man falling from a scaffold would have caused him to request access to information in the owner's manual is highly speculative. Second, the assertion that Chelcher would have acted differently that morning, upon seeing a pictogram, is belied by the fact that he proceeded to sandblast on the day of his injury despite the absence of the job-site safety inspector and despite the obvious mis-rigging of the spider. Third, plaintiffs have presented no credible evidence from which reasonable jurors could conclude that information in the safety manual would have prevented Chelcher's injury; although the manual admonishes users to keep the spider vertical to avoid accidents, it does not warn that back strain is a likely consequence of prolonged use of a leaning spider.

The second prong of the causation element is whether the alleged defect, Spider's failure to warn or affix an instruction manual to the spider cage, was the proximate or legal cause of Chelcher's injuries. Spider's conduct is a proximate, or legal, "cause of harm to another if . . . [its] conduct is a substantial factor in bringing about the harm." Restatement (Second) of Torts §431(a). Even if we had found Spider's conduct to have been a factual (but for) cause of the harm, we would find that plaintiffs failed to show it was a proximate cause of Chelcher's injuries. The use of the phrase "substantial" in the Restatement and the case law demonstrates that there is no litmus test for causation; rather, proximate causation, and hence liability, "hinges on principles of responsibility, not physics." *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 492 (3d Cir. 1985); Restatement (Second) of Torts §431, cmt. a.

Section 433(a) of the Restatement directs a court to consider "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it." Section 434 notes that a determination of proximate causation properly lies within the province of the court when, as here, reasonable minds cannot differ. Weighing all the evidence put forth by both parties and accepting *arguendo* plaintiffs' factual allegations regarding Spider's failure to warn, the Court finds that said failure could not have been a substantial factor in bringing about Chelcher's injuries. HOVIC's and IMC's mis-rigging of the scaffold, their failure to supervise the worksite, and their request that Chelcher proceed in his sandblasting, and his ready acquiescence despite the absence of the safety inspector, were all substantial contributing factors in causing his injury. The combined effect

of these contributing factors had such a predominant impact and so diluted Spider's contribution, if any, as to prevent it from being a substantial factor in producing the harm to Chelcher. As no reasonable jury could conclude that Spider's alleged failure to warn was the proximate cause of Chelcher's back pain, Spider is not liable in tort to plaintiffs. . . .

For the foregoing reasons, neither Chelcher nor his wife may succeed in an action against the manufacturer of the spider scaffold. An order granting summary judgment in favor of Spider is attached.

NOTES TO CHELCHER v. SPIDER STAGING CORP.

1. ***Cause-in-Fact and Proximate Cause.*** The *Chelcher* court analyzed cause-in-fact and proximate cause individually. For proximate cause, the court focused on the first consideration identified in Restatement (Second) §433(a), the number of other causes and the extent of their effect. The court evaluated whether, considering the other factors that influenced the course of events, the defendant's conduct *was significant enough* to justify imposing liability. For cause-in-fact, the court considered whether a warning by the defendant would have *made any difference* to the course of events. Thus, the cause-in-fact question is factual ("Would it have made any difference?") while the proximate cause question involves policy judgment ("Is imposing liability justifiable?").

2. ***The Potential for Numerous Proximate Causes.*** The court recognized that there may be many substantial factors contributing to an accident, so there need not be just one proximate cause. The court's opinion lists four factors that were all substantial and whose combined effect was great enough to make Spider's contribution relatively insignificant. Does it make sense that there can be more than one proximate cause? Does the Restatement (Second) language quoted in *American Truck Leasing* allow for more than one proximate cause?

TAYLOR v. JACKSON

643 A.2d 771 (Comm. Ct. Pa. 1994)

NEWMAN, J.

In these consolidated actions, Valerie Taylor (Taylor) and her parents, Robert and Peggy Taylor, and Joan D. Lindow and her husband, Myron G. Lindow (Lindows), appeal from orders of the Court of Common Pleas of Northumberland County (trial court) granting appellees' motions for summary judgment. . . . We reverse and remand. . . .

On the evening of July 30, 1988, at approximately 6:15 p.m., Diane L. Klopp (Klopp) was driving her motor vehicle in one of the two westbound lanes of Interstate 80, when she either slowed down or stopped on the roadway due to a sudden, heavy rainstorm. Consequently, Jackson, who was following Klopp in his tractor-trailer, jackknifed his vehicle in an attempt to stop so that he would not collide with her vehicle; this incident occurred at mile post number 227.1 of the highway. As a result, the jackknifed vehicle blocked both westbound lanes of the highway.

Traffic immediately began to accumulate behind the disabled vehicle. Two tractor-trailers, driven by John Barrett (Barrett) and Carol Porter (Porter), respectively, were the first vehicles to queue behind Jackson's jackknifed tractor-trailer. Minutes after the accident, an electric utility line owned by Pennsylvania Power and Light Company (PPL), which had been strung across Interstate Route 80, sagged or fell for unknown reasons. The line came to rest on the ground across the eastbound lanes of traffic and on top of Barrett's and Porter's vehicles in the westbound lanes.

At approximately 6:20 p.m. a second motor vehicle accident occurred as vehicles were coming to a stop behind Jackson's tractor-trailer. At mile post number 227.6, one-half mile from the initial accident, the tractor-trailer of Chester Ray Watley, Jr. (Watley) struck the rear of a car operated by Mirita Shroff (Shroff) in the right-hand westbound lane of the highway. After impacting with Shroff's vehicle, Watley's tractor-trailer jackknifed and came to rest against a guard rail at the north side of the right-hand berm.

At 7:05 p.m., State Police Trooper William Nice arrived to detour traffic at Exit 34 of the highway, which was approximately 4.5 miles east of the second accident site. Trooper Nice set up flares across the westbound lanes of the highway and remained at the westbound exit ramp directing traffic until approximately 12:30 a.m. At approximately 7:20 p.m., two PPL employees . . . were at the scene of the first accident and attempted to remove the electrical wire from the road.

It was about 8:15 p.m. when the Lindows came to a stop near mile post number 228.1, one half mile from the second accident scene. Following the Lindows' vehicle was the vehicle of Gerald A. Franz (Franz) along with his passenger, Taylor. A third motor vehicle accident occurred when Joseph J. Questore (Questore) drove his delivery truck into the rear of the Franz vehicle, propelling it eighty-seven feet. Questore's truck also struck, *inter alia,* the rear of the Lindows' vehicle. Because of these collisions, Taylor and the Lindows suffered serious injuries [and sued the appellees, Klopp, Jackson, Watley, PPL, and the Pennsylvania State Police]. . . .

After briefing and oral argument, the trial court granted the motions for summary judgment of appellees [from which the Taylors and Lindows filed this appeal].

Taylor and the Lindows contend that the trial court improperly invaded the province of the jury in determining that the conduct of the various appellees was not a substantial factor in causing their injuries. . . .

In the instant matter, the trial court listed the factors which contributed to the third accident. These factors were:

(1) Klopp coming to a stop during the sudden thunderstorm;
(2) Jackson jackknifing his tractor-trailer;
(3) the initial back-up of traffic behind the first accident;
(4) the downed PPL power line;
(5) the efforts of the Pennsylvania State Police [PSP];
(6) Watley's jackknifing his tractor-trailer in the second accident;
(7) the traffic continuing to back up behind the second accident for approximately two (2) hours; and
(8) Questore's negligent conduct.

The trial court then concluded that the fact that two hours elapsed between the conduct of Klopp, Jackson, Watley, PPL, and the PSP and the injuries complained of,

rendered any negligent conduct on their part not continuous and not active up to the time of the harm. The court thus held that no reasonable jury could find proximate cause between the appellees' conduct and the harm complained of, and accordingly entered summary judgment on their behalf. After a thorough review of the record, we conclude that the trial court's determination in this matter was in error.

Comment (f) of Restatement (Second) of Torts §433(c) provides that "where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long it is, is not sufficient to prevent it from being the legal cause of the other harm." Moreover, our supreme court in *Ford v. Jeffries*, 474 Pa. 588, 379 A.2d 111 (1977), observed that the determination of whether an actor's conduct was a substantial cause of the injuries complained of should not be taken from the jury if the jury may reasonably differ about whether the conduct of the actor has been a substantial factor in causing the harm. Since we believe that reasonable individuals can differ regarding the question of whether a two hour period should insulate a negligent actor from suit given the particular and unique facts of the instant matter, we hold that the trial court erred in granting summary judgment. . . . [Judgment reversed and remanded.]

NOTES TO TAYLOR v. JACKSON

1. ***Lapse of Time.*** As the length of time between an act and an injury increases, more time is available for other independent acts to contribute significantly to the harm. If more acts contribute significantly to the harm, then the original act is less likely to be a substantial factor. The Restatement (Second) of Torts §433 comment f treats this issue:

> Experience has shown that where a great length of time has elapsed between the actor's negligence and harm to another, a great number of contributing factors may have operated, many of which may be difficult or impossible of actual proof. Where the time has been long, the effect of the actor's conduct may thus become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of other factors which have contributed. However, where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of another's harm.

Evidence of lapse of time may reinforce a conclusion, also supported by other factors, that a defendant's act was not a substantial factor. In Brown v. Philadelphia College of Osteopathic Medicine, 760 A.2d 863 (Pa. Super. 2000), the lapse of time confirmed the analysis of other considerations:

> In the present case, the child was born August 29, 1991 and was tested for syphilis shortly thereafter. The erroneous test results [that are the factual basis for the Brown's suit against the hospital] were delivered to the Browns, and Mr. Brown confessed his adultery while Mrs. Brown was still hospitalized recovering from the birth. By some time in October, they had learned that the diagnosis had been made in error. The primary physical altercation between the couple that resulted in Mrs. Brown's physical injury, the arrest of both parties, the filing of a protection from abuse order against Mr. Brown and the couple's separation, occurred more than two months after the receipt of the erroneous diagnosis and in the month after they learned that the diagnosis had been in error. Thus, the lapse of more than two months, between the erroneous diagnosis and the initial break up of their marriage, point to a finding

> that [the hospital's] negligence was not a substantial factor in bringing about this harm. Accordingly, under all three factors set forth in the Restatement analysis, the [hospital's] negligence was not a substantial factor in bringing about the breakdown of the Browns' marriage and, thus, was not a proximate cause of this harm.

The relevance of lapse of time may depend on the mechanism by which the act produces the harm. If the construction materials used in a building, for instance, cause ill effects only after an occupant's long exposure, the lapse of time will not prevent the act from being a substantial factor. But if the consequences of defective materials usually manifest themselves immediately, the significance of the causal contribution of the construction materials may be suspect. See Bahura v. S.E.W. Investors, 754 A.2d 928 (D.C. Ct. App. 1999).

2. ***Problems: Restatement Factors.*** How would the Restatement factors apply in deciding whether the defendant's act in each of the following cases was a substantial factor in causing the plaintiff's harm?

A. A tractor-trailer operator drove off the road and parked on the shoulder so that he could sleep, in violation of a statute prohibiting parking on the shoulder of an interstate highway in a non-emergency situation. An automobile driver on the same road fell asleep at the wheel, lost control of his car, and collided with the parked tractor-trailer. The car driver's widow sued the tractor-trailer driver for negligently parking on the shoulder. Tennyson v. Brower, 823 F. Supp. 421 (E.D. Ky. 1993).

B. A driver carelessly drove her automobile on a paved road that was twenty feet wide and had a 15-foot-wide right-of-way on either side. Her car veered to the left, crossed the eastbound lane, and struck an electric pole. The pole was newly installed by the power company and was located in the right-of-way, 8 feet from the edge of the paved road, which was contrary to statute. The driver sued the power company for negligently locating its pole in the right-of-way. See Talarico v. Bonham, 650 A.2d 1192 (Pa. Commw. 1994).

C. Employees at a hospital negligently disposed of used needles contaminated with hepatitis B in a trash receptacle. A custodial worker emptying the trash was pricked by the needle, which should have been placed in a needle breaker box. The worker became contaminated with hepatitis B, and her family sued the hospital based on their fear of contracting the disease from her, claiming that the fear was caused by the hospital's negligence. See Raney v. Walter O. Moss Regional Hospital, 629 So. 2d 485, 493 (La. Ct. App. 1993).

E. Combining Approaches

The directness, foreseeability, and substantial factor tests can sometimes be combined. References to direct causation occur in opinions that otherwise focus on foreseeability, for example. Understanding each approach is the key to analyzing decisions that seem to blend one or two of them. Sumpter v. Moulton shows how the substantial factor test and foreseeability test for proximate cause can be combined.

SUMPTER v. MOULTON

519 N.W.2d 427 (Iowa 1994)

CADY, J.

This is a negligence action brought by Robert Sumpter against the city of Moulton after Sumpter suffered a heart attack while cleaning the public ditches near his home. Sumpter claimed the city was negligent in failing to keep the ditches open, and this omission caused his injury.

The important facts began on Friday, June 22, 1990, when the city sent Sumpter an abatement notice giving him fifteen days to mow the weeds on four lots he owned south of his home. Sumpter went to see the city clerk. He became extremely agitated and said he would not mow the weeds until the city cleaned the ditches around his land.

The next day, however, sixty-five-year-old Sumpter set out to clean the ditches himself. After working for approximately four hours, he felt pain in his chest and arm. He was admitted to the hospital, and diagnosed as having had a mild heart attack.

Sumpter had not had a physical exam since his retirement five years earlier, and thought he was in excellent health. An angiogram revealed Sumpter had heart disease with ninety to ninety-five percent blockage in his right coronary artery. According to his treating physician, Sumpter complained of a short episode of chest pain the night before he cleaned the ditches. This was denied by Sumpter. Sumpter remained in the hospital for a week. He was later admitted to a hospital in Des Moines for bypass surgery. His physician testified that bypass surgery was inevitable given the extent of Sumpter's blockage, unless Sumpter had suffered a fatal heart attack.

Sumpter testified at trial that the blocked ditches caused standing water which flooded his basement. The jury returned a verdict finding the city negligent, but concluded the negligence did not proximately cause Sumpter's injuries.

Sumpter appeals. He argues the district court erred in instructing on the issues of intervening cause and proximate cause, and in failing to instruct on the issues of aggravation of pre-existing condition or previous infirm condition. . . .

A tortfeasor whose act results in an injury to another, when superimposed upon a prior latent condition, may be responsible in damages for the full disability. This doctrine is commonly known as the "eggshell plaintiff" rule, and is applicable to both the causation and damage elements of a negligence claim. As it relates to causation, the rule essentially removes the foreseeability limitation typically required in the determination of proximate cause.

The city argues the "eggshell" instruction was properly refused by the trial court since Sumpter's extensive coronary disease made his heart attack inevitable, and because his subsequent by-pass surgery was successful. We agree that a defendant cannot be liable to an "eggshell" plaintiff if the pre-existing condition alone causes the injury. In this case, however, Sumpter's physician testified that the physical exertion by Sumpter in cleaning the ditch was the event which initiated the heart attack. This medical testimony is sufficient to generate a jury question on causation. Moreover, Sumpter's injury is not rendered uncompensable simply because it may have been inevitable due to his pre-existing condition. A tortfeasor is liable for damages suffered

by an "eggshell" plaintiff which are a natural consequence of the accident, even though the plaintiff may inevitably suffer similar injuries from a pre-existing condition unrelated to the accident. The city's argument is relevant in determining the amount of damages. It was error to refuse to submit Sumpter's requested instructions on pre-existing condition.

Finally, the trial court modified the uniform jury instruction (700.3) on proximate cause by substituting the phrase "substantial, foreseeable factor" for "substantial factor" and adding the following paragraph:

> "Foreseeable" means that the harm suffered was the natural and probable consequence of the complained of act. A "foreseeable" consequence is one which a reasonably prudent person would anticipate as likely, though not necessary, to result from the performance or nonperformance of a given act.

Trial courts have discretion to modify or rephrase the uniform jury instructions to meet the precise demands of each case as long as the instructions fully and fairly embody the issues and applicable law. In this case, the trial court injected the concept of foreseeability into the substantial factor test.

Causation is a necessary element in all negligence cases. It is actually composed of two related but separate concepts. The first considers the actual cause of the harm. This is known as "cause-in-fact." The second part embraces the legal cause of the injury. This is known as "proximate cause." Even though an act of the defendant may be the factual or actual cause of the plaintiff's injury, liability will only be imposed if it is also a proximate or legal cause of the injury.

The test to determine the actual cause prong of causation is known as sine qua non; but for the defendant's conduct, the harm would not have occurred. The test to determine proximate or legal cause is more involved. Generally, an actor's conduct is a proximate or legal cause of harm to another if the conduct is a "substantial factor" in producing the harm and there is no other rule of law which relieves the actor of liability because of the manner in which the negligence resulted in the harm. Iowa follows the Restatement (Second) of Torts in using the "substantial factor" test to help determine the existence of proximate or legal cause. This test is found in uniform instruction 700.3, together with the "but for" test.

The word "substantial" is used to express the notion that the defendant's conduct has such an effect in producing the harm as to lead reasonable minds to regard it as a cause. Restatement (Second) of Torts §431 cmt. a. Numerous factors are considered to help determine whether negligent conduct is a "substantial factor" in producing the harm, including the existence and extent of other factors, the continuation of the force created by the defendant, and the lapse of time involved. Restatement (Second) of Torts §433 cmt. a. The "substantial factor" test originated to help resolve situations involving multiple causes to an event.

The concept of foreseeability, on the other hand, is a component to proximate cause to help determine the extent to which the law should impose liability for negligence. It goes beyond the substantial factor analysis. It reflects a legal judgment and is rooted in social policy. The policy is based on fairness and justice, and seeks to restrict legal responsibility of a tort-feasor to those causes that are so closely connected with the result that our legal system is justified in imposing liability. If it is not possible for a defendant to have reasonably foreseen that some injury would naturally result to a plaintiff from the actions that actually caused the harm, there can be no liability for any

injury that in fact occurred. It is not necessary to foresee the extent of the harm or the manner it occurred to establish the essential connection, only the existence of some injury to someone.

While the substantial factor test and the concept of foreseeability can join to form the foundation of the proximate cause analysis, they should be considered separately. Foreseeability actually comes into play after a determination has been made that the defendant's conduct was a substantial factor in producing plaintiff's injury. See Restatement (Second) of Torts §435. The modified instruction submitted by the trial court blurs the distinction between "substantial factor" and foreseeability. It also failed to fully explain the concept of foreseeability as a legal limitation on the responsibility for harm. In particular, the instruction failed to inform the jury that the specific harm or consequence that resulted need not be foreseeable. Accordingly, the instruction, as modified, should be avoided on retrial. . . .

In wrestling with unique or special issues at trial, such as foreseeability or intervening cause, it must be remembered that it is the responsibility of the court to declare the existence or non-existence of any rule which relieves a tortfeasor from responsibility for harm which the person's conduct was a substantial factor in producing. Restatement (Second) of Torts §453. The intervening cause instruction and the modified proximate cause instruction make up two such rules. They must, therefore, be given with caution, and only when supported by the underlying facts of the case. If the facts are undisputed, it becomes the duty of the court to apply the facts to the limiting rules. If reasonable persons could differ on whether some harm, for example, was foreseeable, the court should leave the application of the rules for the jury. Restatement (Second) of Torts §453 cmt. b.

We reverse and remand for a new trial.

NOTES TO SUMPTER v. MOULTON

1. ***Combining the Substantial Factor and Foreseeability Tests.*** The Iowa Supreme Court in Sumpter v. Moulton authorized a trial judge to give the jury instructions on proximate cause that included both a substantial factor test and a foreseeability test. It identified the purpose of the substantial factor test as being to impose liability only on defendants whose conduct "has such an effect in producing the harm as to lead reasonable minds to regard it as a cause." The foreseeability test, according to the court, "goes beyond the substantial factor analysis," "reflects a legal judgment, and is rooted in social policy." The foreseeability test imposes liability "to those causes that are so closely connected with the result than our legal system is justified in imposing liability." Because the foreseeability analysis comes into play after the substantial factor test, it must exclude from the category of proximate causes some acts that would otherwise be treated as a basis for liability.

The court found fault with the trial court's instructions to the jury because they blurred the distinction between the tests, not because they included both tests. What jury instructions for proximate cause would properly distinguish the tests?

2. ***Jury Instructions on Proximate Cause.*** Another example of how a state may combine these tests for proximate cause appears in the New Jersey civil model jury instructions. Observe how the model instructions indicate different proximate cause

tests for cases where there is one negligent defendant, the "routine tort case," and several negligent defendants, "concurrent causes."

NEW JERSEY JURY INSTRUCTIONS

7.10 Proximate Cause

General Charge to Be Given in All Cases (5/98)

If you find that the [party] was negligent, you must find that the party's negligence was a proximate cause of the accident/incident/event before you can find that [the party] was responsible for the claimed injury/loss/harm. It is the duty of the [plaintiff] to establish, by the preponderance of the evidence, that the negligence of [the defendant] was a proximate cause of the accident/incident/event and of the injury/loss/harm allegedly to have resulted from [the defendant's] negligence.

The basic question for you to resolve is whether [the plaintiff's] injury/loss/harm is so connected with the negligent actions or inactions of [the defendant] that you decide it is reasonable, in accordance with the instructions I will now give you, that [the defendant] should be held responsible for the injury/loss/harm.

7.11 Proximate Cause

Routine Tort Case Where No Issues of Concurrent or Intervening Causes, or Foreseeability of Injury or Harm (8/99)

By proximate cause, I refer to a cause that in a natural and continuous sequence produces the accident/incident/event and resulting injury/loss/harm and without which the resulting accident/incident/event or injury/loss/harm would not have occurred. A person who is negligent is held responsible for any accident/incident/event or injury/loss/harm that results in the ordinary course of events from his/her/its negligence. This means that you must first find that the resulting accident/incident/event or injury/loss/harm to [the plaintiff] would not have occurred but for the negligent conduct of the defendant. Second, you must find that the defendant's negligent conduct was a substantial factor in bringing about the resulting accident or injury/loss/harm. By substantial, I mean that the cause is not remote, trivial or inconsequential.

If you find that the [defendant's] negligence was a cause of the accident/incident/event and that such negligence was a substantial factor in bringing about the injury/loss/harm, then you should find that the defendant was a proximate cause of the plaintiff's injury/loss/harm.

7.13 Proximate Cause

Where There Is a Claim that Concurrent Causes of Harm Are Present and Claim that Specific Harm Was Not Foreseeable (5/98)

[Steps 1 and 2 are the same as above.]

Third, you must find that some injury/loss/harm to [the plaintiff] must have been foreseeable. For the injury/loss/harm to be foreseeable, it is not necessary that the precise injury/loss/harm that occurred here was foreseeable by [the defendant]. Rather, a reasonable person should have anticipated the risk that [the defendant's] conduct

could cause some injury/loss/harm suffered by [the plaintiff]. In other words, if some injury/loss/harm from [the defendant's] negligence was within the realm of reasonable foreseeability, then the injury/loss/harm is considered foreseeable. On the other hand, if the risk of injury/loss/harm was so remote as to not be in the realm of reasonable foreseeability, you must find no proximate cause.

In sum, in order to find proximate cause, you must find that the negligence of [the defendant] was a substantial factor in bringing about the injury/loss/harm that occurred and that some harm to [the plaintiff] was foreseeable from [the defendant's] negligence.

Statute: LEGISLATIVE FINDINGS; PROXIMATE CAUSE

Tenn. Stat. §57-10-101 (2002)

The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.

Statute: PROXIMATE CAUSE; STANDARD OF PROOF

Tenn. Stat. §57-10-102 (2002)

Notwithstanding the provisions of §57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:

(1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or

(2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

NOTES TO STATUTES

1. ***Rules of Policy Limiting Liability.*** The Tennessee Supreme Court has outlined a three-prong test for proximate cause:

> (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

Haynes v. Hamilton County, 883 S.W.2d 606, 612 (Tenn 1994).

What proximate cause test applies in Tennessee if an injury is associated with the sale of beer to a person over 21 years old? Under 21 years old?

2. *Burden of Proof on Proximate Cause.* Whatever the test for proximate cause, the party obliged to prove that the other was a proximate cause must ordinarily do so by a preponderance of the evidence. Legislatures may change this burden of proof for policy reasons, as the Tennessee legislature did. How does the burden of proof of proximate cause differ in cases involving suits against persons who have sold alcoholic beverages to people under 21 years old?

F. Intervening and Superseding Forces

1. In General

All approaches to proximate cause take account of "intervening" or "superseding" events. When a third party's conduct comes after the defendant's act in the chain of events leading to the plaintiff's injury, that conduct is referred to as an intervening act. If the intervening act was *not reasonably foreseeable* to someone in the defendant's position, it will be characterized as *superseding* and will protect the defendant from liability. An intervening act that was foreseeable, however, will not be superseding and will not protect the defendant from liability.

In analyzing intervening causes, foreseeability of the intervening act is crucial. This contrasts with the duty analysis, which focuses on the foreseeability of the plaintiff or the harm. It also contrasts with the foreseeability test for proximate cause, which focuses on the foreseeability of the general type of accident that occurred. Courts generally agree that a superseding cause is an unforeseeable act by a third party that intervenes (comes between) the defendant's act and the plaintiff's harm. Courts use a variety of terms to describe the foreseeability element in this test, saying that the act is foreseeable if it is a "normal" act, "an act reasonably to be expected" or "an act that is within the scope of the risk created by the defendant's act." However phrased, the focus must be on the foreseeability of the intervening act rather than the foreseeability of the harm that resulted or the plaintiff who was injured.

Terminology. This casebook follows a common practice of describing cause-in-fact, proximate cause, and superseding cause as three separate elements of legal cause to be considered individually. Some courts and writers include treatment of superseding cause issues within the heading of "proximate cause." In either analysis, consideration of superseding cause comes after and in addition to the analysis of whatever other proximate cause test the court uses.

2. When Is an Intervening Force Treated as Superseding?

Price v. Blaine Artista, Inc. shows that there can sometimes be a close relationship between a plaintiff's characterization of a defendant's conduct and the issue of whether a subsequent act is or is not foreseeable. McClenahan v. Cooley demonstrates how a court may decide what facts are relevant to deciding whether an intervening act is superseding in the context of a car owner's negligent act of leaving keys in a car and a thief's conduct after stealing the car.

PRICE v. BLAINE KERN ARTISTA, INC.

893 P.2d 367 (Nev. 1995)

PER CURIAM. . . .

Appellant Thomas Price filed an action . . . against Blaine Kern Artista, Inc. ("BKA"), a Louisiana corporation that manufactures oversized masks in the form of caricatures resembling various celebrities and characters (hereafter "caricature mask"). The caricature mask covers the entire head of the wearer. Price alleged in his complaint that the caricature mask of George Bush which he wore during employment as an entertainer at Harrah's Club in Reno was defective due to the absence of a safety harness to support his head and neck under the heavy weight. He also alleged that his injury occurred when a Harrah's patron pushed him from behind, causing the weight of the caricature mask to strain and injure his neck as he fell to the ground.

On BKA's motion for summary judgment, the district court determined that the patron's push that precipitated Price's fall constituted an unforeseeable superseding cause absolving BKA of liability. . . .

Price argues that legal causation is a question of fact to be decided by the trier of fact and that an intervening criminal or tortious act by a third party does not necessarily preclude liability as a matter of law. In so arguing, however, he concedes (rather improvidently, we suggest) that BKA, a Louisiana corporation, could not reasonably be expected to have foreseen an attack on a user of one of its products by a third-party assailant in Reno, Nevada, and relies exclusively on the prospect that a jury might reasonably infer that a performer wearing a top-heavy, oversized caricature mask may stumble, trip, be pushed, or become imbalanced for numerous reasons. That same jury, according to Price, may find that BKA proximately caused Price's injury due to its failure to equip the caricature mask of our former President with a safety harness.

BKA first counters that legal causation, although normally a jury issue, may nevertheless be resolved summarily in appropriate cases when there is no genuine issue of material fact on the issue of foreseeability. BKA next argues that this is an appropriate case for summary judgment because, by Price's own admission, the third-party attack forming the basis of his complaint was not foreseeable to BKA, and is thus a superseding cause of Price's injuries.

Contrary to BKA's assertions, we conclude . . . that genuine issues of material fact remain with respect to the issue of legal causation.

While it is true that criminal or tortious third-party conduct typically severs the chain of proximate causation between a plaintiff and a defendant, the chain remains unbroken when the third party's intervening intentional act is reasonably foreseeable. Under the circumstances of this case, the trier of fact could reasonably find that BKA should have foreseen the possibility or probability of some sort of violent reaction, such as pushing, by intoxicated or politically volatile persons, ignited by the sight of an oversized caricature of a prominent political figure. We certainly cannot preclude such an inference as a matter of law and decline to penalize Price for his attorney's lack of acuity in conceding this issue. Indeed, while the precise force that caused Price's fall is uncertain, shortly before the fall, an irate and perhaps somewhat confused patron of Harrah's took issue with the bedecked Price over Bush's policy on abortion rights. . . .

For the reasons discussed above, we conclude that a genuine issue of material fact remains with respect to the issue of the legal and proximate cause of Price's injuries. Accordingly, we reverse the district court's entry of summary judgment and remand for trial.

McCLENAHAN v. COOLEY

806 S.W.2d 767 (Tenn. 1991)

DROWOTA, J.

In this action for the wrongful death of his wife and two children and personal injuries to another child, William McClenahan, Plaintiff-Appellant, appeals the dismissal of his lawsuit against Glenn Cooley, Defendant-Appellee, by the Circuit Court of Bradley County. The central issue presented in this litigation is whether a jury should be permitted to determine the issue of proximate causation in cases where the keys are left in the ignition of a parked automobile that is subsequently stolen and thereafter involved in an accident. For the reasons that follow, we reverse and remand. . . .

The facts to be taken as true in this case reveal that on May 20, 1988, at approximately 11 a.m., the Defendant, Glenn Cooley, drove his 1981 Pontiac Bonneville automobile to a bank located in the public parking lot of a shopping center in Athens. The Defendant left the keys in the ignition to his parked automobile while he went inside of the bank to transact business. While the Defendant was in the bank, a thief spotted the keys in the ignition of the vehicle, started the engine, and began driving down the interstate where he was spotted by a state trooper. When the thief exited the interstate a short time later, a high speed chase ensued on the busiest stretch of highway in Cleveland at the lunchtime hour. The thief was pursued by police officers approximately 80 miles per hour approaching the most dangerous intersection in the city. When the vehicles reached the intersection, the thief ran a red light traveling in excess of 80 miles per hour and slammed into another vehicle broadside. That vehicle was being driven by the Plaintiff's thirty-one year old wife who was six to eight months pregnant. She died approximately fourteen hours later in a nearby hospital. The viable fetus was delivered before Mrs. McClenahan's untimely death but likewise perished as a result of injuries arising out of the accident. The Plaintiff's four year old son, a passenger in the vehicle, also died. Another young child who was also riding in the vehicle sustained substantial injuries but survived. The Defendant's vehicle was reported stolen at 11:13 a.m. and the collision between the stolen car and the one owned by the Plaintiff occurred at 11:33 a.m. It should be noted that the Defendant was employed as a law enforcement officer and had formerly been a high ranking officer with various law enforcement agencies in McMinn County. . . .

. . . The question of a vehicle owner's liability for the consequences of an accident caused by a thief, enabled to misappropriate the vehicle through the presence of a key left in the ignition switch by the owner, is a frequently litigated question upon which there is considerable disagreement among the states. . . . An accurate summary of the jurisprudence nationwide concerning the topic at hand was recently provided by the Supreme Court of New Mexico:

> [A] substantial number of courts have not held owners liable for leaving the keys in their unattended vehicles and for the injuries to third persons as a result of the thefts

and subsequent negligent operation of those vehicles. Those courts have concluded either that an owner owes no duty to the general public to guard against the risk of a thief's negligent operation of a vehicle in which the owner left his keys; that the theft and subsequent negligence of the thief could not reasonably be foreseen by the owner as a natural or probable consequence of leaving the keys in the ignition of the car; or have concluded that even if the owner was negligent, his actions were not the proximate cause of the injury because the thief's actions constituted an independent, intervening cause.

An emerging group of jurisdictions, on the other hand, have rejected the contention that an intervening criminal act automatically breaks the chain of causation as a matter of law, concluding instead that a reasonable person could foresee a theft of an automobile left unattended with the keys in the ignition and reasonably could foresee the increased risk to the public should the theft occur. In addition, a few courts, including some of those that earlier denied liability, have indicated a willingness to impose liability upon the owner under special circumstances. Courts looking at special circumstances seek to determine whether an owner's conduct enhanced the probability that his car would be stolen and thus increased the hazard to third persons. Considering special circumstances, then, is just another way of examining the degree of foreseeability of injury and whether the owner is subject to a duty to exercise reasonable care.

This Court is of the opinion that the approach taken by the substantial (and growing) number of jurisdictions representing the minority view is the approach that should be taken in Tennessee, in part, because principles of common law negligence long established in this state provide a sufficient analytical framework to dispose of cases with fact patterns similar to the one presented in this appeal. First, it is axiomatic that in order for there to be a cause of action for common law negligence, the following elements must be established: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal, cause. Our opinions have recognized that proximate causation is the "ultimate issue" in negligence cases. This is particularly true in cases involving the situation where keys are left in the ignition of an unattended vehicle that is subsequently stolen as a result. . . .

With respect to superseding intervening causes that might break the chain of proximate causation, the rule is established that it is not necessary that tortfeasors or concurrent forces act in concert, or that there be a joint operation or a union of act or intent, in order for the negligence of each to be regarded as the proximate cause of the injuries, thereby rendering all tortfeasors liable. There is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result. An intervening act, which is a normal response created by negligence, is not a superseding, intervening cause so as to relieve the original wrongdoer of liability, provided the intervening act could have reasonably been foreseen and the conduct was a substantial factor in bringing about the harm. "An intervening act will not exculpate the original wrongdoer unless it appears that the negligent intervening act could not have been reasonably anticipated." Evridge v. American Honda Motor Co., 685 S.W.2d 632, 635 (Tenn. 1985). See also Restatement (Second) of Torts, Section 447 (1965). "It is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such

intervening acts contributed." Prosser [and Keeton, The Law of Torts, §44, p.314 (5th ed. 1984)]. Just as in the case of proximate causation, the question of superseding intervening cause is a matter peculiarly for the jury because of foreseeability considerations.

. . . The basic issue is foreseeability, both as to proximate causation and superseding intervening cause, and that is a question of fact rather than of law upon which reasonable minds can and do differ, at least where the accident has occurred during the flight of the thief relatively close thereto in time and distance.[11] . . . We thus expressly reject the contention that an intervening criminal act under the circumstances presented here automatically breaks the chain of causation as a matter of law, concluding instead that reasonable minds can differ as to whether a person of ordinary prudence and intelligence through the exercise of reasonable diligence could foresee, or should have foreseen, the theft of an unattended automobile with the keys in the ignition left in an area where the public has access, and could likewise foresee the increased risk to the public should a theft occur. . . . In sum, a jury might conclude in this case that a reasonable person would not have left the keys in the ignition of his unattended car parked in a lot where the public had ready access. As a result, the decisions with regard to foreseeability as it relates to proximate cause and intervening cause should properly be submitted to a jury.

Nothing, however, stated hereinabove is intended to imply that a fact-finder could not reasonably return a verdict for the car owner in this case, or that the evidence in some comparable situation might not possibly justify even a judgment for the vehicle owner as a matter of law. Determinations in this regard must necessarily depend on the entire circumstantial spectrum, such as the position of the vehicle and the nature of the locality in which the vehicle is left, the extent of access thereto, operational condition of the vehicle, its proximity to surveillance, the time of day or night the vehicle is left unattended, and the length of time (and distance) elapsing from the theft to the accident. . . .

NOTES TO PRICE v. BLAINE KERN ARTISTA, INC. AND McCLENAHAN v. COOLEY

1. *Superseding Cause: Alternative Formulations.* The court in McClenahan v. Cooley describes three ways intervening acts are not superseding causes that prevent the defendant from being liable. An intervening act will not be superseding if (1) it is a normal response to the negligent act that is reasonably foreseeable and a substantial factor in bringing about the harm; (2) it could reasonably have been anticipated; or (3) the intervening conduct could have been anticipated and taking the risk of it was unreasonable. The third of these formulations is sometimes referred to as the scope of the risk test. The scope of the risk test asks whether the intervening act was among the foreseeable circumstances that made the defendant's conduct blameworthy. Which approach was used by the court in Price v. Blaine Kern Artista, Inc.?

[11] A study conducted by the United States Department of Justice reveals that 42.3 percent of all automobiles stolen during the period covered by the study were left unattended with the keys in the ignition and that the rate of accidents involving such stolen vehicles was 200 times the normal accident rate. See 45 A.L.R.3d at 797.

2. ***Liability of the Intervening Actor.*** If the intervening actor and the original actor both breached a duty to the plaintiff and the intervening act is not a superseding cause, then both actors will share liability. How their shares are determined is the subject of Chapter 8, Apportionment of Damages. If the intervening actor breached a duty to the plaintiff and his or her act supersedes that of the first actor, only the intervening actor will be liable to the plaintiff.

3. ***Factual Considerations Relevant to Superseding Cause.*** The foreseeability test for superseding cause asks whether the intervening act that contributed to the plaintiff's injury was foreseeable. The court in McClenahan v. Cooley stated that a jury should decide whether theft was foreseeable *and* whether an increased risk to the public in the event of a theft was also foreseeable. The court listed a number of factors the jury should consider in answering those questions. How do those factors compare with the factors analyzed by the court in Price v. Blaine Kern Artista, Inc.?

4. ***Foreseeability of the Intervening Act that Occurred.*** In Price v. Blaine Kern Artista, Inc., the plaintiff's lawyer conceded that BKA, a Louisiana corporation, could not have reasonably foreseen a third-party attack on someone wearing a George Bush caricature mask in Reno, Nevada. The lawyer argued, however, that foreseeability of a less specific event, which the court characterizes as "falling for a variety of reasons," was sufficient. The court decides that what must be foreseeable is an act less precise than the specific time, place, and identity of the act that occurred (a push in Reno during a performance) but more precise than falling for any reason. The falling is not an act of an intervening person; it is the result of the act or an act of the plaintiff. The court held that a jury could find that a violent physical reaction (such as a push) to the caricature of a controversial political figure was foreseeable. Thus, it is the type of intervening act, violent physical reaction, rather than the precise act or its consequence that must be reasonably foreseeable for the superseding cause analysis. What is the type of act that is analyzed in McClenahan v. Cooley?

5. ***Problem: Superseding Cause.*** A defendant operates an automobile dealership and service facility. About ten o'clock a.m. on the day involved, a customer's automobile was delivered to the dealership for repairs. The defendant's employees allowed the automobile to remain outside the building, double-parked in the street with the key in the ignition. About three hours later, it was stolen by an adult stranger who then drove it around the block in such a careless manner that it mounted a sidewalk and struck the plaintiff, a pedestrian thereon, causing her serious injury. The defendant's garage was located in an urban area that had experienced a high and increasing number of automobile thefts in the immediate preceding months. See Liney v. Chestnut Motors, Inc., 218 A.2d 336 (Pa. 1966). Would your analysis be changed if the dealership was located near a high school? See Anderson v. Bushong Pontiac Co., 404 Pa. 382, 171 A.2d 771 (1961).

Statute: PROXIMATE CAUSE

Colo. Stat. §13-21-504(2) and (3) (2002)

(2) The manufacturer's, importer's, or distributor's placement of a firearm or ammunition in the stream of commerce, even if such placement is found to be

foreseeable, shall not be conduct sufficient to constitute the proximate cause of injury, damage, or death resulting from a third party's use of the product.

(3) In a product liability action concerning the accidental discharge of a firearm, the manufacturer's, importer's, or distributor's placement of the product in the stream of commerce shall not be conduct deemed sufficient to constitute proximate cause, even if accidental discharge is found to be foreseeable.

NOTE TO STATUTE

Legislation Directed at Recurring Issues. The statute related to firearms and ammunition may be viewed as a legislative response to a recurring problem facing courts or as special interest legislation. Does the statute appear to resolve the issue of proximate cause or of superseding cause? Does it help to know that Colorado applies the substantial factor test for proximate cause?

Perspective: Superseding Causes and the Direct Cause Test

A superseding cause prevents an actor whose conduct was a proximate cause of the plaintiff's injury from being liable for damages. When the test for proximate cause is the foreseeability or substantial factor test, the test makes sense because the existence of an intervening cause does not, *by itself,* prevent the conduct from being a proximate cause. But the direct cause test for proximate cause seems to imply that there may be no significant intervening causes. In *Polemis,* Lord Justice Banks said that a harm is proximately caused by an actor's conduct if the harm "is directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act." What is the role of superseding cause when a direct cause test is applied?

At least one jurisdiction with a direct cause test also applies a superseding cause test to see whether the "independent cause" has a "connection with the negligent act." Delaware's proximate cause test, which they call a "but-for" test, asks whether the actor's conduct is a direct cause without which the accident would not have occurred:

> The mere occurrence of an intervening cause, however, does not automatically break the chain of causation stemming from the original tortious conduct. This Court has long recognized that there may be more than one proximate cause of an injury. In order to break the causal chain, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must have been neither anticipated nor reasonably foreseeable by the original tortfeasor.

See Duphily v. Delaware Elec. Co-op., Inc., 662 A.2d 821, 828 (Del. 1995).

3. Negligent Treatment of a Plaintiff's Injury: Intervening or Superseding?

Many cases involve medical malpractice taking place after a plaintiff has suffered an injury due to a defendant's negligence. Weems v. Hy-Vee Food Stores, Inc. involves an unpredictable complication from medical care required by the consequences of the defendant's negligence. In Corbett v. Weisband, the plaintiff's initial injury resulted from medical care, but the problem treated in the case involves the role of subsequent medical treatment.

WEEMS v. HY-VEE FOOD STORES, INC.

526 N.W.2d 571 (Iowa App. 1994)

CADY, J.

This is a single issue appeal in a premise liability/slip-and-fall case. The premise owner claims the trial court erred in failing to allow the jury to consider whether the harmful side effects of medical treatment rendered eighteen months after the fall constituted an intervening superseding cause of the subsequent damages. We conclude the trial court properly denied the superseding cause instruction and affirm.

Leonard Weems slipped and fell on a wet floor at a Drug Town Store in Cedar Rapids. Weems was a customer in the store at the time. The store is owned by Hy-Vee Stores, Inc. Weems experienced lower-back pain following the fall. Approximately eighteen months later, Weems visited Dr. Arnold Delbridge, an orthopedic surgeon, in response to his lingering lower-back pain. Dr. Delbridge administered an epidural block in an effort to relieve the pain. The procedure involved a spinal steroid injection. As a result of the epidural block, Weems developed an infection which led to spinal meningitis. He eventually recovered from the disease.

Weems and his wife brought suit against Hy-Vee seeking damages associated with the injuries he received as a result of his fall. The damage claim included the spinal meningitis. The matter proceeded to a jury trial.

At trial, the court refused to submit Hy-Vee's requested instruction concerning whether Dr. Delbridge's administration of the epidural block was a superseding cause of any damages associated with Weems' spinal meningitis. Hy-Vee would be relieved from responsibility for the resulting damages under the proposed instruction if the jury determined the treatment was a superseding cause. . . .

The rule that a tortfeasor is responsible for injuries which result from his or her negligence is not absolute. An exception exists when an intervening act turns into a superseding cause. If an independent force intervenes after the original negligent conduct and plays a substantial role in creating a particular injury to the plaintiff, the original tortfeasor will be relieved from responsibility for the later injury under narrowly-defined circumstances. If these circumstances are met, the intervening act becomes the superseding cause of the injury. In order for an intervening act to become a superseding cause, it must not have been a normal consequence of the original tortfeasor's acts or must not have been reasonably foreseeable.

Hy-Vee argues the spinal meningitis which occurred some eighteen months after the fall was not a reasonably foreseeable consequence of maintaining a wet floor in its drug store. They point out the uncontradicted evidence revealing it is extremely rare for a patient to contract the disease from a spinal injection, possibly as rare as one in ten thousand cases. At the very least, Hy-Vee insists this evidence presented a jury question whether the later intervening medical treatment was a superseding cause of the spinal meningitis.

An intervening act is reasonably foreseeable, and will not break the causal connection between the original negligence and the later injury, if the subsequent force or conduct is within the scope of the original risk. It is unnecessary, however, that the original tortfeasor foresee the specific conduct which makes up the intervening force. It is sufficient if the risk of harm attributable to the intervening act is foreseeable. If the conduct of the original tortfeasor has created or increased the risk of a particular harm to the plaintiff, and has been a substantial factor in causing the harm, it is immaterial to the imposition of liability that the harm results in a manner which no person could have possibly foreseen or anticipated.

An intervening act is a normal consequence of the original tortfeasor's negligence if it is normal to the situation which the tortfeasor created. This means the intervention of the act was not so extraordinary as to fall outside the class of normal events in light of the ultimate situation.

Generally, medical treatment sought by an injured person is considered a normal consequence of the tortfeasor's conduct. The general rule is framed as follows:

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner.

Restatement (Second) of Torts §457. A defendant will be liable for the adverse results of medical treatment unless the treatment is extraordinary or the harm is outside the risks incident to the medical treatment.

It is immaterial in our analysis that the later injury in this case, spinal meningitis, was a rare side effect of the medical treatment. The important evidence was the undisputed testimony that an epidural block was an accepted and common treatment for chronic back pain and that spinal meningitis was a known risk of the procedure. These facts establish the lack of superseding cause. . . .

We conclude the trial court correctly rejected Hy-Vee's requested jury instruction on superseding cause. It was not supported by substantial evidence. The undisputed evidence revealed that medical treatment rendered to Weems was not an extraordinary or unforeseeable act. It was within the scope of the original risk of harm of Hy-Vee's negligence. Hy-Vee exposed Weems to the risk of harm and under the superseding cause analysis, it is immaterial that the precise harm to Weems was rare or even unforeseeable. The instructions by the court properly allowed the jury to consider whether the negligence of Hy-Vee was a proximate cause of the subsequent spinal meningitis, but under the record in this case it was not possible to conclude that the epidural block treatment was a superseding cause.

Affirmed.

CORBETT v. WEISBAND

551 A.2d 1059 (Pa. Super. Ct. 1988)

ROWLEY, J.

. . . The plaintiff, Lucille Corbett, alleged in both actions that the defendants had been negligent in the care and treatment of a post-operative infection in her left knee, which ultimately led to the amputation of her leg in July of 1983. . . .

The events giving rise to these lawsuits commenced in July 1978 with the operation by Dr. DeMoura on Ms. Corbett's left knee. Following the operation, Dr. DeMoura continued to treat Ms. Corbett through October 1978. In December 1978, she came under the care of Dr. Weisband, for treatment of a knee infection. He treated her through August 1981. During that time, in October 1980, she had a left knee fusion performed by Dr. Weisband at Metropolitan Hospital. According to Dr. Greene, who began treating her in September 1981, the left knee fusion was not successful. Ms. Corbett was hospitalized in December 1981 at which time Dr. Greene performed a total knee replacement on her left knee. From January 5 through 30, 1982, Ms. Corbett was readmitted to the hospital under Dr. Greene's care because the wound in front of her left knee joint had opened. She was discharged once the wound began to heal. In March, Ms. Corbett again was admitted to the hospital under Dr. Greene's care because the wound had not yet healed.

Ms. Corbett was not hospitalized again until November, 1982, when she broke her left leg as she was climbing out of bed. She remained in the hospital for nine months following this admission. During this time period, in April 1983, the knee implant was removed because it had become infected. Several months later, in July 1983, Ms. Corbett's leg was amputated above the knee because it was Dr. Greene's belief that the infection would never clear. [The plaintiff alleged that Dr. Weisband was negligent in performing the left knee fusion and in a separate suit alleged that Dr. Green was negligent in performing a total knee replacement.] . . .

At the trial on damages, Dr. Weisband and ROPA [the Regional Orthopedic Professional Association, a group of doctors with whom Dr. Weisband was associated] argued, and the trial court agreed, that Dr. Weisband is not responsible, as a matter of law, for the damages suffered by Ms. Corbett after she came under the care of Dr. Greene because Dr. Greene's conduct was so "highly extraordinary" as to constitute a superseding cause of her subsequent injuries, i.e., aggravation and prolongation of her pain and the ultimate amputation of her leg. On appeal, Ms. Corbett essentially responds that although Dr. Weisband cannot, as a matter of law, be held responsible for damages flowing from a highly extraordinary act, i.e., a superseding cause, the question of whether an intervening act is "highly extraordinary" should properly be left to the jury, and the trial judge erred in making that determination and taking it from the jury under the facts of this case. The trial court held that the opinion testimony from every physician who commented on Dr. Greene's subsequent conduct — that a total knee replacement in a patient of Ms. Corbett's condition was highly unusual and constituted extraordinary negligence — was sufficient to remove the issue from the province of the jury. For the reasons which follow, we disagree with the trial court and award Ms. Corbett a new trial limited to the issue of damages.

An exception to the general rule that a tortfeasor is responsible for injuries arising from his or her negligence may be provided by an intervening act, however, if it constitutes a superseding cause. "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 (Second) of Torts §440. As Professors Prosser and Keeton have stated, "the problem is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which the defendant is not responsible." Prosser & Keeton on Torts §44 (5th ed. 1984), at 301. The law as to negligent intervening acts is set forth in Restatement (Second) of Torts §447, which has been adopted in Pennsylvania. The section outlines the circumstances under which a negligent intervening act is not a superseding cause:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Whether or not the intervening act of a third person is so highly extraordinary as to constitute a superseding cause is a jury question, as held by our Supreme Court in Estate of Flickinger v. Ritsky, 452 Pa. 69, 305 A.2d 40 (1973). There the Court adopted Comment b to §453 of the Restatement (Second) of Torts:

> If . . . the negligent character of the third person's intervening act or the reasonable foreseeability of its being done is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury.

This concept has been continuously reaffirmed in subsequent cases. See Ross v. Vereb, 481 Pa. 446, 392 A.2d 1376 (1978) (whether victim's intervening act of running away from school children and into path of skidding car constituted a superseding cause of harm was a matter for the jury's determination); Thompson v. City of Philadelphia, 320 Pa. Super. 124, 466 A.2d 1349 (1983) (whether City of Philadelphia, as first actor who installed guardrails, could have reasonably foreseen negligent operation by second actor truck driver who drove his rig through guardrail resulting in death to motorist, was a fact question for the jury); Harvey v. Hansen, 299 Pa. Super. 474, 445 A.2d 1228 (1982) (whether a reasonable person would find injured driver's conduct to have been highly extraordinary within the meaning of §447 was a question for the jury); Amabile v. Auto Kleen Car Wash, 249 Pa. Super. 240, 376 A.2d 247 (1977) (whether vacuum pumps at car wash were negligently placed so as to expose injured party to unreasonable dangers was a question for the factfinder).

In each of the above-cited cases, the recurring concept is that "where reasonable minds could differ, resolution of such questions is properly left to the jury." Estate of Flickinger v. Ritsky, 452 Pa. 69, 76, 305 A.2d 40, 44 (1973). Thus, our task in the case at bar is to determine whether reasonable minds could differ on the question of whether Dr. Greene's decision to perform a total knee replacement in the absence of taking an adequate history was so highly extraordinary as to constitute a superseding cause which insulates Dr. Weisband and ROPA from liability for the harm resulting from Dr. Greene's care.

Dr. Weisband and ROPA argue that all of the testimony elicited at trial regarding Dr. Greene's conduct establishes that Dr. Greene acted in a highly extraordinary manner. They point to the following: First, responding to a hypothetical fact situation in which the questioner postulated that Dr. Greene knew of the existence of the chronic osteomyelitis (which he did not, due to his failure to take an adequate history), Dr. Meinhard testified that "it borders on insanity to go ahead and do a total knee [replacement]." He added that such a procedure "would not be good medical practice," and agreed that it could be characterized as gross negligence.

Second, Dr. John Sbarbaro, an expert witness for Dr. Weisband, testified, "I cannot conceive of how [Dr. Greene] could have missed the diagnosis of osteomyelitis." He added that the total knee replacement "was doomed to failure the day it was done because it was a totally and poorly conceived procedure." Third, Dr. Weisband testified that he would not have considered doing a total knee replacement on a patient with chronic osteomyelitis:

> That would be the most inhumane thing you could do to a patient with this condition. . . . [A]s soon as you put a foreign substance into a knee joint that has chronic osteomyelitis, it's going to flare up the chronic osteomyelitis, if not the day of the surgery, within a period of time. No sane orthopedic surgeon would ever do this without planning to amputate soon afterwards.

Finally, Dr. Weisband and ROPA point to deposition testimony of Dr. Greene, admitted at trial, in which he admits that he was completely unaware of any infection in Ms. Corbett's left knee prior to performing the total knee replacement.

The trial court held that the cumulative effect of the foregoing testimony was to establish as a matter of law that Dr. Greene had been grossly negligent in his treatment of Ms. Corbett and that reasonable minds could not differ. "This lack of skill or want of care," said the trial court, "is so obvious as to be within the range of ordinary experience and comprehension of even non-professional persons." We agree that the record establishes that, without question, Dr. Greene was negligent and that expert testimony is not necessary to establish that proposition as a fact. In fact, no one contends that Dr. Greene was not negligent. Whether or not he was negligent is not, however, the issue. The issue is whether his negligence was "highly extraordinary." About that question, reasonable minds could differ.

We hold, therefore, that the trial court erred, under the circumstances of this case, in reaching such a conclusion as a matter of law. . . . Whether or not such conduct was so extreme as to constitute a superseding cause was a question that should properly have been left to the jury. . . .

NOTES TO WEEMS v. HY-VEE FOOD STORES, INC. AND CORBETT v. WEISBAND

1. *Foreseeability of the Intervening Act.* When a defendant's conduct requires a plaintiff to seek medical care, courts seem reluctant to treat the medical care as a superseding act. In Weems v. Hy-Vee Food Stores, Inc., on what basis did the court treat the highly unusual occurrence of spinal meningitis as intervening and not superseding? In Corbett v. Weisband, how did the court analyze the poor performance of knee replacement surgery as intervening but not superseding?

2. *Is Medical Malpractice Foreseeable?* The Restatement (Second) of Torts imposes liability on an original tortfeasor for additional harm from negligent medical care. Section 457 comment b says that the human fallibility of health care providers means that the risks associated with receiving medical attention are within the scope of the risk created by the defendant's negligence:

> It would be stretching the idea of probability too far to regard it as within the foresight of a negligent actor that his negligence might result in harm so severe as to require such services and therefore that he should foresee that such services might be improperly rendered. However, there is a risk involved in the human fallibility of physicians, surgeons, nurses, and hospital staffs which is inherent in the necessity of seeking their services. If the actor knows that his negligence may result in harm sufficiently severe to require such services, he should also recognize this as a risk involved in the other's forced submission to such services, and having put the other in a position to require them, the actor is responsible for any additional injury resulting from the other's exposure to this risk.

Does this comment reflect a belief that medical malpractice is always foreseeable?

3. *Intervening Contributory Conduct by Plaintiffs.* Usually, a superseding cause is an unforeseeable intervening act by a third party (the plaintiff and defendant being the first and second parties). Chapter 7 deals with issues presented by the negligent or otherwise blameworthy conduct of the plaintiff. Typically, when a plaintiff is negligent, the plaintiff's recovery of damages is either reduced or eliminated entirely. As the court in Sumpter v. Moulton, 519 N.W.2d 427 (Iowa 1994), observed, however, courts have, under limited circumstances, considered plaintiff's intervening acts in their superseding cause analysis:

> Generally, the doctrine of intervening cause embraces the intervention of the acts of a third-party or an outside force, not the actions of the injured plaintiff. Restatement (Second) of Torts §440. We recognize, however, that some jurisdictions have applied the doctrine to conduct of the injured plaintiff. See Caraballo v. United States, 830 F.2d 19, 22 (2d Cir. 1987) (applying New York law); Faris v. Potomac Elec. Power Co., 753 F. Supp. 388, 390 (D.C. 1991); 57A Am. Jur. 2d Negligence §650 (1989). In addition to requiring the plaintiff's conduct to be wholly unforeseeable, these cases often involve acts of the plaintiff that rise above mere negligence. 57A Am. Jur. 2d Negligence §650. On the other hand, "if the acts of the plaintiff are within the ambit of the hazards covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence." 57A Am. Jur. 2d Negligence §652. Moreover, if the negligent act of the defendant establishes the stimulus for the

> plaintiff's act, there is ordinarily no break in the chain of events to relieve the defendant from liability, and the subsequent acts of the plaintiff cannot constitute the superseding cause of the injury. Because of our preference for addressing the conduct of parties under the concept of comparative fault, and under the circumstances of this case, we believe the intervening cause of instruction was improperly given.

Statute: EFFECT UPON CHAIN OF PROXIMATE CAUSE

Ind. Stat. §16-36-5-26 (2002)

The act of withholding or withdrawing CPR, when done under:

(1) an out of hospital DNR [do not resuscitate] declaration and order issued under this chapter;

(2) a court order or decision of a court appointed guardian; or

(3) a good faith medical decision by the attending physician that the patient has a terminal illness;

is not an intervening force and does not affect the chain of proximate cause between the conduct of a person that placed the patient in a terminal condition and the patient's death.

Statute: INTERVENING FORCES; PROXIMATE CAUSATION

Ind. Stat §16-36-4-20 (2002)

The act of withholding or withdrawing life prolonging procedures, when done under:

(1) a living will declaration made under this chapter;

(2) a court order or decision of a court appointed guardian; or

(3) a good faith medical decision by the attending physician that the patient has a terminal condition;

is not an intervening force and does not affect the chain of proximate cause between the conduct of any person that placed the patient in a terminal condition and the patient's death.

NOTES TO STATUTES

1. *Statutory Modifications of Proximate Cause Rules.* States occasionally modify legal cause rules for policy reasons. Indiana courts have adopted the following rule for proximate cause:

> We point out that as an element of a negligence cause of action, the test for proximate cause is whether the injury is a natural and probable consequence which, in light of the circumstances, should reasonably have been foreseen or anticipated.

Reynolds v. Strauss Veal, Inc. (1988), Ind. Ct. App., 519 N.E.2d 226, 229, *trans. denied.* What policy reasons support the legislative action reflected in the Indiana statutes?

2. *Statutory Modifications of Superseding Cause Rules.* The Indiana statute describes the effect on legal cause of withholding or withdrawing CPR or life-prolonging procedures. How does this statute affect the proximate cause determination in Indiana? Can either of these acts be a superseding cause that would relieve an actor who negligently put the patient's life in danger from liability?

CHAPTER 7

DEFENSES

I. Introduction

Tort law recognizes a number of defenses that protect a defendant from liability for negligence even though a plaintiff might be able to establish duty, breach, causation, and damages. Negligent conduct by a plaintiff can bar or limit recovery. A plaintiff's agreement to accept risks created by the defendant's conduct may also prevent recovery. A plaintiff's failure to minimize the consequences of a defendant's conduct or a failure to protect against it may also reduce or eliminate damages.

Governmental entities are sometimes immune from suit, and immunity principles also apply to some claims brought by family members against each other. Finally, statutes of limitation and repose apply time limits to the filing of claims. Cases begun after the expiration of these statutory time periods are subject to dismissal.

II. Plaintiff's Contributory Fault

Some injuries are caused by the combined effect of the negligent conduct by the plaintiff and the negligent conduct of one or more defendants. Common law treated a plaintiff's negligence under the doctrine known as *contributory negligence*, making it a complete bar to a plaintiff's recovery no matter how small a contribution that negligence had made to the plaintiff's injury.

Modern approaches require a jury to assign a percentage to the plaintiff's share of responsibility for the injury. Under a system known as *modified comparative negligence* or *modified comparative fault*, a plaintiff is barred from recovering only if the plaintiff's percentage of responsibility is greater than 49 percent or 50 percent (depending on the jurisdiction). Under a system known as *pure comparative negligence* or *pure comparative fault*, a plaintiff is barred from recovering only if the plaintiff's percentage of responsibility is 100 percent. In these comparative systems, when a plaintiff's negligence does not bar recovery, the total damages awarded to the plaintiff are reduced to reflect the percentage of the plaintiff's responsibility.

A. Traditional Common Law Treatment of a Plaintiff's Negligence

Under traditional tort law, a plaintiff's negligent conduct was a total bar to recovery if it was one of the legal causes of the plaintiff's injury. A "total bar" means that the plaintiff's contributory negligence shielded a negligent defendant from all liability. Wright v. Norfolk and Western Railway Company illustrates the power of this doctrine in the context of a railroad crossing accident where the evidence supported findings that the plaintiff was negligent in his driving and that the defendant railroad was negligent in its design of the crossing. The only jurisdictions that currently apply the contributory negligence doctrine are Alabama, Maryland, North Carolina, Virginia, and the District of Columbia.

WRIGHT v. NORFOLK AND WESTERN RAILWAY CO.

427 S.E.2d 724 (Va. 1993)

A. CHRISTIAN COMPTON, J.

On May 12, 1988, Riley E. Wright was severely injured in a collision between the dump truck he was operating and a Norfolk and Western Railway Company [N & W] train at a public crossing. Wright's guardians filed this negligence action against N & W seeking damages on behalf of their ward, a disabled person. A jury returned a verdict in favor of the plaintiffs for $4 million.

Sustaining a post-trial motion, the court below set the verdict aside and entered judgment for the defendant. We awarded the plaintiffs an appeal. . . . The principal issue on appeal . . . is whether the trial court correctly ruled that Wright was guilty of contributory negligence as a matter of law. Although the trial court set the verdict aside, we shall accord the plaintiffs, the recipients of the jury verdict, the benefit of any substantial conflicts in the evidence and of all reasonable inferences that may be drawn from the facts. The evidence is virtually undisputed.

The accident occurred in the town of Brookneal where Maddox Street crosses N & W's main line. The track runs north and south, and the two-way street runs generally east and west. U.S. Highway 501, a north-south roadway, closely parallels the track to the east. At the crossing, Maddox Street intersects Route 501 about 20 feet east of the track and ends there. . . .

The crossing was marked by crossbucks (signal boards) and an advance railroad warning sign ("a yellow sign that had RR on it"). There were no other signals, warning devices, or traffic controls in place at or near the crossing.

The collision took place on a Thursday about 12:45 p.m. The weather was clear, hot, and humid. The roadways were dry.

At the time, the train, composed of 17 cars loaded with wood chips and pulpwood, was moving southbound through Brookneal. Travelling approximately 34 miles per hour, the train approached the crossing with the headlight burning on the engine. Also, an air-operated bell was ringing continuously. In addition, an air-operated whistle was sounding "two longs, a short and a long."

At the same time, Wright, who was operating his employer's truck alone, was proceeding southbound on Route 501 approaching the crossing. Wright's destination was a lumber yard located just west of the crossing on Maddox Street.

The vehicle was a tandem dump truck with "front axles and . . . a dual axle at the back." Its overall length was "around 25 feet." The unit included a solid metal dump body that "sits approximately two inches behind the cab" preventing the operator from seeing "out of" the rear cab window. The vehicle had "regular West Coast" rear view mirrors "set to show what's behind the truck." The truck, in good operating condition, was equipped with an air conditioner, an AM/FM stereo radio, and a CB radio. It had a capacity of 53,500 pounds and was loaded with gravel.

Wright, age 36 and an experienced dump truck operator, had lived less than a mile from the crossing for ten years. On the day of the accident, he "had hauled . . . four loads of gravel" over the crossing to the lumber yard prior to the incident; the previous day, he had delivered five loads to the same destination. Eyewitness testimony revealed that Wright approached the crossing behind another south-bound dump truck. The first truck turned from Route 501 and stopped on Maddox Street east of the crossing. Wright stopped his truck behind the first vehicle. After the first truck moved over the crossing, clearing the track, Wright drove his truck onto the track in front of the train when the train's engine was less than ten feet from the truck. The truck traveled at a slow, steady speed, less than five miles per hour, to a point where the train engine struck the truck in the center of its right side, demolishing it and injuring Wright.

One eyewitness pointed out that there was "a slight incline from 501 up to the crossing." He stated that "as the truck was coming off of 501 onto Maddox the front end of the truck sort of shifted downward as if he were [braking] or changing gears." The witness said, "I had the thought he was going to stop and then the truck, the front end, raised up as he accelerated onto the tracks." The train engineer testified that "just before hitting the edge of the crossing, like six feet, the truck whipped in front of me. It was no time to do anything."

The witnesses did not see any brake lights "come on" on the truck before the impact. The window on the right side of the truck's cab was closed at the time of the collision. Although Wright did not testify due to his disability, his employer testified that Wright, whose hobby was country music, normally operated the truck's air conditioner on hot days and normally "kept his radio on and CB on."

Expert testimony offered by the plaintiffs established that the crossing was not "reasonably safe" and that it was "ultradangerous, or an ultrahazardous crossing." This opinion was based upon "the sight distance available to the motorist, the geometry of the crossing, the type and mix of the traffic that uses the crossing, the speed of the trains, the condition of the tracks and crossing." According to the expert, "All of those in conjunction with the type of protection afforded at the crossing, which is essentially the cross bucks, made it an ultrahazardous crossing." . . .

During trial, the defendant moved the court to strike the plaintiffs' evidence at the conclusion of the plaintiffs' case-in-chief. The grounds of the motion were that the plaintiffs failed to establish, prima facie, the defendant's primary negligence, and that the plaintiffs' own evidence established Wright was guilty of contributory negligence as a matter of law. This motion was overruled. The trial court, after stating, "I'm very troubled, very troubled by Mr. Wright's conduct," decided to allow the contributory negligence issue to go to the jury. . . .

After verdict, the court considered memoranda of law and oral argument on defendant's motion to set aside. . . . [T]he trial court, in a letter opinion, sustained the defendant's motion. The court ruled that . . . Wright was guilty of contributory negligence as a matter of law. . . .

On appeal, the plaintiffs contend that the trial court erred in its ruling on the contributory negligence issue. . . .

We turn now to the merits of the contributory negligence issue, the jury having settled the issue of primary negligence against the defendant. At trial, a defendant has the burden to prove by the greater weight of the evidence that the plaintiff was negligent and that such negligence was a proximate cause of the plaintiff's injuries. Contributory negligence, however, may be shown by the defendant's evidence or by the plaintiff's own evidence. . . .

There is no conflict in the evidence on the issue of contributory negligence. And, there are no direct and reasonable inferences to be drawn from the whole evidence to sustain a conclusion that Wright was free of contributory negligence. Rather, when the evidence is viewed in the light most favorable to the plaintiffs, reasonable persons could not differ in concluding that Wright was guilty of negligence as a matter of law that proximately contributed to the accident and his injuries.

Wright was thoroughly familiar with the crossing, both as the result of living near it and from having traversed it in his truck on nine occasions during a two-day period before the accident. He was aware of the fact that he would have to rely on his senses of sight and hearing to be aware of an approaching train, because of the absence of automatically operated warning devices to remind him. He was aware of the limitations to sight and hearing posed by the configuration of the cab of his truck and by the angle at which Maddox Street ran southwest from Route 501. Yet, despite all these hazards confronting him, Wright drove his truck from a stopped position of safety onto the crossing directly in front of the train when its engine was less than ten feet away.

The expert testified that it was "impossible" for Wright to have heard or seen the train. But, he was not forced to approach the crossing with his right window closed, and presumably with his air conditioner and radio operating. He could have opened his window after his truck had been loaded and before he left the quarry, knowing the dangers to be encountered at the crossing. He could have moved onto Maddox Street and the crossing by making a wider right turn, thus bringing his truck to an attitude with relation to the crossing that he could see clearly north along the track. Obviously, Wright did none of these things, and caused this unfortunate accident.

The only conclusion to be drawn from the whole evidence is that Wright either failed to look and listen with reasonable care, or if he did so look and listen, he failed to discover the immediate presence of the train. In either event, he was the architect of his own misfortune. Thus, we hold that the trial court properly set the verdict aside on the ground that Wright was guilty of contributory negligence as a matter of law. . . .

Accordingly, we hold that the trial court committed no error, and the judgment below will be *Affirmed.*

NOTES TO WRIGHT v. NORFOLK AND WESTERN RAILWAY CO.

1. ***The Traditional Effect of a Contributory Negligence Finding.*** *Wright* illustrates the effect of a finding of plaintiff's negligence in a contributory negligence jurisdiction. Considering the evidence of both plaintiffs' and defendant's negligence, why did the trial judge refuse to enter a judgment based on the jury verdict?

2. *Characterization of Plaintiff's Conduct as Negligent.* Contributory negligence and comparative negligence jurisdictions use the same rules to determine whether a plaintiff or defendant was negligent. The two systems differ only in the *effect* they give to a plaintiff's negligence.

> ***Perspective: Contributory Negligence and Incentives to Avoid Accidents***
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> From an economic perspective, it is sensible to encourage parties who can avoid accidents at the least cost to do so. Even if either the plaintiff or the defendant could have avoided an accident acting alone, it might have been easier (less costly) for one to do so than the other. If the defendant is always the best accident-avoider, perhaps a system where a negligent plaintiff can recover provides superior incentives. If the plaintiff is always the best accident-avoider, perhaps a system where a negligent plaintiff can never recover provides superior incentives. If neither is always true, then neither system would always encourage the best cost-avoiders to take precautions to avoid accidents.

B. Modern Comparative Treatment of a Plaintiff's Negligence

Criticism of the contributory negligence system has led courts and legislatures to replace it with an alternative system, comparative negligence. Two main varieties of comparative negligence have been developed: pure and modified. All comparative negligence systems reject the idea that negligence by a plaintiff is an absolute bar to recovery.

"Pure" comparative negligence allows a contributorily negligent plaintiff to recover some portion of his or her total damages as long as the defendant's negligence was also a proximate cause of the accident. The damages will be reduced by whatever percentage the jury assigns to the plaintiff's negligence.

"Modified" comparative negligence has been adopted in two forms. In one system, a negligent plaintiff is allowed to recover damages only if his or her negligence is *less than* that of the defendant or defendants. In other words, a 49 percent share of responsibility will allow recovery, but a 50 percent share will not (because the fault of a plaintiff who is 50 percent responsible is equal to, not less than, the fault of the defendant or defendants). This is usually called the 49 percent form of comparative negligence.

The other form of modified comparative negligence allows a negligent plaintiff to recover damages only if his or her negligence is *less than or equal to* that of the defendant or defendants. In this system, a plaintiff whom the jury finds to have been as much as 50 percent responsible for his or her injury will be entitled to recover damages. This is usually called the 50 percent form of comparative negligence. The two types of modified comparative negligence reach different results only in cases where a jury finds the plaintiff to be exactly 50 percent responsible for his or her injury.

McIntyre v. Balentine is a state supreme court decision adopting comparative negligence. It provides a survey and analysis of the doctrine. Jensen v. Intermountain Health Care Center Inc. describes how modified comparative negligence may apply in a case with more than one defendant. Dobson v. Louisiana Power and Light Company

illustrates one court's examination of how to determine parties' precise degrees of fault.

Examples If a jury finds that a plaintiff's damages equal $10,000, that the plaintiff was 40 percent responsible, and that a single defendant was 60 percent responsible, the plaintiff would be entitled to a judgment of $6,000 under all forms of comparative negligence.

If a jury finds that a plaintiff's damages equal $10,000, that the plaintiff was 50 percent responsible, and that a single defendant was 50 percent responsible, the plaintiff would be entitled to a judgment of $5,000 under the 50 percent form and under the pure form of comparative negligence but would receive no damages at all under the 49 percent form.

If a jury finds that a plaintiff's damages equal $10,000, that the plaintiff was 51 percent responsible, and that a single defendant was 49 percent responsible, the plaintiff would be entitled to a judgment of $4,900 under the pure form of comparative negligence and would receive nothing under the two types of modified comparative negligence.

McINTYRE v. BALENTINE

833 S.W.2d 52 (Tenn. 1992)

DROWOTA, J.

In this personal injury action, we granted Plaintiff's application for permission to appeal in order to decide whether to adopt a system of comparative fault in Tennessee. . . . We now replace the common law defense of contributory negligence with a system of comparative fault. . . .

In the early morning darkness of November 2, 1986, Plaintiff Harry Douglas McIntyre and Defendant Clifford Balentine were involved in a motor vehicle accident resulting in severe injuries to Plaintiff. The accident occurred in the vicinity of Smith's Truck Stop in Savannah, Tennessee. As Defendant Balentine was traveling south on Highway 69, Plaintiff entered the highway (also traveling south) from the truck stop parking lot. Shortly after Plaintiff entered the highway, his pickup truck was struck by Defendant's Peterbilt tractor. At trial, the parties disputed the exact chronology of events immediately preceding the accident.

Both men had consumed alcohol the evening of the accident. After the accident, Plaintiff's blood alcohol level was measured at .17 percent by weight. Testimony suggested that Defendant was traveling in excess of the posted speed limit.

Plaintiff brought a negligence action against Defendant Balentine and Defendant East-West Motor Freight, Inc. Defendants answered that Plaintiff was contributorally negligent, in part due to operating his vehicle while intoxicated. After trial, the jury returned a verdict stating: "We, the jury, find the plaintiff and the defendant equally at fault in this accident; therefore, we rule in favor of the defendant."

After judgment was entered for Defendants, Plaintiff brought an appeal alleging the trial court erred by refusing to instruct the jury regarding the doctrine of comparative negligence. . . . The Court of Appeals affirmed, holding that comparative negligence is not the law in Tennessee. . . .

The common law contributory negligence doctrine has traditionally been traced to Lord Ellenborough's opinion in Butterfield v. Forrester, 11 East 60,

103 Eng. Rep. 926 (1809). There, plaintiff, "riding as fast as his horse would go," was injured after running into an obstruction defendant had placed in the road. Stating as the rule that "[o]ne person being in fault will not dispense with another's using ordinary care," plaintiff was denied recovery on the basis that he did not use ordinary care to avoid the obstruction. . . .

The contributory negligence bar was soon brought to America as part of the common law, see Smith v. Smith, 19 Mass. 621, 624 (1824), and proceeded to spread throughout the states. . . . This strict bar may have been a direct outgrowth of the common law system of issue pleading; issue pleading posed questions to be answered "yes" or "no," leaving common law courts, the theory goes, no choice but to award all or nothing. . . . A number of other rationalizations have been advanced in the attempt to justify the harshness of the "all-or-nothing" bar. Among these: the plaintiff should be penalized for his misconduct; the plaintiff should be deterred from injuring himself; and the plaintiff's negligence supersedes the defendant's so as to render defendant's negligence no longer proximate. . . .

In Tennessee, the rule as initially stated was that "if a party, by his own gross negligence, brings an injury upon himself, or contributes to such injury, he cannot recover"; for, in such cases, the party "must be regarded as the author of his own misfortune." Whirley v. Whiteman, 38 Tenn. 610, 619 (1858). In subsequent decisions, we have continued to follow the general rule that a plaintiff's contributory negligence completely bars recovery. . . .

In contrast, comparative fault has long been the federal rule in cases involving injured employees of interstate railroad carriers, see Federal Employers' Liability Act, ch. 149, §§3, 35 Stat. 66 (1908) (codified at 45 U.S.C. §53 (1988)), and injured seamen. See Death On The High Seas Act, ch. 111, §6, 41 Stat. 537 (1920) (codified at 46 U.S.C. §766 (1988)). . . .

Similarly, by the early 1900s, many states, including Tennessee, had statutes providing for the apportionment of damages in railroad injury cases. . . . While Tennessee's railroad statute did not expressly sanction damage apportionment, it was soon given that judicial construction. In 1856, the statute was passed in an effort to prevent railroad accidents; it imposed certain obligations and liabilities on railroads "for all damages accruing or resulting from a failure to perform said dut[ies]." . . .

Between 1920 and 1969, a few states began utilizing the principles of comparative fault in all tort litigation. . . . Then, between 1969 and 1984, comparative fault replaced contributory negligence in 37 additional states. . . . In 1991, South Carolina became the 45th state to adopt comparative fault . . . leaving Alabama, Maryland, North Carolina, Virginia, and Tennessee as the only remaining common law contributory negligence jurisdictions.

Eleven states have judicially adopted comparative fault.[3] Thirty-four states have legislatively adopted comparative fault.[4]

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[3] In the order of their adoption, these states are Florida, California, Alaska, Michigan, West Virginia, New Mexico, Illinois, Iowa, Missouri, Kentucky, and South Carolina. Nine courts adopted pure comparative fault. . . . In two of these states, legislatures subsequently enacted a modified form. . . . Two courts adopted a modified form of comparative fault. . . .

[4] Six states have legislatively adopted pure comparative fault: Mississippi, Rhode Island, Washington, New York, Louisiana, and Arizona; eight legislatures have enacted the modified "49 percent" rule (plaintiff may recover if plaintiff's negligence is less than defendant's): Georgia, Arkansas, Maine, Colorado, Idaho, North Dakota, Utah, and Kansas; eighteen legislatures have enacted the modified "50 percent" rule

. . . After exhaustive deliberation that was facilitated by extensive briefing and argument by the parties, amicus curiae, and Tennessee's scholastic community, we conclude that it is time to abandon the outmoded and unjust common law doctrine of contributory negligence and adopt in its place a system of comparative fault. Justice simply will not permit our continued adherence to a rule that, in the face of a judicial determination that others bear primary responsibility, nevertheless completely denies injured litigants recompense for their damages.

We recognize that this action could be taken by our General Assembly. However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those, such as contributory negligence, conceived in the judicial womb. . . .

Two basic forms of comparative fault are utilized by 45 of our sister jurisdictions, these variants being commonly referred to as either "pure" or "modified." In the "pure" form a plaintiff's damages are reduced in proportion to the percentage negligence attributed to him; for example, a plaintiff responsible for 90 percent of the negligence that caused his injuries nevertheless may recover 10 percent of his damages. In the "modified" form plaintiffs recover as in pure jurisdictions, but only if the plaintiff's negligence either (1) does not exceed ("50 percent" jurisdictions) or (2) is less than ("49 percent" jurisdictions) the defendant's negligence. . . .

Although we conclude that the all-or-nothing rule of contributory negligence must be replaced, we nevertheless decline to abandon totally our fault-based tort system. We do not agree that a party should necessarily be able to recover in tort even though he may be 80, 90, or 95 percent at fault. We therefore reject the pure form of comparative fault.

We recognize that modified comparative fault systems have been criticized as merely shifting the arbitrary contributory negligence bar to a new ground. . . . However, we feel the "49 percent rule" ameliorates the harshness of the common law rule while remaining compatible with a fault-based tort system. . . . We therefore hold that so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff.

In all trials where the issue of comparative fault is before a jury, the trial court shall instruct the jury on the effect of the jury's finding as to the percentage of negligence as between the plaintiff or plaintiffs and the defendant or defendants. . . . The attorneys for each party shall be allowed to argue how this instruction affects a plaintiff's ability to recover.

Turning to the case at bar, the jury found that "the plaintiff and defendant [were] equally at fault." Because the jury, without the benefit of proper instructions by the trial court, made a gratuitous apportionment of fault, we find that their "equal" apportionment is not sufficiently trustworthy to form the basis of a final determination between these parties. . . .

(plaintiff may recover so long as plaintiff's negligence is not greater than defendant's): Wisconsin, Hawaii, Massachusetts, Minnesota, New Hampshire, Vermont, Oregon, Connecticut, Nevada, New Jersey, Oklahoma, Texas, Wyoming, Montana, Pennsylvania, Ohio, Indiana, and Delaware; two legislatures have enacted statutes that allow a plaintiff to recover if plaintiff's negligence is slight when compared to defendant's gross negligence: Nebraska and South Dakota. . . . [Nebraska now uses the 49 percent form of modified comparative negligence. — Eds.]